IN THE SUPREME COURT OF THE STATE OF NEVADA

5316 CLOVER BLOSSOM CT TRUST, Appellant, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE, Respondent.	Case No. 82426

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APPEAL

from the Eighth Judicial District Court, Department XXIV
The Honorable Jim Crockett, District Judge
District Court Case No. A-14-704412-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

U.S. Bank, N.A.

U.S. Bancorp, Inc.

Akerman LLP

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1) because the district court entered summary judgment in favor of Respondent U.S. Bank, as Trustee (**U.S. Bank**) on December 29, 2020. Notice of entry of the order granting the HOA's motion to dismiss was served on the same day. Appellant 5316 Clover Blossom Ct Trust (**Clover Blossom**) filed a notice of appeal on January 28, 2021.

APPELLANT'S STATEMENT REGARDING ROUTING

Pursuant to NRAP 28(a)(5), Respondent U.S. Bank states that this case should be assigned to the Court of Appeals. Although the case does not fall under one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b), the issues presented are controlled by on-point precedent from this Court. Furthermore, this appeal was previously twice adjudicated by the Court of Appeals.

ISSUES PRESENTED

Whether the summary judgment in favor of U.S. Bank should be affirmed based on the undisputed evidence establishing that U.S. Bank's servicer tendered an amount to the HOA's agent sufficient to satisfy the superpriority portion of the HOA's lien.

STATEMENT OF THE CASE

This is the third time this case has gone up on appeal. On June 30, 2017, in Case No. 68915, the Nevada Court of Appeals reversed the first summary judgment against U.S. Bank, stating that the district court had not properly considered the HOA's rejection of tender, and that further discovery should be conducted on several issues.

After remand, Clover Blossom moved to dismiss U.S. Bank's counterclaims and crossclaims. The district court *sua sponte* converted the motion to dismiss to a motion for summary judgment and entered summary judgment in favor of Clover Blossom. Again, U.S. Bank appealed and, again, the Court of Appeals reversed the entry of summary judgment in favor of Clover Blossom. *See* Order Affirming in Part, Reversing in Part, and Remanding, Case No. 75861 (Nev. Ct. App. Oct. 16, 2019).

On remand after the second appeal, the district court again considered cross motions for summary judgment. This time, the district correctly applied the law

stated by the Nevada appellate courts and held that U.S. Bank's evidence of tender warranted summary judgment. That judgment should be affirmed.

STATEMENT OF FACTS

I. Factual Background

A. The Borrowers enter into a Deed of Trust to purchase the property.

In June 2004, Dennis Johnson and Geraldine Johnson (collectively **Borrowers**) purchased real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (the **Property**). To finance this purchase, Borrowers took out a loan in the amount of $147,456.00, which was secured by a deed of trust (**Deed of Trust**) in favor of Countrywide Home Loans, Inc. (5AA 1010-41).

The Deed of Trust stated that if there was a "legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Interest (such as a proceeding ... for enforcement of a lien which may attain priority over this Security Instrument)," then the "Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument." (5AA 1017-18). It further stated the Lender could "pay[] any sum secured by a lien which has priority over this Security Instrument." (5AA 1018). Similarly, the Planned Unit Development Rider to the Deed of Trust stated "If Borrower does not pay [HOA] dues and assessments when due, then Lender may pay them." (5AA 1040).

The Deed of Trust was assigned to U.S. Bank via an Assignment of Deed of Trust, which was recorded on June 20, 2011. (5AA 1043-44).

B. The HOA forecloses on the delinquent assessment lien and rejects BANA's tender of more than the full superpriority amount.

Alessi & Koenig, LLC (**Alessi**), acting on behalf of Country Gardens Owners' Association (**HOA**), recorded a Notice of Delinquent Assessment Liens on February 22, 2012, ostensibly encumbering the Property. The Notice stated the Borrowers owed $1,095.50 to the HOA. (5AA 1166). On April 20, 2012, Alessi recorded a Notice of Default and Election to Sell Under Homeowners Association Lien stating the total amount due to the HOA was $3,396.00. (5AA 1168). Finally, on October 31, 2012, Alessi recorded a Notice of Sale, indicating that the Property would be sold at auction on November 28, 2012. (5AA 1170).

