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### **Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE, 137 Nev. Adv. Op. 15 (Apr. 15, 2021)**

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## HOA SUPERPRIORITY LIEN

### **Summary**

Nevada's "superpriority lien" statute gives a homeowner's association (HOA) lien priority over a first deed of trust with respect to the HOA's common expenses that would be due in the absence of acceleration within the nine months before an action was commenced to enforce the lien.<sup>2</sup> U.S. Bank National Association and Nationstar Mortgage's (collectively, U.S. Bank) predecessor paid the HOA in this case nine months' worth of its annual fee in an attempt to satisfy the superpriority lien. However, the HOA's yearly assessment made the entire yearly fee due during the 9 months before the HOA sued to enforce its lien. The district court granted U.S. Bank's motion for summary judgment because the HOA's yearly fee accelerated the payments' due date and U.S. Bank was therefore not required to pay more than nine months of the yearly fee to satisfy the superpriority portion of the lien. The Nevada Supreme Court affirmed the district court's judgment, reasoning that even in the case of an annual assessment, the supermajority portion of an HOA lien is satisfied through payment of nine months' worth of fees.

### **Background**

The HOA in this case charged property owners an annual fee of \$216 each January. The homeowners failed to pay the fee in 2011, and the HOA recorded a notice of lien in April 2011. U.S. Bank's predecessor, also the beneficiary of the first deed of trust, subsequently requested the superpriority payment from the HOA's foreclosure agent. The foreclosure agent sent a ledger of assessments and payments, and U.S. Bank's predecessor paid the foreclosure agent \$162 for nine months' worth of assessments in August 2011. The HOA moved forward with the foreclosure anyway. Appellants (collectively, Noonan) bought the property for \$50,100. Noonan sued to quiet title in the property and the district court entered summary judgment for U.S. Bank. The court reasoned that U.S. Bank's predecessor's payment of nine months' worth of HOA fees cured the default on the lien because Nevada law limits the superpriority portion of an HOA lien to nine months of assessments. Therefore, the court concluded that the sale did not invalidate U.S. Bank's first deed of trust and Noonan took title to the property subject to that deed of trust.

### **Discussion**

On appeal, Noonan argued that the district court erred in holding that U.S. Bank's payment satisfied the superpriority portion of the HOA lien. Noonan challenged the district court's construction of NRS 116.3116(2), which he contends led it to mistake the amount U.S. Bank's predecessor had to pay to satisfy the lien. Noonan argued that the HOA's entire yearly fee had superpriority status under NRS 116.3116(2) because the fee was due in the nine months before the HOA enforced the lien. Noonan further contended that NRS 116.3116(1)'s language

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<sup>1</sup> By Maggie DiFederico.

<sup>2</sup> NEV. REV. STAT. § 116.3116(2) (2017).

allowing HOA's to impose fees "at least annually" meant that there was no acceleration because fees were due in full on a yearly basis.<sup>3</sup>

The Court agreed with the district court's construction of NRS 116.3116(2). The Court reasoned that Noonan's construction rendered the statutory language meaningless. While it is possible for an HOA's yearly fee not to be an acceleration, the statutory phrase "in the absence of acceleration" is meaningless if the statute does not presuppose monthly fees and the possibility of annual fees. The Court concluded that the phrase "in the absence of acceleration" in NRS 116.3116(2) covers the precise situation that occurred between Noonan and U.S. Bank. Therefore, when an HOA fee is due all at once, there has been an acceleration within the meaning of NRS 116.3116(2). Even in the case of an annual assessment, the supermajority portion of an HOA lien is satisfied through payment of nine months' worth of fees. Thus, the district court was correct in concluding that the foreclosure sale did not invalidate the first deed of trust and that Noonan took title subject to it. The Court affirmed summary judgment for U.S. Bank.

### **Conclusion**

The Court construed NRS 116.3116(2)—Nevada's "superpriority lien" statute—in the context of the payment of nine months' worth of a yearly HOA fee at a foreclosure sale. The Court concluded that the statutory phrase "in the absence of acceleration" means that a yearly fee that is due all at once has been accelerated under the statute and the supermajority portion of the HOA lien is satisfied by payment of nine months of fees. The first deed of trust therefore survived the disclosure sale and Noonan's title was subject to the deed of trust.

### **Dissent (Silver, J.)**

Justice Silver asserted that the statutory language of NRS 116.3116(2) is clear and unambiguous in its meaning that if a yearly fee is due in the nine months before notice of delinquent fees is given, the entire yearly fee is subject to superpriority status. The nine-month limitation in the statute simply denotes which kinds of fees are given superpriority status: ones that are due within nine months before an action is commenced to enforce the lien. The yearly fee involved in this case is not an acceleration, as Nevada law allows yearly payment of fees. Cases that refer to a superpriority lien equaling nine months of payments are referring to monthly fees rather than yearly ones. Justice Silver dissented from the majority's opinion because, in her view, the entire yearly fee was subject to superpriority status.

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<sup>3</sup> NEV. REV. STAT. § 116.3116(1) (2009).