IN THE SUPREME COURT OF THE STATE OF NEVADA

DAISY TRUST, a Nevada trust

Appellant,

v.

GREEN VALLEY SOUTH OWNERS ASSOCIATION NO. 1, a Nevada non-profit corporation; and NEVADA ASSOCIATON SERVICES, INC, a Nevada corporation,

Respondents.

Supreme Court No. 82611
District Case No. A791254

RESPONDENT, GREEN VALLEY SOUTH OWNERS ASSOCIATION NO. 1'S ANSWERING BRIEF

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I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Green Valley South Owners Association No. 1 ("HOA"), ("Green Valley") or ("Respondent") has no parent company and is not publicly traded. There is no publicly traded company that owns more than 10% stock of the HOA.

The attorneys who have appeared on behalf of Respondent in this Court and in district court are:

J. William Ebert, Esq. (Nevada Bar No. 2697)
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These representations are made in order so that the judges of this Court may evaluate possible disqualification or recusal.

TABLE OF CONTENTS

II. TABLE OF AUTHORITIES
Cases

Statutes

Other Authorities

Rules

III. JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal pursuant to Nevada Rules of Appellate Procedure ("NRAP") Rule 3A(b)(1) because Daisy Trust, a Nevada Trust ("Daisy Trust" or "Appellant") appeals from a final judgment and order entered in the lower court. NRAP 4(a)(1) provides that a notice of appeal must be filed no later than 30 days after service of the written notice of entry of the judgment or order from which the appeal is made. On February 7, 2020, the district court entered its Order Granting In Part Green Valley's Motion to Dismiss Pursuant to NRCP 12(B)(5) with respect to the third cause of action for Conspiracy ("1st Order"). *See* JA-240-244. On February 16, 2021, the district court entered its Order Granting Green Valley's Motion to Dismiss as to the remaining claims. *See* JA-613-632. Daisy Trust filed its notice of appeal on March 9, 2021. *See* JA-0633-635.

IV. STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court properly determined that neither HOA, or its agent, owed a duty to disclose the existence of an attempted tender to bidders prior to the foreclosure sale that occurred on August 31, 2012 under NRS 116 or NRS 113 or common law.

2. Whether Daisy Trust's Complaint fails to state a claim upon which relief can be granted absent a statutory or common law duty on the part of the HOA or its agent to disclose the existence of an attempted tender.

V. STATEMENT OF THE CASE

Daisy Trust brought this lawsuit arguing that the HOA and its members owes it the sum of the bank's full deed of trust on a 1,245 square foot, 3 bedroom, 2 bathroom home sold for the sum of $277,900 on March 24, 2020.[1] Green Valley claims it would have not have bid on the property if the HOA representative had disclosed that the bank had attempted a tender of the super-priority portion of the lien prior to the foreclosure sale. *See* JA-5-6, Complaint ⁋ 34. The Complaint pled causes of action for Intentional/Negligent Misrepresentation, Breach of the Duty of Good Faith, Conspiracy and Violation of NRS 113 claiming that Green Valley and Nevada Association Services, Inc. ("NAS") NAS owe Daisy Trust a title free of any liens in exchange for a $3,555 investment despite the issuance of a non-warranty deed at sale. *See* JA-1-18, Complaint.

The primary issue before this Court is whether the district court properly determined that the HOA had no statutory or good-faith duties either under NRS 116 or NRS 113 on or before August 31, 2012 to disclose the bank's attempted tender to Daisy Trust prior to the foreclosure sale. *See* JA-4, Complaint ⁋ 25. The district court, determining no duty existed, subsequently found that the allegations pled in Daisy Trust's Complaint, combined with the Declaration of Eddie Haddad, taken as true, failed to state a claim upon which relief could be granted because each cause

[1] MLS#2148188

of action assumed and relied upon such a duty by the HOA. *See* JA-241-246 and JA-596-632, Orders.

