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

APPEAL

From the Eighth Judicial District Court, Department XIII
The Honorable Mark R. Denton, District Judge
District Court Case No. A-17-756215-C

ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

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**) certifies that, in addition to the parties named in this case, the following may have an interest in the outcome of this appeal:

The Bank of New York Mellon is a wholly-owned subsidiary of The Bank of New York Mellon Corporation. The Bank of New York Mellon Corporation, a Delaware corporation, owns 100% of BoNYM.

These representations are made so this court may evaluate possible disqualification or recusal.

DATED this 14th day of October, 2021.

AKERMAN LLP

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JURISDICTIONAL STATEMENT

Following a two-day bench trial on July 28 and July 29, 2020, the district court entered its findings of fact, conclusions of law, and judgment on September 17, 2020. 3 JA 382-98. Notice of entry of the order was entered on October 1, 2020. 4 JA 476-96. Las Vegas Development Group, LLC (**LVDG**) timely appealed the order on October 15, 2020. 4 JA 501-03.

The court awarded BoNYM $9,500.00 in attorneys' fees and $2,836.78 in costs through a written order entered on December 23, 2020. 4 JA 631-34. Notice of entry of the order was entered the same date. 4 JA 636-43. LVDG timely appealed the order on December 23, 2020. 4 JA 645-47.

ROUTING STATEMENT

This appeal does not fall within a category presumptively assigned to the court of appeals under NRAP 17(b). This appeal also raises a principal issue of statewide public importance which remains an open question presently in Nevada—following an HOA foreclosure sale, what statute of limitation (if any) applies to a deed of trust beneficiary's affirmative defenses, and what statute of limitation (if any) applies to a deed of trust beneficiary's quiet title/declaratory relief compulsory counterclaims. The Nevada supreme court should retain jurisdiction of this appeal.

ISSUES

1. Whether any statute of limitation applied to BoNYM's affirmative defenses such that BoNYM was barred from defending itself against LVDG's quiet title/declaratory relief causes of action?
2. Whether BoNYM's compulsory counterclaims for quiet title/declaratory relief were timely?
3. Whether BoNYM's deed of trust survived the HOA's foreclosure sale even if its counterclaims were untimely?
4. Whether LVDG is entitled to free and clear property when it is undisputed on appeal that BoNYM's loan servicer tendered the superpriority portion of the HOA's lien before the sale; alternatively, tender was excused; alternatively, the sale was inequitable?

STATEMENT OF THE CASE

This appeal 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 BAC Home Loans Servicing, LP, through counsel, paid a little more than nine months of assessments to satisfy the HOA's superpriority lien. LVDG obtained title to the property soon after the HOA's sale.

LVDG did not sue BoNYM for quiet title/declaratory relief until 2017, six years after the HOA's sale. BoNYM answered, raising the affirmative defense of tender, and asserted compulsory counterclaims for quiet title/declaratory relief on June 15, 2017. Following a trial on the merits, the district court held that BAC's tender preserved the deed of trust as a matter of law; BoNYM could defend itself by raising the affirmative defense of tender; and BoNYM's claims for quiet title/declaratory relief were timely.

On appeal, LVDG does not dispute that BAC tendered the amount necessary to pay the superpriority lien, or that the tender preserved the deed of trust. Instead, LVDG argues BoNYM's affirmative defenses are time barred, along with its compulsory counterclaims for quiet title/declaratory relief. BoNYM's affirmative defenses and compulsory counterclaims are not time-barred. In any event, because LVDG does not dispute the district court's ruling that the tender preserved the deed of trust, LVDG is not entitled to free and clear title.

STATEMENT OF FACTS

I. Factual History

A. Property History

Dania Hernandez purchased the property located at 1524 Highfield Court, Las Vegas, Nevada on April 10, 2006. 3 JA 383 at ¶ 1. Hernandez financed her purchase with a $208,000.00 loan from Countrywide Home Loans, Inc., which was secured by a deed of trust recorded against the property. *Id.*

BoNYM was assigned the deed of trust in 2011. *Id*. at ¶ 2.

B. The HOA Initiates Foreclosure

The property is located within the Hidden Canyon Owners Association (**HOA**), subject to the HOA's covenants, conditions, and restrictions (**CC&Rs**). *Id*. at ¶ 3. After Hernandez failed to pay her HOA assessments, the HOA began foreclosure proceedings. *Id*. at ¶ 4. The HOA, through its agent Alessi & Koenig, LLC, recorded a notice of delinquent assessment lien against the property on June 3, 2009. *Id*. The HOA, through Alessi, recorded a notice of default against the property on September 2, 2009.

C. Miles Bauer's Tender

BAC Home Loans Servicing, LP serviced the loan at the time the HOA began foreclosure proceedings. 3 JA 384 at ¶ 6. On October 20, 2009, Miles Bauer Bergstrom & Winters LLP, on behalf of BAC and MERS,[1] requested a breakdown of the HOA arrears from Alessi, and the identification of the superpriority amount owed to the HOA. *Id*.

Alessi provided a statement of account on December 17, 2009, which reflected the HOA charged assessments for common expenses at $118.00 per year. *Id*. at ¶ 7. The statement did not reflect any charges for nuisance abatement or exterior maintenance. *Id*.

[1] MERS was the original beneficiary under the deed of trust, solely as nominee for the lender and the lender's successors and assigns. 2 JA 111 at ¶ (E).

