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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

JAMES W. PENGILLY,
Plaintiffs,
v.
NEVADA ASSOCIATION SERVICES et al.,
Defendants.

Case No. 2:14-cv-01463-RFB-NJK

ORDER

I. INTRODUCTION

Before the Court are Plaintiff’s and Defendants’ Motions for Summary Judgment. ECF Nos. 81, 82, 83, 84, 85, and 88. For the reasons stated below ECF No. 81 Motion for Summary Judgment is denied with prejudice in part and denied without prejudice in part; ECF No. 82 Motion for Summary judgment is GRANTED; ECF No. 83 is GRANTED in part and DENIED in part; ECF No. 84 Motion for Summary Judgment is DENIED as moot; and ECF Nos. 85 is denied with prejudice in part and denied without prejudice in part; ECF No. 88 Motion for Summary Judgment is DENIED.

II. BACKGROUND

This case involves a dispute over real property foreclosed on by a Homeowners Association

1 (HOA). The Property, located at 1141 Allerton Park, #411, Las Vegas, Nevada 89109, was
2 originally owned by Plaintiff James Pengilly. The parties now dispute the validity of the
3 foreclosure and title to the property.

4 Plaintiffs and counterclaimants bring the following causes of action: Ke Aloha Holdings,
5 LLC (“Ke Aloha”) asserts claims for quiet title and declaratory relief that it is the proper owner of
6 the property. Ditech Financial, LLC, formerly known as Green Tree Servicing, LLC (“Ditech”) seeks declaratory relief that the foreclosure sale was void as a matter of law. James Pengilly asserts
7 quiet title and declaratory relief that he is the rightful owner and the foreclosure was invalid.
8

9 This case was removed on September 10, 2014 by counter-defendant Internal Revenue
10 Service. ECF No. 1. At a hearing on January 13, 2016, the Court denied without prejudice a
11 pending Motion for Summary Judgment and Motion to Dismiss, permitting the parties to refiled
12 at the close of discovery ECF No.70. Discovery closed on March 23, 2016. ECF No. 58. The
13 parties filed their Motions for Summary Judgment on March 30, 2016.
14

15 **II. LEGAL STANDARD**

16 **A. Motion for Summary Judgment**

17 Summary judgment is appropriate when the pleadings, depositions, answers to
18 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no
19 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
20 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering
21 the propriety of summary judgment, the court views all facts and draws all inferences in the light
22 most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.
23 2014). If the movant has carried its burden, the non-moving party “must do more than simply show
24 that there is some metaphysical doubt as to the material facts Where the record taken as a
25 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
26 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation
27 marks omitted).
28

1 **III. MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS STUHMER ET AL. ECF NO. 82.**

2 The individual defendants who raise this motion are in the case only as defendants to James
3 Pengilly’s claims for quiet title and declaratory relief. NAS is a defendant in those claims as well
4 as Ditech.

5 **A. Undisputed Facts**

6 The Court finds the following facts to be undisputed. The individual defendants bringing
7 this motion are former members of the executive board of the Home Owners Association (“HOA”)
8 at the time of the non-payment, alleged default, and foreclosure. Nevada Association Services
9 (“NAS”) was the trustee and private debt collector hired by the HOA that carried out the
10 foreclosure. Neither individual former members of the HOA executive board nor NAS have
11 claimed or now claims any interest in the property or proceeds from the foreclosure sale.

12 **B. Legal Standard**

13 NRS 40.010 governs Nevada quiet title actions and provides: “An action may be brought
14 by any person against another who claims an estate or interest in real property, adverse to the
15 person bringing the action, for the purpose of determining such adverse claim.” “In a quiet title
16 action, the burden of proof rests with the plaintiff to prove good title in himself.” Breliant v.
17 Preferred Equities Corp, 918 P.2d 314, 318 (Nev. 1996). “[T]here is a presumption in favor of the
18 record titleholder.” Id.

19 “[A] court will refuse to consider a complaint for declaratory relief if a special statutory
20 remedy has been provided. A separate action for declaratory judgment is not an appropriate method
21 of testing defenses in a pending action, nor is it a substitute for statutory avenues of judicial and
22 appellate review.” Public Service Com’n of Nevada v. Eighth Judicial Dist. Court of State of Nev.,
23 818 P.2d 396, 399 (Nev. 1991) (internal citations omitted). The United States Supreme Court has
24 stated the following as to standing in cases for declaratory relief: “Basically, the question in each
25 case is whether the facts alleged, under all the circumstances, show that there is a substantial
26 controversy, between parties having adverse legal interests, of sufficient immediacy and reality to
27 warrant the issuance of a declaratory judgment.” MedImmune, Inc. v. Genentech, Inc., 549 U.S.

1 119, 127 (2007) (quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273
2 (1941)).