After receiving a copy of the Notice of Sale, Bank of America, N.A. (**BANA**),[1] through counsel at Miles Bauer Bergstrom & Winters LLP (**Miles Bauer**), sent a letter to Alessi that offered to pay the full superpriority portion of the HOA's lien and requested information on that account. (5AA 1176-77). Instead of providing a payoff ledger with the exact superpriority amount, Alessi sent a payoff demand in the amount of $4,186.00. (5AA 1180-81). However, the ledger showed the HOA's

[1] At the time, BANA serviced the loan secured by the Deed of Trust.

monthly assessments to be $55.00, meaning the total amount of the last nine months of delinquent assessments was $495.00.

On December 6, 2012, Miles Bauer sent $1,494.50—which included both the $495.00 for delinquent assessments and $999.50 in "reasonable collection costs"—to Alessi with a letter explaining that this amount was meant to satisfy the superpriority portion of the HOA's lien. (5AA 1183-85). Alessi refused to accept this tender and returned the check to Miles Bauer. (5AA 1174).

On January 26, 2013, the HOA non-judicially foreclosed on the Property. (6AA 1245). According to the recorded Trustee's Deed Upon Sale, the HOA sold the Property to Clover Blossom for $8,200.00. *Id*.

According to an appraisal, the fair market value of the Property on the date of the sale was $105,000. (6AA 715-717). Based on this valuation, the Property was purchased by Clover Blossom for just 7.8 percent of its fair market value.

II. Procedural Background

On April 23, 2015, Clover Blossom filed its Amended Complaint. (1AA 001-015). Clover Blossom filed a motion for summary judgment on May 18, 2015. (1AA 016-074). U.S. Bank filed an opposition and countermotion for summary judgment on July 22, 2015. (1AA 075-162). On September 10, 2015, the district court granted summary judgment in Clover Blossom's favor. (1AA 198-204). The summary judgment was appealed by U.S. Bank and vacated by the Nevada Court of Appeals

on August 4, 2017, in Case No. 68915. The Court of Appeals held that the district court had failed to consider BANA's tender and to consider how the equities bore on the sale.

On August 16, 2017, the district court issued an order setting a 180-day period of discovery, based on a stipulation between U.S. Bank and Clover Blossom. (1AA 206-209). U.S. Bank filed an answer and counterclaim to Clover Blossom's amended complaint on October 10, 2017. (2AA 241-323).

On October 23, 2017, well before discovery was complete, Clover Blossom moved to dismiss U.S. Bank's counterclaim. (2AA 324-379). U.S. Bank filed an opposition on November 9, 2017. (2AA 380-484). In the opposition, U.S. Bank pointed out that the Nevada Court of Appeals had just remanded the case for further fact-finding and held that there were remaining material questions of fact, making any motion to dismiss untenable. (3AA 381-400).

The district court issued a written Findings of Fact, Conclusions of Law, and Judgment on February 7, 2018, that ruled against U.S. Bank and in favor of Clover Blossom on the quiet title claims. (3AA 661-674). A notice of entry of order was filed the next day. (3AA 675-695). After the district court denied U.S. Bank's motion for reconsideration, U.S. Bank appealed.

