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 HOLDERS OF AMERICAN HOME MORTGAGE INVESTMENT TRUST 2004-4,
Appellant,
vs.
S&J INVESTMENTS, LLC,
Respondent.

No. 75891-COA

ORDER VACATING AND REMANDING

The Bank of New York Mellon (BNYM) appeals from a district court order granting summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

The original owner of the subject property failed to make periodic payments to his 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, an agent of BNYM—holder of the first deed of trust on the property—sent a payoff request to the HOA's foreclosure agent. The foreclosure agent responded by informing BNYM's agent that it would need to submit an authorization form signed by the homeowner before the foreclosure agent could provide any payoff information. There is no evidence that BNYM or its agent took any further action following the foreclosure agent's response, and the HOA eventually foreclosed on the property. Respondent S&J Investments, LLC (S&J), later acquired the property from the purchasers at the foreclosure sale and initiated the underlying action seeking to quiet title. BNYM

counterclaimed seeking the same, and both parties moved for summary judgment. BNYM argued that its agent's payoff request constituted a valid tender sufficient to preserve its deed of trust and, in the alternative, that the sale should be set aside for fraud, unfairness, or oppression. The district court ruled in S&J's favor, finding that the foreclosure sale extinguished BNYM's deed of trust, the sale was commercially reasonable, and S&J was a bona fide purchaser. 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 its obligation to tender was excused as a matter of law because the HOA's foreclosure agent imposed an arbitrary condition for providing payoff information and had a policy of rejecting superpriority tenders such that tender on the part of BNYM would have been futile.[1] It argues in the alternative that its payoff request,

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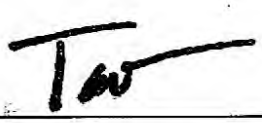
[1]We reject S&J's argument that BNYM failed to raise this issue below and therefore waived it. Although BNYM addressed the alleged futility of tender only in the context of arguing that the sale should be set aside in equity because of fraud, unfairness, or oppression, it nevertheless raised the broad issue of whether the futility of tender operates to preserve its interest. Moreover, because we vacate the district court's order, we need not address the parties' arguments on appeal with respect to setting the sale aside in equity or S&J's purported bona fide purchaser status.

combined with its undisputed readiness to pay, constituted sufficient tender.

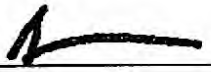
We agree with the district court's conclusion that the payoff request alone did not constitute sufficient tender to preserve BNYM's deed of trust. *See 7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev., Adv. Op. 6, ___ P.3d ___, ___ (2020) (holding that "a promise to make a payment at a later date or once a certain condition has been satisfied cannot constitute a valid tender"). However, because the parties and the district court did not have the benefit of the supreme court's recent decision in *7510 Perla Del Mar*, the issue of whether a tender of the superpriority portion of the HOA's lien would have been futile and possibly excused as a matter of law was not fully developed. *See id.* at ___ (acknowledging that the obligation to tender is excused when the lienor would have rejected it). Because the parties point to evidence in the record demonstrating that the HOA's foreclosure agent might have either rejected or accepted an offer from BNYM to pay the superpriority portion of the HOA's lien, a genuine dispute of material fact remains as to whether tender would have been futile. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. Accordingly, we vacate the district court's order granting summary judgment in favor of S&J and remand this matter for further development in light of recent precedent.

It is so ORDERED.

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. David M. Jones, District Judge
Wright, Finlay & Zak, LLP/Las Vegas
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Eighth District Court Clerk