

NEVADA SUPREME COURT

DANIEL LAKES,

Appellant,

v.

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

Respondent.

Electronically Filed
Docket No. 79324 Jul 26 2021 11:16 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**DANIEL LAKES' REPLY TO U.S. BANK'S
SUPPLEMENTAL RESPONSE**

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: 702-508-9551

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

TABLE OF CONTENTS

ISSUES PRESENTED.....	1
SUMMARY OF ARGUMENTS.....	2
ARGUMENT	3
I. Nevada’s Recording Statutes Apply to Every Written Instrument Creating and/or Assigning an Interest in Real Property, Including U.S. Bank’s Unrecorded Deed of Trust.....	3
II. The Issue of Constructive and/or Inquiry Notice Is a Question of Fact.....	8
III. Lakes Does Not Rely on the Extinguishment of the Ocwen Deed of Trust as the Basis For His Bona Fide Purchaser Status.....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

STATE CASES

<i>Allen v. Webb</i> , 87 Nev. 261, 485 P.2d 677 (1971).....	3, 4, 6, 7
<i>Bemis v. Estate of Bemis</i> , 114 Nev. 1021, 967 P.2d 437(1998).....	6, 7,8
<i>Huntington v. Mila, Inc.</i> , 119 Nev. 355,75 P.3d 354 (2003).....	9
<i>In re Weisman</i> , 5 F.3d 417 (9th Cir. 1993).....	9
<i>Shadow Wood HOA v. N.Y. Cmty. Bancorp.</i> , 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1115 (2016).....	8

STATUTES

N.R.S. §106.210	1, 5, 8
N.R.S. §106.220	1, 8
NR.S. §107.080	5
N.R.S. §111.010	4, 5
N.R.S. § 111.315	4, 5
N.R.S. §111.320	5, 6
N.R.S. § 111.325	3, 4, 5

ISSUES PRESENTED

I.

Whether Nev. Rev. Stat. §§ 111.310-3655 apply to deed of trust assignments and how, if at all, the provisions of Nev. Stat. §106.210 impact the analysis.

II.

Assuming the race notice statutes apply, what effect does U.S. Bank's unrecorded assignment has on Lakes, who took title with constructive notice of the deed of trust but without notice of the deed of trust's assignment to U.S. Bank approximately six weeks prior to his purchase.

///

///

///

///

///

///

///

///

///

///

///

SUMMARY OF ARGUMENT

Nevada Rev. Stat. §111.010 (1) states “conveyance” shall be construed to embrace every instrument in writing, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in land is created, aliened, assigned, or surrendered. The Nevada legislature could not have been clearer in its intent to have the recording requirements of Chapter 111 be construed as broadly as possible, including assignments of deeds of trust. The purpose of the Chapter 111 both requires and encourages individuals to record their property interests and provides the mechanism for resolving claims when one party’s failure to timely record their real property interest and a subsequent good faith bona fide purchaser claim arises. Nevada Rev. Stat. §111.315 requires “every conveyance of interest in real property, which includes an assignment of a deed of trust, to be recorded. Nevada Rev. Stat. §111.325 provides the impact on a subsequent bona fide purchaser who records his interest without knowledge of the unrecorded prior conveyance.

Nevada Rev. Stat. §§106.210-220 does not address the impact of an unrecorded deed of trust on a subsequent bona fide purchaser. However, Nev. Rev. Stat. §§ 106.210-220 requirement of a deed of trust to be recorded before rights can be exercised under Nev. Rev. Stat. §107.080 is consistent with Chapter 111.

Contrary to U.S. Bank's argument, N.R.S. §111.325 applies to Appellant Daniel Lakes' quitclaim deed as well as U.S. Bank's unrecorded assignment of deed of trust based on the plain language of the statute and Nevada caselaw. *See Allen v. Webb*, 87 Nev. 261, 270, 485 P.2d 677, 682 (1971) (affirming summary judgment in favor of the subsequent bona fide purchaser who recorded his deed prior to the holder of a note secured by a deed of trust). U.S. Bank's argument that Lakes cannot be a bona fide purchaser based on constructive notice of the original deed of trust recorded in 2007, completely ignores the intervening assignments, the HOA foreclosure, the post-foreclosure sales and U.S. Bank's post-foreclosure unrecorded assignment of the deed of trust. More importantly, the issues of constructive notice and/or inquiry notice are questions of fact to be determined by the trier of fact.

Finally, Lakes incorporates his arguments from his Opening and Supplemental Briefs regarding the inapplicability of the *Diamond Spur* line of cases to this matter which involves the unrecorded assignment of the deed of trust post-foreclosure and downstream from multiple post-foreclosure sales. Resolution of this case does not require revisiting *Diamond Spur*.

