

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT H. ROSINSKI,  
Appellant,  
vs.  
U.S. BANK NATIONAL ASSOCIATION,  
AS TRUSTEE, ON BEHALF OF THE  
HOLDERS OF THE ADJUSTABLE  
RATE MORTGAGE TRUST 2007-3  
ADJUSTABLE RATE MORTGAGE  
BACKED PASS THROUGH  
CERTIFICATES, SERIES 2007-3,  
Respondent.

No. 66621

**FILED**

JUN 23 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *J. Hendricks*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order granting summary judgment in a judicial foreclosure action.<sup>1</sup> Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge.

On appeal, appellant first argues that the district court erred by granting summary judgment permitting respondent to foreclose on the

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<sup>1</sup>When our initial review of this appeal revealed a potential jurisdictional defect, we directed appellant to show cause why this appeal should not be dismissed for lack of jurisdiction. Having considered appellant's response and the relevant authorities, we conclude that jurisdiction is properly vested in this court because the order entering judgment against the property and ordering its sale was a final judgment for the purpose of appellate jurisdiction. *Cf. Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 91, 247 P.3d 1107, 1110 (2011) (concluding in the mechanic's lien context that a final judgment as to a foreclosure claim enters judgment on the lienable amount and "determine[s] whether the property's sale is to proceed," and that "[a]ny litigation concerning the actual sale, the distribution of the proceeds, and any deficiency judgment then occurs in post-judgment enforcement proceedings"); *see also* NRS 40.455 (providing that an application for a deficiency judgment must be filed within six months after a foreclosure sale).

property because genuine issues of material fact remained as to whether respondent had standing to foreclose. In particular, appellant contends that Mortgage Electronic Registration System, Inc. (MERS), which was the beneficiary of the deed of trust, was never the payee on the underlying promissory note. Appellant further asserts that respondent failed to produce any assignments of the note to demonstrate that the note was properly transferred to respondent. Respondent argues that summary judgment was proper because there were no genuine issues of material fact with regard to respondent's standing to enforce the note and deed of trust.

When the note and deed of trust were initially executed, they were split, with MERS being the beneficiary of the deed of trust and the original lender being the payee on the note. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 520-21, 286 P.3d 249, 259-60 (2012) (explaining that a note and deed of trust may be split at their inception without preventing enforcement of the deed of trust through foreclosure as long as the documents are ultimately held by the same party). Because the note and deed of trust were permissibly held separately and distinctly from each other until they were reunified by respondent, *see id.*, it is of no consequence that MERS was never the payee or an assignee of the note.

Moreover, respondent provided evidence that it had possession of the original note, which was endorsed by the original lender in blank. This evidence established that respondent had the right to enforce the note without any need to produce any assignments demonstrating a chain of transfers between the original lender and respondent. *See id.* at 523, 286 P.3d at 261 (providing that in order to enforce a note signed in blank, the entity seeking to enforce "would merely have to possess the note"). As a result, we conclude that appellant's arguments that respondent failed to demonstrate it had standing to enforce the note lack merit.

Next, appellant argues that there were potential issues with regard to the chain of ownership of the deed of trust because “borrowers may pursue questions regarding the chain of ownership.” Appellant also contends that genuine issues of material fact existed with regard to whether MERS had authority to assign the deed of trust because there are other cases involving MERS where an assignment was forged or where MERS did not have authority to execute the assignment. Thus, he argues the district court abused its discretion by denying his request for additional time to conduct discovery and erred by granting summary judgment even though potential issues of fact remained. Respondent asserts that the district court properly denied the request for a continuance and granted summary judgment because appellant failed to identify any factual issue on which further discovery was needed.


Here, the declaration of counsel presented in support of appellant’s request for a continuance asserted that appellant expected to discover evidence on several subjects relating to the loan documents, but these assertions did not establish that a continuance to conduct discovery was warranted. In particular, appellant did not identify any facts relating to his specific loan documents to explain why he believed that discovery would create a genuine issue of fact with regard to any of the issues he identified. Under these circumstances, we discern no abuse of discretion in the district court’s denial of appellant’s request for time to conduct discovery. *See Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2011) (“The decision to grant or deny a continuance of a motion for summary judgment to allow further discovery is reviewed for an abuse of discretion.”). And because appellant did not identify any genuine issue of material fact with regard to respondent’s right to enforce the note and deed of trust, we conclude the district court correctly granted summary judgment in favor of respondent with regard to the request to


foreclose on the property. See *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Finally, as to appellant's claims regarding a deficiency judgment, the district court did not enter a deficiency judgment, but instead, adjudicated the amount of debt due to respondent from the sale of the property. Indeed, the court cannot enter a deficiency judgment until after the property is sold. See NRS 40.455 (providing that an application for a deficiency judgment must be filed within six months *after* a foreclosure sale). Thus, these arguments are premature and do not provide a basis for reversal.<sup>2</sup>

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

SILVER, J., concurring in part and dissenting in part:

I agree with the majority that the district court properly granted partial summary judgment allowing foreclosure of the property in favor of the beneficiary of the deed of trust. But, the district court's

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<sup>2</sup>In his reply brief, appellant argues that any judgment against the property itself was improper because the property was not named as a party in the underlying proceeding. Appellant, however, waived this argument by failing to raise it in his opening brief on appeal. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011).

granting summary judgment, including entering judgment with numerical calculations based upon breach of the promissory note, was improper.

