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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
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HSBC BANK USA, N.A,, Plaintiff(s), v. EDUBIJES OCHOA-DELGADO, et al., Defendant(s).	Case No. 2:16-CV-1171 JCM (VCF) ORDER

Presently before the court is plaintiff HSBC Bank USA, N.A.'s ("HSBC") motion for summary judgment. (ECF No. 38). Defendant 4918 Athens Bay Trust, ("ABT") filed a response (ECF No. 45), to which plaintiff replied (ECF No. 47).

Also before the court is defendant's motion for summary judgment. (ECF No. 41). Plaintiff filed a response (ECF No. 44), to which defendant replied (ECF No. 46).

I. Facts

This case involves a dispute over real property located at 4918 Athens Bay Place, North Las Vegas, Nevada, 89031 (the "property"). On March 5, 1999, defendant Edubijes Ochoa-Delgado ("Ochoa") obtained a loan from non-party Bank of America, N.A. ("BOA") to purchase the property. (ECF No. 1).

On July 12, 2005, Ochoa secured a new loan from MLSG, Inc., for $154,700. Id. The loan was secured by a deed of trust recorded on July 20, 2005 as a first lien secured against the property. Id. The deed of trust named MERS as the beneficiary and Southwest Title as the trustee. Id.

On January 21, 2009, MERS executed an assignment of the deed of trust to plaintiff, which was recorded on February 4, 2009. Id.; (ECF No. 39-3). On April 21, 2010, MERS executed a

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second assignment of deed of trust to plaintiff, which was recorded on April 29, 2010. (ECF No. 1).

Ochoa became delinquent on his loan obligations. On December 24, 2009, plaintiff, through its foreclosure agent and trustee, recorded a notice of default. Id.; (ECF No. 39-4).

Ochoa also became delinquent on his HOA obligations. On August 27, 2010, defendant Absolute Collection Services ("ACS"), acting on behalf of the HOA, recorded a notice of delinquent assessment lien, stating an amount due of $1,122.40. (ECF No. 39-5). On November 15, 2010, ACS recorded a notice of default and election to sell to satisfy the delinquent assessment lien, stating an amount due of $2,026.40. (ECF No. 39-6).

On September 20, 2012, ACS recorded a third notice of sale,[1] stating an amount due of $4,734.45 and an anticipated sale date of November 6, 2012. (ECF No. 39-7).

On November 6, 2012 the HOA foreclosed on the property. (ECF No. 1). ABT purchased the property at the foreclosure sale for $5,900. Id. A foreclosure deed in favor of ABT was recorded on November 7, 2012. Id.

On May 24, 2016, plaintiff filed the underlying complaint, alleging four causes of action: quiet title/declaratory judgment against all defendants; breach of NRS 116.1113 against the HOA and ACS; wrongful foreclosure against the HOA and ACS; and unjust enrichment against the HOA and ACS. (ECF No. 1).

In the instant motions, plaintiff and defendant ABT move for summary judgment in their favor. (ECF Nos. 38, 41).

II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is

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[1] ACS also recorded notices of sale on February 18, 2011, and March 8, 2012. (ECF No. 1).

"to isolate and dispose of factually unsupported claims." Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial." Id.

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-moving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. See Celotex Corp., 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. See Celotex, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. See id. at 249–50.

III. Discussion

As an initial matter, the court takes judicial notice of the following recorded documents: the first deed of trust (ECF No. 39-2); the assignment to plaintiff; (ECF No. 39-3); the HOA's notice of delinquent assessment (ECF No. 39-5); the HOA's notice of default and election to sell (ECF No. 39-6); the HOA's third notice of sale (ECF No. 39-7); and the trustee's deed upon sale (ECF No. 39-8). See, e.g., United States v. Corinthian Colls., 655 F.3d 984, 998–99 (9th Cir. 2011) (holding that a court may take judicial notice of public records if the facts noticed are not subject to reasonable dispute); Intri-Plex Tech., Inv. v. Crest Grp., Inc., 499 F.3d 1048, 1052 (9th Cir. 2007).

