SUPREME COURT OF THE STATE OF NEVADA
Supreme Court Case No.: 80111

SATICOY BAY LLC SERIES 34 INNISBROOK,
Appellant,
v.
THORNBURG MORTGAGE SECURITIES TRUST 2007-3; FRANK TIMPA; MADELAINE TIMPA; TIMPA TRUST; RED ROCK FINANCIAL SERVICES, LLC; SPANISH TRAIL MASTER ASSOCIATION; REPUBLIC SERVICES; AND LAS VEGAS VALLEY WATER DISTRICT, *Respondents*,

Appeal from the Eighth Judicial District Court,
Clark County, Nevada
District Court Case # A-14-710161-C
The Honorable Glora Sturman

RESPONDENT RED ROCK FINANCIAL SERVICES, LLC'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

This NRAP 26.1 Disclosure is made in connection with RESPONDENT RED ROCK FINANCIAL SERVICES, LLC'S ANSWERING BRIEF. The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a).

1. Respondent Red Rock Financial Services, LLC's is wholly owned by FirstService Residential, Nevada, LLC.
2. Steven B. Scow (Nevada Bar Number 9906), of Koch & Scow, LLC, is the only attorney that has or is expected to appear for Respondent Red Rock Financial Services, LLC in this matter.

Dated this 15th day of April, 2021.

/s/ Steven B. Scow
Steven B. Scow
Attorneys for Respondent Red Rock Financial Services, LLC

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ROUTING STATEMENT

Pursuant to NRAP 17(b)(7), at least a portion of this appeal is presumptively assigned to the Nevada Court of Appeals. That rule presumptively assigns "appeals from postjudgment orders in civil cases," and a portion of this appeal challenges the denial of a postjudgment motion for reconsideration and a postjudgment motion to amend a complaint.

However, Red Rock believes that this matter should be retained by the Supreme Court under NRAP 17(a)(12) as it raises as a principal issue a question of statewide public importance. In the appeal, the appellant raises a novel theory wherein it argues that when a first deed of trust survives an HOA foreclosure, the lender holding the first deed of trust is somehow entitled to the excess proceeds of the foreclosure sale. The theory goes against the express requirements of NRS 116.31164, which mandate that the excess proceeds go to *subordinate* lienholders and then to the homeowner. If the Court were to accept appellant's new theory, the decision would affect the disbursement of excess proceeds in an extremely large number of foreclosures throughout the state and would fundamentaly alter the HOA foreclosure process in Nevada.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In 2014, did HOAs and their agents owe potential bidders a statutory duty to announce at foreclosure sales whether lenders made any superpriority lien tenders?

2. Is a lender whose senior deed of trust survived an HOA foreclosure sale entitled to excess sale proceeds when NRS 116 mandates that such proceeds be applied to subordinate lienholders whose interests were extinguished by the foreclosure?

3. May a party challenge an award of attorneys fees when it has no standing and waived its ability to challenge the award by failing to raise the issue before the lower court?

4. Is a party entitled to amend its complaint to add claims when those same claims were previously dismissed and final judgment was entered a year before the party moved to amend its complaint?

STATEMENT OF THE CASE

Appellant Saticoy Bay, LLC Series 34 Innisbrook ("Saticoy Bay") filed this appeal in order to challenge several rulings revolving around a nonjudicial HOA foreclosure. In November 2014, Respondent Red Rock Financial Services, LLC ("Red Rock") foreclosed on a piece of residential property on behalf of the Spanish Trail Master Association (the "HOA") under a lien for delinquent assessments, and Saticoy Bay was the high bidder at that auction. The sale resulted in litigation between Saticoy Bay, Thornburg Mortgage Securities Trust 2007-3, the lender holding the first deed of trust on the property at the time of foreclosure ("Thornburg"), Red Rock, the HOA, and the prior owner of the residential property, Frank Timpa and Madelaine Timpa as trustees of the Timpa Trust ("Timpa Trust").

The district court made several findings in the litigation that are relevant to this appeal. First and foremost, the lower court granted summary judgment in favor of Thornburg finding that because Thornburg or its predecessor-in-interest tendered the superpriority portion of the HOA lien to Red Rock before foreclosure, Thornburg's deed of trust survived foreclosure. In the order granting summary judgment, the court also dismissed Thornburg's alternative claim to void the foreclosure sale as well as Saticoy Bay's claims against Red Rock and the HOA for failing to disclose Thornburg's tender at foreclosure. Later, because Thornburg's deed of trust survived foreclosure, the lower court granted Timpa Trust the excess proceeds from the foreclosure sale in connection with a motion for summary judgment, and the court

also awarded Red Rock attorney fees and costs as part of the interpleader for the excess proceeds. Finally, the lower court denied two motions Saticoy Bay filed long after the aforementioned motions for summary judgment had been decided, including a motion for reconsideration of summary judgment and a motion to amend the complaint. Both of Saticoy Bay's motions attempted to reverse all previous judgments and unwind the foreclosure sale.

In this appeal, Saticoy Bay argues that the lower court erred in (i) dismissing Saticoy Bay's claims against Red Rock and the HOA, (ii) awarding Timpa Trust the excess proceeds of the foreclosure sale instead of Thornburg, (iii) awarding Red Rock fees and costs from the excess proceeds, and (iv) denying both Saticoy Bay's late motion for reconsideration and late motion to amend its complaint.

FACTS

A. The HOA Forecloses on the Property and Several Parties Bring Suit

On November 7, 2014, Red Rock conducted a nonjudicial foreclosure sale of a piece of residential property located at 34 Innisbrook Avenue, Las Vegas, Nevada (the "Property") on behalf of the HOA under a lien for delinquent HOA assessments. Saticoy Bay was the winning bidder at the sale and purchased the Property for $1,201,000.00, as represented in the foreclosure deed recorded in the Clark County Recorder's Office. (See, 5 JA 0681). According to Red Rock's records, after using the proceeds of the foreclosure sale to cover the delinquent HOA assessments as well as various fees and costs associated with the foreclosure sale, $1,168,865.05

remained in excess proceeds (the "Excess Proceeds"), which Red Rock deposited with the Eighth Judicial District Court. (See, 5 JA 0615-0638).

In November 2014, Saticoy Bay filed a Complaint and Amended Complaint against Thornburg (whom it alleged held a first deed of trust on the Property at the time of foreclosure) and the Timpa Trust (whom it alleged was the predecessor-in-interest of the original owners of the Property) seeking a declaration that Saticoy Bay owned the Property free and clear of any other interests. (See, 1 JA 0001-0008).

Thornburg responded by bringing a counterclaim against Saticoy Bay alleging, in part, that prior to the foreclosure Thornburg or its predecessor-in-interest attempted to pay off the superpriority portion of the HOA lien by sending a check for the superpriority amount to Red Rock, which payment was rejected. Thornburg claimed the attempted payment extinguished the superpriority lien. (See, 1 JA 0023-0024, ¶¶ 28-34). It brought claims requesting either a declaration that its deed of trust survived foreclosure based on the tender, or, in the alternative, for an order voiding the foreclosure sale. (See, 1 JA 0028-29, ¶¶ 68-78). Thornburg also brought various claims in the alternative against Red Rock and the HOA. (See, 1 JA 0030-0037).

Eventually, Saticoy Bay filed a Third Amended Complaint, which brought two new claims against Red Rock and the HOA. Although Saticoy Bay did not label its claims, those claims each sought damages against the HOA and Red Rock for failing to disclose to Saticoy Bay at the foreclosure sale that Thornburg or its predecessor-in-interest had previously sent Red Rock a superpriority tender. (See, 1 JA 0139-44).