VI. SUMMARY OF FACTUAL HISTORY

On or about June 5, 2008, Dennis L. Scott purchased 137 Elegante Way, Henderson, Nevada 89074 ("the Property") and obtained a purchase money loan secured by the Property from CTX Mortgage Company, LLC and evidenced by a deed of trust recorded against the Property on June 27, 2008, for the loan amount of $179,188. *See* JA-3, Complaint ⁋ 12. On September 26, 2011, the interest in the deed of trust was assigned to Bank of America, N.A. ("BANA"). Id. ⁋ 14.

Sometime after purchasing the Property, Borrower defaulted on his homeowner' assessments. *See* JA-3, Complaint ¶ 15. Therefore, on August 23, 2011, HOA, through NAS recorded a notice of delinquent assessment. *See* JA-3, Complaint ⁋ 16. On November 18, 2011, HOA, through NAS, recorded a notice of default and election to sell. *See* JA-3, Complaint ¶ 17.

In response to the notice of default and election to sell, BANA, through the law firm of Miles Bauer Bergstrom & Winters LLP ("Miles Bauer"), contacted NAS and requested that NAS identify the super-priority portion of the HOA's lien. Id. ¶ 18. There is no evidence that a response was provided in writing. Id. ¶ 20.

On February 2, 2012, BANA, through Miles Bauer, claims to have sent a check to NAS in the amount of $882 as purported payment of the super-priority

portion of the delinquent assessment lien. Id. ¶ 22. Daisy Trust further alleged that NAS rejected the tender from Miles Bauer. Id. ⁋ 23.

On August 31, 2021, HOA, through NAS, sold the Property to Daisy Trust for the sum of $3,555 and provided a non-warranty Foreclosure Deed as required by NRS 116. *See* JA-6, Complaint ¶ 25.

VII. STANDARD OF REVIEW

Orders of dismissal issued pursuant to NRCP 12(b)(5) are to be to reviewed on a de novo basis. *See Brown v. Eddie World, Inc.*, 131 Nev. 150, 152 (2015). Statutory interpretation is an issue of law that this Court review *de novo. Washoe Medical Center v. Second Judicial Dist. Court of State of Nev. Ex rel. County of Washoe,* 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006). "When a statute is clear on its face, we will not look beyond the statute's plain language." *Id.* at 793. While the Court will recognize all factual allegations in the complaint as true, the court will not defer to appellant's legal conclusions and will refer those conclusions de novo. *See Buzz Stew, LLC v. City of North Las Vegas,* 124 Nev. 224, 228 (2008).

VIII. SUMMARY OF ARGUMENT

The versions of Nevada Revised Statute ("NRS") Chapter 116 and NRS Chapter 113 in effect on August 31, 2012 did not impose a duty on Green Valley to disclose the existence of an attempted tender of the super-priority lien amount by the holder of a deed of trust prior to sale. NRS Chapter 116 imposes express

requirements upon an HOA with respect to the foreclosure process. Prior to 2015, NRS 116.31162 through NRS 116.31168 contained no express requirement that the HOA disclose an attempted tender either in writing or verbally prior to a foreclosure sale. Instead, Daisy Trust argues this duty was *implied* citing only NRS 116.1113 in support of this argument. NRS 116.1113 states that "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." This was the wording in effect at the time of sale.

NRS 116.1113 did not create *new* duties or obligations on the part of the HOA, only dictates that the duties imposed in the remaining sections of the statute be conducted in good-faith. The only "contract" between Green Valley and Daisy Trust was a *non-warranty* deed which made no representations whatsoever as to potential encumbrances to title. Daisy Trust paid $3,555 for the Property with full knowledge that it did so subject to ALL encumbrances on the property.

Additionally, as the foreclosure procedures and duties of an HOA are clearly set forth in NRS 116, Daisy Trust's arguments that an HOA by inference should be included in the category of "Seller" under NRS 113.130 and be required to complete a disclosure form which lists the bank's deed of trust as a "defect" also fails.

Since the HOA had no affirmative duty under any Nevada statute or common law to disclose the attempted tender by the holder of the deed of trust, and Daisy Trust's claims for Intentional/Negligent Misrepresentation, Breach of the Duty of

Good Faith, Conspiracy and Breach of NRS 113 all hinge on the existence of such a duty, the district court, taking all factual allegations as true, properly ruled that Daisy Trust's Complaint failed to state a claim upon which relief could be granted and found as a matter of law in Green Valley's favor. The district court's ruling was proper, and this Court should affirm the lower court's dismissal of the Complaint with prejudice.

