MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorney for plaintiff/appellant
Saticoy Bay LLC Series 8149
Palace Monaco

SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 8149 PALACE MONACO, Appellant, vs. WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST, MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-11; Respondent	No. 81453

APPELLANT'S OPENING BRIEF

Michael F. Bohn, Esq.
Law Office of
Michael F. Bohn, Esq., Ltd.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 Fax
Attorney for plaintiff/appellant,
Saticoy Bay LLC Series 8149
Palace Monaco

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 8149 Palace Monaco, is a Nevada limited-liability company.

2. The manager for Saticoy Bay LLC, Series 8149 Palace Monaco is Bay Harbor Trust.

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

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The findings of fact, conclusions of law and order granting defendant's motion for summary judgment is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The findings of fact, conclusions of law and order was entered on June 4, 2020. Notice of entry of the findings of fact, conclusions of law and order was served and filed on June 4, 2020. A stipulation and order for NRCP 54(b) certification was filed on September 29, 2020.

(C) Plaintiff filed its notice of appeal on July 6, 2020.

ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/appellant therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale held on December 3, 2013 extinguished the first deed of trust held by Indymac Bank, F.S.B. (hereinafter "Lender") before that deed of trust was assigned to Wells Fargo Bank, National Association, as Trustee for the Structured Adjustable Rate Mortgage Loan Trust, Mortgage Pass Through Certificates Series 2005-11 (hereinafter "defendant") on January 26, 2017.

2. Whether Monaco Landscape Maintenance Association, Inc. (hereinafter "HOA") complied with NAC 116.090 to be treated as a limited-purpose association.

3. Whether the payments made by Robert Nardizzi (hereinafter "former owner") to Red Rock Financial Services (hereinafter "Red Rock") after Red Rock recorded the lien for delinquent assessments on behalf of the HOA paid the superpriority portion of that lien before the HOA foreclosure sale was held on December 3, 2013.

4. Whether the HOA and Red Rock complied with the notice requirements in NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.

5. Whether defendant proved the element of causation required by the California rule.

6. Whether defendant's counterclaim seeking declaratory relief was barred by the three year statute of limitations in NRS 11.190(3)(a).

7. Whether defendant's counterclaim seeking declaratory relief was barred by the four year statute of limitations in NRS 11.220.

8. Whether defendant's counterclaim seeking declaratory relief falls within either NRS 11.070 or NRS 11.080.

9. Whether Saticoy Bay LLC Series 8149 Palace Monaco (hereinafter "plaintiff") is protected as a good faith purchaser for value from the unrecorded claim that the default as to the superpriority portion of the HOA's lien was cured.

10. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

STATEMENT OF THE CASE

On February 27, 2018, plaintiff filed a complaint asserting three claims for relief: 1) declaratory relief/quiet title determining that plaintiff was the rightful owner of the property commonly known as 8149 Palace Monaco Avenue, Las Vegas, Nevada 89117 (hereinafter "Property"), that defendant had no right, title, interest or claim to the Property, and plaintiff's rights in the Property are superior to any interest claimed by defendant; 2) fraudulent concealment and negligence against the HOA; and 3) unjust enrichment against the HOA. (JA 1, pgs. 1-8)

On March 21, 2018, the HOA filed an answer to plaintiff's complaint. (JA1,

pgs. 9-15)

On October 15, 2018, defendant filed an answer to plaintiff's complaint, counter-claims, cross-claims and third party complaint. (JA1, pgs. 19-93)

On November 13, 2018, the HOA filed an answer to defendant's counter-claims, cross-claims and third party claims. (JA1, pgs. 94-100)

On February 6, 2019, plaintiff filed an answer to counterclaim. (JA1, pgs. 101-108)

On February 7, 2019, defendant filed an errata to its answer to plaintiff's complaint, counter-claims, cross-claims and third party complaint. (JA1, pgs. 109-188)

On October 28, 2019, plaintiff filed a motion for summary judgment. (JA1, pg. 199 to JA2a, pg. 328)

On October 28, 2019, defendant filed a motion for summary judgment. (JA2a, pg. 329 to JA3a, pg. 619)

On November 18, 2019, defendant filed an opposition to plaintiff's motion for summary judgment. (JA3a, pgs. 620-653)

On November 18, 2019, the HOA filed an opposition to defendant's motion for summary judgment. (JA3a, pg. 654 to JA3c, pg. 728)

On December 4, 2019, plaintiff filed an opposition to defendant's motion for summary judgment. (JA4, pg. 729 to JA4, pg. 907)

On December 11, 2019, defendant filed a reply in support of its motion for summary judgment. (JA4, pgs. 908-973)

On December 11, 2019, plaintiff filed a reply in support of its motion for summary judgment. (JA5, pgs. 974-1001)

On June 4, 2020, the court entered its findings of fact, conclusions of law and order granting defendant's motion for summary judgment. (JA5, pgs. 1009-1017)

On June 4, 2020, defendant served and filed notice of entry of the court's findings of fact, conclusions of law and order. (JA5, pgs. 1018-1029)

On July 6, 2020, plaintiff filed its notice of appeal. (JA5, pgs. 1030-1031)

On September 29, 2020, plaintiff filed a stipulation and order for NRCP 54(b) certification. (JA5, pgs. 1032-1039)

On September 29, 2020, plaintiff served and filed notice of entry of the stipulation and order for NRCP 54(b) certification. (JA5, pgs. 1040-1049)

STATEMENT OF FACTS

Plaintiff obtained title to the Property by entering and paying the high bid of $17,400.00 at a public auction held on December 3, 2013. *See* copy of foreclosure

deed recorded on December 27, 2013 at JA1, pgs. 233-235.

The public auction arose from a delinquency in assessments due from the former owner to the HOA pursuant to NRS Chapter 116.

Defendant is the beneficiary by assignment of a deed of trust recorded as an encumbrance against the Property. *See* copies of deed of trust recorded on March 15, 2005 at JA2a, pgs. 237-258, and corporate assignment of deed of trust recorded on January 26, 2017, at JA3a, pg. 616-619.

Paragraph (C) at page 1 of the deed of trust identified IndyMac Bank, F.S.B. as the "Lender" and stated: "Lender's address is 155 North Lake Avenue, Pasadena, CA 91101." (JA2a, pg. 237, ¶ (C))

Paragraph (E) at page 2 of the deed of trust stated that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns" and that "**MERS is the beneficiary under this Security Instrument**." (JA2a, pg. 238, ¶ (E)) (emphasis in original).

Paragraph 15 of the deed of trust stated in relevant part: "Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower." (JA2a, pg. 246, ¶ 15)

On May 20, 2009, Red Rock recorded a lien for delinquent assessments for $606.71 on behalf of the HOA. (JA2a, pg. 273)

On May 22, 2009, Red Rock mailed a copy of the recorded lien to the former owner. (JA2a, pgs. 270-273)

On July 7, 2009, Red Rock recorded a notice of default and election to sell for $1,740.42. (JA2a, pg. 275)

On July 15, 2009, Red Rock mailed copies of the notice of default to the Lender at its address in Pasadena, CA, to Wells Fargo Bank, N.A., and to the former owner. (JA2a, pgs. 280-286)

On July 17, 2009, Red Rock mailed a second copy of the notice of default to the former owner. (JA2a, pgs. 277-279)

On April 8, 2013, Red Rock recorded a notice of foreclosure sale for $3,876.82. (JA2a, pgs. 288-289)

On April 9, 2013, Red Rock mailed copies of the notice of foreclosure sale to the Lender at its address in Pasadena, CA, to Wells Fargo Bank, N.A., to the former owner and to the State of Nevada Ombudsman. (JA2a, pgs. 291-301)

On April 8, 2013, a copy of the notice of foreclosure sale was served upon the former owner by posting a copy of the notice in a conspicuous place on the Property.

