

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 KAL-MOR-USA, LLC,)
4)
5 Plaintiff,)
6 vs.)
7 BANK OF AMERICA, N.A., et al.,)
8 Defendants.)
9)

Case No.: 2:13-cv-01046-GMN-PAL

ORDER

10 Pending before the Court are the Motion for Summary Judgment (ECF No. 54) filed by
11 Plaintiff Kal-Mor-USA, LLC (“Kal-Mor”) and the Motion for Summary Judgment (ECF No.
12 56) filed by Defendant Residential Credit Solutions, Inc. (“Residential Credit Solutions”),
13 which have both been fully briefed. However, because the Court finds that an unsettled
14 question of state law is at least partially dispositive in this case, the Court certifies the following
15 question to the Nevada Supreme Court:

16 Does the rule of SFR Investments Pool I, LLC v. U.S. Bank, N.A.,
17 334 P.3d 408 (Nev. 2014) that foreclosures under NRS 116.3116
18 extinguish first security interests apply retroactively to foreclosures
which occurred prior to the date of that decision?

19 I. **BACKGROUND**

20 This case arises out of a homeowners’ association foreclosure sale. On June 1, 2007,
21 Grace L. Chavez purchased real property located at 3055 Casey Drive, Unit #103, Bld. #112,
22 Las Vegas, NV 89120 (the “Property”), giving lender Affiliated Funding Corporation a
23 promissory note for \$132,000.00 (the “Note”), secured by a Deed of Trust against the Property.
24 (Deed of Trust, Ex. 2 to Def.’s MSJ, ECF. No. 56-2). The Deed of Trust named Fidelity
25 National Title (“Fidelity”) as trustee and Mortgage Electronic Registration Systems, Inc.

1 (“MERS”) as beneficiary. (Id.).

2 On March 2, 2012, MERS executed an Assignment of Deed of Trust, assigning its
3 interest to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP fka
4 Countrywide Home Loans Servicing LP (“BANA”). (Ex. 3 to Def.’s MSJ, ECF No. 56-3). On
5 August 2, 2012, BANA assigned the Deed of Trust to Ocwen Loan Servicing, LLC (“Ocwen”)
6 via a Corporation Assignment of Deed of Trust. (Ex. 4 to Def.’s MSJ, ECF No. 56-4). Finally,
7 on November 5, 2015, Ocwen assigned its interest in the Deed of Trust to Defendant
8 Residential Credit Solutions. (Ex. 5 to Def.’s MSJ, ECF No. 56-5).

9 After recording a Notice of Delinquent Assessment Lien, a Notice of Default and
10 Election to Sell, and a Notice of Foreclosure Sale, Canyon Willow Owners Association (the
11 “HOA”), through its agent United Legal Services, Inc., sold the Property at a foreclosure sale to
12 First 100, LLC (“First 100”) for \$2,000.00 on February 4, 2013. (See Exs. 6–9 to Def.’s MSJ,
13 ECF Nos. 56-6–9). First 100 later sold its interest in the Property to Plaintiff Kal-Mor. (Ex. 10
14 to Def.’s MSJ, ECF No. 56-10).

15 On April 4, 2013, Kal-Mor filed its First Amended Complaint in Nevada state court,
16 naming BANA and Fidelity as defendants¹ and seeking declaratory relief and quiet title on the
17 Property pursuant to Nev. Rev. Stat. §§ 30.010 and 116.3116, et seq. (See First Am. Compl.,
18 Ex. A to Pet. for Removal, ECF No. 1-2). Fidelity was served with a copy of the Summons and
19 First Amended Complaint on May 22, 2013, and on June 12, 2013, removed the action to this
20 Court with BANA’s consent. (Pet. for Removal, ECF No. 1).

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25 ¹ The Court later granted the parties’ stipulation to substitute Residential Credit Solutions as Ocwen’s successor-
in-interest. (See Order, ECF No. 51). Because the Court also granted the parties’ stipulations dismissing BANA
(ECF No. 23) and Fidelity (ECF No. 38), Residential Credit Solutions is the only remaining defendant in this
case.