3 **C. Discussion**

4 Defendants argue that the individual board members are not proper parties to this action.
5 The individual parties are only in this case as Defendants in Pengilly’s claims for quiet title (and
6 the derivative “claim” for declaratory relief). Defendants argue that Nevada statutes governing
7 claims related to statutory HOA requirements preclude claims against individual members. NRS
8 116.4117(2)(a)-(c) provides as follows: “Subject to the requirements set forth in NRS 38.310 and
9 except as otherwise provided in NRS 116.3111, a civil action for damages or other appropriate
10 relief for a failure or refusal to comply with any provision of this chapter or the governing
11 documents of an association may be brought: (a) by the association against: (1) a declarant; (2) a
12 community manager; or (3) a unit's owner; (b) by a unit's owner against: (1) the association; (2) a
13 declarant; or (3) another unit's owner of the association; (c) by a class of units' owners constituting
14 at least 10 percent of the total number of voting members of the association against a community
15 manager”. In their Reply and in their Response to Pengilly’s MSJ, Defendants further argue that
16 NRS 40.010, governing quiet title actions, permits suits against those who claim an adverse “estate
17 or interest” in the property at issue. Pengilly argues that while individual members are absent from
18 NRS 116.4118(2), their behavior is governed by NRS 116.31183, prohibiting certain forms of
19 retaliation. Pengilly further argues that the misconduct of NAS and the HOA members is relevant
20 to his claim for declaratory relief where he claims that he has superior interest in the property and
21 that the foreclosure auction was invalid.
22

23 Pengilly’s only claims are for quiet title and declaratory relief as to title—and the invalidity
24 of the foreclosure sale, so as to establish title. Pengilly asserts no other statutory cause of action,
25 and makes no claim that would require action or payment on the part of the individual former
26 members of the HOA. Even if HOA members had some authority to provide relief, it is undisputed
27 that these individuals do not control the current HOA, and that they did not file any liens and did
28 not and do not claim any interest in the property. Pengilly represents in his Motion for Summary

1 Judgment (ECF 88) that only Ke Aloha claims an adverse interest in the property. In his deposition
2 he stated he is unaware of any liens by individual members, and there are no facts in record
3 showing any interest by individual members.

4 The plain language of NRS 40.010 permits quiet title claims against those who could
5 provide and would be necessary for relief, parties claiming some adverse interest in the property.
6 In evaluating the claims against Ke Aloha, the party with an adverse interest in the property, the
7 Court can consider the claims as to the legitimacy of the foreclosure sale, and issue such
8 declaratory relief as necessary and proper. But NAS and the individual members have no present
9 interest in the determination of title or the determination of the legitimacy of the foreclosure sale.
10 They are not necessary or indispensable to the claim for quiet title.

11 Even if the complaint could be read to seek declaratory judgment against these Defendants,
12 the judgment as against these defendants would have no present or reasonably likely future impact
13 on either Plaintiff or the Defendants. As such there may be no cognizable case or controversy
14 sufficient to satisfy Article III standing. Therefore, the individual defendants will be dismissed
15 from the case.

16 For the same reason, NAS must be dismissed from Pengilly's claims. The undisputed facts
17 show that NAS acted as the foreclosure trustee or private debt collector for the HOA, and there is
18 no evidence that NAS ever claimed any interest in the property. Therefore, NAS is dismissed from
19 Pengilly's claims. NAS remains in the case as a defendant in Ditech's cross-claims. Therefore, the
20 Court GRANTS ECF No. 82 Motion for Summary Judgment.
21

22
23 **IV. MOTIONS FOR SUMMARY JUDGMENT BY JAMES PENGILLY, ECF NO. 88, AND KE**
24 **ALOHA HOLDINGS, ECF NO. 81.**

25 **A. Undisputed Facts**

26 The Court finds the following facts to be undisputed.

27 Plaintiff James W. Pengilly's ("Plaintiff" or "Pengilly") purchased the Property located
28 within the Association on August 29, 2007, as evidenced by a Grant, Bargain, Sale Deed, recorded

1 in the Clark County Recorder's Office in Book No. 20070829, as Instrument 02229. James
2 Pengilly, as trustee, pledged the Property to secure repayment of a promissory note for
3 \$414,400.00 to Bank of America, N.A. The beneficial interest of the Deed of Trust was transferred
4 and assigned to Ditech and recorded on November 17, 2011. Fannie Mae has been the owner of
5 the loan continuously since origination. Ditech is the undisputed beneficiary of the First Deed of
6 Trust.

