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**Daniel Lakes v. U.S. Bank Trust, 137 Nev. Adv. Op. 85 (Dec. 30, 2021)**

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PROPERTY LAW: ENSUING FORECLOSURE SALE DID NOT EXTINGUISH THE FIRST DEED OF TRUST

**Summary:**

No issue of material fact exists in this case because the undisputed evidence confirms that the first deed-of-trust beneficiary protected its interest in the property when it tendered the superpriority part of the Home Owners' Association's lien prior to the foreclosure sale. The Court was not persuaded by the appellant's argument that the respondent cannot enforce its first-priority interest since the appellant recorded his grant, bargain, and sale deed prior to the respondent recording its assignment as first deed-of-trust beneficiary. The appellant bought interest in property subject to the first deed-of-trust lien that was recorded years before his purchase. Therefore, the appellant recording his deed prior to respondent's recording of the assignment does not influence the respondent's right to enforce its lien since the assignment did not change the appellant's subordinate interest. The Court affirmed the district court's ruling quieting title in respondent's favor.

**Facts and Procedural History:**

A borrower bought the underlying property using a loan secured by a first deed of trust that was duly recorded with the Clark County Recorder in April 2007. Freddie Mac purchased the loan in May 2007. Then in 2008, the Home Owners Association ("HOA") recorded a lien on the property for \$625.04 in delinquent assessments. The lender's nominee recorded an assignment of the deed of trust one month later to Ocwen Loan Servicing, LLC, Freddie Mac's loan servicer. The HOA recorded a notice of default and election to sell the property with the amount owed being \$1,668.57 that same month. Then in April 2015, the HOA recorded a notice of foreclosure sale stating that the property was in default under the lien for delinquent assessments recorded in 2008. The HOA accepted Ocwen's tender of \$3,241.52 to satisfy the superpriority part of the lien. However, in August 2015, the HOA still foreclosed on its lien. In January 2016, the final conveyance was made to appellant Daniel Lakes. The conveyance was by a grant, bargain, and sale deed that explicitly stated that Lakes's interest was subject to any claims, encumbrances or liens. In January 2016, Lakes recorded the deed. In December 2015, respondent U.S. Bank Trust obtained the loan from Freddie Mac and Ocwen assigned the first deed of trust to U.S. Bank Trust in May 2016. In May 2016, Ocwen recorded the assignment in the Clark County Recorder's Office. Then both Lakes and U.S. Bank Trust sought quiet title.

The district court granted U.S. Bank Trust's motion for summary judgment. The district court found that Lakes "took title to the property subject to U.S. Bank Trust's first deed of trust because the superpriority tender cured the default, such that the ensuing foreclosure sale did not extinguish the first deed of trust." The district court failed to accept Lake's argument that he had no notice of U.S. Bank Trust's interest in the property; therefore, should have the title quieted in his name as a bona fide purchaser. The district court concluded that "Lakes argument that U.S. Bank's interest in the Deed of Trust is void and unenforceable as to him pursuant to N.R.S. § 111.325 is without merit because the timing of the Assignment is immaterial to the HOA Sale

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<sup>1</sup> By Jessica Recarey-Valenzuela.

not extinguishing the Deed of Trust.” The district court’s order was certified as final under NRCP 54(b). Then the court of appeals reversed and remanded. The court of appeals concluded that there was a genuine issue of material fact regarding Lakes’s status as a bona fide purchaser because U.S. Bank Trust failed to record its assignment of the deed of trust prior to Lakes recording his grant, bargain, and sale deed. The Nevada Supreme Court granted U.S. Bank Trust’s petition for review pursuant to NRAP 40B.

### **Discussion:**

Lakes argued that there was a genuine issue of material fact regarding whether Ocwen tendered sufficient payment to cover the superpriority amount in the HOA’s lien. The record did not expressly show what the superpriority amount was, but the Court inferred from the admissible evidence that Ocwen tendered enough to satisfy the lien. The Court inferred that the HOA’s lien could not have exceeded \$625.04 because the HOA’s recorded lien of delinquent assessments was for \$625.04.<sup>2</sup> Ocwen tendered the HOA \$3,241.52 and the HOA accepted payment. Therefore, the district court was proper in determining that Ocwen’s tender of payment for \$3,241.52 cured the default for the superpriority portion of the HOA’s lien and that the subsequent foreclosure sale did not extinguish the first deed of trust.<sup>3</sup>

The Court disagreed with Lakes’ argument pursuant to NRS 111.325 that U.S. Bank Trust’s deed of trust is unenforceable because Lakes recorded his grant, bargain, and sale deed prior to Ocwen recording the assignment of the deed of trust to U.S. Bank Trust. Pursuant to NRS 111.325, unrecorded conveyances of real property “shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded.”<sup>4</sup> The statute does not directly address the specific issue in this case: “whether a party who acquires the beneficial interest in the first deed of trust by post-foreclosure assignment may enforce its interest therein when another party who purchased the property downstream from the foreclosure sale (which was void as to the interest secured by the deed of trust) records his grant, bargain, and sale deed before the recording of the deed-of-trust assignment.” The Court concluded that “it does not apply to allow Lakes to avoid all indebtedness on the property, including the duly recorded first deed-of-trust lien” by interpreting the statute with “reason” in a manner that “harmonizes legislative purpose and policy.”<sup>5</sup>

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<sup>2</sup> See NEV. REV. STAT. § 116.3116(2) (2013) (describes that the superpriority piece of a HOA’s lien is the “assessments for the common expenses . . . which would have become due . . . dueing the 9 months immediately preceding institution of an action to enforce the line); *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 231 (2017) (identifying that serving a notice of delinquent assessments is the commencement of an action to enforce the lien pursuant to the pre-2015 version of NRS 116.3116)

<sup>3</sup> *Diamond Spur*, 427 P.3d at 118–21; see *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (2005) (reviewed a district court order that granted summary judgement de novo); cf. *Prop. Plus Invs., LLC v. Mortg. Elec. Registration Sys., Inc.* 401 P. 3d 728, 731–32 (2017) (observed that an HOA is required to restart the foreclosure procedure to impose a second superpriority default).

