IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellant,

vs.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-7,

Respondent.

Supreme Court No. 81961

Electronically Filed
Mar 11 2021 02:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court Case No. A-17-756215-C

OPPOSITION TO MOTION TO STAY APPEALS AND HOLD ALL DEADLINES IN ABEYANCE

The Bank of New York Mellon F/K/A The Bank of New York, as Trustee for The Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2006-7 (**BoNYM**) opposes appellant Las Vegas Development Group, LLC's (**LVDG**) motion to stay appeals and hold all deadlines in abeyance.

I. Introduction

In this post-HOA foreclosure case involving tender/futility of tender of the HOA's superpriority lien, the district court followed current authority and granted judgment in BoNYM's favor, concluding BoNYM's deed of trust remains a valid encumbrance on a home LVDG acquired through an HOA foreclosure sale. Following entry of judgment, LVDG appealed.

Docket 81961 Document 2021-07182

LVDG now moves the court to stay this appeal based on two other appeals presently before the court. First, LVDG asks to stay the appeal based on the certified question to this court concerning which statute of limitations, if any, applies to a deed of trust beneficiary's quiet title/declaratory relief claim against an HOA-sale purchaser. But regardless of how this court decides the certified question, it will have no bearing on the ultimate outcome of this case. LVDG initiated the underlying case, asserting claims against BoNYM for quiet title/declaratory relief. There is no statute of limitations for BoNYM's affirmative defenses. As a result, there is no reason to stay this appeal because the court can decide the substantive issue of whether LVDG is entitled to quiet title/declaratory relief due to BoNYM's tender/futility of tender without reaching the issue of what statute of limitation, if any, applies to BoNYM's affirmative counterclaim.

LVDG also moves the court to stay this appeal pending final resolution of *Anthony s. Noonan IRA, LLC v. U.S. Bank, N.A. et al.*, 466 P.3d 1276 (Nev. 2020). In that appeal, case no. 78624, the Nevada supreme court panel held that an HOA's entire yearly assessment amount was subject to superpriority status if it became due in the nine months preceding the notice of delinquent assessments. *Id*. at 1279. On January 6, 2021, this court granted en banc reconsideration of the order. Regardless of how the court ultimately decides *Noonan*, the district court in this case held that tender of the superpriority amount (whatever amount that may be), was futile unless

BoNYM paid the entire lien amount, not just the nine months or yearly amount of assessments. **Ex. A**, Findings of Fact and Conclusions of Law at Conclusions of Law ¶¶ 9-17. The court also ruled that BoNYM substantially complied with its payment obligations, and BoNYM's deed of trust survived the HOA sale as a matter of equity. *See generally id*. None of these findings—all of which warrant judgment against LVDG—was contingent on this court's prior *Noonan* decision.

LVDG should not get a free stay of the lower court's judgment through its motion.[1]

II. Factual/Procedural Background

This case arises from an HOA's non-judicial foreclosure sale of real property located at 1524 Highfield Court, Las Vegas, Nevada, which occurred on March 2, 2011. Prior to the sale, BoNYM's loan servicer Bank of America, N.A., through counsel, paid a little more than nine months of assessments to satisfy the HOA's superprioriy lien. The HOA charged an annual assessment at the time. The property reverted to the HOA at the sale, and LVDG later obtained title to the property via quitclaim deed. *See generally* Ex. A.

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[1] Ordinarily, a party seeking to stay a judgment must post a bond or other security in accordance with Nevada Rule of Civil Procedure 62(b).

LVDG filed suit against BoNYM in 2017 to quiet title and for declaratory relief that the HOA foreclosure extinguished BoNYM's deed of trust. On June 15, 2017, BoNYM asserted counterclaims against LVDG for quiet title/declaratory relief that the HOA foreclosure did not affect BoNYM's deed of trust.

The district court held a bench trial on July 28 and 29, 2020. BoNYM asserted various arguments for why the HOA sale did not extinguish the deed of trust, including that its prior loan servicer Bank of America paid the HOA's superpriority lien, that tender was futile due to the HOA foreclosure agent's policy to refuse payments conditioned on applying payment only to the superpriority portion of an HOA's lien, that Bank of America substantially complied with its payment obligations, and that BoNYM's deed of trust survived as a matter of equity.

Based on the evidence, the district court entered its findings of fact and conclusions of law and judgment in favor of BoNYM.

III. Argument

A. The Statute of Limitations Certified Question

The court should deny LVDG's motion because the outcome of the certified question is inconsequential and will not affect the ultimate outcome of this case. BoNYM and LVDG asserted claims against one another—LVDG first asserted a quiet title/declaratory relief claim that the HOA foreclosure extinguished BoNYM's deed of trust, and BoNYM asserted a compulsory quiet title/declaratory relief claim

that the HOA foreclosure sale did not extinguish BoNYM's deed of trust. As a result, it does not matter what statute of limitation (if any) applies to BoNYM's affirmative claims because BoNYM's defenses—including tender and futility of tender—cannot be time barred.

