IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREEN TREE SERVICING, LLC, A FOREIGN LIMITED LIABILITY COMPANY, N/K/A DITECH FINANCIAL, LLC; AND BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP, F/K/A COUNTRYWIDE HOME LOANS SERVICING, LP, A NATIONAL ASSOCIATION,
Appellants,
vs.
JOHN R. KIELTY, AN INDIVIDUAL; JASMINE HOMEOWNERS ASSOCIATION; AND NEVADA ASSOCIATION SERVICES, INC.,
Respondents.

No. 77089-COA

FILED

MAY 18 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Appellants Green Tree Servicing, LLC, n/k/a Ditech Financial, LLC (Ditech), and Bank of America, N.A. (BOA), appeal from a district court order granting summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

The original owner of the subject property failed to make periodic payments to her 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, BOA—the predecessor to Ditech, the current beneficiary of the first deed of trust—tendered payment to the HOA foreclosure agent in an amount exceeding the superpriority amount of the HOA's lien, but the agent rejected the tender and proceeded

with its foreclosure sale, at which respondent John R. Kielty purchased the property. Kielty filed the underlying action seeking, among other things, to quiet title, and appellants counterclaimed seeking the same. Both sides moved for summary judgment on their quiet title claims, and the district court ruled in Kielty's favor, finding that the foreclosure sale extinguished Ditech's deed of trust. The district court later entered orders dispensing with all remaining claims, and this appeal followed.[1]

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

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[1]The HOA—respondent Jasmine Homeowners Association—filed an answering brief in this appeal requesting that this court, in the event that it rules in favor of appellants, instruct the district court on remand to dismiss all of appellants' claims against the HOA as moot. However, the district court granted summary judgment in favor of the HOA on all of those claims, and appellants do not challenge that particular ruling on appeal. Accordingly, appellants have waived any such challenge, and we therefore do not disturb the judgment in favor of the HOA. *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.").

We further note that the HOA foreclosure agent, respondent Nevada Association Services, Inc. (NAS)—against which the district court entered a default judgment in favor of appellants—filed a motion to waive its right to file an answering brief in this matter, which the supreme court granted. Aside from NAS' rejection of the tender, neither it nor the judgment against it are at issue here.

and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

Here, BOA's tender of an amount exceeding nine months of past due assessments satisfied the superpriority lien such that Kielty took the property subject to Ditech's deed of trust. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018). We reject Kielty's argument that the tender letter accompanying the check contained impermissible conditions because it supposedly required the HOA to waive its right to collect maintenance or nuisance abatement charges as part of its superpriority lien. The letter did not address such charges at all, and there is no indication that they were part of the HOA's lien in this case. *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").

We also reject Kielty's argument that appellants failed to prove the superpriority amount of the HOA's lien because BOA relied on a statement of account from a separate property within the same HOA when calculating the superpriority portion. The ledger constituted unrebutted circumstantial evidence of the superpriority amount, and Kielty's assertion that the amount may have included maintenance or nuisance abatement charges is mere speculation. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (discussing the burdens of production that arise in the context of a motion for summary judgment); *see also In re Connell Living Tr.*, 133 Nev. 137, 140, 393 P.3d 1090, 1093 (2017) (recognizing that speculation is insufficient to defeat summary judgment).

Accordingly, because the district court did not have the benefit of the supreme court's decision in *Bank of America* at the time of the proceedings below, we necessarily vacate its order granting summary judgment in favor of Kielty, and we remand for entry of judgment in favor of appellants consistent with this disposition. *See SFR Invs. Pool 1, 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).

It is so ORDERED.[2]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[2]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. Susan Johnson, District Judge
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