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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| LN MANAGEMENT LLC SERIES 7258 PINE BARRENS,<br><br>Plaintiff,<br><br>vs.<br><br>SINAN PEN, an individual; PRAYUTE TUPPA, an individual; BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,<br><br>Defendants. | Case No.: A-13-682746-C<br><br>Dept.: XXXI<br><br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** |
| BANK OF AMERICA, N.A.,<br><br>Counter-claimant,<br><br>v.<br><br>LN MANAGEMENT LLC SERIES 7258 PINE BARRENS,<br><br>Counter-defendants. | |
| BANK OF AMERICA, N.A.,<br><br>Third Party Complainant,<br><br>v.<br><br>VENEZIA COMMUNITY ASSOCIATION, a domestic non-profit corporation,<br><br>Third Party Defendant. | |

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155



Docket 75270 Document 2018-13807

Case Number: A-13-682746-C

VENEZIA COMMUNITY ASSOCIATION, a domestic non-profit corporation,

Third Party Complainant,

v.

RED ROCK FINANCIAL SERVICES, LLC,

Third Party Defendant.

Trial of this matter occurred on December 18 and 19, 2017. The Court adopts the parties' stipulated facts and stipulated exhibits numbered 1 through 26. The Court also heard testimony from Eddie Haddad on behalf of Plaintiff; Rock Jung formerly with the Miles Bauer law firm; Julia Thompson on behalf of Red Rock; and Cindy Manning on behalf of the HOA. Having heard all the evidence and arguments of the parties, the Court enters the following Findings of Fact, Conclusions of Law, and Judgment:

## I. FINDINGS OF FACT

1. On or about December 7, 2009, Sinan Pen and Prayute Tuppa (**Borrowers**) purchased real property located at 7258 Pine Barrens Street, Las Vegas, Nevada 89148 (the **Property**). Stipulated Fact ¶ 1.

2. The Property is located in a common-interest community called Venezia Community Association (**Venezia** or **HOA**), which is governed by Declarations of Community Covenants & Restrictions (aka **CC&Rs** or **Declarations**) recorded with the Clark County Recorder on August 6, 2002, in Book Number 20020806, as Instrument Number 01138. Stipulated Fact ¶ 2.

3. The Borrowers financed the purchase with a loan in the amount of $115,862.00. Stipulated Fact ¶ 3.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

4. The loan is secured by a Deed of Trust in favor of Bank of America, N.A., which was recorded on December 15, 2009, with the Clark County Recorder as Instrument No. 200912150000144 (the **Deed of Trust**). Stipulated Fact ¶ 4; Trial Exhibit 1.

5. The Deed of Trust contains a Planned Unit Development rider that states if the Borrowers do not pay the dues and assessments when due, then the lender may pay them. Trial Ex. 1.

6. The Borrowers defaulted on their payments under the Note and Deed of Trust. Stipulated Fact ¶ 5.

7. The unpaid principal balance due on the loan secured by the Deed of Trust as of November 24, 2015, was $156,360.96. Stipulated Fact ¶ 6.

8. The CC&Rs required the Borrowers to pay Venezia Community Association (**HOA**) periodic assessments. Stipulated Fact ¶ 7.

9. The Borrowers became delinquent on their HOA assessments in March of 2010 and, on October 26, 2010, the HOA, through its foreclosure agent and trustee, Red Rock Financial Services, LLC (**Red Rock**), recorded a Lien for Delinquent Assessments (**Lien**) as Instrument No. 201010260002223. Stipulated Fact ¶ 8. The monthly assessment was $37.50 from January 1, 2010, through October 4, 2012, and at the time the lien was recorded, Borrowers owed, among other things, four months of assessments. *Id.*; Trial Exhibit 22 at RRFS 136.

10. The Lien stated that the amount due to the HOA was $689.00, which included assessments, late fees, interests, fines/violations, and collection fees and costs. Stipulated Fact ¶ 0; Trial Exhibit 4.

11. The Property's HOA account did not include any charges for nuisance abatement or costs related to the maintenance of the exterior of the Property. Stipulated Fact ¶ 10.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

12. Red Rock mailed a copy of the Lien to the Borrowers. Stipulated Fact ¶ 11.

13. On December 16, 2010, the HOA, though the HOA Trustee, recorded a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments (**NOD**), Instrument No. 201012160003124. The Notice stated the amount due to the HOA was $1,743.17, which included assessments, dues, interest, and fees. Stipulated Fact ¶ 12; Trial Exhibit 5.

14. Bank of America, through its counsel at Miles Bauer Bergstrom & Winters (**Miles Bauer**), mailed correspondence to the HOA, via Red Rock, on January 19, 2011, in relation to the HOA's lien. Stipulated Fact ¶ 13; Trial Exhibit 19.

15. The January 19, 2011, included an offer by Miles Bauer, on behalf of the deed holder, to pay the superpriority portion of the HOA's lien. Trial Ex. 19 at BANA/Pen-01-00060.

16. Red Rock did not respond to this letter because it had already explained its position concerning superpriority to Miles Bauer previously. Trial Ex. 22 at RRFS 231.

17. On February 2, 2011, in response to Miles Bauer's emailed request for a payoff, Red Rock provided a ledger associated with the property, which included assessments, interest, costs, and fees totaling $1,946.02. Stipulated Fact ¶ 14; Trial Ex. 22 at RRFS 313–317.

18. Miles Bauer responded on or about February 18, 2011, by sending a letter and a check for $337.50 to Red Rock. The $337.50 was equal to the last nine months of delinquent assessments, which was the maximum amount the HOA could claim had superpriority over the Deed of Trust. Stipulated Fact ¶ 15.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

19. Red Rock acknowledged receipt of the check on February 18, 2011, and subsequently returned the $337.50 check to Miles Bauer without explanation in March 2011. Stipulated Fact ¶ 15 and ¶ 16.

20. At no time after the rejection of its alleged tender did Bank of America communicate with the HOA or Red Rock concerning the subject property.

21. On September 10, 2012, the HOA, through Red Rock, recorded a Notice of Foreclosure Sale Under The Lien for Delinquent Assessments, Instrument No. 201209100001418, setting the sale for October 4, 2012. Stipulated Fact ¶ 17; Trial Exhibit 10.

22. The Notice stated that the amount due to the HOA was $3,917.85. Stipulated Fact ¶ 18; Trial Ex. 10.

23. Red Rock posted the Notice of Sale at the Property and published notice in Nevada Legal News for three consecutive weeks before the sale. Stipulated Fact ¶ 19.

24. Bank of America did not present any evidence that Red Rock did not comply with the notice and posting requirements, including posting the Notice of Sale on the property, in public, and publishing the notice in Nevada Legal News.

25. On October 4, 2012, Red Rock, through a third party, auctioned the Property HOA. Stipulated Fact ¶ 20.

26. The sale was attended by Eddie Haddad, the trustee for Pine Barrens Street Trust. Stipulated Fact ¶ 21.

27. Through Mr. Haddad, Pine Barrens Street Trust was the winning bidder and paid $6,100.00 at the HOA's foreclosure sale, which is good and valuable consideration. Stipulated Fact ¶ 22.

28. Bank of America did not attend the sale.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

29. Pine Barrens Street Trust recorded a Foreclosure Deed on October 15, 2012, with the Clark County Recorder as Instrument Number 201210150000056. Stipulated Fact ¶ 23; Trial Exhibit 11. The Deed states that the property was granted to Pine Barrens Street Trust "without warrant express or implied." Trial Ex. 11.