///

///

///

///

ARGUMENT

I. Nevada's Recording Statutes Apply to Every Written Instrument Creating and/or Assigning an Interest in Real Property, Including U.S. Bank's Unrecorded Deed of Trust.

U.S. Bank's argument that Nevada's "race notice statute scheme" does not apply to the assignment of deeds of trust is contrary to the express language and intent of Nev. Rev. Stat. §111.010, §111.315 and §111.325. The Nevada Legislature could not have made the definition of conveyance for the purpose of Chapter 111 more encompassing. Nevada Rev. Stat. §111.010 (1) states:

As used in this chapter:

1. *'Conveyance' shall be construed to embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned or surrendered.*

(emphasis added). The maxim *expressio unius est exclusio alterius* is inapplicable in this case. Resp. at 13. Nevada Rev. Stat. §111.010 (1) expressly includes the assignment of every written instrument creating any interest in land regardless of its form or name. Additionally, Nevada Rev. Stat. §111.325 expressly and unequivocally sets forth the impact of an *unrecorded conveyance* (which shall be construed to embrace the assignment of deeds of trust) on a subsequent bona fide purchaser's recorded interest in the same real property, or any portion thereof.

Every conveyance of real property within this State hereafter made, which shall not be recorded as provided

in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded.

Nevada Rev. Stat. §111.325 (emphasis added).

Contrary to U.S. Bank's argument, nothing in Nev. Rev. Stat. §106.210 contradicts or addresses the impact of an unrecorded assignment of deed of trust on a subsequent bona fide purchaser. In fact, N.R.S. §106.210 (1) also requires an assigned or beneficial interest in a deed of trust to be recorded and acknowledges that an unrecorded assignment cannot be enforced pursuant to N.R.S. §107.080. Thus, N.R.S. §106.210 (1) is consistent with N.R.S. §111.315 requiring all real property conveyances be recorded and N.R.S. §111.325 resolution of the issue of an intervening good faith bona fide purchaser's rights against the holder of a prior unrecorded deed of trust in favor of the innocent bona fide purchaser.

Thus, N.R.S. §106.210 (1) has no impact on the race notice statutory analysis regarding unrecorded deeds of trust.

II. The Issue of Constructive and/or Inquiry Notice Is a Question of Fact.

U.S. Bank argues that Lakes had constructive notice of the first deed of trust recorded by Countrywide in 2007, thereby preventing him from being a bona fide purchaser as a matter of law. Resp. at 14. Nevada Rev. Stat. §111.320, which is titled "Filing of conveyances or other instruments is notice to all persons: Effect on subsequent purchasers and mortgagees," states:

Every such conveyance or instrument of writing recorded in a manner prescribed in this chapter...***imparts notice to all persons of the contents***, thereof, and subsequent purchasers and mortgagees shall be deemed to take with notice.

(emphasis added). U.S. Bank relies on NRS §111.320 for its argument that Lakes cannot be a bona fide purchaser as a matter of law. Resp. at 15. However, the impact of the facts contained in the recorded conveyance or instrument remains a question of fact.

In this case, Countrywide's recording of its 2007 deed of trust did not provide any facts that would have given rise to the discovery of U.S. Bank's ***unrecorded*** 2015 assignment from Ocwen. From 2007 through 2015, there were multiple assignments and sales related to the property. [JA390-403] Additionally, this Court has held that the issue of constructive notice is a question fact. *See Allen*, 87 Nev. at 270, 485 P.2d at 682 (reversing summary judgment finding that facts contained in recorded deeds of trust did not constitute constructive as a matter of law); *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1027, 967 P.2d 437, 441 (1998) (reversing summary judgment against appellants holding that whether or not appellants had constructive notice is a question of fact).

The case of *Allen v. Webb* is analogous to Lakes regarding both the constructive notice issue and the impact of Allen's unrecorded deed of trust on a bona fide purchaser's subsequently recorded grant deed. Allen sold a ranch to Phillip in exchange for a note secured by a deed of trust. *Id.*, 87 Nev. 262, 485 P.2d 677.

