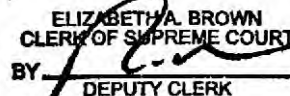
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEAN A. JOHNSTON, PRO SE; AND MARGARET A. JOHNSTON, PRO SE,
Appellants,
vs.
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR TBW MORTGAGE-BACKED TRUST SERIES 2006-5, TBW MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-5; OCWEN LOAN SERVICING, LLC; AND WESTERN PROGRESSIVE-NEVADA, INC.,
Respondents.

No. 78278-COA



FILED

JUL 07 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature] DEPUTY CLERK

ORDER OF AFFIRMANCE

Dean A. Johnston and Margaret A. Johnston appeal from a district court order granting summary judgment and a post-judgment order denying NRCP 60(b) relief in a quiet title action. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

After the Johnstons became delinquent on their mortgage payments, the predecessor to respondent U.S. Bank National Association (U.S. Bank)—the holder of the first deed of trust on the subject property—recorded a notice of default and election to sell on January 8, 2008, but rescinded the notice approximately three years later. U.S. Bank recorded another notice of default and election to sell in late 2017. A few months later, the Johnstons sued U.S. Bank as well as respondents Ocwen Loan Servicing, LLC, and Western Progressive-Nevada, Inc. (referred to collectively as respondents), which are respectively the servicer and trustee of the deed of trust, seeking, among other things, to quiet title. For support, the Johnstons alleged that, because the January 2008 notice of default

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accelerated their loan obligation, respondents' interest in the property terminated on January 8, 2018, pursuant to NRS 106.240. As relevant here, this statute provides that 10 years after the debt secured by a deed of trust "become[s] wholly due . . . it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged." Respondents moved to dismiss under NRCP 12(b)(5), arguing that the Johnstons' claims fail because their loan obligation was decelerated when the January 2008 notice of default was rescinded. The Johnstons opposed that motion.

The district court granted respondents' motion after converting it into one for summary judgment, reasoning that respondents' interest in the property did not terminate on January 8, 2018, because respondents' predecessor rescinded the January 2008 notice of default. Alternatively, the court concluded that, because certain events did not follow the recording of the January 2008 notice of default, the notice was rescinded by operation of law, such that respondents' position was as if the notice had never been recorded. For support, the district court cited NRS 107.550, which mandates that a notice of default be rescinded under certain circumstances and further provides that, once a notice of default is rescinded, the beneficiary is "restored to its former position and has the same rights as though . . . a notice of default and election to sell had not been recorded."

The Johnstons moved for relief under NRCP 60(b)(1), arguing that the district court mistakenly relied on NRS 107.550 since the statute was enacted in 2013 and only applies prospectively. Moreover, the Johnstons sought relief under NRCP 60(b)(3), asserting that respondents committed fraud, misrepresentation, or other misconduct by nonjudicially foreclosing on the property while the underlying proceeding was pending, even though the Johnstons recorded a notice of pendency of action and a hearing had not been held on the notice. But the district court denied the motion, reasoning that summary judgment was warranted even without

reference to NRS 107.550 and that the Johnstons' NRCP 60(b)(3) argument was not properly before the court. This appeal from both orders 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.

On appeal, the Johnstons challenge the summary judgment for respondents, arguing that the district court erred by basing its decision on the retroactive application of NRS 107.550. *See Corp. of the Presiding Bishop, LDS v. Seventh Judicial Dist. Court*, 132 Nev. 67, 70, 366 P.3d 1117, 1119 (2016) (providing that questions of retroactivity are reviewed de novo). Initially, the Johnstons are correct that NRS 107.550 was enacted in 2013 and that the statute only applies prospectively to, as relevant here, deeds of trust for which a notice of default is recorded after October 1, 2013. *See* 2013 Nev. Stat., ch. 403, §§ 15, 30 at 2193-94, 2202 (enacting the provisions that were subsequently codified as NRS 107.550 and providing that they only apply to deeds of trust for which a notice of default is recorded on or after October 1, 2013). And because the dispute in the present case concerns what effect a notice of default recorded in January 2008 had on a deed of trust, the district court erred to the extent it applied NRS 107.550 retroactively to resolve that dispute. *See Corp. of the Presiding Bishop*, 132 Nev. at 70, 366 P.3d at 1119. This conclusion does not end our analysis, however, because the district court also based its decision on respondents having recorded a notice of rescission of the January 2008 notice of default.