In Case No. 75861, the Court of Appeals against reversed the entry of judgment in favor of Clover Blossom. In its order, the Court held that the evidence

produced by U.S. Bank was sufficient to support a ruling that the Miles Bauer tender preserved the Deed of Trust from extinguishment in the ensuing foreclosure sale. *See U.S. Bank, Nat'l Ass'n, as Trustee v. 5316 Clover Blossom Trust*, No. 75861-COA, 2019 WL 5260057, at *2 (Nev. Ct. App. Oct. 16, 2019). The Court expressly rejected Clover Blossom's argument that the Miles Bauer tender was impermissibly "conditional." *See id.*

On remand from the second appellate decision, Clover Blossom and U.S. Bank again filed cross motions for summary judgment. On December 29, 2020, the district court entered an order granting summary judgment in favor of U.S. Bank. (7AA 1486-94). Notice of entry of the judgment was served on the same day. This appeal followed.

SUMMARY OF THE ARGUMENT

This is a routine tender case under NRS 116.3116. A mountain of binding precedent holds that when the holder of a first deed of trust delivers a check in an amount sufficient to pay the superpriority portion of an HOA's lien before the HOA's foreclosure sale, that is a valid tender and even if the check is rejected, any future foreclosure sale is rendered void as to the tendering party's deed of trust. That is exactly what U.S. Bank's servicer did here, and exactly why the district court correctly entered summary judgment in its favor.

Undeterred, Clover Blossom has filed a 74-page opening appellate brief, purporting to raise some twelve distinct issues on appeal. The opening brief weaves indiscriminately between halfhearted attempts to distinguish existing on-point authority and totally ignoring it. But at no point does Clover Blossom provide a compelling rationale in favor of reversing the district court's judgment here.

This litigation has now been ongoing for seven years, through three appeals. That is long enough. This Court should end the case by affirming the summary judgment in favor of U.S. Bank.

ARGUMENT

I. Standard of Review

"This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Id.*; NRCP 56(c).

II. This Court Should Affirm the Summary Judgment Based on BANA's Undisputed Tender of the Superpriority Amount.

This Court should affirm the district court's grant of summary judgment because the district court correctly found that under *See Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018), *as amended on*

denial of reh'g (Nov. 13, 2018), BANA's "tender was sufficient to discharge the super-priority portion of the statutory HOA lien." (7AA 1490).

A. Miles Bauer's tender cured the deficiency as to the superpriority portion of the HOA's lien and rendered the foreclosure sale void as to the Deed of Trust.

As the district court recognized, the Supreme Court of Nevada has left no doubt about the effect of a lender's pre-foreclosure tender: "[a] valid tender of payment operates to discharge a lien or cure a default." *Bank of America*, 134 Nev. at 606, 427 P.3d at 117 (citing *Power Transmission Equip. Corp. v. Beloit Corp.*, 201 N.W.2d 13, 16 (Wis. 1972)).

The United States Court of Appeals for the Ninth Circuit has also held that the *Bank of America* decision "resolves" the question presented by cases like this one. *See Bank of America, N.A. v. Arlington W. Twilight Homeowners Ass'n*, 920 F.3d 620 (9th Cir. 2019). In *Arlington West*, the Ninth Circuit interpreted the *Bank of America* decision to mean that under Nevada law "the holder of the first deed of trust can establish the superiority of its interest by showing that its tender satisfied the superpriority portion of the HOA's lien." *Id.* at 624.

Here, just as in *Bank of America*, BANA (through its counsel at Miles Bauer) tendered payment for the HOA's superpriority lien. Specifically, Miles Bauer sent Alessi a letter that offered to pay the superpriority portion. Alessi provided Miles Bauer with an itemized payoff ledger for the lien. Next, Miles Bauer sent a check

for $1,494.50 along with a letter explaining that this was composed of $495.00 for delinquent assessments and $999.50 in "reasonable collection costs" to satisfy the superpriority lien. The letter correctly defined the statutory superpriority sum as "the nine months of assessments for common expenses." *See Horizons at Seven Hills Homeowner Ass'n v. Ikon Holdings, LLC*, 132 Nev. 362, 372-73, 373 P.3d 66, 73 (2016) ("[W]e conclude the superpriority lien granted by NRS 116.3116(2) does not include an amount for collection fees and foreclosure costs incurred; rather it is limited to an **amount equal to the common expense assessments due during the nine months before foreclosure**.") (emphasis added); *accord Bank of America*, 134 Nev. at 607, 427 P.3d at 118 ("A plain reading of this statute indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments.").[2]

Under binding Nevada law, the delivery of the check from Miles Bauer "cured the default as to the superpriority portion of the HOA's lien," and meant that "the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion." *Bank of America*, 134 Nev. at 612, 427 P.3d at 121. The district court properly applied that rule in granting summary judgment in favor of U.S. Bank. That judgment should be affirmed.