(JA2a, pgs. 303, 305)

Beginning on April 11, 2013, copies of the notice of foreclosure sale were posted in three (3) public places in Clark County, Nevada. (JA2a, pg. 304)

The notice of foreclosure sale was published in the Nevada Legal News on April 11, 2013, April 18, 2013, and April 25, 2013. (JA2a, pg. 307)

SUMMARY OF THE ARGUMENT

The first deed of trust was extinguished when plaintiff purchased the Property at the HOA foreclosure sale held on December 3, 2013.

The HOA did not comply with NAC 116.090 to be treated as a limited-purpose association.

Defendant did not prove that the superpriority lien was paid prior to the public auction held on December 3, 2013.

The HOA and Red Rock complied with every notice requirement in NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.

Defendant not prove the element of causation required by the California rule.

Defendant's counterclaim seeking declaratory relief was barred by the three year statute of limitations in NRS 11.190(3)(a).

Defendant's counterclaim seeking declaratory relief was barred by the four year

statute of limitations in NRS 11.220.

Defendant's counterclaim seeking declaratory relief does not fall within either NRS 11.070 or NRS 11.080.

Plaintiff is protected as a good faith purchaser for value from the unrecorded claim that the default as to the superpriority portion of the HOA's lien was cured.

STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."

ARGUMENT

1. The first deed of trust was extinguished by the HOA foreclosure sale held on December 3, 2013.

NRS 116.3116(2) provides that an HOA's assessment lien is "prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association of a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

The first deed of trust, recorded on March 15, 2005, falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this priority in any way.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742,758, 334 P.3d 408, 419 (2014), this court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust.

Every notice recorded, mailed, posted and published by Red Rock stated "the total amount of the lien" as approved by this court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 P.3d at 418.

The foreclosure deed (JA, pg.233) included the following recitals:

> Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 07/07/2009 as instrument number 0001621 Book 20090707 which was recorded in the office of the recorder of said county. Red Rock Financial Services has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Lien for Delinquent Assessments and Notice of Default and the posting and publication of the Notice of Sale.

Because the high bid of $17,400.00 paid by plaintiff exceeded the full amount of the $3,876.82 identified in the notice of foreclosure sale, the HOA necessarily foreclosed its entire assessment lien including the superpriority portion of the lien.

The foreclosure of the HOA's super priority lien extinguished any estate, right, title, interest or claim in the Property created by the subordinate deed of trust.

Consequently, title to the Property vested in plaintiff free of the extinguished deed of trust.

2. The HOA did not comply with NAC 116.090 to be treated as a limited-purpose association.

At pages 10 and 11 of its motion for summary judgment (JA2a, pg. 338-339), defendant cited Saticoy Bay LLC Series 4500 Pacific Sun v. Lakeview Loan Servicing, LLC, 441 P.3d 81 (Table), 2019 WL 2158334 (Nev. May 15, 2019)(unpublished disposition), where this court decided that because the HOA in that case was "a limited purpose association under NRS 106.1201(2) and (6)," the HOA's "foreclosure sale did not extinguish respondent's deed of trust and that [buyer] took title to the property subject to the first deed of trust.."

First, the unpublished order in the Pacific Sun case "does not establish mandatory precedent." NRAP 36(c)(2).

Second, the order has no "persuasive value" because that case focused only on the exception from NRS Chapter 116 provided in NRS 116.1201(2) for a "limited-purpose association" that had complied with the regulations adopted by the Commission for Common-Interest Communities and Condominium Hotels (hereinafter "CCICCH") pursuant to NRS 116.1201(5).

In the present case, on the other hand, the portion of the Preamble to the

CC&RS and Article 8.2 of the CC&Rs that are quoted at pages 4 and 5 of defendant's motion (JA2a, pgs. 332-333) do not state that the HOA was a "limited-purpose association" pursuant to NRS 116.1201(2). The Preamble (JA2a, pg. 363) and Article 8.2 (JA2a, pgs. 381) instead state that the HOA was "a limited expense liability planned community" in accordance with NRS 116.110368 (replaced by NRS 116.075), NRS 116.1203(1)(b), NRS 116.1203(2) and NRS 116.4101(g).

Article 8.2 of the CC&Rs also stated the intent "that this Declaration and the Project not be subject to any Sections of NRS Chapter 116 **except those Sections expressly required by Sections 116.1203(1)(b) and 116.1203(2)**, unless otherwise expressly stated in this Declaration." (JA2a, pg. 381)(emphasis added)

NRS 116.1203(1) provides:

> Except as otherwise provided in subsections 2 and 3, **if a planned community contains no more than 12 units and is not subject to any developmental rights**, it is subject only to NRS 116.1106 and 116.1107 unless the declaration provides that this entire chapter is applicable. (emphasis added)

NRS 116.1203(2) provides:

> The provisions of NRS 116.12065 and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that the definitions are necessary to construe any of those provisions, **apply to a residential planned community containing more than 6 units**. (emphasis added)

NRS 116.1203(3) also provides:

> Except for NRS 116.3104, 116.31043, 116.31046 and 116.31138, **the**

> **provisions of NRS 116.3101 to 116.350, inclusive**, and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that such definitions are necessary in construing any of those provisions, **apply to a residential planned community containing more than 6 units.** (emphasis added)

In the present case, the legal description in Exhibit "A" (JA2b, pgs. 407-413) and Exhibit "A-1" (JA2b, pgs. 415-420) to the CC&Rs proves that the planned community named "MONACO" included more than 12 units.

Paragraph B in the Preamble at page 1 of the CC&Rs (JA2a, pg. 362) also stated that the Declarant intended to develop "a residential community containing a maximum of one thousand three hundred thirty seven (1,337) single-family residences . . . ."

Paragraph D in the Preamble at page 1 of the CC&Rs (JA2a, pg. 362) also stated that "the development of the Project is intended to be consistent with the Monaco master development plan per Zone Change ZC-1270-97 and Tentative Subdivision Map TM 0202-97 . . . ."

Because the HOA in the present case included more than 12 units, NRS 116.1203(3) expressly provides that "the provisions of **NRS 116.3101 to 116.350, inclusive**," governed the HOA. (emphasis added)

These provisions necessarily included the superpriority lien rights granted to the HOA by NRS 116.3116(2) as well as the language in NRS 116.31162 to

116.31168, and by incorporation, NRS 107.090, that governed the nonjudicial foreclosure of the HOA's superpriority lien rights. *See also* Section 8.9.1 of the CC&Rs at JA2a, pgs. 384-385.

NRS 116.1104 states in relevant part:

> Except as expressly provided in this chapter, its provisions may not be varied by agreement, and rights conferred by it may not be waived.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 P.3d at 418-419, this court held that this language in NRS 116.1104 prevented the HOA from enforcing language in the CC&Rs stating that "no lien created under this Article 9 [governing nonpayment of assessments], nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the beneficiary under any Recorded first deed of trust encumbering a Unit, made in good faith and for value" and the language in the CC&Rs stating that "[t]he lien of the assessments, including interest and costs, shall be subordinate to the lien of any first Mortgage upon the Unit."

In the present case, the language in Section 8.14 of the CC&Rs relating to "Priority of Lien" (JA2a, pg. 386) matches the language that this court found to be unenforceable in SFR Investments Pool 1, LLC v. U.S. Bank, N.A.

Although the language in Section 15.1 of the CC&Rs relating to "Mortgagee

Protection" (JA2a, pg. 395) is slightly different than the language described in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., defendant did not explain how the HOA's exercise of the lien rights granted to the HOA by NRS 116.3116(2) and Section 8.9 of the CC&Rs (JA2a, pgs. 384-385) could constitute an "amendment or violation of this declaration."

Furthermore, as stated at pages 9 to 12 of plaintiff's opposition to defendant's motion for summary judgment (JA4, pgs. 737-740), the CC&Rs for the HOA do not meet the statutory requirements for the exception to NRS Chapter 116 in NRS 116.1201(2) for a "limited-purpose association."