7 The Declaration requires, among other things, that each owner of a unit that has been
8 annexed into the Association, including Pengilly, must pay to the Association monthly
9 assessments. An owner's failure to pay assessments results in an automatically perfected,
10 foreclosable delinquent assessment lien. On or about March 14, 2012, Pengilly and fifteen (15)
11 other unit owners in WCL filed a lawsuit against Mark A. Stuhmer, Douglas L. Crook, Bill
12 Blanchard, Kenneth R. Sailley, Erika Geiser (together "HOA's Executive Board") and other parties
13 alleging violations of NRS 116 as well as other causes of action ("HOA Lawsuit"). Pengilly failed
14 to pay overdue homeowners' assessments and, accordingly, on July 19, 2012, a Notice of
15 Delinquent Assessment was recorded against the Property, which notice was mailed to the
16 Property and to Pengilly via regular and certified return receipt requested to the Property pursuant
17 to NRS 116.31162(1)(a).

18 On September 11, 2012, (which is over 30 days after mailing of the Delinquent Assessment
19 Lien as required under NRS 116.31162(1)(b)) a Notice of Default and Election to Sell was
20 recorded against the Property, which notice was mailed to Plaintiff via certified mail return receipt
21 requested. On August 27, 2013, 11 months after the recording of the Notice of Default and Election
22 to Sale, a Notice of Foreclosure Sale was recorded against the Property, which notice was mailed
23 to Pengilly via certified mail return receipt requested. The Notice of Foreclosure Sale contained
24 all information required pursuant to NRS 116.311635, including, but not limited to, the time and
25 place of the sale of the Property. In addition, the Notice of Foreclosure Sale was published and
26 posted as required by Nevada law.

27 ...
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1 On December 13, 2013, the Property was sold at public auction to Ke Aloha Holdings,
2 LLC, for the sum of \$17,100 as evidenced by a Foreclosure Deed. Following the completion of
3 the HOA lien sale, NAS distributed funds to the HOA totaling over \$14,000 and covering
4 outstanding expenses for 21 months of assessments and other various charges. No calculation was
5 made for the payment of Ditech on its claim.

6 In June 2013 a “terminating event”—an event which terminates declarant (developer)
7 control over the HOA—occurred under NRS 116.31032, because five years passed since the right
8 to add new units was last exercised. The parties stipulated in a state court action that such an event
9 had occurred. They did not stipulate that the HOA lacked authority after June 2013. No court made
10 any determination as to the effect of the terminating event, or the authority of the HOA.

11 On January 7, 2013, the declarant of the Association, West Charleston Lofts I, LLC, filed
12 a petition for relief under Chapter 11 of the United States Bankruptcy Code. As a result of the
13 Chapter 11 petition, with its corresponding automatic stay, the Association was prohibited from
14 transferring control of the Association from the declarant to the homeowners. Counsel for the
15 Declarant/Developer sent a letter to the HOA on Sept 20, 2013 stating that any transfer to
16 homeowner control would violate the automatic stay set forth in 11 U.S.C. 362(a). The
17 Association, as well as the plaintiffs (including Pengilly) in the State Court Action, each
18 participated in and approved the Chapter 11 Bankruptcy Plan of Reorganization and entered into
19 a Stipulation and Order for Amendments to Debtor's Proposed Plan of Reorganization Re:
20 Treatment of Claims held by West Charleston Loft Owners Association ("BK Stipulation").
21 Among the issues addressed in the BK Stipulation was the treatment of the 6 units owned by the
22 declarant, as well as the transition from Debtor (developer or declarant) control of the Association
23 to homeowner control of the Association. More specifically, the BK Stipulation provides that the
24 transition to a homeowner controlled HOA shall occur “upon entry of a final order approving the
25 stipulation.”
26

27 On May 1, 2014, the bankruptcy court entered its Findings of Fact, Conclusions of Law
28 and Order Confirming Debtor's Fourth Amended Plan of Reorganization. As set forth in the

1 Findings of Fact and Conclusions of Law and Order Confirming Debtor's Fourth Amended Plan
2 of Reorganization: All settlements, compromises, releases, discharges, exculpations and
3 injunctions set forth in the Plan, shall be, and hereby are, effective and binding on all persons who
4 may have had standing to assert such settled, released, discharged, exculpated or enjoined cause
5 of action and no other person or entity shall possess such standing to assert such causes of action
6 after the Effective Date.

7 Pengilly and other homeowners brought a lawsuit against the HOA on March 14, 2012.
8 The HOA issued a notice of delinquent payments on July 19, 2012. The Notice of Default and
9 Election to Sell was recorded on September 11, 2012. After it filed for bankruptcy, the HOA's
10 Executive Board filed proofs of claims stating that an owner of six units in the association had
11 been in arrears on at least five of its units since 2009 and yet no actions were taken against this
12 owner.

13 **B. The HOA's Authority to Foreclose**

14 Pengilly argues that the HOA board did not have authority to foreclose, because it was
15 divested of that authority when the "terminating event" occurred.

