UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * HSBC BANK USA, et al.,

Plaintiff(s), v. LEE FAMILY PROPERTIES, LLC. SERIES XVII, et al,

Defendant(s).

Case No. 2:16-CV-644 JCM (NJK)

ORDER

Presently before the court is plaintiff HSBC Bank USA, National Association, as trustee for GSAA Home Equity Trust 2005-6, Asset-Backed Certificates Series 2005- HSBC) motion for summary judgment. (ECF No. 57). Defendants Lee Family Properties, LLC, Series (ECF Nos. 58, 59), to which plaintiff replied (ECF No. 63). I. Facts

This case involves a dispute over real property located at 8101 West Flamingo Road #1051, Las Vegas, Nevada (ECF No. 1).

On February 15, 2005, Leticia R. McCoy purchased the property pursuant to a grant, bargain, sale deed from the HOA. Id. McCoy obtained a loan in the amount of $117,600 from GreenPoint Mortgage Funding, Inc. GreenPoint to finance the purchase. Id. The loan was secured by a deed of trust recorded on February 28, 2005. Id.; (ECF No. 1-6). The deed of trust lists GreenPoint as the lender and Mortgage Electronic Registration Systems, Inc. as the 1- 6). d a mortgage protection clause. (ECF No. 1-4).

On September 24, 2011, MERS assigned its interest in the deed of trust to Bank of America, N.A. , which was recorded on October 6, 2011. (ECF No. 1-8).

On January 13, 2012, Alessi & Koenig, LLC Alessi , acting on behalf of the HOA, recorded a notice of delinquent assessment lien, stating an amount due of $1,196.50. (ECF No. 1- 10). On June 25, 2012, Alessi, acting on behalf of the HOA, recorded a notice of default and election to sell to satisfy the delinquent assessment lien, stating an amount due of $3,101. (ECF No. 1-11).

On July 23, 2012, Miles, Bauer, Bergstrom & Winters LLP , acting on behalf of BOA, sent Alessi a letter requesting a payoff ledger. (ECF No. 57). In response, Alessi demanded $3,988.70, but did not include a statement of the super-priority lien amount. Id. The payoff demand included a breakdown of past due assessments, fees, and costs, and an account ledger from the HOA showing that the monthly assessment on the property was $164.45. Based on , BOA sent Alessi a check for $2,269.77 on August 16, 2012, which and reasonable collection costs. Id. The HOA, through Alessi, did not accept or cash the check. Id.

On January 10, 2013, BOA assigned its interest in the deed of trust to plaintiff via a corporate assignment of deed of trust, which was recorded on January 11, 2013. (ECF No. 1-9).

On July 31, 2013, Alessi sale, stating an amount due of $7,507.83 and an anticipated sale date of August 28, 2013. (ECF No. 1-12).

On October 2, 2013, the HOA foreclosed on the property. (ECF No. 1). The HOA purchased the property at the foreclosure sale for $8,045.83. Id. A foreclosure deed in favor of the HOA was recorded on May 27, 2014. (ECF No. 1-13). Also on May 27, 2014, the HOA quitclaimed its interest to Lee via quitclaim deed. (ECF No. 1-14).

On March 23, 2016, plaintiff filed the underlying complaint, alleging (1) quiet title; (2) preliminary and permanent injunction; (3) wrongful foreclosure; (4) negligence; (5) negligence per se; (6) breach of contract; (7) misrepresentation; (8) unjust enrichment; (9) tortious interference with contract; and (10) equitable subrogation. (ECF No. 1).

HOA. (ECF No. 46).

II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, e as to any material fact and the movant is entitled to a Celotex Corp. v. Catrett, 477 U.S. 317,

323 24 (1986). For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. , 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving Id.

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-) by demonstrating that the nonmoving party failed to make a sho party will bear the burden of proof at trial. See Celotex Corp., 477 U.S. at 323 24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient

versions of th , 809 F.2d 626, 631 (9th Cir. 1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. See Celotex, 477 U.S. at 324.

truth, but to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 249 (1986). The evidence Id. at 255. But if the evidence of the

nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. See id. at 249 50. III. Discussion

As an initial matter, claim (2 as the court follows the well- a cause of action. See, e.g., In re Wal- t Practices Litig., 490 F. Supp. 2d

1091, 1130 (D. Nev. 2007); Tillman v. Quality Loan Serv. Corp., No. 2:12-CV-346 JCM RJJ, 2012 WL 1279939, at *3 (D. Nev. Apr. 13, 2012) (finding that independ ; Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1201

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i. Quiet title an estate or interest in real property, adverse to the person bringing the action for the purpose of

Nev. Rev. Stat. § 40.010. plea to quiet title does not require any particular elements, but each party must plead and prove his or her own claim to the property Chapman v. Deutsche Bank Nat l Trust Co., 302 P.3d 1103, 1106 (Nev. 2013) (citations and internal quotation marks omitted). Therefore, for a party to succeed on its quiet title action, it needs to show that its claim to the property is superior to all others. See also Breliant v. Preferred Equities Corp., 918 In a quiet title action, the burden of proof rests with the plaintiff to .

Section 116.3116(1) of the Nevada Revised Statutes 1

gives an HOA a lien on its s for unpaid assessments and fines; moreover, NRS 116.3116(2) gives priority to that HOA lien over all other liens and encumbrances with limited exceptions such as ught to

security interests. See Nev. Rev. Stat. § 116.3116(2). In SFR Investments Pool 1 v. U.S. Bank, the

Nevada Supreme Court provided the following explanation:

As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement other HOA fees or assessments, is subordinate to a first deed of trust. 334 P.3d 408, 411 (Nev. 20 SFR Investments Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority lien by nonjudicial foreclosure sale. Id. at 415. superpriority lien, proper foreclosure of w Id. at 419; see

1 The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where otherwise indicated, the references in this order to statutes codified in NRS Chapter 116 are to the version of the statutes in effect in 2011 13, when the events giving rise to this litigation occurred. also upon compliance with the statutory notice and timing rules).

Subsection (1) of NRS 116.31166 provides that the recitals in a deed made pursuant to NRS 116.31164 of the following are conclusive proof of the matters recited:

(a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell; (b) The elapsing of the 90 days; and (c) The giving of notice of sale[.] Nev. Rev. Stat. § 116.31166(1)(a) (c). 2

conclusive recitals concern default, notice, and publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and give context to NRS 116.31166. Shadow Wood Homeowners Assoc. v. N.Y. Cmty. Bancorp., Inc., 366 P.3d 1105 (Nev. 2016) Shadow Wood . Nevertheless, courts retain the equitable authority recitals. See id. at 1112.

Here, the parties have provided the recorded notice of delinquent assessment, the recorded notice of default and election to sell, the recorded deed upon sale. See (ECF Nos. 1-10, 1-11, 1-12, 1-13). Pursuant to NRS 116.31166, these recitals in the recorded foreclosure deed are conclusive to the extent that they implicate compliance with NRS 116.31162 through NRS 116.31164, which provide the statutory prerequisites of a valid

2 The statute further provides as follows:

2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.

3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the uni s owner without equity or right of redemption.

Nev. Rev. Stat. § 116.31166(2) (3). foreclosure. See id. at 1112 (he recitals made conclusive by operation of NRS 116.31166 implicate compliance only with the statutory prerequisites to foreclosure). Therefore, pursuant to NRS 116.31166 and the recorded foreclosure deed, the foreclosure sale is valid to the extent that it complied with NRS 116.31162 through NRS 116.31164.

Importantly, while NRS 116.3116 accords certain deed recitals conclusive effect e.g., default, notice, and publication of the notice of sale it does not conclusively, as a matter of law, entitle the buyer at the HOA foreclosure sale to success on a quiet title claim. See Shadow Wood, 366 P.3d at 1112 (rejecting contention that NRS 116.31166 defeats, as a matter of law, actions to quiet title). Thus, the question remains whether plaintiff has demonstrated sufficient grounds to justify setting aside the foreclosure sale. See id.

upon the equities. This includes considering the status and actions of all parties involved, including Id.

Plaintiff raises the following grounds in support of its motion for summary judgment: 3 rejected tender; improper notice; and commercial reasonability under Shadow Wood. (ECF No. 57).

1. Rejected Tender Offer collection costs on August 16, 2012, prior to the foreclosure sale, preserved the first priority of the

deed of trust. (ECF No. 57). Plaintiff thus maintains that the HOA (and ultimately Lee) took title to the property subject to the deed of trust. Id.

sent forth in the notice of default. (ECF No. 57). Rather, BOA tendered $2,269.77, an amount it calculated to be sufficient. Id.