B. The District Court Issues an Order for Summary Judgment Granting Thornburg's Claim for Declaratory Relief and Denying All Other Claims

In May 2018, the parties to this action filed multiple competing motions for summary judgment. The district court initially denied all of those motions, though it later granted Thornburg's motion for summary judgment on reconsideration due to the fact that Thornburg had tendered payment of the HOA's superpriority lien before foreclosure. (See, 10 JA 1719-1728). In the order, the lower court held that Thornburg's deed of trust survived foreclosure. (*Id.*).

Importantly, the lower court also held that "all remaining claims not specifically mentioned, including all claims in Thornburg's counterclaims and crossclaims and Saticoy's complaint, are dismissed with prejudice." (See, 10 JA 1724). Such dismissed claims included Thornburg's alternative claim to void the foreclosure sale and Saticoy Bay's claims against Red Rock and the HOA. The HOA had filed a countermotion for summary judgment on all of Thornburg's claims, which Red Rock joined, (See, 8 JA 1156-1196, 1210-1212), but the HOA's dispositive motion did not mention Saticoy Bay's claims against the HOA. (See, 8 JA 1156-1196).

During the hearings on the motions for summary judgment and reconsideration, the parties and the court discussed Saticoy Bay's claims against Red Rock and the HOA. The parties recognized that the HOA and Red Rock did not move for summary judgement on those claims (See, 13 JA 2251). The parties and the court

also discussed the possibility that since both Saticoy Bay's and Thornburg's claims against Red Rock and the HOA were affected by the claims regarding the survival of the deed of trust, it made sense to possibly litigate the claims between Saticoy Bay and Thornburg and then hear separate motions on Saticoy Bay's claims against Red Rock and the HOA. (See, 13 JA 2336). Ultimately, however, the district court granted Thornburg's motion for summary judgment, and it also dismissed all other claims including Saticoy Bay's claims against Red Rock.

Although Saticoy Bay filed several motions after the district court dismissed all of its claims in 2018, including a motion to reconsider the order dismissing those claims (see, 12 JA 2069-2090) and a motion to amend its Complaint (see, 12 JA 2167-2189), Saticoy Bay did not raise any objections to the 2018 dismissal of its claims against Red Rock and the HOA. All counsel were specifically put on notice that these claims were being dismissed and agreed to the same by signing off on the 2018 findings of fact, conclusions of law. (See, 10 JA 1719-1728). And more significantly, despite the entry of a final order, Saticoy Bay did not timely appeal the district court's 2018 judgment.

C. Disposition of the Excess Proceeds

When Red Rock filed its answer to Thornburg's claims, it filed a complaint to interplead the Excess Proceeds. (See, 1 JA 0094-0108). After the district court granted Thornburg's motion for summary judgment, Timpa Trust brought a motion for summary judgment on the interpleader claims alleging it was entitled to the

Excess Proceeds. (See, 10 JA 1752-1849). Red Rock responded to the motion seeking an award of the fees and costs associated with bringing the interpleader in the amount of $29,161.69. (See, 11 JA 1867-1870). Saticoy Bay filed an opposition to the Timpa Trust's motion arguing that Thornburg was actually entitled to the Excess Proceeds even though Thornburg's deed of trust survived foreclosure. Saticoy Bay made no mention of Red Rock's request for fees and costs. (See, 11 JA 1886-2038). On September 11, 2019, the district court granted the Timpa Trust's motion and Red Rock's request for fees and costs. (See, 12 JA 2058-2068).

D. Saticoy Bay Made Several Late Attempts to Reverse the District Court's Judgments

Despite the fact that the district court dismissed all claims seeking to void the foreclosure sale, made findings that Thornburg's deed of trust survived the foreclosure sale, and granted the Timpa Trust's motion for the Excess Proceeds, Saticoy Bay filed two late motions seeking to reverse all of the previous decisions and requesting the ability to bring new claims seeking to set aside the foreclosure sale. Specifically, on September 24, 2019, Saticoy Bay brought a motion for reconsideration of all of the above-mentioned orders, (see, 12 JA 2069-2090) and on October 16, 2019, Saticoy Bay brought a motion to amend its complaint to add claims seeking to set aside the foreclosure sale. (See, 12 JA 2167-2189). The district court denied both claims. (See, 12 JA 2225-2227).

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SUMMARY OF THE ARGUMENT

Saticoy Bay challenges several of the lower court's findings at various stages of the litigation. Relevant to Red Rock, Saticoy Bay argues that the district court acted improperly when it: (1) dismissed Saticoy Bay's claims against Red Rock, (2) awarded the Timpa Trust the Excess Proceeds of the foreclosure sale, (3) awarded Red Rock fees and costs from the Excess Proceeds, and (4) denied Saticoy Bay's tardy motion to amend its complaint. For a number of different reasons, each of Saticoy Bay's arguments are unpersuasive, and this Court should disregard them.

First, the dismissal of Saticoy Bay's claims against Red Rock and the HOA should have been appealed after the 2018 order was entered, and there was no timely appeal. Moreover, the dismissal was proper because those claims clearly had no merit in light of numerous Supreme Court opinions against Saticoy Bay. This case is one of a large number of cases that Saticoy Bay and other purchasers have brought against HOAs and their agents for failing to disclose superpriority tenders at foreclosure. This Court has issued numerous opinions against those purchasers including a number of opinions against Saticoy Bay and affiliated entities all holding that ***HOAs and their agents did not owe purchasers any duty to disclose tenders before 2015***, when NRS Chapter 116 was amended. Nothing distinguishes this case from those other cases, and it is beyond question that Saticoy Bay's claims against Red Rock and the HOA have no merit. There is no good reason to remand this case on that issue so that Red Rock can go through the formality of moving to dismiss such obviously improper

claims in the lower court. In order to promote efficiency and judicial economy, this Court should uphold the dismissal of Saticoy Bay's claims against Red Rock and the HOA.

In regards to the second issue, Saticoy Bay argues that Thornburg (and not the Timpa Trust) was entitled to the Excess Proceeds, because Thornburg's interest in the Property was somehow junior to the HOA's lien even though its deed of trust survived foreclosure. By making such an argument, Saticoy Bay is attempting to transform Thornburg into the Schrödinger's cat of HOA foreclosures, both living and dead, both senior to the HOA's lien and subordinate to it. This, of course, is impossible. Senior liens survive foreclosure and junior liens are extinguished by foreclosure by their very definitions. We know for a certainty that Thornburg's deed of trust was not junior to, or subordinate to, the HOAs, because the deed of trust indisputably survived foreclosure. All of Saticoy Bay's pages of analysis ignores that simple fact as much as it seems to ignores the actual language in the statutes and caselaw quoted in the Opening Brief. Because Thornburg tendered the superpriority HOA lien, the HOA necessarily foreclosed on the subpriority lien. Thus, pursuant to the plain language NRS 116.3116(2) (2014), Thornburg's interest was superior to the HOA's. By having a senior interest unaffected by foreclosure, Thornburg was not entitled to any of the Excess Proceeds pursuant to NRS 116.31164(c) (2014), as those Excess Proceeds are reserved for subordinate interests that were wiped out by foreclosure. The lower court correctly awarded those proceeds to the Timpa Trust.

In light of the above analysis, Saticoy Bay has no business challenging the lower court's award of fees and costs to Red Rock from a portion of the Excess Proceeds for Red Rock's actions in interpleading those proceeds. Saticoy Bay has no interest in the Excess Proceeds and is not affected in any way by their disbursement, especially considering the fact that Thornburg is not entitled to the Excess Proceeds and the Excess Proceeds are not to be used to reduce the debt encumbering the Property. For those reasons, Saticoy Bay has no standing to challenge the award of fees. Moreover, Saticoy Bay made no effort to challenge the award of fees in the lower court and, therefore, waived the issue. This Court should disregard Saticoy Bay's argument in regards to the award of fees and costs to Red Rock.

