IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILMINGTON TRUST, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO CITIBANK N.A., AS TRUSTEE, F/B/O THE REGISTERED HOLDERS OF STRUCTURED ASSET MORTGAGE INVESTMENTS II TRUST 2007-AR6, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR6, INCORRECTLY IDENTIFIED AS CITIBANK N.A. AS TRUSTEE FOR STRUCTURED ASSET MORTGAGE INVESTMENTS II TRUST 2007-AR6 MORTGAGE PASS-THROUGH CERTIFICATE SERIES 2007-AR6,
Appellant,
vs.
ANTHONY S. NOONAN IRA LLC,
Respondent.

No. 71634

FILED

JUL 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Wilmington Trust, National Association, appeals from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Wilmington held a first deed of trust on a property which respondent Anthony S. Noonan IRA LLC (Noonan) purchased at a homeowners' association (HOA) foreclosure sale conducted pursuant to NRS Chapter 116. Noonan filed suit against Wilmington and others to establish that Noonan now held the property free and clear of any encumbrances, such as Wilmington's deed of trust. Both Wilmington and Noonan filed motions for summary judgment. The district court denied

Wilmington's motion and granted summary judgment in favor of Noonan. This appeal followed.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

We first address Wilmington's arguments that the HOA foreclosure sale price was grossly inadequate, constituting fraud, oppression, or unfairness sufficient to void the foreclosure under *Shadow Wood Homeowners Ass'n, Inc. v. New York Community Bancorp, Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016). But *Shadow Wood* does not allow a low foreclosure sale price to void a sale on its own. *See* 132 Nev. at 60, 366 P.3d at 1112; *see also Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. ___, ___, 405 P.3d 641, 643-44 (2017) (noting that inadequacy of price alone is not sufficient grounds to set aside a foreclosure sale). Moreover, the record indicates that the sale price did not necessarily fall below 20 percent of the estimated value of the property so as to make the foreclosure sale price obviously inadequate. *See Shadow Wood*, 132 Nev. at 60, 366 P.3d at 1112 (discussing a sale price falling below 20 percent of fair market value as a general measure for considering whether a sale price at a foreclosure sale is inadequate).

In order to invalidate the sale, Wilmington must demonstrate that, in light of the totality of the circumstances, "fraud, unfairness, or oppression . . . accounts for and brings about the inadequacy of price." *Nationstar*, 133 Nev. at ___, 405 P.3d at 643 (quoting *Shadow Wood*, 132 Nev. at 58-59, 366 P.3d at 1111). "[W]here the inadequacy of the price is great, a court may grant relief based on slight evidence of fraud, unfairness, or oppression." *Id.* (citing *Golden v. Tomiyasu*, 79 Nev. 503, 514-15, 387 P.2d 989, 994-95). But, given the not insubstantial price at the foreclosure sale, we decline to accept Wilmington's assertion that its five claimed defects in the foreclosure process invalidate the foreclosure sale.

Its arguments regarding the time elapsed from the notice of lien to the actual sale, the rejected settlement offers, and the alleged non-competitive nature of the sale are wholly unpersuasive as the HOA complied with all required elements for a nonjudicial foreclosure proceeding. *Cf. id.* at ___ n.11, 405 P.3d at 648 n.11 (listing irregularities that might rise to a level of fraud, unfairness, or oppression such as failure to follow statutory requirements and collusion between parties in the foreclosure sale). To the extent that Wilmington argues that the foreclosure deed conveyed only the HOA's lien interest, we are similarly not convinced by this assertion. Although the language in the deed is not a model of clarity, the language does not support a conclusion that the foreclosure sale was not pursuant to NRS Chapter 116 where the evidence in the record demonstrates that the foreclosure sale was conducted pursuant to these statutes. *See* NRS 116.31166(1) ("Every sale of a unit pursuant to NRS 116.31162 to 116.31168, inclusive, vests in the purchaser the title of the unit's owner . . . .").

Wilmington's final alleged defect is that the HOA made certain representations that indicated that the HOA believed that its lien was second in priority to the first deed of trust beneficiary's interest, based both on the CC&Rs and a letter the HOA sent to Wilmington's predecessor in interest. But below, Wilmington did not present any evidence to demonstrate that these representations establish any fraud, unfairness, or oppression that affected the sale. *See Nationstar*, 133 Nev. at ___, 405 P.3d at 643. Moreover, Nevada caselaw does not allow CC&R clauses to alter the applicability of superpriority status for an HOA lien. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 757-58, 334 P.3d 408, 419 (2014) (recognizing that NRS 116.1104 overrules mortgage protection clauses contained within CC&Rs); NRS 116.1104 (stating that NRS Chapter 116 provisions cannot be varied by agreement and rights cannot be waived except as provided by the chapter).

And while the aforementioned letter includes language similar to the one at issue in *ZYZZX2 v. Dizon*, 2:13-cv-1307-JCM-PAL, 2016 WL 1181666 (D. Nev. Mar. 25, 2016), unlike that letter, the HOA letter at issue here clarified that the HOA lien may affect the lienholder's position. Regardless, Wilmington has provided only the argument of counsel rather than any admissible evidence to demonstrate that either of these representations brought about the low sale price at the foreclosure sale. *See Nationstar*, 133 Nev. at ___, 405 P.3d at 647-49; *SFR Investments*, 130 Nev. at 757-58, 334 P.3d at 418-19; *see also Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (recognizing that "[a]rguments of counsel are not evidence and do not establish the facts of the case" (alteration and internal quotation marks omitted)). Accordingly, absent evidence that there was fraud, unfairness,

or oppression that brought about the low sales price, there were no equitable grounds upon which a factfinder could have justified a conclusion that the foreclosure sale did not extinguish respondent's deed of trust. *See Nationstar*, 133 Nev. at ___, 405 P.3d at 647-49.

The remainder of Wilmington's arguments are unpersuasive attempts to question the constitutionality of the HOA foreclosure statutes. These arguments are unconvincing, and we cannot reevaluate *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. ___, 388 P.3d 970 (2017) (holding that the NRS Chapter 116 HOA foreclosure provisions do not violate the takings clause nor implicate the lienholder's due process rights and are constitutional in application). *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (noting stare decisis "applies a fortiori to enjoin lower courts to follow the decision of a higher court"). Further, the Nevada Supreme Court has determined that the holding of *SFR Investments*, which explained the applicability of the Chapter 116 HOA foreclosure process, applies retroactively. *See K&P Homes v. Christiana Tr.*, 133 Nev. ___, ___, 398 P.3d 292, 295 (2017).

Based on the foregoing, our review indicates no genuine issues of material fact upon which reversal of the summary judgment is required. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Gloria Sturman, District Judge
John Walter Boyer, Settlement Judge
Ballard Spahr LLP/Las Vegas
The Law Office of Mike Beede, PLLC
Eighth District Court Clerk