In this regard, NRS 116.1201(5) states in part:

> 5. The Commission shall establish, by regulation:
>
> > (a) The criteria for determining whether an association, a limited-purpose association or a common-interest community satisfies the requirements for an exemption or limited exemption from any provision of this chapter. . .

NRS 116.015 defines the word "Commission" to mean "the Commission for Common-Interest Communities and Condominium Hotels created by NRS 116.600."

NRS 116.600(1) created the Commission, and NRS 116.600(2) describes its membership and appointments. On its website, the Nevada Real Estate Division defines the Commission as "a seven-member body, appointed by the governor that

acts in an advisory capacity to the Division, adopts regulations, and conducts disciplinary hearings."

NRS 116.1201(5)(a) directs the Commission to establish by regulation "[t]he criteria for determining whether an association, a limited-purpose association or a common-interest community satisfies the requirements for an exemption or limited exemption from any provision" of NRS Chapter 116. To that end, the Nevada Real Estate Division and the Commission adopted NAC 116.090, which provides in part:

> **NAC 116.090 "Limited-purpose association" interpreted.** (NRS 116.1201, 116.615)
>
> 1. An association is a limited-purpose association pursuant to subparagraph (1) of paragraph (a) of subsection 6 of NRS 116.1201 if:
>
> (a) The association has been created for the sole purpose of maintaining the common elements consisting of landscaping, public lighting or security walls, or trails, parks and open space;
>
> (b) The declaration states that the association has been created as a landscape maintenance association; **and**
>
> (c) The declaration expressly prohibits:
>
> (1) The association, and not a unit's owner, from enforcing a use restriction against a unit's owner;
>
> (2) The association from adopting any rules or regulations concerning the enforcement of a use restriction against a unit's owner; **and**
>
> (3) The imposition of a fine or any other penalty against a unit's owner for a violation of a use restriction. (emphasis added)

NAC 116.090 sets forth the requirements for determining whether an HOA is a limited-purpose association, and NRS 116.1201(5)(a) expressly incorporates the

Commission's criteria. Thus, in determining whether the HOA is truly a limited-purpose association under NRS 116.1201, this court must look to the requirements of NAC 116.090.

NAC 116.090 has three sub-parts that are connected by the word "and" that appears at the end of NAC 116.090(b). NAC 116.090(c) has three sub-parts that are connected by the word "and" at the end of NAC 116.090(c)(2). As a result, there are five (5) separate requirements that must be met before an association qualifies for the exception from NRS Chapter 116 provided by NRS 116.1201(2).

The first requirement under NAC 116.090(1)(a) is that the association has been created **for the sole purpose** of maintaining common elements consisting of landscaping, public lighting or security walls, or trails, parks and open space." (emphasis added)

In the present case, on the other hand, the Preamble at pages 1 and 2 of the CC&Rs (JA2a, pgs. 362-363) does not state that the HOA was formed "for the sole purpose" required by NAC 116.090(1)(a).

Furthermore, as stated at page 11 of plaintiff's opposition(JA3, pg. 664), the CC&Rs contain multiple provisions that prove the HOA was not created "for the sole purpose" required by NAC 116.090(1)(a). These disqualifying provisions include the

power to enforce 16 different use restrictions (Article 3 at JA2a, pgs. 369-372), grant easements (Section 6.1.3 at JA2a, pg. 377), obtain insurance (Article 12 at JA2a, pgs. 389-393), annex property (Article 13 at JA2a, pgs. 393-394), and bring civil actions (JA2b, pgs. 402-403).

Furthermore, Section 6.1.6 of the CC&Rs (JA2a, pg. 377) expressly authorizes the HOA to initiate judicial proceedings to enforce "the Governing Documents," which term is defined in Section 1.23 of the CC&Rs (JA2a, pg. 366) to mean "this Declaration, the Bylaws, any Association Rules, and any other documents that govern the operation of the Association."

Section 6.1.7 of the CC&Rs (JA2a, pg. 378) also grants the HOA "[t]he power, but not the duty, to perform any and all lawful acts incidental to and in furtherance of the Association's express powers set forth in Sections 6.1.1 to 6.1.6 above which the Association deems necessary or proper."

At page 12 of its motion (JA2a, pg. 340), defendant stated that "Monaco is governed by the terms of the CC&Rs and not Chapter 116 by the express language of the statute and the CC&Rs."

To support this argument, at page 14 of its reply (JA4, pg. 921), defendant quoted a portion of Section 17.3.1 of the CC&Rs (JA2b, pg. 402) and stated that the

last sentence in Section 17.3.1 explicitly prohibited the HOA from enforcing a use restriction against a unit's owner.

On the other hand, the first part of the last sentence clearly stated that "[t]he enforcement powers of the Association shall be limited to enforcement of **any** provisions of this Declaration concerning the Association Property and the Association . . . ." (JA2b, pg. 402, § 17.3.1) This use of the word "any" would necessarily include the 16 different use restrictions in Article 3 of the CC&Rs. (JA2a, pgs. 369-372)

Because the HOA did not qualify for the exceptions to NRS Chapter 116 provided by either NRS 116.1201 or NRS 116.1203, the HOA in the present case is therefore governed by the mandatory language in NRS 116.1104 that prohibited the HOA from varying by agreement or waiving the superpriority lien rights granted to the HOA by NRS 116.3116(2).

Consequently, defendant's deed of trust was subordinate to the HOA's superpriority lien and was extinguished by the nonjudicial foreclosure of that prior lien on December 3, 2013.

3. Defendant did not prove that the superpriority lien was paid prior to the public auction held on December 3, 2013.

Under Nevada law, when "payment" is asserted as a defense, "each element of

the defense must be affirmatively proved," and "[t]he burden of proof clearly rests with the defendant." Schwartz v. Schwartz, 95 Nev. 202, 206, n. 2, 591 P.2d 1137, 1140, n. 2 (1979); Rosenbaum v. Rosenbaum, 86 Nev. 550, 552, 471 P.2d 254, 255 (1970).

In Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003), the court of appeals stated:

> "The trustor-mortgagor or the person who alleges that a debt has been paid has the burden of proving payment." (4 Miller & Starr, Cal. Real Estate, supra, Deeds of Trusts and Mortgages, § 10:71, p. 217, fn. omitted.)

In the present case, defendant argued that Exhibits 15 to 18 to its motion (JA3a, pgs. 555-573) proved that the former owner entered into a payment arrangement with the HOA. **These exhibits, however, do not include the writing that sets out the terms of the payment arrangement** – these exhibits instead include four (4) cashier's checks purchased by the former owner and four (4) "Payment Allocation Reports" prepared by Red Rock.

The four (4) cashier's checks were drawn payable to Red Rock for the following amounts:

Date	Amount to Red Rock
May 30, 2013	$ 404.00

June 21, 2013	169.00
July 22, 2013	168.00
August 23, 2013	168.00
Total Payments:	$ 909.00

None of the cashier's checks tendered by the former owner (JA3a, pgs. 556-557, 560-561, 565-566, 570-571) included any direction by the former owner on how to apply each partial payment.

Defendant relied on deposition testimony by Sara Trevino, a trustee sale officer employed by Red Rock, as proof that "[t]he HOA Trustee allocated Nardizzi's payments to the oldest outstanding assessments of the HOA." (JA2a, pgs. 336-337, ¶23)

As discussed at page 14 of plaintiff's opposition (JA4, pg. 742), however, the deposition testimony by Ms. Trevino proved that Red Rock **received $909.00** in payments from the former owner, and Red Rock **paid only $559.00** from those payments to the HOA:

Amount to Red Rock	Amount to HOA	Testimony by Ms. Trevino
$ 404.00	$ 129.00	JA3a, pg. 505, 80:8-11
169.00	94.00	JA3a, pg. 506, 83:16-22

168.00	168.00	JA3a, pg. 506, 85:15-19
168.00	168.00	JA3a, pg. 507, 87:11-13
$ 909.00	$ 559.00	

The payment allocation reports created by Red Rock show that Red Rock deducted a portion of the first two payments to reimburse itself for the $350.00 paid for the "Trustee Sale Guarantee" incurred during the foreclosure process – this includes $275.00 posted under "Title Allocation Detail" at JA3a, pg. 558 and $75.00 posted under "Title Allocation Detail" at JA3a, pg. 563.