Finally, Saticoy Bay's motion to amend its complaint was a thinly veiled attempt to reverse all of the district court's final judgments in this case. The motion literally sought to reassert a claim that the foreclosure sale should be set aside even though the district court had already dismissed a claim to set aside the sale. Nevada courts do not allow parties to amend their pleadings after final judgment. Saticoy Bay is also precluded under the doctrines of issue and claim preclusion from relitigating issues that have already been finally decided. For those reasons, the lower court properly denied Saticoy Bay's motion.

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ARGUMENT

I. Standards of Review

A. Standard of Review Regarding Motions for Summary Judgment

Saticoy Bay argues that this Court should reverse the lower court's orders granting summary judgment on Saticoy Bay's claims against Red Rock and on the interpleader claim granting the Timpa Trust the Excess Proceeds. This Court reviews the district court's granting of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). It upholds summary judgment "when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting NRCP 56(c)).

However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* at 1030. The factual dispute must be material to the dispute, meaning the disputed fact must affect the outcome of the suit. *Id.* The fatual dispute must also be genuine, meaning that it is supported by more than "gossamer threads of whimsy, speculation and conjecture." *Id.* (quoting *Pegasus v. Reno Newspapers*, Inc., 57 P.3d 82, 87 (Nev. 2002)). The non-moving party "may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Id.* at 1030-31 (quoting *Pegasus*, 57 P.3d at 87).

B. Standard of Review Regarding the Award of Fees and Costs

Saticoy Bay also challenges the lower court's award of fees and costs to Red Rock from the Excess Proceeds for filing the interpleader action. This Court reviews an award of attorney fees for an abuse of the lower court's discretion. See, *Spencer v. Klementi*, 466 P.3d 1241, 1248 (Nev. 2020). As such, this Court will only reverse an order of fees "where a trial court exercises its discretion in clear disregard of the guiding legal principles." *Gunderson v. D.R. Horton, Inc.*, 319 P.3d 606, 615 (Nev. 2014) (quoting *Bergmann v. Boyce*, 856 P.2d 560, 563 (Nev. 1993)).

C. Standard of Review Regarding the Denial of Saticoy Bay's Motion to Amend

Saticoy Bay is also challenging the lower court's denial of its motion to amend its complaint. Similar to an award of fees, a motion to amend "is addressed to the sound discretion of the trial court, and its action in denying such a motion will not be held to be error in the absence of a showing of abuse of discretion." *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 416 P.3d 249, 254 (Nev. 2018) (quoting *Kantor v. Kantor*, 8 P.3d 825, 828 (Nev. 2000)).

II. The Court Should Affirm the Dismissal of Saticoy Bay's Claims Against Red Rock and the HOA

Saticoy Bay's claims against Red Rock and the HOA were dismissed by a final, unappealed order, and these claims do not have merit. The dismissal was part of the 2018 order granting summary judgment, and it was entered on December 5, 2018 (the "2018 Order"). There was no timely appeal of that order, and Saticoy Bay

waived its right to bring these claims. Even if the claims were properly brought and appealed, this Court has already upheld the dismissal of the same claims brought by the same party on multiple occasions. The Court should uphold the dismissal of the plainly futile claims to promote efficiency and judicial economy.

A. Saticoy Bay Did Not Timely Appeal the Dismissal of the Claims Against Red Rock and the HOA.

The 2018 Order is a final judgment, and there was no timely appeal. Saticoy Bay did not take any action until May 10, 2019, when it filed a motion to reinstate the statistically closed case to deal with the Excess Proceeds issues. The Nevada Rules of Appellate Procedure require an appeal to be filed no later than 30 days after the date of service regarding the notice of entry of a judgment/order. NRAP 4(a)(1). No such appeal was filed, and Saticoy Bay is procedurally and jurisdictionally estopped from seeking to revive any claims against Red Rock and the HOA.

B. Saticoy Bay's Claims Against Red Rock and the HOA Are Meritless

Even if the dismissal of Saticoy Bay's claims against the HOA and Red Rock was properly appealed, those claims are improper. In both of its claims against Red Rock and the HOA, Saticoy Bay alleges that it was damaged "by the HOA and [Red Rock's] failing to disclose the tender was made by Bank of America at some point prior to the foreclosure sale." (1 JA 142, ¶ 26; 143, ¶ 31). However, this Court has held on multiple occasions that HOAs and their agents had no duty to disclose such tenders to potential purchasers prior to 2015, and it has, in fact, upheld the dismissal

of such claims brought by none other than Saticoy Bay. In light of those holdings, it is obvious that Saticoy Bay's claims against Red Rock are meritless, and the Court should uphold the dismissal of the claims once more.

This Court first considered whether HOAs and their agents had a duty to disclose tenders at foreclosures taking place before 2015 in *Noonan v. Bayview Loan Servicing*. In that case it upheld summary judgment dismissing a purchaser's claim for misrepresentation against an HOA's agent for failing to disclose a superpriority tender. 438 P.3d 335 (Nev. 2019) (Unpublished Disposition). The Court reasoned that while NRS 116.31164 now "require[es] an HOA to disclose if tender of the superpriority portion of the lien has been made," the version of the statute applicable before 2015 did not "requir[e] any such disclosure." *Id.* It then rejected the exact same theory in *A Oro, LLC v. Ditech Fin. LLC*, noting that "***appellant has provided no legal support for the unorthodox proposition that the winning bidder at a foreclosure sale can bring a fraud claim against the auctioneer when the auctioneer's foreclosure notices have disclaimed any warranties as to the title being conveyed***." *A Oro, LLC v. Ditech Fin. LLC*, 434 P.3d 929 n. 2 (Nev. 2019) (Unpublished Disposition) (emphasis added).

More recently, this Court considered several appeals brought by Saticoy Bay (the same party to this case represented by the same counsel) challenging the dismissal of multiple claims against HOAs and their agents based on the failure to disclose tenders at foreclosure (the same claims Saticoy Bay brought against Red

Rock in this case). This Court has upheld the dismissal of Saticoy's claims ***at least eight times***, because HOAs and their agents had no duty to disclose the tenders before 2015.[1] It has also upheld the dismissal of such claims brought by other purchasers.[2]

While each of the opinions cited above are unpublished, Red Rock may cite them for their persuasive value pursuant to NRAP 36(c)(2). Moreover, the above opinions are mandatory precedent in regards to any "related cases," NRAP 36(c)(2), though the rule does not define what constitutes a related case.

Saticoy Bay's claims against Red Rock and the HOA here are part of a large wave of cases Saticoy Bay has brought (and continues to bring) against foreclosure agents and associations for allegedly failing to disclose tenders at foreclosure. As just mentioned above, this Court has already considered and summarily dismissed a number of these cases in unpublished decision. This case appears to be "related" to those cases as that term is used in NRAP 36, and the Court's opinions are mandatory

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[1] See, *Saticoy Bay, LLC, Series 8320 Bermuda Beach v. S. Shores Community Assn.*, 473 P.3d 1046 (Nev. 2020); *Saticoy Bay, LLC, Series 3984 Meadow Foxtail Drive v. Sunrise Ridge Master Homeowners Assn.*, 80204, 2021 WL 150737, at *1 (Nev. Jan. 15, 2021); *Saticoy Bay LLC Series 5413 Bristol Bend Ct. v. Nevada Assn. Services, Inc.*, 475 P.3d 777 (Nev. 2020); *Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone Ranch Community Assn.*, 473 P.3d 1045 (Nev. 2020); *Saticoy Bay, LLC, Series 6408 Hillside Brook v. Mt. Gate Homeowners' Assn.*, 473 P.3d 1046 (Nev. 2020); *Saticoy Bay, LLC, Series 3123 Inlet Bay v. Genevieve Ct. Homeowners Assn., Inc.*, 473 P.3d 1046 (Nev. 2020); *Saticoy Bay, LLC, Series 11339 Colinward v. Travata and Montage at Summerlin Ctr. Homeowners' Assn.*, 474 P.3d 333 (Nev. 2020); *Saticoy Bay, LLC Series 1330 Crystal Hill v. Tripoly at Stephanie Homeowners Assn. and Red Rock*, SC Case No. 79778 (Nev. March 26, 2021).