Time "[l]imitations do not run against defenses," and statutes of limitations "are available only as a shield, not as a sword." *Dredge Corp. v. Wells Cargo, Inc.*, 389 P.2d 394, 396 (Nev. 1964). "[S]tatutes of limitations are intended to protect a defendant against the evidentiary problems associated with defending a stale claim." *Nev. State Bank v. Jamison Family P'ship*, 801 P.2d 1377, 1381 (Nev. 1990). "To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 72, 77 S.Ct. 161 (1956), *cited in City of Saint Paul v. Evans*, 344 F.3d 1029, 1033 (9th Cir. 2003). No statute of limitations applies to bar BoNYM from asserting tender or futility of tender as a defense to LVDG's claims.

This court has confirmed that a party should be able to raise the affirmative defense of tender even if a standalone claim would otherwise be time barred. In *Renfroe*, a purchaser acquired a property that was previously sold at an HOA sale and filed a quiet title action against Carrington Mortgage Services, LLC, the record beneficiary of the first deed of trust. *Renfroe v. Carrington Mortg. Servs., LLC*, 456

P.3d 1055 (Nev. 2020) (unpublished). Carrington moved for summary judgment on the ground that its predecessor, Bank of America, tendered the superpriority amount of the HOA's lien prior to the HOA sale. *Id*. Renfroe opposed and argued, in part, that Carrington's tender argument was time barred. *Id*. Relying on *Diamond Spur*, the district court granted Carrington's motion for summary judgment and Renfroe appealed. *Id*.

This court affirmed and held that Renfroe's argument that Carrington's tender argument was untimely was "incorrect." *Id.* The court made clear that "[s]tatutes of limitations do not run against defenses." *Id.* (citing *City of Saint Paul v. Evans*, 344 F.3d 1029, 1033–34 (9th Cir. 2003) (concluding that statute of limitations do not apply to defenses because "[w]ithout this exception, potential plaintiffs could simply wait until all available defenses are time-barred and then pounce on the helpless defendant")). Because LVDG's quiet title/declaratory relief counterclaims were properly before the district court, there is no question the court could evaluate the merits of BoNYM's affirmative defenses.[2]

[2] *Renfroe* also held a senior deed of trust holder's pre-HOA-foreclosure tender cures the superpriority and protects the senior deed of trust automatically, such that the senior deed holder "had no obligation to prevail in a judicial action as a condition precedent to enforcing its deed of trust that had already survived the HOA's foreclosure sale." *Id., citing Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 606 (Nev. 2018). This means the pre-sale tender was effective to protect BoNYM's deed of trust even without the current lawsuit, so any stay of appeal for an issue that does not affect the ultimate legal outcome of the tender would not serve the ends of justice.

Because BoNYM's tender defenses were not time barred, the district court properly entered judgment in BoNYM's favor. As a result, staying this case, as opposed to a case where an HOA-sale purchaser does not assert claims against a deed of trust beneficiary, will have no effect on the outcome. A stay is unwarranted and nothing more than unnecessary delay in this circumstance.

B. The Annual Assessments En Banc Reconsideration

While BoNYM asserted Bank of America's tender preserved the deed of trust, the district court held that the HOA's trustee did not reject the tender check because the superpriority calculation was off by a few dollars, but rather that the HOA trustee rejected the check because it was not for the full amount secured by the HOA's entire lien. Ex. A at Conclusions of Law, ¶ 9. The district court also held that BoNYM was excused from tendering a superpriority payment because it would have been futile. *Id*. at ¶¶ 11-17. Based on the HOA trustee's word and conduct in rejecting payments, the HOA trustee would have also rejected payment for a full annual assessment so the deed of trust beneficiary was excused from sending such payment. *Id*. Alternatively, the district court held Bank of America substantially complied with its payment obligations, and BoNYM's deed of trust survived as a matter of equity. Even considering *Noonan*, which is now subsequently subject to en banc reconsideration, the district court held that the evidence supported a finding that BoNYM was entitled to judgment in its favor. And, regardless of how this court

ultimately decides *Noonan*, based on the facts of this case, it will not affect whether BoNYM's deed of trust survived the HOA sale. As a result, there is no reason to stay the case pending resolution of *Noonan*, and the court should allow this appeal to proceed in the normal course.

IV. Conclusion

For the reasons expressed above, BoNYM respectfully requests this court deny LVDG's motion to stay appeals and to hold all deadlines in abeyance.

DATED this 11th day of March, 2021.

AKERMAN LLP

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CERTIFICATE OF SERVICE

I certify that I electronically filed on March 11, 2021, the foregoing **OPPOSITION TO MOTION TO STAY APPEALS AND HOLD ALL DEADLINES IN ABEYANCE** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Patricia Larsen
An employee of AKERMAN LLP

EXHIBIT A

EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Plaintiff, vs. DANIA V. HERNANDEZ, an individual; THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-7, a national banking association; DOE individuals I through XX; and ROE CORPORATIONS I through XX, Defendants.	Case No.: A-17-756215-C Dept. No.: XIII **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**
THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-7, Counterclaimant, vs. LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Counterdefendant.	

