IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TYRONE & IN-CHING, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY,
Appellant,
vs.
BAYVIEW LOAN SERVICING, LLC, A FOREIGN LIMITED LIABILITY COMPANY,
Respondent.

No. 76446-COA

FILED

JUL 21 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Tyrone & In-Ching, LLC (Tyrone), appeals from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

The original owners of the subject property failed to make periodic payments to their 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, counsel for a predecessor to respondent Bayview Loan Servicing, LLC (Bayview)—holder of the first deed of trust on the property—sent a payoff request to the HOA's foreclosure agent inquiring as to what amount of the HOA's lien constituted the nine months of past due assessments entitled to superpriority and offering to pay that amount upon proof of the same. In response, the foreclosure agent stated that it would provide a statement of account for the nine-month superpriority lien only upon proof of foreclosure by the bank. It further

stated that it would require payment of a specified fee before producing any kind of statement of account. Bayview's predecessor took no further action following the foreclosure agent's response, and the HOA eventually foreclosed on the property, which the HOA acquired by credit bid following the ensuing sale. The HOA then sold the property to Tyrone's predecessor, which in turn sold it to Tyrone.

Tyrone later filed the underlying action seeking to quiet title to the property, and Bayview counterclaimed seeking the same. The matter proceeded to a bench trial, following which the district court issued written findings of fact and conclusions of law ruling in Bayview's favor, concluding that Bayview's predecessor's offer to pay the superpriority amount of the HOA's lien constituted a valid tender sufficient to preserve the deed of trust as a matter of law. Additionally, although it noted that it did not need to reach these issues in light of its ruling on tender, the district court found that Bayview failed to make a showing of fraud, unfairness, or oppression sufficient to set the sale aside in equity, and also that Tyrone failed to demonstrate that it was a bona fide purchaser (BFP). Finally, the district court noted that it did not reach the issue of whether—as Bayview argued in the alternative—the foreclosure agent's response to the payoff request demonstrated that the HOA elected to foreclose only on the subpriority portion of its lien. Accordingly, the district court entered judgment in favor of Bayview, concluding that Tyrone took the property subject to Bayview's deed of trust, and this appeal followed.

Tyrone contends that the district court erred in concluding that Bayview's predecessor's offer to pay the superpriority portion of the HOA's lien constituted a valid tender. Bayview counters that this court should affirm the judgment on grounds that Bayview's predecessor's obligation to

tender was excused as a matter of law. Alternatively, Bayview contends that this court could affirm on grounds that the sale should have been set aside in equity because it was affected by fraud, unfairness, or oppression.

This court reviews a district court's legal conclusions following a bench trial de novo, but we will not disturb the district court's factual findings "unless they are clearly erroneous or not supported by substantial evidence." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

We agree with Tyrone that the district court erred in determining that Bayview's predecessor's offer to pay the superpriority amount of the HOA's lien constituted a valid tender. *See 7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev., Adv. Op. 6, 458 P.3d 348, 349 (2020) (holding that "an offer to pay the superpriority amount in the future, once that amount is determined, does not constitute a tender sufficient to preserve the first deed of trust"). However, at the time of the proceedings below, the parties and the district court did not have the benefit of the supreme court's recent opinion in *Perla Del Mar*, which held that the obligation to tender is excused for futility where the evidence shows that the HOA or its foreclosure agent "had a known policy of rejecting such payments." *Id.* In so holding, the supreme court cited cases from other jurisdictions endorsing the general proposition that a tender is excused when, as a factual matter, the party entitled to payment demonstrates by words or conduct that it will not accept the tender. *Id.* at 351. Because the district court in this matter erroneously concluded there was sufficient tender, it did not make any factual findings as to whether the foreclosure agent's response demonstrated that tender would have been futile or whether any other circumstances existed that might have excused the

obligation to tender.[1] Accordingly, in the absence of any such findings, we cannot affirm on those grounds as Bayview requests, but we reverse and remand this matter to the district court for further consideration in light of recent precedent.[2] *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev., Adv. Op. 8, 459 P.3d 227, 232 (2020) (remanding for further proceedings in light of "issues [that] deserve full development and briefing

