IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TBES INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
BANK OF AMERICA, N.A.,
Respondent.

No. 76429-COA

ORDER OF REVERSAL AND REMAND

TBES Investments, LLC (TBES), appeals from a district court order granting a motion for summary judgment, certified as final pursuant to NRCP 54(b), in a quiet title action. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

The original owner of the subject property failed to make periodic payments to his 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 respondent Bank of America, N.A. (BOA)—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. BOA took no further action following the foreclosure agent's response, and the agent eventually proceeded with its foreclosure sale where a predecessor in interest to TBES acquired the property.

TBES's predecessor filed the underlying action seeking to quiet title to the property, and TBES later substituted into the proceeding as the plaintiff. BOA then counterclaimed to quiet title to the property, and the parties filed competing motions for summary judgment. The district court ruled in BOA's favor, concluding that its offer to pay the superpriority amount of the HOA's lien constituted a valid tender sufficient to preserve the deed of trust. As an alternative basis for its decision, the court further concluded that, although TBES was a bona fide purchaser, the sale should be set aside in equity because the sale price was grossly inadequate and the sale was unfair because the HOA's foreclosure agent rejected BOA's tender. This appeal followed.

On appeal, TBES contends that the district court erred in concluding that BOA's offer to pay the superpriority portion of the HOA's lien constituted a valid tender. BOA counters that this court should affirm the judgment on grounds that BOA's obligation to tender was excused as futile as a matter of law. Alternatively, BOA contends that this court should affirm since the district court correctly set aside the sale in equity because the sale was unfair and for a grossly inadequate price.

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.

Initially, we agree with TBES that BOA's offer to pay the superpriority amount of the HOA's lien did not constitute 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"). Thus, because the district court reached a contrary conclusion, which it relied on in holding that BOA's deed of trust survived the foreclosure sale and that, in the alternative, the foreclosure sale must be set aside in equity, the court erred by granting summary judgment in BOA's favor on these bases, and we therefore reverse its decision.[1] *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

In reaching this result, we recognize that, 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." 136 Nev., Adv. Op. 6, 458 P.3d at 349, 351 (citing cases from

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[1]BOA argues that, to the extent the district court concluded that the foreclosure sale must be set aside in equity, we may affirm its determination because the foreclosure sale was affected by unfairness created by a provision in the HOA's CC&Rs and representations by the HOA's foreclosure agent. But the district court did not address these issues below, and we decline to do so for the first time on appeal. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev., Adv. Op. 8, 459 P.3d 227, 232 (2020) (noting that "this court will not address issues that the district court did not directly resolve").

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). In the absence of *Perla Del Mar*, the parties did not fully develop the futility issue during the underlying proceeding, and as discussed above, the district court erroneously concluded that there was sufficient tender rather than considering whether tender would have been futile. Accordingly, we decline to consider the parties' arguments with respect to the futility issue in the first instance on appeal and direct the district court on remand to consider the issue in light of the supreme court's decision in *Perla Del Mar*.[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 in district court" and stating that "this court will not address issues that the district court did not directly

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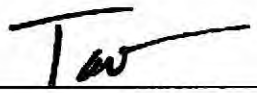
[2]BOA contends that this case is directly controlled by the opinion in *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, in which the supreme court examined an identical response, from the same HOA foreclosure agent, to an identical payoff request and concluded that "the only reasonable construction 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 did not consider this issue, the procedural posture of this appeal is distinct from that presented in *Jessup*, thereby warranting a remand for further consideration.

resolve"). In so doing, the district court should also consider any arguments the parties may raise with respect to whether the foreclosure sale should be set aside based on equitable considerations.

It is so ORDERED.[3]

_____, C.J.
Gibbons



_____, J.
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cc: Hon. Kerry Louise Earley, District Judge
The Law Office of Mike Beede, PLLC
Akerman LLP/Las Vegas
Eighth District Court Clerk

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[3]Insofar as TBES argues in its reply brief that, when a district court declares a foreclosure sale void as to the superpriority portion based on tender, or the futility thereof, it is sitting in equity and therefore must consider "the entirety of the circumstances that bear upon the equities" under *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 63, 366 P.3d 1105, 1114 (2016), TBES waived that argument by failing to raise it in its opening brief. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (declining to consider an issue raised for the first time in a reply brief). To the extent the parties raise additional 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.