On January 21, 2010, Miles Bauer tendered $88.50 to Alessi to satisfy the alleged superpriority portion of the HOA's lien. *Id*. at ¶ 8. This amount represented nine months of the yearly assessment. *Id*. Alessi rejected Miles Bauer's tender. *Id*. at ¶ 9. Alessi explained:

> . . . 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. . . .

Id. at ¶ 10. Alessi's letter did not identify a different dollar amount it believed to be the superpriority. 3 JA 385 at ¶ 11.

Alessi reiterated its 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.

Id. at ¶ 12.

D. The HOA Forecloses on its Subpriority Lien

After the HOA, through Alessi, rejected Miles Bauer's tender, the HOA recorded a notice of sale on August 9, 2010. *Id*. at ¶ 13.

The HOA foreclosed on the property on March 2, 2011. *Id*. at ¶ 14. The property reverted to the HOA at the sale. *Id*. On March 30, 2011, the HOA quitclaimed its interest in the property to LVDG for $4,500.00. *Id*. at ¶ 17.

The fair market value of the property at the time of the HOA's sale was $76,000.00. *Id*. at ¶ 18.

II. Procedural History

A. The Pleadings

LVDG did not file a judicial suit until 2017, six years after the HOA's sale. 1 JA 8 at ¶ 57. LVDG filed its first amended complaint against BoNYM and other defendants on June 8, 2017. 1 JA 1-10. It asserted claims against BoNYM for quiet title/declaratory relief. *Id.*

BoNYM filed its answer on June 15, 2017. 1 JA 13-22. It included, among other defenses, the affirmative defense of tender. 1 JA 20 at ¶ 7. BoNYM also asserted compulsory counterclaims for quiet title/declaratory relief. 1 JA 22-28. BoNYM alleged: "On January 21, 2010, Miles Bauer tendered payment of nine months of assessments, as outlined in the HOA Trustee's payoff statement, in the amount of $88.50." 1 JA 24 at ¶ 17. BoNYM included as part of its counterclaim a copy of Miles Bauer's tender documents. 1 JA 29-38.

B. The Dispositive Motions

LVDG moved to dismiss BoNYM's counterclaims, asserting the claims were barred by the statute of limitations and laches. 1 JA 39-54. It moved for summary

judgment on the same basis. *Id*. BoNYM opposed. 1 JA 64-71. The court denied LVDG's motion. 1 JA 82-101.

On March 18, 2019, BoNYM moved for summary judgment on all claims for relief. 3 JA 102-08. BoNYM asserted that BAC's tender preserved the deed of trust by operation of law, or alternatively, the sale should be set aside as a matter of equity. *Id*. LVDG opposed, again asserting that BoNYM's counterclaims were untimely. 4 JA 232-57. The court denied BoNYM's summary judgment motion through a written order entered on August 2, 2019. 3 JA 368-69.

C. The Trial

The court held a bench trial on July 28-29, 2020. 5 JA 648-788. On September 17, 2020, the court entered its findings of fact, conclusions of law, and judgment. 3 JA 382-98. The court held Miles Bauer's tender preserved the deed of trust as a matter of law; alternatively, tender was futile and excused; alternatively, Bank of America (as successor to BAC) substantially complied with its payment obligations; alternatively, the deed of trust survived as a matter of equity. 3 JA 386-95. The court held there was no presumption the deed of trust was extinguished, and BoNYM had no obligation to file a lawsuit to confirm what the tender automatically accomplished—preservation of the deed of trust. 3 JA 395-96. Regardless, the court ruled that if LVDG's affirmative claims were timely, BoNYM's compulsory counterclaims on the same operative facts must be as well. 3 JA 396-97.

The court further held that LVDG (not BoNYM) initiated the lawsuit, and no statute of limitation applied to BoNYM's affirmative defense of tender. 3 JA 396.

D. The Offer of Judgment and Attorneys' Fees Motion

As the prevailing party at trial, BoNYM submitted a costs memorandum for $2,836.78. 4 JA 400-05. BoNYM moved for attorneys' fees and costs under NRCP 68 on October 15, 2020. 4 JA 504-11. Years before the July 2020 trial, BoNYM sent on offer of judgment to LVDG on September 19, 2018, offering to pay LVDG $5,000.00 to accept a judgment that LVDG's title to the property is encumbered by the deed of trust. 4 JA 514-15. Through its fees motion, BoNYM asked for the $19,280.50 in fees it incurred after serving the offer of judgment and all its costs in the amount of $2,836.78. *Id.* LVDG opposed BoNYM's motion. 4 JA 611-20.

After analyzing the *Beattie* and *Brunzell* factors, the court granted $9,500.00 in fees and $2,836.78 in costs. 4 JA 627-29. The court noted that, as the prevailing party, BoNYM was not limited to costs that were incurred post-offer of judgment. 4 JA 628 (citing NRS 18.020). A written order followed. 4 JA 631-34.

SUMMARY OF ARGUMENT

On appeal, LVDG does not dispute BAC's tender or the district court's holding that the tender preserved the deed of trust. It argues instead that BoNYM could not assert the affirmative defense of tender because BoNYM did not sue LVDG within the alleged statute of limitation for a quiet title/declaratory relief claim. But BoNYM was not required to *ever* sue LVDG for quiet title/declaratory relief because BAC's

tender automatically preserved the deed of trust. Regardless, under binding Nevada precedent, BoNYM is entitled to defend itself and assert affirmative defenses to LVDG's causes of action against it, including the defense of tender.