NRS 40.430(1) states “there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate.” A judicial foreclosure proceeding occurs where security is first sold and then, if any deficiency results, the court renders a judgment for the deficient sum. *Paramount Ins., Inc. v. Rayson and Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970). The one-action rule set forth in NRS 40.430(1) was adopted to change the common law rule permitting a creditor to pursue the remedy of sale of land or suit on note, or both at once. *Id.* at 648-49, 472 P.2d at 533. Our supreme court has explained “the purpose behind the one-action rule in Nevada is to prevent harassment of debtors by creditors attempting double recovery by seeking a full money judgment against the debtor and by seeking to recover the real property securing the debt.” *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 816, 123 P.3d 748, 751 (2005). “Consequently, to recover a debt secured by real property in Nevada, a creditor must seek to recover on the property through judicial foreclosure before recovering from the debtor personally.” *Id.* at 816, 123 P.3d at 750.

Here, a review of U.S. Bank’s complaint reflects two causes of action: one for foreclosure, and one for a deficiency judgment. The district court order granting summary judgment in this case effectively granted relief due to U.S. Bank for both foreclosure and for breach of the promissory note in terms of a money judgment, including calculations involving attorney fees and costs involved in the pending litigation. This violates Nevada’s one-action rule.

I also agree with Rosinski that the district court’s granting of summary judgment in this case, including awarding a judgment containing numerical calculation with attorney fees and costs, was

premature. Our case law has long held that in judicial foreclosures “the sale of the security is first accomplished, and if any deficiency results in satisfying the debt owed, judgment for the deficient sum is rendered.” *Paramount Ins., Inc.*, 86 Nev. at 648, 472 P.2d at 533. Before the court may award a deficiency judgment, NRS 40.457 requires the court to hold a hearing to consider evidence of the fair market value of the property “as of the date of [the] foreclosure sale.” NRS 40.457(1). A subsequent deficiency judgment exists only to the extent the debt exceeds the fair market value of the property at the time of the foreclosure sale. *First Interstate Bank of Nevada v. Shields*, 102 Nev. 616, 618-19, 730 P.2d 429, 431 (1986). This prevents creditors from “reap[ing] a windfall at an obligor’s expense.” *Id.* at 618, 730 P.2d at 431. Thus, the “right to [a] deficiency judgment does not vest until [after] the secured property is sold.” *Lavi v. Eighth Judicial Dist. Court*, 130 Nev. \_\_\_, \_\_\_, 325 P.3d 1265, 1269 (2014). In fact, a deficiency may not exist if the fair market value at the time of sale exceeds the amount due, in which case “no party, guarantor included, may be held liable to the creditor.” *First Interstate Bank of Nevada*, 102 Nev. at 619, 730 P.2d at 431.

Here, in today’s real estate market, the sale of this Las Vegas, high-end residence in Red Rock Country Club may very well have yielded a return sufficient to cover all indebtedness, including all costs incurred by U.S. Bank. Therefore, the district court’s monetary award based on breach of the promissory note not only violated the one-action rule, it was also premature, as the bank cannot know if a deficiency even exists until after the foreclosure sale occurs. *See Keever v. Nicholas Beers Co.*, 96 Nev. 509, 513, 611 P.2d 1079, 1082 (1980) (“The right to have a secured creditor proceed against the security before attacking the general assets of the debtor is one of the ‘right(s) secured by . . . the laws of this state’”) (quoting *Paramount*, 86 Nev. at 651, 472 P.2d at 535 (Thompson, J., concurring)).

Instead, the district court should have granted partial summary judgment allowing the foreclosure of the property. Thereafter, if a deficiency still existed, the district court could have conducted a deficiency hearing to determine the amount actually owed to U.S. Bank. This would have also allowed Rosinski due process, as Rosinski would have been afforded the opportunity to present to the district court appraisals and any other evidence in mitigation of a deficiency judgment. The district court then, after hearing all of the evidence produced by both sides, could have determined whether a deficiency actually existed and could enter judgment accordingly. Thus, I would affirm in part, reverse in part, and remand for further proceedings.

  
\_\_\_\_\_, J.  
Silver

cc: Chief Judge, Eighth Judicial District Court  
Hon. J. Charles Thompson, Senior Judge  
Lansford W. Levitt, Settlement Judge  
Johnson & Gubler, P.C.  
McCarthy & Holthus, LLP/Las Vegas  
Eighth District Court Clerk