[2] See, *Cypress Manor Drive Tr. v. Foothills at MacDonald Ranch Master Assn.*, 473 P.3d 1048 (Nev. 2020); *Santa Margarita St. Tr. v. Paseo Del Rey Homeowners Assn.*, 473 P.3d 1048 (Nev. 2020); *LN Mgt. LLC Series 3732 v. Shadow Hills Master Assn.*, 474 P.3d 333 (Nev. 2020); *Iridescent St. Tr. v. Montenegro Estates Landscape Maint. Assn.*, 472 P.3d 1208 n. 1 (Nev. 2020).

precedent preventing Saticoy Bay from bringing its claims. But even if this case is not technically related to the previous cases, the dismissal of the previous cases is extremely persuasive. Each of those cases have fervently expressed that agents like Red Rock owed no duty to disclose tenders at foreclosure. This case is identical to those cases, and there is no reason to treat it differently. For that reason, this Court should uphold the lower court's summary judgment order dismissing Saticoy Bay's claims against Red Rock and the HOA.

C. Since Saticoy Bay's Claims Against Red Rock Are Improper, the Court Should Uphold Summary Judgment Even if Red Rock Did Not Raise the Issue in Lower Court, Especially Since Saticoy Bay Did Not Raise the Issue Previously

Saticoy Bay argues that Red Rock did not raise any arguments in regards to Saticoy Bay's claims against it in lower court, so this Court should reverse summary judgment on those claims. But when the claims were dismissed, Saticoy Bay did not raise the issue before the lower court either, nor did it timely appeal the 2018 Order. Red Rock does not deny that it did not file summary judgment on Saticoy Bay's claims against it, but the lower court nevertheless elected to dismiss Saticoy Bay's claims, and that dismissal was proper in light of the above case law.

Saticoy Bay's claims are clearly improper as a matter of law, and it is beyond any reasonable question that Red Rock did not owe Saticoy Bay any duty before 2015 to announce the tender before foreclosure. It makes little sense to send the parties back to district court just to have the court grant summary judgment or a motion for

judgment on the pleadings once more. Remanding this case would not promote judicial economy, expediency, or practical wisdom as it would force the parties to go through unnecessary hoops on an obvious issue for no good reason. Moreover, because Saticoy Bay has already had multiple opportunities to raise the relevant issues in the past, upholding summary judgment would not be unfair to Saticoy Bay or show it a lack of respect. Saticoy Bay has, through many previous cases, made its voice heard, and this Court has summarily rejected Saticoy Bay's arguments. Remanding this case would only give Saticoy Bay another bite at an apple it devoured long ago. For those reasons, the Court should uphold summary judgment on the claims Saticoy Bay brought against Red Rock.

D. Saticoy Bay Does Not Allege That it Made Any Inquiries to Red Rock Regarding Tender and Testifies Under Oath That it Had No Communications With Red Rock

Saticoy Bay argues in its Opening Brief that had it previously known of a challenge to its claims against Red Rock, it would have argued that it made an inquiry to Red Rock before foreclosure asking about tender. (Opening Brief, pp. 23, 24). It makes this argument in a twelfth hour attempt to distinguish this case from the above-cited caselaw. Saticoy Bay, however, never actually alleged that it made any inquiries, and ***Saticoy Bay actually testified more than once under oath that it never made any inquiries regarding tender.*** Saticoy Bay's argument is disingenuous and should be set aside.

1. Saticoy Bay Did Not Allege That it Made Any Inquiries

Saticoy Bay argues that it brought a claim for misrepresentation against Red Rock and would have argued that it made inquiries regarding tender if given the chance. It neglects to admit, however, that it never alleged that it made any inquiries and, as such, its apparent misrepresentation claims were not properly alleged and were improper.

Saticoy Bay's Third Amended Complaint is peculiar. Saticoy Bay does not provide any titles to its claims or give any indication what it believes to be the basis of its claims against Red Rock. In its Fourth Claim of Relief, Saticoy Bay vaguely alleges that "Plaintiff's high bid to the Property should be rescinded due to the misrepresentations by the HOA and [Red Rock] in the foreclosure documents," but Saticoy Bay makes no mention of what it believes those misrepresentations to be. (See, 1 JA 0142, ¶27). Nowhere in that claim or elsewhere in Saticoy Bay's Third Amended Complaint does Saticoy Bay allege that it made any inquiries about tender or that Red Rock provided misrepresentations in response to those inquiries.

Even when Saticoy Bay moved to amend its complaint in October 2019 it never alleged that it made any inquiries regarding tender. In fact, the proposed Fourth Amended Complaint does not make any new allegations against Red Rock at all. The only new allegations in that proposed complaint ask the lower court to set aside the sale in a sixth claim for relief. (See, 12 JA 2183-2188).

Despite the contents of the actual complaints and proposed complaints. Saticoy Bay now implies that it either alleged it made inquiries to Red Rock and Red Rock made misrepresentations regarding tender, or it moved to amend its complaint to include such allegations. (See Opening Brief, pp. 23-26) But neither representation is accurate.

This Court has made clear in the previous Saticoy Bay opinions that any misrepresentation claim (or any other claim) against an HOA's agent for failing to disclose a tender is improper and should be dismissed unless, perhaps, the complaint alleges that Saticoy Bay "specifically asked [the foreclosure agent] whether a superpriority tender had been made in this case," and that the agent "misrepresented that a superpriority tender had not been made." *Saticoy Bay, LLC, Series 8320 Bermuda Beach v. S. Shores Community Assn.*, 473 P.3d 1046 (Nev. 2020). Even where the complaint generally alleges that Saticoy Bay had a "pattern and practice" of "attempting to ascertain whether anyone had attempted to or did tender payment," if it does not allege a specific inquiry, it should be dismissed. *Id.*

Here, since Saticoy Bay never alleged that it made any inquiries to Red Rock or that Red Rock made any misrepresentations in response to the inquires, its claims are improper whether they are claims for misrepresentation or claims for breach of NRS 116.1113 or NRS Chapter 113. See, *Id.* If this Court were to send the case back to district court on remand because the issue was not raised in lower court, Red Rock would simply move for judgment on the pleadings pursuant to NRCP 12(c), and the

lower court would necessarily grant the motion in light of the multiplicity of opinions against Saticoy Bay. As argued above, the Court should, therefore, allow the dismissal of those claims to stand.

2. Saticoy Bay Has Testified Under Oath That it Never Made Any Inquiries to Red Rock

Even if Saticoy Bay had made sufficient allegations in its Third Amended Complaint regarding inquiry, it has plainly testified under oath that it never made any inquiries or had any communications with Red Rock before foreclosure. By Saticoy Bay's own recitation of the facts, this case is no different than any of Saticoy Bay's other cases that have been dismissed, and the Court should treat this case no differently.

In its Opening Brief, Saticoy Bay attempts to get this Court to believe that it possibly made an inquiry before foreclosure by citing to nothing more than its Counsel's offhand speculations in a hearing before the lower court. Counsel specifically speculated that "my client would have not spent a million two without making an inquiry as to when that tender was made in this particular case," (see, Opening Brief, p. 26) hoping that its predictions create a question of fact. Counsel does not appear to be aware of his client's other statements, as that client has adamantly stated that it made no inquiries.