THIS MATTER having come on for non-jury trial on July 28 and 29, 2020, Plaintiff appearing by and through Roger P. Croteau, Esq. of the firm of Roger P. Croteau & Associates, Ltd., and the entity Defendants appearing by and through Rex D. Garner, Esq. of the firm of Akerman LLP;

AND, the Court having heard the testimony of witnesses and received other evidence and heard the argument of counsel and having taken the matter under advisement pending

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submission of proposed findings of fact and conclusions of law and judgment, and being now fully advised in the premises;

NOW, THEREFORE the Court hereby makes the following

FINDINGS OF FACT

The Subject Property, Note, and Deed of Trust

1. On April 10, 2006 Dania Hernandez purchased the property located at 1524 Highfield Court, Las Vegas, Nevada, financed with a loan from Countrywide Home Loans, Inc. in the amount of $208,000.00. The loan was evidenced by a note and secured by a deed of trust recorded against the property on April 19, 2006. **Trial Ex. 26**; **Stipulated Facts, ¶ 1**.[1]

2. The deed of trust was assigned to BoNYM in 2011 via a recorded assignment of deed of trust. **Trial Ex. 32**; **Stipulated Facts, ¶ 2**.

The HOA Foreclosure and the Tender

3. The property is located in the Hidden Canyon Owners Association (**HOA**) and is subject to the HOA's covenants, conditions, and restrictions (CC&Rs). **Stipulated Facts, ¶ 3**.

4. Hernandez failed to pay the HOA all amounts due to it, so the HOA, through its agent, Alessi & Koenig, LLC (**Alessi**), recorded a notice of delinquent assessment lien on June 3, 2009. Per the notice, the amount due to HOA was $571.85. **Trial Ex. 27**; Stipulated **Facts, ¶ 4**.

5. The HOA, through its agent Alessi, recorded a notice of default on September 2, 2009.[2] The notice states the amount due to HOA was $1,404.49. **Trial Ex. 28**; **Stipulated Facts, ¶ 5**.

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[1] The stipulated facts were filed February 27, 2020.

[2] Assembly Bill 204 in the 2009 legislative session amended NRS 116.3116, increasing the superpriority from 6 months to 9 months. This bill took effect October 1, 2009. The action to enforce the lien in this case, having started before October 1, 2009, means the HOA's superpriority lien in this case was limited to 6 months. *See Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 231, 133 Nev. Adv. Op. 3 (2017) (serving a notice of delinquent assessments constitutes institution of an action to enforce the lien) ("As such, a party has instituted "proceedings to enforce the lien" for

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6. On October 20, 2009, Miles Bauer Bergstrom & Winters LLP (**Miles Bauer**), as the attorneys of MERS, as nominee for BAC Home Loans Servicing, LP, as then-servicer of the loan, requested a breakdown of the HOA arrears from Alessi, and the identification of the superpriority amount owed to HOA. **Stipulated Facts, ¶ 6.**

7. On or about December 17, 2009, Alessi provided a facsimile cover letter and Resident Transaction Detail, which revealed the HOA charged assessments for common expenses of $118.00 annually, and showing the account had no charges for nuisance abatement or exterior maintenance. **Stipulated Facts, ¶¶ 7–9.** Such item did not give a monthly breakdown, but such a breakdown would amount to $9.83 monthly.

8. On January 21, 2010, Miles Bauer sent a letter, together with a check payable to Alessi in the amount of $88.50 to Alessi, purporting to represent 9 months of assessments, *i.e.* nine-twelfths of the HOA annual assessment of $118.00. **Trial Ex. 41**; **Stipulated Facts, ¶ 10.**

9. Alessi refused Miles Bauer's payment. **Trial Ex. 41**; **Stipulated Facts, ¶ 11.**

10. At the time Alessi rejected Miles Bauer's payment, it explained its reasoning for doing so in a letter found within Alessi's file for this property's foreclosure, which had nothing to do with a 9-month versus 12-month difference, but instead with Alessi's understanding and belief that the superpriority included its fees and costs in addition to assessments owed:

> ". . . we are unable to accept the partial payments offered by your clients as payment in full. . . . case authority exists which provides that the association's lien also includes the reasonable cost of collection of those assessments.
>
> If the association were to accept your offer that only includes assessments, Alessi & Koenig would be left with a lien against the association for our substantial out-of-pocket expenses and fees generated. . . ."

Trial Ex. 41 at 41-069; *see also* **Trial Ex. 40.**

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purposes of NRS 116.3116(6) when it provides the notice of delinquent assessment. This interpretation conforms to our decision in *SFR*, where we stated that "[t]o initiate foreclosure under NRS 116.31162 through NRS 116.31168, a Nevada HOA must notify the owner of the delinquent assessments.").

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11. Alessi & Koenig's letter did not identify a different dollar amount that it believed was the superpriority. **Trial Ex. 41** at 41-069.

12. Alessi & Koenig reiterated their policy two years later in another letter to Miles Bauer:

> ". . . In the opinion, the Commission concluded that associations may collect, as part of the super priority lien, the costs of collecting as authorized by NRS 116.310313.
>
> Furthermore, the nine-month super-priority is not triggered until the beneficiary under the first deed of trust forecloses."

Trial Ex. 39.

13. The HOA, through its agent Alessi, recorded a notice of sale on August 9, 2010. The notice states the amount due to HOA was $2,862.23. **Trial Ex. 29**; **Stipulated Facts, ¶ 12**.

14. Alessi, on behalf of the HOA, auctioned the property on March 2, 2011, and the HOA won the bidding with a credit bid for all amounts owed to it. **Testimony of Yvette Sauceda** (HOA representative). A foreclosure deed in favor of the HOA was recorded March 3, 2011. **Trial Ex. 30**; **Stipulated Facts, ¶ 13**.

