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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

FREEDOM MORTGAGE CORPORATION, a New Jersey corporation,

Plaintiff,

v.

TROVARE HOMEOWNERS ASSOCIATION, a Nevada corporation; TRIPLE BRAIDED CORD, LLC, as trustee of the HR TRUST; GERARDO GOMEZ, an individual, and DOES 1 through 10 inclusive,

Defendants.

Case No. 2:11-cv-01403-MMD-GWF

ORDER

(Plf.'s Motion for Summary Judgment – dkt. no. 59; Def.'s Motion for Summary Judgment – dkt. no. 64; Def.'s Motion for Default Judgment – dkt. no. 69)

I. SUMMARY

Before the Court are Plaintiff Freedom Mortgage Corporation's Motion for Summary Judgment (dkt. no. 59), Defendant Triple Braided Cord, LLC's Motion for Summary Judgment (dkt. no. 64), and Defendant Triple Braided Cord, LLC's Motion for Default Judgment (dkt. no. 69). For the reasons discussed below, all motions are denied.

II. BACKGROUND

This case arises from a priority dispute between two lien holders on a parcel of real property. In cross-motions for summary judgment, the parties dispute whether Plaintiff's mortgage securing a refinancing loan was a junior security interest extinguished through a foreclosure sale or, whether under the equitable doctrine of replacement, Plaintiff's mortgage was subrogated to the senior priority position of the mortgage it replaced in the refinancing transaction and remains intact in the property.

1 Defendant Triple Braided Cord, LLC, as trustee of the HR Trust (“HR Trust”), the
2 purchaser in the foreclosure sale, argues that the equitable doctrine of replacement may
3 not be used to supplant the protections of Nevada’s recording statutes afforded to bona
4 fide purchasers. Contrarily, Plaintiff Freedom Mortgage Corporation (“Plaintiff”) argues
5 that HR Trust had constructive notice of its interest and is not protected by the recording
6 statutes. Because questions of material fact remain, including whether there is a bona
7 fide purchaser and whether HR Trust had constructive notice, the motions for summary
8 judgment are denied.

9 The following facts are undisputed. On or about September 25, 2008, Plaintiff
10 and Defendant Gerardo Gomez (“Gomez”) entered into a loan agreement whereby
11 Plaintiff agreed to lend Gomez approximately \$197,395.00 to purchase a home (the
12 “Property”). The loan was secured by a Deed of Trust on the Property, which was
13 recorded on September 30, 2008 (“First DOT”). (Dkt. no. 64-1.) Later, on April 15,
14 2009, Gomez and Plaintiff entered into a refinancing loan agreement, whereby Plaintiff
15 loaned \$200,355.00 to Gomez at a lower interest rate with lower monthly payments.
16 This new loan paid off the outstanding debt under the first loan and was also secured by
17 a Deed of Trust on the Property (“Second DOT”). However, the Second DOT was not
18 recorded until May 5, 2009. (Dkt. no. 64-3.) In between the execution of the new loan
19 agreement and the recording of the Second DOT, Defendant Trovare Homeowners
20 Association (“Trovare”) recorded a Notice of Delinquent Assessment Lien (the
21 “Intervening Lien”) on April 27, 2009 for delinquent dues totaling \$988.00. (Dkt. no. 64-
22 2.) A few weeks later on May 19, 2009, Plaintiff released the First DOT pursuant to a
23 Substitution of Trustee and Deed Reconveyance. (Dkt. no. 64-4.)

24 Pursuant to its lien, Trovare filed a Notice of Default and Election to Sell under
25 Homeowners Association Lien on June 17, 2009. (Dkt. no. 32-5.) More than a year
26 later, Trovare recorded a Notice of Foreclosure Sale against the property to recover the
27 outstanding balance of \$4,113.00 in unpaid dues and fees. (Dkt. no. 32-6.) After
28 several continuances, Trovare sold the property at a trustee’s sale for \$6,348.67 to HR

1 Trust on March 4, 2011; HR Trust recorded the Foreclosure Deed on March 26, 2011.
2 (Dkt. no. 64-8.) The Parties have stipulated that Trovare conducted the foreclosure sale
3 in compliance with the notice requirements and other necessary provisions of NRS
4 116.3116 through NRS 116.3117. (Dkt. no. 57.)

5 On August 31, 2011, more than two years after Trovare instigated foreclosure
6 proceedings, Plaintiff filed this lawsuit for declaratory relief and quiet title seeking to
7 establish that its security interest was not extinguished in the trustee's sale and still
8 exists in the Property. HR Trust counterclaimed against Plaintiff and Doe Defendants
9 and cross-claimed against Gomez for declaratory relief and quiet title seeking to
10 establish that HR Trust purchased the property free of encumbrances from any party to
11 this suit. Plaintiff and HR Trust both moved for summary judgment on their respective
12 claims (dkt. no. 59, 64), but stipulated to dismiss all claims against Trovare (dkt. no. 57).
13 Additionally, HR Trust moved for default judgment against Gomez and all fictitious
14 parties (dkt. no. 69.), after the Clerk's Entry of Default against Gomez (dkt. no. 30).

