

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 HOME LOANS
SERVICING, LP; AND RECONTRUST
COMPANY, N.A.,
Appellants,
vs.
PAUL U. PAWLIK; AND SOUTHERN
CAPITAL PRESERVATION, LLC, AS
TENANTS IN COMMON,
Respondents.

No. 76578-COA

FILED

NOV 13 2019

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

ORDER OF REVERSAL AND REMAND

Bank of America, N.A., and Recontrust Company, N.A. (collectively referred to as BOA), appeal from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

The original owners of the subject property failed to make periodic payments to their homeowners' association (HOA). The HOA recorded a notice of delinquent assessment lien and later a notice of default and election to sell to collect on the past due assessments and other fees pursuant to NRS Chapter 116. BOA tendered payment to the HOA foreclosure agent for an amount that was purportedly equal to nine months of past due assessments, but the agent rejected the payment and proceeded with its foreclosure sale.

Respondents Paul U. Pawlik and Southern Capital Preservation, LLC (collectively referred to as Pawlik), later acquired the property from the person who purchased it at the HOA foreclosure sale and, in place of that person, substituted into the underlying proceeding in which the parties asserted, among other things, competing claims to quiet title to the property. The parties subsequently filed cross-motions for summary judgment, and the district court ruled in favor of Pawlik, concluding that the foreclosure sale extinguished BOA's deed of trust. This appeal followed.

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

On appeal, BOA asserts that its tender was for an amount equal to nine months of past due assessments, which was the amount needed to satisfy the superpriority portion of the HOA's lien. *See Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. 362, 371, 373 P.3d 66, 72 (2016) (holding that the superpriority portion of an HOA's lien consists of nine months of past due assessments). BOA further contends that the district court erroneously determined that its tender was conditional and not kept good, that the HOA was justified in rejecting the tender because it had a good faith belief that the superpriority amount

included collection fees and costs, and that Pawlik was protected as a bona fide purchaser. As he did below, Pawlik does not dispute that BOA's tender was for an amount equal to nine months of past due assessments. Consequently, any challenge to that assertion has been waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."). Instead, Pawlik focuses on BOA's remaining arguments, which we address below.

To begin, the conditional language in the tender letter at issue here included "conditions on which [BOA] ha[d] a right to insist," as the supreme court recently concluded in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 607, 427 P.3d 113, 118 (2018). Indeed, that opinion involved a letter that included nearly identical conditional language. As a result, the district court erred in determining that the tender was ineffective based on this conditional language. And once a valid tender was made, BOA was not required to take any further action for the tender to eliminate the superpriority portion of the HOA's lien. *Cf. id.* at 609-11, 427 P.3d at 119-21 (declining to require the deed of trust holder to take actions beyond those specifically required by NRS Chapter 116 to maintain its interest). Thus, the district court likewise erred insofar as it concluded that BOA had failed to keep the tender good.

Turning to the district court's determination that the HOA was justified in rejecting the tender because it had a good-faith belief that the superpriority amount included collection fees and costs, we conclude that

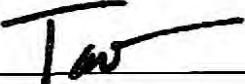
this was also erroneous. The HOA's subjective good-faith belief underlying its rejection of the tender has no bearing on the effectiveness of BOA's tender. Indeed, BOA's tender of the superpriority amount cured the underlying default by operation of law and thereby rendered the ensuing foreclosure sale void as to the superpriority portion of the lien, and the HOA's basis for rejecting the tender could not somehow validate the void sale. *See id.* at 612, 427 P.3d at 121 (explaining that "[a] foreclosure sale on a mortgage lien after valid tender satisfies that lien is void, as the lien is no longer in default"); *see also* Restatement (Third) of Property: Mortgages § 6.4(b) & cmt. c (Am. Law Inst. 1997) (stating that a party's reasons for rejecting a tender may be relevant insofar as that party may be liable for money damages but that the reason for rejection does not alter the tender's legal effect). And given that tender of the superpriority amount rendered any foreclosure on the superpriority portion of the HOA's lien void, Pawlik's status as a purported bona fide purchaser is likewise irrelevant and could not provide a basis for determining the tender was not effective. *See Bank of Am.*, 134 Nev. at 612, 427 P.3d at 121 (explaining that a party's bona fide purchaser status is irrelevant when a defect in the foreclosure renders the sale void).

In light of the foregoing, we conclude that the tender extinguished the HOA's superpriority lien such that Pawlik took the property subject to BOA's deed of trust. *See id.* at 605, 427 P.3d at 116. And because we therefore conclude that the district court erred in granting Pawlik's motion for summary judgment and denying BOA's motion for summary judgment, we reverse and remand this matter to the district court for entry of judgment in favor of BOA. *See SFR Invs. Pool 1, LLC v. U.S.*

Bank, N.A., 135 Nev., Adv. Op. 45, 449 P.3d 461, 466 (2019) (reversing an order granting one party summary judgment and directing entry of judgment on the opposing party's counter-motion for summary judgment); *SFR Invs. Pool 1, LLC v. First Horizon Home Loans*, 134 Nev. 19, 25, 409 P.3d 891, 895 (2018) (doing the same).

It is so ORDERED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Department 8, Eighth Judicial District Court
Akerman LLP/Las Vegas
Noggle Law PLLC
Eighth District Court Clerk

¹Given our disposition of this appeal, we need not address the parties' remaining arguments.