

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BANK OF AMERICA, N.A.,)
)
Plaintiff,)
vs.)
SBH 4 HOMEOWNERS' ASSOCIATION;)
BDJ INVESTMENTS, LLC; and NEVADA)
ASSOCIATION SERVICES, INC.,)
Defendants.)

Case No.: 2:16-cv-00487-GMN-PAL

ORDER

Pending before the Court is the Motion for Summary Judgment, (ECF No. 38), filed by Plaintiff Bank of America, N.A. ("BANA"). Defendants BDJ Investments, LLC ("BDJ") and SBH 4 Homeowners' Association ("HOA") (collectively "Defendants") filed Responses, (see ECF Nos. 41, 47), to which BANA filed a Reply, (see ECF No. 48).

Also pending before the Court is BDJ's Motion for Summary Judgment, (ECF No. 40). BANA filed a Response, (ECF No. 45), and HOA failed to file a reply, and the time to do so has passed. For the reasons discussed below, the Court **GRANTS** BANA's Motion and **DENIES** HOA's Motion.

I. BACKGROUND

BANA filed its Complaint on March 7, 2016, asserting claims involving the non-judicial foreclosure on real property located at 1852 Vida Pacifica Street, Las Vegas, NV 89115 (the "Property"). (Compl. ¶ 7, ECF No. 1). On September 29, 2008, non-parties Juan F. Castillo and Priscila A. Castillo purchased the Property by way of a loan in the amount of \$163,041.00 secured by a Deed of Trust ("DOT") recorded September 30, 2008. (Id. ¶ 13).

On February 24, 2010, HOA, through its agent Nevada Association Services, Inc. ("NAS"), recorded a notice of delinquent assessment lien and a notice of default and election to

1 sell to satisfy the delinquent assessment lien. (Id. ¶ 16). On August 20, 2010, HOA recorded a
2 notice of foreclosure sale. (Id. ¶ 17). On September 7, 2012, BDJ purchased the Property at the
3 foreclosure sale pursuant to NRS § 116.1113. (Id. ¶ 27).

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

8 **II. LEGAL STANDARD**

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

21 In determining summary judgment, a court applies a burden-shifting analysis. “When
22 the party moving for summary judgment would bear the burden of proof at trial, it must come
23 forward with evidence which would entitle it to a directed verdict if the evidence went
24 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
25 the absence of a genuine issue of fact on each issue material to its case.” C.A.R. Transp.

1 Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
2 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
3 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
4 essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
5 party failed to make a showing sufficient to establish an element essential to that party's case
6 on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 323–24. If
7 the moving party fails to meet its initial burden, summary judgment must be denied and the
8 court need not consider the nonmoving party's evidence. Adickes v. S.H. Kress & Co., 398 U.S.
9 144, 159–60 (1970).

10 If the moving party satisfies its initial burden, the burden then shifts to the opposing
11 party to establish that a genuine issue of material fact exists. Matsushita Elec. Indus. Co. v.
12 Zenith Radio Corp., 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
13 the opposing party need not establish a material issue of fact conclusively in its favor. It is
14 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
15 parties' differing versions of the truth at trial.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors
16 Ass'n, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
17 summary judgment by relying solely on conclusory allegations that are unsupported by factual
18 data. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
19 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
20 competent evidence that shows a genuine issue for trial. Celotex Corp., 477 U.S. at 324.

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

1 **II. DISCUSSION**

2 BANA asserts claims against Defendants for quiet title, violation of NRS § 116.1113,
3 wrongful foreclosure, and injunctive relief. The Court first considers the impact of the Ninth
4 Circuit’s ruling in Bourne Valley Court Trust v. Wells Fargo Bank, NA, 832 F.3d 1154 (9th Cir.
5 2016), cert. denied, No. 16-1208, 2017 WL 1300223 (U.S. June 26, 2017), before turning to
6 BANA’s individual claims.

