IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PNC BANK, N.A., A NATIONAL ASSOCIATION,
Appellant,
vs.
SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY CORPORATION,
Respondent.[1]

No. 77337-COA

ORDER OF REVERSAL AND REMAND

PNC Bank, N.A. (PNC), appeals from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

In 2004, the original owner of the subject property executed a first deed of trust in connection with its purchase, which named Mortgage Investors Corporation (MIC) as the lender and Mortgage Electronic Registration Systems, Inc. (MERS), as the beneficiary solely as nominee for MIC and MIC's successors and assigns. Years later, the original owner of the property failed to make periodic payments to his homeowners' association (HOA). The HOA's foreclosure agent recorded a notice of delinquent assessment lien, a notice of default and election to sell, and a notice of sale to collect on the past due assessments and other fees pursuant

[1]We direct the clerk of the court to amend the caption for this case to conform to the caption on this order.

to NRS Chapter 116.[2] The HOA later proceeded with a foreclosure sale, and respondent SFR Investments Pool 1, LLC (SFR), acquired the property from the purchaser at the sale. Meanwhile, MERS assigned its beneficial interest in the first deed of trust to PNC.

PNC filed the underlying action to quiet title to the property, and SFR counterclaimed for the same. The parties eventually filed competing motions for summary judgment in which they primarily disputed whether the foreclosure sale was void based on the HOA foreclosure agent's failure to mail a copy of the notices of default and sale to MERS. In particular, the parties disputed whether this failure constituted a violation of NRS 116.31168 and NRS 107.090,[3] which require an HOA to provide notices of default and sale to the holder of a recorded first deed of trust before the HOA can proceed to foreclose. *See SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon*, 134 Nev. 483, 489, 422 P.3d 1248, 1253 (2018) (holding that NRS 116.31168 incorporates NRS 107.090's requirement that foreclosure notices be provided to all holders of subordinate security interests). The district court granted summary judgment in favor of SFR, finding that NRS 116.31168 and NRS 107.090 were satisfied because the HOA's agent mailed a copy of the notices of default and sale to MIC, which the court held was

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[2]Throughout these proceedings, the parties and district court cited to the post-2015 version of NRS Chapter 116. But this dispute is governed by the pre-2015 version of NRS Chapter 116, which was in effect at the time of the underlying foreclosure sale. Although this mistake does not affect the disposition of this appeal, for clarity, we cite to the pre-2015 version of NRS Chapter 116. *See* 2015 Nev. Stat., ch. 266, §§ 1-7, at 1333-45.

[3]Although NRS 107.090 was amended in 2019, *see* 2019 Nev. Stat., ch. 238, § 15, at 1367-68, we apply the pre-2019 version of that statute, which was in effect during the underlying foreclosure proceedings.

the holder of the first deed of trust on the property. For support, the district court reasoned that MERS was an agent for MIC rather than the holder of the first deed of trust since that instrument designates MERS as the nominee for MIC and MIC's successors and assigns. 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, the parties primarily dispute whether the district court erred in concluding that MERS was an agent for the lender rather than the holder of the first deed of trust for purposes of NRS 116.31168 and NRS 107.090.[4] *See Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002) (reviewing questions of law addressed in a summary judgment order de novo). That dispute is resolved by the supreme court's decision in

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[4]SFR further asserts that PNC failed to present admissible evidence to show that the HOA's agent did not mail the notices of default and sale to PNC, and as a result, SFR maintains that we need not reach the question of whether MERS was a holder of the first deed of trust entitled to the notices under NRS 116.31168 and NRS 107.090. But SFR's challenge to the admissibility of the evidence that PNC submitted to show that the notices were not mailed to MERS is waived on appeal, as SFR did not present it below. *See 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.").