15. Because the HOA credit bid, no money changed hands as a consequence of the auction, and the assessment balance to the HOA remained unpaid. **Testimony of Yvette Sauceda** (HOA representative); *see also* **Trial Ex. 46** at 46-029.

16. Not until weeks later through a non-NRS-116 sale to LVDG did the HOA get funds and apply them to the assessments that comprised the superpriority. **Testimony of Yvette Sauceda**.

17. On March 30, 2011, the HOA quitclaimed its interest to LVDG in exchange for $4,500.00. **Trial Ex. 31**; **Stipulated Facts, ¶ 14**.

18. At the time of the HOA's foreclosure sale, the property's fair market value was $76,000.00, meaning both the auction price and the amount LVDG paid were less than 6% of the fair market value. **Stipulated Facts, ¶ 15**.

Any of the foregoing Findings of Fact that are more appropriately to be considered Conclusions of Law shall be so deemed.

FROM the foregoing Findings of Fact, the Court hereby makes the following

CONCLUSIONS OF LAW

Burdens of Proof

1. As explained by the Nevada Supreme Court, "the burden of proof rests with the party seeking to quiet title in its favor." *Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 366 P.3d 1105 (2016) (citing *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996)); *see also Res. Grp., LLC as Tr. of E. Sunset Rd. Tr. v. Nevada Ass'n Servs., Inc.*, 135 Nev. Adv. Op. 8, 437 P.3d 154, 156 (2019) ("each party to a quiet title action has the burden of demonstrating superior title in himself or herself").

2. LVDG bears the burden of proof on all its claims against defendants, and BoNYM bears the burden of proof on its counterclaims and defenses.

3. Further, deed recitals are not conclusive. *See Shadow Wood, supra.* To the extent there is any evidentiary value found in deed recitals, it is limited only to "default, notice, and publication," and statutory prerequisites to the sale. *Id.* The recitals do not address the issues in this case, including tender and the equities of the sale. *Shadow Wood*, 132 Nev., Adv. Op. 5, 366 P.3d at 1110 (explaining deed recitals do not eliminate equitable relief).

Bank of America's tender did not itself preserve the deed of trust

4. Under NRS 116.3116(2), an association's lien is split "into two pieces, a superpriority piece and a sub-priority piece." *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 745, 334 P.3d 408, 411 (2014). If a senior deed of trust holder pays or tenders payment of the superpriority before the HOA's sale, the superpriority piece is satisfied, meaning the HOA's auction cannot affect the senior deed of trust. *Bank of America, N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. Adv. Op. 72, 427 P.3d 113 (2018) (***Diamond Spur***)

("Bank of America's tender cured the default and prevented foreclosure as to the superpriority portion of the HOA's lien by operation of law.").

5. Just as it did in *Diamond Spur*, here Miles Bauer sent a letter to the HOA's collection agent, seeking to determine the superpriority amount of the HOA's lien and "offer[ing] to pay that sum upon presentation of adequate proof of the same by the HOA." **Trial Ex. 41**; **Stip. Facts**, at ¶ 6. In response, Alessi provided a ledger. **Trial Ex. 41**; **Stip. Facts**, at ¶ ¶ 7–9.

6. Based on the ledger, which showed the account had no nuisance or maintenance charges under NRS 116.310312, but which did not identify a superpriority amount, Miles Bauer sent a check purporting to represent 9 months of assessments. *See* Finding of Fact No. 8, *supra*. **Trial Ex. 41**; **Stipulated Facts, ¶ 10**.

7. Alessi rejected the payment. *See id.*; **Stip. Facts**, at ¶ 11. The Nevada Supreme Court has recently held that if an HOA makes assessments payable annually, the entire assessment amount can have superpriority status if it becomes due within the nine months preceding the notice of delinquent assessments, which is the case here. *Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE*, 136 Nev. Adv. Op. 41, 466 P.3d 1276 (2020).

8. The Nevada Supreme Court has confirmed that Miles Bauer could rely on the information provided by an association's collection agent in calculating their superpriority tenders in *Diamond Spur*, explaining:

> The record establishes that Bank of America tendered the correct amount to satisfy the superpriority portion of the lien on the property. **Pursuant to the HOA's accounting**, nine months' **worth** of assessment fees totaled $720, **and the HOA did not indicate that the property had any charges for maintenance or nuisance abatement**. Bank of America sent the HOA a check for $720 in June 2012. On the record presented, this was the full superpriority amount.

134 Nev. at 607 (emphasis added). Earlier in the opinion, the Court stated that Miles Bauer tendered the correct superpriority amount "based on the HOA's representations" to Miles Bauer. *See id.*, at 605; *see also* 74 AM. JUR. 2d *Tender* § 4 (explaining that offering to pay a specific amount is "excused" if "the amount depends on the balance shown by accounts that are inaccessible to the party from whom the tender would otherwise be required . . . and such

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information is ascertainable only from the accounts of the creditor, who does not disclose the required information to the debtor"). Miles Bauer had a right to rely on the document provided to them by Alessi to calculate the superpriority amount, and Alessi never suggested a different dollar amount. Moreover, the Supreme Court's use of the term "worth" supports the notion that the yearly assessment in this case could be properly apportioned to determine the monetary amount represented by nine months. However, the Nevada Supreme Court has otherwise ruled in *Noonan, supra.*

9. However, Alessi rejected the tender check not because Miles Bauer's superpriority calculation was off by a few dollars—Alessi rejected the check because it was not for the full amount secured by the HOA's **entire** lien (both subpriority and superpriority portions), just as its letter to Miles Bauer said. **Trial Ex. 41** at 41-069.