BoNYM's compulsory counterclaims for quiet title/declaratory relief are also not time barred. BoNYM seeks prospective relief only—a declaration as to whether its deed of trust remains enforceable. Because BoNYM seeks prospective relief, no statute of limitation applies under *City of Fernley v. Nevada Department of Taxation*, 132 Nev. 32, 44, 366 P.3d at 707-08 (2016). Even if a statute of limitation applied, because BoNYM's counterclaims are compulsory, at a minimum they may be asserted as affirmative defenses to LVDG's quiet title/declaratory relief claims.

STANDARD OF REVIEW

A district court's "findings of fact will be upheld unless they are not supported by substantial evidence or are clearly erroneous." *Horgan v. Felton*, 123 Nev. 577, 581, 170 P.3d 982, 985 (2007). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013). A district court's conclusions of law are reviewed *de novo*. *County of Clark v. Sun State Props., Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003).

A district court's award of attorneys' fees and costs pursuant to NRCP 68 is reviewed for an abuse of discretion. *Ozawa v. Vision Airlines*, 125 Nev. 556, 563, 216 P.3d 788, 792 (2009).

ARGUMENT

I. BAC's Tender Preserved the Deed of Trust by Operation of Law

LVDG does not dispute the district court's finding that Miles Bauer paid Alessi nine months of assessments before the HOA sale to satisfy the superpriority portion of the HOA's lien. 3 JA 384 at ¶ 8. *See also* Opening Br. at 17 ("[I]n this particular case, it is undisputed that [Miles Bauer] contacted HOA's agent, Alessi, and forwarded a check to ostensibly pay the superpriority portion of the HOA Lien on January 21, 2010."). Nor does LVDG dispute the court's conclusion that Miles Bauer's tender preserved the deed of trust; alternatively, tender was futile and excused; alternatively, Bank of America (as successor to BAC) substantially complied with its payment obligations; alternatively, the deed of trust survived the HOA's sale as a matter of equity. 3 JA 386-95.

In *Bank of America*, this court held that a tender cures the superpriority default "by operation of law," meaning the HOA's subsequent foreclosure was "void . . . as to the superpriority portion" and thus could not "extinguish the first deed of trust." *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018). Even more recently, this court explained that it is not a form of "equitable relief" for a court to "determine[e] that the superpriority tender, or rather the excuse

thereof, cured the default as to that portion of [the association's] lien by operation of law." *7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev. 62, 67, 458 P.3d 348, 352 (2020). Several recent unpublished decisions confirm this holding. *1st One Hundred Inv. Pool, LLC v. U.S. Bank, N.A.*, 472 P.3d 1208 2020 WL 5889021, at *1 (Nev. 2020) (unpublished) ("because the tender cured the superpriority default, the district court neither erred in finding that 1st One Hundred failed to demonstrate good title in itself, nor did it err in declining to balance the equities"); *Paradise Harbor Place Tr. v. Nationstar Mortgage, LLC*, 448 P.3d 544, 2019 WL 4390488, at *2 n.2 (Nev. Sept. 12, 2019) (unpublished) ("[W]e clarify that the district court did not grant equitable relief. Rather, it correctly determined that appellant took title to the property subject to the first deed of trust because the superpriority tender cured the default as to that portion of the HOA's lien by operation of law.").

In other words, BAC's pre-sale tender preserved the deed of trust automatically, without BoNYM ever needing to assert claims against LVDG. *Renfroe v. Carrington Mortgage Services, LLC*, 456 P.3d 1055, 2020 WL 762638, at *1 (Nev. Feb. 14, 2020) (unpublished) (the deed beneficiary's pre-sale tender protected the deed of trust automatically, such that the beneficiary "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").

Bank of America, *Renfroe*, and a host of other unpublished decisions confirm BoNYM did not need to involve the courts for its deed of trust to survive. LVDG took title to the property subject to BoNYM's deed of trust as a matter of law.

II. Affirmative Defenses are Not subject to Statutes of Limitation

1. BoNYM can defend itself against LVDG's complaint.

Instead of disputing tender, LVDG argues BoNYM's tender defense and quiet title/declaratory relief compulsory counterclaims were barred by the statute of limitation. But "[l]imitations do not run against defenses. The statute is available only as a shield, not as a sword." *Dredge Corp. v. Wells Cargo, Inc.*, 180 Nev. 99, 389 P.2d 394, 396 (1964). In *Dredge*, a plaintiff brought a declaratory claim, asking a district court to rule that it was no longer bound by its contract with the defendant because the defendant had breached the contract first. *Id.* The district court refused. It ruled the defendant breached "the contract at a time more than 6 years before this suit was commenced," so "this action in all of its interrelated aspects was barred by limitations." *Id.*

This court reversed. "Of course a claim for coercive relief (damages and an accounting) is subject to the bar of limitations." *Id.* But, Nevada's statutes of limitation apply to "cause[s] of action," and the plaintiff's "request . . . for a declaration of nonliability . . . does not present a 'cause of action' in the sense that term is used in N.R.S. 11.010." *Id.* (citing *Luckenbach S.S. Co. v. United States*, 312 F.2d 545 (2d Cir. 1963)).

> [T]hat is to say, [the plaintiff] does not contend that it has a 'cause of action' not to convey—rather, its position is that it has a valid reason or defense for not doing so—namely, Wells' breach of its obligation to perform under the contract. The subject matter of its request, therefore, is in the nature of a defense. Limitations do not run against defenses. The statute [of limitations] is available only as a shield, not as a sword.

Id. (citing *N. Pac. Rwy. v. United States*, 277 F.2d 615, 623-24 (10th Cir. 1960)).