IX. ARGUMENT

A. The District Court Did Not Err in Dismissing Daisy Trust's Claim For Intentional and/or Negligent Misrepresentation.

Daisy Trust's claims for both Intentional Misrepresentation and Negligent Misrepresentation rely on the assumption that Green Valley, through its agent NAS, had a statutory and/or common law duty to disclose that BANA tendered funds intended to satisfy the superpriority portion of the HOA lien prior to the August 31, 2012 foreclosure sale. *See Appellant's Opening Brief*, pages 14-15. This assumption is simply false and unsupported by case law or relevant statutes.

Daisy Trust, in the Opening Brief, relies on the case of *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007) to support the argument that the failure to affirmatively disclose BANA's attempted tender prior to the foreclosure sale was an "omission of a material fact" sufficient to support a claim for both Intentional and Negligent Misrepresentation. While this Court, in the *Nelson v. Heer* matter, did determine that the omission of a material fact can meet the element of a false

representation, that party had to be "bound in good faith to disclose" that fact in question. *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007). As will be discussed below, on or before August 31, 2012, neither Green Valley or NAS was under any affirmative duty under NRS 116 or NRS 113 to disclose the existence of the pre-sale tender and failing to do so was in no way inconsistent with the non-warranty deed provided after the sale.

In the case of *Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335 (Nev. 2019), this Court considered whether a HOA agent was required to disclose any tender of the superpriority portion of the lien prior to a foreclosure sale of the property. After careful analysis, this Court affirmed the district court's order granting summary judgment stating "[s]ummary judgment was appropriate on the negligent misrepresentation claim because Hampton neither made an affirmative false statement nor omitted a material fact it was bound to disclose." *Id.* (citing *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 400, 302 P.3d 1148, 1153 (2013) (providing the elements for a negligent misrepresentation claim); *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) ("[T]he suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation." (internal quotation marks omitted)). The *Noonan* Court clearly considered its prior decision in *Nelson v. Heer* and rejected those arguments as applicable to the same basic facts as set forth herein.

Similarly, in *A Oro, LLC v. Ditech Financial LLC*, 2019 WL 913129, 434 P.3d 929 (Nev. 2019) (unpublished), the Nevada Supreme Court concluded that the district court correctly granted summary judgment for the respondent homeowners association on the appellant foreclosure purchaser's fraudulent nondisclosure claim. In *A Oro, LLC*, the foreclosure purchaser challenged the district court's entry of summary judgment in favor of the lender on the tender issue. *Id*. The foreclosure purchaser had also asserted claims against the association based upon fraudulent non-disclosure of lender's tender; however, the district court awarded summary judgment in favor of the association on the foreclosure purchaser's claim. *Id*. In upholding the district court decision, the Nevada Supreme Court determined ("among other reasons") that "there [was] no evidence that [the association] intended to induce appellant into placing the winning bid at the foreclosure sale, as [the association] was unaware of appellant's assumptions regarding the legal effect of the sale." See *Id.* (emphasis added), citing Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) (setting forth the elements of a fraudulent nondisclosure claim). The *A Oro, LLC* Court also noted, "that appellant has provided no legal support for the unorthodox proposition that the winning bidder at a foreclosure sale can bring a fraud claim against the auctioneer when the auctioneer's foreclosure notices have disclaimed any warranties as to the title being conveyed." Id. at n.2 (emphasis added).

