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 OF THE CWALT, INC., ALTERNATIVE LOAN TRUST 2006-5T2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-5TA,
Appellant,
vs.
SFR INVESTMENTS POOL 1, LLC; AND CORONADO RANCH STREET AND LANDSCAPE MAINTENANCE CORPORATION,
Respondents.

No. 76849-COA

FILED

APR 27 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER VACATING AND REMANDING

The Bank of New York Mellon (BNYM) appeals from district court orders granting summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

The original owner of the subject property failed to make periodic payments to his homeowners' association, respondent Coronado Ranch Street and Landscape Maintenance Corporation (the 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 appellant BNYM—holder 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, but the foreclosure agent rejected the tender and proceeded with its foreclosure sale, at which respondent SFR Investments Pool 1, LLC (SFR), purchased the property. BNYM initiated the underlying

action seeking to quiet title against SFR and also asserting claims for wrongful foreclosure and unjust enrichment against the HOA. SFR counterclaimed, also seeking to quiet title. All of the parties moved for summary judgment, and the district court ruled in SFR's favor, finding that BNYM's tender was not sufficient to preserve the deed of trust. Largely on the same grounds, the district court entered a separate order granting summary judgment in the HOA's favor on BNYM's claims against it. This appeal followed.

This court reviews a district court's order granting summary judgment de novo. *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.

Here, the district court incorrectly ruled in favor of SFR, as BNYM's tender—which exceeded nine months of past due assessments—extinguished the HOA's superpriority lien such that SFR took the property subject to BNYM's deed of trust.[1] *See Bank of Am., N.A. v. SFR Invs. Pool*

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[1]We reject SFR's contention that this court must avoid characterizing the deed of trust as belonging to BNYM so as to avoid making any finding as to BNYM's standing to foreclose on the property. Our acknowledgement of BNYM's interest in the deed of trust by virtue of its status as the beneficiary of record has no bearing on whether it has standing to foreclose, which—as SFR correctly points out and as BNYM concedes—requires

1, LLC, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018). We reject SFR's contention that the tender at issue here was impermissibly conditional. *See id.* at 607, 427 P.3d at 118 ("In addition to payment in full, valid tender must be unconditional, or with conditions on which the tendering party has a right to insist."). SFR argues that the tender letter required the HOA to waive its right to collect maintenance and nuisance abatement charges as part of its superpriority lien, but the letter did not address such charges at all, and there is no indication that such charges were part of the HOA's lien. *Cf. id.* at 607-08, 427 P.3d at 118 (concluding that a materially similar tender letter was not impermissibly conditional and noting that "the HOA did not indicate that the property had any charges for maintenance or nuisance abatement"). Accordingly, such charges are not relevant to this case.

We further note that, contrary to the district court's conclusions below, once BNYM tendered, no further actions were required to preserve the tender for it to extinguish the superpriority lien. *See id.* at 609-11, 427 P.3d at 119-21 (rejecting the buyer's arguments that the bank was required to record its tender or take further actions to keep the tender good). The district court also erred to the extent it relied upon the good faith of the HOA's foreclosure agent, as the subjective good faith of a foreclosure agent in rejecting a valid tender cannot validate an otherwise void sale. *See id.* at 612, 427 P.3d at 121 ("[A]fter a valid tender of the superpriority portion of

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reunification of the deed of trust and the promissory note. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521, 286 P.3d 249, 260 (2012) (holding that "separation is not irreparable or fatal to either the promissory note or the deed of trust, but it does prevent enforcement of the deed of trust through foreclosure unless the two documents are ultimately held by the same party").

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."); Restatement (Third) of Prop.: Mortgs. § 6.4(b) & cmt. c (Am. Law Inst. 1997) (indicating that a party's reasons for rejecting a tender may be relevant insofar as that party may be liable for money damages but that the reason for rejection does not alter the tender's legal effect). Accordingly, because the district court did not have the benefit of the supreme court's decision in *Bank of America* at the time it resolved this matter, we necessarily vacate the district court's order granting summary judgment in favor of SFR, and we remand with instructions for the district court to enter judgment in favor of BNYM such that SFR took the property subject to BNYM's deed of trust.[2] *See SFR Invs. Pool I, LLC v. U.S. Bank, N.A.*, 135 Nev. 346, 352, 449 P.3d 461, 466 (2019) (reversing an order granting one party summary judgment and directing entry of judgment on the opposing party's countermotion 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).

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[2]We agree with BNYM that the district court erroneously expunged the lis pendens that BNYM had recorded against the property because it incorrectly determined that BNYM's claims to title were not viable. Because we vacate the district court's order, we necessarily reinstate the expunged lis pendens, although we note that—as conceded by BNYM—expungement will be proper upon entry of judgment in favor of BNYM. *See* NRS 14.015(2)(d) (governing notices of the pendency of an action and requiring in part that "[t]he party who recorded the notice would be injured by any transfer of an interest in the property *before the action is concluded*" (emphasis added)); *Levinson v. Eighth Judicial Dist. Court*, 109 Nev. 747, 750, 857 P.2d 18, 20 (1993) (noting that the function of a lis pendens "is to prevent the transfer or loss of real property which is the subject of dispute in the action that provides the basis for the lis pendens").

Finally, with respect to the district court's order granting summary judgment in favor of the HOA on BNYM's claims for wrongful foreclosure and unjust enrichment, we need not reach the merits of that order because—as BNYM concedes in its briefing on appeal—the preservation of BNYM's deed of trust renders those claims moot. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (noting that, "even though a case may present a live controversy at its beginning, subsequent events may render the case moot"). Accordingly, we vacate the district court's order granting summary judgment in favor of the HOA and remand with instructions for the district court to dismiss those claims as moot.

It is so ORDERED.[3]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[3]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.

cc: Hon. Joseph Hardy, Jr., District Judge
Akerman LLP/Las Vegas
Kim Gilbert Ebron
Gordon & Rees Scully Mansukhani LLP
Eighth District Court Clerk