NEVADA SUPREME COURT

DANIEL LAKES,

Appellant,

v.

U.S. BANK TRUST, Trustee for LSF9 Master Participation Trust,

Respondent.

Docket No. 79324

APPELLANT'S REPLY BRIEF

Doreen Spears Hartwell, Esq.
Nev. State Bar No. 7525
Laura J. Thalacker, Esq.
Nevada State Bar No. 5525
Hartwell Thalacker, Ltd.
11920 Southern Highlands Pkwy, #201
Las Vegas, Nevada 89141
Phone: 702-850-1076; Fax: 702-508-9441

Attorneys for Appellant Daniel Lakes in Conjunction with the Legal Aid Center of Southern Nevada

TABLE OF CONTENTS

I. Summary of Argument

Respondent U.S. Bank argues that Appellant Daniel Lakes' status as a bona fide purchaser is irrelevant because the HOA foreclosure sale did not extinguish the first lien deed of trust on the subject property. However, Lakes argument is not based on whether the first lien deed of trust was extinguished by the foreclosure sale. Lakes has made it clear that ***U.S. Bank's unrecorded prior assignment*** of the first deed of trust is unenforceable ***against Lakes***, a subsequent bona fide purchaser for value and without notice pursuant to N.R.S. §111.325. The district court's disregard of the applicability of N.R.S. §111.325 was reversible error as a matter of law.

II. Genuine Issues of Material Fact Existed Regarding Whether U.S. Bank Satisfied the Priority Lien Under NRS § 116.3116 (2).

U.S. Bank had the burden of proving that the superpriority lien had been satisfied but failed to meet its burden. *See Breliant v. Preferred Equities Corp*., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (stating the burden of proof rests with the party seeking to quiet title in its favor); *see also Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc*., 132 Nev. 49, 60, 366 P.3d 1105, 1112 (2016).

U.S. Bank now argues for the first time on appeal that the superpriority portion of the delinquent assessment cannot exceed $625.00 set forth in the Notice of Delinquent Assessments recorded on July 9, 2008 ("7/9/08 Notice"). Respondent's Brief at pp. 19-20. However, there was no evidence presented in the district court

regarding the amount of the superpriority portion of the HOA's lien. U.S. Bank made the conclusory statement that the Ocwen check for $3241.52 satisfied the superpriority portion of the lien and nothing more. (JA0153; JA0455-457.)

Meanwhile, the Notice of Foreclosure Sale Under the Lien for Delinquent Assessments ("Notice of Foreclosure Sale") recorded on April 24, 2015 stated that the total unpaid balance and reasonably estimated costs, expenses, and advancements totaled $7,161.36. (JA0379- JA0380)

U.S. Bank relies on N.R.S. 116.3116(2) for the proposition that the delinquent assessments cannot exceed the amount set forth in the Notice of Delinquent Assessment. Nothing in N.R.S. 116.3116 limits the superpriority portion of a lien to the amount set forth in the Notice of Delinquent Assessment. *See also Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 231-32 (Nev. 2017) (holding that the amount of unpaid assessments upon which an HOA can foreclose is limited to within three years of the HOA instituting proceedings to enforce its lien).

Therefore, the district court erred as a matter of law in finding that there were no genuine issues of material fact regarding whether the superpriority portion of the HOA's lien had been satisfied by U.S. Bank's predecessor.

/ / /

II. Lakes' Status as a Bona Fide Purchaser Under N.R.S. 111.325 Is the Dispositive Issue in This Matter.

U.S. Bank argues that the holding in "the *Diamond Spur*" case is dispositive of this matter because it stands for the proposition that Lakes' status as a bona fide purchaser is irrelevant. However, *Diamond Spur* held that a party's status as a bona fide purchaser is only irrelevant "when a defect in the foreclosure renders the sale void." *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev., Adv. Op. 72, 427 P.3d 113 (2018) ("*Diamond Spur*").

Unlike *Diamond Spur* matter, there was no "defect in the foreclosure" that rendered the HOA sale void. U.S. Bank acknowledged in its brief that the HOA followed the proper foreclosure proceedings when its agent, Red Rock Financing provided the 7/9/08 Notice of Delinquent Assessment, the 4/24/15 Notice of Default and Intent to Foreclose followed by the 8/25/15 HOA foreclosure sale. Clearly, U.S. Bank cannot argue that Ocwen did not receive advance notice of the foreclosure sale while at the same time arguing that Ocwen tendered the superpriority portion of the HOA lien.

