IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

SAIPAN ACHUGAO RESORT MEMBERS' ASSOCIATION,
Appellant/Cross-Appellee,

v.

WAN JIN YOON,
Appellee/Cross-Appellant.

SUPREME COURT NO. CV-06-0049-GA
SUPERIOR COURT NO. 03-0187E

Cite as: 2011 MP 12

Decided October 31, 2011

Timothy H. Bellas, Timothy H. Bellas, LLC, Saipan, MP, for Appellant/Cross-Appellee.
Richard W. Pierce, Law Office of Richard W. Pierce, Saipan, MP, for Appellee/Cross-Appellant.

BEFORE: MIGUEL S. DEMAPAN,[1] Chief Justice (Ret.); ALEXANDRO C. CASTRO, Acting Chief Justice; JOHN A. MANGLONA, Associate Justice.

MANGLONA, J.:

¶ 1 This case arises from a commercial property dispute between Wan Jin Yoon ("Yoon") and the Saipan Achugao Resort Members' Association ("SARMA"). The trial court concluded that Yoon's liability for certain fees imposed by SARMA began on the date that the trial court entered an order approving Yoon's purchase of his property interest. The trial court also concluded that a forced sale of Yoon's property interest was invalid. SARMA appeals both of these conclusions. Yoon cross-appeals, raising six distinct issues: (1) whether the trial court erred when it imposed assessment fees upon Yoon but not upon any other SARMA member; (2) whether Yoon is liable for assessment fees during the time period after the court entered its findings of fact and conclusions of law but before the court entered an order explicitly quieting title; (3) whether Yoon should be awarded a credit equal to the amount of Yoon's assessment fees that SARMA has used or might in the future use to pay its attorney's fees; (4) whether Yoon is entitled to damages; (5) whether Yoon is entitled to attorney's fees and costs; and (6) whether the trial court violated the First Amendment when it issued orders that were based in part upon Yoon's contacts with government officials and agencies.

¶ 2 We vacate the trial court's conclusion that Yoon was not entitled to damages arising from the invalid forced sale, and remand to the trial court for a calculation of such damages. On the remaining issues, we affirm the trial court.

I

¶ 3 The Plumeria Resort was built in 1990 in San Roque, Saipan. It consists of commercial spaces and retail spaces (collectively, "the commercial area"), as well as resort guest rooms. SARMA was formed as a non-profit corporation in February 2000. Pursuant to the Bylaws of Saipan Achugao Resort Members' Association ("SARMA Bylaws" or "Bylaws"), all owners of sublease interests in the Plumeria Resort were required to be members of SARMA. The Bylaws authorized SARMA to charge members two types of fees: management fees and urgent repair fees (collectively, "assessment fees"), which it could levy upon members bi-annually.

¶ 4 At some time prior to September 2001, Micronesia Company, Ltd. ("Micronesia") obtained a sublease interest in the Plumeria Resort that included thirty-four guest rooms and the commercial area. Micronesia subsequently mortgaged its sublease interest to Itochu Corporation ("Itochu"). In September 2001, the revenue of the Plumeria Resort decreased significantly. As a result, Micronesia declared

[1] Former Chief Justice Miguel S. Demapan heard oral argument. He retired from the Commonwealth Judiciary prior to the issuance of this opinion.

bankruptcy. Itochu instituted foreclosure proceedings against Micronesia and obtained a court order that authorized a judicial foreclosure sale of Micronesia's interest.

¶ 5 On December 13, 2002, Yoon submitted the highest bid at a foreclosure auction of Micronesia's interest in the thirty-four guest units and the commercial area. On March 7, 2003, the trial court issued an order approving the sale of Micronesia's interest to Yoon. The order authorized the court-appointed seller of the mortgaged interest, Mr. Joyner, to execute and deliver a certificate of sale to Yoon. Mr. Joyner delivered the certificate of sale to Yoon on March 19, 2003.

¶ 6 Prior to the foreclosure auction, SARMA informed Yoon that he would be obligated to pay assessment fees if he purchased Micronesia's interest. After the foreclosure auction, Yoon received an invoice from SARMA that assessed him fees from the date of the foreclosure auction, December 13, 2002. As of April 2003, Yoon had failed to pay any of the assessment fees detailed in the invoice.

¶ 7 On December 23, 2002, Yoon purchased a sublease interest in three additional guest units of the Plumeria Resort (the "Asanuma Units") from Asanuma Corporation via an assignment of sublease. The assignment of sublease stated that Yoon, as the assignee, would be responsible for paying all assessment fees imposed on the Asanuma Units after December 24, 2002. As of April 14, 2003, Yoon had paid none of the assessment fees that he was obligated to pay under the assignment.

¶ 8 A provision in the SARMA Bylaws (the "forced sale provision") provided that SARMA could require a member to sell its leasehold interest if that member was in material default and if that default was not cured within a stated time period. On April 14, 2003, pursuant to the forced sale provision, SARMA transferred, without court supervision, Yoon's interest in the commercial area and five of the thirty-four units to itself (the "forced sale"). SARMA subsequently purchased the commercial area and the five units and offset the purchase price against Yoon's unpaid assessment fees. Yoon's three Asanuma Units were not subject to the forced sale.

¶ 9 Following the December 2002 foreclosure auction, Yoon repeatedly attempted to persuade various Commonwealth agencies to shut down the Plumeria Resort. He also asserted control over much of the commercial area. On April 17, 2003, after numerous attempts to collect the assessment fees owed by Yoon, SARMA filed a complaint against him and Yoon counter-claimed.

¶ 10 On May 25, 2006, following a bench trial, the trial court entered its findings of fact and conclusions of law. It concluded that Yoon was subject to assessment fees imposed on the thirty-four units and the commercial area, beginning March 7, 2003, the date the court entered its order approving the sale. It also concluded that SARMA's forced sale of the five units and the commercial area was unlawful and invalid. On November 21, 2006, the trial court entered its "Final Judgment and Order." That order determined the precise amount of assessment fees Yoon owed to SARMA. Yoon filed a motion for amendment of judgment pursuant to Commonwealth Rule of Civil Procedure 59. In February 2007, the

trial court issued an order that granted in part and denied in part Yoon's motion. It subsequently entered an order adjudicating attorney's fees and costs, and declining to award any attorney's fees or costs to Yoon. Both Yoon and SARMA appealed.

II

¶ 11 We have jurisdiction over this appeal pursuant to 1 CMC § 3102(a).

III

A. Obligation for Assessment Fees

¶ 12 On appeal, SARMA claims that Yoon assumed the obligation to pay assessment fees on December 13, 2002, the date of the foreclosure auction. SARMA argues that the trial court erred when it concluded Yoon was only liable for assessment fees from March 7, 2003, the date the order approving the foreclosure sale was issued. We review de novo the issue of when a purchaser of property at a foreclosure sale assumes the obligation to pay assessment fees. *Castro v. Castro*, 2009 MP 8 ¶ 11; *Loren v. E'Saipan Motors, Inc.*, 1 NMI 133, 136 (1990).

¶ 13 We recognize that the Plumeria Resort is a "common interest community" within the meaning of the Restatement (Third) of Property: Servitudes (2000).[2] When a controversy arises as to the rights of a member in a common interest community, the court must look to the "governing documents" of that community, which are defined to include the community's bylaws. *See* Restatement (Third) of Property: Servitudes § 6.2(6) (2000) ("'Governing documents' means the declaration and other documents, such as the articles of incorporation or articles of association, *bylaws*, and rules and regulations, that govern the operation of a common-interest association, or determine the rights and obligations of the members of the common-interest community.") (emphasis added); Restatement (Third) of Property: Servitudes § 6.12 (2000) (stating limited circumstances in which a court may excuse compliance with provisions in a governing document); *see also Wolinsky v. Kadison*, 449 N.E.2d 151, 156 (Ill. Ct. App. 1983) ("When a controversy arises as to the rights of a unit owner in a condominium, we must . . . consider the declaration, and study the bylaws . . . ."). We therefore begin our analysis of Yoon's liability for assessment fees with the plain language of the SARMA Bylaws.[3] We may turn to the rules of decision

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[2] A "common interest community" is as a real-estate development in which "individually owned lots or units are burdened by a servitude" to either "pay for the use of, or contribute to the maintenance of" common property or to pay dues or assessments to an association that provides services to the common property. Restatement (Third) of Property: Servitudes § 6.2(1) (2000). The trial court concluded that the Plumeria Resort was a common interest community within the meaning of the Restatement definition. *See Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super Ct. May 25, 2006) (Findings of Fact and Conclusions of Law: Order at 33). Neither Yoon nor SARMA contest this conclusion on appeal.

