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3 **UNITED STATES DISTRICT COURT**4 **DISTRICT OF NEVADA**5 FEDERAL NATIONAL MORTGAGE  
6 ASSOCIATION,

7 Plaintiff

8 v.

9 VEGAS PROPERTY SERVICES, INC. and  
10 OPULENCE CONDOMINIUM  
11 ASSOCIATION,

12 Defendants

Case No.: 2:17-cv-01798-APG-PAL

13 **Order Granting Motion for Summary  
14 Judgment and Denying Motions to Dismiss  
15 and for Rule 56(d) Relief**

16 [ECF Nos. 36, 42, 49]

17 This case revolves around whether a deed of trust still encumbers property located at  
18 5415 West Harmon Avenue #2114, Las Vegas, Nevada, following a non-judicial foreclosure sale  
19 conducted by a homeowners association (HOA). Plaintiff Federal National Mortgage  
20 Association (Fannie Mae) seeks a declaration that its deed of trust continues to encumber the  
21 property. Defendant Vegas Property Services, Inc. (Vegas) purchased the property at the HOA  
22 foreclosure sale.

23 The parties are familiar with the facts, so I will not repeat them here except where  
necessary. Vegas moves to dismiss, arguing Fannie Mae's equitable claims should be dismissed  
due to laches and unclean hands because Fannie Mae took no action before the HOA sale to pay  
off the superpriority amount or to stop the foreclosure sale. Alternatively, Vegas argues the  
transfer of the note to Fannie Mae is void because it is not in writing and is not recorded.  
Finally, Vegas contends that Fannie Mae consented to the foreclosure.

Fannie Mae opposes dismissal and moves for summary judgment in its favor. Fannie  
Mae asserts that it owned the note and deed of trust and was the beneficiary of record for the

1 deed of trust at the time of the HOA foreclosure sale. Fannie Mae contends that under the  
2 federal foreclosure bar in 12 U.S.C. § 4617(j)(3), the HOA foreclosure sale could not have  
3 extinguished its property interest. Fannie Mae asserts that it may have consented to an HOA's  
4 superpriority lien having priority over the deed of trust, but the federal foreclosure bar requires  
5 the Federal Housing Finance Agency (FHFA) to consent to Fannie Mae's lien being  
6 extinguished by foreclosure of the HOA's superpriority lien and FHFA has not done so. Fannie  
7 Mae argues neither laches nor unclean hands apply because it had no obligation to do anything,  
8 as the federal foreclosure bar preserves its property interests automatically by operation of law.

9         Vegas replies that Fannie Mae has not presented sufficient evidence to show it had a  
10 property interest at the time of the foreclosure sale. Vegas contends there is no writing showing  
11 the transfer of the note, so Fannie Mae cannot show compliance with the statute of frauds for the  
12 alleged 2004 transfer of ownership to Fannie Mae. Vegas also argues that because Fannie Mae  
13 did not record a transfer of the note in 2004, the transfer is void as to subsequent purchasers like  
14 Vegas. Vegas further contends that Fannie Mae never owned the note because it was placed in a  
15 trust for which Fannie Mae serves as trustee. Vegas also argues the federal foreclosure bar  
16 violates due process. Finally, Vegas asks for relief under Federal Rule of Civil Procedure 56(d),  
17 asserting it needs discovery to respond to the summary judgment motion.

18         Fannie Mae was the beneficiary of record under the deed of trust at the time of the HOA  
19 foreclosure sale and thus had a property interest that complied with the statute of frauds and  
20 Nevada's recording statutes. FHFA has not consented to Fannie Mae's property interests being  
21 extinguished by HOA foreclosure sales. Consequently, the federal foreclosure bar preserves  
22 Fannie Mae's interest and the HOA foreclosure sale did not extinguish the deed of trust. The  
23 federal foreclosure bar does not deprive Vegas of due process as a matter of law. And because

1 the federal foreclosure bar operates automatically, Fannie Mae had no obligation to pay off the  
2 superpriority lien or to try to stop the HOA foreclosure sale. Thus, there is no basis to apply  
3 unclean hands or laches. Finally, I deny the Rule 56(d) motion because further discovery would  
4 not change the outcome.