Recent unpublished decisions of the Nevada Supreme Court have also rejected Daisy Trust's arguments that there was a duty on the part of the HOA and its agent to disclose attempted tenders that created an omission supporting a misrepresentation claim. *See Saticoy Bay, LLC, Series 11339 Colinward vs. Travata and Montage at Summerlin Centre Homeowners Association, et. al.*, Case No. 80162, 2020 WL 6129987, at 1 (Oct. 16, 2020) *Unpublished Disposition*; *See Saticoy Bay, LLC, Series 3123 Inlet Bay vs. Genevieve Court Homeowners Association, et. al.*, Case No. 80135, 2020 WL 6130912, at *1 (Oct. 16, 2020); *See Saticoy Bay, LLC, Series 8320 Bermuda Beach vs. South Shores Community Homeowners Association, et. al.*, Case No. 80165, 2020 WL 6130913, at *1 (Nev. Oct. 16, 2020); *See Saticoy Bay, LLC, Series 6408 Hillside Brook vs. Mountain Gate Homeowners Association, et. al.*, Case No. 80134, 2020 WL 6129970, at *1 (Nev. Oct. 16, 2020); *See Saticoy Bay, LLC, Series 8920 El Diablo vs. Silverstone Ranch Homeowners Association, et. al.*, Case No. 80039, 2020 WL 6129887, at *1 (Oct. 16, 2020); *LN Management LLC Series 4980 Droubay v. Squire Village at Silver Springs Community Association*, No. 79035, 2020 WL 6131470, at *1 (Nev. Oct. 16, 2020); *Tangiers Drive Trust v. The Foothills at MacDonald Ranch Master Association*, No. 78564, 2020 WL 6131435, at *1 (Nev. Oct. 16, 2020); *Cypress Manor Drive Trust v. The Foothills at McDonald Ranch Master Association*, No. 78849, 2020 WL 6131467, at *1 (Nev. Oct. 16, 2020).

As to the claim of Negligent Misrepresentation, Daisy Trust also argues that the district court erred in dismissing its claim under a NRCP 56(b) analysis because adequate facts were plead to support the claim even absent an affirmative duty to disclose pursuant to this Court's analysis in *Barmettler v. Reno Air, Inc.*, 114 Nev.441 (1998). These alleged facts were that Green Valley and NAS had a pecuniary interest in the outcome of the foreclosure sale and that they "…supplied false information (or at least omitted information) when asked whether a tender/Attempted Payment had been made, upon which Appellant justifiably relied." *See Appellant's Opening Brief*, page 15-16. This is simply not the case. At no point in the Complaint or briefing did Daisy Trust ever allege a specific inquiry made to NAS or Green Valley prior to or during the foreclosure sale to which either provided false information or ignored a documented inquiry about any presale tender. There was only a vague Declaration from Eddie Haddad that he generally would attempt to determine whether a tender had been issued prior to sale. *See* JA-0334. This Declaration contained no specific information as to the Property, including what attempts were made to contact Green Valley or NAS prior to the sale, whether he was able to speak to anyone representing either, who he spoke to, what was said or not said or any other details which would provide a sufficient basis to support that either Green Valley or NAS "supplied false information for the guidance of others in their business transactions…" *See Id.* at 449. Such vague allegations are also

insufficient to support a claim that Haddad had a "…justifiable reliance upon the information…" *Id.* The only fact pled specifically as to the Property were that the foreclosure deed states that the Property was sold 'without warranty expressed or implied," as required by NRS 116.31164(3)(a) as it existed at the time of the sale. *See* JA-84-85. Under the weight of the Nevada Supreme Court's decision in *Noonan, A Oro,* the multitude of unpublished opinions identical to the facts as alleged in this case, as well as the express provisions of NRS 116, Daisy Trust is unable to assert as a matter of law that the HOA or its agent intentionally or negligently misled it by not disclosing an attempted tender.

B. The District Court Did Not Err in Determining That, At The Time of the Foreclosure Sale, The HOA Had No Legal Duty To Affirmatively Disclose The Existence Of An Attempted Tender Under NRS Chapter 116.

Daisy Trust alleges that Green Valley, through its agent NAS, breached its duty of good faith under NRS 116.1113 by failing to disclose the existence of the Miles Bauer tender. *See* JA-10-11, Complaint ¶¶ 71-81. This claim presupposes such a duty exists despite the lack of any such specific requirements in the pre-2015 version of NRS 116 in existence at the time of the foreclosure sale.