[3] We note that, though both the parties and the trial court cited to the Bylaws in the course of their legal analysis, they did not begin their analysis with the plain language of the Bylaws. This is particularly puzzling in light of the fact that both the parties and the trial court recognized that the Bylaws govern the relationship between Yoon and SARMA.

established by 7 CMC § 3401[4] if necessary to aid in our interpretation of the Bylaws. *See, e.g.*, *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2007 MP 22 ¶¶ 14-16 (beginning with the "simple and straightforward" language of lease agreement when adjudicating whether the port authority was entitled to collect fees from shipping company's "non-revenue" passengers, and subsequently applying Commonwealth case law and the Restatements to interpret the lease).

1. The SARMA Bylaws

¶ 14 The bylaws of a condominium association or other association formed for the management of common property are considered to be a contract between the association and the members of the association. *1230-1250 Twenty-Third St. Condo. Unit Owners Ass'n v. Bolandz*, 978 A.2d 1188, 1191 (D.C. 2009) ("A condominium instrument, such as the bylaws, is a contract between the unit owners and the condominium association."); *Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass'n.*, 548 A.2d 87, 91 (D.C. 1988) ("The condominium instruments, including the bylaws and the sales agreement, are a contract that governs the legal rights between the Association and unit owners."). Because the bylaws are a contract, rules of contract interpretation apply. *See Johnson*, 548 A.2d at 91 (citing 8 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 4195 (perm ed., rev. vol. 1982)) (noting that "rules of contract interpretation are generally applicable to the interpretation of bylaws."). We see no reason to depart from this common law rule. We accordingly hold that the Bylaws constitute a contract between SARMA and Yoon, and that rules of contract interpretation are applicable.

¶ 15 "[O]ur primary concern in contract interpretation is to determine and give effect to the intentions of the parties as expressed in the instrument, and the intent of contracting parties is generally presumed to be encompassed by the plain language of contract terms." *Tinian Shipping Co.*, 2007 MP 22 ¶ 16 (citation omitted). Interpretation of contract terms is a question of law reviewable de novo. *Malite v. Tudela*, 2007 MP 3 ¶ 23 (citing *Pangelinan v. Itaman*, 1996 MP 16 ¶ 3); *Camacho v. L & T Int'l Corp.*, 4 NMI 323, 326 (1996)).

¶ 16 The SARMA Bylaws explicitly address a foreclosure sale purchaser's liability for assessment fees. The SARMA Bylaws state:

> Any provision contained herein notwithstanding, each Mortgagee who comes into possession of a Unit by virtue of foreclosure or by deed or assignment in lieu of foreclosure, or any purchaser at a foreclosure sale, shall take title to the Unit free of any

[4] Title 7 CMC § 3401, Applicability of Common Law reads:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth.

> claims for unpaid assessments or charges against the same which *accrue prior to the time such Mortgagee or Purchaser comes into possession thereof*, except for claims for a pro rata share of such assessments or charges resulting from a pro rata reallocation of assessments or charges to all units.

Saipan Achugao Resort Members' Ass'n v. Yoon, No. 03-1087E (NMI Super. Ct. May 25, 2006) (Findings of Fact and Conclusions of Law: Order at 34) (emphasis added). The plain language of the SARMA Bylaws indicates that Yoon became liable for assessment fees only after he came into possession of his property interest in the Plumeria Resort. Nothing elsewhere in the SARMA Bylaws contradicts this plain language.

¶ 17 We note that the trial court cited to the "comes into possession" language but subsequently misconstrued it. Immediately after citing to the provision above, the trial court stated:

> The Bylaws, which govern this particular relationship mirror the generally supported common law theory that a purchaser at a foreclosure sale acquires title free and clear of all junior interest to the foreclosed lien.
>
> Secondly, although not uniform, several state jurisdictions . . . have determined that a purchaser of a property at a foreclosure auction comes into ownership only after the foreclosure . . . is confirmed . . . .

Saipan Achugao Resort Members' Ass'n v. Yoon, No. 03-1087E (NMI Super. Ct. May 25, 2006) (Findings of Fact and Conclusions of Law: Order at 34) (internal citation omitted). The trial court did not explain how the Bylaws "mirror the generally supported common law theory" when the Bylaws refer specifically to assessment fees and are silent as to "junior interests." Moreover, the trial court seems to have conflated possession with ownership. It referred to a purchaser who "comes into ownership," although this phrase does not appear in the Bylaws.

¶ 18 Consistent with the plain language of the Bylaws, we conclude that Yoon became liable for assessment fees attributable to the thirty-four units and the commercial area on the date that he came into possession. We now consider the question of when Yoon came into possession of the thirty-four units and the commercial area. Because the SARMA Bylaws do not define "comes into possession," we turn first to Commonwealth written law. *See* 7 CMC § 3401.

2. Analysis of Commonwealth Foreclosure Provisions

¶ 19 In the Commonwealth, written law includes the Commonwealth Constitution and Commonwealth statutes, along with case law, court rules, legislative rules and administrative rules. *Borja v. Goodman*, 1 NMI 225, 242 (1990) (Villagomez, J., concurring). Written law also includes the Covenant[5] and provisions of the United States Constitution, as well as laws and treaties applicable under the Covenant. *Id.* The Restatements may not be applied as the rules of decision if any of those sources of written law are

[5] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note.

applicable. *Id.* Here, Commonwealth case law is silent as to when a purchaser at a foreclosure sale comes into possession,[6] as are the Commonwealth Constitution, court rules, legislative rules, administrative rules, and the Covenant. We therefore confine our analysis of written law to Commonwealth statutes. We first provide an overview of the various Commonwealth statutory provisions that are relevant to foreclosure. We then analyze those provisions to determine when a purchaser at a foreclosure sale comes into possession of the foreclosed property.

¶ 20 Pursuant to 2 CMC § 4537, all judicial actions for foreclosure must be brought in the Commonwealth Superior Court. If the court, after trial, determines the facts set forth in the complaint to be true, the trial court:

> [S]hall ascertain the amount due to the plaintiff upon the mortgage debt or obligation, including interest, costs, and attorney's fees, and shall render judgment for the sum so found due, and order that the same be paid into court within a period of three months from and after the date on which the order was made.

2 CMC § 4537(d). When the mortgagor fails to pay, the trial court shall order the property at issue to be sold. *Id.* § 4537(e). The sale must be made by a person "appointed by the court for that purpose." *Id*.

¶ 21 After the property is sold, the person making the sale must "give to the purchaser a certificate of sale and properly record a duplicate thereof." 2 CMC § 4537(f). The certificate of sale must "state the date of judgment under which the sale was made, the names of the parties, a particular description of the real property sold, the price bid for each distinct lot or parcel, and the period during which the property is subject to redemption." *Id*. A mortgagor then has twelve months from the "date of the sale" to pay the purchase price and redeem the property. *Id.* § 4542(a). At the expiration of this time for redemption of the property, "the person making the sale, or that person's successor in office, or other officer appointed by the court, must make to the purchaser . . . a deed or deeds to the property." *Id.* § 4537(f). The deed "shall vest in the grantee all the rights, title and interest of the mortgagor in and to the property sold." *Id*.

¶ 22 Having summarized the relevant Commonwealth statutory provisions, we now analyze those provisions to determine when a purchaser at a foreclosure sale comes into possession of the foreclosed property. As a general rule, the right to possession of a foreclosed property after a foreclosure sale is determined by statute. *Chase Manhattan Bank v. Robert-Surzano*, 51 V.I. 1024, 1040 (D. V.I. App. Div. 2009) (citations omitted).[7] However, the Commonwealth lacks a statutory provision that expressly

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[6] The Commonwealth follows the lien theory of mortgages. *Villanueva v. City Trust Bank*, 2002 MP 1 ¶ 15. Under the lien theory, the mortgagor retains both title and possession to the property subject to the mortgage until the mortgage is extinguished through foreclosure, and the mortgagee has a lien on the property only. *See id.* ¶ 13. However, Commonwealth courts have never before considered when the mortgage becomes extinguished and when the mortgagor's right of possession transfers to the purchaser at a foreclosure sale.