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[1]Although Bayview did not explicitly argue below that the obligation to tender was excused and instead claimed that its predecessor's offer to pay constituted sufficient tender, it broadly argued that its predecessor was not required to deliver any actual payment to the HOA's foreclosure agent to preserve its interest in light of the agent's response to the payoff request. Moreover, the agent's response appears to have been a factor informing the district court's conclusion that Bayview's predecessor adequately tendered. Accordingly, the issue of whether tender was excused was sufficiently preserved such that the district court should consider it on remand in light of the evidence admitted at trial, the principles set forth in *Perla Del Mar*, and any other considerations the district court deems appropriate.

[2]Bayview contends that this case is directly controlled by the opinion in *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, in which the supreme court examined an identical response, from the same HOA foreclosure agent, to an identical payoff request and concluded that "the only reasonable construction of the [response]" was that the agent "would reject a superpriority tender." 135 Nev. 42, 46-47, 435 P.3d 1217, 1220 (2019). But the supreme court recently vacated that opinion upon reconsideration en banc in an unpublished order, in which it applied its newer precedent under *Perla Del Mar* and stated that it was not "persuaded that the district court clearly erred in finding that the evidence introduced at trial did not establish that [the agent] had a known policy of rejecting superpriority tenders such that formal tender should have been excused." *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, Docket No. 73785 (Order Affirming in Part, Reversing in Part, and Remanding, May 7, 2020). However, because the district court in this matter made no factual findings at all on this issue, the procedural posture of this appeal is distinct from that presented in *Jessup*, thereby warranting a remand for further consideration.

in district court" and stating that "this court will not address issues that the district court did not directly resolve"); *In re Application of Finley*, 135 Nev. 474, 482 n.4, 457 P.3d 263, 270 n.4 (Ct. App. 2019) (declining to make a factual determination in the first instance).

Because Bayview also contends that this court could affirm the judgment on equitable grounds, we address that issue as well. *See Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) ("A respondent may, . . . without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument."). In determining that Bayview failed to show fraud, unfairness, or oppression to warrant setting the sale aside, the district court found that the property reverted to the HOA by credit bid because there were no other bidders at the sale, thereby implying that Bayview failed to demonstrate that the sale price itself was affected by the foreclosure agent's conduct. *See Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 748, 405 P.3d 641, 647 (2017) (noting that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale absent additional proof of some element of fraud, unfairness, or oppression *as accounts for and brings about* the inadequacy of price" (emphasis added) (internal quotation marks omitted)). Bayview fails to argue that the district court abused its discretion with respect to this finding, and we therefore do not disturb it. *See Res. Grp., LLC ex rel. E. Sunset Rd. Tr. v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 55, 437 P.3d 154, 160 (2019) ("A district court's decision to set aside a foreclosure sale on equitable grounds is subject to an abuse of discretion standard of review."); *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). Accordingly, we affirm the judgment insofar as the district court declined to set the sale aside on equitable grounds.[3]

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

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[3]Because all that remains to be decided in light of our disposition is whether the sale was valid in its entirety such that Tyrone took title to the property free and clear of the deed of trust, or whether the sale was void as to the superpriority portion of the HOA's lien such that Tyrone took the property subject to the deed of trust, we need not consider Tyrone's argument that it was a BFP. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018) (noting that "[a] party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void"); *W. Sunset 2050 Tr. v. Nationstar Mortg., LLC*, 134 Nev. 352, 357 n.5, 420 P.3d 1032, 1037 n.5 (2018) ("[B]ecause we conclude that the HOA sale was valid, we need not resolve the parties' additional dispute as to whether West Sunset was a *bona fide* purchaser."). Further, because the district court did not reach—and the parties do not discuss on appeal—Bayview's alternative argument at trial that the HOA intended to foreclose only on the subpriority portion of its lien, we take no position on that point. *See 9352 Cranesbill Tr.*, 136 Nev., Adv. Op. 8, 459 P.3d at 232.

cc: Hon. Rob Bare, District Judge
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Eighth District Court Clerk