Under Nevada law, "[a]n action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action for the purpose of determining such adverse claim." Nev. Rev. Stat. § 40.010. "A plea to quiet title does not require any particular elements, but each party must plead and prove his or her own claim to the property in question and a plaintiff's right to relief therefore depends on superiority of title." Chapman v. Deutsche Bank Nat'l Trust Co., 302 P.3d 1103, 1106 (Nev. 2013) (citations and internal quotation marks omitted). Therefore, for plaintiff to succeed on its quiet title action, it needs to show that its claim to the property is superior to all others. See also Breliant v. Preferred Equities Corp.,

918 P.2d 314, 318 (Nev. 1996) ("In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself.").

Section 116.3116(1) of the Nevada Revised Statutes[2] gives an HOA a lien on its homeowners' residences for unpaid assessments and fines; moreover, NRS 116.3116(2) gives priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as "[a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent." Nev. Rev. Stat. § 116.3116(2)(b).

The statute then carves out a partial exception to subparagraph (2)(b)'s exception for first security interests. See Nev. Rev. Stat. § 116.3116(2). In SFR Investments Pool 1 v. U.S. Bank, N.A., the Nevada Supreme Court provided the following explanation:

> As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust.

334 P.3d 408, 411 (Nev. 2014) ("SFR Investments").

Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority lien by nonjudicial foreclosure sale. Id. at 415. Thus, "NRS 116.3116(2) provides an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." Id. at 419; see also Nev. Rev. Stat. § 116.31162(1) (providing that "the association may foreclose its lien by sale" upon compliance with the statutory notice and timing rules).

Subsection (1) of NRS 116.31166 provides that the recitals in a deed made pursuant to NRS 116.31164 of the following are conclusive proof of the matters recited:

> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale[.]

Nev. Rev. Stat. § 116.31166(1)(a)–(c).[3] "The 'conclusive' recitals concern default, notice, and publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale

[2] The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where otherwise indicated, the references in this order to statutes codified in NRS Chapter 116 are to the version of the statutes in effect in 2011–13, when the events giving rise to this litigation occurred.

[3] The statute further provides as follows:

as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and give context to NRS 116.31166." Shadow Wood Homeowners Assoc. v. N.Y. Cmty. Bancorp., Inc., 366 P.3d 1105 (Nev. 2016) ("Shadow Wood"). Nevertheless, courts retain the equitable authority to consider quiet title actions when a HOA's foreclosure deed contains statutorily conclusive recitals. See id. at 1112.

Here, the parties have provided the recorded notice of delinquent assessment, the recorded notice of default and election to sell, the recorded notice of trustee's sale, and the recorded trustee's deed upon sale. See (ECF No. 39-5, 39-6, 39-7, 39-8). Pursuant to NRS 116.31166, these recitals in the recorded foreclosure deed are conclusive to the extent that they implicate compliance with NRS 116.31162 through NRS 116.31164, which provide the statutory prerequisites of a valid foreclosure. See id. at 1112 ("[T]he recitals made conclusive by operation of NRS 116.31166 implicate compliance only with the statutory prerequisites to foreclosure."). Therefore, pursuant to NRS 116.31166 and the recorded foreclosure deed, the foreclosure sale is valid to the extent that it complied with NRS 116.31162 through NRS 116.31164.

Importantly, while NRS 116.3116 accords certain deed recitals conclusive effect—e.g., default, notice, and publication of the notice of sale—it does not conclusively entitle ABT to judgment as a matter of law on plaintiff's quiet title claim. See Shadow Wood, 366 P.3d at 1112 (rejecting contention that NRS 116.31166 defeats, as a matter of law, actions to quiet title). Thus, the question remains whether plaintiff has demonstrated sufficient grounds to justify setting aside the foreclosure sale. See id.

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2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.

3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption.

Nev. Rev. Stat. § 116.31166(2)–(3).

“When sitting in equity . . . courts must consider the entirety of the circumstances that bear upon the equities. This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief.” Id.

Plaintiff raises the following grounds in support of its motion for summary judgment: the sale in this case was commercially unreasonable; and Nevada’s HOA foreclosure statute is unconstitutional on its face pursuant to the Ninth Circuit decision in Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 832 F.3d 1154 (9th Cir. 2016) (“Bourne Valley”). As set forth in further detail below, the court finds that plaintiff has failed to set forth sufficient grounds to justify setting aside the foreclosure sale and has not raised a genuine issue to withstand summary judgment.

1. Commercial reasonability

Plaintiff argues that the foreclosure sale was commercially unreasonable because the property sold at approximately 6% of its fair market value, which is grossly inadequate so as to justify setting the foreclosure aside. (ECF No. 38). Plaintiff further argues that this case presents additional elements of unfairness, as the controlling CC&Rs contained a mortgage protection clause and the HOA notices did not specifically contest the applicability of the mortgage protection clause to the HOA foreclosure proceedings. Id.