[7] For jurisdictions with such statutes, see, e.g., *Sec. Sav. & Loan Ass'n v. Busch*, 523 P.2d 1188, 1191 (Wash. 1974) ("[The Revised Code of Washington] designates those who are entitled to possession during the period of

governs the right to possession of the foreclosed property after a foreclosure sale. In the absence of a governing statutory provision, we must apply canons of statutory construction to determine when the legislature intended a foreclosure sale purchaser to come into possession of the foreclosed property. *See Commonwealth v. Hossain*, 2010 MP 21 ¶ 12 (Slip Opinion, Dec. 31, 2010) (relying upon canons of statutory construction to determine the intended meaning of a statute, when statutory provisions did not expressly define a relevant term).

¶ 23 The most basic canon of statutory construction is that "the [statutory] language must be given its plain meaning, where the meaning is clear and unambiguous." *Calvo v. N. Mariana Islands Scholarship Advisory Bd.*, 2009 MP 2 ¶ 21 (quoting *Aguon v. Marianas Pub. Land Corp.*, 2001 MP 4 ¶ 30). "One statutory provision should not be construed to make another provision [either] inconsistent or meaningless." *Estate of Faisao v. Tenorio*, 4 NMI 260, 265 (1995) (quoting *In re Estate of Rofag*, 2 NMI 18, 29 (1991)) (alternation in original). In addition, "[i]n determining legislative intent, the statute must be read as a whole, and not as isolated words contained therein." *Calvo*, 2009 MP 2 ¶ 22 (quoting *Estate of Faisao*, 4 NMI at 266).

¶ 24 We first analyze 2 CMC § 4542(a), which states:

> The judgment debtor may redeem the property from the purchaser within 12 months of the date of the sale, *upon paying the purchaser the amount of the purchase*, with one percent per month interest thereon, up to the time of redemption. *In addition, the judgment debtor shall pay* the following:
>
> (1) The amount of any assessment or taxes;
> (2) Any reasonable sum paid for fire insurance, maintenance, upkeep, or repair or improvements located upon the property;
> (3) The fair market value of any improvements constructed upon the property; and
> (4) Any sum paid on a prior obligation secured the property to the extent such payment was necessary for the protection of the purchaser's interest, which the purchaser may have paid thereon after purchase, and interest on such amounts in the amount computed above.

Id. (emphasis added). Section 4542(a) indicates that, as a general rule, the purchaser must have the right to possession of the property at some time during the twelve month redemption period, before the right to redemption expires. If the purchaser was not in possession at some point during redemption, the purchaser presumably would not have authority to pay for "any assessment or taxes," or "maintenance, upkeep, or repair or improvements," or the "protection of the purchaser's interest." 2 CMC § 4542. Yet a judgment debtor would be forced to reimburse the foreclosure sale purchaser for such payments under the plain language of 2 CMC § 4542. This result makes no sense, and would consequently render 2 CMC § 4542 both "inconsistent" and "meaningless." *See Estate of Faisao*, 4 NMI at 265.

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redemption."); *Pillsbury v. McGarry*, 138 P. 836, 837 (Or. 1914) (stating that the right to possession during the redemption period is expressly conferred by statute in Oregon).

¶ 25 We also take note of 2 CMC § 4543(a), which states that "[t]he purchaser, from the time of the sale until a redemption, is entitled to receive, *from the tenant in possession*, the rents of the property sold, or the value of its use and occupation." (Emphasis added). Section § 4543(a) unambiguously states that a purchaser cannot take possession during the redemption period when there is a "tenant in possession." *Calvo*, 2009 MP 2 ¶ 21 (providing that statutory language must be given its plain meaning). We interpret 2 CMC § 4543(a) to mean that a foreclosure sale purchaser would be entitled to possession if another party were not lawfully in possession. We do not interpret section 4543(a) to impair the purchaser's right to possession in other circumstances. Section 4542 enables the purchaser to improve the property and make payments related to the property during the redemption period, and that ability would become meaningless if we read Section 4353(a) to forbid the purchaser from taking possession until after the time for redemption expires.

¶ 26 In light of the above analysis, we interpret 2 CMC § 4542 to mandate that, absent a tenant in possession, the purchaser at a foreclosure sale acquires the right to possession of the foreclosed property at some time prior to the expiration of the redemption period. We now consider the question of precisely when during the redemption period the purchaser acquires the right to possession. This issue is not addressed by section 4537 nor by any other Commonwealth statutory provision. Commonwealth case law and other Commonwealth written laws are also silent. Moreover, there are no Restatements governing this matter.[8] Therefore, our discussion now descends to the common law of the United States. 7 CMC § 3401.

3. Possession at Common Law

¶ 27 In many jurisdictions, the right to possession is interwoven with judicial confirmation of the foreclosure sale. We therefore begin with a discussion of confirmation. Confirmation ordinarily occurs when a court enters an order confirming, approving, or otherwise ratifying a judicial foreclosure sale. *See, e.g.*, *First Hawaiian Bank v. Timothy*, 31 P.3d 205, 214-15 (Haw. 2001) (discussing a court's jurisdiction to enforce its order confirming a foreclosure sale). Confirmation is "an indication that the sale has been made in due compliance with the provisions of the decree ordering that sale, and manifests a court's acceptance of a purchaser's offer embodied in his bid reported to the court." *Travelers Indem. Co. v. Heim*, 388 N.W.2d 106, 108 (Neb. 1986) (citing 47 Am. Jur. 2d *Judicial Sales* § 201 (1969)). According to common law, it is well established that a judicial sale does not become final, complete and valid until confirmation.[9]

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[8] The Restatement (Third) of Property: Mortgages (1997) is silent, as is the Restatement (Third) of Property: Servitudes (2000).

[9] *Monet v. Lee Henderson & Wong*, No. 94-00884 HG, 1995 U.S. Dist. LEXIS 17300, at *9 (D. Haw. Nov. 3, 1995) ("Under Hawaii law, a sale pursuant to a foreclosure auction is not final until confirmation."); *Dellinger v. First Nat'l Bank of Russellville*, 970 S.W.2d 223, 225 (Ark. 1998) ("It is settled law that a judicial sale is not complete until confirmation."); *World Sav. & Loan Ass'n v. AmerUS Bank*, 740 N.E.2d 466, 474 (Ill. Ct. App. 2000)

¶ 28 Among jurisdictions that allow purchasers to take possession of the foreclosed property during the redemption period,[10] many permit the purchaser to possess the foreclosed property from confirmation onward. *See, e.g., In re Marathon Foundry & Mach. Co.*, 239 F.2d 122, 128 (7th Cir. 1956) (noting that a party's suggestion to pay an additional amount for property "may have been a peace offer . . . to end the litigation and to acquire possession of property to which it had been entitled since the court's confirmation of the judicial sale."); *Godfrey v. Powell*, 155 F.2d 51, 53 (5th Cir. 1946) ("On confirmation of the sale by the court the accepted bidder becomes the purchaser in the full sense of the term and the substantial owner of the property sold with the right of possession . . . ." (quoting 31 Am. Jur. *Judicial Sales* § 146)); *Sarasota-Fruitville Drainage Dist. v. All Lands Within Said Dist.*, 25 So.2d 498, 500 (Fla. 1946) ("Where land is sold at a judicial sale and the buyer allows the former owner to remain in possession after confirmation, the presumption is that the possession of the original owner is as quasi tenant or tenant at sufferance of the buyer . . . .").

¶ 29 We see no reason to depart from the common law approach. We cannot find that a foreclosure sale purchaser acquires the right to possession on the date of the auction. The successful bidder at a judicial foreclosure sale is nothing more than the preferred purchaser, and the bidder receives no rights or interests by virtue of the bid. *In re Welch*, 92 F. Supp. 510, 514 (W.D. Ky. 1950) ("[P]rior to confirmation of the sale a bidder is not a purchaser and is not vested with any title or interest in the property offered for sale . . . ."). We reject the idea that the purchaser receives the right to possession upon the issuance of the certificate of sale. The certificate of sale is generally considered to be a ministerial document only, whose validity is dependent upon a prior or subsequent confirmation. *See, e.g., W. T. Watts, Inc. v. Sherrer*, 571 P.2d 203, 206 (Wash. 1977) ("This court has recognized long ago that a sheriff's certificate of purchase does not pass title but is only evidence of an inchoate interest . . . ."). We are, therefore, left with the date of confirmation as the only date during the redemption period when a purchaser may receive the right to possession.

