IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOMES LOANS SERVICING, LP,
Appellant,
vs.
SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 70501

ORDER OF REVERSAL AND REMAND

Appellant Bank of America, N.A., appeals from a district court summary judgment in a real property action.[1] Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

[1]Upon initial review of this appeal, the court directed appellant to show cause why the appeal should not be dismissed as a timely-filed reconsideration motion remained pending in the district court. *See* NRAP 4(a)(4), (6) (listing motions that toll the time to file an appeal and providing that a premature notice of appeal does not divest the district court of jurisdiction); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195 (2010) (explaining that a timely filed motion for reconsideration that states with particularity the grounds for relief sought and seeks a "substantive alteration of the judgment" will be treated as a tolling motion (internal quotation marks omitted)). Bank of America responded to the order to show cause by filing a copy of a written, file-stamped district court order denying reconsideration, and because the entry of that order has vested jurisdiction in this court, this appeal may now proceed. *See* NRAP 4(a)(6) (providing that if a written-file stamped order resolving a tolling motion is filed before a premature appeal is dismissed, "the notice of appeal shall be considered filed on the date of and after entry of the order . . . of the last-remaining timely motion").

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Bank of America, N.A., held a first deed of trust on the subject property, which respondent SFR Investments Pool 1, LLC, purchased at a homeowners' association (HOA) foreclosure sale conducted pursuant to NRS Chapter 116 after the homeowner failed to pay HOA assessments. *See* NRS 116.3116[2]-.31168; *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. ___, ___, 388 P.3d 970, 971 (2017) (recognizing that the statutory scheme grants HOAs superpriority liens for unpaid assessments and allows HOAs to nonjudicially foreclosure on those liens). After SFR purchased the property, litigation ensued with Bank of America and SFR both claiming title to the property. The district court ultimately granted summary judgment in SFR's favor, finding that the sale was conducted properly and that the HOA's foreclosure on its superpriority lien extinguished Bank of America's deed of trust on the property. This appeal followed.

Bank of America first argues that the statutory scheme allowing HOA foreclosures to extinguish first deeds of trust is facially unconstitutional because it allows parties like Bank of America to be deprived of their property without due process. However, the Nevada Supreme Court's recent opinion in *Saticoy Bay* specifically addressed this argument and held that the statutory scheme does not implicate due process because no state actor is involved in the HOA's foreclosure of its superpriority lien. *See* 133 Nev. at ___, 388 P.3d at 972-73 (recognizing that for due process to apply a state actor must be involved and concluding that the nonjudicial foreclosure process in NRS Chapter 116 does not

[2]Any discussion of NRS 116.3116 in this order refers to the version prior to the amendments adopted in 2015. 2015 Nev. Stat., ch. 266, § 1, at 1333-36.

include any state actor, thus the statutory scheme does not violate due process). Accordingly, this argument does not provide a basis to overturn the grant of summary judgment in SFR's favor.

Next, Bank of America argues that it provided appropriate tender of the superpriority lien amount to protect its first deed of trust and that the HOA improperly rejected that tender. SFR responds that the tender was not proper because it was conditional in nature. The district court agreed with SFR and concluded that the tender was conditional in nature, requiring the HOA to waive its possible right to additional amounts when the applicable law regarding what could be included in a superpriority lien was unsettled, and therefore was not sufficient to protect Bank of America's interest in the property.

Having reviewed the tender given by Bank of America, we conclude that, to the extent it was conditional, Bank of America had a right to insist on the given condition. *See, e.g., Dull v. Dull*, 674 P.2d 911, 913 (Ariz. Ct. App. 1983) ("A tender is not conditional . . . if the condition is one which the person making the tender has a legal right to insist upon."); *McGehee v. Mata*, 330 So. 2d 248, 249 (Fla. Dist. Ct. App. 1976) (same); *Fresk v. Kraemer*, 99 P.3d 282, 286-87 (Or. 2004) (same).[3] Bank of America's tender indicated that it represented nine months' worth of HOA assessments and that the HOA's acceptance of the tender would act as a complete resolution of the HOA's superpriority lien. And the supreme court has confirmed that the pre-2015 version of NRS 116.3116 limited the

[3]When Nevada has no law on point, we may look to other jurisdictions for guidance. *See Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 642, 289 P.3d 201, 205 (2012) (looking to other jurisdictions for guidance when Nevada has no law on the issue at hand).