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

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

19 The necessary implication of the Ninth Circuit’s opinion in Bourne Valley is that the
20 petitioner succeeded in showing that no set of circumstances exists under which the opt-in
21 notice provisions of NRS § 116.3116 would pass constitutional muster. See, e.g., United States
22 v. Salerno, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the
23 most difficult challenge to mount successfully, since the challenger must establish that no set of
24 circumstances exists under which the Act would be valid.”); William Jefferson & Co. v. Bd. of
25 Assessment & Appeals No. 3 ex rel. Orange Cty., 695 F.3d 960, 963 (9th Cir. 2012) (applying

1 Salerno to facial procedural due process challenge under the Fourteenth Amendment). The fact
2 that a statute “might operate unconstitutionally under some conceivable set of circumstances is
3 insufficient to render it wholly invalid.” Salerno, 481 U.S. at 745. To put it slightly differently,
4 if there were any conceivable set of circumstances where the application of a statute would not
5 violate the constitution, then a facial challenge to the statute would necessarily fail. See, e.g.,
6 United States v. Inzunza, 638 F.3d 1006, 1019 (9th Cir. 2011) (holding that a facial challenge to
7 a statute necessarily fails if an as-applied challenge has failed because the plaintiff must
8 “establish that no set of circumstances exists under which the [statute] would be valid”).

9 Here, the Ninth Circuit expressly invalidated the “opt-in notice scheme” of NRS
10 § 116.3116, which it pinpointed in NRS 116.3116(2). Bourne Valley, 832 F.3d at 1158. In
11 addition, this Court understands Bourne Valley also to invalidate NRS 116.311635(1)(b)(2),
12 which also provides for opt-in notice to interested third parties. According to the Ninth Circuit,
13 therefore, these provisions are unconstitutional in each and every application; no conceivable
14 set of circumstances exists under which the provisions would be valid. The factual
15 particularities surrounding the foreclosure notices in this case—which would be of paramount
16 importance in an as-applied challenge—cannot save the facially unconstitutional statutory
17 provisions. In fact, it bears noting that in Bourne Valley, the Ninth Circuit indicated that the
18 petitioner had not shown that it did not receive notice of the impending foreclosure sale. Thus,
19 the Ninth Circuit declared the statute’s provisions facially unconstitutional notwithstanding the
20 possibility that the petitioner may have had actual notice of the sale.

21 Accordingly, the HOA foreclosed under a facially unconstitutional notice scheme, and
22 thus the HOA foreclosure cannot have extinguished the DOT. Therefore, the Court must quiet
23 title as a matter of law in favor of BANA as assignee of the DOT.
24
25

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

3 In its prayer for relief, BANA requests primarily a declaration that BDJ purchased the
4 Property subject to its DOT. (See Compl. 14:13–14). The other relief requested—with the
5 exception of the injunctive relief—is phrased in the alternative. (See id. ¶¶ 58–73). Therefore,
6 because the Court grants summary judgment for BANA on its quiet title claim, BANA has
7 received the relief it requested. Accordingly, the Court dismisses BANA’s second and third
8 causes of action as moot.

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

12 **III. CONCLUSION**

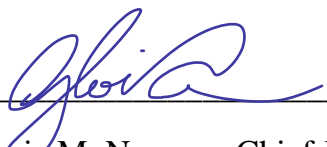
13 **IT IS HEREBY ORDERED** that BANA’s Motion for Summary Judgment, (ECF No.
14 38), is **GRANTED** pursuant to the foregoing.

15 **IT IS FURTHER ORDERED** that BDJ’s Motion for Summary Judgment, (ECF No.
16 40), is **DENIED**.

17 **IT IS FURTHER ORDERED** that BANA’s remaining claims are **DISMISSED with**
18 **prejudice**.

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

20 **DATED** this 4 day of April, 2018.

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24 _____
25 Gloria M. Navarro, Chief Judge
 United States District Judge