Insofar as the Johnstons argue that, because NRS 107.550 does not apply in the present case, the notice of rescission did not decelerate their loan obligation, their argument is unavailing. Indeed, although NRS 107.550(3) provides that rescission of a notice of default restores a beneficiary to the position it occupied before the notice of default was recorded, that provision simply codifies a power that loan documents typically provide to lenders. *See Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 892, 266 P.3d 602, 606 (2011) (recognizing that loan documents generally permit a lender that has "chosen to take advantage of any of its [nonjudicial] remedies, to rescind the process before its completion" and explaining that such action "renders moot disputes concerning the notice of default or its timing" (alteration in original)). While the Johnstons contend that the subject loan documents did not permit respondents to decelerate their loan obligation by rescinding the January 2008 notice of default, the deed of trust implicitly authorizes such action by providing respondents with discretion to foreclose or pursue other remedies if a default is not cured after a notice of default is recorded.

The Johnstons further argue that, pursuant to the supreme court's decision in *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 16 P.3d 1074 (2001), and the language of NRS 106.240, the notice of rescission did not prevent the statute's 10-year period from running by decelerating their loan obligation. But while the *Pro-Max* court considered whether NRS 106.240's terms were limited to bona fide purchasers, that decision did not address what happens to the statute's 10-year period when a lender uses a notice of rescission to decelerate a loan obligation. *See id.* at 94-95, 16 P.3d at 1077-78. Moreover, the Johnstons have not identified anything in NRS 106.240 that indicates that the statute's 10-year period continues to run even when a lender records a notice of rescission that decelerates a loan obligation. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280,

1288 n.38 (2006) (explaining that this court need not consider issues that are not supported by cogent argument). And because the Johnstons do not otherwise argue that the language in the notice of rescission at issue here was insufficient to decelerate their loan obligation, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived), they have not demonstrated that the district court erred in concluding that they were not entitled to NRS 106.240's conclusive presumption. *See Nev. Dep't of Corr. v. York Claims Servs., Inc.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015) (providing that questions of law are reviewed de novo).

Nevertheless, the Johnstons argue that summary judgment was inappropriate because respondents failed to disclose that they foreclosed on the property while the underlying proceeding was pending, even though the Johnstons recorded a notice of pendency of action and a hearing on the notice had not been held. But since the Johnstons premised their claims on the theory that they were entitled to NRS 106.240's conclusive presumption, any dispute between the parties concerning the nonjudicial foreclosure was not material for purposes of summary judgment. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031 (providing that "[t]he substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant"). And regardless, while the Johnstons' claims were essentially a challenge to respondents' ability to enforce the note and deed of trust, the Johnstons never took any action to preserve the status quo aside from asserting a claim for a preliminary injunction that they failed to pursue. Thus, we conclude that no genuine issue of material fact existed to prevent summary judgment for respondents. *See id.* at 729, 121 P.3d at 1029.

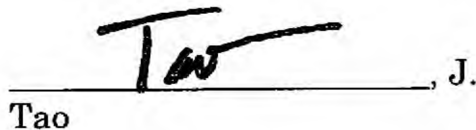
Insofar as the Johnstons also challenge the district court's post-judgment order denying their request for NRCP 60(b) relief, they rely on

the same arguments that they assert to challenge the summary judgment order. Accordingly, we conclude that the district court did not abuse its discretion in denying the Johnstons' motion for NRCP 60(b) relief for the reasons discussed above. *Ford v. Branch Banking & Tr. Co.*, 131 Nev. 526, 528, 353 P.3d 1200, 1202 (2015) (reviewing the district court's denial of an NRCP 60(b) motion for an abuse of discretion).

Thus, given the foregoing, we affirm the district court's orders granting respondents' motion for summary judgment and denying appellants' post-judgment motion for NRCP 60(b) relief.

It is so ORDERED.[1]

_______________, C.J.
Gibbons



_______________, J.
Tao

_______________, J.
Bulla

cc: Hon. Thomas W. Gregory, District Judge
Dean A. Johnston
Margaret A. Johnston
Wright, Finlay & Zak, LLP/Las Vegas
Snell & Wilmer, LLP/Tucson
Snell & Wilmer/Phoenix
Snell & Wilmer, LLP/Las Vegas
Douglas County Clerk

[1]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.