16 "Except as otherwise provided in this section, the declaration may provide for a period of
17 declarant's control of the association, during which a declarant, or persons designated by a
18 declarant, may appoint and remove the officers of the association and members of the executive
19 board. A declarant may voluntarily surrender the right to appoint and remove officers and members
20 of the executive board before termination of that period and, in that event, the declarant may
21 require, for the duration of the period of declarant's control, that specified actions of the association
22 or executive board, as described in a recorded instrument executed by the declarant, be approved
23 by the declarant before they become effective. Regardless of the period provided in the declaration,
24 a period of declarant's control terminates no later than the earliest of . . . (e) Five years after any
25 right to add new units was last exercised." NRS 116.31032

26 "Except as otherwise provided in subsection 5 of NRS 116.212, not later than the
27 termination of any period of declarant's control, the units' owners shall elect an executive board of
28

1 at least three members, all of whom must be units' owners. The executive board shall elect the
2 officers of the association. Unless the governing documents provide otherwise, the officers of the
3 association are not required to be units' owners. The members of the executive board and the
4 officers of the association shall take office upon election.” NRS 116.30134.

5 The statute appears to define declarant control as the power to appoint and remove officers
6 and members of the executive board: “the declaration may provide for a period of declarant's
7 control of the association, during which a declarant, or persons designated by a declarant, may
8 appoint and remove the officers of the association and members of the executive board.” NRS
9 116.31032, Regardless of the scope of control, the statute provides that certain events trigger the
10 termination of “declarant’s control.” It says nothing as to the authority of the existing HOA officers
11 and executive board members at the time of termination.

12 NRS 116.30134 provides that a new board “shall” be elected “not later than the termination
13 of any period of declarant’s control.” The Nevada Supreme Court does not appear to have
14 addressed what if any authority an HOA possesses in an interim period—after a terminating event
15 has occurred but before the mandatory election, which the statute provides must occur at or before
16 the time of the termination. The statute unambiguously terminates “declarant control” at the time
17 but is silent as to the ongoing authority of a declarant-appointed HOA. While the statutes require
18 an election at that time, the most logical and equitable reading of the statutory framework is that
19 while the process of electing a new HOA must begin as soon as or before a terminating event
20 occurs, the existing HOA maintains authority until new officers and executive board members can
21 be elected. Therefore, the HOA maintained authority to foreclose regardless of the triggering
22 event.

23
24 Moreover, Defendant Ke Aloha argues that the bankruptcy stay and subsequent Stipulation
25 and Order for Amendments to Debtor's Proposed Plan of Reorganization, filed on March 10, 2014,
26 included an agreement that a new HOA election would be held upon entry of the final order in that
27 bankruptcy case. That stipulation and order includes and addresses debts owed by homeowners to
28 the HOA. In this case a Notice of Default and Election to sell was recorded and sent to Pengilly

1 on September 11, 2012, the alleged terminating event occurred in June 2013, and the foreclosure
2 sale occurred in December 2013. The undisputed facts further show that the developer's counsel
3 represented to the HOA that it could not disband and elect a new board because of the automatic
4 stay triggered by the bankruptcy filing on January 7, 2013.

5 Plaintiff stipulated in the bankruptcy case, months before the allegedly terminating event,
6 to postponement of the shift to homeowner control until the final order in that case, which did not
7 occur until May 2014. Moreover, the stipulation called for the receipt of debt payments and other
8 actions to be carried out by the HOA during that period. Thus even if the bankruptcy stay did not
9 as a matter of law supersede the automatic termination of the developer/declarant's authority,
10 Plaintiff in effect stipulated to its authority to act as the HOA until the final order. Therefore, the
11 Court grants summary judgment for Ke Aloha on this issue and finds that the HOA had the
12 authority to pursue the foreclosure.

13 **C. Retaliatory Intent Would Not Bar Foreclosure**

14 **1. Legal Standard**

15 "An executive board, a member of an executive board, a community manager or an officer,
16 employee or agent of an association shall not take, or direct or encourage another person to take,
17 any retaliatory action against a unit's owner because the unit's owner has: (a) [c]omplained in good
18 faith about any alleged violation of any provision of this chapter or the governing documents of
19 the association; (b) [r]ecommended the selection or replacement of an attorney, community
20 manager or vendor; or (c) [r]equested in good faith to review the books, records or other papers of
21 the association. 2. In addition to any other remedy provided by law, upon a violation of this section,
22 a unit's owner may bring a separate action to recover: (a) Compensatory damages; and (b)
23 Attorney's fees and costs of bringing the separate action." NRS 116.31183

24 "The sale of a unit pursuant to NRS 116.31162 [common interest ownership foreclosure],
25 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right
26 of redemption." NRS 116.31166; See 2015 Nevada Laws Ch. 266 (S.B. 306) (showing version
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1 prior to 2015 amendments). However, the Nevada Supreme Court, evaluating claims under the
2 same prior version of the statute, held that “in an appropriate case, a court can grant equitable relief
3 from a defective HOA lien foreclosure sale.” Shadow Wood HOA v. N.Y. Cmty. Bancorp., 366
4 P.3d 1105, 1106 (Nev. 2016). Where an association sells a property at a foreclosure sale for an
5 inadequate price, and there is a showing of fraud, unfairness, or oppression, a court may grant
6 equitable relief setting aside an HOA foreclosure sale. Id. at 1107, 1112, 1116. In determining the
7 equities in an action to set aside a foreclosure sale, the Court should consider the position and
8 “innocence” or lack thereof of a bona fide purchaser. See id. at 1114-15.