When Saticoy Bay filed its motion for summary judgment in this case, it attached a declaration from its principal, Iyad (Eddie) Haddad. Under oath Mr. Haddad stated the following:

> 9. At no time prior to the foreclosure sale did I receive any information from the HOA or the foreclosure agent about the property or the foreclosure sale.
>
> 10. Neither myself or anyone associated with plaintiff/counterdefendant, Saticoy Bay, LLC Series 34 Innisbrook, have any affiliation with the HOA board or the foreclosure agent.
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> ...
>
> 12. Any attempt to find out any information about a tender or payment of the super priority lien at the auction would also be a futile act. Asking questions during the auctions would be considered to be a disruption. I would not get a response and would be prohibited from bidding the rest of the day. In addition, often, the persons crying the sale are third party contractors without any knowledge of what is in the file other than what is provided to cry the sale.

(3 JA 0306-07). Mr. Haddad went into great detail to emphatically state that he never had any communications with Red Rock and never received any information from Red Rock. He also made it clear that he would have been incredulous of any answer

to any inquiry, because the auctioneers at the foreclosures did not have any information regarding tenders.[3]

The Court can see from the above testimony that the speculation by counsel cited in Saticoy Bay's Opening Brief is unsupported and unsupportable. In reality, this case is identical to every other Saticoy Bay case that has been dismissed and affirmed by this Court. The Court should, similarly, uphold the dismissal of Saticoy Bay's claims against Red Rock and the HOA in this case.

III. The District Court Properly Awarded the Excess Proceeds to the Timpa Trust

Saticoy Bay argues that Thornburg and not the Timpa Trust is entitled to the Excess Proceeds, because, even though Thornburg's deed of trust survived foreclosure, that deed of trust "was and always remains junior to the Association's lien." (Opening Brief, p. 29). This argument is logically inconsistent. Arguing that a deed of trust both survived an HOA foreclosure ***and*** is junior to the HOA's lien is like arguing that John Doe is married ***and*** he is a bachelor; the statements are contradictory by the very definitions of the words used. The proposition that all junior liens are extinguished by foreclosure is an *a priori* proposition; it is logically justified by nothing more than the labels we have long used to describe what happens in the foreclosure process. Liens that survive foreclosure are labeled "senior" or "prior,"

[3] Throughout discovery in this case, Saticoy Bay had many opportunities to explain that it made inquiries regarding tender, but time and again it denied that it had ever taken any such actions and no documents in this case support in the least that there was ever a misrepresentation to Saticoy Bay.

and liens that are extinguished by foreclosure are labeled "junior" or "subordinate." The simple fact that Thornburg's lien survived foreclosure is proof positive that it was not a junior or subordinate lien, and it is not entitled to the excess proceeds of the foreclosure sale.

Saticoy Bay's confusion on this simple issue may stem from a misunderstanding of the so-called black letter law, the mechanics of NRS Chapter 116, and the policy behind the operation of the law. It is helpful to review each separately.

A. Pursuant to Centuries-Old Case Law, All Junior Liens Are Extinguished by Foreclosure, All Senior Liens Survive Foreclosure, and Only Junior Lienholders Are Entitled to Excess Proceeds

Saticoy Bay mentions "black letter law" and "centuries old lien law" in its Opening Brief, (see, Opening Brief pp. 32, 35), but it does not demonstrate a proper application of what that law is. It seems Saticoy Bay does not understand that if a party's deed of trust is not extinguished by a foreclosure, it is not a junior or subordinate lienholder and is not entitled to the excess proceeds of the foreclosure sale pursuant to that black letter law.

It has long been the law in the United States that when a party forecloses on a piece of property pursuant to a lien, all other interests are split into one of two different categories. If those interests are ***senior*** to or ***prior*** to the foreclosing party's interest, then those interests are unaffected by the foreclosure and are not

extinguished by the foreclosure.[4] On the other hand, if those interests are ***junior*** or ***subordinate*** to the foreclosing party's interest, then those interests are extinguished by the foreclosure.[5]

Each case that considers the issue, moreover, holds that only junior lienholders—whose interests in the property were extinguished by foreclosure—have any interest in the excess proceeds of the foreclosure sale. On the other hand, senior lienholders—whose interests survive foreclosure—have no interest in the proceeds.[6]

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[4] See, *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 121 (Nev. 2018) (quoting *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. § 17:16 (2018) ("Any mortgages, deeds of trust, or liens which are senior to the deed of trust which is being foreclosed are unaffected by the foreclosure of the junior deed of trust."); see also, *U.S. v. Sage*, 566 F.2d 1114, 1114–15 (9th Cir. 1977) ("Foreclosure . . . has no effect whatsoever upon the interest of senior mortgagees"); *Murphy v. Wachovia Bank of Delaware, N.A.*, 36 N.E.3d 48, 53–54 (Mass. App. 2015) ("[T]he senior mortgage will remain attached to the property."); *Branch Banking and Tr. Co. v. Tomblin*, 163 So. 3d 1229, 1230–31 (Fla. 5th Dist. App. 2015) ("[T]he senior creditor's interest remains with the property after foreclosure.").

[5] See, e.g. *Erickson Const. Co. v. Nevada Nat. Bank*, 513 P.2d 1236, 1238 (Nev. 1973) (holding that because an interest was "junior and subordinate" to that of the foreclosing party, that interest was extinguished by the foreclosure"); *Sage*, 566 F.2d at 1114-15 (holding that all junior mortgagees are affected and extinguished by foreclosure); *Zieve, Brodnax & Steele, LLP v. Dhindsa*, 262 Cal. Rptr. 3d 567, 573 (Cal. App. 5th Dist. 2020) ("[W]hen the holder of a senior deed of trust directs the trustee to conduct a nonjudicial foreclosure, the foreclosure sale extinguishes all rights and interests *to the real property* of the junior lienors."); *Murphy*, 36 N.E.3d at 53 (explaining that a junior lien "will be extinguished by a senior mortgagee's foreclosure.").

[6] See, *Sage*, 566 at F.2d at 1115 (quoting L. Jones, Law of Mortgages s 2186 (1928)) ("[U]pon sale under a junior mortgage, the surplus . . . is not applied to the satisfaction of the prior mortgage."); *Zieve*, 262 Cal.Rptr. 3d at 573 ("[T]he junior lienor is entitled to share in any surplus sales proceeds"); MTC *Fin., Inc. v. Nationstar Mortg., LLC*, 228 Cal. Rptr. 3d 238, 240 (Cal. App. 1st Dist. 2018) ("When a junior lienholder forecloses on a second deed of trust at a nonjudicial trustee's sale, the senior lienholder is not entitled to any proceeds from the sale because the property is purchased at the sale subject to the first deed of trust."); *Branch Banking*, 163 So. 3d at 1230-31 ("[T]he senior creditor's interest remains with the property after the foreclosure, and it is not entitled to claim any excess proceeds from the sale."); *Murphy*, 36 N.E.3d at 54 ("Because [the senior lienholder] could expect that its mortgage would remain with the property, it had no right to share in the surplus funds of [the junior lienholder's] foreclosure.").

This rule is rooted deep in this nation's common law. In fact, the Ninth Circuit referred to the rule as "*ancient*." *See*, *U.S. v. Sage*, 566 F.2d 1114, 1115 (9th Cir. 1977).