Finally, it is presumed under N.R.S. 47.250 (16) that that the law has been obeyed by the HOA in conducting the sale. It is also presumed under N.R.S. 47.250(17) that "a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest."

Therefore, *Diamond Spur* is not dispositive and the district court's failure to consider Lakes' bona fide purchaser status was reversible error.

III. Lakes Status as a Bona Fide Purchaser Is A Question of Fact That Was Not Considered By The District Court.

The district court did not determine the issue of Lakes status as a bona fide purchaser. Nevertheless, U.S. Bank argues that Lakes was not a bona fide purchaser because he had constructive notice of the Ocwen loan and a duty to inquire or investigate. RB at pp. 28-32.

Contrary to U.S. Bank's argument, there was nothing in the chain of title that would have put Lakes on notice that the 8/25/15 HOA sale did not extinguish the Ocwen's first deed of trust. Furthermore, the Nevada Supreme Court has held that the duty to inquire and/or investigate arises "when the circumstances are such that a purchaser is in possession of facts that would lead a reasonable man in his position to make an investigation that would advise him of the existence of *prior unrecorded* rights. *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 246 (1979) (emphasis added). In this case, Lakes argues that ***U.S. Bank's unrecorded security interest*** is unenforceable against Lakes, a subsequent bona fide purchaser.

U.S. Bank does not dispute *its obligation* to record its assignment from Ocwen which is the crux of Lakes' argument. Instead, U.S. Bank solely argues that Lakes purchased the property subject to Ocwen's first deed of trust securing the original loan. However, Lakes is the quintessential bona fide purchaser for value without

notice that N.R.S. §113.325 was meant to protect. Despite the various pitfalls related to HOA foreclosures and the subsequent resale of the foreclosed properties, in this case, had U.S. Bank complied with the recording statute, Lakes would have been provided notice of the unextinguished first deed of trust when he had the Clark County recorder perform a title search for him. U.S. Bank's security interest would have appeared after Noone Graeff's purchase. Lakes would have never had purchased the Subject Property if he had known of U.S. Bank's security interest.

Lakes' status as a bona fide purchaser was a question of fact that was not addressed by the district court making the award of summary judgment in favor of U.S. Bank improper.

V. CONCLUSION

The district court improperly disregarded the impact of N.R.S. §111.325 in determining whether U.S. Bank's prior unrecorded interest was enforceable against Daniel Lakes, a bona fide purchaser for value and without actual or constructive notice. Because whether a person is a bona fide purchaser is a question of fact that the district court expressly did not determine when improperly granting summary judgment in favor of U.S. Bank, Lakes requests that the Findings of Facts, Conclusions of Law on the Motion for Summary Judgment be vacated and this matter be remanded to the district court with instructions to properly apply N.R.S. §111.325 to resolve the issue of whether Lakes is a subsequent bona fide purchaser

thereby making U.S. Bank Trust's prior unrecorded security interest void and unenforceable against Lakes' interest in the Subject Property.

HARTWELL THALACKER, LTD

/s/Doreen Spears Hartwell
Doreen Spears Hartwell, NSB # 7525
Laura J. Thalacker, NSB # 5522
11920 Southern Highlands Pkwy, Suite 201
Las Vegas, Nevada 89141

Attorneys for Appellant Daniel Lakes

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 it has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font Times New Roman.

2. I further certify that this brief complies with the type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 1626 words; and I 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.

3. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of July 2020.

_/s/Doreen Spears Hartwell
Doreen Spears Hartwell
Nevada State Bar No. 7525
Hartwell Thalacker, Ltd
11920 Southern Highland Pkwy, Suite 201
Las Vegas, Nevada 89141
Telephone: 702-850-1076

CERTIFICATE OF SERVICE

I certify that on the 6th day of July 2020, I served a copy of Appellant's Reply Brief upon counsel of record via e-Flex electronic service to the following:

☐ By personally serving it upon him/her; or

☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es); or

☒ By email to the following email addresses:

tasca@ballardspahr.com
sakaij@ballardspahr.com
Joel E. Tasca, Esq.
Joseph P. Sakai, Esq.
Ballard Spahr
1980 Festival Plaza Dr. #900
Las Vegas, NV 89135
U.S. Bank Trust,
Trustee for LSF9 Master Participation Trust

/s/Doreen Spears Hartwell
An Employee of Hartwell Thalacker, Ltd