9 **2. Discussion**

10 Plaintiff argues that the foreclosure was retaliatory for the filling of the homeowner’s
11 lawsuit, and that the unlawful “agenda” in pursuing the foreclosure, invalidates it. Defendant Ke
12 Aloha argues that the foreclosure sale extinguished any prior claim, and that even if the foreclosure
13 was retaliatory pursuant to the statute, that would not negate an otherwise legitimate foreclosure
14 for failure to pay HOA dues. As a preliminary matter Defendant is incorrect that the statute
15 categorically bars any claim to invalidate an HOA foreclosure sale. “In an appropriate case, a court
16 can grant equitable relief from a defective HOA lien foreclosure sale.” Shadow Wood HOA v.
17 N.Y. Cmty. Bancorp., 366 P.3d 1105, 1106 (Nev. 2016).

18 The undisputed facts show a valid debt to the HOA and a valid foreclosure pursuant to the
19 HOA’s lien. Moreover, Ke Aloha has shown that it was an “innocent” bona fide purchaser of the
20 property, and Pengilly has presented no evidence or argument to the contrary. The court must
21 consider Ke Aloha’s status in its equitable determination. See Shadow Wood HOA, 366 P.3d at
22 1114-15. The Court finds there is insufficient evidence to establish retaliation under NRS
23 116.31183. And an allegation of inadequate price alone does not create a basis for setting aside the
24 foreclosure.¹ Thus, the Court finds that Plaintiff has failed to raise a dispute as to equities sufficient
25 to set aside the sale, and dismisses this claim.
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¹ The Court also does not find the price to necessarily be inadequate. Purchasers in these types of sales would understand the potential for litigation over the sale and factor this into the price.

1 **D. Ke Aloha’s Purchase**

2 **1. Legal Standard**

3 “1. A limited-liability company is considered legally organized pursuant to this chapter:
4 (a) At the time of the filing of the articles of organization with the Secretary of State; and (b) Upon
5 paying the required filing fees to the Secretary of State. 2. A limited-liability company must not
6 transact business or incur indebtedness, except that which is incidental to its organization or to
7 obtaining subscriptions for or payment of contributions, until the company is considered legally
8 organized pursuant to subsection.” NRS 86.201

9 Under NRS 86.5483(1)(i) and NRS 80.015(1)(i), “[o]wning, without more, real property” does not
10 constitute “transacting business” for foreign LLCs. Under NRS 86.213 “Every person . . . who is
11 purporting to do business” in Nevada but who has failed to file articles of organization is subject
12 to a fine between \$1,000 and \$10,000. In Executive Management, Ltd. v. Ticor Title Ins. Co., the
13 Nevada Supreme Court held that the proper remedy where an unqualified corporation seeks to
14 litigate is to stay proceedings while they have an opportunity to cure the defect. 38 P.3d 872, 875
15 (Nev. 2002).

16 **2. Discussion**

17 The undisputed facts show that the individual managing member of Ke Aloha attended the
18 sale and purchased the property. The foreclosure deed states that Ke Aloha purchased the Home
19 on December 13, 2013. The purchaser did not request that title be vested in Ke Aloha’s name until
20 December 17, 2013, one day after the articles of organization were filed.

21 Pengilly argues that contract principles require a meeting of the minds and consideration
22 between two parties, and as Ke Aloha, referenced in the deed, did not exist, the foreclosure could
23 not satisfy contract principles and must be overturned. Ke Aloha argues that the statute does not
24 invalidate transactions by an unorganized LLC, but rather exists to establish penalties for operation
25 of business while unorganized. Ke Aloha further argues that while a transaction by an unorganized
26 may create temporary liability in the transacting individual, there is no authority to invalidate a
27 transaction based solely on the use of the name of an unorganized entity.
28

1 It is not disputed that the managing member purchased the property and Pengilly does not
2 raise defects other than the use of the name of the as yet unorganized LLC. Pengilly has presented
3 no authority that would negate an otherwise legally valid contract carried out by a managing
4 member because the member uses the name of an as yet unorganized LLC. Such a categorical rule
5 would be inconsistent with the purpose of contract requirements, to ensure an enforceable, genuine
6 mutual agreement. The quickly remedied naming issue here does not violate the principles or
7 purposes of contract law, and absent authority to the contrary, the Court will not negate the sale
8 for this reason.