<sup>4</sup> NEV. REV. STAT. § 111.325 (2011).

<sup>5</sup> *Pascua v. Bayview Loan Servicing, LLC*, 434 P.3d 287, 289 (2019) (Stating that the Court will “construe” an issue when the statute’s language does not discuss it in a manner where “reason and public policy” indicates the legislatures’ intent).

In this case, Lakes is not considered a subsequent purchaser pursuant to NRS 111.325 because U.S. Bank Trust had the first deed of trust assigned to it about four months after Lakes acquired the subordinate interest by the grant, bargain, and sale deed. Lakes' interest was subordinate because the property "was encumbered by a secured creditor's senior lien" when Lakes purchased the property in 2016. This encumbrance was shown by the "duly recorded first deed of trust." The HOA possessed interest in only its "subpriority claims for assessments and related fees" on the day of the foreclosure sale. The recording statute's purpose is to protect those that truly believe they are getting a good title.<sup>6</sup>

A "post-foreclosure, off-record deed-of-trust assignment" was not material to Lakes's title because "the deed-of-trust lien recorded in 2007 was enforceable against the property when Lakes purchased his interest in 2016." Lakes's deed reflects that the property was not sold "free and clear of all claims, liens, and encumbrances." Further, Lakes bought title "subject to the recorded first deed-of-trust lien." The statutory recording requirement for the assignment and the May 2016 assignment to U.S. Bank Trust did not alter Lakes's interest from January 2016.<sup>7</sup>

Therefore, the parties do not have conflicting claims to the interest because Lakes's property interest was subordinate to the first deed-of-trust lien that continued unfulfilled. The interest is not affected even if the beneficiary of the first deed of trust assigned its interest to another party. Further, notice of the first-priority lien was provided through the 2007 recorded first deed of trust, regardless of the beneficiary. Any purchaser in this situation would have constructive notice of the deed-of-trust lien; therefore, it would not be possible for a bona fide purchaser to exist.<sup>8</sup> Without a record of satisfaction<sup>9</sup> or ten years after the maturity date,<sup>10</sup> the lien could not be assumed.

Pursuant to NRS 106.210, U.S. Bank Trust's deed-of-trust lien is enforceable. NRS 106.210 states that those assignments need to be recorded prior to the assignee exercising the power of sale.<sup>11</sup> NRS 111.325 and NRS 106.210 are complementary. NRS 111.325 permits evasion of "unrecorded instruments against subsequent bona fide purchasers for valuable consideration. NRS 106.210 requires that to be enforced "any assignment of the beneficial interest under a deed of trust must be recorded", and "the trustee under the deed of trust may not

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<sup>6</sup> See *SFR Inv. Pool 1, LLC v. First Horizon Home Loans*, 409 P.3d 891, 893 (2018) ("The very purpose of recording statutes is to impart notice to a subsequent purchaser."); *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 471 P.2d 666, 668 (1970) ("recording statutes provide 'constructive notice' of the existence of an outstanding interest in land, thereby putting a prospective purchaser on notice that he may not be getting all he expected."); see *Bank of Am., N.A. v. Casey* 52 N.E.3d 1030, 1035 (Mass. 2016) (Discussing that the state's recording statute "requires that a mortgage be recorded . . . in order to provide effective notice to anyone beyond the parties to the mortgage transaction and those with actual notice of it").

<sup>7</sup> *Cf. Kapila v. Atl. Mortg. & Inv. Corp.*, 184 F.3d 1335, 1337 (11th Cir. 1999) (found that after the mortgagor files for bankruptcy the owner of a mortgage interest can transfer the interest because "the perfected mortgage is neither actually nor potentially the property of the debtor," that only has the legal title, instead of an equitable interest, in the mortgaged property).

<sup>8</sup> See NEV. REV. STAT. § 111.320.

<sup>9</sup> See NEV. REV. STAT. § 106.260–106.270.

<sup>10</sup> See NEV. REV. STAT. § 106.240.

<sup>11</sup> Lakes used *Allen v. Webb*, 485 P.2d 677, 678 (1971), in his supplemental reply brief to support his position as a bona fide purchaser and his interpretation of NRS 111.325. However, *Allen* is not applicable because it deals with recording a new deed of trust.

exercise the power of sale pursuant to NRS 107.080 unless and until the assignment is recorded.”<sup>12</sup> Lakes’s purchase of the property was not induced due to U.S. Bank Trust’s failing to record the assignment until May 2016. Additionally, Lakes was not prejudiced by U.S. Bank Trust recording the assignment after the foreclosure because the first deed of trust was not released when the HOA foreclosed on its subordinate lien. Therefore, Lakes’s notice of the deed-of-trust assignment’s existence was not impacted by the fact that it was not recorded until after Lakes took the title.

**Conclusion:**

The district court properly decided that U.S. Bank Trust could enforce its deed-of-trust lien pursuant to NRS 106.210 because U.S. Bank Trust recorded its assignment prior to its counterclaim to quiet title and Lakes is not considered a subsequent purchaser pursuant to NRS 111.325.

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<sup>12</sup> NEV. REV. STAT §106.210.