1 **II. LEGAL STANDARD**

2 Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure (“Rule 5”), a United
3 States District Court may certify a question of law to the Nevada Supreme Court “upon the
4 court’s own motion.” Nev. R. App. P. 5(a)–(b). Under Rule 5, the Nevada Supreme Court has
5 the power to answer such a question that “may be determinative of the cause then pending in
6 the certifying court and . . . it appears to the certifying court there is no controlling precedent in
7 the decisions of the Supreme Court of this state.” Nev. R. App. P. 5(a).

8 Rule 5 also provides that a certification order must specifically address each of six
9 requirements:

- 10 (1) The questions of law to be answered;
11 (2) A statement of all facts relevant to the questions certified;
12 (3) The nature of the controversy in which the questions arose;
13 (4) A designation of the party or parties who will be the appellant(s) and the
14 party or parties who will be the respondent(s) in the Supreme Court;
15 (5) The names and addresses of counsel for the appellant and respondent; and
16 (6) Any other matters that the certifying court deems relevant to a
17 determination of the questions certified.

18 Nev. R. App. P. 5(c).

19 **III. DISCUSSION**

20 In this case, the Court is sitting in diversity jurisdiction; thus Nevada substantive law
21 controls. Because the relevant facts are set forth above, the Court addresses the remaining five
22 requirements below.

23 First, whether the rule announced in *SFR Invs. Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d
24 408 (Nev. 2014) that foreclosures under NRS § 116.3116 extinguish first security interests
25 applies retroactively to foreclosures which occurred prior to the date of that decision is a
question of state law.

Second, the retroactivity of SFR is at least partially dispositive to the present case. If
that rule is not retroactive, because the HOA sale in this case occurred prior to the issuance of

1 the SFR decision, Residential Credit Solutions would be entitled to a declaration that the Deed
2 of Trust still encumbers the Property.

3 Third, there is no controlling precedent as to the retroactivity of SFR. One court in this
4 district has discussed this issue, finding that SFR did not apply retroactively pursuant to the test
5 outlined in *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 867 P.2d 402 (Nev. 1994). See *Trust v.*
6 *K & P Homes*, 2:15-cv-01534-RCJ-VCF, 2015 WL 6962860, at *5 (D. Nev. Nov. 9, 2015).
7 However, shortly after this ruling, the court decided to certify to the Nevada Supreme Court the
8 same retroactivity question at issue in the instant order. See *Trust v. K & P Homes*, 2:15-cv-
9 01534-RCJ-VCF, 2016 WL 923091 (D. Nev. Mar. 9, 2016).

10 Accordingly, under Rule 5, answering this certified question is within the power of the
11 Nevada Supreme Court, and the Court finds that a determination of this question would
12 promote judicial efficiency.

13 **IV. CONCLUSION**

14 **IT IS HEREBY ORDERED** that the Motions for Summary Judgment (ECF Nos. 54,
15 56) are **DENIED without prejudice** with permission to renew within thirty days of the
16 resolution of the Court's Certified Question to the Nevada Supreme Court.

17 **IT IS FURTHER ORDERED** that the following question of law is **CERTIFIED to**
18 **the Nevada Supreme Court** pursuant to Rule 5 of the Nevada Rules of Appellate Procedure:

19 Whether the rule of *SFR Investments Pool I, LLC v. U.S. Bank*,
20 *N.A.*, 334 P.3d 408 (Nev. 2014) that foreclosures under NRS
21 § 116.3116 extinguish first security interests applies retroactively to
foreclosures which occurred prior to the date of that decision.

22 See Nev. R. App. P. 5(c)(1). The nature of the controversy and a statement of facts are
23 discussed above. See Nev. R. App. P. 5(c)(2)–(3). Defendant Residential Credit Solutions is
24 designated as the Appellant, and Plaintiff Kal-Mor is designated as the Respondent. See Nev.
25 R. App. P. 5(c)(4). The names and addresses of counsel are as follows:

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2 Charles Robert Peterson, Neil B Durrant, and Jason G. Martinez
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23 See Nev. R. App. P. 5(c)(5). Further elaboration upon the certified question is included in this
24 Order.

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