5 Summary judgment is appropriate if the movant shows “there is no genuine dispute as to  
6 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
7 56(a), (c). A fact is material if it “might affect the outcome of the suit under the governing law.”  
8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if “the evidence  
9 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

10 The party seeking summary judgment bears the initial burden of informing the court of  
11 the basis for its motion and identifying those portions of the record that demonstrate the absence  
12 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
13 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
14 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
15 (9th Cir. 2000). I view the evidence and reasonable inferences in the light most favorable to the  
16 non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir.  
17 2008).

18 The federal foreclosure bar in 12 U.S.C. § 4617(j)(3) provides that “in any case in which  
19 [FHFA] is acting as a conservator,” “[n]o property of [FHFA] shall be subject to . . .  
20 foreclosure[] or sale without the consent of [FHFA].” The question of whether the federal  
21 foreclosure bar applies to preserve Fannie Mae’s interest in this property following the HOA’s  
22 foreclosure sale of its superpriority lien is controlled by *Berezovsky v. Moniz*, 869 F.3d 923 (9th  
23 Cir. 2017). In that case, the Ninth Circuit held that the federal foreclosure bar preempts Nevada

1 law and precludes an HOA foreclosure sale from extinguishing Fannie Mae’s<sup>1</sup> interest in  
2 property without FHFA’s affirmative consent. *Id.* at 927-31.

3         The parties dispute whether Fannie Mae owned the note, when it acquired its interest in  
4 the note, whether that interest was properly recorded, and the significance of the fact that the  
5 note was at one point placed into a trust. But none of these disputes matters in this case because  
6 it is undisputed that at the time of the HOA foreclosure sale, Fannie Mae was the beneficiary of  
7 record for the deed of trust. *See* ECF Nos. 32 at 6; 3 at 139-41; 50 at 18. A deed of trust is a  
8 security interest in the property. *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 254 (Nev.  
9 2012) (en banc); *Leyva v. Nat’l Default Servicing Corp.*, 255 P.3d 1275, 1279 (Nev. 2011) (en  
10 banc). It is this interest in property that Fannie Mae seeks to preserve through this action.

11 Whether Fannie Mae will be able to foreclose on the property at some later point in time is not  
12 before me, so the status of the note is irrelevant in this case. The only question here is whether  
13 the deed of trust was extinguished by the HOA foreclosure sale, and because Fannie Mae was the  
14 beneficiary of record for the deed of trust, the federal foreclosure bar precludes that interest from  
15 being extinguished without FHFA’s consent. That interest was recorded in a signed writing prior  
16 to the HOA sale, so neither the statute of frauds nor Nevada’s recording statutes changes the  
17 result. *See* Nev. Rev. Stat. §§ 111.205, 111.210, 111.315-.325. Further, Vegas’s status as a bona  
18 fide purchaser is irrelevant because “Nevada’s law on bona fide purchasers is preempted by the  
19 federal foreclosure bar.” *JPMorgan Chase Bank, N.A. v. GDS Fin. Servs.*, No. 2:17-cv-02451-  
20 APG-PAL, 2018 WL 2023123, at \*3 (D. Nev. May 1, 2018).

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23 <sup>1</sup> *Berezovsky* involved the Federal Home Loan Mortgage Corporation (“Freddie Mac”) but there is no material difference between Freddie Mac and Fannie Mae for these purposes. Both were placed into conservatorship under FHFA, and the federal foreclosure bar prohibits the non-consensual foreclosure of FHFA’s assets. *Berezovsky*, 869 F.3d at 925–27.