Importantly, Nevada's HOA foreclosure statute did not change any of the above. Instead, it explicitly stated at the time of the foreclosure that only junior or subordinate lienholders were entitled to the excess proceeds. NRS 116.31164(c) (2014) stated that after an HOA foreclosure, the HOA was to apply the proceeds first to cover the expenses and costs of the sale, then to satisfy its own lien, and then to satisfy "in order of priority any ***subordinate*** claim of record." (emphasis added).

In this case, Saticoy Bay does not deny that the Excess Proceeds were to be distributed only to junior lienholders. Instead, it curiously argues that Thornburg somehow was a junior lienholder. But this Court can reject that argument out of hand, ***because the lower court already held, and Saticoy Bay does not deny and has already stipulated with Thornburg, that Thornburg's deed of trust was not extinguished by the foreclosure sale***. While its deed of trust is still intact, Thornburg cannot be a junior lienholder; a junior lienholder is, by definition, a lienholder who's interests were extinguished by foreclosure. Since Thornburg was unaffected by the foreclosure, it's interest's are senior to the HOA's, and it is not entitled to any of the Excess Proceeds. The Court should, therefore, disregard Saticoy Bay's new theory.

B. Under NRS 116.3116, Thornburg's Deed of Trust Was Senior to the HOA's Because Thornburg Satisfied the Superpriority Portion of the HOA Lien

Saticoy Bay's insistence that Thornburg's interest in the Property is junior to the HOA's is premised on the inaccurate presumption that the common law first in time, first in right lien priority rule applies in this case. Since the HOA recorded the CC&Rs before Thornburg recorded the deed of trust, Thornburg's lien "was and always remains junior to the Association's lien." (See, Opening Brief, p. 29). This argument, however, blatantly ignores the fact that NRS 116.3116 and not the common law first-in-time-first-in-right rule governs the HOA's lien priority, and that statute represents a significant departure from the common law rule.[7] The first-in-time-first-in-right rule plays no part in HOA foreclosures (at least in regards to the first deed of trust) and Saticoy Bay's continual reference to the rule is misguided.

NRS 116.3116(2) (2014) sets forth in detail what priority an HOA's lien has *vis-a-vis* other liens. That statute explicitly states that the HOA lien is "prior to all other liens and encumbrances on a unit except . . . ***[a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent***" as well as a number of other types of liens inapplicable to this case. NRS 116.3116(2) (2014) (emphasis added). The statute goes on to split the HOA's lien, stating that an HOA's lien is even prior to the above liens "to the extent

[7] Confusingly, Saticoy Bay acknowledges that NRS 116.3116 supplants the common law lien priority rule, but it continues to refer to the common law rule as if that rule governs throughout its brief. (See, Opening Brief, p. 45).

of the assessments for common expenses based on the periodic budget adopted by the association . . . which would have become due . . . during the 9 months immediately preceding institution of an action to enforce the lien." *Id.* That second section of the statute creates the now well-known superpriority lien.

This Court went to great lengths to clarify the priority of these liens under NRS 116.3116 in the landmark decision, *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408 (Nev. 2014). In that case, the Court held that if NRS 116.3116(2) had ended after the first-quoted sentence above, "***a first deed of trust would have complete priority over an HOA lien***." *Id.* at 410 (emphasis added). However, as written, the statute, "splits an HOA lien into two pieces, a superpriority piece and a subpriority piece." *Id.* at 411. The superpriority lien is "prior to" a first deed of trust, and the subpriority lien is "***subordinate*** to a first deed of trust." *Id.* (emphasis added).

The Court went on to explain that if the holder of the first deed of trust does not want to be extinguished, it may pay the superpriority lien leaving the HOA to foreclose on the subpriority lien, which is, again, "subordinate to [the] first deed of trust." *Id.* at 411, 418. Later, the Court clarified its position, holding that "a first deed of trust holder's unconditional tender of the superpriority *amount due results in the buyer at foreclosure* ***taking*** **the property subject to the deed of trust**." *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 116 (Nev. 2018). The Court went on to explain that when the superpriority lien is satisfied the first deed of trust survives

foreclosure specifically because it is "***senior*** to the [lien' which is being foreclosed." *Id.*

In this case, the lower court found that Thornburg tendered the superpriority portion of the HOA's lien. Therefore, Saticoy Bay ***took the property subject to the deed of trust***. Moreover, Thornburg's interest remained ***senior*** to the HOA's lien, and the foreclosed-upon subpriority lien remained ***subordinate*** to Thornburg's deed of trust. Thus, pursuant to NRS 116.3116(2) (2014) as clarified by this Court, Thornburg was certainly not a junior lienholder as Saticoy Bay argues, and it is not entitled to any of the Excess Proceeds.

Saticoy Bay knows all of this; it has actually benefitted from the statute many times having purchased many homes at HOA foreclosures. In fact, in the Opening Brief it openly quotes most of the above statutes and caselaw, which all openly state that Thornburg's interest is senior to the subpriority lien. Still, Saticoy Bay responds to Nevada's split lien approach with incredulity, essentially arguing that Nevada could not have actually intended to split the HOA's lien into separate superpriority and subpriority liens. In fact, it continually mocks Timpa Trust's explanation of the split lien approach by referring to the explanation disparagingly as the "Flipping Interest" theory. (Opening Brief, p. 35). It's only real attack is that the split lien approach is "a departure from hundreds of years of jurisprudence." *Id.* at 36. While it is correct to state as much, this Court has openly acknowledged that "the split-lien

approach represents a 'significant departure from existing practice." *SFR*, 334 P.3d at 412 (quoting 1982 UCIOA § 3–116 cmt. 1; 1994 & 2008 UCIOA § 3–116 cmt. 2).

Instead of acknowledging what NRS 116.3116 and the accompanying caselaw really says, Saticoy Bay spends a good portion of its brief explaining its own new theory that Thornburg's deed of trust will always be junior to the HOA's but that Thornburg could somehow preserve its deed of trust without changing its lien priority by tendering the superpriority amount. By making a tender, it essentially argues, Thornburg would get to enjoy all of the benefits of a senior lienholder and a junior lienholder. Saticoy Bay's lengthy and convoluted theory is not supported by any authority nor is the theory supported by policy considerations as explained below.

C. Policy Considerations Do Not Support Saticoy Bay's Theory That Thornburg is Entitled to the Excess Proceeds of the Foreclosure Sale

No statute or caselaw supports Saticoy Bay's theory that a senior lienholder is entitled to the Excess Proceeds, and there is no need for this Court to consider the policy behind the theory. However, Saticoy Bay relies heavily on policy considerations in its motion, so those considerations deserve some discussion. Central to Saticoy Bay's theory is an argument that the Timpa Trust is not deserving of the Excess Proceeds because it defaulted on its loan and failed to pay HOA assessments, and it will be unjustly rewarded with a windfall if it receives the Excess Proceeds. Such an argument focuses too intently on the unusual facts of this specific case, and does not consider the process applied more generally. Saticoy Bay makes

the error of failing to see the forest for the trees, and it cannot see the undesirable consequences of its proposed novel approach.

This case is distinct from most HOA foreclosure cases, because Saticoy Bay severely overestimated the value of the interest it was purchasing at the foreclosure sale at issue in this case, and it apparently paid much more than its interest was worth. Perhaps emboldened by the *SFR* decision shortly before the foreclosure sale, Saticoy Bay bid more than a million dollars for the Property thinking it would receive the Property clear and free of any deeds of trust. It, however, turned out that Thornburg preserved its interest in the Property by tendering the superpriority portion of the HOA's lien prior to foreclosure, and Saticoy Bay purchased the Property subject to a deed of trust. Essentially, Saticoy Bay took a large gamble and lost, and, as a result, the foreclosure sale produced an unusually high amount of excess proceeds, and the prior owner received much more of the Excess Proceeds than is typical. Since, if adopted, Saticoy Bay's approach to the distribution of excess proceeds will affect a huge number of foreclosures, the Court should look to other scenarios to see if Saticoy's approach is even logical.

