IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SATICOY BAY LLC SERIES 8336 CREEK CANYON,
Appellant,
vs.
WELLS FARGO BANK, N.A.,
Respondent.

No. 79559-COA

ORDER OF REVERSAL AND REMAND

Saticoy Bay LLC Series 8336 Creek Canyon (Saticoy Bay) appeals from a district court order granting a motion for summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

The original owner of the subject property failed to make periodic payments to his homeowners' association (HOA). Through its foreclosure agent, Alessi & Koenig, LLC (Alessi), 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. Months before the sale, respondent Wells Fargo Bank, N.A.—holder of the first deed of trust on the property—informed Alessi that it intended to pay the superpriority amount of the HOA's lien and requested an account ledger reflecting that amount. Alessi responded that it could not provide a superpriority payoff amount unless the bank had foreclosed. Upon further inquiry from Wells Fargo as to whether Alessi would accept a partial payment of the HOA's lien in the amount of the superpriority portion, Alessi stated that it would, but only as a progress payment towards the full lien amount, not payment in full. Ultimately, just a few days before

the sale, Alessi provided Wells Fargo an account ledger setting forth all of the charges included in the HOA's lien. Wells Fargo then calculated the superpriority amount of the lien and mailed a check in that amount to Alessi. Although Wells Fargo mailed the check before the foreclosure sale, the check did not arrive at Alessi's office until five days after the sale, at which Saticoy Bay had purchased the property.

Saticoy Bay then initiated the underlying action seeking to quiet title to the property, and Wells Fargo counterclaimed seeking the same. Both parties later moved for summary judgment, and the district court ruled in Wells Fargo's favor, concluding that Wells Fargo's offer to pay the superpriority portion of the HOA's lien constituted a valid tender sufficient to satisfy that portion of the lien and preserve the first deed of trust. Relying on our supreme court's opinion in *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. 42, 435 P.3d 1217 (2019), *vacated on reconsideration en banc*, Docket No. 73785 (Order Affirming in Part, Reversing in Part, and Remanding, May 7, 2020), the district court concluded that Wells Fargo's offer was a valid tender because Alessi's failure to cooperate with Wells Fargo's efforts to identify and satisfy the superpriority amount constituted a rejection of the offer. The district court thereby also impliedly concluded that any obligation to tender on the part of Wells Fargo was excused as a matter of law. And because the district court ruled on these grounds, it did not address Wells Fargo's alternative argument that the sale should be set aside in equity. This appeal followed.

Saticoy Bay contends on appeal that the district court erred in concluding that Wells Fargo's offer to pay the superpriority amount of the HOA's lien constituted a valid tender. It further contends that Wells Fargo failed to set forth any evidence demonstrating that Alessi would have

rejected any tender such that the obligation to tender was excused.[1] Wells Fargo counters that its offer did constitute valid tender and, alternatively, that its obligation to tender was excused in light of Alessi's supposed rejection of its offer. It additionally contends that its mailing of the check prior to the sale constituted sufficient tender, regardless of the fact that the check was not received until after the sale. Finally, it contends that this court could affirm on the alternative ground that the sale should have been set aside in equity for fraud, unfairness, or oppression.

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.

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[1]Saticoy Bay also contends that Wells Fargo waived the affirmative defense of tender, which it had the burden of proving, *see Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 52, 437 P.3d 154, 158 (2019) ("Payment of a debt is an affirmative defense, which the party asserting has the burden of proving." (citing NRCP 8(c) and *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979))), because it failed to assert it in a responsive pleading below. But as our supreme court did in *Resources Group*, we reject that argument because Saticoy Bay did not suffer any prejudice due to Wells Fargo's failure to plead the affirmative defense—which was heavily litigated below—and fairness dictates that we reach the issue of tender, which is crucial for evaluating the legal effect of the underlying sale. *See id.* at 53 n.5, 437 P.3d at 159 n.5.

At the outset, we agree with Saticoy Bay that the district court erred in concluding that Wells Fargo's offer to pay the superpriority amount of the HOA's lien—once Alessi informed it of that amount—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"). Moreover, we reject Wells Fargo's alternative argument that the check it mailed to Alessi for the superpriority amount constituted a valid tender as of the time of mailing. Wells Fargo failed to raise this issue below, instead insisting that the check arriving after the sale was legally irrelevant because Wells Fargo's previous offer to pay—combined with Alessi's failure to timely provide an account ledger—constituted sufficient tender. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."). And even if Wells Fargo had preserved the issue, existing Nevada precedent does not support its position. *See Res. Grp.*, 135 Nev. at 52-53, 437 P.3d at 158-59 (considering the date of arrival, not the date of mailing, in evaluating whether the tendering party met its burden to demonstrate the effectiveness of its mailed tender).

Turning to whether Wells Fargo's obligation to tender was excused as a matter of law, Wells Fargo does not point to any evidence in the record demonstrating that it knew Alessi would have rejected a tender of the superpriority amount. *See Perla Del Mar*, 136 Nev., Adv. Op. 6, 458 P.3d at 351 (citing *Schmitt v. Sapp*, 223 P.2d 403, 406-07 (Ariz. 1950) ("An actual tender is unnecessary where it is apparent the other party will not accept it. The law does not require one to do a vain and futile thing."