In several recent unpublished opinions, the court applied the *Dredge* rule in exactly the same context as this case. *SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon*, 472 P.3d 188, 2020 WL 4634162, at *1 (Nev. Sept. 18, 2020) (unpublished) (in response to a purchaser's argument that "challenge[d] the timeliness of respondent's assertion of tender," the court wrote, "the district court properly rejected this argument because respondent raised tender as an affirmative defense and affirmative defenses are not subject to statutes of limitation"); *SFR Invs. Pool 1, LLC v. Carrington Mortgage Services, LLC*, 472 P.3d 187, 2020 WL 5634160, at *1 (Nev. Sept. 18, 2020) ("respondent asserted 'tender' as an affirmative defense to appellant's claims, and this court has recognized that '[l]imitations do not run against defenses'"); *Renfroe v. Carrington Mortgage Services*, 456 P.3d 1055, 2020 WL 762638, at *1 (Nev. Feb. 14, 2020) (unpublished) ("We conclude that Carrington, as a defendant, may assert its affirmative defense [of tender] notwithstanding the statute of limitations."). *See also City of Saint Paul v. Evans*, 344 F.3d 1029, 1033-34 (9th Cir. 2003) (concluding that statutes 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.").

2. BoNYM did not "waive" its tender affirmative defense.

LVDG asserts BoNYM waived its affirmative defenses, including tender, because it did not "timely adjudicate the force and effect of the HOA Foreclosure Sale." Opening Br. at 5. As an initial matter, LVDG waived this argument by not raising it in the trial court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Even if LVDG's waiver argument was not waived, BoNYM did not waive anything. "Waiver requires the intentional relinquishment of a known right." *Nevada Yellow Cab Corp. v. Eighth Judicial District Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). To infer waiver from conduct, the conduct must be "so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." *Id*. Waiver cannot be established by "**delay alone**." *Id*. (emphasis added).

Even if delay alone could support waiver, BoNYM's purported delay in filing suit cannot show it intentionally relinquished its rights under the deed of trust because BoNYM was not required to file suit in the first place. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 611, 427 P.3d 113, 120-21 (2018) (rejecting SFR's argument "the tendering party [must] bring an action showing that the tender is valid and paid into court to avoid loss of its position through foreclosure of the superpriority portion of the lien").

3. If LVDG's complaint is timely, at a minimum the court must allow BoNYM's compulsory counterclaims based on tender to be asserted as an affirmative defense.

.

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," it is a compulsory counterclaim. NRCP 13(a). Although a plaintiff's filing of a complaint does not toll the statute of limitations governing a defendant's compulsory counterclaim, the defendant may nevertheless raise the same theory as an affirmative defense. *Nevada State Bank v. Jamison Family P'Ship*, 106 Nev. 792, 798-99, 801 P.2d 1377, 1381-82 (1990). Even BoNYM's compulsory counterclaims are time-barred (they are not; see Part III, *infra*), BoNYM properly asserted tender as an affirmative defense. *Jamison*, 106 Nev. at 798-99, 801 P.2d at 1381-82.

III. BoNYM's Quiet Title/Declaratory Relief Counterclaims are Timely

A. No Statute of Limitation Applies

1. City of Fernley holds no statute applies to prospective relief.

BoNYM sought declaratory relief under Nevada's version of the Uniform Declaratory Judgments Act, NRS 30.010 *et seq.*, and Nevada's quiet title statute, NRS 40.010. 1 JA 25-27. These statutes do not contain a statute of limitation, and no limitations period expressly applies itself to them. *Cf. Luckenbach S. S. Co. v. United States*, 312 F.2d 545, 548 (2d Cir. 1963) ("Limitations statutes do not apply

to declaratory judgments as such."). In fact, Nevada applies no limitations period at all to suits seeking declaratory relief.

In *City of Fernley v. Nevada Department of Taxation*, Fernley sought to invalidate a state revenue distribution statute as inconsistent with the Nevada Constitution. 132 Nev. 32, 44, 366 P.3d 699, 707-08 (2016). It also sought money damages as compensation for revenues it had been denied under the allegedly unconstitutional statute. *Id.* at 708. Before reaching the merits, this court assessed whether Fernley's claims were barred by the statute of limitations, and it gave different answers for the two different sorts of relief Fernley requested, explaining, "[t]he statute of limitations applies differently depending on the type of relief sought." *Id.* at 706. As to money damages, the supreme court applied the four-year catch-all statute. *Id.* at 707. Because Fernley knew about its damages claim for eleven years, the four-year statute barred it from seeking damages for the allegedly unconstitutional denial of revenue.

On the other hand, the four-year statute did not bar the declaratory judgment claim. *Id.* This ruling was required by "the doctrine of constitutional supremacy," and aimed to stop statutes of limitations from interfering with judicial review. *Id.* But it also reached more broadly. It cited a New York case—one without constitutional issues—as "holding that no statutory limitation applies 'when a declaratory judgment will serve a practical end in determining and stabilizing an

uncertain or disputed jural question, either as to present or prospective obligations.'" *Id.* at 706 (quoting *Kirn v. Noyes*, 31 N.Y.S.2d 90, 93 (1941)).

City of Fernley also approvingly quoted a Michigan case involving the constitutionality of a tax statute, but the Michigan case's reasoning (like *City of Fernley*'s) was only partly about constitutional law. *See id.* at 706-07 (citing *Taxpayers Allied for Constitutional Taxation v. Wayne Cty.*, 537 N.W.2d 596, 600 (Mich. 1995)). Like *City of Fernley*, the Michigan supreme court said applying a statute of limitations to declaratory claims about the constitutionality of statutes would frustrate judicial review. *Taxpayers Allied*, 537 N.W.2d at 600 ("To hold otherwise would truncate the constitutional right.").