9 Therefore, ECF No. 88 Motion for Summary Judgment by Plaintiff Pengilly is DENIED.
10

11 **V. MOTION FOR SUMMARY JUDGMENT BY NAS AND THE HOA [ECF No. 83]**

12 This Motion seeks summary judgment against Ditech as defendants in Ditech's
13 counterclaims. Ditech has only one claim for declaratory relief against all Counter-Defendants and
14 Cross-Defendant. It seeks an order declaring the December 13, 2013 foreclosure sale void as a
15 matter of law.

16 As laid out above, NAS was the foreclosure trustee, and has no present or future interest in
17 the property. The Ditech claim against NAS is solely for declaratory judgment as to its
18 participation in a completed past action—its role in the foreclosure sale. It does not seek damages
19 against NAS, and NAS claims no present or potential future interest either in title to the property
20 or in payment from any foreclosure sale. The Court finds that there is not a substantial controversy
21 of sufficient “immediacy and reality” against NAS, where the only relief sought is a declaratory
22 judgment that would affect no present or future interest of NAS.
23

24 The HOA makes essentially the same argument, that this is a dispute as to title to the
25 property, and that the HOA does not claim title or any interest in title. However, Ditech argues that
26 if the court were to grant the declaratory relief requested, Ditech would have a claim against the
27 HOA for wrongful foreclosure and accounting, to recover the amount of its lien, which h it claims
28 had priority over the HOA lien. The HOA has not responded to this argument, but reasserts that as

1 the only claim is one for declaratory relief, it cannot state a claim against the HOA. However,
2 unless the HOA is willing to forfeit any claim of entitlement to the defaulted dues it recuperated
3 in the foreclosure sale, there remains a justiciable case or controversy cognizable in a case for
4 declaratory judgment.

5
6 **VI. MOTION FOR SUMMARY JUDGMENT BY DITECH FINANCIAL [ECF No. 85]**

7 Ditech has only one claim, for declaratory relief against all Counter-Defendants and Cross-
8 Defendant. It seeks an order declaring the December 13, 2013 foreclosure sale void as a matter of
9 law.

10 **A. Undisputed Facts**

11 The Court finds the following additional undisputed facts related to this Motion.

12 On or about August 29, 2007, James Pengilly, as trustee, acquired Unit 411 in the West
13 Charleston Lofts common interest community located at 1141 Allerton Park, #411, Las Vegas,
14 Nevada 89109 (the "Property"). James Pengilly, as trustee, pledged the Property to secure
15 repayment of a promissory note for \$414,400.00 to Bank of America, N.A. The beneficial interest
16 of the Deed of Trust was transferred and assigned to Ditech and recorded on November 17, 2011.
17 Fannie Mae has been the owner of the loan continuously since origination. Ditech is the undisputed
18 beneficiary of the First Deed of Trust pursuant to the provisions of NRS 116.3116(2) based upon
19 the disclaimer of all other potential claimants in this matter.

20
21 The Property was subject to the provisions of the Amended and Restated Declaration of
22 Covenants, Conditions and Restrictions and Grant and Reservation of Easements for West
23 Charleston Lofts Owners Association (the "CC&Rs") recorded on July 3, 2007 in the Clark County
24 Recorder's office as instrument number 200707030001035. The CC&Rs provide that no violation
25 of the CC&Rs " ... shall operate to defeat or render invalid the rights of the Beneficiary under any
26 Deed of Trust. The CC&Rs also include a specific reservation of rights as to super-priority liens.

27 Prior to the completion of the HOA Lien Sale in this matter, Charleston Lofts Owners
28 Association adopted collection policies in 2007 and 2013. Neither of the Collection Policies

1 adopted by the Association address the enforcement of super-priority lien rights. In July 2012, the
2 Association declared Pengilly delinquent on the payment of his assessments and caused to be
3 recorded a Notice of Delinquent Assessment lien through its agent, Nevada Association Services,
4 Inc. ("NAS"). The Notice of Delinquent Assessment Lien was recorded with the Clark County
5 Recorder on July 19, 2012 as instrument number 20 201207190001100. The Notice of Delinquent
6 Assessment lien makes no reference to the enforcement of superpriority lien rights. [Sep. Stmt. 7.]

7 There was no communication between NAS and the Association concerning the
8 enforcement of superpriority lien rights. NAS was aware of the super-priority issue being litigated
9 in Nevada Courts and that the investor "that had purchased the property at our foreclosure
10 auctions" were suing for clear title [based on the super-priority]. NAS did not take a position
11 regarding whether or not it was enforcing the superpriority lien / portion of the lien.