For example, consider a hypothetical where the facts are the same as in this case, but where the Timpa Trust's predecessors had taken out a substantial second mortgage on the Property for $1 million and secured by a second deed of trust that was also in default at the time of foreclosure. Under Saticoy Bay's theory, Thornburg's interest would have not only survived foreclosure, but Thornburg would

also be entitled to all of the Excess Proceeds. Meanwhile, the foreclosure would have wiped out the second deed of trust leaving that subordinate lender with nothing. Saticoy Bay's theory creates an opportunity for first deed of trust holder to receive double recovery and leaves subsequent creditor's high and dry, which cannot be what the legislature intended in passing NRS Chapter 116.

Alternatively, consider a hypothetical where the Timpa Trust's Predecessors had built up $1 million in equity when the HOA foreclosed. Again, Thornburg would have received all of the Excess Proceeds and the right to foreclose while the original owners and all of their equity would be completely wiped out. Such a scenario creates a completely unfair outcome that Saticoy Bay fails entirely to consider.

There is a reason why U.S. courts have long adopted the ancient rule that only junior lienholders and then homeowners are entitled to excess proceeds, which is also codified in NRS 116.31164 (2014). Junior interests are all wiped out completely by foreclosure and rely on those excess proceeds as a cushion. Meanwhile, surviving interests such as Thornburg are entirely ***unaffected*** by foreclosure; they are in the exact same position they were in before the foreclosure took place. It would be fundamentally unfair for those survivors to also swallow up the very thing junior interests can look to in order to protect their interests. HOA foreclosures have already been hard enough on homeowners who have lost all of the equity in their homes for failing to pay assessments. Saticoy Bay now wants to rip the only possible, and

typically inadequate, consolation such homeowners have had, the leftover excess proceeds of the sale. Policy does not favor Saticoy Bay's theory, nor does the law.

Finally, it should also be noted that Saticoy Bay is wrong to argue that the Timpa Trust received a windfall in this case. As Saticoy Bay itself admits, Thornburg's loan is in default for millions of dollars. It is not likely to recover those amounts by foreclosing on the Property. It must, therefore, look to Timpa Trust to pay the deficiency judgment. The Timpa Trust will depend on the excess proceeds to cover that judgment. Saticoy Bay is wrong to argue that Timpa Trust made out like a bandit. The Court should reject Saticoy Bay's theory and uphold the lower court's order distributing the excess proceeds to Timpa Trust rather than Thornburg.

IV. Saticoy Bay Cannot Challenge the Award of Attorney Fees to Red Rock

Saticoy Bay never once mentioned Red Rock's request for fees and costs from the Excess Proceeds and never opposed the request before the lower court. In fact, no party opposed the request, and the lower court granted the request as unopposed. Now, for the first time, Saticoy Bay argues that fees and costs should not have been awarded to Red Rock from the Excess Proceeds, or, more specifically, that only $2,500 should have been awarded to Red Rock, which is a number that Saticoy Bay apparently derived on its own. (Opening Brief, p. 29). Saticoy Bay has no interest in the excess proceeds and no standing to challenge the award to fees. Moreover, since Saticoy Bay never challenged the fees in the lower court, this Court should refuse to consider the issue for the first time on appeal.

A. Since Saticoy Bay Has no Interest in the Excess Proceeds, it Has no Standing to Challenge the Award of Attorney Fees

Saticoy Bay has no interest in the excess proceeds, and it, therefore, does not have standing to challenge the lower court's decision to award fees to Red Rock from the excess proceeds. Pursuant to NRAP 3A a party must have standing in order to appeal a judgment or order such as the award of fees and costs to Red Rock. The question of standing is a question of law to be reviewed de novo by this Court. *Nationstar Mortg., LLC v. SFR Investments Pool 1*, LLC, 396 P.3d 754, 756 (Nev. 2017). To have standing, "the party seeking relief [must have] a sufficient interest in the litigation, so as to ensure the litigant will vigorously and effectively present his or her case against an adverse party." *Id.* Generally, therefore, "a party must show a personal injury and not merely a general interest that is common to all members of the public" in order to have standing. *Schwartz v. Lopez*, 382 P.3d 886, 894 (Nev. 2016). In other words, "either a personal right or right of property [must be] adversely and substantially affected' by a district court's ruling." *Matter of T.L.*, 406 P.3d 494, 496 (Nev. 2017)

In the case of an award of fees and costs, when the award has no effect on the party challenging the award, that challenging party does not have standing to challenge the award. See, *Matter of Est. of Herrmann*, 677 P.2d 594, 610 (Nev. 1984). Moreover, a party has no standing to challenge an interpleader order when it is "not entitled to any part of the fund . . . deposited in court for distribution among the

interpled defendants." *Farmers Ins. Exch. v. Civ. Serv. Emp. Ins. Co.*, 587 P.2d 420, 421 (Nev. 1978).

In this case, Saticoy Bay has no interest in the Excess Proceeds of the foreclosure sale, and, therefore, no interest in the lower court's decision to award Red Rock fees and costs from the Excess Proceeds. It, therefore, has no standing to challenge the award. It has attempted to paint a convoluted picture where Thornburg is actually entitled to the Excess Proceeds, and an award of the Proceeds to Thornburg will affect Saticoy Bay's interest in the Property, which gives Saticoy Bay standing. However, as Red Rock has shown above, Thornburg has no interest in the Excess Proceeds either. Those Excess Proceeds belong to subordinate lien holders, and then to the unit's owner, and the use of the Excess Proceeds in no way affects Saticoy Bay's interest in the Property. Saticoy Bay's theory of standing, therefore, is based on an incorrect premise and should be disregarded.

B. Saticoy Bay Did Not Challenge the Award of Fees in the Lower Court

Even if Saticoy Bay had standing to challenge the award of fees, Saticoy Bay never made any mention of the award in the lower court and never challenged the award. Now, for the first time, it argues that Red Rock should not have received such a high award and should have only received $2,500.

When a party does not raise an issue before the lower court, it waives that issue, and the issue will not be considered on appeal. See, *Archon Corp. v. Eighth Jud. Dist. Ct. in and for County of Clark*, 407 P.3d 702, 708 (Nev. 2017). Here,

Saticoy Bay has no excuse for why it did not challenge the award of fees and costs in the lower court, and this Court should refrain from considering the issue for the first time on appeal.

Saticoy Bay may argue that the Court should now make an exception to the rule, but a challenge to an award of fees is not the type of challenge that this Court should consider for the first time on appeal. This Court reviews an award of attorney fees for an abuse of the lower court's discretion. See, *Spencer v. Klementi*, 466 P.3d 1241, 1248 (Nev. 2020). Since Saticoy Bay never mentioned fees in the lower court, it is impossible for Saticoy Bay to argue that the lower court abused its discretion in granting Red Rock fees and costs when that decision was unopposed. Saticoy Bay has no basis to challenge the award, and this Court should, therefore, uphold the award of fees.

V. The District Court Properly Denied Saticoy Bay's Motion to Amend

Saticoy Bay made two late-in-game Hail Mary attempts before the lower court to essentially reverse every final order in the case. It filed a motion to reconsider two motions for summary judgment, and it filed a motion to amend its pleadings well after the lower court disposed of all of its claims. Its attempts were improper, and the district court correctly denied both. Red Rock, however, did not oppose the motion for reconsideration and leaves it to the Timpa Trust to address that motion in its own answering brief. Red Rock did, however, oppose the motion to amend, (12 JA 2218-2224) and it, therefore, responds to that motion below.