Yet the Michigan court also made a prudential argument with equal force outside constitutional cases: if the court held prospective relief was time-barred, that would not settle the dispute over the tax statute's validity; instead it would force the plaintiffs to sue for damages after the state again collected the allegedly invalid tax. *Id.* For that reason, the court concluded that applying a statute of limitations to lawsuits seeking prospective relief would be "very impractical." *Id.*

2. BoNYM seeks prospective relief.

City of Fernley's distinction between prospective and retrospective relief is very simple. *City of Fernley* applies regardless whether the impetus for the declaratory relief arose in the past or is expected in the future. *Bank of N.Y. Mellon v. Willow Creek Cmty. Ass'n*, No. 2:16-cv-00717-RFB-BNW, 2019 WL 4677009, at

*3 (D. Nev. Sept. 25, 2019). *City of Fernley* asks only whether the relief is declaratory: "There are two types of relief: retrospective relief, such as money damages, and prospective relief, such as injunctive or declaratory relief." 366 P.3d at 706. There is no question which side of this line BoNYM's claim falls on. BoNYM seeks declaratory relief, which is prospective.

The reason prospective declaratory relief is not subject to limitation is the same practical reason identified in *Taxpayers Allied*, on which *City of Fernley* heavily relied. In both *Taxpayers Allied* and *City of Fernley*, applying a statute of limitations would not have resolved the parties' dispute because the constitutional issue would have been left unaddressed. A ruling that a particular cause of action was time-barred would not stop new causes of action from accruing. Each time an unconstitutional tax was collected (*Taxpayers Allied*) or each time revenue was unconstitutionally withheld (*City of Fernley*), a new damages claim would arise with a new limitations period.

The same problem exists here. BoNYM does not seek damages for an injury it suffered on the sale date—if it did, then a statute of limitations would apply. Instead, BoNYM seeks judicial confirmation that it may enforce the deed of trust in the future, for example through the following actions:

- inspecting the property (*see* 2 JA 1117 (section 7 providing, "Lender . . . may make reasonable entries upon and inspections of the Property"));
- claiming insurance proceeds if the property is destroyed (*see id*. (section 5 providing, "If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument . . . ."));
- requiring LVDG to maintain the property (*see id.* (section 7 providing, "Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property."));
- demanding rents under the Uniform Assignment of Rents Act (*See* NRS 107A.010 *et seq*.);
- continuing to pay taxes and insurance to preserve its interest in the property; and
- foreclosing.

Because BoNYM's deed of trust is not extinguished, BoNYM could do any of the following:

- demand rents or an inspection and then sue if LVDG refused;
- bring a judicial foreclosure suit;

- as discussed below, schedule a nonjudicial foreclosure and litigate the deed of trust's validity if LVDG sued to stop the sale; or
- schedule a nonjudicial foreclosure, buy the property at the sale, and sue to eject LVDG from the property.

But each of these other avenues, especially the nonjudicial foreclosure, requires escalating the conflict in some way, complicating the issues, incurring avoidable fees, and perhaps exposing BoNYM to damages claims by LVDG.

For this reason, many states do not impose a statute of limitations on quiet title actions seeking prospective relief regarding the status of title (as opposed to possession of the property).[2] Applying a statute of limitations to such a claim leaves the parties without a means for determining the status of the title. No statutory default rule determines whether BoNYM's deed of trust continues to encumber the

[2] *See, e.g.*, *Williams v. Mertz*, 549 So. 2d 87, 88 (Ala. 1989) ("This was a quiet title action, and there is no statute of limitations for quiet title actions."); *Kean v. Forman*, 752 A.2d 906, 908 (Pa. Super. Ct. 2000) (holding a quiet title action seeking to remove cloud on title is not subject to any statute of limitations); *Ditta v. Conte*, 298 S.W.3d 187, 192 (Tex. 2009) ("We have held that as long as an injury clouding the title remains, so too does an equitable action to remove the cloud; therefore, a suit to remove the cloud is not time-barred."); *Branting v. Salt Lake City*, 153 P. 995, 1001 (Utah 1915) ("the action is purely one to remove a cloud or to quiet title [to real property], the statute of limitations has no application"); *Van Sant v. City of Seattle*, 287 P.2d 130, 132 (Wash. 1955) ("Respondent's action was brought to remove a cloud on his title, and such actions are not subject to the statute of limitations."); 54 C.J.S. Limitations of Actions § 42 ("an action which in essence is an action to remove clouds from title is not subject to the period of limitations prescribed for a possessor action").

property; thus, BoNYM has no way to have a determination whether it may enforce the lien interest. The same pragmatic concerns that underlie the reasoning in *City of Fernley* apply here.

The existence of ongoing conflict illustrates why *City of Fernley* is dispositive: BoNYM sought a declaration regarding present and future rights, not retroactive or coercive relief.

3. BoNYM's theories may have different limitation periods.

BoNYM's counterclaims asserted more than one basis for its requested declaratory judgment, and the present argument applies more clearly to some theories than to others.

To the extent BoNYM seeks equitable relief from an otherwise valid sale based on procedural irregularities, *see Nationstar Mortgage LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 748-49, 405 P.3d 641, 648 (Nev. 2017), there is some intuitive argument for requiring it to seek equitable relief from the sale within some limitations period after the sale occurred.