("[A] judicial foreclosure sale is not complete until the trial court confirms it. . . . Until the court confirms the sheriff's proceedings, there is not a true sale in the legal sense."); *Cont'l Oil Co. v. McNair Realty Co.*, 353 P.2d 100, 105 (Mont. 1960) ("When confirmation of a judicial sale is expressly required by statute, such a sale becomes valid and complete on confirmation and not before."); *Travelers Indem. Co.*, 388 N.W.2d at 108 ("When confirmed, a judicial sale is final and complete . . . ."); *Am. Fed. Sav. & Loan Ass'n of Tacoma v. McCaffrey*, 728 P.2d 155, 161 (Wash. 1986) ("A foreclosure sale becomes valid and complete only upon confirmation by the court . . . .").

[10] Several jurisdictions provide, either by statute or in accordance with common law, that the purchaser does not acquire the right to possession until the expiration of the redemption period and the delivery of the deed. *See, e.g., Butler v. Lomas & Nettleton Co.*, 862 F.2d 1015, 1019 (3d Cir. 1988) (citing to a Pennsylvania statutory provision which provides that the purchaser does not receive possession until the sheriff's deed is executed); *Hermes v. Fed. Crop Ins. Corp.*, 729 F. Supp. 1292, 1296 (D. Kan. 1990) ("[The mortgagor's] right to redemption and the concomitant right to possession and profits ended when the statutory redemption period ran . . . ."); Because we hold that the purchaser acquires the right to possession of the foreclosed property during the redemption period pursuant to 2 CMC § 4542, we do not consider these jurisdictions in our analysis.

¶ 30 We hold that a purchaser of property at a judicial foreclosure auction receives the right to possession of that property upon confirmation of the sale by the court. We note that this right of possession is subject to the exception contained in 2 CMC § 4543 for tenants who are in possession, and to the mortgagor's right of redemption.

4. SARMA's Arguments

¶ 31 SARMA argues that Commonwealth statutes do not allow for confirmation, and that the March 7, 2003 order approving the sale could not constitute confirmation of the sale. SARMA also argues that legal title passed to Yoon on the date of the auction, and that Yoon should thus be liable for assessment fees beginning from the date of the auction. Finally, SARMA makes an equitable argument and asserts that Yoon should be held liable for assessment fees from the date of the auction because he took possession of the property and acted as the owner of the property since the auction date. We address each argument in turn.

i. Confirmation

¶ 32 As SARMA correctly recognizes, Commonwealth statutory law is silent as to confirmation. Neither 2 CMC § 4537(f) nor any other provision refers to confirmation of a judicial foreclosure sale. However, for the reasons that follow, we interpret Commonwealth statutory law to permit confirmation.

¶ 33 First, section 4531 provides that "[n]o mortgage may be foreclosed other than by the judicial remedies provided by this chapter." Interpreting Commonwealth written law to allow for confirmation is consistent with the judicial oversight established by section 4531. Confirmation allows the trial court to ensure that "the sale has been made in due compliance with the provisions of the decree ordering that sale . . . ." *Travelers Indem. Co.*, 388 N.W.2d at 108. Confirmation also allows the trial court to accept the purchaser's offer embodied in his or her bid as reported to the court. *See id.* In contrast, if we interpreted Commonwealth written law to bar confirmation, 2 CMC § 4531 would impede the trial court's ability to perform its statutorily mandated duties. *See Estate of Faisao*, 4 NMI at 265 (providing that one statutory provision should not render the other inconsistent or meaningless). Under 2 CMC § 4531, the trial court would be tasked with oversight of a foreclosure sale, yet denied the power to review the sale and ensure that the sale was conducted in compliance with the decree ordering sale.

¶ 34 In addition, section 4511 provides:

> The purpose of this chapter is to establish a system of mortgage law in the Commonwealth which will induce lenders to make secured commercial and residential loans, while at the same time insuring that residents of the Commonwealth who execute mortgages will have a full comprehension of the nature and consequences of their act. All provisions of this chapter shall be construed in such a manner as to best effectuate its purposes.

Id. Confirmation is consistent with the purposes stated in section 4511. Both lenders and borrowers may enter into loans with the knowledge that, if the mortgaged property becomes subject to foreclosure proceedings, the sale will become final and complete on a definite date.

¶ 35 Moreover, 2 CMC § 4537(f) provides that "[w]henever any real property shall be sold under judgment of foreclosure pursuant to the provisions of this chapter, the *person making the sale* must give to the purchaser *a certificate of sale* . . . ." *Id.* (emphasis added). Title 2 CMC § 4537(e) states that the person making the sale is "a person appointed by the court for that purpose . . . ." When read together, 2 CMC § 4537(e) and 2 CMC § 4537(f) indicate that there cannot be a certificate of sale without a court order confirming the sale. If the person making the sale is responsible for delivering the certificate of sale, must be appointed by the court, and is under the control of the court, it follows that the court must be able to order and confirm delivery of the certificate of sale.

¶ 36 We also note that most United States jurisdictions provide for confirmation of judicial foreclosure sales, either by statute or pursuant to common law. *See, e.g.*, 735 Ill. Comp. Stat. 5/15-1507(f) (2011) ("The Certificate of Sale shall further indicate that it is subject to confirmation by the court."); Minn. Stat. § 581.08 (2010) ("Upon the coming in of the report of sale, the court shall grant an order confirming the sale . . . .If the sale is confirmed, the sheriff shall forthwith execute the proper certificate of sale . . . ."); Wash. Rev. Code § 61.12.060 (2011) ("The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing . . . ."); *see also Dellinger*, 970 S.W.2d at 225 (stating that "a judicial sale is not complete until confirmation" although Arkansas statutory provisions are silent as to confirmation); *S. Realty & Utils. Corp. v. Belmont Mortgage Corp.*, 186 So. 2d 24, 25 (Fla. 1966) (referring to "confirmation" of judicial foreclosure sale, when Florida statutory provisions are silent as to confirmation).

¶ 37 In light of the above persuasive authority we hold that a trial court has authority to enter an order confirming a judicial foreclosure sale. We reject SARMA's contrary argument.

ii. Title

¶ 38 The trial court found that Yoon acquired title to the sublease interest in the thirty-four guest units and the commercial area upon issuance of the March 7, 2003 order confirming the foreclosure sale. This finding was integral to the trial court's ultimate conclusion that Yoon was liable for assessment fees beginning March 7, 2003. On appeal, SARMA argues that title passed to Yoon at the date of the auction, and Yoon should therefore be liable for assessment fees from the auction date onward. Because we hold that Yoon's liability for assessment fees is determined by the date he came into possession, and not by the date he received title, we need not decide whether or when Yoon received title to the thirty-four units and the commercial area. However, because both the parties and the trial court place significant emphasis on title, we direct the parties to the relevant Commonwealth law.

¶ 39 Title 2 CMC § 4537(f) states that the deed given to the foreclosure sale purchaser at the end of the redemption period "shall vest in the grantee all the rights, *title* and interest of the mortgagor in and to the property sold . . . ." (Emphasis added). The plain language of 2 CMC § 4537(f) indicates that a purchaser at a foreclosure sale receives complete, legal title to the foreclosed property on the date that the purchaser receives an executed deed, which occurs after the redemption period expires. We note that this plain language is consistent with the rule in many common law jurisdictions. *See, e.g.*, *In re Spencer*, 115 B.R. 471, 478 (D. Del. 1990) ("Delaware courts have long recognized that the legal title is not in the purchaser until a deed is executed.") (quotations omitted).

iii. Equity

¶ 40 SARMA argues, as it did in the trial court, that equity requires Yoon to be held liable for assessment fees from the date of the auction. SARMA specifically alleged that it detrimentally relied on Yoon's representations that he was a SARMA member, and that Yoon exercised control of the thirty-four units and the commercial area from the date of the auction onward.[11] The trial court rejected the argument because SARMA failed to plead detrimental reliance in the complaint. It further stated that, after examining the behavior of the parties, it declined to sympathize with either party and was not inclined to right any perceived injustice through equity.

