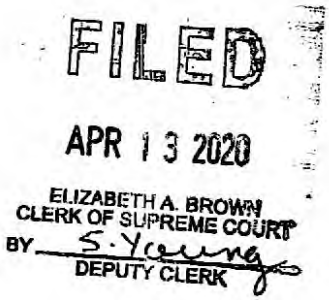
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAHIN MALEK, AN INDIVIDUAL,
Appellant,
vs.
BANK OF AMERICA, N.A.; THE FOOTHILLS AT MACDONALD RANCH MASTER ASSOCIATION, A NEVADA COMMUNITY ASSOCIATION; AND NEVADA ASSOCIATION SERVICES, INC., A NEVADA CORPORATION,
Respondents.

No. 76085-COA



ORDER AFFIRMING IN PART, VACATING IN PART AND REMANDING

Shahin Malek 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; Adriana Escobar, Judge.[1]

The original owners of the subject property failed to make periodic payments to their homeowners' association, respondent The Foothills at MacDonald Ranch Master Association (the HOA). The HOA—through its foreclosure agent, respondent Nevada Association Services, Inc. (NAS)—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. Respondent Bank of America, N.A. (BOA)—holder of the first deed of trust on the property—claims that it tendered payment to NAS for nine months of past due assessments prior

[1]The Honorable Carolyn Ellsworth, Judge, entered the challenged order setting aside the default judgment against Bank of America, N.A., but the Honorable Adriana Escobar, Judge, presided over the remainder of the proceedings.

to the sale and that NAS rejected the tender. Ultimately, the HOA and NAS proceeded with the foreclosure, selling the property to Malek.

Malek later filed suit against BOA, the HOA, and NAS, among others, seeking to quiet title to the property. After BOA initially failed to answer the complaint, Malek obtained a default judgment against it. He then stipulated with both the HOA and NAS to dismiss them from the action with prejudice, and the district court entered orders adopting the stipulations. BOA moved to set the default judgment aside on grounds of excusable neglect, which the district court granted. BOA then filed an answer and counterclaim against Malek seeking to quiet title, as well as multiple crossclaims against the HOA and NAS. Malek also asserted claims for damages against the HOA and NAS, but the district court concluded that the prior stipulations to dismiss those entities from the action with prejudice precluded Malek from asserting those claims against them in this litigation. Ultimately, BOA moved for summary judgment on the quiet title claims, which the district court granted, finding that Malek failed to rebut BOA's proffered evidence of tender and that the tender rendered the foreclosure sale void. This appeal followed.

Malek now challenges multiple interlocutory orders as well as the district court's order granting summary judgment. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (noting that the appellate courts may consider challenges to interlocutory orders in the context of an appeal from a final judgment). Specifically, Malek contends that the district court abused its discretion in setting aside the default judgment against BOA on grounds of excusable

neglect under NRCP 60(b)(1).[2] Malek further argues that the district court erred in interpreting the stipulated dismissals of the HOA and NAS as prohibiting him from asserting claims for damages against them in this action. With respect to the district court's order granting BOA's motion for summary judgment, Malek contends that the district court should have stricken improperly disclosed evidence that BOA relied on, that it should not have stricken evidence that Malek relied on in opposition, and that a genuine dispute of material fact remained as to whether the alleged tender was delivered. Finally, Malek contends that he is a bona fide purchaser and that equity warrants quieting title in his favor.

We first consider whether the district court abused its discretion in setting aside the default judgment against BOA under NRCP 60(b)(1). *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656, 428 P.3d 255, 257 (2018) (noting that a "district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)" and that such a decision will not be reversed "absent an abuse of discretion" (internal quotation marks omitted)). NRCP 60(b)(1) provides that a district court may relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." The Nevada Supreme Court has identified four factors that indicate whether such relief is appropriate: "(1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith." *Rodriguez*, 134 Nev. at 657, 428 P.3d at

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[2]The 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). Because the amendments do not affect our disposition, we cite the current version of the rules herein.

257. Moreover, a district court considering such a request must always consider Nevada's underlying policy of deciding cases on their merits whenever possible. *Id.*

Here, the district court considered evidence from BOA showing that its failure to timely respond to Malek's complaint was the result of an internal filing error due to a specific misunderstanding by one of its administrative employees. *Cf. Gemini, Inc. v. Fertil*, 92 Nev. 183, 184-85, 547 P.2d 687, 687-88 (1976) (concluding the district court did not abuse its discretion in declining to set aside a default judgment where the defendant argued excusable neglect but did not provide evidence as to *why* its insurance carrier failed to deliver the summons and complaint to counsel). The district court also found that BOA acted promptly to remove the default judgment, and it was not persuaded that the bank was acting in bad faith or with an intent to delay the instant proceedings. Accordingly, the district court determined that it would be better to resolve the case on the merits in light of Nevada's policy in favor of doing so. Because the district court considered appropriate factors and its determination was supported by substantial evidence in the record, we discern no abuse of discretion on this point. *See* NRCP 60(b)(1); *Rodriguez*, 134 Nev. at 656, 428 P.3d at 257; *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (noting that evidence that a reasonable mind might accept as adequate to support a conclusion is substantial evidence to support a district court's decision).