However, in April 1958, the escrow agent mailed Allen the deed of trust without recording it. In August 1958, Phillip sold the ranch to Webb who promptly recorded the deed. A few weeks later, the Allens noticed that their trust deed was not stamped as having been recorded and asked at the recorder's office about it. Upon learning that the escrow agent failed to record the trust deed, they had it recorded. Some years later, Allen recorded a default against Phillip due to non-payment. *Allen*, 87 Nev. at 270, 485 P.2d 682. Only then, did Allen learn of Webb's recorded deed. Allen initiated a quiet title action against Webb and a negligence claim against the escrow agent for negligence. *Id.*

The lower court dismissed both claims on summary judgment finding that Allen's unrecorded deed of trust was void against Web's recorded interest as a subsequent bona fide purchaser without notice of Allen's deed of trust. The Nevada Supreme Court affirmed summary judgment in favor of Web, as a subsequent bona fide purchaser. *Id.* at 87 Nev. at 272, 485 at P.2d 682. Contrary to U.S. Bank's argument, Nevada's race notice statute is not interpreted so narrowly as to apply solely to the "same property interest." In *Allen*, the race notice statute applied to a deed of trust and a subsequent grant deed. *Id.*

With regards to the negligence claim, this Court reversed summary judgment holding that whether Allen had constructive notice of facts giving rise to the claim based on the 1956 recording of the intervening deed was a question of fact. *Id.* at

269-70, 485 P.2d at 682. This Court expressly noted the Allens' lack of sophistication with real estate matters to be considered when determining the issue of constructive notice. *Id.*

Similarly, the issue of what facts can be imputed to Lakes based on constructive notice is also a question of fact. U.S. Bank's argument that it was unreasonable for Lakes to rely on the clerk at the Clark County Recorder's Office instead of using a title company to search the chain of title in this sale by owner transaction is a question of fact. Even the issue of what facts could potentially be imputed to Lakes based on the content of the recorded deeds is also a question of fact making summary judgment in favor of U.S. Bank improper. *See Bemis*, 114 Nev. at 1027, 967 P.2d at 441. "A subsequent purchaser is bona fide under common-law principles if it takes the property . . . without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *See Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 64, 366 P.3d 1105, 1115 (2016).

As noted by the Court of Appeals, the issue is whether U.S. Bank's *unrecorded* purchase of Ocwen's security interest was enforceable *against* Mr. Lakes, a downstream subsequent bona fide purchaser without notice of *U.S. Bank's* interest. *See* Court of Appeals Decision, Case No. 79324-COA, filed 12/30/20, at p.

8. Questions of inquiry notice ultimately turn on the scope of the investigation that a reasonable person would have conducted and what the investigation would have revealed. *See Huntington v. Mila, Inc.*, 119 Nev. 355, 357, 75 P.3d 354, 356 (2003) (recognizing that a duty of inquiry arises where a purchaser has knowledge of facts that would lead a reasonable person to conduct an investigation that would disclose the existence of prior unrecorded rights and explaining that the purchaser is charged with constructive notice of facts that such an investigation would reveal).

The inferences to be drawn based on Lakes' level of sophistication in real estate matters are themselves questions of facts reserved for the district court to consider in the first instance. *See Huntington*, 119 Nev. at 357, 75 P.3d at 356; *see also In re Weisman*, 5 F.3d 417, 421 (9th Cir. 1993) ("Whether the circumstances are sufficient to require inquiry as to another's interest in property [for purposes of determining whether a party is a bona fide purchaser] is a question of fact, even where there is no dispute over the historical facts"). Based on Lakes level of sophistication and the content of the recorded documents in the title chain, Lake would not have uncovered facts requiring him to further investigate, nor would he have discovered U.S. Bank's unrecorded assignment.

III. Lakes Does Not Rely on the Extinguishment of the Ocwen Deed of Trust as the Basis For His Bona Fide Purchaser Status.

U.S. Bank continues to ignore the fact that Lakes bought the Subject Property in January 2015, more than eight years after the 2007 deed of trust was recorded and

three transfers post-HOA foreclosure and without knowledge of U.S. Banks' unrecorded deed of trust. [JA390-403] Nothing with regards to Lakes straight forward bona fide purchaser argument requires this Court to revisit any of its rulings in the *Diamond Spur* line of cases. It has been Lakes position that this case is a straightforward bona fide purchaser analysis based on Lakes good faith subsequent purchase of his home for value and without knowledge of U.S. Banks unrecorded deed of trust.

CONCLUSION

Nevada's race notice statutes apply to both Lakes' quitclaim deed and U.S. Bank's untimely recorded assignment of the deed of trust. NRS §§106.210-220 has absolutely no impact on the issue of Lakes status as a bona fide purchase. Thus, Lakes requests that the Court of Appeals ruling be affirmed and this matter remanded to the district court for determination of his status as a bona fide purchaser.

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 2622 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 26th day of July 2021.

/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 26th day of July 2021, I served a copy of Daniel Lakes' Reply to Supplement Response 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