The payment allocation reports created by Red Rock also show that Red Rock credited all other payments against the past due semi-annual assessments that became due on January 1, 2009, July 1, 2009, January 1, 2010, July 1, 2010 and January 1, 2011. (JA3a, pgs. 558, 563, 568) Red Rock did not allocate any portion of the monies that it received to the other foreclosure expenses, late fees or interest identified in Red Rock's account detail, dated December 3, 2013. (JA2b, pgs. 470-474)

In the deposition transcript attached as Exhibit 9 to defendant's motion, Ms. Trevino testified:

> Q So **is it Red Rock's policy** if they receive more than the semiannual assessment that's due, they would just forward it to

the next semiannual assessment charge?

A The oldest outstanding assessment.

JA3a, pg. 507, 86:10-14 (emphasis added)

Although this might be "Red Rock's policy," defendant did not prove that the HOA and the former owner agreed to use "Red Rock's policy" for the payments made by the former owner.

Because Ms. Trevino was employed by Red Rock and not by the HOA, Ms. Trevino did not have the personal knowledge required by 50.025(1) to testify regarding how the HOA applied the partial payments received by it.

In 9352 Cranesbill Trust v. Wells Fargo Bank, N.A., 136 Nev. 76, 80, 459 P.3d 227, 231 (2020), this court applied some of the rules from Able Electric, Inc. v. Kaufman, 104 Nev. 29, 752 P.2d 218 (1988), "that courts follow in deciding how to allocate partial payments on overdue debts."

One of these rules provides that "[w]hen a debtor partially satisfies a judgment, that debtor has the right to make an appropriation of such payment to the particular obligations outstanding." Able Electric, Inc. v. Kaufman, 104 Nev. at 30-31, 32, 752 P.2d at 219, 220.

Another rule is that "[i]f the debtor does not direct how to apply the payment

to her account, the creditor may determine how to allocate the payment." Able Electric, Inc. v. Kaufman, 104 Nev. at 32, 752 P.2d at 220.

In the present case, however, the former owner and the HOA entered into a written payment agreement that specifically defined how the monthly payments of $163.38 would be applied. (JA3a, pg. 671)

Although paragraph 16 of the district court's findings of fact (JA5, pg. 1012, ¶16) quoted language from the fifth paragraph of the payment agreement, the district court did not quote the following language in the fourth paragraph of the payment agreement:

> Please note that **this Payment Agreement includes the current balance owed plus future assessments through the end of the Payment Agreement**. Upon completion of this Agreement, your account will be current with the Association and Red Rock. Do not send a separate payment to the Association or the managing agent until the completion of this Payment Agreement. (emphasis added)

The district court also did not mention paragraph 8 of the HOA's written Collection of Assessments Policy (JA3b, pg. 674), which states:

> Payment Agreements and Allocations: Requests for Payment Agreements must be submitted by the unit's owner(s) in writing. The Board may from time to time allow the Collection Agency to enter into Payment Agreements of limited term and conditions on behalf of the Association. The Board will determine acceptable terms and conditions and notify the Collection Agency in writing. Any requests for terms other than those pre-approved by the Board require the approval of the Board prior to execution of the agreement. **The Agreement allows the owner to make scheduled partial payments of the entire balance owing, in addition to the current assessments.** Failure to meet any terms of the written agreement shall give the Association and/or its Collection Agency the right to immediately continue the collection process without

> further notice to the owner bringing all amounts due and payable. All payments received shall be allocated to the Association in accordance with current law. (emphasis added)

The four (4) "Payment Allocation Reports" prepared by Red Rock prove that Red Rock and the HOA violated the payment terms provided by the Payment Agreement and the HOA's written Collection of Assessments Policy because Red Rock did not apply any part of the payments made by the former owner to "future" assessments and/or "current" assessments.

The district court also did not apply the agreed method of allocating the former owner's payments, but instead relied entirely on how Red Rock allocated the payments in Red Rock's payment allocation reports. *See* Paragraphs 4 and 5 of the court's conclusions of law, filed on June 4, 2020 at JA5, pg. 1014, ¶¶ 4, 5.

In 9352 Cranesbill Trust v. Wells Fargo Bank, N.A., 136 Nev. at 80, 459 P.3d at 231, this court cited 70 C.J.S. Payment § 53 (2019), to support its conclusion that when the court must "determine how to apply the payment," the court should make that allocation "in view of all of the circumstances, as is most in **accord with justice and equity** and will best protect and maintain the rights of **both** the debtor **and** the creditor." (emphasis added)

From the perspective of the borrower/unit owner, there is no benefit to

applying a payment only to the superpriority portion of an assessment lien because foreclosure of even the nonpriority portion of the lien will terminate the unit owner's interest in the property and vest title to the property in the HOA sale purchaser.

From the perspective of the creditor (i.e. the HOA), there is a specific benefit to payments being allocated only to foreclosure costs and the nonpriority portion of the lien because purchasers are more likely to enter bids at the HOA foreclosure sale if they know that the subordinate deed of trust will be extinguished.

From the perspective of "justice and equity," it also makes sense that any payments made by the unit owner be allocated first to foreclosure costs and the nonpriority portion of the lien because allocating those payments to the superpriority portion of the lien disturbs "the equitable balance" that the superpriority lien was designed to achieve.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 748-749, 334 P.3d at 413, this court quoted from Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995), that "[a]n official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction."

This court also noted that comment 1 to 1982 UCIOA § 3-116 and comment

2 to 1994 & 2008 UCIOA § 3-116 stated that the superpriority lien "is a specially devised mechanism designed to 'strike[ ] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders.'" 130 Nev. at 748, 334 P.3d at 412

That "equitable balance" is not served if a lender can choose not to make any payments to an HOA during the nonjudicial foreclosure process and later insist that partial payments made by a unit owner be applied to the assessments making up the superpriority portion of the lien.

As stated at page 14 of plaintiff's opposition (JA4, pg. 742), by the time that Mr. Nardizzi made his first partial payment on May 30, 2013, Mr. Nardizzi's account had been delinquent since January 1, 2009, a period of approximately four and one-half years.

The account detail produced by Red Rock (JA2b, pgs. 470 to 474) proved that by December 3, 2013, the former owner had failed to pay four semi-annual assessments of $114.00, six semi-annual assessments of $120.00, ten late fees of $10.00, and interest of $146.55, for a total of $1,176.00.

At page 15 of its reply (JA4, pg. 922), defendant stated that Red Rock's account detail (JA2b, pgs. 470-474) proved that the superpriority lien was only

$114.00 and that the partial payments made by the former owner were "allocated by the HOA Trustee**, at the direction of the HOA**, to Nardizzi's account." (emphasis added)

The record on appeal, however, does not contain any evidence proving that the HOA directed Red Rock to allocate the payments received from the former owner in a manner that is inconsistent with the Payment Agreement and the HOA's written Collection of Assessments Policy.

The Payment Allocation Reports attached as Exhibit 15 (JA3a, pg. 558), Exhibit 16 (JA3a, pg. 563), Exhibit 17 (JA3a, pg. 568), and Exhibit 18 (JA3a, pg. 573) to defendant's motion were each prepared by Red Rock. None of the reports include any instructions from the HOA as to how Red Rock should apply the monies received from the former owner.

At pages 16 and 17 of its reply (JA4, pgs. 923-924), defendant stated that the HOA's discovery responses prove that the HOA "outsources its collection and foreclosure activities," but the HOA's responses to Interrogatory No. 16 and Interrogatory No. 18 did not say that the HOA "outsourced" how the payments received from Red Rock's "collection and foreclosure activities" would be applied.