12 In September 2012, NAS, on behalf of the Association, recorded a Notice of Default and
13 Election to Sell ("NOD"). The NOD makes no reference to the enforcement of superpriority lien
14 rights. Again, there was no communication between NAS and the Association concerning the
15 enforcement of superpriority lien rights in connection with the NOD. As is the practice of NAS,
16 an authorization to publish was sent to the Board for review and execution prior to drafting and
17 recording the Notice of Foreclosure Sale. However, it is not the practice of NAS to request that
18 the Board confirm its intent to enforce superpriority lien rights. As a result, superpriority lien issues
19 were not discussed between the Association and NAS. After the expiration of 90 days, NAS
20 recorded its Notice of Sale on August 27 2013. ("NOS"). The NOS makes no reference to the
21 enforcement of superpriority lien rights at the lien sale auction (the "HOA Lien Sale"). As with all
22 of the other documents, there was no communication between NAS and the Association
23 concerning the enforcement of superpriority lien rights in connection with the NOS. The Auction
24 was ultimately conducted on December 13, 2013. Ke Aloha Holdings LLC was the successful
25 bidder at the auction with a bid of \$17,100.00. NAS issued a Foreclosure Deed for the Property to
26 Ke Aloha Holdings. The Foreclosure Deed makes no reference to the enforcement of superpriority
27 lien rights.
28

1 The Notice of Lien, Notice of Default, and Notice of Sale only discuss and relate to one
2 Lien. The Notice of Lien used language such as "has a lien on the following" and "against which
3 the lien is imposed." The Notice of Lien stated only that the amount of \$4,410.60 was due upon
4 its recording. The Notice of Default used language such as "reflected on said lien," "enforce the
5 lien by sale," "obligation being foreclosed upon," "paying the entire amount," and stated only that
6 the amount due was \$6,634.44. Similarly, the Notice of Sale references "lien" singular and stated
7 that there was an amount due of \$15,126.53. These documents are the only public notices regarding
8 the Lien, and the only information potential bidders had access to before the Foreclosure Sale.
9 And, none of these documents evidence any attempts to bifurcate or limit the Lien, or give any
10 indication that the HOA or NAS intended to reserve any portion thereof.

11 Following the completion of the HOA lien sale, NAS distributed funds to the Association
12 totaling over \$14,000 and covering outstanding expenses for 21 months of assessments and other
13 various charges for the Association. No calculation was made for the payment of Ditech on its
14 priority claim.

15 **B. Legal Standard**

16 “A foreclosure sale of the association's lien (whether judicial or nonjudicial) is governed
17 by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien
18 entitled to priority extinguishes that lien and any subordinate liens, transferring those liens to the
19 sale proceeds. Nothing in the Uniform Laws establishes (or was intended to establish) a contrary
20 result.” SFR Investment Pool 1 v. U.S. Bank, 334 P.3d 408, 414 (Nev. 2014) (quoting UCIOA
21 (official commentary to statute)). “NRS 116.3116(2) establishes a true superpriority lien[.]” SFR
22 Investment Pool 1 v. U.S. Bank, 334 P.3d 408, 414 (Nev. 2014). The scheme is designed to “avoid
23 having the community subsidize first security holders who delay foreclosure.”

24 “As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a
25 superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine
26 months of unpaid HOA dues and maintenance and nuisance-abatement charges, is “prior to” a first
27 28

1 deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate
2 to a first deed of trust.” SFR, 334 P.3d at 411 (Nev. 2014).

3 The SFR Court relied on the language of NRS 116.3116(2), which provides as follows:
4 “The [HOA] lien is also prior to all security interests described in paragraph (b) to the extent of
5 any [maintenance and nuisance-abatement] charges incurred by the association on a unit pursuant
6 to NRS 116.310312 and to the extent of the assessments for common expenses [i.e., HOA dues]
7 based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would
8 have become due in the absence of acceleration during the 9 months immediately preceding
9 institution of an action to enforce the lien . . . This subsection does not affect the priority of . . .
10 liens for other assessments made by the association.” NRS 116.3116(2). This amounts to an
11 exception to an exception. The statute provides that “a lien under this section is prior to all other
12 liens and encumbrances on a unit except . . . (b) a first security interest on the unit recorded before
13 the date on which the assessment sought to be enforced became delinquent.” NRS 3116(2)(b).

14 “It is the intent of the parties to the deeds which, in this case, must determine the nature
15 and extent of the estate conveyed[.]” City Motel, Inc. v. State ex rel. State Dept. of Highways, 336
16 P.2d 375, 377 (Nev. 1959). “The intentions of the parties are determined from all the circumstances
17 surrounding the transaction.” Kartheiser v. Hawkins, 645 P.2d 967, 968 (Nev. 1982).