However, BoNYM also claimed its deed of trust survived based on the pre-sale tender, and LVDG does not dispute the court's tender rulings on appeal. Nothing in Chapter 116 or Nevada supreme court precedent creates a presumption that an HOA lien foreclosure involves a superpriority component. To the contrary, forcing

lenders to sue to overcome a "presumption of extinguishment"[3] would contradict the purpose of non-judicial foreclosure. As discussed above, when tender occurs, it "cure[s] the default and prevent[s] foreclosure as to the superpriority portion of the HOA's lien by operation of law." *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 120 (Nev. 2018). No legal action is necessary.

Responding to an argument that the tendering party had to keep the tender good by paying it into court, this court held:

> To judicially impose such a rule would only obstruct the operation of the split-lien scheme. The practical effect of requiring the first deed of trust holder to pay the tender into court is that a valid tender would no longer serve to discharge the superpriority portion of the lien. Instead, the tendering party would have to bring an action showing that the tender is valid and paid into court before the lien is discharged. With such conditions, ***a tendering party could only achieve discharge of the superpriority portion of the lien by litigation. This process negates the purpose behind the unconventional HOA split-lien scheme: prompt and efficient payment of the HOA assessment fees on defaulted properties***.

Id. at 120-21 (emphasis added). A presumption of extinguishment would create exactly the same problem—it would force those that paid the superpriority component to sue for a declaratory order. There is no reason to impose a judicial-

[3] In addition to its "presumption of extinguishment" argument, LVDG argues the HOA's deed recitals are "conclusive." This court rejected that argument. *Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing LLC*, 478 P.3d 376, 378 (Nev. 2020) (conclusive recitals of default in a foreclosure deed do not prevent a valid pre-sale tender from preserving a deed of trust).

action requirement, especially when nothing in Chapter 116 or precedent supports a presumption of extinguishment. Many HOA sales involve a superpriority component, but not all—for example, a sale can occur after a homeowner pays off all the delinquent assessments but not the costs of collection or the lender can tender. The statute expects loan servicers to pay, as occurred here—there is no presumption of non-payment.

If the deed of trust survived automatically, "by operation of law," *id.* at 120, then BoNYM is not seeking equitable relief from the sale but simply a declaration prior to a non-judicial foreclosure of whether its deed of trust still encumbers the property. That declaration, sought for purposes of "determining and stabilizing an uncertain or disputed jural question, either as to present or prospective obligations," is prospective relief under *City of Fernley*. 132 Nev. 32, 44, 366 P.3d at 706 (2016).[4]

[4] LVDG argues that, pursuant to NRS 47.250(16)-(18), "a foreclosure sale and the resulting deed are both presumed valid." Opening Br. at 12. The district court's order did not hold the HOA's sale or corresponding foreclosure deed were invalid. Rather, the court held the sale was subject to BoNYM's deed of trust. NRS 47.250(16)-(18) is irrelevant to the court's determination in this regard.

Similarly, LVDG's reliance on *Breliant* that a "presumption exists in favor of the record title holder is merely a statement of the burden of proof in a quiet title action. *See, e.g.*, *Breliant v. Preferred Equities Corp.*, 918 P.2d 314, 318 (Nev. 1996). It should not even apply in case involving tender or futility of tender—it governs disputes between recorded and unrecorded interests. *See id.* (presumption in favor of record title holder based on case involving an "adverse possession claimant"). This case does not involve an unrecorded interest but is a priority dispute between holders of recorded interests, i.e., the recorded foreclosure deed and the recorded

4. A declaratory suit can be untimely only if coercive relief is untimely.

Nevada's Uniform Declaratory Judgments Act "shall be so interpreted and construed as to . . . harmonize, as far as possible, with federal laws . . . on the subject of declaratory judgments . . . ." NRS 30.160. Like *City of Fernley*, federal law focuses on the remedy sought: "an action for declaratory relief will be barred to the same extent the applicable statute of limitations bars the concurrent legal remedy." *Algrant v. Evergreen Valley Nurseries Ltd.*, 126 F.3d 178, 181 (3d Cir. 1997); *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993). "When the declaratory judgment sought by a plaintiff would declare his entitlement to some affirmative relief, his suit is time-barred if the applicable limitations period has run on a direct claim to obtain such relief." *118 E. 60th Owners Inc. v. Bonner Properties Inc.*, 677 F.2d 200, 202 (2d Cir. 1982).

This is also the approach California courts take when applying similar statutes of limitations: "The Legislature has not established a specific statute of limitations for actions to quiet title. Therefore, courts refer to the underlying theory of relief to determine the applicable period . . . . An inquiry into the underlying theory requires the court to identify the nature (i.e., the "gravamen") of the cause of action." *Salazar v. Thomas*, 236 Cal. App. 4th 467, 476, 186 Cal. Rptr. 3d 689, 694-95 (2015), *as*

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deed of trust. Regardless, doctrines allocating the burden of proof in quiet title claims say nothing about whether a particular quiet title claim is timely.

modified on denial of reh'g; *see also Berberich v. Bank of Am. N.A.*, 460 P.3d 440, 443 (Nev. 2020) (citing *Salazar* for guidance in applying NRS 11.080).

The most important "affirmative relief" BoNYM seeks is judicial confirmation of its right to foreclose non-judicially. So long as a nonjudicial foreclosure would be timely, a suit for declaratory judgment concerning the viability of foreclosure is also timely.

Foreclosure is timely. The deed of trust remains valid and enforceable until ten years after the note becomes fully due. NRS 106.240. There is no evidence in the complaint or in the public records that the due date has been accelerated, so the deed of trust remains enforceable until ten years after the maturity date—that is, until May 1, 2046. (*See* 2 JA 111 (maturity date is May 1, 2036)).

