

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BANK OF NEW YORK MELLON, F/K/A
THE BANK OF NEW YORK MELLON
AS TRUSTEE FOR THE CERTIFICATE
HOLDERS OF THE CWABS, INC.,
ASSET BACKED CERTIFICATES,
SERIES 2005-3, A FOREIGN
CORPORATION; AND MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC., A FOREIGN
CORPORATION,
Appellants,
vs.
RH KIDS, LLC,
Respondent.

No. 76620-COA

FILED

DEC 27 2019

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

ORDER OF REVERSAL AND REMAND

Bank of New York Mellon (BNYM) appeals from a district court order granting a motion for summary judgment, certified as final under NRCP 54(b), 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. Prior to the sale, the predecessor to BNYM—the beneficiary of the first deed of trust on the property—tendered payment to the HOA foreclosure agent in an amount exceeding nine months of past due assessments, which the agent rejected. The HOA proceeded with its foreclosure sale, and RH Kids, LLC (RH), later acquired the property from the purchaser at the sale. RH then filed the underlying action

against BNYM seeking to quiet title, and BNYM counterclaimed seeking the same. The parties ultimately filed competing motions for summary judgment, and the district court ruled in RH's favor, concluding that BNYM failed to produce admissible evidence that the tender was delivered, and even if it had, the tender was impermissibly conditional. This appeal followed.

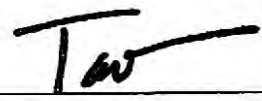
This court reviews a district court's order granting summary judgment de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the 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, BNYM argues that the district court erred in granting summary judgment because there was sufficient evidence of delivery, including deposition testimony from a representative of the HOA foreclosure agent admitting that the tender at issue here was delivered and rejected. It also argues that the tender in this case was in all relevant respects identical to the one discussed in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018), and that it was therefore sufficient to preserve the deed of trust. RH's only argument in response is that the district court was correct on the delivery issue and that the HOA foreclosure agent's representative did not testify about receipt of the specific tender in this case and instead stated only the agent's general policy concerning rejection of tenders.

Having reviewed the record—in particular, the testimony of the HOA foreclosure agent’s representative—we agree with BNYM that the district court erred; BNYM produced un rebutted evidence of delivery. See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (“If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence.”). Moreover, because the tender at issue here was identical to the one discussed in *Bank of America* in all relevant respects, the district court should have concluded that the tender preserved the deed of trust and that RH took the property subject to it. See 134 Nev. at 605, 427 P.3d at 116. Accordingly, we reverse the grant of summary judgment to RH and remand this matter for entry of judgment in favor of BNYM. See *SFR Invs. Pool I, 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.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Department 8, Eighth Judicial District Court
Akerman LLP/Las Vegas
Hong & Hong
Eighth District Court Clerk