15 **III. DISCUSSION**

16 **A. Legal Standard**

17 The purpose of summary judgment is to avoid unnecessary trials when there is
18 no dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*,
19 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when "the
20 pleadings, the discovery and disclosure materials on file, and any affidavits show there
21 is no genuine issue as to any material fact and that the movant is entitled to judgment
22 as a matter of law." Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317,
23 330 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on which a
24 reasonable fact-finder could find for the nonmoving party and a dispute is "material" if it
25 could affect the outcome of the suit under the governing law. *Anderson v. Liberty*
26 *Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). Where reasonable minds could differ on the
27 material facts at issue, however, summary judgment is not appropriate. *Warren v. City*
28 *of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). "The amount of evidence necessary to

1 raise a genuine issue of material fact is enough “to require a jury or judge to resolve the
2 parties’ differing versions of the truth at trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897,
3 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S. 253, 288–89
4 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all
5 inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v.*
6 *Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). Where parties submit
7 cross-motions for summary judgment, the court must consider each party’s evidence,
8 regardless under which motion the evidence is offered. *Fair Hous. Council v. Riverside*
9 *Two*, 249 F.3d 1132, 1136 (9th Cir. 2001); see also William W. Schwarzer, et al., *The*
10 *Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (Feb.
11 1992); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice*
12 *and Procedure* § 2720, at 335-36 (3d ed.1998) (“The court must rule on each party’s
13 motion on an individual and separate basis, determining, for each side, whether a
14 judgment may be entered in accordance with the Rule 56 standard.”).

15 **B. Analysis**

16 Plaintiff and HR Trust seek the Court’s determination on the seniority of the
17 Second DOT in relation to the Intervening Loan. This determination necessarily
18 establishes if the Property is still subject to Plaintiff’s security interest or if that security
19 interest was extinguished in the foreclosure sale. Plaintiff asserts that, even though it
20 was recorded later in time, the Second DOT should have assumed the priority position
21 of the First DOT under equitable principles. HR Trust counters that the equitable
22 doctrine upon which Plaintiff relies is not recognized under Nevada law, and even if it
23 was, equitable doctrines cannot frustrate the purposes underlying the recording
24 statutes. Ultimately, the Court concludes the equitable doctrine upon which Plaintiff
25 relies is a part of Nevada law, but it is unclear, given the insufficiency of facts in the
26 record, whether the doctrine applies to the circumstances of this case.

27 Nevada is a race-notice recording state, wherein any interest in real property,
28 properly recorded, has priority over subsequently filed interests. See NRS 111.320,

1 111.325; *Buhecker v. R.B. Petersen & Sons Constr. Co.*, 929 P.2d 937, 940 (Nev.
2 1996). “Ordinarily, when a senior deed of trust is satisfied, the junior lienholders remain
3 in their respective order of priority and are consequently elevated up the priority line.”
4 *American Sterling Bank v. Johnny Management LV, Inc.*, 245 P.3d 535, 539 (Nev.
5 2010). However, equitable doctrines allow for certain junior interests to “leap-frog” in
6 front of those senior to them. See *id.* at 539. The equitable doctrine of replacement
7 allows a newly recorded mortgage to assume the priority position of a previous
8 mortgage from the same lender when the newly recorded mortgage extinguishes and
9 replaces the previous mortgage as part of the same transaction. Restatement (Third) of
10 Prop.: Mortgages § 7.3(a) (1997) [hereinafter Restatement]. The underlying policy of
11 the doctrine is to facilitate borrowers’ ability to obtain more favorable loan terms through
12 refinancing and modification by providing lenders with flexibility to make changes to
13 loans without sacrificing the priority of their security interest in the property. See
14 Restatement § 7.3 cmt. a. (1997).

15 Trovare’s interest was recorded before the Second DOT and consequently, when
16 the First DOT was released, Trovare’s interest became the senior lien. Under general
17 priority rules alone, when Trovare foreclosed on their senior lien and sold the property at
18 a trustee’s sale, Plaintiff’s junior interest was extinguished. Thus, unless replacement
19 applies to the circumstances of this case, HR Trust purchased the property from
20 Trovare free from Plaintiff’s encumbrance. Plaintiff and HR Trust dispute both the
21 availability of replacement under Nevada law and the application of replacement to the
22 particular facts of this case. Although the Court finds that the doctrine is available under
23 Nevada law, it denies summary judgment for both parties because the factual record is
24 insufficient to determine whether or not HR Trust was a bona fide purchaser protected
25 by the recording statutes which would bar the application of the replacement doctrine.