30. The Foreclosure Deed (Trial Ex. 11) contains recital language affirming compliance with all notice requirements:

> This conveyance is made pursuant to the powers conferred upon Agent by Nevada Revised Statutes, the Venezia Community Association governing documents (CC&Rs) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 12/16/2010 as Instrument Number 0003124 Book 20101216 which was recorded in the office of the recorder of said county.
>
> Red Rock Financial Services has complied with all requirements of law including, but not limited to, the elapsing of the 90 days, the mailing of copies of the Notice of Delinquent Assessment Lien and Notice of Default and Election to Sell, and the posting and publication of the Notice of Sale.
>
> Said property was sold by said Trustee at public auction on 10/4/2012 at the place indicated on the Notice of Sale.

31. Plaintiff had no notice that any party had offered to or had tendered the superpriority portion of the lien nor did they have notice that Red Rock had accepted any payment of the superpriority lien.

32. On or around November 28, 2012, Red Rock caused to be recorded a Release of Lien for Delinquent Assessments, rescinding and withdrawing the Lien for Delinquent Assessments recorded on October 26, 2010. Trial Exhibit 12.

33. On May 22, 2013, Pine Barrens Street Trust transferred the Property to LN Management LLC, Series 7258 Pine Barrens (**Plaintiff**) via

Quitclaim Deed, which was recorded as Instrument No. 2013052300004695. LN Management is managed by Mr. Haddad. Stipulated Fact ¶ 24; Trial Exhibit 18.

34. Bank of America's appraiser, Scott Dugan, is an expert appraiser qualified to render an opinion concerning value. Stipulated Fact ¶ 25.

35. Mr. Dugan's opinion of fair market value of the Property (as defined by the FDIC Interagency Appraisal and Evaluation Guidelines (December 2, 2010) Appendix D) is that it was worth $119,000.00 at the time of the auction. Stipulated Fact ¶ 26.

36. The purchase price paid at the HOA Sale by Plaintiff is, thus, approximately 5% of the Property's fair market value at the time of the sale. Stipulated Fact ¶ 27.

37. The $6,100.00 in proceeds from the HOA's foreclosure sale were directed as follows: (1) $1,364.51 to the HOA; (2) $2,495.15 to Red Rock for its fees; (3) $364.00 to North American Title Company; (4) $1,397.14 to Sinan Pen and Prayute Tuppa as the prior owners; and (5) $479.20 to Republic Services as a sub-lien holder. Bank of America received none of the sale proceeds. Stipulated Fact ¶ 29; Trial Ex. 22 at RRFS 98.

## II. CONCLUSIONS OF LAW

1. "A quiet title action . . . is the proper method by which to adjudicate disputed ownership of real property rights." *Howell v. Ricci*, 124 Nev. 1222, 1224, 197 P.3d 1044, 1046 (2008). "An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim." NRS 40.010.

2. NRS 30.010 et seq. gives courts "power to declare rights, status and other legal relations." Plaintiff and Bank of America both seek declaratory relief under that statute.

3. Here, Plaintiff and Bank of America request declaratory relief and/or to quiet title. The sale did not extinguish the Deed of Trust because: (1) Bank of America tendered payment for the superpriority portion of the lien; (2) the HOA only foreclosed on the sub-priority portion of the lien; (3) Plaintiff is not a bona fide purchaser; and (4) the Deed of Trust survived as a matter of equity.

**Bank of America's tender extinguished the Superpriority**

4. In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (2014), the Nevada Supreme Court held that a first deed of trust holder's pre-foreclosure tender of the superpriority amount of the HOA's lien prevents the first deed of trust from being extinguished. 334 P.3d at 414 ("[A]s junior lienholder, [the holder of the first deed of trust] could have paid off the [HOA] lien to avert loss of its security[.]"). In fact, the drafters of the Uniform Common Interest Ownership Act (**UCIOA**), adopted by Nevada as NRS 116, *et seq.*, contemplated this result when drafting the superpriority provision, stating that "[a]s a practical matter, secured lenders will most likely pay the [nine] months assessments demanded by the association rather than having the association foreclose on the unit." 1982 UCIOA § 3-116 cmt. 1 (cited with approval in *SFR Investments*, 334 P.3d at 414.).

5. Further, the Nevada Real Estate Division of the Department of Business and Industry, the agency charged with administering the HOA Lien Statute, has explained that it is "likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by [an HOA]." 13—01 Op. Dep't of Bus. & Indus., Real Estate Div. 18 (2012); *see also Folio v. Briggs*,

99 Nev. 30, 34, 656 P.2d 842, 844 (1983) (explaining that courts "are obliged to attach substantial weight to [an] agency's interpretation" of a statute it is charged with administering).

6. Nevada's Supreme Court has confirmed that the only portion of the HOA's lien that is prior to the first deed of trust's interest is that amount for nine months of assessments only. *Horizons at Seven Hills Homeowners Assoc. v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35 (Apr. 28, 2016). As the Supreme Court held, "Taking into consideration the legislative intent, the statute's text, and statutory construction principles, we conclude the super priority 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." *Id.* at p. 13. The HOA's foreclosure begins at the recording of the notice of delinquent assessment lien. *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 231, 133 Nev. Adv. Op. 3 (2017). *See also Property Plus Investments, LLC v. Mortgage Electronic Registration Systems Inc., et al.*, 133 Nev. Ad. Op. 62 (Sept. 2017).

7. Here, the Borrowers became delinquent on their HOA assessments in March of 2010. The HOA, through its Trustee, recorded its Lien eight months later on October 4, 2012. Shortly after the HOA Trustee recorded the Notice of Default and Election to Sell, Bank of America, through its counsel at Miles Bauer, contacted the HOA Trustee and requested a payoff ledger detailing the superpriority amount of the HOA's lien. In accordance with the payoff ledger, BANA calculated the superpriority portion and tendered a check to the HOA Trustee on or about February 18, 2011 in the amount of $337.50—an amount equal to nine months of assessments, which was the maximum statutory

superpriority lien amount, as there were no nuisance of abatement charges as part of the lien.

8. Miles Bauer's letter was not conditional in this case, but to the extent the tender was conditional, Bank of America had a right to insist on the given condition. The Miles Bauer letter merely stated that the payment would be made upon satisfactory proof of the amount owed. A statement is only conditional if it is not limited by a condition. *See* "unconditional" Black's Law Dictionary (14th ed. 2014). Here, the Miles Bauer letter does not make the payment of the superpriority amount dependent on an uncertain or contingent event, nor, importantly, does it require the HOA or HOA Trustee to waive any rights.

9. Further, even if the letter were deemed to be conditional, it is irrelevant for purposes of this particular case as it is undisputed, by the testimony and exhibits, that Red Rock did not reject Miles Bauer's payment because of any conditions in the letter but, instead, based on Red Rock's position that there was no superpriority portion of the HOA's lien upon which Red Rock was foreclosing.

10. Red Rock did not reject Miles Bauer's payment because of the language on the check stub, nor did Red Rock believe Miles Bauer intended to pay off the entirety of the HOA's lien.

11. Red Rock's rejection of the check was unjustified, and Bank of America's efforts constituted sufficient tender under applicable law to extinguish the superpriority portion of the lien.