It is true that NRS 116.1113 imposes a duty of good faith in the performance of every contract or duty governed by the statute. Nev. Rev. Stat. § 116.1113. However, the only "duties" owed to Daisy Trust are outlined in sections 116.31162 through 116.31168. HOA complied with these duties by complying with all notice

and recording requirements set forth in NRS 116 as it existed at the time of the sale. HOA was not required to disclose the existence of a pre-sale tender of the super-priority portion of the lien. Further, it was specifically prohibited from giving any purchaser at auction a so-called warranty deed. The only type of deed it could give to any purchaser was one made "without warranty" pursuant to NRS 116.31164(3)(a).

The 2015 Legislature substantially revised NRS 116, see 2015 Nev. Stat., Ch. 266. Under the current version of the statute, an HOA is required to record satisfaction of the super-priority lien at least 5 days before the date of sale. See Nev. Rev. Stat. § 116.31164(2). The current version of the statute, however, is not controlling here. The version that applies is the version that was in effect at the time of the events giving rise to this action. See generally *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 313 P.3d 849, 853 (Nev.,2013) ("Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively."); see also *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1487, 511 U.S. 244, 245 (U.S.Tex.,1994) ("The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.").

In an effort to circumvent the clear legislative intent, Daisy Trust attempts to piggy-back the good-faith language of NRS116.1113 with Comments to Section 1-113 of the Uniform Common Interest Ownership Act ("UCIOA") and argue that the two statutes combined together imposed a responsibility upon the HOA to affirmatively disclose any tenders to potential bidders to comply with a "candor" element of the good-faith duty. *See* Opening Brief, pages 17-18. Daisy Trust further grasps at the Restatement (Second of Contracts) Section 205 to tie candor and honesty into the provision. *Id.*

Implicit, however, in the application of these principles to the instant matter is the fact that NRS 116.1113 does not impose extra-statutory duties on an HOA; it only governs existing contracts and duties. See generally *PennyMac Corp. v. SFR Investments Pool 1, LLC*, 2018 WL 4413612, at *3 (Nev., 2018) (unpublished) ("Accordingly, we are not persuaded that the agent's failure to undertake the extra-statutory duty … amounts to unfairness sufficient to set aside the sale.")

Daisy Trust's complaint has not identified any deficiencies in the HOA's compliance with the notice and recording requirements of NRS 116 as they existed at the time of the sale, nor will it address the fact that the HOA was statutorily prohibited from giving any purchaser at auction a so-called warranty deed. See Nev. Rev. Stat. § 116.31164(3)(a). Daisy Trust's numerous opinions on what the HOA or NAS "could have" done do not create a duty or give rise to a violation of the statute.

The only applicable contract to be interpreted between the parties in this matter is the Foreclosure Deed. That Foreclosure Deed specifically set forth that the HOA provided no warranties as to the title of the Property. As the Deed of Trust had been recorded, and the HOA made no representations as to the title, Daisy Trust has no argument that the HOA or its agent acted in a manner inconsistently with the contract between the parties.

In *Noonan,* this Court held that NRS Chapter 116 did not impose a duty to disclose an attempted tender on the HOA or its agent based on a comparison of the 2013 version with the 2017 version of the statute. The analysis would be the same for the 2015 version of the statute.

C. The District Court Did Not Err in Determining That, At The Time of the Foreclosure Sale, The HOA Had No Legal Duty To Affirmatively Disclose The Existence Of An Attempted Tender Under NRS Chapter 113.

Daisy Trust also argues that the HOA was required to disclose the existence of the tender pursuant to NRS 113.130, a statute which governs the disclosure of certain defects on residential property, as well as services, land uses (open range), and zoning classifications, is equally misplaced. See Opening Brief, p. 27-32; see also Nev. Rev. Stat. 113.060, et. seq.

The bank's pre-sale tender does not fit into any of the disclosure categories contemplated by NRS 113. It is not a water or sewage service, nor does it involve

open range liability, zoning classifications, gaming enterprise districts, or transfer fee obligations. See Nev. Rev. Stat. §§ 113.060 through 113.085. It also does not qualify as the discovery or worsening of a defect subject to disclosure under NRS 113.130.

