

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BANK OF AMERICA, N.A.,)
)
Plaintiff,)
vs.)
)
SOLERA AT STALLION MOUNTAIN UNIT)
OWNERS' ASSOCIATION, et al.,)
)
Defendants.)
_____)

Case No.: 2:16-cv-00286-GMN-GWF

ORDER

Pending before the Court is the Motion for Summary Judgment, (ECF No. 30), filed by Plaintiff Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP ("BANA"). Defendants NV Eagles, LLC ("NV Eagles") and Solera at Stallion Mountain Unit Owners' Association ("HOA") (collectively "Defendants") filed Responses, (see ECF No. 35, 36), to which BANA filed Replies, (see ECF Nos. 40, 41).

Also pending before the Court is NV Eagles' Motion for Summary Judgment, (ECF No. 31), to which HOA joins, (ECF No. 31). BANA filed a Response, (ECF No. 33), and HOA filed a Reply, (ECF No. 39). For the reasons discussed below, the Court **GRANTS** BANA's Motion and **DENIES** HOA's Motion.

I. BACKGROUND

BANA filed its Complaint on February 12, 2016, asserting claims involving the non-judicial foreclosure on real property located at 6061 Fox Creek Avenue, Las Vegas, Nevada (the "Property"). (Compl. ¶ 8, ECF No. 1). On September 22, 2005, non-party Catherine T. Samoska purchased the Property by way of a loan in the amount of \$283,386.00 secured by a Deed of Trust ("DOT") recorded August 27, 2007. (Id. ¶ 14).

1 On November 1, 2010, HOA, through its agent Nevada Association Services, Inc.
2 (“NAS”), recorded a notice of delinquent assessment lien. (Id. ¶ 16). On December 1, 2010,
3 HOA recorded a notice of default and election to sell to satisfy the delinquent assessment lien.
4 (Id. ¶ 18). Although BANA requested the super-priority amount HOA alleged was due, HOA
5 did not provide this amount. (Id. ¶ 25). Nevertheless, BANA tendered what it calculated as the
6 super-priority amount to HOA through NAS on October 20, 2011. (Id. ¶ 27). On August 22,
7 2011, HOA recorded a notice of trustee’s sale. (Id. ¶ 18). On April 19, 2013, Underwood
8 Partners, LLC, purchased the Property at the foreclosure sale pursuant to NRS § 116.1113. (Id.
9 ¶ 28). Underwood subsequently transferred its interest in the Property to NV Eagles. (Id. ¶ 30).

10 BANA asserts the following causes of action against various parties involved in the
11 foreclosure and subsequent sales of the Property: (1) quiet title with a requested remedy of
12 declaratory judgment; (2) breach of Nevada Revised Statute (“NRS”) 116.1113; (3) wrongful
13 foreclosure; (4) injunctive relief. (Id.).

14 **II. LEGAL STANDARD**

15 The Federal Rules of Civil Procedure provide for summary adjudication when the
16 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
17 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
18 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
19 may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
20 A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to
21 return a verdict for the nonmoving party. *Id.* “Summary judgment is inappropriate if
22 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
23 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P ’ship*, 521 F.3d 1201, 1207 (9th
24 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
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1 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
2 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

3 In determining summary judgment, a court applies a burden-shifting analysis. “When
4 the party moving for summary judgment would bear the burden of proof at trial, it must come
5 forward with evidence which would entitle it to a directed verdict if the evidence went
6 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
7 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
8 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
9 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
10 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
11 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
12 party failed to make a showing sufficient to establish an element essential to that party’s case
13 on which that party will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 323–24. If
14 the moving party fails to meet its initial burden, summary judgment must be denied and the
15 court need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S.
16 144, 159–60 (1970).

17 If the moving party satisfies its initial burden, the burden then shifts to the opposing
18 party to establish that a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v.*
19 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
20 the opposing party need not establish a material issue of fact conclusively in its favor. It is
21 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
22 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
23 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
24 summary judgment by relying solely on conclusory allegations that are unsupported by factual
25 data. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go

1 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
2 competent evidence that shows a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324.

3 At summary judgment, a court’s function is not to weigh the evidence and determine the
4 truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The
5 evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in
6 his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not
7 significantly probative, summary judgment may be granted. *Id.* at 249–50.

8 **II. DISCUSSION**

9 BANA asserts claims against Defendants for quiet title, violation of NRS § 116.1113,
10 wrongful foreclosure, and injunctive relief. The Court first considers the impact of the Ninth
11 Circuit’s ruling in *Bourne Valley Court Trust v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir.
12 2016), cert. denied, No. 16-1208, 2017 WL 1300223 (U.S. June 26, 2017), before turning to
13 BANA’s individual claims.