18 **C. Discussion**

19 Ditech argues that there must be affirmative proof of intent to foreclose on the super-
20 priority “portion” of the lien and the absence of clear evidence in the prior notices and the deed,
21 and the testimony of the NAS representative that they did not know or take a position as to the
22 super-priority issue means that the Court must find that they foreclosed only on the sub-priority
23 portion. Ditech contends that the fact that the HOA used the proceeds to pay the entire arrears for
24 HOA dues indicates intent to foreclose on the sub-priority portion, because the HOA did not follow
25 the statutory requirement for prioritization after payment of the super-priority portion.
26

27 Ke Aloha argues that the statutory scheme does not permit an HOA to foreclose on only
28 the sub-priority portion of the lien; there is a single lien that may be foreclosed on, with portions

1 that have different priority. Ke Aloha argues that even if the HOA can foreclose on only the sub-
2 priority portion, where all prior notices indicate intent to foreclose on the entire lien, for all unpaid
3 dues, and the deed does not indicate intent to bifurcate or foreclose only on the sub-priority portion,
4 the parties clearly intended to foreclose upon the entire lien, including the super-priority portion.

5 The statutory scheme establishes that “a lien under this section is prior” to all interests
6 excepting those including a first security interest, and that the super-priority portion of an HOA
7 lien “is also prior” to a first security interest (emphasis added). The undisputed facts show no
8 affirmative evidence of or even consideration of a separation of the super-priority versus sub-
9 priority liens or portions of a single lien, but rather demonstrate intent to foreclose based upon the
10 entire amount of unpaid HOA dues.

11 Ditech cites to the CC&Rs (HOA bylaws), which state that a violation should not operate
12 to defeat the rights of any beneficiary under a deed. However, the CC&Rs specifically reserve any
13 super-priority rights. In this case there was no unambiguous statement at the time of the sale of an
14 intent to foreclose on the sub-priority portion only, and to purchase the property encumbered by
15 the super-priority lien. The Court finds that where, as here, there was clear intent to foreclose based
16 upon the entirety of unpaid dues, which includes a lien that “is prior . . . to the extent [of the super-
17 priority portion,” NRS 116.3116(2),” the clear intent is to foreclose upon both portions of the lien,
18 including the part which by operation of the statute has super-priority. Therefore, the Court need
19 not decide if the statute permits bifurcation and foreclosure only on the sub-priority portion, and
20 the Court denies summary judgment on the non-constitutional claims in ECF No. 85.

21 **VII. STAY**

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23
24 On August 12, 2016, the Ninth Circuit issued its decision on appeal in Bourne Valley Court
25 Tr v. Wells Fargo Bank, N.A., 832 F.3d 1154, 1159-60 (9th Cir. 2016), holding that NRS 116
26 violates the Due Process Clause and is facially unconstitutional. The Court of Appeals issued its
27 mandate in the appeal on December 14, 2016, vacating and remanding the judgment to the United
28 States District Court, District of Nevada. On January 26, 2017, the Nevada Supreme Court issued

1 its decision in Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133
2 Nev. Adv. Op. 5, 2017 WL 398426 (Nev. Jan. 26, 2017), holding that NRS 116's foreclosure
3 process does not constitute state action sufficient to support a due process challenge. The parties
4 in Bourne Valley and Saticoy Bay are seeking review of both decisions in the United States
5 Supreme Court. Bourne Valley's deadline to file its petition for writ of certiorari of the Ninth
6 Circuit's Bourne Valley decision is April 3, 2017, and Wells Fargo's deadline to file its petition for
7 writ of certiorari of the Nevada Supreme Court's Saticoy Bay decision is April 25, 2017. This
8 Court additionally anticipates certifying an issue regarding NRS 116's notice requirement to the
9 Nevada Supreme Court. As the ultimate mandate in these cases may affect issues in the instant
10 litigation, this proceeding is hereby STAYED.

11
12 **VIII. CONCLUSION**

13 Accordingly,

14 **IT IS HEREBY ORDERED** that ECF No. 81 is DENIED without prejudice as to the
15 constitutional claims only, and denied with prejudice as to all other claims.

16 **IT IS FURTHER ORDERED** that ECF No. 82 Motion for Summary Judgment is
17 GRANTED.

18 **IT IS FURHTER ORDERED** that ECF No. 83 Motion for Summary Judgment is
19 GRANTED in part with respect to the claims against Nevada Association Services, and DENIED
20 in part with respect to the West Charleston Lofts Homeowner's Association.

21 **IT IS FURTHER ORDERED** that ECF No. 84 Motion for Summary Judgment is
22 DENIED as moot.

23 **IT IS FURTHER ORDERED** that ECF No. 85 is DENIED without prejudice as to the
24 constitutional claims only and denied with prejudice as to all other claims.

25 **IT IS FURTHER ORDERED** that ECF No. 88 Motion for Summary Judgment is
26 DENIED.
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IT IS FURTHER ORDERED that this case is STAYED. Pending [81] and [85] are denied without prejudice with respect to the constitutional claims only, with leave to refile as to those claims once the stay is lifted.

DATED: March 31, 2017.



RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE