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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6
7 **BANK OF AMERICA, N.A.,**

8 **Plaintiff,**

9 vs.

10 **TOSCANO RIVER TOWNHOMES**
11 **ASSOCIATION, INC. et al.,**

12 **Defendants.**

3:16-cv-00196-RCJ-VPC

ORDER

13 This case arises from the foreclosure of a residential property pursuant to a homeowners
14 association lien. Now pending before the Court is Plaintiff Bank of America's Motion for
15 Summary Judgment. (ECF No. 30.) For the reasons given herein, the Court grants the motion.

16 **I. FACTS AND PROCEDURAL BACKGROUND**

17 On or about October 9, 2008, non-party Michael R. Toscano purchased a home located at
18 1980 Dickerson Road, Reno, Nevada, 89503 ("the Property"), subject to the Covenants,
19 Conditions, and Restrictions ("CC&Rs") of Toscano River Townhomes Association, Inc. ("the
20 HOA"). (Compl. ¶¶ 8, 14, ECF No. 1.) The Deed of Trust ("DOT") identified Summit Funding,
21 Inc. as the lender, Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary,
22 First Centennial Title Company of Nevada as the trustee, and a secured amount of \$314,128.
23 (Deed of Trust, ECF No. 30-1.) By an assignment recorded on October 3, 2011, MERS
24 transferred its interest in the Property to Bank of America. (Assignment, ECF No. 30-2.)

1 On September 25, 2013, Defendant ATC Assessment Collection Group, LLC (“ATC”)—
2 as the HOA’s agent—recorded a Notice of Default and Election to Sell against the Property, due
3 to Mr. Toscano’s failure to pay HOA dues. (Compl. ¶¶ 17–18.) On October 30, 2013, Bank of
4 America—through its agent Miles, Bauer, Bergstrom & Winters, LLP (“Miles Bauer”)—
5 requested a current HOA superpriority lien payoff demand and account ledger from ATC.
6 (Compl. ¶ 26; Ledger Request, ECF No. 30-6 at 6–7.) ATC responded to the request by sending
7 an itemized owner ledger for the Property, but did not specifically provide the amount of the
8 HOA’s superpriority lien. (Compl. ¶ 26; Owner Ledger, ECF No. 30-6 at 9–11.) Therefore,
9 based on the \$265 monthly assessments appearing in the ledger, Miles Bauer calculated the
10 superpriority amount of the HOA’s lien to be \$2,385. (Compl. ¶ 27–28.) On December 6, 2013,
11 Miles Bauer tendered this amount to ATC in an attempt to protect the DOT from extinguishment
12 at the impending foreclosure sale. (*Id.*; Tender Letter, ECF No. 30-6 at 13–14; Check, ECF No.
13 30-6 at 15.) It is undisputed that the tender was rejected. (*See* Resp. 5, ECF No. 31.)

14 On August 5, 2014, a foreclosure deed was recorded with Defendant Remedy Property
15 Partners, LLC (“Remedy”) named as grantee. Despite an appraised value of \$198,000, Remedy
16 paid just \$9,000 at the foreclosure sale. (Appraisal Report, ECF No. 30-9 at 5–7; Foreclosure
17 Deed, ECF No. 30-7 at 65–66.) Remedy took the foreclosure deed “without warranty expressed
18 or implied.” (Foreclosure Deed.) Soon thereafter, by an assignment recorded on August 11,
19 2014, Remedy transferred its interest in the Property to Defendant Comstock Capital Partners,
20 LLC (“Comstock”). (Deed of Sale, ECF No. 30-10.) The conveyance to Comstock was also
21 “without warranty, express or implied.” (*Id.*)

22 Bank of America alleges four causes of action in its Complaint: (1) quiet title/declaratory
23 judgment against all Defendants; (2) breach of N.R.S § 116.1113 against the HOA and ATC; (3)

1 wrongful foreclosure against the HOA and ATC; and (4) injunctive relief against Comstock.
2 Bank of America now moves for summary judgment. (ECF No. 30.)

3 **II. LEGAL STANDARDS**

4 A court must grant summary judgment when “the movant shows that there is no genuine
5 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
6 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v.*
7 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there
8 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A
9 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
10 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

11 In determining summary judgment, a court uses a burden-shifting scheme. The moving
12 party must first satisfy its initial burden. “When the party moving for summary judgment would
13 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
14 directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v.*
15 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and internal quotation marks
16 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
17 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
18 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
19 party failed to make a showing sufficient to establish an element essential to that party’s case on
20 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

21 If the moving party fails to meet its initial burden, summary judgment must be denied and
22 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,
23 398 U.S. 144 (1970). If the moving party meets its initial burden, the burden then shifts to the
24 opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v.*

1 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
2 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
3 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’
4 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809
5 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary
6 judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*,
7 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
8 allegations of the pleadings and set forth specific facts by producing competent evidence that
9 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

10 At the summary judgment stage, a court’s function is not to weigh the evidence and
11 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
12 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
13 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
14 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.
15 Notably, facts are only viewed in the light most favorable to the non-moving party where there is
16 a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even
17 where the underlying claim contains a reasonableness test, where a party’s evidence is so clearly
18 contradicted by the record as a whole that no reasonable jury could believe it, “a court should not
19 adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

20 **III. ANALYSIS**

21 **A. Tender of the Superpriority Piece of the HOA’s Lien**

22 This Court has held that the unconditional pre-foreclosure tender of the superpriority lien
23 amount has the legal effect of extinguishing the superpriority portion of an HOA lien, whether or
24 not the tender is accepted. *See, e.g., U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*, No. 3:15-

1 cv-00241, 2016 WL 4473427, at *6–8 (D. Nev. Aug. 24, 2016) (Jones, J.). Here, there is no
2 genuine dispute that the full superpriority piece was tendered prior to the sale. Plaintiff has
3 adduced evidence that on or about December 6, 2013, Miles Bauer tendered a check to the HOA
4 for \$2,385, comprising nine months’ worth of common assessments. (*See* Kendis Aff. ¶¶ 6–10,
5 ECF No. 30-6 at 2–4; Owner Ledger, ECF No. 30-6 at 9–11 (indicating monthly assessments of
6 \$265); Tender Letter, ECF No. 30-6 at 13–14; Check, ECF No. 30-6 at 15.) The superpriority
7 piece of an HOA lien does not include collection costs. *Horizons at Seven Hills Homeowners*
8 *Ass’n v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, 2016 WL 1704199, at *6 (Nev. 2016).
9 Therefore, the uncontroverted evidence indicates that Miles Bauer tendered the full amount of
10 the HOA’s superpriority lien.

11 In addition, the check tendered by Miles Bauer was an unconditional order to pay money;
12 that is part of the very definition of a check under the law of commercial paper. *See* Nev. Rev.
13 Stat. § 104.3104. The language Miles Bauer included with its cashier’s check states that Miles
14 Bauer, and presumably its client, will understand endorsement of the check to mean they have
15 fulfilled their obligations. (Tender Letter, ECF No. 30-6 at 13–14.) This language simply
16 delineated how the tenderer would interpret the actions of the recipient. It did not require the
17 HOA to take any action or waive any rights. And it did not depend on any uncertain event or
18 contingency. Thus, a reasonable jury could not find the tender was conditional. In reality, the
19 check was an unconditional order to pay money, permitting the HOA to immediately demand
20 and receive money from the draftee in the amount indicated on the check without any further
21 action or consent by Plaintiff or its agent Miles Bauer.

22 The Court notes that the unpublished Nevada Supreme Court case that had previously
23 held that a rejected tender was sufficient to extinguish the superpriority piece of an HOA lien,
24 *see Stone Hollow Ave. Trust v. Bank of Am., Nat’l Ass’n*, 382 P.3d 911 (Nev. 2016), has been

1 vacated and remanded upon en banc reconsideration, *see Stone Hollow Avenue Tr. v. Bank of*
2 *Am., N.A.*, No. 64955, (Nev. Dec. 21, 2016). But the Nevada Supreme Court did not rule that a
3 wrongfully rejected tender did not extinguish a corresponding lien. *See id.* Rather, it found that
4 the district court had erred in determining whether there remained a genuine issue of material
5 fact on the question of wrongful rejection of the tender in that case. *See id.* Had the Court
6 believed that a wrongfully rejected tender necessarily did not extinguish a corresponding lien, it
7 would not have vacated and remanded for further fact-finding on that issue but simply reversed
8 with instructions. The remand necessarily implied the Nevada Supreme Court’s position that a
9 wrongfully rejected tender extinguishes a corresponding superpriority piece of an HOA lien.
10 Even ignoring the entire *Stone Hollow* case, the heavy weight of authority as cited by this Court
11 in previous cases, *see, e.g., U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*, 2016 WL 4473427,
12 at *6–8, indicates that a wrongfully rejected tender is effective to immediately extinguish a
13 corresponding lien.

14 **B. Comstock’s BFP Status**

15 Comstock argues it is a bona fide purchaser for value without notice (“BPF”), and that
16 the Court should therefore rule that it took title free of the DOT. (Resp. 19–20, ECF No. 31.) A
17 BFP is a person who pays money for real property before obtaining notice of an earlier interest in
18 the property. 5 Tiffany Real Property § 1262 & n.39.50 (3rd ed. 2015). The traditional common
19 law rule of competing interests in real property is “first in time, first in right.” 11 Thomas, *supra*,
20 § 92.03, at 97 (citing Ralph W. Aigler, *The Operation of the Recording Acts*, 22 Mich. L. Rev.
21 405, 406 (1924) (“first in time was first in right because there was nothing left for the second
22 transferee”)). The equity courts created exceptions to the traditional “first in time, first in right”
23 rule. *Id.* § 92.03, at 98. Under the common law, an earlier claim had priority over a later claim if
24 both claims were legal claims (as opposed to equitable claims). *Id.* § 92.03, at 97. The same was

1 true if both claims were equitable. *Id.* BFP status only mattered under the common law where the
2 purported BFP had a legal claim and a competing earlier claim to the property was purely
3 equitable. *Id.*

4 Today, the difference between legal and equitable claims does not matter as much as the
5 policies behind recognizing BFP status (or not) in particular circumstances, and BFP-type
6 exceptions to the common law rule of priority are governed by recording statutes, in any case. *Id.*
7 § 92.03, at 98–99. Recording statutes are categorized as “race,” “notice,” or “race-notice”
8 statutes. *Id.* § 92.08, at 158. Under notice statutes, an exception to the traditional “first in time”
9 rule is codified for those who give value for an interest in land “without notice or knowledge” of
10 an earlier competing interest. *Id.* § 92.08(b). Race-notice statutes additionally require the later
11 grantee to record his interest before the earlier grantee. *Id.* § 92.08(c). Where notice matters, as
12 under notice and race-notice statutes, one who takes title without warranty can be found to have
13 had inquiry notice of prior unrecorded interests (and therefore not qualify as a BFP), because a
14 grantor’s refusal to issue standard warranties of title should put a reasonable and prudent person
15 on notice of potential competing interests. *Id.* § 92.09(c)(3)(C), at 191.

16 Nevada has a race-notice statute. *See Nev. Rev. Stat. § 111.325* (“Every conveyance of
17 real property within this State hereafter made, which shall not be recorded as provided in this
18 chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable
19 consideration, of the same real property, or any portion thereof, where his or her own
20 conveyance shall be first duly recorded.”). In other words, a later-obtained interest can prevail
21 over an earlier-obtained interest in Nevada where the later purchaser has no knowledge of the
22 previous interest and records his interest first. It is not genuinely disputed that neither of these
23 elements is satisfied here. Comstock had constructive notice of the DOT at the time it acquired
24 its interest in the Property because the DOT had been recorded, *see Nev. Rev. Stat. § 111.315*,

1 and the deed of sale by which Comstock obtained its interest in the Property was of course not
2 recorded before the DOT.