¶ 41 We review a court's exercise of its equitable powers for abuse of discretion. *Pangelinan v. Itaman*, 1996 MP 16 ¶ 4. "An abuse of discretion occurs when the decision 'rests upon a clearly erroneous finding of fact, errant conclusion of law or an improper application of law to fact.'" *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 33 (quoting *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3rd Cir. 2000)). Here, the trial court's decision was not based on any erroneous conclusions of law. Neither does the record contain erroneous findings of fact or improper application of the law to the fact. The trial court found that Yoon "appeared bent on bullying" SARMA and that SARMA "excluded Yoon from various meetings" and otherwise acted inequitably towards Yoon. *Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-1087E (NMI Super. Ct. May 25, 2006) (Findings of Fact and Conclusions of Law: Order at 40). There is no evidence that either of these findings were clearly erroneous. Accordingly, we cannot say that the court abused its discretion when it declined to exercise its equitable powers.

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[11] SARMA resurrects its equitable argument on appeal. SARMA states:

> [T]here is no inequity in finding that this purchaser acquired the benefits and obligations of title, at the time of the foreclosure sale. The trial court amply documented that Yoon took actions, on several occasions between December 2002 and March 7, 2003, evidencing that he was the owner of the units and commercial space in the Plumeria which he purchased from Micronesia.

Appellant's Br. at 23.

5. Conclusion

¶ 42 In summary, we hold that the SARMA Bylaws obligated Yoon to pay assessment fees only after he came into possession of the property interest in the thirty-four guest units and the commercial area. We further hold that a purchaser of property at a foreclosure sale acquires the right to possession of property upon the entry of an order by the court confirming the sale. We affirm the trial court's conclusion that Yoon was liable for assessment fees dating from the March 7, 2003 order approving the foreclosure sale.

B. Forced Sale

¶ 43 We now turn to the issue of whether the trial court erred when it concluded that SARMA's forced sale was invalid. The trial court invalidated the forced sale on two alternate grounds. First, it considered a provision in the Bylaws stating that a member must be in "default" before SARMA could conduct a forced sale. It reasoned that, if Yoon was not liable for assessment fees until confirmation, then Yoon was not in default on his assessment fees when SARMA conducted the forced sale, and therefore the forced sale was unlawful. Second, the trial court concluded that the forced sale was procedurally invalid, regardless of whether Yoon was in default. It reasoned that the Bylaws did not allow SARMA to conduct the forced sale without court supervision. SARMA does not challenge the trial court's finding of procedural invalidity. Instead, SARMA argues that Yoon's failure to pay assessment fees on the Asanuma Units constituted default and gave SARMA independent cause to institute the forced sale.

¶ 44 SARMA's argument is meritless. The trial court concluded that the forced sale was procedurally invalid regardless of whether Yoon was in default on some or all of his properties. Yoon's alleged default on the Asanuma Units was therefore irrelevant to the trial court's conclusion, and the trial court was correct when it declined to consider whether Yoon's default on the Asanuma Units could have been a substantive basis for the forced sale. We accordingly affirm the trial court's conclusion that the forced sale was invalid.

C. Assessments Against Other SARMA Members

¶ 45 Yoon argues that the trial court erred when it found him liable for assessment fees but did not assess fees against other defaulting SARMA members. The issue of whether a court must impose assessment fees against all defaulting members of a common interest community when only some defaulting members are before the court is an issue of law which we review de novo. *Castro*, 2009 MP 8 ¶ 11; *Loren*, 1 NMI at 136.

¶ 46 Here, though many SARMA members owed assessment fees, Yoon was the only SARMA member before the court. Thus, while the court could order Yoon to pay assessment fees to SARMA, it could not impose assessment fees upon other SARMA members who were not properly before it and who had neither notice nor the opportunity to be heard. *See Castro*, 2009 MP 8 ¶ 17 (quoting *Office of the Attorney Gen. v. Honrado*, 1996 MP 15 ¶ 15 n.5) (stating that due process has both a procedural and a

substantive component, and procedural due process "implies that official action must meet a minimum standard of fairness to the individual, conferring the right, for example, to adequate notice and a meaningful opportunity to be heard."). The trial court correctly recognized this when it stated: "Should SARMA wish to enforce its bylaws and lease provisions against the respective owners of those units by court action, it may do so by separate court actions." *Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super. Ct. Nov. 21, 2006) (Final Judgment and Order at 6). We therefore deny Yoon's claim that assessments should have been imposed upon all SARMA members.

D. Yoon's Liability for Assessment Fees Prior to February 9, 2007

¶ 47 In its May 2006 order, the trial court concluded that SARMA's forced sale of the commercial area and the five units was unlawful. The May order explicitly quieted title to the "thirty-four units," but did not quiet title to the commercial area. At Yoon's request, the trial court quieted title to the commercial area in a final judgment issued on February 9, 2007. Yoon now argues that he should not have to pay assessment fees imposed on the commercial area and possibly the five units[12] for the time period before the trial court quieted title. He reasons that "without possession, [he] should not be [forced] to pay." Appellant's Br. at 28-29 (emphasis added).

¶ 48 As a threshold matter, we must determine what Yoon means when he refers to "possession." As used by Yoon, "possession" may mean either actual, physical possession of property or the right to possession of property. *See, e.g., Melnick v. Press*, 2011 U.S. Dist. LEXIS 90276, at *32 (E.D.N.Y. August 12, 2011) (emphasis added) (discussing action to partition property and stating, "[t]he tenant seeking the partition need not be in actual possession of the property to bring such an action, but instead need only have a right to possession of the property pursuant to the property's title."). The distinction is important because the law that governs right to possession is often distinct from the law that governs actual possession. *See, e.g., Gentry v. Smith*, 487 F.2d 571, 578 (5th Cir. 1973) (concluding that party was real owner and was thus entitled to right of possession, but that party could not take actual possession of property away from present possessor without instituting an unlawful detainer action).

¶ 49 Here, Yoon argues that:

> The court held that the May 25, 2006 order gave Mr. Yoon the immediate *right to possession* of the commercial area and five residential units appropriated.[13] SARMA did

[12] It is unclear whether Yoon is claiming that he lacked possession of the commercial area only, or whether he is claiming that he lacked possession of both the commercial area and the five units.

[13] The trial court found that Yoon had "possession" of his property from May 2006 onward. *See Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super. Ct. Feb. 9, 2007) (Order Granting in Part and Denying in Part Yoon's Motion for Amendment of Final Judgment at 3). The trial court reasoned that the May 2006 order explicitly stated that "possession should be restored to Yoon;" and (2) Yoon identified no "obstruction" to his possession after May 25, 2006. *Id.* It is unclear whether the trial court was referring to Yoon's actual possession of the property, his right to possession, or both.

> not believe that to be true and neither did Mr. Yoon. . . .Without *possession*, Mr. Yoon should not be entitled to pay assessments related to the appropriated areas.

Appellant's Br. at 28-29 (emphasis added). Because Yoon first argues that the trial court erroneously concluded that the May 2006 order gave him "right to possession," but then asserts that he is without "possession," it is unclear whether Yoon is alleging that he was deprived of actual possession, the right to possession, or both.

¶ 50 We recognize that the art of advocacy is not one of mystery. Our adversarial system relies on advocates to inform the discussion and to bring issues to the Court's attention. *Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003). An appellate court may only review issues which are "argued specifically and distinctly in a party's opening brief . . . ." *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 776 n.5 (9th Cir. 2010) (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)). We will not manufacture arguments for an appellant; a bare assertion does not prove a claim. *Id.*; *see also Hardage v. CBS Broadcasting, Inc.*, 433 F.3d 672, 672 (9th Cir. 2006)) (citations and quotations omitted) ("Our circuit has repeatedly admonished that we cannot manufacture arguments for an appellant and therefore we will not consider any claims that were not actually argued in appellant's opening brief."). Moreover, appellants must "submit the relevant evidentiary record before this Court and identify the parts of the record which support the appeal." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 30 n.20 (citing *Guerrero v. Tinian Dynasty Hotel*, 2006 MP 26 ¶ 28 (citation omitted)).