26 **1. Availability**

27 The Court finds that the replacement doctrine as stated in the Restatement § 7.3
28 is part of Nevada law. Although the Nevada Supreme Court has not had the opportunity

1 to directly address the doctrine of replacement, it has specifically adopted the related
2 doctrine of Equitable Subrogation as stated in the Restatement § 7.6. Equitable
3 Subrogation permits a person who pays off an entire encumbrance of another “to
4 assume the same priority position as the holder of the previous encumbrance.” *Houston*
5 *v. Bank of America Federal Savings Bank*, 78 P.3d 71, 74 (Nev. 2003) (quoting *Mort v.*
6 *U.S.*, 86 F.3d 890, 893 (9th Cir. 1996). Thus, Equitable Subrogation operates in the
7 same manner as replacement, except Equitable Subrogation deals with the
8 circumstance where one lender refinances the loan of another lender as opposed to the
9 circumstance of replacement where a single lender refinances its own prior loan. See
10 Restatement § 7.6 cmt. e. (1997).

11 The Court sees no reason why Nevada law would recognize the ability of a
12 lender to retain priority when refinancing the loan of another, but not when refinancing
13 its own, prior loan. The same rationale and policies underlie both doctrines. See
14 *Houston*, 78 P.3d at 74-75; Restatement § 7.6 cmt. e. (1997). Further, the internal
15 references within the comments of the Restatement suggest that replacement and
16 Equitable Subrogation are simply two iterations of the same equitable principle. See
17 Restatement § 7.6 cmt. e. (1997). In fact, the Nevada Supreme Court has even
18 referenced the Restatement § 7.3 as an authority in its reasoning on the proper
19 application of § 7.6. See *American Sterling*, 245 P.3d at 540. For these reasons, the
20 Court finds that the doctrine of replacement is available under Nevada law.

21 **2. Applicability**

22 Having determined that the doctrine of replacement is part of Nevada law, the
23 Court turns to the question of the doctrine’s application to the instant case. Under the
24 replacement doctrine:

25 If a senior mortgage is released of record and, as part of the
26 same transaction, is replaced with a new mortgage, the
27 latter mortgage retains the same priority as its predecessor,
28 except

(1) to the extent that any change in the terms of the
mortgage or the obligation it secures is materially

1 prejudicial to the holder of a junior interest in the real
estate, or
2 (2) to the extent that one who is protected by the
recording act acquires an interest in the real estate at
3 a time that the senior mortgage is not of record.

4 Restatement § 7.3(a) (1997). Here, Plaintiff released the First DOT, the senior
5 mortgage of record, and replaced it with the Second DOT as part of the same
6 transaction. Thus, the Second DOT retained the priority position of the First DOT and
7 was senior to the Intervening Lien unless one of the two exceptions applies.

8 *a. Did changes to the mortgage prejudice Trovare's junior interest?*

9 The first exception protects the expectations of junior lienholders at the time of
10 the refinancing by seeking to preserve the relative probability of repayment of loans
11 secured by junior liens. See *American Sterling*, 245 P.3d at 539-40. Where
12 replacement would act as a mechanism to retroactively modify the terms of a senior
13 loan such that junior lenders are less likely to be repaid, junior lienholders are
14 prejudiced and replacement is inapplicable. See *id.* at 541-42. However, Nevada
15 Courts have held that increases in the loan principal are not prejudicial because
16 subsequent loans can only be subrogated to the amount of the original loan. See
17 *American Sterling*, 245 P.3d at 540. Additionally, extensions of the maturity date are
18 generally not prejudicial as they typically reduce the likelihood of foreclosure of a senior
19 lien and often result in reduced monthly payment. *Id.* Only where a junior lienholder's
20 expectation of repayment is significantly impacted, such as an accelerated maturity date
21 on the loan, is replacement inapplicable. See *id.* at 541-42.

22 Here, the modifications to Plaintiff's loan were not prejudicial to Trovare.
23 Although the principal did increase, the increased amount cannot be subrogated under
24 equitable principles. Additionally, the term of the loan was extended, the new interest
25 rate was lower, and the monthly payments were smaller. These modifications would
26 increase the solvency of the debtor and subsequently increase the probability of
27 repayment for junior lien holders. Consequently, the modifications did not prejudice
28 Trovare's interest and the first exception does not apply.

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b. Was Trovare or HR Trust protected by the recording statutes?