10. The Nevada Supreme Court has held that ". . . an offer to pay the superpriority amount in the future, once that amount is determined, does not constitute a tender sufficient to preserve the first deed of trust." *7510 Perla Del Mar Ave. Tr. v. Bank of America, N.A.,* 136 Nev. Adv. Op. 6, 458 P.3d 348, 349 (2020). (*Perla*)

Alternatively, Miles Bauer was excused from tendering a superpriority payment because it would have been futile

11. However, a tendering party can also establish excuse from formal tender/delivery of money. *Perla, supra,* at 349 ("formal tender is excused when the evidence shows that the party entitled to payment had a known policy of rejecting [superpriority] payments.").

12. The *Perla* decision confirms long-standing law that delivery of payment is *not* always necessary to effectuate a legal tender.[3] To be sure, a creditor like an HOA and its

[3] *See, e.g., Guthrie v. Curnutt*, 417 F.2d 764, 765–66 (10th Cir. 1969) ("[W]hen a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced."); *In re Pickel*, 493 B.R. 258, 271 (Bankr. D.N.M. 2013) ("Tender is unnecessary if the other party has stated that the amount due would not be accepted."); *Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) ("Tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, an acceptance of it will be refused." (internal quotation marks and alterations omitted)); 74 Am. Jur. 2d Tender § 4 (2012) ("A tender of an amount due is waived when the party entitled to payment,

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collection agent can waive or excuse payment, and they can do this by words or by conduct. *Id.*

13. In addition to waiver, a creditor's words or actions—like Alessi's ordinary course of business to reject payments—can render payment futile, in which case the law will not require a payor to perform a useless or futile act.[4]

14. Here, Alessi had a well-known policy of rejecting Miles Bauer's payments, as its letter acknowledges:

> ". . . we are unable to accept the partial payments offered by your clients as payment in full . . . case authority exists which provides that the association's lien also includes the reasonable cost of collection of those assessments.
>
> If the association were to accept your offer that only includes assessments, Alessi & Koenig would be left with a lien against the association for our substantial out-of-pocket expenses and fees generated. . . ."

Trial Ex. 41 at 069; *see also* **Trial Ex. 39** ("Furthermore, the nine-month super-priority is not triggered until the beneficiary under the first deed of trust forecloses.").

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by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted."); 86 C.J.S. Tender § 5 (2017) (tender "is waived when the party entitled to payment, by declaration or conduct . . . makes clear that they will not perform, or they have evaded tender, or in any other way obstructs or prevents a tender"); *cf. Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) ("The law is clear ... that any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract."); *see also Perla*, 2020 WL 966026, *3 (citing multiple cases on waiver, excuse, and futility).

[4] *See, e.g., Telemark Dev. Grp., Inc. v. Mengelt*, 313 F.3d 972, 978 (7th Cir. 2002) ("tender may be excused when the conduct of the creditor makes it 'reasonably clear that such [tender] would be a vain, idle, or useless act.'"); *Quality Motors v. Hays*, 225 S.W.2d 326 (Ark. 1949) (tender is immaterial when it would be vain and useless); *Donnellan v. Rocks*, 22 Cal. App. 3d 925, 929 (1st Dist. 1972) ("it is equally well established that the law does not require the performance of an idle act and a formal tender of performance is excused by the refusal in advance of the party to accept the performance."); *Fox Run Properties, LLC v. Murray*, 654 S.E.2d 676 (Ga. App. 2007) ("tender is excused or waived where the seller, by conduct or declaration, proclaims that if a tender should be made, acceptance would be refused" because "the law does not require a futile tender or other useless act."); *Chapman v. Olbrich*, 217 S.W.3d 482, 491 (Tex. App. 2006) ("Tender of performance is excused under certain circumstances, such as when a tender would be futile"); *Roundville Partners, L.L.C. v. Jones*, 118 S.W.3d 73, 79 (Tex. App. 2003) ("when actual tender would have been a useless act, an idle ceremony, or wholly nugatory, constructive tender will suffice."); *Schmitt v. Sapp*, 71 Ariz. 48, 223 P.2d 403, 406–07 (1950) ("An actual tender is unnecessary where it is apparent the other party will not accept it. The law does not require one to do a vain and futile thing.").

15. Alessi's known policy of rejecting Miles Bauer tenders because it believed the tender letter had conditional language has been acknowledged by at least one other court. *Bank of America, N.A. v. Bernini Dr Trust*, Case No. 2:16-cv-00474-APG-BNW, 2020 WL 1044005 (D. Nev. 2020).

16. By its word and by its conduct in rejecting payments, Alessi had the same policy under which the Nevada Supreme Court held delivering payment was excused entirely, so the deed holder was excused from sending payment at all. But here, Miles Bauer actually delivered payment, so the first deed of trust should fare no worse than in *Perla*.