Even a suit on the note would be timely. The borrower's note is a negotiable instrument under UCC article 3, so its statute of limitations is found in NRS 104.3118(1): "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within 6 years after the due date or dates stated in the note or, if a due date is accelerated, within 6 years after the accelerated due

date." Without any acceleration,[5] BoNYM would retain the right to bring a timely claim to enforce the note.[6]

5. No statute of limitations would resolve stalemates like this.

It is not by happenstance or mistake that the Nevada legislature has not established a statute of limitations that applies to the type of claim BoNYM brought here. As with many other states, Nevada law recognizes there is no purpose in setting a time limitation on how long a party has to bring an action to establish the status of its title or interest in real property when no other law provides the answer. This case fits squarely in the framework of *City of Fernley*, with BoNYM seeking prospective relief so it can decide whether to seek to enforce its deed of trust.

B. NRS 107.080 does Not Provide an Analogous Statute of Limitations to Chapter 116 Sales

LVDG appears to assert that Chapter 116 sales be subjected to a thirty- to ninety-day window to contest the sale, similar to NRS 107.080's provisions—despite that there is no statutory language in Chapter 116 to support LVDG's argument. For this reason alone, the court should reject LVDG's policy argument. *City Council of*

[5] Acceleration is relevant to an action on the note. BoNYM maintains it is not relevant to the ancient mortgage statute, NRS 106.240.

[6] Even if the statute of limitations on the note had expired, that would not prevent BoNYM from conducting a nonjudicial foreclosure on the deed of trust. *Facklam*, 401 P.3d at 1071 ("[A] lender may recover on a deed of trust even after the statute of limitations for contractual remedies on the note has passed.").

City of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 784 P.2d 974, 977 (1989) (citation omitted); *Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 88, 94, 993 P.2d 50 (2000) ("[W]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent.").

NRS 107.080 would not provide an applicable statute of limitations for this case in any event. NRS 107.080(5) creates a special cause of action to void a trustee's sale if the trustee "does not substantially comply" with the statute, and this cause of action must be filed within either thirty or ninety days after the trustee's deed is recorded. However, the deadline is actually one of the elements of the cause of action and not, strictly speaking, a statute of limitations. *See* NRS 107.080(5)(b). If it were a statute of limitations, it would not be analogous to BoNYM's compulsory counterclaims because it applies only to a special statutory cause of action for voiding the sale—not to a cause of action to set aside the sale under the common law or some other statute, and certainly not to a suit seeking a declaration that the sale was void ab initio.

NRS 107.080(7) then provides that, "[u]pon expiration of the time for commencing an action which is set forth in subsections 5 and 6, any failure to comply with the provisions of this section or any other provision of this chapter does not affect the rights of a bona fide purchaser as described in NRS 111.180." This is

not a statute of limitations, either. It does not prohibit parties from filing suits after thirty or sixty days; it only establishes a strong bona fide purchaser defense.

BoNYM was not required to file suit against LVDG within thirty to ninety days of the HOA's sale.

C. The Federal Foreclosure Bar Case is Irrelevant

LVDG cites *JPMorgan Chase Bank N.A. v. SFR Investments Pool 1 LLC* as holding that a statute of limitations applies to suits to enforce the federal foreclosure bar. Opening Br. at 25-26 (citing 475 P.3d 52, 2020 WL 6373427 (Nev. Oct. 29, 2020)). In *JPMorgan*, the court did apply a statute of limitations to a claim for declaratory relief, but it appears not to have considered whether applying a statute of limitations was appropriate under *City of Fernley*—its opinion does not cite *City of Fernley*. And where a question is not presented or considered but an answer is merely assumed without argument, that assumption forms no part of the case's holding and has no precedential effect. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The actual holding of *JPMorgan* is that, under 12 U.S.C. § 4617(b)(12), a claim under the Federal Foreclosure Bar is more like a contract than like a tort claim, so courts should apply either the six-year federal statute of limitations for contract suits by the FHFA or the six-year state statute of limitations for breach of contract.

475 P.3d at 56-57. This case does not involve the federal statute *JPMorgan* interpreted and applied, and *JPMorgan* did not consider the issues raised here.

D. LVDG can Sue, so BoNYM can Sue

Unless LVDG at some point loses possession of the property for five years, it can sue BoNYM at any time to determine whether the sale extinguished the deed of trust. LVDG's lawsuit resolves the exact same dispute as BoNYM's counterclaims.

If LVDG can seek relief against BoNYM, then BoNYM can file counterclaims to determine whether LVDG is entitled to that relief. That is precisely what declaratory judgment acts are for: "[t]he Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure or never." *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981) (citation omitted).

E. BoNYM may still Foreclose even if its Counterclaims are Untimely

BoNYM's counterclaims are timely. But even if its claims are time-barred, this court should not award title to LVDG. BoNYM has the legal right to foreclose nonjudicially, and LVDG cannot prove good title in itself.

1. No limitation period applies to nonjudicial foreclosures.

BoNYM has the legal right to nonjudicially foreclose as a result of the tender, or alternatively excuse of tender and/or the unfairness of the sale. This is because

no statute of limitations applies to nonjudicial foreclosures. See Facklam v. HSBC Bank, 133 Nev. 497, 499, 401 P.3d 1068, 1070-71 (2017). In other words, BoNYM has "no obligation to prevail in this judicial action as a condition precedent to enforcing its deed of trust that had already survived [the HOA's] foreclosure sale." Renfroe v. Carrington Mortgage Services, LLC, 456 P.3d 1055, 2020 WL 762638, at *1 (Nev. Feb. 14, 2020) (unpublished). BoNYM countersued for quiet title to avoid future litigation with LVDG when it nonjudicially forecloses.