[2] There is no evidence that the HOA's superpriority lien included any charges for maintenance or nuisance abatement.

B. Clover Blossom Fails to Identify any Basis for Distinguishing Binding Nevada Law Regarding Tender.

While not directly challenging the binding nature of the *Bank of America* decision, Clover Blossom nonetheless attacks is application here. But Clover Blossom's range from merely meritless to downright frivolous. Not one of its arguments has merit.

First, Clover Blossom argues that the HOA foreclosure sale extinguished the Deed of Trust. AOB at 13-15. Somewhat astoundingly, Clover Blossom makes this argument without once referencing the key issue in this case: the fact that BANA tendered payment to the HOA, and the implications of that fact under the *Bank of America* decision. While Clover Blossom purports to confront that authority elsewhere, arguing that the foreclosure sale alone meant that "title to the Property was vested in the Trust free of the extinguished deed of trust" without any mention of the fact of tender is downright disingenuous. In any case, Clover Blossom's arguments about the effect of the deed recitals were squarely rejected in *Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing LLC*, 136 Nev. Adv. Op. 85, 478 P.3d 376 (2020) ("*McLaren*"), and Clover Blossom provides no basis for distinguishing that decision.

Second, Clover Blossom purports to recognize the implications of the *Bank of America* decision, but seems to argue that it does not apply because the tender was both "conditional" and insufficient because it did not cover the full amount of

collection costs and fees incurred by Alessi.[3] As an initial matter, Clover Blossom's suggestion that the tender is conditional is not just wrong as a matter of law, *see McLaren*, 478 P.3d at 379; *Renfroe v. Carrington Mortg. Servs., LLC*, 456 P.3d 1055 (Table), 2020 WL 762638, at *2 (Nev. Feb. 14, 2020) – it is also barred by the law of the case in light of the Court of Appeals's rejection of the very same "conditional" argument. *See U.S. Bank, Nat'l Ass'n, as Trustee v. 5316 Clover Blossom Trust*, No. 75861-COA, 2019 WL 5260057, at *2 (Nev. Ct. App. Oct. 16, 2019) ("[W]e reject Clover Blossom's arguments on appeal that the tender was impermissibly conditional ….").

To the extent that Clover Blossom is arguing that the tender was insufficient because it did not cover all the fees and costs claimed by Alessi, Clover Blossom incredibly does not even address the Nevada Supreme Court's *en banc* decision in. *Ikon Holdings*, rejecting that very argument. *See id.*, 132 Nev. 362, 373, 373 P.3d 66, 73 ("For the reasons set forth above, we conclude that a superpriority lien pursuant to NRS 116.3116(2) does not include an additional amount for the collection fees and foreclosure costs that an HOA incurs preceding a foreclosure sale …."). The Supreme Court's reliance on one example in the Uniform Common

[3] Given that it is undisputed that (1) Miles Bauer delivered the tender check to Alessi and (2) the tender check was sufficient to cover the full superpriority amount of the HOA's lien, it is not necessary for this Court to consider the fact that the evidence unequivocally establishes that Alessi would have rejected any properly calculated tender check, as there is no need to apply the excuse-of-tender doctrine.

Interest Ownership Act commentary in the recent decision in *Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE*, 137 Nev. Adv. Op. 15, 485 P.3d 206, 208 (2021) (en banc) does not provide any basis to believe the Court has abandoned that precedent.