17. Based on Alessi's words and conduct, Alessi would have also rejected payment for a full annual assessment, so the deed holder was excused from sending such payment under *Perla*.

Alternatively, Bank of America substantially complied with its payment obligations

18. The doctrine of "[s]ubstantial compliance may be sufficient to avoid harsh, unfair[,] or absurd consequences." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475–76, 255 P.3d 1275, 1278 (2011) (internal quotation omitted); *see also Fondren v. K/L Complex Ltd.*, 106 Nev. 705, 713, 800 P.2d 719 (1990) ("[i]t is not realistic to become so technical that such errors defeat an otherwise valid lien for a large amount.") (citing *Hayes v. Pigg*, 267 Or. 143, 515 P.2d 924 (1973)); *see also Nevada Equities v. Willard Pease Drilling Co.*, 84 Nev. 300, 303, 440 P.2d 122, 123 (1968) ("We shall not condone a forfeiture in the absence of any ascertainable public policy requiring us to do so."); *Claybaugh v. Gancarz*, 81 Nev. 64, 78, 398 P.2d 695, 703 (1965) ("[e]very reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture.") (internal citations omitted).

19. The Nevada Supreme Court has applied the substantial compliance doctrine to various requirements under NRS 116. *See, e.g., Saticoy Bay 9050 W Warm Springs 2079 v. NAS*, 444 P.3d 428, 135 Nev. Adv. Op. 23 (2019) (applying substantial compliance standard to homeowner's redemption under NRS 116.31166(4)); *U.S. Bank, N.A. v. Resources Grp.*, 444 P.3d 442, 448, 135 Nev. Adv. Op. 26 (2019) (remanding for analysis of HOA trustee's

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substantial compliance NRS 116 notice requirements); *Black's Law Dictionary* 524 (10th ed. 2014) (*de minimis non curat lex*, meaning the law does not concern itself with trifles).

20. If lenders have the right to pay the superpriority amount, then lenders must also have the right to know what that amount is. *See U.S. Bank ND, N.A. v. Resources Group, LLC*, 135 Nev. Adv. Op. 26, 444 P.3d 442, 447 (2019) (explaining that the "Legislature has mandated [that] the deed of trust holder [have] time to cure" a superpriority lien).

21. Alessi rejected the superpriority tender, without telling Miles Bauer anything about paying an annual assessment or any other specified amount. Even if Miles Bauer had sent a check in the amount of twelve months and not just nine months of assessments, Alessi's consistent policy of rejecting Miles Bauer's superpriority tenders leaves no doubt the result would have been the same—Alessi would have rejected the payment.

22. If homeowners and HOAs are entitled to the doctrine of substantial compliance under NRS 116, so are BoNYM and Miles Bauer. Otherwise, the result is "harsh, unfair, and absurd" in light of Miles Bauer's tender of its best estimate of the superpriority amount and Alessi's rejection of that tender for reasons wholly unrelated to any *de minimis* miscalculation of the superpriority amount.

23. A 3-month shortage (here, $29.50) should not, under the substantial compliance doctrine, eliminate a deed securing repayment of a loan in the original amount of $208,000.00—well over 7,000 times greater than the alleged deficiency in Miles Bauer's check.

Alternatively, the deed of trust survived the HOA's sale as a matter of equity

24. The Nevada Supreme Court confirmed an HOA foreclosure sale is void where the party challenging the sale can show an inadequate sales price and additional "proof of some element of fraud, unfairness, or oppression [that] accounts for and brings about the inadequacy of price." *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 405 P.3d 641 (Nev. 2017) (***Shadow Canyon***).

25. In *Shadow Canyon*, the court rejected an argument that a sales price of under 20% of the fair market value renders the sale *per se* void, instead finding the court should

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engage in more of a sliding scale analysis. *Id.* at 643 (quoting *Golden v. Tomiyasu*, 387 P.2d 989, 995 (1963) ("While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience.")). Specifically, where there is a wide disparity in price, a party challenging the sale "may require less evidence of fraud, unfairness, or oppression to justify setting aside the sale." *Id.* at 643–44 (citing *Golden v. Tomiyasu*, 79 Nev. at 515–16.)

The auction price was inadequate

26. A price below 20% of fair market value is "obviously inadequate." *See Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 60, 366 P.3d 1105, 1112 (2016).

27. The undisputed evidence here shows the property had a fair market value of $76,000.00 as of the date of the foreclosure. Stipulated Fact # 15. The HOA's credit bid was $4,310.82. Trial Ex. 30. LVDG purchased the property for $4,500.00. Trial Ex. 31. The sales price at auction and paid by LVDG were each approximately 6% of the fair market value and were, therefore, grossly inadequate prices.

28. The lower the price, the less fraud and unfairness is required to set aside the sale or to declare, under equity, this sale did harm a senior lienholder's interest. *See Ballentyne v. Smith*, 205 U.S. 285, 290 (1907) ("if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefitted by the sale will be sufficient to justify setting it aside. It is difficult to formulate any rule more definite than this, and each case must stand on its own particular facts."); *Shadow Canyon*, 405 P.3d at 648–49 (quoting *Golden v. Tomiyasu*, 387 P.2d 989, 995 (1963) ("While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience."); *see also U.S. Bank ND, N.A. v. Resources Group, LLC*, 135 Nev. Adv. Op. 26, 444 P.3d 442, 448

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(2019) ("The relationship is hydraulic: where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought.") (quoting *Shadow Canyon*, 133 Nev. at 749).