NRS 116.3116 codifies the Uniform Common Interest Ownership Act (“UCIOA”) in Nevada. See Nev. Rev. Stat. § 116.001 (“This chapter may be cited as the Uniform Common-Interest Ownership Act”); see also SFR Investments, 334 P.3d at 410. Numerous courts have interpreted the UCIOA and NRS 116.3116 as imposing a commercial reasonableness standard on foreclosure of association liens.[4]

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[4] See, e.g., Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d 1222, 1229 (D. Nev. 2013) (“[T]he sale for $10,000 of a Property that was worth $176,000 in 2004, and which was probably worth somewhat more than half as much when sold at the foreclosure sale, raises serious doubts as to commercial reasonableness.”); SFR Investments, 334 P.3d at 418 n.6 (noting bank’s argument that purchase at association foreclosure sale was not commercially reasonable); Thunder Props., Inc. v. Wood, No. 3:14-cv-00068-RCJ-WGC, 2014 WL 6608836, at *2 (D. Nev. Nov. 19, 2014) (concluding that purchase price of “less than 2% of the amounts of the deed of trust” established commercial unreasonableness “almost conclusively”); Rainbow Bend *Homeowners Ass’n* v. Wilder, No. 3:13-cv-00007-RCJ-VPC, 2014 WL 132439, at *2 (D. Nev. Jan. 10, 2014) (deciding case on other grounds but noting that “the purchase of a residential property free and clear of all encumbrances for the price of delinquent HOA dues would raise grave doubts as to the commercial reasonableness of the sale under Nevada law”); Will v. Mill *Condo. Owners’ Ass’n*, 848 A.2d 336, 340 (Vt. 2004) (discussing commercial reasonableness standard and concluding that “the UCIOA does provide for this additional layer of protection”).

James C. Mahan
U.S. District Judge

In Shadow Wood, the Nevada Supreme Court held that an HOA's foreclosure sale may be set aside under a court's equitable powers notwithstanding any recitals on the foreclosure deed where there is a "grossly inadequate" sales price and "fraud, unfairness, or oppression." 366 P.3d at 1110; see also Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC, 184 F. Supp. 3d 853, 857–58 (D. Nev. 2016). In other words, "demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression." Id. at 1112; see also Long v. Towne, 639 P.2d 528, 530 (Nev. 1982) ("Mere inadequacy of price is not sufficient to justify setting aside a foreclosure sale, absent a showing of fraud, unfairness or oppression." (citing Golden v. Tomiyasu, 387 P.2d 989, 995 (Nev. 1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere inadequacy of price, it may be if the price is grossly inadequate and there is "in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price" (internal quotation omitted)))).

The Shadow Wood court did not adopt the restatement. Compare Shadow Wood, 366 P.3d at 1112–13 (citing the restatement as secondary authority to warrant use of the 20% threshold test for grossly inadequate sales price), with St. James Village, Inc. v. Cunningham, 210 P.3d 190, 213 (Nev. 2009) (explicitly adopting § 4.8 of the Restatement in specific circumstances); Foster v. Costco Wholesale Corp., 291 P.3d 150, 153 (Nev. 2012) ("[W]e adopt the rule set forth in the Restatement (Third) of Torts: Physical and Emotional Harm section 51."); Cucinotta v. Deloitte & Touche, LLP, 302 P.3d 1099, 1102 (Nev. 2013) (affirmatively adopting the Restatement (Second) of Torts section 592A). Because Nevada courts have not adopted the relevant section(s) of the restatement at issue here, the Long test, which requires a showing of fraud, unfairness, or oppression in addition to a grossly inadequate sale price to set aside a foreclosure sale, controls. See 639 P.2d at 530.

Nevada has not clearly defined what constitutes "unfairness" in determining commercial reasonableness. The few Nevada cases that have discussed commercial reasonableness state, "every aspect of the disposition, including the method, manner, time, place, and terms, must be commercially reasonable." Levers v. Rio King Land & Inv. Co., 560 P.2d 917, 920 (Nev. 1977).

This includes "quality of the publicity, the price obtained at the auction, [and] the number of bidders in attendance." Dennison v. Allen Grp. Leasing Corp., 871 P.2d 288, 291 (Nev. 1994) (citing Savage Constr. v. Challenge–Cook, 714 P.2d 573, 574 (Nev. 1986)).