Third, Clover Blossom argues at length that and in various ways that U.S. Bank was time-barred from arguing that the Miles Bauer tender preserved the Deed of Trust in the foreclosure sale. To be clear, U.S. Bank raised the effect of the tender at least as early as June 2015, when it opposed Clover Blossom's original motion for summary judgment. But in any case, Clover Blossom's arguments fail as a matter of law. The Nevada appellate courts have **repeatedly** rejected the argument that a defense to the effect of an HOA's foreclosure sale could be untimely under a statute of limitations, applying the longstanding Nevada law holding that "[l]imitations do not run against defenses." *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 100, 389 P.2d 394, 396 (1964). *See, e.g.*, *TRP Fund VI, LLC v. Ditech Fin. LLC*, 481 P.3d 1256 (Table), 2021 WL 911899, at *1 (Nev. Mar. 9, 2021); *SFR Investments Pool 1, LLC v. JPMorgan Chase Bank, N.A.*, 478 P.3d 342 (Table), 2020 WL 7396063, at *1 (Nev. Dec. 16, 2020); *SFR Investments Pool 1, LLC v. Carrington Mortg. Servs.*, 472 P.3d 187 (Table), 2020 WL 5634160, at *1 (Nev. Sept. 18, 2020); *Renfroe*, 456 P.3d 1055 (Table), 2020 WL 762638, at *2.

Clover Blossom addresses this issue half-heartedly, arguing in vague fashion that the tender issue was not in the nature of an affirmative defense. *See* AOB at 42-46. Clover Blossom never engages the numerous unpublished decisions from the Nevada Supreme Court holding directly to the contrary. Nor does it address the *Renfroe* decision, where the Nevada Supreme Court directly rejected the notion that a tendering party has an obligation to bring some sort of affirmative claim rather than invoking tender as a defense to a claim seeking declaratory relief. *Renfroe,* 456 P.3d 1055 (Table), 2020 WL 762638, at *2 ("[W]e clarify that Carrington 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. … Therefore, it was proper for Carrington to respond to Renfroe's suit by explaining that its deed of trust was preserved upon tender, and it was not time-barred from doing so.").

Finally, Clover Blossom resorts to arguing argues in a few places that tender is an equitable concept, and thus the district court erred by failing to apply equitable concepts—such as the factors discussed in *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016) and the bona fide purchaser doctrine—to disregard the effect of Bank of America's tender. *Renfroe* specifically held (based on the *Bank of America* decision) "that a subsequent property owner is not protected as the transferee of a bona fide purchaser after a valid tender." 2020 WL 762638, at *2 (citing *Bank of America*, 134 Nev. at

609-10, 612, 427 P.3d at 119-20, 121). In doing so, the *Renfroe* decision joined a number of others that also applied *Bank of America*'s holding that tender is a legal doctrine and does not invoke equitable remedies. *See, e.g.*, *7510 Perla Del Mar Trust v. Bank of America, N.A.*, 136 Nev. 62, 65 n.1, 458 P.3d 348, 350 n.1 (2020) (holding that a tender has the legal effect of causing the association foreclosure sale purchaser to acquire title subject to the existing deed of trust and rejecting argument that equitable principles apply). Clover Blossom offers no reason to reject those binding precedents here.

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Clover Blossom's brief may be long, but it is short on substance. Every single one of its arguments is controlled by binding Nevada law. The district court properly applied that binding law to the undisputed facts of this case and granted summary judgment in favor of U.S. Bank. That judgment should be affirmed.

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CONCLUSION

For all of the above reasons, the district court's summary judgment in favor of U.S. Bank should be affirmed.

DATED this 15th day of September, 2021.

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/s/ *Lilith V. Xara*

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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 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 opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 3,447 words.

FINALLY, I CERTIFY that I have read this **Respondent's 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 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.

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I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on September 15, 2021, the foregoing **RESPONDENT'S 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/ Patricia Larsen
An employee of AKERMAN LLP