14 **A. The Scope and Effect of Bourne Valley**

15 In *Bourne Valley*, the Ninth Circuit held that NRS § 116.3116’s “‘opt-in’ notice scheme,
16 which required a homeowners’ association to alert a mortgage lender that it intended to
17 foreclose only if the lender had affirmatively requested notice, facially violated the lender’s
18 constitutional due process rights under the Fourteenth Amendment to the Federal Constitution.”
19 *Bourne Valley*, 832 F.3d at 1156. Specifically, the Court of Appeals found that by enacting the
20 statute, the legislature acted to adversely affect the property interests of mortgage lenders, and
21 was thus required to provide “notice reasonably calculated, under all circumstances, to apprise
22 interested parties of the pendency of the action and afford them an opportunity to present their
23 objections.” *Id.* at 1159. The statute’s opt-in notice provisions therefore violated the Fourteenth
24 Amendment’s Due Process Clause because they impermissibly “shifted the burden of ensuring
25 adequate notice from the foreclosing homeowners’ association to a mortgage lender.” *Id.*

1 The necessary implication of the Ninth Circuit’s opinion in Bourne Valley is that the
2 petitioner succeeded in showing that no set of circumstances exists under which the opt-in
3 notice provisions of NRS § 116.3116 would pass constitutional muster. See, e.g., *United States*
4 *v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the
5 most difficult challenge to mount successfully, since the challenger must establish that no set of
6 circumstances exists under which the Act would be valid.”); *William Jefferson & Co. v. Bd. of*
7 *Assessment & Appeals No. 3 ex rel. Orange Cty.*, 695 F.3d 960, 963 (9th Cir. 2012) (applying
8 *Salerno* to facial procedural due process challenge under the Fourteenth Amendment). The fact
9 that a statute “might operate unconstitutionally under some conceivable set of circumstances is
10 insufficient to render it wholly invalid.” *Salerno*, 481 U.S. at 745. To put it slightly differently,
11 if there were any conceivable set of circumstances where the application of a statute would not
12 violate the constitution, then a facial challenge to the statute would necessarily fail. See, e.g.,
13 *United States v. Inzunza*, 638 F.3d 1006, 1019 (9th Cir. 2011) (holding that a facial challenge to
14 a statute necessarily fails if an as-applied challenge has failed because the plaintiff must
15 “establish that no set of circumstances exists under which the [statute] would be valid”).

16 Here, the Ninth Circuit expressly invalidated the “opt-in notice scheme” of NRS
17 § 116.3116, which it pinpointed in NRS 116.3116(2). *Bourne Valley*, 832 F.3d at 1158. In
18 addition, this Court understands *Bourne Valley* also to invalidate NRS 116.311635(1)(b)(2),
19 which also provides for opt-in notice to interested third parties. According to the Ninth Circuit,
20 therefore, these provisions are unconstitutional in each and every application; no conceivable
21 set of circumstances exists under which the provisions would be valid. The factual
22 particularities surrounding the foreclosure notices in this case—which would be of paramount
23 importance in an as-applied challenge—cannot save the facially unconstitutional statutory
24 provisions. In fact, it bears noting that in *Bourne Valley*, the Ninth Circuit indicated that the
25 petitioner had not shown that it did not receive notice of the impending foreclosure sale. Thus,

1 the Ninth Circuit declared the statute’s provisions facially unconstitutional notwithstanding the
2 possibility that the petitioner may have had actual notice of the sale.

3 HOA also argues that NRS § 107.090, which “requires that copies of the notice of
4 default and election to sell, and the notice of sale be mailed to each ‘person with an interest or
5 claimed interest’ that is ‘subordinate’ to the HOA’s super-priority,” is “incorporated into NRS
6 Chapter 116 by NRS 116.31168.” (HOA’s MSJ 8:18–26, ECF No. 32). However, Bourne
7 Valley expressly rejected this argument. Bourne Valley, 832 F.3d at 1159 (“If section
8 116.31168(1)’s incorporation of section 107.090 were to have required homeowners’
9 associations to provide notice of default to mortgage lenders even absent a request, section
10 116.31163 and section 116.31165 would have been meaningless.”).

11 Accordingly, the HOA foreclosed under a facially unconstitutional notice scheme, and
12 thus the HOA foreclosure cannot have extinguished the DOT. Therefore, the Court must quiet
13 title as a matter of law in favor of Plaintiff as assignee of the DOT.

14 **B. Plaintiff’s Remaining Claims for Violation of NRS § 116.1113, Wrongful**
15 **Foreclosure, and Injunctive Relief**

16 In its prayer for relief, BANA requests primarily a declaration that CSC and the
17 Martinez-Aviles purchased the Property subject to its DOT. (See Compl. 14:24–25). The
18 other relief requested—with the exception of the injunctive relief—is phrased in the alternative.
19 (See id. 14:26–15:3). Therefore, because the Court grants summary judgment for BANA on its
20 quiet title claim, BANA has received the relief it requested. Accordingly, the Court dismisses
21 BANA’s second and third causes of action as moot.

22 With regard to BANA’s request for a preliminary injunction pending a determination by
23 the Court concerning the parties’ respective rights and interests, the Court’s grant of summary
24 judgment for BANA moots this claim, and it is therefore dismissed.

1 **III. CONCLUSION**

2 **IT IS HEREBY ORDERED** that BANA's Motion for Summary Judgment, (ECF No.
3 30), is **GRANTED** pursuant to the foregoing.


4 **IT IS FURTHER ORDERED** that NV Eagles' Motion for Summary Judgment, (ECF
5 No. 31), is **DENIED**.

6 **IT IS FURTHER ORDERED** that BANA's claims against CSC are **DISMISSED with**
7 **prejudice**.

8 The Clerk of Court is ordered to close the case.

9 **DATED** this 17 day of August, 2017.

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Gloria M. Navarro, Chief Judge
United States District Judge