12. Bank of America's tender left the sub-priority portion as the sole portion of the HOA's lien. The sale, therefore, had no impact on the first Deed of Trust. "A foreclosure sale by a junior mortgagee has no effect on the rights of senior lienholders because the purchaser of a junior mortgage takes subject to

priority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust." *Id.*

18. The Nevada Supreme Court has made clear that an HOA can choose to foreclose on either the sub-priority or superpriority portion of its lien. *See Shadow Wood*, 366 P.3d at 1116 ("And **if** the association forecloses on its superpriority lien portion, the sale would extinguish other subordinate interests in the property.") (emphasis added). *See also*, *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. Adv. Op. 35, 373 P.3d 66, 73–74 (2016) (recognizing that the HOA's superpriority lien remained on the property after the lender foreclosed); *SFR Inv. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014).

19. The parties' intent "determine[s] the nature and extent of the estate conveyed" by a deed. *City Motel, Inc. v. State ex rel. State Dept. of Highways*, 75 Nev. 137, 141, 336 P.2d 375, 377 (1959). "Parties usually describe in the granting clause of a deed all that they intend to convey." *Coppermines Co. v. Comins*, 38 Nev. 359, 148 P. 349, 354 (1915). "[A] party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey." *Brophy Min. Co. v. Brophy & Dale Gold & Silver Min. Co.*, 15 Nev. 101, 113 (1880).

20. Nothing in any of the recorded documents sets forth an intention to foreclose on the superpriority component of the lien. For example, NRS 116.31162(1)(b)(1), as it existed at the time of the sale, states that the HOA's Notice of Default must "describe the deficiency in payment." The Notice of Default does not describe any portion of its lien as having seniority over Bank of America's Deed of Trust.

21. Instead, Red Rock had communicated to Miles Bauer, before this sale, that Red Rock's position was that a first Deed of Trust is senior to an HOA

the rights of all senior liens and encumbrances." *In re Del Gizzo*, 5 B.R. 446, 448 (Bankr. D.R.I. 1980) (citing *Brunette v. Myette*, 40 R.I. 546, 102 A. 520 (1918)).

13. Plaintiff purchased the property at the HOA's sub-priority sale subject to the Deed of Trust. *See* NRS 116.31164(3)(a) (the purchaser at an HOA foreclosure receives "a deed without warranty which conveys to the grantee all title of the unit's owner to the unit." NRS 116.31164(3)(a)).

14. Plaintiff's arguments under *Shadow Wood* that Bank of America should have done more to protect its interest are not applicable to the present case as there was a tender of the superpriority amount and the actions of Red Rock as discussed below.

15. Further, Plaintiff's arguments about keeping the tender good are unavailing because Red Rock held Miles Bauer's check for several weeks before returning it, and gave Miles Bauer no indication why it initially accepted the check and then returned it, and given the other representations of Red Rock in the instant case. Further, based on the testimony of the Red Rock witness and Rock Jung (Miles Bauer) that the tendered checks were routinely rejected tendered checks, there would be no basis for Bank of America, through Miles Bauer, to do what Plaintiff suggested.

**Alternatively, the HOA Foreclosed on Only a Sub-priority Lien**

16. In addition to the tender, The HOA foreclosure sale did not extinguish the Deed of Trust because the sale was for the sub-priority portion only.

17. Pursuant to NRS 116.3116, an HOA's lien is split "into two pieces, a superpriority piece and a sub-priority piece." *SFR Investments*, 334 P.3d at 410. The "superpriority piece" is "prior to a first deed of trust." *Id.* "The sub-

lien and that there was no superpriority portion unless and until the first Deed holder forecloses.

22. The witnesses for Red Rock and the HOA testified that they intended only a sub-priority sale.

23. Given the above representations and conduct, Plaintiff's intent to purchase a superpriority does not alter the outcome that the sale was only for the superiority portion of the lien. Further, given the disclaimer of warranties and covenants concerning title, and the sale's effect on other encumbrances, does not weigh in favor of a superpriority sale.

24. No evidence was presented of a script at sale or any announcement by the sale's crier, so no evidence was presented that the crier announced this sale as a superpriority or sub-priority sale.

25. The Foreclosure Deed was silent on superpriority, and the Court cannot imply a superpriority into the Foreclosure Deed, especially when the Deed disclaims warranties.

26. Additionally, the HOA Trustee's distribution of the foreclosure sale proceeds supports the determination that the HOA Trustee foreclosed on the sub-priority portion of the HOA's lien. This distribution—in which the HOA Trustee paid the HOA for the full value of its lien without providing any proceeds to Bank of America—could occur only if the HOA Trustee foreclosed on the sub-priority lien, as a superpriority foreclosure would have required the HOA Trustee to pay off the full amount of the loan secured by Bank of America's Deed of Trust before paying off the sub-priority portion of the HOA's lien and to pay Bank of America before sending any proceeds to the Borrowers.

27. NRS 116.31164 mandates the proceeds from a superpriority foreclosure be distributed in the following order: (1) the reasonable expenses of the sale; (2) expenses of securing possession and paying governmental charges

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

133 Nev. Adv. Op. 91 (Nov. 22, 2017), *citing Zyzzx 2 v. Dizon*, No. 2:13-cv-1307, 2016 WL 1181666, at *5 (D. Nev. Mar. 25, 2016).

37. In addition, it was unfair for Red Rock to reject tender, and Bank of America was entitled to rely on its tender and on Red Rock's representations that the foreclosure would not affect the Deed of Trust.

**Even if Plaintiff was viewed as a Bona Fide Purchaser, the balance of equities lies in favor of Bank of America**

38. To be a bona fide purchaser, one must take property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Shadow Wood*, 366 P.3d at 1115 (citing *Bailey v. Butner*, 176 P.2d 226, 234 (Nev. 1947); *see also, Nationstar Mortgage LLC, v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (Nov. 22, 2017) (making no mention of *bona fide* purchaser in determining whether an HOA foreclosure extinguishes a first deed of trust). Under Nevada law, bona fide purchaser status is an affirmative defense for which the asserting party bears the burden of proof. NRS 111.325; *see also Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 248 (1979) (explaining that the putative bona fide purchaser "was required to show that legal title had been transferred to her before she had notice of the prior conveyance to appellant").

39. A party has constructive notice of any recorded interest in the real property records—regardless of whether the party searched the real property records. *Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077, 1086–88 (D. Nev. 2012) (noting the purpose of Nevada's recording statute is to provide constructive notice of all recorded instruments to any subsequent purchaser or mortgagee).

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

Nev. 503, 515, 387 P.2d 989, 995 (1963). As the *Shadow Canyon* court reiterated, "where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought." *Id.*

32. Here, the HOA sold the property for approximately five percent (5%) of its fair market value at the time of the sale. The purchaser purchased the property for $6,100.00. Dividing the sale price by the fair market value at the time of the sale ($119,000.00) shows Plaintiff purchased the property for five percent (5%) of its fair market value, a grossly inadequate price which along with a showing of "unfairness" renders the sale invalid. *Nationstar*, 133 Nev. Adv. Op. 91, at 15.

33. In considering the testimony of Plaintiff's representative, the Court finds that in light of the other testimony, including *inter alia* Scott Dugan and Red Rock combined with Exhibit 22, a fair market value definition was appropriate in this case.

34. This analysis is consistent with what Red Rock and the HOA's understanding that the value of the property was closer to $95,000.00 based on emails between them before the sale that set forth the value of loan secured by the Deed of Trust and comparable property values. Trial Exhibit 22 at RRFS 265.

35. Equity dictates that the Court find that the lien foreclosed upon was the sub-priority portion as Red Rock had previously informed Bank of America, through the bank's counsel at Miles Bauer, that the HOA's lien was junior to the Deed of Trust and that there was no superpriority in the HOA's lien.

36. This type of representation that a foreclosure sale will not extinguish the first Deed of Trust is among the non-exhaustive examples of unfairness, fraud, and oppression in *Shadow Canyon's* opinion at footnote 11.

## Alternative Claims

45. Although a ruling on Bank of America's alternative or contingent claims against the HOA is unnecessary, based on the Court's ruling that the Deed of Trust survived the HOA sale, the Court will address each.

46. The Court grants Bank of America's request for declaratory relief that the Deed of Trust remains a lien on the property.

47. The Court denies Bank of America's quiet title claim against the HOA because the HOA claims no interest in the property.

48. The Court denies Bank of America's wrongful foreclosure claim against the HOA because there was a default of the homeowners at the time of the foreclosure.

49. The Court similarly denies Bank of America's indemnity claim against the HOA because of the deed survival.

50. The HOA voluntarily dismissed its third-party complaint against Red Rock before closing arguments.

51. Within 30 days of Notice of Entry of this Judgment, Bank of America will provide, pursuant to NRS 107.200, to Plaintiff a statement setting forth the unpaid balance of the debt secured by the Deed of Trust, the rate of interest on the unpaid balance, the total amount of principal and interest which is due and has not been paid, and the amount of any additional charges, costs, or expenses paid or incurred by the beneficiary which is a lien on the real property described in the Deed of Trust.

52. Thus, all the claims, counterclaims, cross-claims, and third-party claims of all parties have now been resolved.

Accordingly, the Court enters Judgment as follows:

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

and insurance premiums before the sale; (3) the superpriority amount of the association's lien; (4) the full value of the senior deed of trust; and (5) the subordinate portion of the association's lien.

28. The HOA Trustee distributed the $6,100.00 in proceeds exactly as they should have if the sale was sub-priority, having paid: (1) itself $2,495.15; (2) the HOA $1,364.51, over four times greater than the superpriority amount of the HOA's lien, which was no more than $337.50; (3) $364.00 to North American Title Company; (4) the Borrowers $1,397.14; and, (5) $479.20 to Republic Services as a sub-lien holder. Bank of America received none of the sale proceeds.

29. The HOA Trustee's distribution of the proceeds is proper only if the HOA Trustee foreclosed on the sub-priority portion of the HOA's lien. This sub-priority foreclosure left Bank of America's Deed of Trust in place and Plaintiff possesses the property subject to the senior Deed of Trust.

**Alternatively, the Deed of Trust Survived the HOA Sale as a Matter of Equity**

30. In addition to the basis set forth above, the Court also evaluated the equitable considerations. In so doing, the Court finds that the Deed of Trust survived the HOA sale as a matter of equity.

31. A foreclosure can be set aside if the sale fetched an inadequate price and there is evidence of fraud, unfairness, or oppression. *See Nationstar Mortgage LLC, v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (Nov. 22, 2017); *Shadow Wood Homeowners Ass'n, Inv. v. New York Community Bancop, Inc.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1114 (2016). The greater the disparity between the sales price and the fair market value, the less additional evidence of unfairness or oppression is required to justify setting aside the sale. *Nationstar*, 133 Nev. Adv. Op. 91, at 15; *Golden v. Tomiyasu*, 79

40. A person has constructive notice of a senior deed of trust's interest in the property if the deed of trust or an assignment is recorded in the real property records. *Fed. Nat'l Mortg. Ass'n v. SFR Invs. Pool 1, LLC*, No. 2:14-cv-02046, 2015 WL 5723647, at *3 (D. Nev. Sept. 28, 2015) ("The 2011 recording of Fannie Mae's assignment of the deed of trust put the purchaser on constructive notice of Fannie Mae's interest and prevents the purchaser from claiming BFP status in this case.").

41. In the present case, Plaintiff had actual and constructive notice of a competing or superior interest or equity in the property, being the deed of trust. *See id.*; *see also Hewitt v. Glaser Land & Livestock Co.*, 75 Nev. 128, 335 P.2d 778 (Nev. 1959).

42. Plaintiff's professional experience is relevant in considering its bona fide purchaser status. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 276 P.3d 1277, 1284-1285 (Wash. 2012). Plaintiff is a sophisticated purchaser.

43. Plaintiff made no inquiry to determine whether this was superpriority or sub-priority sale and made no inquiry about tender. Plaintiff knew it was receiving no warranties or covenants, and it knew it could not receive title insurance following this HOA sale without litigation.

44. Accordingly, in light of the evidence presented, taking into account Plaintiff's testimony that he was not specifically aware of the tender in the present case by Miles Bauer or the specific representations between Red Rock and Bank of America's representative, the sale's equities weigh in favor of concluding that Plaintiff purchased the property subject to Bank of America's first Deed of Trust. Accordingly from an equitable standpoint, Plaintiff purchased the property subject to Bank of America's first Deed of Trust.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

## ORDER AND JUDGMENT

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Bank of America's Deed of Trust, Instrument No. 200912150000144, was not extinguished by the foreclosure sale conducted on October 4, 2012.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that title to the property located at 7258 Pine Barrens Street, Las Vegas, Nevada 89148 is vested in LN Management LLC, Series 7258 Pine Barrens, and that such interest is subject to Bank of America's Deed of Trust.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Bank of America's Deed of Trust, Instrument No. 200912150000144, remains a valid lien encumbering the Property.

IT **IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Judgment is entered in favor of Bank of America and against LN Management LLC, Series 7258 Pine Barrens on their respective quiet title/declaratory relief claims.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Bank of America's claims against the HOA are denied.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Venezia Community Association's third-party complaint against Red Rock is dismissed without prejudice.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Bank of America shall provide to LN Management LLC, Series 7258 Pine Barrens, in accordance with NRS 107.200 et seq., a statement setting forth the amount of the unpaid balance of the debt secured by the Deed of Trust, the rate of interest

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

on the unpaid balance, the total amount of principal and interest which is due and has not been paid, and any additional charges, costs, or expenses paid or incurred by the beneficiary which is a lien on the real property described in the Deed of Trust.

DATED: January 12, 2018

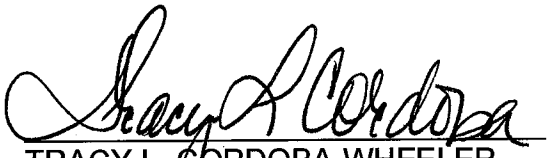
JOANNA S. KISHNER
DISTRICT COURT JUDGE

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

## CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below, as a courtesy not comprising formal written notice of entry, via one or more of the following manners: Email, Facsimile, U.S. mail, Electronic Service (E-Service) if the Attorney/Party has signed up as required, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

**ALL PARTIES SERVED VIA E-SERVICE**



TRACY L. CORDOBA-WHEELER
Judicial Executive Assistant

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Steven D. Grierson
CLERK OF THE COURT

**NEO**

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*Attorneys for Defendant Bank of America, N.A.*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LN MANAGEMENT LLC SERIES 7258 PINE BARRENS,

Plaintiff,

vs.

SINAN PEN, an individual; PRAYUTE TUPPA, an individual; BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendants.

BANK OF AMERICA, N.A.,

Counter-claimant,

v.

LN MANAGEMENT LLC SERIES 7258 PINE BARRENS,

Counter-defendants.

BANK OF AMERICA, N.A.,

Third Party Complainant,

v.

VENEZIA COMMUNITY ASSOCIATION, a domestic non-profit corporation,

Third Party Defendant.

Case No.: A-13-682746-C

Dept.: XXXI

**NOTICE OF ENTRY OF ORDER OF FINDING OF FACTS AND CONCLUSIONS OF LAW AND JUDGMENT**

AKERMAN LLP
1635 VILLAGE CENTER CIRCLE, SUITE 200
LAS VEGAS, NEVADA 89134
TEL.: (702) 634-5000 – FAX: (702) 380-8572



Case Number: A-13-682746-C

VENEZIA COMMUNITY ASSOCIATION, a domestic non-profit corporation,

Third Party Complainant,

v.

RED ROCK FINANCIAL SERVICES, LLC,

Third Party Defendant.

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that the **FINDING OF FACTS AND CONCLUSIONS OF LAW AND JUDGMENT** has been entered on the 16th day of January 2018, in the above-captioned matter. A copy of said Order is attached hereto as Exhibit A.

DATED this 22nd day of January, 2018

**AKERMAN LLP**

/s/ *Rex Garner*
DARREN BRENNER, ESQ.
Nevada Bar No. 8386
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22nd day of January, 2018 and pursuant to NRCP 5(b), I served via the Clark County electronic filing system a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER OF FINDING OF FACTS AND CONCLUSIONS OF LAW AND JUDGMENT** , addressed to:

**Law Office of Kerry P. Faughnan**
Kerry P. Faughnan, Esq. kerry.faughnan@gmail.com
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# EXHIBIT A

# EXHIBIT A

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Steven D. Grierson
CLERK OF THE COURT

FFCL

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| LN MANAGEMENT LLC SERIES 7258 PINE BARRENS,<br><br>Plaintiff,<br><br>vs.<br><br>SINAN PEN, an individual; PRAYUTE TUPPA, an individual; BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,<br><br>Defendants. | Case No.: A-13-682746-C<br><br>Dept.: XXXI<br><br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** |
| BANK OF AMERICA, N.A.,<br><br>Counter-claimant,<br><br>v.<br><br>LN MANAGEMENT LLC SERIES 7258 PINE BARRENS,<br><br>Counter-defendants. | |
| BANK OF AMERICA, N.A.,<br><br>Third Party Complainant,<br><br>v.<br><br>VENEZIA COMMUNITY ASSOCIATION, a domestic non-profit corporation,<br><br>Third Party Defendant. | |

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155



Case Number: A-13-682746-C

VENEZIA COMMUNITY ASSOCIATION, a domestic non-profit corporation,

Third Party Complainant,

v.

RED ROCK FINANCIAL SERVICES, LLC,

Third Party Defendant.

Trial of this matter occurred on December 18 and 19, 2017. The Court adopts the parties' stipulated facts and stipulated exhibits numbered 1 through 26. The Court also heard testimony from Eddie Haddad on behalf of Plaintiff; Rock Jung formerly with the Miles Bauer law firm; Julia Thompson on behalf of Red Rock; and Cindy Manning on behalf of the HOA. Having heard all the evidence and arguments of the parties, the Court enters the following Findings of Fact, Conclusions of Law, and Judgment:

## I. FINDINGS OF FACT

1. On or about December 7, 2009, Sinan Pen and Prayute Tuppa (**Borrowers**) purchased real property located at 7258 Pine Barrens Street, Las Vegas, Nevada 89148 (the **Property**). Stipulated Fact ¶ 1.

2. The Property is located in a common-interest community called Venezia Community Association (**Venezia** or **HOA**), which is governed by Declarations of Community Covenants & Restrictions (aka **CC&Rs** or **Declarations**) recorded with the Clark County Recorder on August 6, 2002, in Book Number 20020806, as Instrument Number 01138. Stipulated Fact ¶ 2.

3. The Borrowers financed the purchase with a loan in the amount of $115,862.00. Stipulated Fact ¶ 3.

4. The loan is secured by a Deed of Trust in favor of Bank of America, N.A., which was recorded on December 15, 2009, with the Clark County Recorder as Instrument No. 200912150000144 (the **Deed of Trust**). Stipulated Fact ¶ 4; Trial Exhibit 1.

5. The Deed of Trust contains a Planned Unit Development rider that states if the Borrowers do not pay the dues and assessments when due, then the lender may pay them. Trial Ex. 1.

6. The Borrowers defaulted on their payments under the Note and Deed of Trust. Stipulated Fact ¶ 5.

7. The unpaid principal balance due on the loan secured by the Deed of Trust as of November 24, 2015, was $156,360.96. Stipulated Fact ¶ 6.

8. The CC&Rs required the Borrowers to pay Venezia Community Association (**HOA**) periodic assessments. Stipulated Fact ¶ 7.

9. The Borrowers became delinquent on their HOA assessments in March of 2010 and, on October 26, 2010, the HOA, through its foreclosure agent and trustee, Red Rock Financial Services, LLC (**Red Rock**), recorded a Lien for Delinquent Assessments (**Lien**) as Instrument No. 201010260002223. Stipulated Fact ¶ 8. The monthly assessment was $37.50 from January 1, 2010, through October 4, 2012, and at the time the lien was recorded, Borrowers owed, among other things, four months of assessments. *Id.*; Trial Exhibit 22 at RRFS 136.

10. The Lien stated that the amount due to the HOA was $689.00, which included assessments, late fees, interests, fines/violations, and collection fees and costs. Stipulated Fact ¶ 0; Trial Exhibit 4.

11. The Property's HOA account did not include any charges for nuisance abatement or costs related to the maintenance of the exterior of the Property. Stipulated Fact ¶ 10.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

12. Red Rock mailed a copy of the Lien to the Borrowers. Stipulated Fact ¶ 11.

13. On December 16, 2010, the HOA, though the HOA Trustee, recorded a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments (**NOD**), Instrument No. 201012160003124. The Notice stated the amount due to the HOA was $1,743.17, which included assessments, dues, interest, and fees. Stipulated Fact ¶ 12; Trial Exhibit 5.

14. Bank of America, through its counsel at Miles Bauer Bergstrom & Winters (**Miles Bauer**), mailed correspondence to the HOA, via Red Rock, on January 19, 2011, in relation to the HOA's lien. Stipulated Fact ¶ 13; Trial Exhibit 19.

15. The January 19, 2011, included an offer by Miles Bauer, on behalf of the deed holder, to pay the superpriority portion of the HOA's lien. Trial Ex. 19 at BANA/Pen-01-00060.

16. Red Rock did not respond to this letter because it had already explained its position concerning superpriority to Miles Bauer previously. Trial Ex. 22 at RRFS 231.

17. On February 2, 2011, in response to Miles Bauer's emailed request for a payoff, Red Rock provided a ledger associated with the property, which included assessments, interest, costs, and fees totaling $1,946.02. Stipulated Fact ¶ 14; Trial Ex. 22 at RRFS 313–317.

18. Miles Bauer responded on or about February 18, 2011, by sending a letter and a check for $337.50 to Red Rock. The $337.50 was equal to the last nine months of delinquent assessments, which was the maximum amount the HOA could claim had superpriority over the Deed of Trust. Stipulated Fact ¶ 15.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

19. Red Rock acknowledged receipt of the check on February 18, 2011, and subsequently returned the $337.50 check to Miles Bauer without explanation in March 2011. Stipulated Fact ¶ 15 and ¶ 16.

20. At no time after the rejection of its alleged tender did Bank of America communicate with the HOA or Red Rock concerning the subject property.

21. On September 10, 2012, the HOA, through Red Rock, recorded a Notice of Foreclosure Sale Under The Lien for Delinquent Assessments, Instrument No. 201209100001418, setting the sale for October 4, 2012. Stipulated Fact ¶ 17; Trial Exhibit 10.

22. The Notice stated that the amount due to the HOA was $3,917.85. Stipulated Fact ¶ 18; Trial Ex. 10.

23. Red Rock posted the Notice of Sale at the Property and published notice in Nevada Legal News for three consecutive weeks before the sale. Stipulated Fact ¶ 19.

24. Bank of America did not present any evidence that Red Rock did not comply with the notice and posting requirements, including posting the Notice of Sale on the property, in public, and publishing the notice in Nevada Legal News.

25. On October 4, 2012, Red Rock, through a third party, auctioned the Property HOA. Stipulated Fact ¶ 20.

26. The sale was attended by Eddie Haddad, the trustee for Pine Barrens Street Trust. Stipulated Fact ¶ 21.

27. Through Mr. Haddad, Pine Barrens Street Trust was the winning bidder and paid $6,100.00 at the HOA's foreclosure sale, which is good and valuable consideration. Stipulated Fact ¶ 22.

28. Bank of America did not attend the sale.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

29. Pine Barrens Street Trust recorded a Foreclosure Deed on October 15, 2012, with the Clark County Recorder as Instrument Number 201210150000056. Stipulated Fact ¶ 23; Trial Exhibit 11. The Deed states that the property was granted to Pine Barrens Street Trust "without warrant express or implied." Trial Ex. 11.

30. The Foreclosure Deed (Trial Ex. 11) contains recital language affirming compliance with all notice requirements:

> This conveyance is made pursuant to the powers conferred upon Agent by Nevada Revised Statutes, the Venezia Community Association governing documents (CC&Rs) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 12/16/2010 as Instrument Number 0003124 Book 20101216 which was recorded in the office of the recorder of said county.
>
> Red Rock Financial Services has complied with all requirements of law including, but not limited to, the elapsing of the 90 days, the mailing of copies of the Notice of Delinquent Assessment Lien and Notice of Default and Election to Sell, and the posting and publication of the Notice of Sale.
>
> Said property was sold by said Trustee at public auction on 10/4/2012 at the place indicated on the Notice of Sale.

31. Plaintiff had no notice that any party had offered to or had tendered the superpriority portion of the lien nor did they have notice that Red Rock had accepted any payment of the superpriority lien.

32. On or around November 28, 2012, Red Rock caused to be recorded a Release of Lien for Delinquent Assessments, rescinding and withdrawing the Lien for Delinquent Assessments recorded on October 26, 2010. Trial Exhibit 12.

33. On May 22, 2013, Pine Barrens Street Trust transferred the Property to LN Management LLC, Series 7258 Pine Barrens (**Plaintiff**) via

Quitclaim Deed, which was recorded as Instrument No. 2013052300004695. LN Management is managed by Mr. Haddad. Stipulated Fact ¶ 24; Trial Exhibit 18.

34. Bank of America's appraiser, Scott Dugan, is an expert appraiser qualified to render an opinion concerning value. Stipulated Fact ¶ 25.

35. Mr. Dugan's opinion of fair market value of the Property (as defined by the FDIC Interagency Appraisal and Evaluation Guidelines (December 2, 2010) Appendix D) is that it was worth $119,000.00 at the time of the auction. Stipulated Fact ¶ 26.

36. The purchase price paid at the HOA Sale by Plaintiff is, thus, approximately 5% of the Property's fair market value at the time of the sale. Stipulated Fact ¶ 27.

37. The $6,100.00 in proceeds from the HOA's foreclosure sale were directed as follows: (1) $1,364.51 to the HOA; (2) $2,495.15 to Red Rock for its fees; (3) $364.00 to North American Title Company; (4) $1,397.14 to Sinan Pen and Prayute Tuppa as the prior owners; and (5) $479.20 to Republic Services as a sub-lien holder. Bank of America received none of the sale proceeds. Stipulated Fact ¶ 29; Trial Ex. 22 at RRFS 98.

## II. CONCLUSIONS OF LAW

1. "A quiet title action . . . is the proper method by which to adjudicate disputed ownership of real property rights." *Howell v. Ricci*, 124 Nev. 1222, 1224, 197 P.3d 1044, 1046 (2008). "An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim." NRS 40.010.

2. NRS 30.010 et seq. gives courts "power to declare rights, status and other legal relations." Plaintiff and Bank of America both seek declaratory relief under that statute.

3. Here, Plaintiff and Bank of America request declaratory relief and/or to quiet title. The sale did not extinguish the Deed of Trust because: (1) Bank of America tendered payment for the superpriority portion of the lien; (2) the HOA only foreclosed on the sub-priority portion of the lien; (3) Plaintiff is not a bona fide purchaser; and (4) the Deed of Trust survived as a matter of equity.

**Bank of America's tender extinguished the Superpriority**

4. In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (2014), the Nevada Supreme Court held that a first deed of trust holder's pre-foreclosure tender of the superpriority amount of the HOA's lien prevents the first deed of trust from being extinguished. 334 P.3d at 414 ("[A]s junior lienholder, [the holder of the first deed of trust] could have paid off the [HOA] lien to avert loss of its security[.]"). In fact, the drafters of the Uniform Common Interest Ownership Act (**UCIOA**), adopted by Nevada as NRS 116, *et seq.*, contemplated this result when drafting the superpriority provision, stating that "[a]s a practical matter, secured lenders will most likely pay the [nine] months assessments demanded by the association rather than having the association foreclose on the unit." 1982 UCIOA § 3-116 cmt. 1 (cited with approval in *SFR Investments*, 334 P.3d at 414.).

5. Further, the Nevada Real Estate Division of the Department of Business and Industry, the agency charged with administering the HOA Lien Statute, has explained that it is "likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by [an HOA]." 13—01 Op. Dep't of Bus. & Indus., Real Estate Div. 18 (2012); *see also Folio v. Briggs*,

99 Nev. 30, 34, 656 P.2d 842, 844 (1983) (explaining that courts "are obliged to attach substantial weight to [an] agency's interpretation" of a statute it is charged with administering).

6. Nevada's Supreme Court has confirmed that the only portion of the HOA's lien that is prior to the first deed of trust's interest is that amount for nine months of assessments only. *Horizons at Seven Hills Homeowners Assoc. v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35 (Apr. 28, 2016). As the Supreme Court held, "Taking into consideration the legislative intent, the statute's text, and statutory construction principles, we conclude the super priority 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." *Id.* at p. 13. The HOA's foreclosure begins at the recording of the notice of delinquent assessment lien. *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 231, 133 Nev. Adv. Op. 3 (2017). *See also Property Plus Investments, LLC v. Mortgage Electronic Registration Systems Inc., et al.*, 133 Nev. Ad. Op. 62 (Sept. 2017).

7. Here, the Borrowers became delinquent on their HOA assessments in March of 2010. The HOA, through its Trustee, recorded its Lien eight months later on October 4, 2012. Shortly after the HOA Trustee recorded the Notice of Default and Election to Sell, Bank of America, through its counsel at Miles Bauer, contacted the HOA Trustee and requested a payoff ledger detailing the superpriority amount of the HOA's lien. In accordance with the payoff ledger, BANA calculated the superpriority portion and tendered a check to the HOA Trustee on or about February 18, 2011 in the amount of $337.50—an amount equal to nine months of assessments, which was the maximum statutory

superpriority lien amount, as there were no nuisance of abatement charges as part of the lien.

8. Miles Bauer's letter was not conditional in this case, but to the extent the tender was conditional, Bank of America had a right to insist on the given condition. The Miles Bauer letter merely stated that the payment would be made upon satisfactory proof of the amount owed. A statement is only conditional if it is not limited by a condition. *See* "unconditional" Black's Law Dictionary (14th ed. 2014). Here, the Miles Bauer letter does not make the payment of the superpriority amount dependent on an uncertain or contingent event, nor, importantly, does it require the HOA or HOA Trustee to waive any rights.