¶ 51 Yoon refers to the "right to possession" but does not refer to "actual possession," nor does he present arguments related to actual possession. We therefore presume that Yoon's arguments refer only to his "right of possession." If Yoon intended to argue that he was not in actual possession of the commercial area, he bore the burden to make that argument clear in his briefing to the Court and to provide evidence from the record in support of his argument.

¶ 52 Having established that the word "possession" as used by Yoon refers to Yoon's right of possession, we now consider whether he was deprived of the right of possession as to the commercial area prior to the trial court's February 2007 order quieting title. An unlawful sale of property does not transfer the right to possession of the property. The right to possession instead remains with the party who held that right prior to the unlawful sale. *See, e.g.*, *United States v. Rodgers*, 461 U.S. 677, 715 (1983) (emphasis added) (considering forced sale of delinquent taxpayers' interest in property and stating, "[i]n this case, the homestead estate owned by the delinquent taxpayer—Mrs. Rodgers' deceased husband—did not include the right to sell or force the sale of the homestead during Mrs. Rodgers' lifetime without her consent. Mrs. Rodgers had, and still has, an indefeasible right to possession . . . ."); *see also Trinity United Methodist Church v. Levesque*, 870 A.2d 1116, 1125 (Conn. Ct. App. 2005). (affirming judgment finding that tenants who retained physical possession of property after termination of tenancy negligently

interfered with landlord's right of possession); *Eventov Diamond Co. v. Weiss*, 150 Misc. 913, 915 (N.Y. Mun. Ct. 1934) (discussing "unlawful" sale of diamonds and stating, "plaintiff has never divested itself of either title or the right to possession.").

¶ 53 As stated above, we hold that Yoon obtained the right to possession once the trial court confirmed the foreclosure sale. We also hold that the forced sale of Yoon's property was unlawful. Thus, Yoon retained the right to possession of his property even after the forced sale. His argument that he lost the right of possession by virtue of the forced sale is meritless.[14] Accordingly, we deny Yoon's claim that he should not have to pay assessment fees imposed on the commercial area before the February 2007 judgment.

E. Credit for Attorney's Fees

¶ 54 We now address Yoon's argument that he should receive a credit for SARMA's attorney's fees and costs. Yoon argued

> Mr. Yoon *should receive a credit for his share of the attorney fees* incurred by the Association and *assessed or in theory to be assessed* to him. The reason is simple. The Association, under the control of Niju-Ichi and Three Bells, continued with this lawsuit to uphold the Association's unlawful acts in breach of their duties to the members, particularly Mr. Yoon. Why should Mr. Yoon . . . bear responsibility for a lawsuit based upon the controlling directors' unlawful acts?

Saipan Achugao Resort Members' Ass'n v. Yoon, No. 03-0187E (NMI Super. Ct. Sept. 25, 2006) (Response to Court's Order Requiring Final Report from Receiver Muna and Memorandum on Hearing Prior to Judgment at 10) (emphasis added). On appeal, Yoon maintains that he should receive a credit equal to the amount of his assessment fees that SARMA has used or will use to pay its attorney's fees.[15] The issue of whether an association may use a member's assessment fees to pay attorney's fees incurred in litigation with that member is an issue of law we review de novo. *Castro*, 2009 MP 8 ¶ 11; *Loren*, 1 NMI at 136.

¶ 55 The power to impose assessments is critical to the financial viability of most common interest communities. Restatement (Third) of Property: Servitudes § 6.5 cmt. b (2000). Assessments levied

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[14] Note that Yoon's argument is also meritless because an order quieting title does not and cannot determine the right to possession. An order quieting title merely adjudicates the plaintiff's title as superior to that of the other parties to the action. *See, e.g., Jackson v. City of Cassville*, 234 S.W.3d 627, 631 n.3 (Mo. Ct. App. 2007); *Makila Land Co., LLC v. Kapu*, 156 P.3d 482, 484 (Haw. Ct. App. 2006). Thus, a party not already in possession who prevails in a quiet title action must bring a separate action, typically an action for ejectment, to assert his right of possession of the property. *Stephanson v. Teregeyo*, 2008 MP 13 ¶¶ 5, 11 (discussing action brought by plaintiff for "quiet title, *ejectment*, mesne profits (loss of rent), an injunction, and rental income due from the property," stating that trial court "declined to issue (i) an *order quieting title* to the premises in favor of Stephanson, (ii) an *order ejecting the unidentified individuals* from the property . . . .").

[15] It is unclear from Yoon's briefing whether he is referring to a credit against assessment fees he has already paid, a credit against assessment fees he has yet to pay but may pay in the future, or both.

pursuant to an association's express powers must be used for authorized purposes of the association and are generally subject to constraints enumerated in the governing documents. *Id.* However, within those limitations, an association has broad power to determine how assessment fees are used. *See, e.g.*, *Boyle v. Lake Forest Prop. Owners Ass'n, Inc*., 538 F. Supp. 765, 769 (S.D. Ala. 1982) (upholding a covenant to pay assessments, despite the covenant's failure to state purpose for which the assessments would be used or property to be benefitted). A member's assessment fees may be used to pay for reasonable attorney's fees incurred in the association's litigation with that member, so long as the payment of attorney's fees is an authorized purpose under the relevant statutory provisions and governing documents. *See Washington Courte Condo. Ass'n-Four v. Adreani*, 523 N.E.2d 1248, 1249 (Ill. App. Ct. 1988) (holding developer liable to pay special assessments on owned units, for purpose of financing litigation against itself for construction defects); *Wrenfield Homeowners Ass'n v. DeYoung*, 600 A.2d 960, 963 (Pa. Super. 1991) (holding that association's declaration made defaulting homeowner liable for assessments plus cost of collection for amount in default to the association, including attorney's fees).

¶ 56 Here, the Bylaws state that the "Association shall have the general responsibilities of . . . establishing and collecting monthly assessments from members . . . ." SARMA Bylaws § 3.1(c). The Bylaws also state:

> Preparation and Approval of Budget
>
> (1) At least forty-five (45) days before the beginning of each fiscal year, the Board shall adopt an annual budget . . . .
> (2) Such annual budget shall also include such reasonable amounts as the Board considers necessary to provide working capital, a *general operating reserve* and reserves for contingencies and replacements.

SARMA Bylaws § 6.1(b)(1)-(2) (emphasis added). By stating that SARMA has "general responsibilities" of "establishing and collecting assessment fees" the Bylaws indicate that SARMA has broad authority to determine the purpose for which assessment fees are used. SARMA Bylaws § 3.1. In addition, the Bylaws' reference to "a general operating reserve" indicates that SARMA may use assessment fees for general operating expenses, including attorney's fees. SARMA Bylaws § 6.1. We conclude that the payment of attorney's fees is an authorized purpose under the plain language of the Bylaws. SARMA may use Yoon's assessment fees to pay its attorney's fees, even those incurred in litigation with Yoon.

¶ 57 Yoon relies on the law governing corporate directors and argues that he should be relieved of responsibility for assessment fees because the SARMA directors breached their fiduciary duties. Unfortunately for Yoon it is well established that an association's alleged bad behavior does not relieve its members of the duty to pay assessment fees. *Lynn v. Windridge Co-Owners Ass'n*, 743 N.E.2d 305, 313 (Ind. Ct. App. 2001) (holding that members were liable for assessment fees even after association suspended members' voting rights for non-payment of assessments); *Park Place Estates Homeowners*

Ass'n. v. Naber, 35 Cal. Rptr. 2d 51, 54 (Cal. Ct. App. 1994) (refusing to allow members to assert homeowners association's conduct as a defense or setoff to association's enforcement action). Yoon's analogy to the law governing corporate directors, and his assertions that SARMA's alleged misconduct should relieve him of the duty to pay fees, are misplaced.

¶ 58 Because we conclude as a matter of law that the use of assessment fees to pay attorney's fees is an authorized purpose under the plain language of the Bylaws, we do not reach the issue of the amount of fees that Yoon has paid to SARMA,[16] nor do we reach Yoon's claim that he is not obligated to pay fees that SARMA may, in the future, use to fund litigation against him. In sum, we deny Yoon's claim that he should receive a credit equal to the amount of his assessment fees that SARMA has used or will use to pay its attorney's fees.