Edelstein v. Bank of New York Mellon, which rejected an agency theory similar to the one relied on by SFR and the district court, reasoning that courts must honor the beneficiary designation in a deed of trust that provides legal title to the lien created by such an instrument. 128 Nev. 505, 515-16, 519, 286 P.3d 249, 256-57, 258-59 (2012) (explaining that courts are not at liberty to disregard a beneficiary designation that is an express part of the parties' contract). Thus, because MERS was designated as the beneficiary in the first deed of trust, the HOA was required to mail MERS a copy of the notices of default and sale under NRS 116.31168 and NRS 107.090. And insofar as the district court granted summary judgment based on a contrary conclusion, it erred. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

Given that the district court erroneously determined that MERS was not entitled to the notices of default and sale, it did not proceed to address the parties' arguments with respect to whether NRS Chapter 116's notice requirements were satisfied because PNC was not prejudiced by the lack of notice to MERS since PNC had actual notice of the original owner's default on his periodic payments to the HOA and the HOA's decision to proceed with foreclosure. *See U.S. Bank, Nat'l Ass'n ND v. Res. Grp., LLC*, 135 Nev. 199, 203-04, 444 P.3d 442, 447 (2019) (explaining that NRS Chapter 116's notice requirements are satisfied if the party entitled to notice receives actual notice and is not prejudiced by an HOA's failure to provide statutory notice); *see also Schleining v. Cap One, Inc.*, 130 Nev. 323, 330, 326 P.3d 4, 8-9 (2014) (involving a nonjudicial foreclosure of a deed of trust and looking to whether the homeowner received actual notice of default and the lender's decision to proceed with foreclosure). Because PNC's position is that it would have acted to protect its interest in the loan

if it had received the notices of default and sale, the parties' arguments concerning actual notice and prejudice raise a threshold question that the parties dispute, which is whether PNC acquired an interest in the loan prior to the foreclosure sale, such that it could have suffered prejudice absent some form of notice. The record includes contradictory evidence with respect to that issue, including deposition testimony suggesting that PNC purchased the loan secured by the first deed of trust in 2004 and a post-foreclosure sale assignment of the first deed of trust from MERS to PNC. Thus, we conclude that genuine issues of material fact remain that preclude summary judgment.

Accordingly, we reverse the summary judgment in favor of PNC and remand for further proceedings consistent with this order. In doing so, we note that, if the district court determines that PNC did not receive actual notice or that PNC was prejudiced by the lack of notice to MERS, the court must consider whether SFR is a bona fide purchaser, and if so, whether the HOA's violation of NRS 116.31168 and NRS 107.090 rendered the foreclosure sale void under NRS 107.080[5] or voidable based on principles of equity, as a void sale defeats a party's bona fide purchaser status, while a voidable sale does not.[6] *Res. Grp.*, 135 Nev. at 205-07, 444 P.3d at 447-49

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[5]NRS 107.080 has been amended many times. For clarity, we cite to the pre-2013 version of the statute, which is the version that was in effect at the time of the underlying foreclosure sale. *See* 2013 Nev. Stat., ch. 302, § 1, at 1418-23; 2013 Nev. Stat., ch. 330, § 5, at 1548-52; 2013 Nev. Stat., ch. 403, § 17, at 2195-99.

[6]Insofar as SFR also asserts that it was protected by the recitals in the HOA's foreclosure deed under NRS 116.31166(8), the recitals that are conclusive under the pre-2015 version of that statute do not include recitals concerning the mailing of the notices of default and sale. And regardless, we will not accept a conclusive recital that attests to proper service if the

(explaining that an HOA's failure to comply with NRS Chapter 116's notice requirement may render a foreclosure sale void under NRS 107.080 or voidable based on equity principles, which determines the effect of a party's bona fide purchaser status); *see also Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 63-66, 366 P.3d 1105, 1114-16 (2016) (requiring district courts to consider a party's bona fide purchaser status when balancing the equities in an action to quiet title after an HOA's foreclosure sale).

It is so ORDERED.[7]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Wolfe & Wyman LLP
Kim Gilbert Ebron
Eighth District Court Clerk

HOA's foreclosure agent in fact failed to mail the notices of default and sale as required by NRS 116.31168 and NRS 107.090. *See Res. Grp.*, 135 Nev. at 205 n.4, 444 P.3d at 448 n.4 (citing *Albice v. Premier Mortg. Servs. of Wash. Inc.*, 239 P.3d 1148, 1154 (Wash. Ct. App. 2010) ("We are unwilling to accept a trustee's legal conclusions contrary to the actual facts of the foreclosure process as conclusive evidence where an accurate reporting of the facts would have shown the legal conclusions to be incorrect.").

[7]We have considered the parties remaining arguments and conclude that they either do not present a basis for relief, are not properly before us, or need not be addressed given our disposition of this appeal.