A "defect" is defined as "a condition that materially affects the value or use of residential property in an adverse manner." *See* Nev. Rev. Stat. § NRS 113.100(1). The key to disclosure under this section is the seller's realization, perception, and knowledge of the alleged defect. *See Nelson v. Heer*, 123 Nev. 217, 224163 P.3d 420 (2007); *see also* Nev. Rev. Stat. §113.140(1). A seller is not required to disclose defects of which he is unaware. *Id*.

The difficulty of applying these provisions to the instant matter cannot be understated. There is no authority supporting the argument that NRS 113.130 applies to disclosure of the potential risks associated with purchasing property at an NRS 116 foreclosure sale. In fact, most if not all cases interpreting NRS 113.130 involve a seller's obligation to disclose physical defects in real property.[2] Furthermore, the

[2] See *e.g.* cases involving alleged violations of NRS 113.130: *Laurrance v. Deutsche Bank Nat. Trust Co. ex rel. American Home Mortg. Assets Trust 2006-5*, 2015 WL 5521879, at *2 (D.Nev.,2015) (failure to disclose existence of pipelines); *Lo v. Federal Nat. Mortg. Ass'n*, 2015 WL 4662630 (D.Nev.,2015) (failure to disclose mold); *Webb v. Shull*, 270 P.3d 1266, 1268, 128 Nev. 85, 88 (Nev.,2012) (failure to disclose soil defects); *Allstate Ins. Co. v. Burney*, 2009 WL 2834954, at *1

pertinent disclosure requirements of NRS Chapter 113 apply to sellers. NRS Chapter 113 defines a "seller" as "a person who sells or intends to sell any residential property." NRS 113.100. In the instant action, the HOA was not a "seller" under that definition, but merely an entity foreclosing on a lien. Neither the HOA or its agent ever claimed any interest to the property.

Furthermore, nowhere in either NRS 113 or NRS 116 do the statutes suggest the Seller's Real Property Disclosure Form ("SRPDF") should be supplied in NRS 116 foreclosure sales. Plaintiff alleges that the "Residential Disclosure Guide (the "Guide") suggests Defendants should supply the SRPDF. However, the actual Guide does not ever refer to the HOA or HOA Agent as possible sellers for which the SRPDF might apply or refer to a HOA foreclosure sale, or suggest the SRPDF applies to NRS 116 Foreclosure Sales.

The Guide suggests to protect oneself from a faulty SRPDF in buying a home, "[t]he Buyer is advised to obtain an independent inspection performed by a properly licensed home inspector." NRS 116 foreclosure properties are not open for inspection prior to sale, and NRS 116 foreclosure homes may be occupied, for which the buyer assumes the responsibility.

(D.Nev.,2009) (faulty construction and repair of driveway and retaining walls); Nelson, 123 Nev. 217 (failure to disclose water damage).

The Nevada Supreme Court clearly agrees with this analysis. "Similarly, and assuming without deciding that NRS Chapter 113 applies to NRS Chapter 116 sales, NRS 113.130 requires a seller to disclose "defect[s]," not superpriority tenders. NRS 113.100 defines "Defect" as "a condition that materially affects the value or use of residential property in an adverse manner." To the extent that a deed of trust counsel conceivably constitutes a "condition," we note that the subject property technically has the same "value" regardless of whether it is encumbered by the deed of trust. In a footnote, the Court further stated "Nor are we persuaded that the Seller's Real Property Disclosure Form would require disclosure of a superpriority tender." *See See Saticoy Bay, LLC, Series 3123 Inlet Bay vs. Genevieve Court Homeowners Association, et. al.* (Case No. 80135) (2020), page 2.

D. The District Court Did Not Err in Concluding That Daisy Trust Failed to State a Claim For Civil Conspiracy.

Daisy Trust's conspiracy claim fails for similar reasons. To establish a claim for civil conspiracy, Daisy Trust must show (1) that Defendants, by acting in concert, intended to accomplish an unlawful objective for the purpose of harming Daisy Trust; and (2) that Daisy Trust sustained damages resulting from defendants' act or acts. See *Consol. Generator-Nevada, Inc. v. Cummins Engine* Co., 114 Nev. 1304, 971 P.2d 1251 (1999); see also *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98 (1998). Daisy Trust cannot meet this evidentiary burden. In this case, as discussed above, there was no unlawful objective because neither Green Valley or