We next consider whether the district court improperly prevented Malek from asserting claims for damages against the HOA and NAS on grounds that he had previously stipulated to dismiss those entities from the action with prejudice. Malek argues that, because he had only asserted his quiet title claims against the HOA and NAS at the time of the stipulations and had no reason to know at that point that he might have

claims for damages against them based on irregularities in the sale process (i.e., failure to accept tender), the stipulations were not meant to prevent Malek from asserting such claims if and when he gained such knowledge. Alternatively, Malek contends that the district court should have granted his motion to set the stipulations aside under NRCP 60(b).[3]

"[V]alid stipulations are controlling and conclusive and both trial and appellate courts are bound to enforce them." *Second Baptist Church of Reno v. Mount Zion Baptist Church*, 86 Nev. 164, 172, 466 P.2d 212, 217 (1970). Written stipulations are a species of contract, so they must generally be interpreted according to their plain language when they are unambiguous, and we review such interpretations de novo. *DeChambeau v. Balkenbush*, 134 Nev. 625, 628-29, 431 P.3d 359, 361-62 (Ct. App. 2018).

We discern no error in the district court's interpretations of the written stipulations at issue here. They unambiguously "dismissed [the HOA and NAS] from this action, with prejudice," and stated that neither entity was "subject to any award of damages . . . so long as it complies with this stipulation." Rather than simply dismissing the quiet title claims, the stipulations dismissed the HOA and NAS from the entire *action* with prejudice, thereby precluding Malek from asserting any further claims against them in the context of the underlying litigation.[4] *See* NRCP 3 ("A

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[3]Malek also contends that the district court erred in enforcing the stipulated dismissal of NAS because NAS, unlike the HOA, did not oppose Malek's motion to set the stipulations aside or move to dismiss Malek's claims for damages, and instead filed an answer. But courts have inherent authority to enforce their own orders, *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007), and because the court adopted the stipulation as its own order, we discern no error on this point.

[4]We take no position as to whether Malek would be precluded from asserting such claims in a separate action. Moreover, although we conclude

civil action is commenced by filing a complaint with the court."); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Manson*, 105 Nev. 816, 820, 783 P.2d 955, 957 (1989) ("Unlike a claim, an action includes the original claim and any crossclaims, counterclaims, and third-party claims."). We further conclude that the district court did not abuse its discretion in determining that Malek's failure to apprehend the legal effect of the plain language in the stipulations did not warrant setting them aside.[5] *See* NRCP 60(b); *Rodriguez*, 134 Nev. at 656, 428 P.3d at 257; *see also Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986) ("[The] failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from a judgment.").

We turn now to the district court's order granting summary judgment and its associated evidentiary rulings. Because we ultimately conclude that the district court appropriately granted summary judgment in favor of BOA regardless of its rulings on certain other pieces of evidence,

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that the stipulations dismissed the HOA and NAS from the entire action, to the extent that conclusion may appear inconsistent with their continued participation in the action with respect to BOA's crossclaims, we note that stipulations generally bind only the parties that assent to them. *See Cramer v. State, DMV*, 126 Nev. 388, 396, 240 P.3d 8, 13 (2010). Thus, BOA was entitled to assert its crossclaims in the underlying action.

[5]We decline to address Malek's contentions, raised for the first time on appeal, that the stipulations were invalid because they were not signed by all of the parties who had then appeared in the action and that the stipulations should be set aside on grounds of fraud or misrepresentation under NRCP 60(b). *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (noting that issues not raised in the trial court are deemed waived). To the extent Malek alluded to potential misrepresentations by the HOA and NAS in the context of his arguments below on mistake, inadvertence, surprise, or excusable neglect, the district court did not abuse its discretion in giving more weight to the plain language of the stipulations and Malek's failure to apprehend their legal consequences. *See Rodriguez*, 134 Nev. at 656, 428 P.3d at 257.

we need only address Malek's arguments with respect to one of the district court's evidentiary rulings: declining to strike both an affidavit from a representative of the law firm that allegedly sent the tender letter and check to NAS, as well as the business records the affidavit authenticated. Malek contends that the district court should have stricken this evidence because BOA failed to name the law firm's representative as a witness under NRCP 16.1.

Pursuant to NRCP 16.1, without awaiting a discovery request, a party must provide to the other parties "the name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b)." NRCP 16.1(a)(1)(A)(i). A party is under a duty to supplement their initial disclosures with later-acquired information, but only "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process." NRCP 26(e)(1). A party who fails to provide information or identify a witness under the disclosure rules may not use the information or the witness to supply evidence on a motion "unless the failure was substantially justified or is harmless." NRCP 37(c)(1). On appeal, we generally review a district court's decisions whether to impose discovery sanctions and whether to admit evidence for an abuse of discretion. *See Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010); *see also Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 232, 445 P.3d 846, 848 (2019).