9. Further, even if the letter were deemed to be conditional, it is irrelevant for purposes of this particular case as it is undisputed, by the testimony and exhibits, that Red Rock did not reject Miles Bauer's payment because of any conditions in the letter but, instead, based on Red Rock's position that there was no superpriority portion of the HOA's lien upon which Red Rock was foreclosing.

10. Red Rock did not reject Miles Bauer's payment because of the language on the check stub, nor did Red Rock believe Miles Bauer intended to pay off the entirety of the HOA's lien.

11. Red Rock's rejection of the check was unjustified, and Bank of America's efforts constituted sufficient tender under applicable law to extinguish the superpriority portion of the lien.

12. Bank of America's tender left the sub-priority portion as the sole portion of the HOA's lien. The sale, therefore, had no impact on the first Deed of Trust. "A foreclosure sale by a junior mortgagee has no effect on the rights of senior lienholders because the purchaser of a junior mortgage takes subject to

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

the rights of all senior liens and encumbrances." *In re Del Gizzo*, 5 B.R. 446, 448 (Bankr. D.R.I. 1980) (citing *Brunette v. Myette*, 40 R.I. 546, 102 A. 520 (1918)).

13. Plaintiff purchased the property at the HOA's sub-priority sale subject to the Deed of Trust. *See* NRS 116.31164(3)(a) (the purchaser at an HOA foreclosure receives "a deed without warranty which conveys to the grantee all title of the unit's owner to the unit." NRS 116.31164(3)(a)).

14. Plaintiff's arguments under *Shadow Wood* that Bank of America should have done more to protect its interest are not applicable to the present case as there was a tender of the superpriority amount and the actions of Red Rock as discussed below.

15. Further, Plaintiff's arguments about keeping the tender good are unavailing because Red Rock held Miles Bauer's check for several weeks before returning it, and gave Miles Bauer no indication why it initially accepted the check and then returned it, and given the other representations of Red Rock in the instant case. Further, based on the testimony of the Red Rock witness and Rock Jung (Miles Bauer) that the tendered checks were routinely rejected tendered checks, there would be no basis for Bank of America, through Miles Bauer, to do what Plaintiff suggested.

**Alternatively, the HOA Foreclosed on Only a Sub-priority Lien**

16. In addition to the tender, The HOA foreclosure sale did not extinguish the Deed of Trust because the sale was for the sub-priority portion only.

17. Pursuant to NRS 116.3116, an HOA's lien is split "into two pieces, a superpriority piece and a sub-priority piece." *SFR Investments*, 334 P.3d at 410. The "superpriority piece" is "prior to a first deed of trust." *Id.* "The sub-

priority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust." *Id.*

18. The Nevada Supreme Court has made clear that an HOA can choose to foreclose on either the sub-priority or superpriority portion of its lien. *See Shadow Wood*, 366 P.3d at 1116 ("And **if** the association forecloses on its superpriority lien portion, the sale would extinguish other subordinate interests in the property.") (emphasis added). *See also*, *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. Adv. Op. 35, 373 P.3d 66, 73–74 (2016) (recognizing that the HOA's superpriority lien remained on the property after the lender foreclosed); *SFR Inv. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014).

19. The parties' intent "determine[s] the nature and extent of the estate conveyed" by a deed. *City Motel, Inc. v. State ex rel. State Dept. of Highways*, 75 Nev. 137, 141, 336 P.2d 375, 377 (1959). "Parties usually describe in the granting clause of a deed all that they intend to convey." *Coppermines Co. v. Comins*, 38 Nev. 359, 148 P. 349, 354 (1915). "[A] party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey." *Brophy Min. Co. v. Brophy & Dale Gold & Silver Min. Co.*, 15 Nev. 101, 113 (1880).

20. Nothing in any of the recorded documents sets forth an intention to foreclose on the superpriority component of the lien. For example, NRS 116.31162(1)(b)(1), as it existed at the time of the sale, states that the HOA's Notice of Default must "describe the deficiency in payment." The Notice of Default does not describe any portion of its lien as having seniority over Bank of America's Deed of Trust.

21. Instead, Red Rock had communicated to Miles Bauer, before this sale, that Red Rock's position was that a first Deed of Trust is senior to an HOA

lien and that there was no superpriority portion unless and until the first Deed holder forecloses.

22. The witnesses for Red Rock and the HOA testified that they intended only a sub-priority sale.

23. Given the above representations and conduct, Plaintiff's intent to purchase a superpriority does not alter the outcome that the sale was only for the superiority portion of the lien. Further, given the disclaimer of warranties and covenants concerning title, and the sale's effect on other encumbrances, does not weigh in favor of a superpriority sale.

24. No evidence was presented of a script at sale or any announcement by the sale's crier, so no evidence was presented that the crier announced this sale as a superpriority or sub-priority sale.

25. The Foreclosure Deed was silent on superpriority, and the Court cannot imply a superpriority into the Foreclosure Deed, especially when the Deed disclaims warranties.

26. Additionally, the HOA Trustee's distribution of the foreclosure sale proceeds supports the determination that the HOA Trustee foreclosed on the sub-priority portion of the HOA's lien. This distribution—in which the HOA Trustee paid the HOA for the full value of its lien without providing any proceeds to Bank of America—could occur only if the HOA Trustee foreclosed on the sub-priority lien, as a superpriority foreclosure would have required the HOA Trustee to pay off the full amount of the loan secured by Bank of America's Deed of Trust before paying off the sub-priority portion of the HOA's lien and to pay Bank of America before sending any proceeds to the Borrowers.

27. NRS 116.31164 mandates the proceeds from a superpriority foreclosure be distributed in the following order: (1) the reasonable expenses of the sale; (2) expenses of securing possession and paying governmental charges

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

and insurance premiums before the sale; (3) the superpriority amount of the association's lien; (4) the full value of the senior deed of trust; and (5) the subordinate portion of the association's lien.

28. The HOA Trustee distributed the $6,100.00 in proceeds exactly as they should have if the sale was sub-priority, having paid: (1) itself $2,495.15; (2) the HOA $1,364.51, over four times greater than the superpriority amount of the HOA's lien, which was no more than $337.50; (3) $364.00 to North American Title Company; (4) the Borrowers $1,397.14; and, (5) $479.20 to Republic Services as a sub-lien holder. Bank of America received none of the sale proceeds.

29. The HOA Trustee's distribution of the proceeds is proper only if the HOA Trustee foreclosed on the sub-priority portion of the HOA's lien. This sub-priority foreclosure left Bank of America's Deed of Trust in place and Plaintiff possesses the property subject to the senior Deed of Trust.

**Alternatively, the Deed of Trust Survived the HOA Sale as a Matter of Equity**

30. In addition to the basis set forth above, the Court also evaluated the equitable considerations. In so doing, the Court finds that the Deed of Trust survived the HOA sale as a matter of equity.