NAS had a duty to disclose the existence of the attempted tender prior to sale. But if this Court continues its analysis, the claim becomes even weaker because (1) NAS would have rejected the tender because the parties disputed the amounts due and owing under the statute; and (2) the Property was sold without warranty as to encumbrances. Recent unpublished decisions of the Nevada Supreme Court have set forth that such conduct is not unlawful, and therefore a conspiracy claim cannot be maintained. *See Saticoy Bay, LLC, Series 11339 Colinward vs. Travata and Montage at Summerlin Centre Homeowners Association, et. al.*, Case No. 80162, 2020 WL 6129987, at 1 (Oct. 16, 2020) *Unpublished Disposition*; *See Saticoy Bay, LLC, Series 3123 Inlet Bay vs. Genevieve Court Homeowners Association, et. al.*, Case No. 80135, 2020 WL 6130912, at *1 (Oct. 16, 2020); *See Saticoy Bay, LLC, Series 8320 Bermuda Beach vs. South Shores Community Homeowners Association, et. al.*, Case No. 80165, 2020 WL 6130913, at *1 (Nev. Oct. 16, 2020).

Finally, there can be no conspiracy between Green Valley and NAS under the preclusive weight of the intra-corporate conspiracy doctrine, which stands for the proposition that "agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." See *Collins v. Union Federal Sav. & Loan Ass'n*, 662 P.2d 610, 622, 99 Nev. 284, 303 (Nev.,1983). Therefore, to sustain a claim for conspiracy against agents and their

corporation, Daisy Trust must prove that one or more of the agents acted outside of the scope of their employment "to render them a separate person for the purposes of conspiracy." See *Faulkner v. Arkansas Children's Hosp*., 69 S.W.3d 393, 407, 347 Ark. 941, 962 (Ark.,2002).

Daisy Trust has not plead facts sufficient to meet this standard. To the contrary, Daisy Trust plead that the HOA and NAS, "acting together … reached an implicit or express agreement amongst themselves whereby they agreed to withhold the information concerning the Attempted Payment of the Super-Priority Lien Amount…" See Complaint ⁋ 84. The Complaint makes no allegations whatsoever that NAS acted outside of its scope as HOA's agent or for its individual advantage. Its conspiracy claim must be dismissed accordingly. Daisy Trust's reliance on *Tricarichi v. Cooperative Rabobank, U.A.*, 440 P.3d 645 (Nev. 2019) does not rebut this legal position. This case applies in instances where the alleged co-conspirators in fact were not in legal agency relationship, and are treated so for the purpose of the conspiracy analysis. *See* Opening Brief, pages 32-34. Daisy Trust's Complaint fails to clearly set forth that NAS acted in its individual capacity, or what economic benefit it received by this course of action. The Complaint's conspiracy claim must be dismissed accordingly.

X. CONCLUSION

Based on the above, the HOA respectfully submits that the Motion to Dismiss entered in favor of the Defendants should be affirmed in its entirety.

Dated this 2nd day of September, 2021.

LIPSON NEILSON P.C.

/s/ Janeen V. Isaacson

By: _____

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XI. AFFIRMATION

The undersigned does hereby affirm that the proceeding document does not contain the social security number of any person.

Dated this 2nd day of September, 2021.

LIPSON NEILSON P.C.

/s/ Janeen V. Isaacson

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XII. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

[a] This brief has been prepared in a proportionally spaced typeface using Word 2016 Times New Roman Font Size 14.

2. 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 brief exempted by NRAP 32(a)(7)(C), it is:

[a] Proportionately spaced, has a typeface of 14 points or more, and contains 4,750; or

[b] does not exceed 30 pages.

3. I certify pursuant to NRAP 28.2 that I have read that the attached Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any other 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. 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 2nd day of September, 2021.

LIPSON NEILSON P.C.

/s/ Janeen V. Isaacson

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2021, I electronically filed the foregoing **RESPONDENT, GREEN VALLEY SOUTH OWNERS ASSOCIATION NO. 1'S ANSWERING BREIF** via the Court's E-Flex System to the following.

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