(citation omitted)); *see also Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (noting that a party moving for summary judgment "must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence"). To the contrary, Alessi had expressly informed Wells Fargo that it would "accept [a partial payment of the HOA's entire lien], but only as a progress payment, not payment in full." Wells Fargo contends that this statement—along with Alessi's prior statement that it could not provide a superpriority payoff amount unless Wells Fargo foreclosed—shows that Alessi would have rejected any tender purporting to cure the superpriority default.[2] But Wells Fargo fails to explain how Alessi's subjective belief that the HOA's superpriority lien was effective only upon foreclosure by the bank in any way indicates that it would have rejected a payment of the superpriority amount, especially in light of its stated willingness to accept a partial

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[2]We recognize that—as argued by Wells Fargo—the supreme court previously analyzed a similar statement by an HOA's foreclosure agent regarding the inapplicability of the superpriority lien until after foreclosure by the bank and concluded that, although it was not an explicit rejection of an offer to pay the superpriority amount, "the only reasonable construction of the [statement]" was that the agent would have rejected such a tender. *Thomas Jessup*, 135 Nev. at 46-47, 435 P.3d at 1220. However, as noted above, the supreme court later vacated its opinion in that matter upon reconsideration en banc in an unpublished order. Docket No. 73785 (Order Affirming in Part, Reversing in Part, and Remanding, May 7, 2020). And notably absent from that order is any construction at all of the agent's statement, as the supreme court instead declined to disturb the district court's factual finding following trial that the bank had failed to show that it knew the agent would reject a tender. *See id.* Moreover, unlike Alessi in the instant matter, the agent in that case did not explicitly inform the bank that it would have accepted a partial payment of the HOA's lien. *See Thomas Jessup*, 135 Nev. at 44, 435 P.3d at 1218; Docket No. 73785 (Order Affirming in Part, Reversing in Part, and Remanding, May 7, 2020).

payment. *See 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). Wells Fargo likewise fails to explain why Alessi would have had to agree with Wells Fargo that a superpriority portion of the HOA's lien existed—and that the offered payment would satisfy that portion—in order for Alessi to accept the tender or for the tender to have that legal effect. *See id.*; *see also Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018) (holding that a valid tender, even though it was rejected, "cured the default as to the superpriority portion of the HOA's lien, [and] the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion"); *cf. Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621-22, 426 P.3d 593, 596-97 (2018) (recognizing that a party's subjective belief as to the effect of a foreclosure sale cannot alter the sale's actual effect).

Wells Fargo further contends that Alessi's failure to provide a superpriority payoff amount or furnish any kind of account ledger until just a few days before the foreclosure sale constituted a refusal of cooperation either excusing Wells Fargo's obligation to timely tender or rendering its payment offer sufficient tender in and of itself. *See Perla Del Mar*, 136 Nev., Adv. Op. 6, 458 P.3d at 350 (citing *Cochran v. Griffith Energy Serv., Inc.*, 993 A.2d 153, 166 (2010) ("A tender is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied." (internal quotation marks omitted))). But even assuming that Alessi's conduct amounted to a refusal of cooperation, Wells Fargo fails to identify

any evidence or provide any explanation in support of the notion that Alessi's failure to cooperate made it impossible for Wells Fargo to timely deliver the tender; rather, it simply alleges that the account ledger Alessi provided before the sale was "grossly belated," thereby implying—without proving—that it was not capable of delivering the tender prior to the sale. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (recognizing that arguments of counsel are not evidence); *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Wells Fargo also points to the fact that it mailed the check and faxed a copy of it to Alessi prior to the sale, but it does not provide any legal reason why that should have prevented Alessi from proceeding with the sale on the scheduled date, nor does it point to any evidence demonstrating why there were no other means available to ensure that the tender was timely delivered. *Cf. Res. Grp.*, 135 Nev. at 56-57, 437 P.3d at 161 (concluding when evaluating whether a sale should have been set aside for fraud, unfairness, or oppression that a tender was not timely delivered because of the tendering party's lack of diligence, noting that it could have pursued other options, including overnight or in-person delivery).

Finally, to the extent Alessi's conduct in responding to Wells Fargo's inquiries may be relevant to whether the sale should be set aside in equity on grounds of fraud, unfairness, or oppression, *see Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 741, 405 P.3d 641, 643 (2017) ("[W]here the inadequacy of the price is great, a court may grant relief based on slight evidence of fraud, unfairness, or oppression."), the district court did not reach that issue 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"). Thus, because Wells Fargo fails to demonstrate that it was entitled to summary judgment in its favor, *see Wood*, 121 Nev. at 729, 121 P.3d at 1029, and because the district court must address the parties' equitable arguments in the first instance, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[3]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Timothy C. Williams, District Judge
Law Offices of Michael F. Bohn, Ltd.
Snell & Wilmer, LLP/Tucson
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk

[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.