Under NRS 116.31166(1), the holder of a first deed of trust may pay off the superpriority portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest.

3 See (ECF No. 57). Accordingly ummary judgment on its claim for quiet title. See Nev. Rev. Stat. § 116.31166(1); see also SFR Investments, 334 P see also, e.g., 7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A., et al., 979 F. Supp. 2d 1142, 1149 lienholders want to avoid this result, they readily can preserve their Carillo v. Valley Bank of Nev., 734 P.2d 724, 725 (Nev. 1987); Keever v. Nicholas Beers Co., 611 P.2d 1079, 1083 (Nev. 1980))).

dues and maintenance and nuisance-abatement charges SFR Investments, 334 P.3d at 411 (emphasis added); see

also 7912 Limbwood Ct. Trust

BOA merely presumed that the amount set forth in the notice of default included more than sufficient to preserve its interest in the property. See generally, e.g., Nev. Rev. Stat. § 107.080

(allo good the deficiency in performance or payment for 35 days); Nev. Rev. Stat. § 40.430 (barring

judicially ordered foreclosure sale if the deficiency is made good at least 5 days prior to sale).

The notice of default recorded on June 25, 2012, set forth an amount due of $3,101. (ECF No. 1-11). Rather than tendering the amount listed in the notice so as to preserve its interest in the property and then later seeking elected to tender a lesser amount based on its unwarranted assumption that the amount stated in

the notice included more than what was due. See SFR Investments, 334 P.3d at 418 (noting that the deed of trust holder can pay the entire lien amount and then sue for a refund).

After failing to use the legal remedies available to prevent the property from being sold to a third party for example, seeking a temporary restraining order and preliminary injunction and filling a lis pendens on the property prior to foreclosure (see Nev. Rev. Stat. §§ 14.010, 40.060) forth in the statutes. See generally, e.g., , 2 Monag. 274, 277 she asks without doing great injustice to other innocent parties who would not have been in a

Nussbaumer v. Superior Court in & for Yuma Cty complaining party has access to all the facts surrounding the questioned transaction and merely

makes a mistake as to the legal consequences of his act, equity should normally not interfere, Based on the foregoing, plaintiff has failed to sufficiently establish that its predecessor in interest tendered a sufficient amount prior to the foreclosure sale so as to render title subject to the deed of trust.

2. Lack of notice Plaintiff argues that defendants failed to provide plaintiff with actual notice of the foreclosure sale. (ECF No. 57). Plaintiff argues in the alternative that defendant failed to provide plaintiff statutorily-sufficient notice. Id.

A first deed of trust holder only has a constitutional grievance if he in fact did not receive reasonable notice of the sale at which his property rights was extinguished. Wells Fargo Bank, N n, No. 315CV00390RCJVPC, 2017 WL 1364583, at *4 (D. Nev. Apr. 13, 2017). deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate

Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 982 (9th Cir. 1998).

Here, defendant Lee proffered evidence that Alessi mailed plaintiff notice of sale. (ECF No. 58-2). Accordingly, plaintiff is not entitled to judgment as a matter of law based on lack of actual notice. See Matsushita, 475 U.S. at 586.

-priority portion of the HOA lien. (ECF No. 57). Plaintiff thus maintains that the notices were statutorily deficient. Id. The Nevada Supreme Court considered and rejected this argument in SFR Investments. 334 P.3d at 418.

Further, plaintiff confuses constitutionally mandated notice with the notices required to conduct a valid foreclosure sale. Due process does not require actual notice. Jones v. Flowers,

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their object Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); see also Bourne Valley, 832 F.3d at 1158.

Accordingly, plaintiff has failed to show that summary judgment is proper based on its theory that the notices in this case were defective.