1 Vegas has not raised a genuine dispute whether FHFA consented to the HOA foreclosure  
2 sale extinguishing Fannie Mae’s deed of trust. Vegas relies on statements by Fannie Mae, but  
3 the federal foreclosure bar requires FHFA’s consent, not Fannie Mae’s. Moreover, the federal  
4 foreclosure bar’s “plain text . . . does not necessitate a decision by FHFA not to consent to a  
5 given foreclosure sale; rather, the bar on foreclosure sales lacking FHFA’s consents applies by  
6 default.” *Fed. Home Loan Mortg. Corp. v. SFR Investments Pool 1, LLC*, 893 F.3d 1136, 1149  
7 (9th Cir. 2018). Thus, absent some affirmative action by FHFA consenting to a particular  
8 extinguishment, the federal foreclosure bar operates automatically to protect FHFA’s assets.  
9 There is no evidence FHFA consented to this sale extinguishing the deed of trust.

10 Finally, I have previously rejected the due process argument Vegas raises. *Nationstar*  
11 *Mortg. LLC v. Tow Properties, LLC II*, No. 2:17-cv-01770-APG-VCF, 2018 WL 2014064, at \*5-  
12 7 (D. Nev. Apr. 27, 2018). So has the Ninth Circuit. *Fed. Home Loan Mortg. Corp.*, 893 F.3d at  
13 1147-51. The federal foreclosure bar does not violate Vegas’s due process rights as a matter of  
14 law.

15 In sum, no genuine dispute remains that the federal foreclosure bar applies to preserve  
16 Fannie Mae’s recorded interest in the deed of trust. The HOA foreclosure sale did not extinguish  
17 it as a matter of law.

18 Vegas nevertheless argues that Fannie Mae should be precluded from asserting its  
19 equitable claims for quiet title because of laches and unclean hands. Specifically, Vegas  
20 contends Fannie Mae did nothing to protect its interests prior to the HOA sale and waited too  
21 long to bring suit after the sale.

22 Fannie Mae’s quiet title claims against Vegas sound in equity because Fannie Mae seeks  
23 to resolve competing claims to interests in property. *See Shadow Wood HOA v. N.Y. Cmty.*

1 *Bancorp*, 366 P.3d 1105, 1111 (Nev. 2016) (en banc) (stating that a person seeking to quiet title  
2 under Nevada Revised Statutes § 40.010 may invoke the court’s equitable powers to resolve  
3 competing claims to title). Thus, equitable defenses such as laches and unclean hands may bar  
4 the claims.

5 “Laches is an equitable time limitation on a party’s right to bring suit, . . . resting on the  
6 maxim that one who seeks the help of a court of equity must not sleep on his rights.” *Jarrow*  
7 *Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002) (quotations and internal  
8 citation omitted). The “laches determination is made with reference to the limitations period for  
9 the analogous action at law. If the plaintiff filed suit within the analogous limitations period, the  
10 strong presumption is that laches is inapplicable.” *Id.* Laches is an affirmative defense that  
11 “requires proof of (1) lack of diligence by the party against whom the defense is asserted, and  
12 (2) prejudice to the party asserting the defense.” *In re Beaty*, 306 F.3d 914, 926 (9th Cir. 2002)  
13 (quotation omitted).

14 “The unclean hands doctrine generally bars a party from receiving equitable relief  
15 because of that party’s own inequitable conduct.” *Las Vegas Fetish & Fantasy Halloween Ball,*  
16 *Inc. v. Ahern Rentals, Inc.*, 182 P.3d 764, 766 (Nev. 2008) (quotation omitted). The inequitable  
17 conduct must be connected to the subject matter or transaction at issue in the litigation and must  
18 be “unconscientious, unjust, or marked by the want of good faith.” *Id.* (quotation omitted). To  
19 determine whether the unclean hands doctrine applies, I consider two factors: “(1) the  
20 egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the  
21 misconduct.” *Id.* at 767. The unclean hands doctrine will bar an equitable remedy “[o]nly when  
22 these factors weigh against granting the requested equitable relief.” *Id.* I have “broad discretion  
23 in applying these factors,” but my determination must be supported by “substantial evidence.” *Id.*