2. LVDG cannot prove free and clear title.

LVDG believes it is entitled to judgment on its quiet title/declaratory relief counterclaims should BoNYM's counterclaims be barred by a statute of limitation. But this is not the case. As discussed above, there is no presumption of extinguishment. LVDG still has the burden of proving quiet title in its favor, which it cannot do. *Resources Grp. v. Nevada Assoc. Services, Inc.*, 135 Nev. 48, 50, 437 P.3d 154, 157 (2019) (each party has a respective burden to establish good title); *see Centeno v. Mortgage Electronic Registration Systems, Inc.*, 132 Nev. 954, 2016 WL 3486378, at *2 (Nev. June 23, 2016) (unpublished) ("Here, [the purchaser at the HOA sale] failed to, by affidavit or otherwise, establish that a valid notice of trustee's sale was recorded at the time of foreclosure to support the deed's recitals of notice compliance. [The purchaser] thereby failed to meet [its] burden to prove that BOA's first deed of trust was properly extinguished.").

LVDG has not shown it is entitled to quiet title in its favor and cannot do so. The district court held that BAC's tender preserved BoNYM's deed of trust—a conclusion of law that LVDG did not appeal. This court should not award quiet title to LVDG regardless of whether BoNYM timely sought quiet title.

F. The Sale, by Itself, does Not Press an Adverse Claim

LVDG's brief presumes the HOA sale itself necessarily challenged the lien and started the statute running. *See generally* Opening Br. This position is inconsistent both with *Berberich* and this court's decisions about tender.

As *Berberich* and *Bentley* held, "mere notice" of a title dispute does not start the statute running. *Berberich v. Bank of Am. N.A.*, 136 Nev. 93, 97 460 P.3d 440, 443 (2020); *accord Bentley v. State, Office of State Eng'r*, 132 Nev. 946, 2016 WL 3856572, at *10 (Nev. July 14, 2016) (unpublished). Instead the statute did not begin running until someone "presses an adverse claim" or "eject[s]" the title owner from the property. *Berberich*, 136 Nev. at 97, 460 P.3d at 443. Merely threatening to enforce a lien was not sufficient because it was consistent with the title owner's present control of the property. *Id.* Likewise, merely recording a water diversion agreement was inadequate; the defendant needed to actually divert the water. *Bentley*, 2016 WL 3856572, at *10.

In short, to start the statute running, mere words are not enough. The party threatening a plaintiff's property interest must take some action inconsistent with the plaintiff's rights—something like ejecting a title owner or diverting a water flow.

The HOA sale in this case was an action and not merely words, but it was not an action inconsistent with BoNYM's rights. Where a lender has tendered the superpriority debt, or where tender is excused, a foreclosure does not conflict with the lienholder's rights; rather, the foreclosure is simply "void as to the superpriority portion." *Bank of Am. N.A. v. SFR Invs. Pool 1 LLC*, 427 P.3d 113, 120-21 (Nev. 2018); *7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev. 62, 67, 458 P.3d 348, 352 (2020) (deed of trust survives where tender is excused). Foreclosure after tender is perfectly consistent with the deed of trust's continued existence—the deed of trust survives automatically, "by operation of law," and the lender has no obligation to file suit to preserve its interest. *Bank of Am. N.A.*, 427 P.3d at 120-21.

Because the sale was not inconsistent with BoNYM's rights in the property, it did not start the clock for BoNYM to sue to protect its rights. Further, because BoNYM's deed of trust does not grant title to the property or any right to possess it, LVDG's title ownership and possession of the property are not inconsistent with the deed of trust's validity, and they do not start the clock either.

IV. The District Court did Not Abuse its Discretion when it Awarded BoNYM its Fees and Costs.

The district court awarded $2,836.78 in costs to BoNYM as the prevailing party in the litigation. 4 JA 627-29; 4 JA 631-34. The court also awarded BoNYM $9,500.00 in attorneys' fees, based on an offer of judgment that BoNYM submitted to LVDG that LVDG did not accept. *Id*.

On appeal, LVDG does not argue that the district court abused its discretion when analyzing the *Beattie* or *Brunzell* factors. *See* Opening Br. at 38. It solely argues that if this court decides the statute of limitations barred BoNYM's affirmative defenses and counterclaims, it should also reverse the district court's fees and costs award. *Id*. For the reasons outlined in this brief, the court should affirm the district court on all counts, including the fees and costs award.

CONCLUSION

BAC's pre-sale tender preserved the deed of trust as a matter of law. As a result, BoNYM was not required to initiate any litigation to protect the deed of trust. After LVDG filed suit, BoNYM was allowed to defend itself, which included raising the affirmative defense of tender.

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BoNYM also asserted counterclaims for quiet title/declaratory relief against LVDG. The court should follow *Fernley* and hold no statute of limitations applies. If the court applies a statute of limitation, it should follow *Berberich* and hold that the statute of limitations does not begin running until some party takes action inconsistent with the continued existence of BoNYM's lien, and that the foreclosure of an allegedly junior subpriority HOA lien does not qualify.

DATED this 14th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

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 answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 7378 words.

FINALLY, I CERTIFY that I have read this **Answering 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 answering 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.

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 14th day of October, 2021.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on October 14, 2021, the foregoing **ANSWERING BRIEF** 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/ Carla Llarena
An employee of Akerman LLP