HOA's superpriority lien amount to the amount which Bank of America offered: "an amount equal to the common expense assessments due during the nine months before foreclosure." *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. ___, ___ n.2, 373 P.3d 66, 67 n.2, 72 (2016).[4] Thus, Bank of America had a right to insist that acceptance of the nine months' worth of HOA assessments would result in the satisfaction of the HOA's superpriority lien as that condition comported with the law. *See Dull*, 674 P.2d at 913; *McGehee*, 330 So. 2d at 249; *Fresk*, 99 P.3d at 286-87. Accordingly, the district court's finding that Bank of America's tender was insufficient solely because it was conditional is incorrect.

Despite our conclusion that the conditional nature of Bank of America's tender did not render it insufficient, that does not end our inquiry. Rather, to conclude that Bank of America's tender was sufficient, we must also be able to determine that the *amount* of the tender was sufficient to fully satisfy the superpriority lien. *See generally* 15 Richard A. Lord, *Williston on Contracts* § 47:1 (4th ed. 2017) (providing that valid tender in a contract scenario requires an offer to pay the amount due). Because the district court stopped its inquiry once it found that the tender

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[4]We recognize that the district court did not have the benefit of the *Horizons* decision at the time it granted summary judgment. We may still use the supreme court's later interpretation of the statute, however, to determine whether the district court's legal conclusions were correct. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994) (providing that a court's interpretation of a statute "is explaining its understanding of what the statute has meant continuously since the date when it became law"); *Davidson v. Davidson*, 132 Nev. ___, ___, 382 P.3d 880, 883 (2016) ("This court's goal in construing statutes is to uphold the intent of the Legislature . . . .").

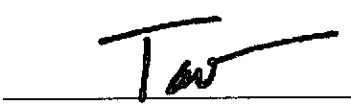
was conditional, it did not reach the issue of whether the amount of the tender was sufficient to satisfy the superpriority portion of the lien.

Without a finding regarding the sufficiency of the amount of the tender, a genuine issue of material fact remains as to whether Bank of America's tender was proper and the HOA's rejection of the offered tender was improper, such that the offer of tender satisfied the superpriority lien. *See, e.g., Hohn v. Morrison*, 870 P.2d 513, 516-17 (Colo. App. 1993) (providing that a proper tender that is rejected without justification may invalidate a lien on real property); *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, ___, 334 P.3d 408, 414 (2014) (providing that a holder of the first deed of trust can pay off the superpriority lien to avert its loss of security under the HOA foreclosure statutes); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (providing the standard for summary judgment). We therefore must reverse and remand that issue to the district court for it to decide in the first instance. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). And based on the district court's determination as to tender, the court may need to reweigh the remaining equitable considerations. *See Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105, 1114 (2016) (recognizing that one of the relevant considerations in deciding an equitable challenge to an HOA foreclosure sale is the purported tender of the superpriority lien and providing that "courts must consider *the entirety of the circumstances* that bear upon the equities" (emphasis added)); *see also La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 880 (9th Cir. 2014) (cited with approval in *Shadow Wood* for the

proposition that remand to the district court for reconsideration of its decision regarding an equitable remedy was appropriate when the district court failed to consider a fact relevant to the weighing of equities). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Akerman LLP/Las Vegas
Kim Gilbert Ebron
Eighth District Court Clerk

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[5]As to Bank of America's argument that the deed recitals cannot conclusively establish compliance with the foreclosure statutes, we decline to consider that argument as the district court did not rely solely on the recitals being conclusive in its order granting summary judgment. And to the extent this order does not address all of the issues raised by Bank of America, we decline to address those issues at this time because the district court's decision may change on remand such that Bank of America is no longer aggrieved by it.