1           The principles of laches and unclean hands do not bar Fannie Mae’s quiet title claims  
2 because Vegas has not presented sufficient evidence that Fannie Mae sat on its rights or engaged  
3 in inequitable conduct. The limitation period for quiet title claims such as the ones Fannie Mae  
4 asserts is four years. *See Bank of Am., N.A. v. Country Garden Owners Ass’n*, No. 2:17-cv-  
5 01850-APG-CWH, 2018 WL 1336721, at \*2 (D. Nev. Mar. 14, 2018); *In re Amerco Deriv.*  
6 *Litig.*, 252 P.3d 681, 703 (Nev. 2011) (en banc). The HOA foreclosure sale took place on March  
7 26, 2015, and the trustee’s deed upon sale was recorded on April 10, 2015. ECF No. 3 at 152.  
8 Fannie Mae filed this suit on June 29, 2017, well within the four-year limitation period. Laches  
9 presumptively does not apply. And because Fannie Mae’s interest was protected by operation of  
10 law under the federal foreclosure bar, its failure to take action before the HOA sale does not raise  
11 a genuine dispute about a lack of diligence or inequitable conduct.<sup>2</sup>

12           Finally, I deny Vegas’s motion for relief under Rule 56(d). “Rule 56(d) offers relief to a  
13 litigant who, faced with a summary judgment motion, shows the court by affidavit or declaration  
14 that ‘it cannot present facts essential to justify its opposition.’” *Michelman v. Lincoln Nat’l Life*  
15 *Ins. Co.*, 685 F.3d 887, 899 (9th Cir. 2012) (quoting Rule 56(d)). A party seeking Rule 56(d)  
16 relief bears the burden of “proffer[ing] sufficient facts to show that the evidence sought exists,  
17 . . . and that it would prevent summary judgment.” *Nidds v. Schindler Elevator Corp.*, 113 F.3d  
18 912, 921 (9th Cir. 1996) (internal citation omitted). When confronted with a Rule 56(d) motion,  
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21           <sup>2</sup> The only other claim Fannie Mae asserts against Vegas is one for unjust enrichment.  
22 Fannie Mae has not moved for summary judgment on that claim. As for Vegas’s motion to  
23 dismiss for unclean hands and laches, those are affirmative defenses that raise fact issues and so  
are not suitable for resolution on a motion to dismiss. *Bank of Am., N.A. v. Saticoy Bay LLC*  
*Series*, No. 17-CV-02808-APG-CWH, 2018 WL 3312969, at \*2 (D. Nev. July 5, 2018). I  
therefore deny the motion to dismiss the unjust enrichment claim based on laches and unclean  
hands.


1 I may “(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or  
2 declarations or to take discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d).

3 Vegas contends it needs to explore Fannie Mae’s consent to the HOA having a  
4 superpriority lien over the deed of trust. But that would not change the result because the federal  
5 foreclosure bar requires FHFA consent and the federal foreclosure bar operates as a matter of  
6 law. Vegas also contends it would seek discovery on whether Fannie Mae owns the note and  
7 whether the note was moved into or out of a trust. Because Fannie Mae was the recorded  
8 beneficiary under the deed of trust at the time of the HOA sale, this information also would not  
9 change the result.

10 IT IS THEREFORE ORDERED that defendant Vegas Property Services, Inc.’s motion to  
11 dismiss **(ECF No. 36)** and motion for relief **(ECF No. 49) are DENIED.**

12 IT IS FURTHER ORDERED that plaintiff Federal National Mortgage Association’s  
13 motion for summary judgment **(ECF No. 42) is GRANTED.** The homeowners association’s  
14 non-judicial foreclosure sale conducted on March 26, 2015 did not extinguish Federal National  
15 Mortgage Association’s interest in the property located at 5415 West Harmon Avenue #2114,  
16 Las Vegas, Nevada, and thus the property is subject to the deed of trust.

17 DATED this 25th day of October, 2018.

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21 ANDREW P. GORDON  
22 UNITED STATES DISTRICT JUDGE  
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