The HOA's foreclosure involved unfairness and oppression

29. In *Shadow Canyon*, the Nevada Supreme Court indicated that whether a lender "tried to tender payment" before the sale is "significant[]" to determine whether the lender's deed of trust survived as an equitable matter. 405 P.3d at 650.

30. As described above, Miles Bauer tenderednine9 months of assessments on a lien for which, based on the statute when initiated, limited the superpriority to six months.[5] To the extent there was any deficiency with the tender, it was inequitable for Alessi to reject it without identifying an alternative superpriority. And Alessi's blanket policy of rejecting payments the senior lender was entitled to make is also unfair and oppressive.

31. The credit bid and lack of distribution of auction proceeds also establish unfairness if this HOA sale is construed as a superpriority sale.

32. In an unpublished decision, the Nevada Supreme Court reversed a lower court decision under unfairness, saying genuine issues of material fact existed concerning both the opening bid amount and how the funds from sale were distributed. *JPMorgan Chase Bank, N.A. v. 1209 Village Walk Trust, LLC*, 424 P.3d 813 (table), No. 69784, 2018 WL 1448805 (Nev. Mar. 20, 2018). First, the court expressed concern that "if the HOA trustee set the sale price for the entire lien amount rather than the superpriority portion, it may have chilled bidding on the property." *Id.* at 6. Next, the court opined about distribution of sale proceeds, saying, "The HOA may have owed JPMorgan any amount beyond the superpriority portion of the assessment lien, as JPMorgan's interest as the holder of the first deed of trust was superior to the subpriority portion of the assessment lien."[6]

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[5] *See* footnote 2, *supra.*

[6] The 2013 JEB Report, often cited and relied upon in Nevada Supreme Court opinions, explains through illustration that if an HOA forecloses on a superpriority lien, the HOA must pay the first mortgage holder before paying itself the subpriority portion of HOA's lien (Example 2).

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33. Here, the HOA credit bid its entire lien, and it distributed zero dollars to the first deed holder after sale and again after selling the property to LVDG. The HOA should have had to pay the senior lender before paying itself the subpriority portion of the lien, as explained in *Village Walk Trust* and the 2013 JEB Report, Example 2, unless the HOA foreclosure did not contain a superpriority, in which case the HOA could keep all sale proceeds without affecting BoNYM's deed of trust.

34. In fact, because no money was paid at the NRS 116 sale, and the full assessment balance owed to the HOA remained outstanding after the HOA's sale, no one satisfied the superpriority. Testimony of Yvette Sauceda (HOA representative). The HOA could not have sold a lien containing a superpriority if all the amounts that could have comprised the superpriority portion of the lien remained unpaid after the auction.

The balance of equities shows no harm to LVDG

35. In balancing the equities, LVDG has offered no evidence of harm.

36. Moreover, it is not harmed by a finding that the deed of trust survived the sale. LVDG purchased the property knowing all title risks, including the certainty it could not get title insurance without litigation. Testimony of Charles Schmidt. LVDG offered no proof its predecessor, the HOA, was a bona fide purchaser, which was its burden to do. *See, e.g., Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 248 (1979) (explaining that the **putative bona fide purchaser "was required to show** that legal title had been transferred to her before she had notice of the prior conveyance to appellant") (emphasis added); *see also RLP-Ampus Place, LLC v. U.S. Bank, N.A.*, 408 P.3d 557 (table), 2017 WL 6597148, at *1 (Nev. Dec. 22, 2017) (unpublished) ("[A] putative BFP must introduce some evidence to support its BFP status beyond simply claiming that status.").

37. The HOA took no position on what effect its foreclosure had on the senior deed, and no evidence was presented it believed it was getting clear title. The HOA's own notice of sale warned bidders the sale came with no covenants or warranties, and the foreclosure deed to the HOA similarly disclaimed any warranty. Trial Exs. 29 and 30.

38. In addition, *Thompson on Real Property* (often cited by the Nevada Supreme Court) instructs: "In applying the equitable doctrine of bona fide purchaser, some courts have held that one who takes by quitclaim deed cannot be a bona fide purchaser because the deed purports to convey only such right, title or interest as the grantor may have, and thus the deed carries notice of every defect in the grantor's title." 11 David A. Thomas, *Thompson on Real Property*, § 92.09(c), at 191 (2008); *see also* 6A C.J.S. Deeds § 327 ("It is well established that a quitclaim deed only conveys such title or interest as possessed by the grantor at the time of the making of the deed . . . and 'one who accepts a quitclaim deed is conclusively presumed to have agreed to take the title subject to all risks as to defects and [e]ncumbrances'").[7]

39. LVDG accepted a quitclaim deed from the HOA. Trial Ex. 31.

40. To the extent the actual payment did not satisfy the superpriority, and to the extent Alessi's policy did not excuse delivery of payment, the equities balance in favor of setting aside any superpriority portion of the HOA's sale here.

There is no presumption the deed of trust was extinguished, and BoNYM had no obligation to file a lawsuit to confirm what the tender automatically accomplished

41. There is nothing in NRS 116, the text or commentary to the Uniform Common Interest Ownership Act, or the Nevada Supreme Court's published decisions creating a presumption that an HOA foreclosure extinguishes a senior mortgage.

