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SUPREME COURT

STATE OF NEVADA

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| SATICOY BAY LLC SERIES 133 McCLAREN,<br><br>Appellant,<br><br>vs.<br><br>GREEN TREE SERVICING LLC; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR THE CERTIFICATE-HOLDERS OF CWABS MASTER TRUST, REVOLVING HOME EQUITY LOAN ASSET BACKED NOTES, SERIES 2004-T,<br><br>Respondent. | No. 78661 |

# APPELLANT'S PETITION FOR SUPREME COURT REVIEW

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## NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Plaintiff/appellant, Saticoy Bay LLC Series 133 McLaren, is a Nevada limited-liability company.

2. The manager for Saticoy Bay LLC Series 133 McLaren is Bay Harbor Trust.

3. The trustee for Bay Harbor Trust is Iyad Haddad a/k/a Eddie Haddad.

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## APPELLANT'S PETITION FOR SUPREME COURT REVIEW

Pursuant to NRAP 40B, Saticoy Bay LLC Series 133 McLaren (hereinafter "plaintiff") petitions the court for review of the amended order of affirmance entered by the court of appeals on May 1, 2020 on the grounds that the order conflicts with prior opinions of this court and involves the following fundamental issue of statewide public importance:

> Whether the pre-sale tender of nine months of common assessments made by the lender holding a subordinate deed of trust renders an HOA's foreclosure of its superpriority lien void even when the lender does not prove that it is entitled to equitable relief from the conclusive recital of default in the foreclosure deed.

## BASIS FOR REVIEW

The precise basis on which plaintiff seeks review is the court of appeals' reliance on this court's opinion in Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev. 604, 427 P.3d 113 (2018)(hereinafter "*Diamond Spur*"), as dispositive even though Green Tree Servicing LLC (hereinafter "defendant") did not prove that it was entitled to equitable relief against plaintiff from the conclusive recital of default in the foreclosure deed.

## CITATION OF AUTHORITY

**Defendant did not prove that it was entitled to equitable relief against plaintiff from the conclusive recital of default in the foreclosure deed.**

In its order, the court of appeals mentioned plaintiff's argument that defendant failed to comply with the mandatory language in NRS 111.315, which made the unrecorded tender by Miles Bauer void against plaintiff pursuant to NRS 111.325. The court of appeals also mentioned plaintiff's argument that the conditional tender by Miles Bauer had no legal effect because it was rejected by the HOA in good faith.

On the other hand, the court of appeals did not discuss at all plaintiff's argument that the district court improperly granted equitable relief to defendant from the conclusive recital of "default" in the foreclosure deed recorded on November 26, 2013. *See* Appellant's Opening Brief, pgs. 34 to 38, and Appellant's Reply Brief, pgs. 9 to 11.

At page 2 of its order, the court of appeals cites *Diamond Spur* as support for its conclusion that "the district court correctly found that the tender of nine months of past due assessments extinguished the superpriority lien such that Saticoy Bay took the property subject to Green Tree's deed of trust."

In *Diamond Spur*, this court quoted from Power Transmission Equip. Corp. v. Beloit Corp., 201 N.W. 2d 13, 16 (Wis. 1972), that "[a] lien may be lost by . . .

payment or tender of the proper amount of the debt secured by the lien," but the Wisconsin Supreme Court in Power Transmission Equip. Corp. v. Beloit Corp. and this court in *Diamond Spur* did not discuss the effect of a statute like NRS 116.31166 on a payment or tender like the one made by Miles Bauer on December 16, 2011. (SER Vol. I, pgs. 183-185)

At pages 23 and 24 of plaintiff's 7.27 pre-trial memorandum (JA1, pgs. 129-130), and at page 34 of Appellant's Opening Brief, plaintiff cited NRS 116.31166(1)(a), which states that the recital of "default" in the foreclosure deed is "conclusive proof of the matters recited." NRS 116.31166(2) in turn states that a deed that contains the recitals listed in NRS 116.31166(1) is "conclusive against the unit's former owner, his or her heirs and assigns, **and all other persons**." (emphasis added).

At page 22 of Respondent's Answering Brief, defendant stated that in Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016)(hereinafter "Shadow Wood"), this court stated that "under NRS 116.31166, the recitals in an association's trustee's deed only 'implicate compliance only with the statutory prerequisites to foreclosure.'"

On the other hand, the "conclusive" recital of "default" in NRS

116.31166(1)(a) is expressly identified as one of the recitals in the foreclosure deed that is "conclusive proof of the matters recited."

At page 23 of Respondent's Answering Brief, defendant quoted this court's statement in *Diamond Spur* that a "foreclosure sale on a mortgage lien after valid tender satisfies that lien is void, as the lien is no longer in default." *Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121.

In *Diamond Spur*, however, this court did not discuss at all the express language in NRS 116.31166 that made the recitals in the foreclosure deed "conclusive" against defendant. In *Diamond Spur*, this court also did not discuss this court's statement in Shadow Wood that "cases elsewhere to have addressed comparable conclusive- or presumptive-effect recital statutes confirm that such recitals do not defeat equitable relief in a proper case; rather, such recitals are 'conclusive, *in the absence of grounds for equitable relief*.' Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d 493, 496 (1943) (emphasis added) . . . ." Shadow Wood, 132 Nev. at 59, 366 P.3d at 1111-1112.

At page 23 of its Brief, defendant stated that "[t]he recitals in the deed regarding compliance with the statutory prerequisites to foreclosure cannot operate to validate a void sale," but that statement simply ignores the "conclusive" recital

that a default exists. NRS 116.31166(1)(a).

In Shadow Wood, this court cited Hardy Cos., Inc. v. SNMARK, LLC, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010), as authority that "[t]he Legislature is 'presumed not to intend to overturn long-established principles of law' when enacting a statute," and this court stated that "the foreign precedent cited under which equitable relief may still be available in the face of conclusive recitals, **at least in cases involving fraud**, lead us to the conclusion that the Legislature, through NRS 116.31166's enactment, did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals." Shadow Wood, 132 Nev. at 59-60, 366 P.3d at 1112. (emphasis added)

In the present case, defendant did not allege or prove that the HOA foreclosure sale held on November 22, 2013 involved fraud.

As stated at page 36 of Appellant's Opening Brief, the statement in *Diamond Spur* quoted by defendant must be read together with the language in Shadow Wood to mean that "the only way for the court to look behind the conclusive recital is to invoke the court's power of equity."

The court of appeals, however, did not address plaintiff's argument regarding defendant's failure to prove it was entitled to equitable relief from the conclusive

recital of default. At the middle of page 3 of its order, the court of appeals instead quoted this court's statement in *Diamond Spur* that "after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property." (134 Nev. at 612, 427 P.3d at 121)

On the other hand, that statement in *Diamond Spur* was based on Henke v. First Southern Properties, Inc., 586 S.W.2d 617, 620 (Tex. App. 1979), which is factually unlike the present case for many reasons.

First, the lender "agreed with Henke that they would not foreclose if he paid them $2,156 by cashier's check" by a specified time, and the lender "accepted the money with the advice Henke's loan had been reinstated." 586 S.W.2d at 619.

In the present case, NAS did not accept the check for $276.75 tendered by Miles Bauer. (Trial Exhibit 15; testimony by Rock Jung, Esq. at JA1, pg. 224)

Second, the Henke case did not involve a conclusive- or presumptive-effect recital statute like NRS 116.31166, and the court in Henke did not discuss the conditions for granting equitable relief from such a statute.

In *Diamond Spur*, this court also cited 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law,* § 7:21 (6th ed.

2014), but that treatise did not discuss the effect of a "conclusive" recital of default like the one in NRS 116.31166. The authors also stated that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at 956-957.

In Armenta-Carpio v. Nevada, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013), this court stated that "we will not overturn precedent absent compelling reasons for doing so." Defendant's argument, however, requires that this court interpret *Diamond Spur* as overruling this court's interpretation in Shadow Wood of the conclusive recitals in NRS 116.31166 even though no language in *Diamond Spur* supports such a conclusion.

As quoted at page 36 of Appellant's Opening Brief, in Shadow Wood, this court quoted from Smith v. United States, 373 F.2d 419, 424 (4th Cir.1966), that "[e]quitable relief will not be granted to the possible detriment of innocent third parties." This court also cited In re Vlasek, 325 F.3d 955, 963 (7th Cir.2003), as authority that "it is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties." This court also cited Riganti v. McElhinney, 248 Cal. App.2d 116, 56 Cal. Rptr. 195, 199 (Ct. App.1967), as authority that "equitable relief should not be granted where it would work a gross

injustice upon innocent third parties."

In the present case, the evidence proved that the nonjudicial foreclosure of the HOA's superpriority lien was not "void" because the "conclusive" recital of default in the foreclosure deed proved that the entire lien was still in default on November 22, 2013. The recital of default was "conclusive" because defendant did not prove that it was entitled to equitable relief from the "conclusive" recital.

Furthermore, the standard for denying equitable relief is determined by whether an "innocent third party" is affected and does not depend upon plaintiff's status as a bona fide purchaser.

In the present case, defendant did not prove that plaintiff or any other bidders at the public auction held on November 22, 2013 were provided with notice of the conditional tender offered by Miles Bauer on December 16, 2011.

As stated at page 36 of Appellant's Opening Brief, when a party challenges the conclusive recital of default, the only way for the court to look behind the conclusive recital is to invoke the court's powers of equity. The fact that the court sits in equity when analyzing a tender case is confirmed by this court's analysis of the "kept good" argument asserted by SFR in *Diamond Spur*. This court rejected the argument, not under the statute or under common law, but by quoting from the Annotation,

*Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921): "Generally, there is no fixed rule in equity which requires a tender to be kept good in the sense in which that phrase is used at law." 134 Nev. at 610-611, 427 P.3d at 120.

As stated at page 36 of Appellant's Opening Brief, but for invoking the inherent powers of equity, neither this court nor any other court could ever look behind the conclusive recital of default.

As a result, simply proving the delivery of a valid tender does not end the inquiry because this court stated that "[w]hen sitting in equity…courts must consider the entirety of the circumstances that bear upon the equities." Shadow Wood, 132 Nev. at 63, 366 P.3d at 1114.

In the present case, as demonstrated at page 17 of plaintiff's 7.27 pre-trial memorandum (JA1, pg. 123) and page 20 of Appellant's Opening Brief, the Miles Bauer letter included an offer to enter into a contract that required as an express condition to the HOA's negotiation of Miles Bauer's check, the HOA must violate NRS 116.1104, which prohibited the HOA from altering or waiving provisions of the statute either through the CC&Rs or through any agreement with another party. NRS 116.3116(2). *See* SFR Investments Pool I, LLC. v. U.S. Bank, N.A., 130 Nev. 742, 757, 334 P.3d 408, 419 (2014).

As discussed at pages 20 and 21 of plaintiff's 7.27 pre-trial memorandum (JA1, pgs. 126-127), the Miles Bauer letter contained a blatant misrepresentation of what constitutes the superpriority portion of an assessment lien and then required that the HOA accept Miles Bauer's presentation of the law.

As stated at page 6 of Appellant's Opening Brief, on September 9, 2011, Nevada Association Services, Inc. (hereinafter "NAS") recorded a notice of default and election to sell (JA1, pg. 92, ¶10), and on September 19, 2011, NAS mailed copies of the notice of default to the former owners, MERS, Countrywide Home Loans, Inc. and other interested parties. (JA1, pg. 92, ¶11)

NRS 111.320 expressly provides that the notice of default recorded on September 9, 2011 imparted notice to defendant when the deed of trust was assigned to defendant on May 28, 2013. (JA1, pg. 92, ¶6)

On October 29, 2013, NAS mailed copies of the notice of foreclosure sale to defendant and other interested parties. (JA1, pg. 93, ¶13)

Despite this notice, defendant allowed the Property to be sold to plaintiff without objection and without notice of defendant's unrecorded claim of tender.

As discussed at page 37 of Appellant's Opening Brief, equitable relief is not available when the moving party has an adequate remedy at law and will not suffer

irreparable injury if denied equitable relief. Las Vegas Valley Water District v. Curtis Park Manor Water Users Ass'n, 98 Nev. 275, 278, 646 P.2d 549, 551 (1982); County of Washoe v. City of Reno, 77 Nev. 152, 360 P.2d 602, 604 (1961).

As quoted at page 37 of Appellant's Opening Brief, if the HOA and NAS acted wrongfully in foreclosing the superpriority portion of the HOA's assessment lien, defendant's right to sue the HOA and NAS for damages provided defendant with an adequate remedy at law. Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 777 (1994)(*citing* Munger v. Moore, 11 Cal. App.3d 1, 9, 11, 89 Cal. Rptr. 323 (1970)).

At page 5 of its judgment (JA1, pg. 161), the district court stated:

> Based on the Nevada Supreme Court's analysis in the *Diamond Spur* case, this Court must conclude that the bank's tender in the present case, was sufficient to satisfy the super-priority lien amount, and preserved the Bank's interest in the property, such that the purchaser at the foreclosure sale, purchased the property subject to the deed of trust.

The district court, however, did not discuss at all the effect of the conclusive recital of default in the foreclosure deed, and the court did not identify any facts that supported granting equitable relief to defendant from the conclusive recital of default in the foreclosure deed.

Because the high bid of $10,200.00 paid by plaintiff at the public auction held

on November 22, 2013 exceeded the full amount owed as stated in the notice of foreclosure sale, the HOA necessarily foreclosed its entire lien, including the unpaid amount of the superpriority lien.

## CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this court review the order entered by the court of appeals on May 1, 2020, vacate the order entered by the court of appeals, and reverse the judgment entered in favor of defendant by the district court.

DATED this 18th day of May, 2020.

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## 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 32(a)(6) because this brief has been prepared in a

proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 40B because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced and has a typeface of 14 points and contains 2,930 words.

3. I hereby certify that I have read this appellate 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 of the transcript or appendix where the matter relied on is to be found.

DATED this 18th day of May, 2020.

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## CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 18th day of May, 2020, a copy of the foregoing **APPELLANT'S PETITION FOR SUPREME COURT REVIEW** was served electronically through the Court's electronic filing system to the following individuals:

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/s/ /*Marc Sameroff /*
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