3. Commercial reasonability Plaintiff argues that the foreclosure sale was commercially unreasonable because the property sold for less than 10% of its fair market value, which is grossly inadequate so as to justify setting the foreclosure aside. (ECF No. 57). Plaintiff further argues that the Shadow Wood court adopted the restatement approach, quoting the opinion as holding that a court is warranted in invalidating a s 57 at 20) (emphasis omitted)

Nevada. See Uniform Common- see also SFR Investments, 334 P.3d at 410. Numerous courts have interpreted the UCIOA and NRS 116.3116 as imposing a commercial reasonableness standard on foreclosure of association liens. 4 4 See, e.g., Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d 1222, 1229 (D. Nev. 2013) was probably worth somewhat more than half as much when sold at the foreclosure sale, raises serious doubts as to commercial reasonableness. SFR Investments, 334 P.3d at 418 n.6 (noting reasonable); Thunder Props., Inc. v. Wood, No. 3:14-cv-00068-RCJ-WGC, 2014 WL 6608836, at *2 (D. Nev. Rainbow Bend v. Wilder, No. 3:13-cv-00007-RCJ-VPC, 2014 WL 132439, at *2 (D. Nev. property free and clear of all encumbrances for the price of delinquent HOA dues would raise Will v. Mill

In Shadow Wood, the N 3d

at 1110; see also Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC, 184 F. Supp. 3d 853, 857 58 (D. Nev. 2016). foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a

Id. at 1112; see also Long v. Towne, 639 P.2d 528, sale, absent a showing of Golden v. Tomiyasu, 387 P.2d

989, 995 (Nev. 1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere ddition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy

Notably, the Shadow Wood court did not adopt the restatement threshold test for grossly inadequate sales price. Compare Shadow Wood, 366 P.3d at 1112 13

(citing the restatement as secondary authority to warrant use of the 20% threshold test for grossly inadequate sales price), with St. James Village, Inc. v. Cunningham, 210 P.3d 190, 213 (Nev. 2009) (explicitly adopting § 4.8 of the Restatement in specific circumstances); and Foster v. Costco Wholesale Corp. (Third) of Torts: Physical and Emotional H and Cucinotta v. Deloitte & Touche,

LLP, 302 P.3d 1099, 1102 (Nev. 2013) (affirmatively adopting the Restatement (Second) of Torts section 592A). Because Nevada courts have not adopted the relevant section(s) of the restatement at issue here, the Long test, which requires a showing of fraud, unfairness, or oppression in addition to a grossly inadequate sale price to set aside a foreclosure sale, controls. See 639 P.2d at 530.

Nevada has not clearly defined in determining commercial reasonableness. The few Nevada cases that have discussed commercial reasonableness state, every aspect of the disposition, including the method, manner, time, place, and terms, must be , 848 A.2d 336, 340 (Vt. 2004) (discussing commercial reasonableness e UCIOA does provide for this add Levers v. Rio King Land & Inv. Co., 560 P.2d 917, 920 (Nev. 1977).

bidders in attendance. Dennison v. Allen Grp. Leasing Corp., 871 P.2d 288, 291 (Nev. 1994) (citing Savage Constr. v. Challenge Cook, 714 P.2d 573, 574 (Nev. 1986)).

Here, plaintiff fails to set forth sufficient evidence to show fraud, unfairness, or oppression so as to justify the setting aside of the foreclosure sale. foreclosure as sufficient to justify setting aside the sale. (ECF No. 57 at 21). This argument

overlooks the reality of the foreclosure process. The amount of the lien not the fair market value of the property is what typically sets the sales price. Further, this court has rejected pla argument that a CC&R mortgage protection clause, without more, demonstrates fraud or unfairness that would justify setting aside a foreclosure sale. See, e.g., Bayview Loan Servicing, LLC v. SFR Investments Pool 1, LLC, no 2:14-cv-01875-JCM-GWF, 2017 WL 1100955, at *9 (D. Nev. Mar. 22, 2017).

The foregoing does not constitute the type of conduct sufficient to justify this court exercising its equitable power to set aside a foreclosure sale, as sale price alone is insufficient to satisfy the Long test. See, e.g., Nationstar Mortg., LLC, No. 70653, 2017 WL 1423938, at *3 n.2 Sale price alone, however, is never enough to demonstrate that the sale was commercially unreasonable; rather, the party challenging the sale must also make a showing of fraud, unfairness,

unfairness, or oppression, and its commercial reasonability argument fails as a matter of law. See Shadow Wood, 366 P.3d at 1110. IV. Conclusion

In light of the foregoing, plaintiff has not shown that it is entitled to judgment as a matter of law on its claim for quiet title. . . . .

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that motion for summary judgment (ECF No. 57) be, and the same hereby is, DENIED. DATED March 23, 2018. ____ UNITED STATES DISTRICT JUDGE