

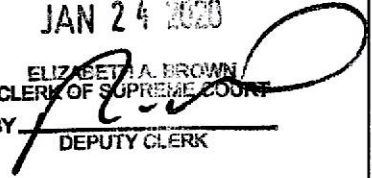
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE BANK OF NEW YORK MELLON,
F/K/A THE BANK OF NEW YORK, AS
TRUSTEE FOR THE CERTIFICATE
HOLDERS CWALT, INC.
ALTERNATIVE LOAN TRUST 2006-
OA14 MORTGAGE PASS-THROUGH
CERTIFICATE SERIES 2006-OA14,
Appellant,
vs.
MEO ENTERPRISES, LLC,
Respondent.

No. 75860-COA

FILED

JAN 24 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

The Bank of New York Mellon (BNYM) appeals from a district court order granting a motion for attorney fees and costs in a quiet title action. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

After prevailing on summary judgment in the underlying quiet title action following an NRS Chapter 116 foreclosure sale, respondent MEO Enterprises, LLC (MEO), moved for attorney fees and costs under NRCP 68.¹ MEO had served an offer of judgment on appellant BNYM—which it rejected—offering to pay it \$5000 in exchange for disclaiming its deed of

¹The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). We cite the prior versions of the applicable rules, as they were in effect at all relevant times herein.

trust and any other interest it may have in the subject property, as well as agreeing to allow the district court to quiet title in MEO's favor.² The district court granted MEO's motion, concluding that all of the *Beattie*³ factors weighed in favor of MEO and awarding it over \$16,000 in attorney fees and costs. The district court primarily focused upon the extent to which MEO's offer was reasonable in light of over \$117,000 in excess proceeds from the sale that remained available for BNYM to claim, as well as the extent to which BNYM's rejection of the offer was unreasonable and in bad faith because its defenses lacked a factual basis. This appeal followed.

If a party "rejects an offer [of judgment] and fails to obtain a more favorable judgment," it is responsible for "the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer." NRCP 68(f)(2). When determining whether to award attorney fees under NRCP 68, the district court must consider all of the *Beattie* factors, which are:

- (1) whether the [defendant's defense] was brought in good faith;
- (2) whether the [plaintiff's] offer of judgment was reasonable and in good faith in both its timing and amount;
- (3) whether the [defendant]'s decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith;
- and (4) whether the fees sought by the offeror are reasonable and justified in amount.

²We take no position as to the validity of the offer itself, which BNYM does not challenge on appeal. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

³*Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

O'Connell v. Wynn Las Vegas, LLC, 134 Nev. 550, 554, 429 P.3d 664, 668 (Ct. App. 2018) (quoting *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)); see also *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). We will reverse a district court's decision on the *Beattie* factors only if the court abused its discretion, meaning that its evaluation of the factors was arbitrary or capricious. *O'Connell*, 134 Nev. at 554, 429 P.3d at 668.

On appeal, BNYM argues that the district court abused its discretion because MEO's offer was not reasonable in light of the amount of the loan secured by the deed of trust (over \$200,000), and also because BNYM's defenses—particularly its claim that NRS Chapter 116's notice provisions were unconstitutional—were brought in good faith.

As an initial matter, we note that the district court's written order misstates two of the *Beattie* factors. With respect to the first factor, the written order incorrectly evaluates whether MEO brought its claims in good faith instead of whether BNYM brought its defenses in good faith. See *Yamaha*, 114 Nev. at 252, 955 P.2d at 673 (noting that "it would seem meaningless to weigh whether [the plaintiff]'s claim was brought in good faith [where the plaintiff] was the prevailing party" and the offeror). And with respect to the third factor, the written order concludes that BNYM's decision to reject the offer was merely "unreasonable," whereas *Beattie* provides that the applicable standard is whether the rejection was "grossly unreasonable." Moreover, we agree with BNYM that the district court's finding of bad faith was questionable at best. Notably, at the time BNYM rejected the offer, the Supreme Court of Nevada had not yet decided *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. 28, 388 P.3d 970 (2017), which rejected constitutional arguments similar to

BNYM's that the Ninth Circuit had previously embraced. *See Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1159-60 (9th Cir. 2016). Nevertheless, in spite of the above-noticed concerns, based on our review of the entirety of the district court's analysis—including the court's consideration of the issues presented at the hearing on the matter—we conclude that the district court's overall application of the *Beattie* factors was not arbitrary or capricious.

In examining these factors below—which were correctly identified and argued by the parties in the motion practice and at the hearing—the district court gave the most weight, in both its oral and written findings, to the availability to BNYM of a large amount of excess proceeds in the course of determining that MEO's offer was reasonable and made in good faith. We discern no abuse of discretion in that analysis.


We also reject BNYM's argument that the district court failed to consider the extent to which accepting MEO's offer would have precluded BNYM from recovering any of the excess proceeds. Although BNYM is correct that accepting the offer would have required it to disclaim its deed of trust and that its right to excess proceeds originated with the deed of trust, *see* NRS 116.31164(3)(c) (2005) (setting forth the order in which excess proceeds must be distributed, including to satisfy “any subordinate claim of record”), BNYM has not cited any authority in support of the notion that disclaiming a deed of trust in any way impacts the holder's right to claim excess proceeds from a prior foreclosure sale. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that the appellate courts need not consider claims not cogently argued or supported by relevant authority). Moreover, under Nevada's more general foreclosure statutes, a lienholder's right to excess

proceeds vests at the time of the foreclosure sale, not at the time any claim to the proceeds is made. See NRS 40.462(1); *Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 824, 313 P.3d 849, 856 (2013). And BNYM does not provide any explanation as to why that would not also be the case under NRS Chapter 116 or why disclaiming a deed of trust would also constitute disclaimer of a previously vested right. Under these circumstances, we decline to address BNYM's argument on this point. *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Under the circumstances detailed above, we discern no abuse of discretion in the court's decision to award fees and costs. See *Yamaha*, 114 Nev. at 252 n.16, 955 P.2d at 673 n.16 (“[N]o one factor under *Beattie* is determinative and [the district court] has broad discretion to grant the request so long as all appropriate factors are considered.”). Accordingly, we affirm the district court's decision.

It is so ORDERED.⁴


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁴Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Joseph Hardy, Jr., District Judge
Akerman LLP/Las Vegas
The Law Office of Mike Beede, PLLC
Eighth District Court Clerk