F. Damages Arising from Forced Sale

¶ 59 We now turn to Yoon's claim that he was entitled to contractual and tort damages arising from the forced sale. As discussed above, the trial court concluded that the forced sale of the commercial area and the five units was invalid. However, it also concluded that Yoon should receive no monetary damages arising from the invalid forced sale. It stated that it "[saw] fit to adjust any of Yoon's conceivable expected damages to reflect his failure to take appropriate steps to resolve his dispute with the Association." *Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super. Ct. May 25, 2006) (Findings of Fact and Conclusions of Law: Order at 41). The trial court found that Yoon's sole remedy for the forced sale was "the return of his property and the guaranty of quiet enjoyment . . . ." *Id.* at 37.

¶ 60 Yoon argues on appeal that the above conclusion as to damages was error, and that he was entitled to "contractual and tort damages" pursuant to the trial court's finding that the forced sale was a breach of the Bylaws. Appellee's Br. at 7. He specifically argues that "CNMI law does not permit a court or jury to deny damages because of feelings that business persons should not request aid from the executive or legislative branches." *Id.* SARMA counters that, in deciding not to award damages, the trial court properly considered Yoon's conduct during the litigation.

¶ 61 The amount of a party's recoverable damages is a question of fact, and is reviewed under a clearly erroneous standard. *Manglona v. Commonwealth*, 2005 MP 15 ¶ 66 (citing *Davis v. United States*, 375 F.3d 590, 592 (7th Cir. 2004)). However, the measure of damages upon which that factual computation is based is a question of law. *Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 40 (2d Cir. 2009)) ("Although the amount of recoverable damages is a question of fact, the measure of damages upon

[16] The total amount of assessment fees Yoon has paid to SARMA is unclear from the record. Whether SARMA has used those assessment fees to pay any of its attorney's fees is also unclear.

which the factual computation is based is a question of law." (quoting *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991) (quotations omitted)). Here, Yoon is not appealing an amount of damages awarded. He instead appeals the trial court's method of measuring his damages. He specifically asserts that the trial court erred when it concluded that his conceivable damages should be adjusted to reflect his conduct. Thus, this is a question of law reviewed de novo.

¶ 62 With respect to contractual damages, the Restatement (Second) of Contracts provides that "[e]very breach of contract gives the injured party a right to damages against the party in breach, unless the contract is not enforceable against that party . . . ." Restatement (Second) of Contracts § 346 cmt. a. (1981). The party's right to damages is based on an expectation interest, as measured by:

> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
> (c) any cost or other loss that he has avoided by not having to perform.

Tano Group, Inc. v. Dep't of Pub. Works, 2009 MP 18 ¶ 30 (quoting Restatement (Second) of Contracts § 347(a)-(c) (1981)).

¶ 63 Applying the above authority, we find that the trial court's conclusion as to the measure of Yoon's damages was error. As discussed *supra*, the Bylaws are interpreted as a contract between SARMA and Yoon. Moreover, the May 2006 order expressly found that SARMA breached the Bylaws when it conducted the invalid forced sale. *Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super. Ct. May 25, 2006) (Findings of Fact and Conclusions of Law: Order at 40). Because the Bylaws are interpreted as a contract and SARMA was in breach of the Bylaws, Yoon is an "injured party" who has a "right to damages" under the Restatement (Second) of Contracts § 346 (1981). The trial court does not recognize Yoon's right to contractual damages. Indeed, it does not mention contractual damages at all. It instead "adjust[s]" Yoon's "conceivable expected damages," without stating what those damages might be or whether those damages are based in contract, tort, or otherwise. *Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super. Ct. May 25, 2006) (Findings of Fact and Conclusions of Law: Order at 41).

¶ 64 We take note of the trial court's reasoning as to servitudes. It stated that it had "wide latitude" to enforce a servitude in a common interest community and that, as a result, it had discretion to not award damages. *Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super. Ct. Nov. 21, 2006) (Final Judgment and Order at 3). While it is true that a court has wide latitude when enforcing a servitude, Restatement (Third) of Property: Servitudes § 8.3 (2000), the Bylaws are not a servitude. They are a contract between SARMA and Yoon. Thus, we must apply contract principles and not the law of servitudes to the conclusion that SARMA breached the Bylaws when it conducted the forced sale.

¶ 65 We also note that several different contractual doctrines allow a court to limit the contractual damages it awards to an injured party. For example, under the doctrine of unforseeability, "[d]amages are not recoverable for loss that the party in breach did not have reason to foresee . . . ." *Tano Group, Inc.* 2009 MP 18 ¶ 31 (quoting Restatement (Second) of Contracts § 351 (1981)). In addition, "[a] court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation." *Id.* ¶ 39 (quoting Restatement (Second) of Contracts § 351(3) (1981)). Here, it is not clear to the Court whether the trial court intended its adjustment of Yoon's damages to fall under a limiting doctrine. As mentioned above, it is not clear whether the court was discussing contractual damages. Therefore, we vacate the trial court's conclusion that Yoon is not entitled to damages based upon the forced sale, and remand for a consideration of contractual damages consistent with this opinion.

G. Attorney's Fees and Costs

¶ 66 We now consider Yoon's argument that he is entitled to attorney's fees and costs under the SARMA Bylaws. In its February 2007 order on fees, the trial court found Yoon to be the "prevailing party." *Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super. Ct. Feb. 28, 2007) (Order: Re: Attorneys Fees and Costs; Order: Re: Receivers Fees at 3). However, it refused to award any attorney fees or costs to Yoon. It reasoned that the parties' misconduct precluded an award of attorney's fees to either party:

> Given the litany of abuses, which gratuitously initiated and prolonged litigation, the Court will exercise its discretion by refusing to shift the burden of fees and costs associated with litigation from one party to another. Alternatively, this Court will order that both parties are entitled to matching awards of fees and costs to be offset against one another.

Saipan Achugao Resort Members' Ass'n v. Yoon, No. 03-0187E (NMI Super. Ct. Feb. 28, 2007) (Order: Re: Attorneys Fees and Costs; Order: Re: Receivers Fees at 7).

¶ 67 Yoon argues that the word "shall" in the SARMA Bylaws is unambiguous and that the trial court lacked discretion to deny attorney's fees and costs. SARMA counters that the word "may" in the SARMA Bylaws gave the trial court discretion not to award fees. Before we consider whether the language of the Bylaws obligated the court to award attorney's fees, we consider whether a court has discretion to deny attorney's fees on equitable grounds, regardless of the contractual language. A court's decision to award attorney's fees is reviewed for abuse of discretion. *Estate of Ogumoro v. Ko*, 2011 MP 11 ¶ 69 (Slip Opinion, October 20, 2011) (citing *Century Ins. Co. v. Guerrero Bros.*, 2010 MP 13 ¶ 17 (Slip Opinion, Sept. 9, 2010).

¶ 68 Under an exception to the American Rule,[17] a prevailing party may be awarded attorney's fees when the fees are "agreed to by contract." *Reyes v. Reyes*, 2004 MP 1 ¶ 79. However, this exception is limited by equity. Even if such fees are mandated by a contractual provision, a court has discretion to decline to award attorney's fees to a prevailing party if the court believes that an award of attorney's fees would be "inequitable and unreasonable." *Cable Marine, Inc. v. M/V Trust Me II*, 632 F.2d 1344, 1345 (5th Cir. 1980) (affirming trial court's refusal to award attorney's fees, despite fact that fees were provided for in contract, when "[the trial] court apparently believed that plaintiff had acted unreasonably in not accepting either of the earlier settlement offers made by defendant and in forcing the cause to trial."); *United States v. Mountain States Const. Co.*, 588 F.2d 259, 263 (9th Cir. 1978) (affirming trial court's refusal to award attorney's fees as provided for in subcontract between parties, when "[plaintiff] asked the court to enforce part of the very contract for whose termination [plaintiff] was partly at fault." (citing 11 Samuel Williston & Walter H. E. Jaeger, A Treatise on the Law Contracts § 1418 (3d ed. 1968)).