Here, plaintiff fails to set forth sufficient evidence to show fraud, unfairness, or oppression so as to justify the setting aside of the foreclosure sale. Plaintiff's motion overlooks the reality of the foreclosure process. The amount of the lien—not the fair market value of the property—is what typically sets the sales price. Further, this court has consistently rejected plaintiff's argument that a CC&Rs mortgage protection clause, without more, demonstrates fraud or unfairness that would justify setting aside a foreclosure sale. See, e.g., Bayview Loan Servicing, LLC v. SFR Investments Pool 1, LLC, no 2:14-cv-01875-JCM-GWF, 2017 WL 1100955, at *9 (D. Nev. Mar. 22, 2017).

Plaintiff's other arguments to set aside the foreclosure sale as commercially unreasonable are without merit. The foreclosure notices did not need to specifically state that they supersede the mortgage protection clause in the CC&Rs. See, e.g. Bank of America, N.A. v. Hollow De Oro Homeowners Association, no 2:15-cv-00675-JCM-VCF, 2018 WL 523354, at *8 (D. Nev. Jan. 23, 2018). Further, the "common understanding" of the law in 2012 does not influence the outcome of this case.

Accordingly, plaintiff's commercial reasonability argument fails as a matter of law. See, e.g., Nationstar Mortg., LLC v. SFR Investments Pool 1, LLC, No. 70653, 2017 WL 1423938, at *2 n.2 (Nev. App. Apr. 17, 2017) ("Sale price alone, however, is never enough to demonstrate that the sale was commercially unreasonable; rather, the party challenging the sale must also make a showing of fraud, unfairness, or oppression that brought about the low sale price.").

2. Due process

Plaintiff argues that NRS Chapter 116 is unconstitutional under Bourne Valley, wherein the Ninth Circuit held that the HOA foreclosure statute is facially unconstitutional. (ECF No. 38).

The Ninth Circuit held that NRS 116.3116's "opt-in" notice scheme, which required a HOA to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively requested notice, facially violated mortgage lenders' constitutional due process rights. Bourne

Valley, 832 F.3d at 1157–58. The facially unconstitutional provision, as identified in Bourne Valley, exists in NRS 116.31163(2). See id. at 1158. At issue is the "opt-in" provision that unconstitutionally shifts the notice burden to holders of the property interest at risk. See id.

"A first deed of trust holder only has a constitutional grievance if he in fact did not receive reasonable notice of the sale at which his property rights was extinguished." Wells Fargo Bank, N.*A. v. Sky Vista Homeowners Ass'*n, No. 315CV00390RCJVPC, 2017 WL 1364583, at *4 (D. Nev. Apr. 13, 2017). To state a procedural due process claim, a claimant must allege "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 982 (9th Cir. 1998). Plaintiff has failed on both prongs.

Here, plaintiff received notice of the planned HOA foreclosure. (ECF No. 41-14 at 4). Therefore, plaintiff's due process argument fails as a matter of law. See, e.g., Spears v. Spears, 596 P.2d 210, 212 (Nev. 1979) ("The rule is well established that one who is not prejudiced by the operation of a statute cannot question its validity.").

Further, plaintiff confuses constitutionally mandated notice with the notices required to conduct a valid foreclosure sale. Due process does not require actual notice. Jones v. Flowers, 547 U.S. 220, 226 (2006). Rather, it requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); see also Bourne Valley, 832 F.3d at 1158.

Accordingly, plaintiff has failed to show that summary judgment is proper based on Bourne Valley.

IV. Conclusion

In light of the foregoing, ABT has shown that it is entitled to judgment as a matter of law. ABT has provided the recorded foreclosure deed in its favor, which is conclusive of the recitals contained therein, and has shown that its interest in the property is superior to plaintiff's interest. On the other hand, the court finds that plaintiff has failed to show that it is entitled to judgment as

a matter of law on its quiet title claim against ABT. Further, plaintiff has provided no grounds to justify setting aside the otherwise valid foreclosure sale.

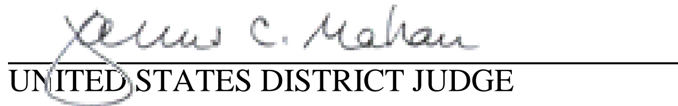
Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that ABT's motion for summary judgment (ECF No. 41) be, and the same hereby is, GRANTED, consistent with the foregoing.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (ECF No. 38) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that ABT shall prepare a proposed judgment consistent with this order and submit it to the court within thirty (30) days of the filing of this order.

DATED February 27, 2018.



UNITED STATES DISTRICT JUDGE