Arguments made by counsel are not evidence and do not establish the facts of

a case. Nevada Association Services, Inc. v. Eighth Judicial District Court, 130 Nev. 949, 957, 338 P.3d 1250, 1255-56 (2014).

Because the record on appeal does not contain any admissible evidence proving that the HOA directed Red Rock to allocate the payments received by Red Rock in a manner inconsistent with the Payment Agreement and the HOA's written Collection of Assessments Policy, the findings in paragraphs 17, 18, 19 and 20 of the district court's findings of fact (JA5, pg. 1012, ¶¶ 17, 18, 19 and 20) should be vacated by this court.

4. The HOA and Red Rock complied with every notice requirement in NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.

At page 18 of it motion (JA2a, pg. 346), defendant stated that in SFR Investments Pool 1, LLC v. Bank of New York Mellon, 134 Nev. 483, 487, 422 P.3d 1248, 1252 (2018), this court observed "that NRS 116.31168 incorporates NRS 107.090, which requires that notices be sent to a deed of trust beneficiary."

Although NRS 116.31168(1) states that "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed," NRS 107.090 does not require that any "notices be sent to a deed of trust beneficiary."

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Prior to being amended in 2019, NRS 107.090(3) required that a copy of the notice of default be mailed to "[e]ach person who has recorded a request for a copy of the notice" (NRS 107.090(3)(a)) and "[e]ach other **person with an interest** whose interest or claimed interest is subordinate to the deed of trust." (NRS 107.090(3)(b)) (emphasis added)

NRS 107.090(4) required that "a copy of the notice of time and place of sale" be mailed to "each person described in subsection 3."

NRS 107.090(1) stated:

> As used in this section, "person with an interest" means **any person who has or claims any right, title or interest in, or lien or charge upon, the real property** described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated. (emphasis added)

The Nevada Legislature's decision not to include the words "deed of trust beneficiary" in NRS 107.090(3)(b) is significant because this court has stated that "**we are bound to follow a statute's plain language** when the language is unambiguous" and that "[t]o do otherwise would implicate the separation of powers." Pope v. Motel 6, 121 Nev. 307, 314, 114 P.3d 277, 282 (2005) (emphasis added)

In Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008), this court stated that "when a

statute is facially clear, we will generally not go beyond it in determining the Legislature's intent" and "**we consider multiple legislative provisions as a whole**, construing a statute **so that no part is rendered meaningless**." (emphasis added)

In Williams v. State Dep't of Corrections, 133 Nev. 594, 598, 402 P.3d 1260, 1264 (2017), this court stated that "[w]e must presume that the variation in language indicates a variation in meaning" and that the Legislature's "explicit decision to use one word over another in drafting a statute is material." (*quoting* S.E.C. v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003)).

At page 18 of its motion (JA2a, pg. 346), defendant referred to footnote 11 in Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. 740, 749 n. 11, 405 P.3d 641, 648 n. 11 (2017)(hereinafter "Shadow Canyon"), that parenthetically describes SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 756, 334 P.3d at 418, as "observing that NRS 116.31168 incorporates NRS 107.090, which requires that notices be sent to a deed of trust beneficiary." This court, however, did not use the words "deed of trust beneficiary" in SFR Investments Pool 1, LLC v. U.S. Bank, N.A.

At page 18 of it motion (JA2a, pg. 346), defendant also altered the meaning of the language quoted by defendant from U.S. Bank, National Association ND v.

Resources Group, LLC, 135 Nev. 199, 203, 444 P.3d 442, 446 (2019), by inserting the word "[MERS]" in place of the words "U.S. Bank" that were used by this court in that case.

This change in language is significant because MERS did not serve as a nominee for the Lender in U.S. Bank, National Association ND v. Resources Group, LLC like MERS did in the present case. Paragraph 2 instead named the Lender as the beneficiary of the deed of trust. 135 Nev. at 202, 444 P.3d at 446. This court also noted that paragraph 1 of the deed of trust identified a specific mailing address for the Lender. Id.

Furthermore, earlier in its opinion, this court stated that "these statutes require an HOA seeking to foreclose a superpriority lien to send **the holder** of a recorded first deed of trust notices of default and of sale, even though the deed of trust holder has not formally requested them." 135 Nev. at 201, 443 P.3d at 445. (emphasis added)

In SFR Investments Pool 1, LLC v. Bank of New York Mellon, this court stated:

> Replacing the deed of trust with the homeowners' association superpriority lien within the language of NRS 107.090 then requires that the homeowners' association provide notice **to the holder of the first security interest** as a subordinate interest.

135 Nev. at 203, 443 P.3d at 446. (emphasis added)

In U.S. Bank, National Ass'n ND v. Resources Group, LLC, the deed of trust stated that any required notice "shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1." 135 Nev. at 202, 443 P.3d at 446.

The defect in U.S. Bank, National Ass'n ND v. Resources Group, LLC was created because Alessi & Koenig did not mail copies of the notice of default and notice of foreclosure sale to U.S. Bank National Association ND at its address in Fargo, ND stated in paragraph 1 at page 1 of the deed of trust. Alessi & Koenig instead mailed the notices to the "return to" name and address for "US Recordings" appearing at the top left corner of page 1 of the deed of trust.

In the present case, paragraph 15 of the deed of trust (JA2a, pg. 246, ¶15) stated in relevant part:

> Any notice to Lender shall be given by delivering it or mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

Paragraph (C) at page 1 of the deed of trust identified the Lender's address as 155 North Lake Avenue, Pasadena, CA 91101. (JA2a, pg. 237, ¶ (C)) This is the exact address to which Red Rock timely mailed copies of both the notice of default

and the notice of foreclosure sale. *See* certified mail receipts at JA2a, pgs. 281, 295.

The deed of trust does not contain any language that required that any notices be mailed to MERS either as beneficiary or as nominee for the Lender.

Defendant also does not identify any statute or other authority that requires that notice to be sent to MERS when MERS is named as a beneficiary but is "acting solely as nominee for Lender and Lender's successors and assigns." *See* paragraph (E) at JA2a, pg. 238, ¶ (E).

The holding in U.S. Bank, National Ass'n ND v. Resources Group, LLC does not support defendant's argument because MERS was not identified as a nominee for the Lender in the deed of trust in that case.

In Edelstein v. Bank of New York Mellon, 128 Nev. 505, 520, 286 P.3d 249, 259 (2012), this court stated that "a [deed of trust] beneficiary is entitled to a distinctly different set of rights than that of a note holder." This court also stated:

> Although we conclude that MERS is the proper beneficiary pursuant to the deed of trust, **that designation does not make MERS the holder of the note**. (emphasis added)

In Edelstein, it was necessary to determine the "proper beneficiary" of the deed of trust because the statute interpreted in Edelstein specifically provided that "[t]he **beneficiary of the deed of trust** or a representative shall attend the mediation." NRS

107.086(5). (emphasis added)

In the present case, on the other hand, NRS 107.090(3)(b) and NRS 107.090(4) did not require that notices be mailed to "the beneficiary identified in the Deed of Trust" as claimed by defendant at page 18 of its motion. (JA2a, pg. 346)

In the present case, the "person with an interest" in the deed of trust recorded on March 15, 2005 was not MERS. The "person with an interest" was instead the Lender named in the deed of trust: IndyMac Bank, F.S.B. (JA2a, pg. 237,¶ (C))

Paragraph (E) of the deed of trust expressly stated that MERS was acting "solely as nominee for Lender and Lender's successors and assigns." (JA2a, pg. 238, ¶ (E))

The recitals at page 3 of the deed of trust (JA2a, pg. 239) also stated:

> Borrower understands and agrees that **MERS holds only legal title to the interests granted by Borrower in this Security Instrument**. . . . (emphasis added)

In Landmark National Bank v. Kesler, 216 P.3d 158 (Kan. 2009), the lender named in a first mortgage filed a petition to judicially foreclose its mortgage, but did not name MERS as a party even though MERS was identified as the beneficiary in a second mortgage recorded against the property. After the lender named in the first mortgage obtained a default judgment and the property was sold at a sheriff's sale,

the unrecorded assignee of the second mortgage (i.e. Sovereign Bank) filed a motion to set aside the court's confirmation of the sale because "MERS was a K.S.A. 60-219(a) contingently necessary party and, because Landmark failed to name MERS as a defendant, Sovereign did not receive notice of the proceedings." Id. at 162.

MERS also joined Sovereign's motion. Id.

The Kansas Supreme Court examined language in the mortgage that matches the language used at pages 1 and 2 of the deed of trust (JA2a, pgs. 237-238) and language that matches other language used in the deed of trust in the present case.

In particular, the court noted that paragraph 12 of the mortgage stated that "any notice to Lender shall be given by certified mail to Lender's address stated herein or to such other address as Lender may designate by notice to Borrower as provided herein." Id. at 165.

As quoted at page 32 above, paragraph 15 of the deed of trust (JA2a, pg. 246, ¶15) in the present case contains similar language.

In Culhane v. Aurora Loan Services of Nebraska, 708 F.3d 282, 287 (5th Cir. 2013), the court stated:

> **MERS's mortgagee status is narrowly circumscribed: it acts solely as "nominee" for the owner or servicer of the mortgage**, including the owner's or servicer's successors and assigns. There is one condition: the party for whom MERS serves as nominee must be a member of MERS. The upshot of this arrangement is that MERS holds the legal

title to the mortgage as mortgagee of record, but **it does not have any beneficial interest in the loan.** (emphasis added)

Because MERS does not hold "any beneficial interest" in a loan, MERS is not a "person with an interest" as defined in NRS 107.090(1).

Black's Law Dictionary (10th ed. 2014) defines the word "nominee" as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." (emphasis added)

By definition, a "nominee" like MERS is not a "person with an interest" as defined in NRS 107.090(1). MERS is instead an agent for the "person with an interest."

Defendant did not cite any authority that requires duplicate notices to be mailed to MERS when notice is provided directly to the "person with an interest" at the exact address identified in the deed of trust.

At page 19 of its motion (JA2a, pg. 347), defendant stated that "the Deed of Trust cannot be extinguished from the Property as its holder never received a copy of the operative foreclosure notices, or had actual notice of the sale by any means." As discussed above, MERS was not the "holder" of the deed of trust in the present case.

This court has stated that a nonjudicial foreclosure agent's only duty is to mail the notices, that "[t]heir mailing presumes that they were received," and that "[a]ctual notice is not necessary as long as the statutory requirements are met." Hankins v. Administrator of Veteran Affairs, 92 Nev. 578, 555 P.2d 483, 484 (1976); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462, 464 (1971)(applying NRS 107.080(3)).

Because copies of both the notice of default and the notice of foreclosure sale were timely mailed to the Lender, the law presumes that both notices were received.

At page 20 of its motion (JA2a, pg. 348), defendant stated that "[a]s MERS was not provided the Notice of Default and Notice of Sale it was deprived of all of the required information contained in the foreclosure notices." On the other hand, defendant did not cite any authority that requires a second notice to be served on a "nominee" when notice has already been provided directly to the entity for which MERS is "acting solely as a nominee."

Because defendant did not prove that any required notice was not timely recorded, mailed, posted or published as required by statute, the sale held on December 3, 2013 was not void.

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5. Defendant not prove the element of causation required by the California rule.

At the bottom of page 20 and top of page 21 of its motion (JA2a, pgs. 348-349), defendant stated that "[t]he fair market value of the Property at the time of the HOA Sale was $185,000" and that the high bid of $17,400.00 paid by plaintiff at the foreclosure sale was "less than 10% of the Property's value."

On the other hand, in Shadow Canyon, this court stated that the "commercial reasonableness" standard, which derives from Article 9 of the Uniform Commercial Code, "has no applicability in the context of an HOA foreclosure involving the sale of real property." Shadow Canyon, 133 Nev. at 741, 405 P.3d at 642.

With respect to the reference to comment b to Restatement (Third) of Prop.: Mortgages, § 8.3 (1997) in Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. 49, 60, 366 P.3d 1105, 1112-1113 (2016), this court stated in Shadow Canyon:

> As to the Restatement's 20-percent standard, we clarify that *Shadow Wood* did not overturn this court's longstanding rule that "'inadequacy of price, however, gross, is not in itself a sufficient ground for setting aside a trustee's sale'" absent additional "'proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price,'" 132 Nev., Adv. Op. 5, 366 P.3d at 1111 (quoting *Golden v. Tomiyasu*, 9 N3v. 503, 514, 387 P.2d 989, 995 (1963)).

133 Nev. at 741, 405 P.3d at 642-643.

In Shadow Wood, this court stated that the consideration paid by a bona fide

purchaser need only be "valuable" (*quoting* Fair v. Howard, 6 Nev. 304, 308 (1871)) and "that the fact that the foreclosure sale purchaser purchased the property for a 'low price' did not in itself put the purchaser on notice that anything was amiss with the sale." (*quoting* Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished disposition)). Shadow Wood, 132 Nev. at 65, 366 P.3d at 1115.

The $17,400.00 paid by plaintiff satisfies these standards.

At page 21 of its motion (JA2a, pg. 349), defendant stated that fraud, oppression, or unfairness affected the foreclosure sale because Red Rock mailed letters to the Lender and Wells Fargo Bank, N.A. that stated: "The Association's Lien for Delinquent Assessments is Junior only to the Senior Lender/Mortgage Holder." (JA3a, pgs. 536-537)

On the other hand, the very next sentence in each letter stated: "This Lien may affect your position." (JA3a, pgs. 536-537)

Defendant did not prove that any person who received the letters interpreted the letters as a statement that the HOA was not foreclosing the superpriority portion of its lien.

Furthermore, because defendant did not prove that either letter was made known to the persons who attended the public auction held on December 3, 2013, it

is impossible for these letters to "account for" or have "brought about" the high bid of $17,400.00 paid by plaintiff for the Property.

Defendant also stated that the HOA's governing documents contained a mortgage protection clause. As discussed at page 13 above, this court stated in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 P.3d at 418-419, that "NRS 116.1104 defeats this argument."

Defendant's second allegation of fraud, oppression, or unfairness is that after the notice of lien was recorded, the former owner made payments to Red Rock that were "equal to almost eight times the superpriority amount." (JA2a, pg. 350)

As discussed at pages 20 to 29 above, however, defendant did not meet its burden to prove that Red Rock properly applied the former owner's payments to the super priority portion of the HOA's lien.

Defendant's third allegation of fraud, oppression, or unfairness is that Red Rock did not mail the notice of default or notice of sale to MERS. (JA2a, pgs. 350-351) However, as discussed above, MERS was simply a nominee on behalf of IndyMac Bank, and NRS 107.090 does not require notices to be mailed to a nominee. Defendant also did not prove that failing to mail notice to MERS had any impact on the amounts bid at the public auction held on December 23, 2013.

6. Defendant's counterclaim seeking declaratory relief was barred by the three year statute of limitations in NRS 11.190(3)(a).

At page 3 of its motion for summary judgment (JA2a, pg. 331) defendant stated that "[t]his quiet title action involves the claimed rights and interests in real property . . . ."

As discussed at page 4 of plaintiff's opposition (JA2, pg. 202), defendant's counterclaim asserted a first cause of action for quiet title/declaratory relief, a second cause of action for permanent and preliminary injunction, and a third cause of action for unjust enrichment.

The controlling language in NRS 116.31166(1) states that the recitals in a foreclosure deed are "conclusive proof of the matters recited." This includes the recital of "default" in NRS 116.31166(1)(a). NRS 116.31166(2) states that the foreclosure deed is "conclusive against the unit's former owner, his or her heirs and assigns, and all other persons."

A lender like defendant cannot rebut these presumptions in its own mind and act as if the presumptions do not exist. The presumptions are true until proven otherwise, and one can only prove otherwise through a court action. The record titleholder does not have any duty to prove the presumptions because this would obviously defeat the whole nature of the presumptions.

Nevada law provides that "[a] presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof." Yeager v. Harrah's Club, Inc., 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) (*citing* NRS 47.180 and Vancheri v. GNLV Corp., 105 Nev. 417, 421, 777 P.2d 366, 368 (1989)).

In Shadow Canyon, 133 Nev. at 746, 405 P.3d at 646, this court stated that NRS 47.250(16) includes a presumption that "the law has been obeyed" and that there is "a presumption in favor of the record titleholder." *(quoting* Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996)).

In Shadow Wood, 132 Nev. at 57, 366 P.3d at 1110-1111, this court discussed the effect that a conclusive recital of default could have even where no default existed, and in order to avoid what it perceived to be a "breathtakingly broad" reading, this court held that "courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite NRS 116.31166."

This court stated, however, that the recitals in a foreclosure deed are "conclusive, *in the absence of grounds for equitable relief*." 132 Nev. at 59, 366 P.3d at 1112 (*quoting* Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d 493, 496 (1943)).

This court also concluded 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." 132 Nev. at 59-60, 366 P.3d at 1112.

As a result, but for invoking the court's 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 as stated by this court in Shadow Wood, "[w]hen sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities." 132 Nev. at 63, 366 P.3d at 1114 (citations omitted).

In Armenta-Carpio v. Nevada, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013), this court stated that "under the doctrine of *stare decisis*, we will not overturn precedent absent compelling reasons for doing so."

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018)(hereinafter "Diamond Spur"), this court included a passing reference to Shadow Wood when discussing "SFR's status as a bona fide purchaser," but this court did not discuss at all the legal effect of the "conclusive" recital of default on the lender's claim that the rejected tender cured the default as to the superpriority portion of the lien. 134 Nev. at 612, 427 P.2d 121.

In Resources Group, LLC, as Trustee of E. Sunset Road Trust v. Nevada Association Services, Inc., 135 Nev. 48, 437 P.3d 154, 156 (2019), this court stated that "the burden of demonstrating that the delinquency was cured presale, rendering the sale void, was on the party challenging the foreclosure . . . ."

Consequently, in order to obtain equitable relief from the "conclusive" recital of default in the foreclosure deed, defendant was required to timely file an action seeking that relief.

Declaratory relief is not a stand-alone claim. Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989); Nguyen v. JP Morgan Chase Bank, No. SACV 11-01908 DOC (ANx), 2012 WL 294936, at *4 (C.D. Cal. Feb. 1, 2012) ("A claim for declaratory relief is not a stand-alone claim, but rather depends upon whether or not Plaintiff states some other substantive basis for liability."). For a party to obtain declaratory relief, there must be an independent basis for jurisdiction. Miller–Wohl Co., Inc. v. Commissioner of Labor & Industry, 685 F.2d 1088, 1091 (9th Cir.1982).

Because declaratory relief is not a stand-alone claim and is only derivative of some other substantive claim brought in the action, the statute of limitations that governs a request for declaratory relief is that which applies to the substantive cause

of action. "A claim for declaratory relief is subject to a statute of limitations generally applicable to civil claims." Zuill v. Shanahan, 80 F.3d 1366, 1369-70 (9th Cir. 1996).

In Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 688 (9th Cir. 1993), the court quoted from Gilbert v. City of Cambridge, 932 F.2d 51, 58 (5th Cir.1991), that if "a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern." The statute of limitations for declaratory relief is the one applicable to an ordinary legal or equitable action based on the same claim. Mangini v. Aerojet–General Corp., 230 Cal. App. 3d 1125, 1155, 281 Cal. Rptr. 827, 846 (Cal. Ct. App. 1991).

In Perry v. Terrible Herbst, Inc., 132 Nev. 767, 770, 383 P.3d 257, 260 (2016), this court stated that "[t]he nature of the claim, not its label, determines what statute of limitations applies." (*citing* Stalk v. Mushkin, 125 Nev. 21, 25, 199 P.3d 838, 841 (2009)) This court also stated that "[w]hen a statute lacks an express limitations period, courts look to analogous causes of action for which an express limitations period is available either by statute or by case law." 383 P.3d at 260. (*quoting* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 518 (Tex. 1998))

In Diamond Spur, 134 Nev. at 610, 427 P.3d at 120, this court discussed specific principles that apply to statutory liens:

> Generally, the creation and release of a lien cause priority changes in a property's interests as a result of a written legal document. But Bank of America's tender discharged the superpriority portion of the HOA's lien by operation of law. *See* NRS 116.3116; 53 C.J.S. Liens § 14 (2017) ("A statutory lien is created and defined by the legislature. The character, operation and extent of a statutory lien are ascertained solely from the terms of the statute ."). NRS Chapter 116's statutory scheme allows banks to tender the payment needed to satisfy the superpriority portion of the HOA lien and maintain its senior interest as the first deed of trust holder. NRS 116.3116(l)-(3).

In Diamond Spur, the plaintiff bank asserted its tender claim, and this court decided the issue of satisfaction of the superpriority lien, by tender, solely under the language in NRS 116.3116. In particular, this court stated that "NRS 116.3116 governs liens against units for HOA assessments and details the portion of the lien that has superpriority status." 134 Nev. at 606, 427 P.3d at 117.

This court also stated:

> As discussed in Section A, **a plain reading of NRS 116.3116** indicates that at the time of Bank of America's tender, tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that portion of the lien. (emphasis added)

134 Nev. at 608, 427 P.3d at 118.

In Diamond Spur, this court held that Bank of America's delivery of a check in the amount of nine months of assessments satisfied the superpriority portion of the lien, and therefore at the time when the HOA foreclosed there was no default as to

and no authority to foreclose the superpriority portion of the lien. 129 Nev. at 612, 427 P.3d at 121.

An allegation that the superpriority portion of the lien was satisfied challenges the fact that a default existed and that the HOA had authority to foreclose. *See* Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983) ("An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale.") *See also*, McKnight Family, LLP v. Adept Management Services, Inc., 129 Nev. 610, 616, 310 P.3d 555, 559 (2013) ("A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself.")

Black's Law Dictionary (10th ed. 2014) defines the word "liability" to be "[t]he quality, state, or condition of being legally obligated or accountable."

Consequently, the statute of limitations that would apply to the declaration sought by defendant against plaintiff is the three-year period in NRS 11.190(3)(a) because the claim is "[a]n action upon a liability created by statute."

/ / /

As stated by this court in Clark v. Robison, 113 Nev. 949, 951, 944 P.2d 788, 789 (1997), "[i]n determining whether a statute of limitations has run against an action, the time must be computed from the day the cause of action accrued." This court also stated that "[a] cause of action 'accrues' when a suit may be maintained thereon." Id.

This court has recognized that "[e]very one is presumed to know the law and this presumption is not even rebuttable." Smith v. State, 38 Nev. 477, 481, 151 P. 512, 513 (1915).

As a result, defendant is presumed to have known the "fundamental principle of mortgage law" that "[a] valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law." Restatement (Third) of Prop.: Mortgages, § 7.1 (1997).

Defendant is also presumed to have known that this "fundamental principle of mortgage law" supplemented the provisions of NRS Chapter 116 pursuant to NRS 116.1108.

Where the facts giving rise to the cause of action are a matter of public record, "[t]he public record gave sufficient notice to start the statute of limitations running."

Cumming v. San Bernardino Redevelopment Agency, 125 Cal. Rptr. 2d 42, 46 (Cal. App. 2002).

In the present case, the foreclosure sale that extinguished the deed of trust became a matter of public record when the foreclosure deed was recorded on December 27, 2013. (JA1, pg. 233-234)

Because the Lender had constructive notice that the high bid paid by plaintiff exceeded "the total amount of the lien" disclosed in each recorded notice, the Lender had notice no later than December 27, 2013, that the public auction held on December 3, 2013 had extinguished the deed of trust.

Consequently, defendant needed to file an affirmative claim seeking equitable relief from the conclusive recital of default on or before December 27, 2016.

As noted above, however, defendant did not file its counterclaim seeking relief from the "conclusive" foreclosure deed until defendant filed its answer and counterclaim on October 15, 2018. (JA1, pgs. 19-93)

Because defendant's counterclaim was filed more than three (3) years after the HOA foreclosure deed was recorded on December 27, 2013, defendant's counterclaim was barred by the statute of limitations.

/ / /

7. Defendant's counterclaim seeking declaratory relief was barred by the four year statute of limitations in NRS 11.220.

As quoted at page 8 of plaintiff's opposition (JA2, pg. 736), NRS 11.220 states that "[a]n action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."

Because the claim for declaratory relief asserted by defendant falls within the cases described in NRS 11.190(3)(a), NRS 11.220 does not apply to defendant's counterclaim.

However, even if this court applied the four-year statute of limitations in NRS 11.220, that four-year time period expired no later than December 27, 2017.

8. Defendant's counterclaim seeking declaratory relief does not fall within either NRS 11.070 or NRS 11.080.

As quoted at page 8 of plaintiff's opposition (JA4, pg. 736), NRS 11.070 expressly limits the five year period provided by that statute to a "cause of action or defense to an action" that is "founded upon the title to real property." NRS 11.070 also requires that "the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made" was "seized or possessed of the premises in question within 5 years before the committing of the act" for which the "action is prosecuted or defense made."

NRS 11.080 also provides a five-year limitations period for actions "for the recovery of real property, or for the recovery of possession thereof. . . ."

In Hamm v. Arrowcreek Homeowners Ass'n, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008), this court stated that while "a lien is a monetary encumbrance on property, which clouds title," the lien "exists separately from that title," and therefore an action involving the lien does not "relate to" title.

Defendant's counterclaim could not be "founded upon title to real property" as required by NRS 11.070 because defendant did not foreclose its deed of trust and obtain title to or possession of the Property. For the same reason, defendant's counterclaim could not be an action for the "recovery of real property" or the "recovery of the possession thereof" as required by NRS 11.080.

A plain reading of the language used by the Legislature in both NRS 11.070 and NRS 11.080 proves that defendant did not have standing to assert a claim that falls within either statute.

9. Plaintiff is protected as a good faith purchaser for value from the unrecorded claim that the default as to the superpriority portion of the HOA's lien was cured.

In Shadow Wood, this court stated:

> So, when an association's foreclosure complies with the statutory foreclosure rules, **as evidenced by the recorded notices**, such as is the case here, and without any facts to indicate the contrary, the purchaser

> would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, **the basis of which is unknown to that purchaser**.
>
> **That NYCB retained the ability to bring an equitable claim to challenge Shadow Wood's foreclosure sale is not enough in itself to demonstrate that Gogo Way took the property with notice of any potential future dispute as to title**. And NYCB points to no other evidence indicated that Gogo Way had notice before it purchased the property, either actual, constructive, or inquiry, as to NYCB's attempts to pay the lien and prevent the sale. . . .

132 Nev. at 65-66, 366 P.3d at 1116. (emphasis added)

This court also stated that because the lender did not prove that the purchaser, Gogo Way, "had any notice of the pre-sale dispute between NYCB and Shadow Wood, the potential harm to Gogo Way must be taken into account and further **defeats NYCB's entitlement to judgment as a matter of law**." 132 Nev. at 66, 366 P.3d at 1116. (emphasis added)

In the present case, every document recorded as of the date of the HOA foreclosure sale showed that the Lender held the beneficial interest in the deed of trust and that the deed of trust was subordinate to the HOA lien being foreclosed.

In Shadow Canyon, this court stated that the lender "has the burden to show that the sale should be set aside in light of Saticoy Bay's status as the record title holder."133 Nev. at 746, 405 P.3d at 646.

In Wells Fargo Bank, N.A. v. Radecki, 134 Nev. at 621, 426 P.3d at 596, this court stated that "[w]e agree with the district court that Radecki has no obligation to

establish BFP status."

In First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 1442, 71 Cal. Rptr. 2d 295, 301 (1998), the court stated that where a party seeks equitable relief, the burden is on the party seeking equitable relief to allege and prove that the person holding legal title is not a bona fide purchaser.

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.

The bona fide purchaser doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

Because every recorded document was consistent with the foreclosure of a delinquent assessment lien that included an unpaid superpriority amount, and because

the Lender did not record any document stating that the default in payment of the HOA's superpriority lien had been "cured," plaintiff's rights are not affected by that unrecorded claim.

NRS 111.180(1) identifies several requirements for a purchaser to be a "bona fide purchaser," but the words "bona fide purchaser" do not appear in NRS 111.325.

NRS 111.325 expressly provides that in order to be protected from the unrecorded claim of tender, plaintiff need only be a subsequent purchaser, in good faith and for a valuable consideration "where his or her own conveyance shall be first duly recorded."

Moreover, when choosing the language in NRS 111.325, the Nevada Legislature intentionally chose not to include the words "actual knowledge, constructive notice of, or reasonable cause to know" that are included in NRS 111.180(1), but not in NRS 111.325. NRS 111.325 expressly provides that in order to be protected from the unrecorded claim of tender, plaintiff need only be a subsequent purchaser, in good faith and for a valuable consideration "where his or her own conveyance shall be first duly recorded."

According to the principles of statutory interpretation discussed in Williams v. State Dep't of Corrections, 133 Nev. 594, 598-599, 402 P.3d 1260, 1264 (2017),

the Legislature's decision not to include the words "bona fide purchaser" or the words "actual knowledge, constructive notice of, or reasonable cause to know" in NRS 111.325 must be viewed as intentional.

Comment c to Section 6.4 of Restatement (Third) of Prop: Mortgages (1997) explains the significance of recording notice of payments made by the person responsible for payment of a debt:

> When payment or tender by the person primarily responsible for the debt has extinguished the mortgage, the payor derives little comfort unless a document can be recorded to clear the public records of the mortgage lien.

Defendant's argument, however, requires that this court interpret NRS Chapter 116 in a way that permits the expectations of a "good faith" purchaser to be subverted by a lender's intentional choice not to disclose its claim that the superpriority portion of the lien had been paid.

Because the foreclosure deed was "first duly recorded," the express language in NRS 111.325 provides that defendant's unrecorded claim based on the payments made by the former owner is "void" as to plaintiff.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this court reverse the findings of fact, conclusions of law and order granting defendant's motion for

summary judgment.

DATED this 23rd day of December, 2020.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for plaintiff/appellant
Saticoy Bay LLC Series 8149
Palace Monaco

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)(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 page or type-volume limitations of NRAP 32(a)(7) 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 12,694 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 23rd day of December, 2020.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for plaintiff/appellant
Saticoy Bay LLC Series 8149
Palace Monaco

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 23rd day of December, 2020, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

R. Samuel Ehlers, Esq.
Aaron D. Lancaster, Esq.
Wright, Finlay & Zak, LLP
7785 W. Sahara Ave., Ste. 200
Las Vegas, NV 89117
Attorneys for Wells Fargo Bank, NA

J. William Ebert, Esq.
Janeen V. Isaacson, Esq.
Lipson Neilson P.C.
9900 Covington Cross Dr., Ste. 120
Las Vegas, NV 89144
Attorneys for Defendant Monaco Landscape Maintenance Association

/s/ /*Marc Sameroff /*
An Employee of the LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.