3 The remaining question is whether Comstock is a BFP as against the fact that the HOA's
4 superpriority lien had been extinguished prior to the sale. That is, if Comstock had no notice of
5 any pre-sale dispute between Plaintiff, ATC, and the HOA, should the legal effects of Miles
6 Bauer's tender be imposed against Comstock? The general BFP rule in Nevada is:

7 Any purchaser who purchases an estate or interest in any real property in good
8 faith and for valuable consideration and who does not have actual knowledge,
9 constructive notice of, or reasonable cause to know that there exists a defect in, or
adverse rights, title or interest to, the real property is a bona fide purchaser.

10 Nev. Rev. Stat. § 111.180(1). Even assuming the issue were whether Comstock had notice not
11 only of the DOT but also of the legal possibility that the DOT might have survived the HOA
12 foreclosure sale (whether due to the pre-sale tender of the superpriority piece in particular or the
13 legal possibility that the sale might not extinguish the DOT under N.R.S § 116.3116 in general),
14 Comstock was not an innocent purchaser. Comstock was on inquiry notice of the continuing
15 vitality of the DOT, especially considering that: (1) the foreclosure deed had been recorded and
16 indicated a sale price that was but a tiny fraction of the original loan amount appearing in the
17 DOT, and a similarly small fraction of the Property's appraised value; and (2) Comstock took
18 title to the Property without any express or implied warranty. *See Berge v. Fredericks*, 591 P.2d
19 246, 249–50 (Nev. 1979); 11 Thomas, *supra*, § 92.09, at 163 (“Persons who knew about or could
20 have discovered the existence of prior adverse claims through reasonable investigations should
21 not be protected.”). A buyer who takes title without warranty does not qualify as a BFP, because
22 a grantor's refusal to issue standard warranties of title puts a reasonable and prudent person on
23 inquiry notice of any competing interests. *See* 11 Thomas, *supra* § 92.09(c)(3)(C), at 191. And
24 any inquiry to Remedy alone was insufficient as a matter of law. *See id.* (noting that “reliance

1 upon a vendor, or similar person with reason to conceal a prior grantee's interest, does not
2 constitute 'adequate inquiry'"). The law was not clear at the time of the foreclosure sale that the
3 sale would extinguish the DOT at all, superpriority tender or not, and a reasonable purchaser
4 therefore would have perceived a serious risk that it would not. Comstock cannot be said to be a
5 BFP as against the DOT under these circumstances.

6 **C. Plaintiff's Claims for Violation of NRS 116.1113 and Wrongful Foreclosure**

7 In its prayer for relief, Plaintiff requests primarily a declaration that Remedy and
8 Comstock purchased the Property subject to its DOT. The other relief requested—with the
9 exception of the injunctive relief discussed below—is phrased in the alternative. Therefore,
10 because the Court grants summary judgment for Plaintiff on its quiet title claim, Plaintiff has
11 received the relief it requested. Accordingly, the Court dismisses Plaintiff's second and third
12 causes of action as moot.

13 **D. Injunctive Relief**

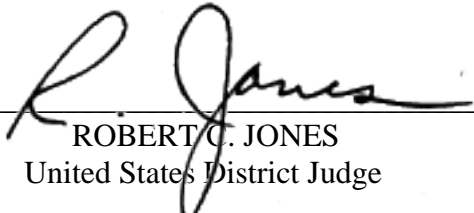
14 In its fourth cause of action, Plaintiff requests a preliminary injunction pending a
15 determination by the Court concerning the parties' respective rights and interests. The Court's
16 grant of summary judgment for Plaintiff moots this claim, and it is therefore dismissed.

17 **CONCLUSION**

18 IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment (ECF No. 30)
19 is GRANTED. Plaintiff shall submit a proposed form of judgment within fourteen days of this
20 order's entry.

21 IT IS SO ORDERED.

22 DATED: This 23rd day of May, 2017.

23 
24 _____
ROBERT C. JONES
United States District Judge