42. No statute of limitation applies to BoNYM's affirmative defenses based on the tender facts. Decades ago, the Nevada Supreme Court examined the issue of applying statutes of limitations to defenses and concluded: "Limitations do not run against defenses." *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 101, 389 P.2d 394, 396 (Nev. 1964).

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[7] *See also Bright v. Johnson*, 302 S.W.3d 483, 492 (Tex. App. 2009) ("[A] subsequent purchaser is not a bona fide purchaser if the conveyance is made without warranty."); *Fla. E. Coast Ry v. Patterson*, 539 So.2d 575, 577 (Fla. 3rd DCA 1992) (quoting *St. Clair v. City Bank & Trust Co.*, 175 So.2d 791, 792 (Fla. 2d DCA 1965)) ("It is well established that a quitclaim deed only conveys such title or interest as possessed by the grantor . . . and 'one who accepts a quitclaim deed is conclusively presumed to have agreed to take the title subject to all risks as to defenses and incumbrances [sic].'"); *Crump v. Knight*, 56 So.2d 625, 628 (Ala. 1952) ("One who takes under a quitclaim deed acquires only such title and interest as his grantor had, and is not within the protection of a bona fide purchaser.").

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43. The reasoning behind this statement follows in the next sentence of the opinion: "The statute is available only as a shield, not a sword." *Id.*; *see also City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1033–34 (9th Cir. 2003) (examining "the interplay between statutes of limitations and defenses" and concluding that such limitations do not apply to defenses because "[w]ithout this exception, potential plaintiffs could simply wait until all available defenses are time barred and then pounce on the helpless defendant").

44. *Dredge*, in turn, cited to a Second Circuit case called *Luckenbach Steamship Co. v. United States*, 312 F.2d 545, 548 (2d Cir. 1963), which held that "[l]imitations statutes do not apply to declaratory judgments as such. Declaratory relief is a mere procedural device by which various types of substantive claims may be vindicated. There are no statutes which provide that declaratory relief will be barred after a certain period of time."

45. Here, LVDG filed suit seeking a declaration that when it purchased the property from the HOA, which had purchased the property at its own foreclosure sale—an auction which came with pre-sale warnings disclaiming any guarantee or covenant concerning the quality of title or the sale's effect on other liens—it purchased title free of the deed of trust.

46. BoNYM asserted several defenses to LVDG's requested relief, including tender and inequities of the sale. As defenses, no limitations period can apply to defeat them as time barred.

If LVDG's claims are timely, BoNYM's compulsory counterclaims on the same operative facts must be as well

47. Although the court can rule on the tender as a *defense* without examining the same argument as a *counterclaim* that may be subject to a limitations period, the counterclaims are timely because they are compulsory under NRCP 13.

48. If a counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction," then it qualifies as a compulsory counterclaim. NRCP 13(a); *see also Yates v. Washoe Cty. Sch. Dist.*, No. 03:07-CV-00200-

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LRH-RJJ, 2007 WL 3256576, at *2 (D. Nev. Oct. 31, 2007) ("a plaintiff's institution of a suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim.").[8]

49. BoNYM's counterclaims arise out of the same occurrence—the HOA's foreclosure—as LVDG claims, and they also seek the kind of declaratory relief that *Luckenbach*, cited in *Dredge*, said has no applicable statute of limitations because declaratory relief is not a claim that seeks a judgment for money or to coerce an adversary to take some action, but merely requests a declaration of non-liability—here, non-extinguishment of a lien. 312 F.2d at 548. *Cf. Bull v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695, 700–01, 79 L.Ed. 142 (1935).

50. For this reason, too, LVDG's arguments about BoNYM's counterclaim being time-barred fail.

If any of the foregoing Conclusions of Law are more appropriately to be considered Findings of Fact, they shall be so deemed.

JUDGMENT

For the foregoing reasons, the Court ORDERS, ADJUDGES, AND DECREES:

1. The March 2, 2011 HOA foreclosure sale did not extinguish the subject deed of trust.

2. The deed of trust, recorded as instrument number 20060419-0000609, remains an encumbrance against the property located at 1524 Highfield Court, Las Vegas, Nevada 89032, APN 139-09-410-021.

[8] To determine whether a claim is a compulsory counterclaim, courts look to "(1) whether the issues of fact and law raised by the claim and counterclaim largely are the same; (2) whether *res judicata* would bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule; (3) whether substantially the same evidence will support or refute plaintiff's claim as well as defendant's counterclaim; and (4) whether there is any logical relationship between the claim and the counterclaim." *Tank Insulation Int'l, Inc. v. Insultherm, Inc.*, 104 F.3d 83, 85–86 (5th Cir. 1997). There can be no doubt that BoNYM's counterclaims are simply the mirror of LVDG's similar claims, thus meeting all these factors.

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3. Title is quieted in LVDG's name, but LVDG's title remains subject to the deed of trust.

Dated this 17th day of September, 2020

CB8 052 DB14 DD74
Mark R. Denton
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Development Group LLC, Plaintiff(s) vs. Dania Hernandez, Defendant(s)	CASE NO: A-17-756215-C DEPT. NO. Department 13

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