Although BOA did not identify the law firm's representative by name in its initial disclosures, Malek's claim that he was ambushed by BOA's reliance on this witness is belied by the record, as BOA disclosed the subject affidavit and business records to Malek in its first supplemental disclosure long before the close of discovery. Accordingly, because BOA made this information known to Malek during discovery, it appears that it

complied with NRCP 26(e)(1), and the district court did not abuse its discretion in declining to strike the affidavit or the accompanying records under NRCP 37(c)(1).[6] *See Foster*, 126 Nev. at 65, 227 P.3d at 1048. And even if BOA did not fully comply with the disclosure rules (e.g., if it knew an address and telephone number for the law firm's representative and failed to provide it), Malek failed to challenge the supposedly incomplete disclosure or move to compel further production before the discovery commissioner. *See* EDCR 2.34(a) (requiring that all discovery disputes first be heard by the discovery commissioner unless otherwise ordered by the court). Instead, he chose to raise the issue for the first time in opposition to BOA's motion for summary judgment, and he therefore waived it. *See Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 172-73, 252 P.3d 676, 679-80 (2011) (holding that a party's failure to first raise before the discovery commissioner an issue that was presentable to it constituted a waiver).

Turning to the merits of the district court's summary judgment, this court reviews an 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

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[6]Malek argues for the first time on appeal that BOA failed to comply with NRS 52.260(4), which requires that a "party intending to offer an affidavit pursuant to this section must serve on the other parties a notice of the intent and make available for inspection or copying the records of the regularly conducted activity at least 10 days before the records are to be introduced at a hearing." Because this issue was not raised below, it is waived. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983. But even if Malek preserved the issue, he fails to explain how BOA's disclosure of the affidavit and business records in discovery did not satisfy the requirements of the statute. *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 unsupported by cogent argument or relevant authority).

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.

Here, there is no genuine dispute of material fact to preclude summary judgment in favor of BOA. Based upon the properly authenticated business records BOA produced in support of its motion, there is at least circumstantial evidence in the record—including a printout from the law firm's internal filing system, as well as copies of the tender letter and check—indicating that the law firm tendered the superpriority amount of the HOA's lien to NAS, and that NAS rejected the tender and returned the check. Although Malek distrusts BOA's business records and contends that the tender might not have been delivered in light of the absence of any direct evidence, such general allegations are insufficient to defeat summary judgment. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030-31; *see also Daisy Tr.*, 135 Nev. at 236, 445 P.3d at 851 (noting that, to the extent a party does not trust otherwise properly authenticated business records, it bears the burden of showing that they are not trustworthy); *In re Connell Living Tr.*, 133 Nev. 137, 140, 393 P.3d 1090, 1093 (2017) (noting that speculation is insufficient to defeat summary judgment).

Accordingly, the district court properly concluded that Malek failed to rebut BOA's evidence of tender and that BOA's deed of trust therefore survived the sale.[7] *See Bank of Am., N.A. v. SFR Invs. Pool 1,*

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[7]To the extent Malek contends that BOA's failure to tell him about the tender during their prelitigation correspondence somehow indicates

LLC, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018) (holding that, "after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property").[8] Moreover, because the sale was void as to the superpriority portion of the lien as a matter of law, Malek's equitable arguments are unavailing. *See id.* (noting that a party's bona fide purchaser status is irrelevant when a defect in the foreclosure renders the sale void as a matter of law). However, as acknowledged by both Malek and BOA, because the district court did not have the benefit of the supreme court's decision in *Bank of America* and instead relied upon prior unpublished orders of that court, it incorrectly declared the sale void in its entirety rather than just as to the superpriority portion of the HOA's lien, thereby effectively stripping Malek of his interest in the property. *See*

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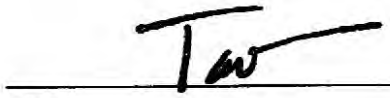
that it was never delivered or that BOA may have fabricated its evidence, that is mere speculation insufficient to defeat summary judgment. *See Connell Living Tr.*, 133 Nev. at 140, 393 P.3d at 1093. Moreover, to the extent Malek contends that the absence of the tender letter or check in NAS' file creates a genuine dispute of material fact, and that the deposition testimony of NAS' representative shows that NAS would not have gone through with the sale if it received the tender, Malek misstates the representative's testimony. She testified that, at the time of the underlying sale, NAS would have rejected conditional partial payments of the sort at issue here, and it probably would not have kept any record of the rejected tender in its file.

[8]Malek asks this court to overrule *Bank of America*, but we cannot overrule Nevada Supreme Court precedent. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (noting that stare decisis "applies *a fortiori* to enjoin lower courts to follow the decision of a higher court"); *cf. People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (Ct. App. 2007) ("The Court of Appeal must follow, and has no authority to overrule, the decisions of [the California Supreme Court]." (alteration in the original) (internal quotation marks omitted)).

id. Thus, in light of the foregoing, we affirm the challenged interlocutory orders of the district court, but we necessarily vacate the order granting summary judgment and remand with instructions for the district court to reenter judgment in favor of BOA such that Malek took the property subject to BOA's deed of trust.

It is so ORDERED.[9]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

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[9]Insofar 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.