31. A foreclosure can be set aside if the sale fetched an inadequate price and there is evidence of fraud, unfairness, or oppression. *See Nationstar Mortgage LLC, v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (Nov. 22, 2017); *Shadow Wood Homeowners Ass'n, Inv. v. New York Community Bancop, Inc.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1114 (2016). The greater the disparity between the sales price and the fair market value, the less additional evidence of unfairness or oppression is required to justify setting aside the sale. *Nationstar*, 133 Nev. Adv. Op. 91, at 15; *Golden v. Tomiyasu*, 79

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

Nev. 503, 515, 387 P.2d 989, 995 (1963). As the *Shadow Canyon* court reiterated, "where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought." *Id.*

32. Here, the HOA sold the property for approximately five percent (5%) of its fair market value at the time of the sale. The purchaser purchased the property for $6,100.00. Dividing the sale price by the fair market value at the time of the sale ($119,000.00) shows Plaintiff purchased the property for five percent (5%) of its fair market value, a grossly inadequate price which along with a showing of "unfairness" renders the sale invalid. *Nationstar*, 133 Nev. Adv. Op. 91, at 15.

33. In considering the testimony of Plaintiff's representative, the Court finds that in light of the other testimony, including *inter alia* Scott Dugan and Red Rock combined with Exhibit 22, a fair market value definition was appropriate in this case.

34. This analysis is consistent with what Red Rock and the HOA's understanding that the value of the property was closer to $95,000.00 based on emails between them before the sale that set forth the value of loan secured by the Deed of Trust and comparable property values. Trial Exhibit 22 at RRFS 265.

35. Equity dictates that the Court find that the lien foreclosed upon was the sub-priority portion as Red Rock had previously informed Bank of America, through the bank's counsel at Miles Bauer, that the HOA's lien was junior to the Deed of Trust and that there was no superpriority in the HOA's lien.

36. This type of representation that a foreclosure sale will not extinguish the first Deed of Trust is among the non-exhaustive examples of unfairness, fraud, and oppression in *Shadow Canyon's* opinion at footnote 11.

133 Nev. Adv. Op. 91 (Nov. 22, 2017), *citing Zyzzx 2 v. Dizon*, No. 2:13-cv-1307, 2016 WL 1181666, at *5 (D. Nev. Mar. 25, 2016).

37. In addition, it was unfair for Red Rock to reject tender, and Bank of America was entitled to rely on its tender and on Red Rock's representations that the foreclosure would not affect the Deed of Trust.

**Even if Plaintiff was viewed as a Bona Fide Purchaser, the balance of equities lies in favor of Bank of America**

38. To be a bona fide purchaser, one must take property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Shadow Wood*, 366 P.3d at 1115 (citing *Bailey v. Butner*, 176 P.2d 226, 234 (Nev. 1947); *see also, Nationstar Mortgage LLC, v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. Adv. Op. 91 (Nov. 22, 2017) (making no mention of *bona fide* purchaser in determining whether an HOA foreclosure extinguishes a first deed of trust). Under Nevada law, bona fide purchaser status is an affirmative defense for which the asserting party bears the burden of proof. NRS 111.325; *see also Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 248 (1979) (explaining that the putative bona fide purchaser "was required to show that legal title had been transferred to her before she had notice of the prior conveyance to appellant").

39. A party has constructive notice of any recorded interest in the real property records—regardless of whether the party searched the real property records. *Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077, 1086–88 (D. Nev. 2012) (noting the purpose of Nevada's recording statute is to provide constructive notice of all recorded instruments to any subsequent purchaser or mortgagee).

40. A person has constructive notice of a senior deed of trust's interest in the property if the deed of trust or an assignment is recorded in the real property records. *Fed. Nat'l Mortg. Ass'n v. SFR Invs. Pool 1, LLC*, No. 2:14-cv-02046, 2015 WL 5723647, at *3 (D. Nev. Sept. 28, 2015) ("The 2011 recording of Fannie Mae's assignment of the deed of trust put the purchaser on constructive notice of Fannie Mae's interest and prevents the purchaser from claiming BFP status in this case.").

41. In the present case, Plaintiff had actual and constructive notice of a competing or superior interest or equity in the property, being the deed of trust. *See id.*; *see also Hewitt v. Glaser Land & Livestock Co.*, 75 Nev. 128, 335 P.2d 778 (Nev. 1959).

42. Plaintiff's professional experience is relevant in considering its bona fide purchaser status. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 276 P.3d 1277, 1284-1285 (Wash. 2012). Plaintiff is a sophisticated purchaser.

43. Plaintiff made no inquiry to determine whether this was superpriority or sub-priority sale and made no inquiry about tender. Plaintiff knew it was receiving no warranties or covenants, and it knew it could not receive title insurance following this HOA sale without litigation.

44. Accordingly, in light of the evidence presented, taking into account Plaintiff's testimony that he was not specifically aware of the tender in the present case by Miles Bauer or the specific representations between Red Rock and Bank of America's representative, the sale's equities weigh in favor of concluding that Plaintiff purchased the property subject to Bank of America's first Deed of Trust. Accordingly from an equitable standpoint, Plaintiff purchased the property subject to Bank of America's first Deed of Trust.

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

## Alternative Claims

45. Although a ruling on Bank of America's alternative or contingent claims against the HOA is unnecessary, based on the Court's ruling that the Deed of Trust survived the HOA sale, the Court will address each.

46. The Court grants Bank of America's request for declaratory relief that the Deed of Trust remains a lien on the property.

47. The Court denies Bank of America's quiet title claim against the HOA because the HOA claims no interest in the property.

48. The Court denies Bank of America's wrongful foreclosure claim against the HOA because there was a default of the homeowners at the time of the foreclosure.

49. The Court similarly denies Bank of America's indemnity claim against the HOA because of the deed survival.

50. The HOA voluntarily dismissed its third-party complaint against Red Rock before closing arguments.

51. Within 30 days of Notice of Entry of this Judgment, Bank of America will provide, pursuant to NRS 107.200, to Plaintiff a statement setting forth the unpaid balance of the debt secured by the Deed of Trust, the rate of interest on the unpaid balance, the total amount of principal and interest which is due and has not been paid, and the amount of any additional charges, costs, or expenses paid or incurred by the beneficiary which is a lien on the real property described in the Deed of Trust.

52. Thus, all the claims, counterclaims, cross-claims, and third-party claims of all parties have now been resolved.

Accordingly, the Court enters Judgment as follows:

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

## ORDER AND JUDGMENT

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Bank of America's Deed of Trust, Instrument No. 200912150000144, was not extinguished by the foreclosure sale conducted on October 4, 2012.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that title to the property located at 7258 Pine Barrens Street, Las Vegas, Nevada 89148 is vested in LN Management LLC, Series 7258 Pine Barrens, and that such interest is subject to Bank of America's Deed of Trust.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Bank of America's Deed of Trust, Instrument No. 200912150000144, remains a valid lien encumbering the Property.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Judgment is entered in favor of Bank of America and against LN Management LLC, Series 7258 Pine Barrens on their respective quiet title/declaratory relief claims.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Bank of America's claims against the HOA are denied.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Venezia Community Association's third-party complaint against Red Rock is dismissed without prejudice.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Bank of America shall provide to LN Management LLC, Series 7258 Pine Barrens, in accordance with NRS 107.200 et seq., a statement setting forth the amount of the unpaid balance of the debt secured by the Deed of Trust, the rate of interest

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

on the unpaid balance, the total amount of principal and interest which is due and has not been paid, and any additional charges, costs, or expenses paid or incurred by the beneficiary which is a lien on the real property described in the Deed of Trust.

DATED: January 12, 2018

JOANNA S. KISHNER
DISTRICT COURT JUDGE

## CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below, as a courtesy not comprising formal written notice of entry, via one or more of the following manners: Email, Facsimile, U.S. mail, Electronic Service (E-Service) if the Attorney/Party has signed up as required, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

**ALL PARTIES SERVED VIA E-SERVICE**

Tracy L. Cordoba

TRACY L. CORDOBA-WHEELER
Judicial Executive Assistant