Saticoy Bay filed the motion to amend its complaint on October 16, 2019, asking the district court to allow it to add a sixth claim seeking to set aside the foreclosure sale. (12 JA 2167-2189). The major problem with Saticoy Bay's motion is that it came after the lower court already disposed of all of Saticoy Bay's claims, and made final rulings on every claim before it. Almost a year before Saticoy Bay filed its motion to amend, the district court issued the 2018 Order wherein it ruled on Thornburg's motion for summary judgment denying Thornburg's claim to set aside the foreclosure sale and granting Thornburg's claim seeking a declaration that the foreclosure sale did not extinguish its deed of trust. (10 JA 1719-1728).[8] Additionally, a month before Saticoy Bay filed it motion to amend, the district court granted the Timpa Trust's motion for summary judgment for the Excess Proceeds of the foreclosure sale. (12 JA 2050-2057).

The motion to amend is a rather blatant attempt to unwind every final judgment the district court made. Because Saticoy Bay did not like the fact that the district court upheld the foreclosure sale and granted the Timpa Trust the Excess Proceeds, it retroactively tried to bring claims to disrupt the final judgments. As discussed below, its attempts were erroneous for several reasons.

A. Parties Cannot Amend Their Pleadings Post-Judgment Except in Narrow Inapplicable Circumstances

[8] The district court's findings of fact and conclusions of law in the 2018 Order stated that it was dismissing each of Thornburg's counterclaims and crossclaims not specifically mentioned in the order. (10 JA 1724). In one of those dismissed counterclaims Thornburg asked to void the foreclosure sale. (1 JA 0029, ¶ 77).

It is unsurprising that this Court has held that "[o]nce a judgment is final, it should not be reopened" through a motion to amend the complaint. *Greene v. Eighth Jud. Dist. Ct. of Nevada ex rel. County of Clark*, 990 P.2d 184, 186 (Nev. 1999). Doing so would "[u]ndermin[e] the finality of judgments [and] would have serious repercussions for appellate jurisdiction," because "[p]ermitting such amendments would create procedural and jurisdictional difficulties." *Id.* That is true in circumstances where the amendment would not even alter the final judgments such as was the case in *Greene*.[9] It is certainly true in cases like this, where Saticoy Bay is attempting to amend its complaint to unwind two previous final judgments.

Saticoy Bay attempts to get around this obvious barrier by arguing that NRCP 15(b)(2) allows it to again, for the fourth time, amend its complaint in these circumstances. That rule, entitled "For Issues Tried by Consent," states:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

The rule, by its plain language, allows for ministerial amendments to pleadings when the issues actually tried are not those that were raised in the pleadings.

[9] The petitioner in *Greene* attempted only to amend its complaint to add claims that would help it collect on its judgment. See, *Id.* at 185-86.

NRCP 15(b)(2) ***does not allow amendments that would open the case back up to new claims and issues. It does not allow parties to use motions to amend to relitigate cases***, which is what Saticoy Bay is attempting to do here.

The issue of setting aside the sale in this case was already pled by Thornburg, and it was tried. The district court denied the claim. There is no reason for Saticoy Bay to amend the pleadings to supposedly conform to the evidence. That is not even what Saticoy Bay is attempting to do. It wants to amend so that it can retry the issue. It wants to completely overturn both the district court order holding that Thornburg's interest survived foreclosure and its order that the Timpa Trust is entitle to the Excess Proceeds. NRCP 15(b)(2) does not permit such amendments; if it did, it would create an unintended mechanism for parties to engage in never-ending litigation, always able to set aside final judgments through post-judgment amendments. Since that was not the rule's intent, Saticoy Bay cannot rely on the narrow rule, and the Court should now deny Saticoy Bay's attempt to misuse the rule.

B. Saticoy Bay is Precluded From Bringing Claims to Set Aside the Foreclosure Sale

The issue of whether or not the foreclosure sale should be set aside was already finally decided a year before Saticoy Bay moved to amend its complaint, and Saticoy Bay was precluded from retrying the issue. The doctrine of issue preclusion, which prevents parties from raising an issue identical to one that has already been settled on the merits between the same parties, applies to prevent Saticoy from now raising its

new claim. *See*, *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008). Moreover, under the doctrine of claim preclusion, a party such as Saticoy Bay may not bring claims against a party such as Thornburg, Red Rock, the HOA, or the Timpa Trust that could have been brought against those parties in litigation where a final judgment has been reached. *See*, *Id.*

As discussed above, Thornburg already brought a claim to set aside the foreclosure sale, and the district court dismissed that claim with prejudice in connection with the 2018 Order. The Court, moreover, granted the Timpa Trust the Excess Proceeds in September 2019. Both of those orders constituted final judgments. Therefore, Saticoy Bay was precluded under the doctrines of both issue and claim preclusion from bringing new claims to set aside the foreclosure sale. Based on the application of both doctrines, the Court should uphold the dismissal of Saticoy Bay's motion to amend.

C. The District Court Properly Denied Saticoy Bay's Motion to Amend Due to the Undue Delay in Filing the Motion, Saticoy Bay's Motive, and Prejudice to the Non-Moving Parties

Finally, even under normal circumstances, courts may deny motions to amend when there is evidence of "undue delay, bad faith or dilatory motive on the part of the movant;" it may also deny the motion if granting the motion would result in unfair prejudice to the nonmoving party. *Stephens v. S. Nev. Music Co.*, 507 P.2d 138, 139 (Nev. 1973). In this case there is abundant evidence of all of these things. If Saticoy Bay moving to amend its complaint almost a year after the district court dismissed

all of its claims is not evidence of undue delay, then there is no such thing as undue delay. By moving to amend, Saticoy Bay wished to reverse a year of litigation because it did not like the prior outcome. Equity will not stand for such an attempt, and the lower court did not abuse its discretion when it denied the motion.

The Court should uphold the lower court's denial of Saticoy Bay's motion to amend.

CONCLUSION

The Court should affirm each of the district court's orders in this case. It should affirm the dismissal of Saticoy Bay's claims against Red Rock because Saticoy Bay did not properly appeal that issue and because Red Rock did not owe Saticoy Bay any duty to disclose any superpriority lien tenders at foreclosure. The Court should also affirm the award of the Excess Proceeds to the Timpa Trust, because Thornburg's deed of trust survived foreclosure, and Thornburg has no interest in the Excess Proceeds. Further, the Court should affirm the award of attorneys fees and costs to Red Rock because Saticoy Bay has no standing to challenge the fees and waived the issue by failing to bring it before the lower court. Finally, the Court should affirm the denial of Saticoy Bay's motion to amend the complaint because Saticoy Bay is prevented from amending its complaint after final judgment.

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Dated: April 15, 2021

KOCH & SCOW, LLC

/s/ Steven B. Scow
Steven B. Scow
Attorneys for Respondent
Red Rock Financial Services, LLC

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP (a)(6) because: This brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a type face of 14 points and contains 10,183 words.

Finally, I hereby certify that I have read this Respondent's Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

Dated: April 15, 2021

KOCH & SCOW, LLC

/s/ Steven B. Scow
Steven B. Scow
Attorneys for Respondent
Red Rock Financial Services, LLC

CERTIFICATE OF SERVICE

Pursuant to FRCP 5, I certify that on April 15, 2021, I caused a copy of **RESPONDENT RED ROCK FINANCIAL SERVICES, LLC'S ANSWERING BRIEF** to be filed and served through the Court's eFlex electronic filing service to all counsel of record in this action.

I declare under penalty of perjury that the above is true and correct.

Executed on April 15, 2021, at Henderson, Nevada.

KOCH & SCOW, LLC

/s/ Steven B. Scow
Steven B. Scow
Attorneys for Respondent
Red Rock Financial Services, LLC