¶ 69 In this case, the trial court found that "the actions of the parties prior to and during the litigation have unnecessarily prolonged litigation at the cost of all involved." *Saipan Achugao Resort Members' Ass'n v. Yoon*, No. 03-0187E (NMI Super. Ct. Feb. 28, 2007) (Order: Re: Attorneys Fees and Costs; Order: Re: Receivers Fees at 6). It referred to numerous "examples of the disreputable behavior engaged in by the parties, particularly Yoon." *Id.* In particular, it took issue with Yoon's "demonstrated attempts to interfere with the already fragile state of operation of the Plumeria Resort . . . ." *Id.* The trial court found that these attempts included, but were not limited to: (1) several "concerned citizen" letters delivered to the Commonwealth Department of Public Works; (2) discussions with a Commonwealth Senator about writing a letter that would "cause trouble" for the Plumeria Resort; and (3) various "well-documented" efforts to involve various Commonwealth government officials in Yoon's attempt to shut down the Plumeria Resort. *Id.* Based upon this "litany of abuses," the trial court concluded that it had discretion to deny attorney's fees to Yoon. *Id.*

¶ 70 Yoon challenges the trial court's findings of fact. He asserts that there is no "factual basis in the record" to show that his activities "gratuitously limited and prolonged litigation." Appellee's Br. at 22. The standard for overturning findings of fact is whether we have firm conviction that the trial court's findings were clearly erroneous. *Deleon Guerrero v. Dep't of Pub. Lands*, 2011 MP 3 ¶ 21 (Slip Opinion, March 31, 2011) (citing *Rogolofoi v. Guerrero*, 2 NMI 468, 476 (1992)). Here, the trial court gave several

[17] The American Rule states that parties bear their own costs of litigation. *Reyes v. Reyes*, 2004 MP 1 ¶ 79 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975)).

factual reasons for its denial of Yoon's request for attorney's fees and costs. Yoon provides no evidence tending to show that these findings were erroneous.

¶ 71 Yoon also argues that the trial court had no authority to base its decision denying attorney's fees upon "actions that took place prior to the commencement of litigation or outside the judicial arena." Appellee's Br. at 22. He provides no legal support for this proposition. As stated above, equity allows a court to award fees based upon conduct that affects the litigation, even if that conduct did not take place in open court. *See Cable Marine, Inc.*, 632 F.2d at 1345 (refusing to award attorney's fees based upon party's conduct in settlement negotiations before trial). Yoon's argument is unpersuasive.

¶ 72 Finally, Yoon equates the trial court's refusal to award fees with a sanction, and argues that such a sanction must be reasonable. In support of his argument, Yoon cites to *Pac. Amusement, Inc. v. Villanueva*, 2006 MP 8 ¶ 20. Yoon's argument is specious. *Villanueva* concerned NMI Rule of Civil Procedure 38 sanctions for a frivolous appeal. *Id. Villanueva* did not comment on the trial court's equitable power to grant or deny attorney's fees provided by contract.

¶ 73 We are compelled to give due deference to the trial court. We hold that the trial court did not abuse its discretion when it declined to award attorney's fees and costs to Yoon. Although Yoon may have felt compelled to contact government officials and agencies as he did, the trial court concluded that Yoon acted unreasonably and that his actions unnecessarily delayed the litigation. Accordingly, we affirm the refusal to award Yoon attorney's fees and costs. Because we hold that the trial court had equitable discretion to deny attorney's fees, we do not consider the parties' arguments as to the significance of "may" and "shall" in the SARMA Bylaws.

H. First Amendment Petition Clause

¶ 74 Finally, we address Yoon's claim that the trial court violated his First Amendment rights under the Petition Clause. As mentioned above, Yoon contacted various Commonwealth agencies and officials in an attempt to shut down the Plumeria Resort. In a footnote to a document filed with the trial court, Yoon argued that these contacts were protected under the First Amendment. The trial court did not rule on the argument. On appeal, Yoon relies on the footnote to assert that that trial court violated the First Amendment when it based its decision to deny him damages, deny him attorney's fees, and impose assessment fees upon his contacts with government agencies and officials, because his contacts fell under his First Amendment "constitutional protected right to petition the government." Appellee's Br. at 11-14. SARMA counters that the First Amendment issue is raised for the first time on appeal and that the Court should refuse to consider it. Appellant's Br. at 9-10.

¶ 75 We first consider whether an argument raised in a footnote to a trial brief is one properly raised in the trial court. An issue is raised and preserved for appeal when it was argued or briefed before the trial court. *Emmert Indus. Corp. v. Artisan Assocs*., 497 F.3d 982, 985 (9th Cir. 2007) (noting that issue was

raised for the first time on appeal when it was "never argued or briefed" in the district court); *c.f. Pac. Bell Tel. Co. v. Cal. Pub. Util. Comm'n*, 621 F.3d 836, 848 n.17 (9th Cir. 2009) (noting that issue not raised for first time on appeal when it was fully briefed in the district court). An issue that is only mentioned in a footnote is not argued or briefed before the trial court, and therefore has not been adequately raised and preserved for appellate review. *See United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (internal quotations omitted) ("It is well-established . . . we do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review."); *Diesel v. Town of Lewisboro*, 232 F.3d 92, 110 (2d Cir. 2000) (finding issue of whether party's conspiracy claim was a 28 U.S.C. § 1983 claim not adequately raised, when only mention of issue was in a "footnote in his primary brief").

¶ 76 *Svoboda* and *Diesel* address footnotes to the parties' appellate court briefing, rather than footnotes to trial court briefing. However, we find that the prohibition upon considering issues raised only in footnotes extends to footnotes in trial court briefing. "'It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal' for '[o]verburdened trial judges cannot be expected to be mind readers.'" *Horne v. Flores*, 129 S. Ct. 2579, 2617 (2009) (Breyer, J. dissenting) (quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991)) (alteration in original). As Justice Breyer noted, it would be "difficult to operate an adversary system of justice" in the absence of such a rule. *Id.* We will not force our trial courts to scrutinize a party's multitude of footnotes in search of arguments that the party should have raised in the body of its briefing. Requiring such an exercise forces the trial court to become a "mind reader" and to guess at whether the parties intended their footnotes to raise arguments for the court's consideration.

¶ 77 Yoon asserts that he raised the First Amendment issue in a footnote to a document titled "Response to Court's Order Requiring Final Report from Receiver Muna and Memorandum on Hearing Prior to Judgment." Appellee's Reply Br. at 2. Yoon did not mention the First Amendment issue in the body of that document. Neither does Yoon allege that he raised the First Amendment issue during trial or in any other briefing filed with the trial court. The record is devoid of any reference to the First Amendment issue aside from the footnote cited to by Yoon. Thus, in accordance with the rule stated above, we hold that Yoon did not properly raise the First Amendment issue below.

¶ 78 We now consider whether we may review the First Amendment issue, though it is raised for the first time on appeal. An appellate court has discretion to review an issue raised for the first time on appeal where: "(1) a new theory or issue has arisen due to a change in the law while the appeal was pending; (2) the issue is only one of law not relying on any factual record; or (3) plain error occurred and an injustice might otherwise result if the appellate court does not consider the case." *Mendiola v. Commonwealth*

Utils. Corp., 2005 MP 2 ¶ 24. These exceptions are discretionary and "narrow." *Bolalin v. Guam Publ'n, Inc.*, 4 NMI 176, 181 (1994).

¶ 79 There has been no change in the law while this appeal was pending that would present a new theory or issue related to the First Amendment claim. Neither is the First Amendment issue only one of law. On the contrary, Yoon's First Amendment Petition Clause claim is highly fact-specific.[18] Finally, plain error has not occurred. There is a reasonable dispute as to whether the trial court's concern with Yoon's extra-judicial government contacts violated the Petition Clause. Accordingly, we decline to review Yoon's First Amendment claim.

IV

¶ 80 In light of the foregoing, the judgment of the trial court as to Yoon's damages is VACATED, and this case is REMANDED for a consideration of contractual damages consistent with this opinion. In all other respects the judgment of the trial court is AFFIRMED.

SO ORDERED this 31st day of October, 2011.

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ALEXANDRO C. CASTRO
Acting Chief Justice

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JOHN A. MANGLONA
Associate Justice

[18] For example, Yoon's claim would require the Court to examine the factual record in order to determine whether Yoon's activity implicated his associational or speech interests. *See WMX Techs., Inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999) ("The protections afforded by the Petition Clause have been limited by the Supreme Court to situations where an individual's associational or speech interests are also implicated . . . ." considering applicable facts and holding that First Amendment claim failed, when application for major use permit implicated neither associational nor speech interests).