The second exception protects the interests of two classes: (1) secured lenders recording their interests after the release of the first mortgage but before the second is recorded, and (2) bona fide purchasers acquiring interests from sellers who are senior lien holders of record, but whose interests are subject to subrogation under the doctrine of replacement. See Restatement § 7.3(a)(2) (1997). This second exception seeks to maintain the integrity of the recording statutes by negating any equitable priority status of a second loan where the holder of an intervening lien relied in good faith on the property records without notice of another’s equitable right to subrogate. Consequently, this exception incentivizes creditors with senior priority under replacement to both record their interests and resolve priority disputes quickly because delaying to do so only increases the chances that a party acting in good faith and without notice will eliminate their rights under the replacement doctrine.

Trovare is not protected by the recording statutes because it had notice of Plaintiff’s senior priority. Although Trovare recorded its interest before Plaintiff recorded the Second DOT, the First DOT was still of record at that time. Consequently, Trovare’s expectation was to be a junior lien holder. Elevating their status would result in an inequitable windfall, and Trovare is not within the class protected by the second exception.

However, because Plaintiff delayed in resolving the priority dispute at the time of the foreclosure sale, HR Trust may have taken the property in good faith and without notice, thus falling within the recording statutes’ protection. Under Nevada law, a party against whom an unrecorded interest is asserted may void that unrecorded interest if (1) he or she was a purchaser for value, and (2) he or she purchased without notice of the unrecorded interest. *Berge v. Fredericks*, 591 P.2d 246, 247 (Nev. 1979). As to the first element, a purchaser for value is one who acquires an interest in land for present consideration, and excludes those receiving property as a gift from protection. *Id.* Adequacy of the present consideration is not part of the analysis. See *id.* As to the

1 second element, in addition to actual and record notice, circumstances “such that a
2 purchaser is in possession of facts which would lead a reasonable man in his position to
3 make an investigation that would advise him of the existence of prior unrecorded rights”
4 impose a duty of inquiry and constitute constructive notice. *Allison Steel Mfg. Co. v.*
5 *Bentonite, Inc.*, 471 P.2d 666, 668 (Nev. 1970).

6 Here, genuine issues of material fact remain unresolved regarding whether HR
7 Trust was a bona fide purchaser without notice. HR Trust meets the first element since
8 it paid \$6,348.67 to obtain the Property. While this may represent an extremely
9 discounted price given the fair market value of the Property, the Court does not analyze
10 the adequacy of the consideration. However, under these particular facts, the
11 inadequacy in the purchase price together with the timing in the title records may
12 evidence that HR Trust does not meet the second element. Such a low purchase price
13 suggests that buyers were aware or should have been aware of other encumbrances or
14 potential disputes concerning the sale. Further, the fact that an inspection of the title
15 records would show the First DOT on record followed by the recording of the
16 Intervening Lien, followed by the recording of the Second DOT, followed by the release
17 of the First DOT – although technically establishing the priority of the Intervening lien –
18 may be sufficient to at least create a duty of inquiry into Plaintiff’s priority position. This
19 indicates that HR Trust may have constructive notice of Plaintiff’s interest and thus was
20 not protected by the recording statutes. Consequently, HR Trust’s Motion for Summary
21 Judgment must be denied.

22 However, while the evidence of the low purchase price and the timing in the
23 record suggest that HR Trust had constructive notice of Plaintiff’s interest, that
24 suggestion is hardly conclusive. The evidence pertinent to this inquiry simply has not
25 been developed. To conclude that HR Trust had constructive notice requires the Court
26 to rely on inferences and assumptions about why the purchase price was low, and who
27 knew what when. Reliance on such inferences and assumptions is improper in a

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1 summary judgment analysis. Therefore, Plaintiff's Motion for Summary Judgment as to
2 HR Trust must similarly be denied.

3 **C. Claims Against Defendant Gerardo Gomez**

4 Both Plaintiff and HR Trust have asserted claims for quiet title and declaratory
5 relief against Gomez and have moved, respectively, for summary judgment and default
6 judgment on those claims. Gomez has not asserted any claim to an interest in the
7 property and cannot do so as his interest was extinguished in the foreclosure.
8 Nonetheless, out of what appears to be an abundance of caution, both parties have
9 included Gomez in their actions due to his presence in the chain of title. Although this
10 inclusion may be prudent in an action for quiet title, the resolution of this technicality
11 seems premature given the major disputed issue in the case is yet unresolved.
12 Consequently, the Court declines to grant either Plaintiff's Motion for Summary
13 Judgment as to Gomez, or HR Trust's Motion for Default Judgment against Gomez until
14 the relative priority of Plaintiff's and HR Trust's interests is established.


15 **III. CONCLUSION**

16 IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is
17 DENIED.

18 IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment is
19 DENIED.

20 IT IS FURTHER ORDRED that Defendant's Motion for Default Judgment is
21 DENIED.

22 DATED THIS 28th day of November 2012.

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25 _____
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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