IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEWEL D. SHEPARD,
Appellant,
vs.
BAYVIEW LOAN SERVICING, LLC; BANK OF AMERICA, N.A.; COUNTRYWIDE HOME LOANS, INC.; RECONTRUST COMPANY; AKERMAN LLP; AND TENESA S. POWELL,
Respondents.

No. 78804-COA

FILED

SEP 28 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jewel D. Shepard appeals from a district court order dismissing a civil complaint. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Shepard sued respondents Bayview Loan Servicing, LLC (Bayview); Bank of America, N.A. (BOA); Countrywide Home Loans, Inc. (Countrywide); Recontrust Company (Recontrust); Akerman LLP (Akerman); and Tenesa S. Powell alleging, among other things, that they committed various improprieties in connection with the foreclosure of her home. BOA, Countrywide, and Recontrust moved to dismiss Shepard's claims against them under NRCP 12(b)(5), arguing that Shepard named them in three prior lawsuits concerning the subject property; that she presented her present claims against them in the prior actions, or at least could have done so, and that her claims against them are therefore barred by the doctrine of claim preclusion and a settlement agreement from one of the prior actions. Bayview, Akerman, and Powell likewise moved to dismiss

under NRCP 12(b)(5), asserting that Shepard's complaint consisted of claims for breach of contract, intentional misrepresentation, and unjust enrichment and that those claims were not viable given Shepard's factual allegations. Moreover, Bayview, Akerman, and Powell argued that, insofar as Shepard's complaint included a claim to quiet title to the subject property, dismissal was required under NRCP 12(b)(6) for failure to name a necessary party under NRCP 19(b) since Shepard did not name the purchaser at the foreclosure sale—the Bank of New York Mellon FKA the Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-4CB, Mortgage Pass-Through Certificates, Series 2006-4CB (BNYM)—as a defendant in the underlying proceeding.

Shepard opposed dismissal and, after purporting to join BNYM to the underlying proceeding and attempting to serve it with process, she moved for the entry of default against it. The district court agreed with respondents and granted their respective motions to dismiss. And based on that decision, the district court also denied Shepard's motion for the entry of default against BNYM. This appeal followed.

Powell's Claims Against BOA, Countrywide and Recontrust

On appeal, Shepard initially argues that the district court erred by concluding that her claims against BOA, Countrywide, and Recontrust were barred by the claim preclusion doctrine and her prior settlement agreement with them. *See G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 705, 262 P.3d 1135, 1137 (2011) (explaining that the applicability of the claim preclusion doctrine is a question of law that appellate courts review de novo); *see also The Power Co. v. Henry*, 130 Nev. 182, 189, 321 P.3d 858, 863 (2014) (reviewing the district court's

interpretation of a settlement agreement de novo). In presenting this argument, Shepard repeatedly emphasizes that the underlying proceeding concerned the foreclosure of her home and maintenance costs that she subsequently incurred in connection with a break-in at the property. And because those events occurred after her prior lawsuits and the execution of the settlement agreement, Shepard contends that she could not have asserted her related claims against BOA, Countrywide and Recontrust in the prior lawsuits and that the claim preclusion doctrine and settlement agreement therefore do not apply here. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (explaining that, for claim preclusion to apply, "the subsequent action [must be] based on the same claims or any part of them that were or could have been brought in the first case").

Even if Shepard is correct, we cannot conclude, based on our de novo review, that she has stated viable claims for relief against BOA, Countrywide, or Recontrust. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (reviewing a district court order granting an NRCP 12(b)(5) motion to dismiss de novo). Shepard specifically contends that she stated claims for wrongful foreclosure and breach of contract based on an alleged violation of NRS 107.530 (Nevada's Homeowners' Bill of Rights) and for recovery of her maintenance costs against these respondents, which she asserts were not barred by claim preclusion or the settlement agreement. But because all of the allegations in Shepard's complaint relating to these claims concern actions taken by Bayview, Akerman, Powell and BNYM, her allegations do not support viable claims for relief against BOA, Countrywide and Recontrust. *See id.*

at 227-28, 181 P.3d at 672. And aside from these deficiencies in Shepard's complaint, nothing in the remainder of the record suggests that she could prevail on these claims against BOA, Countrywide and Recontrust, as she has never sought to demonstrate a connection between her underlying allegations and these respondents' purported liability for the alleged violation of NRS 107.530 or the maintenance costs.

While Shepard also argues that she stated wrongful foreclosure and breach of contract claims against these respondents based on her allegation that an assignment of her deed of trust was invalid because Recontrust was not licensed when it recorded the instrument, her argument is fundamentally flawed since Nevada law did not require deed-of-trust assignments to be recorded in 2010, when the one at issue here was executed.[1] NRS 106.210 (1965) (providing that "any assignment of the

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[1]To the extent that Shepard also asserts that she stated a claim for quiet title against these respondents, she has not demonstrated a basis for relief. Indeed, the district court concluded that, under NRCP 19(b), Shepard could not proceed with a quiet title claim since she did not name the record title holder, BNYM, as a party to the underlying proceeding. Shepard challenges that decision by asserting that she properly served BNYM. But the issue here is not whether Shepard served BNYM, which had not been properly joined to the underlying proceeding when Shepard attempted service. *See* NRCP 15(a)(2) (providing that, once the period for amending a pleading as a matter of course expires, "a party may amend its pleading only with the opposing party's written consent or the court's leave"). Instead, the issue here is whether the district court correctly determined that BNYM was a necessary party that could not be joined to the underlying proceeding. *See* NRCP 19(b) (requiring the district court to consider whether a claim should be dismissed if a person necessary to the proceeding cannot be joined). And because Shepard fails to address this determination on appeal, she waived any challenge thereto. *Powell v. Liberty Mut. Fire*

beneficial interest under a deed of trust *may* be recorded" (emphasis added)); *Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 233, 445 P.3d 846, 849 (2019) (recognizing that NRS 106.210 did not require deed-of-trust assignments to be recorded until it was amended in 2011 and that the amendment only applies to deed-of-trust assignments executed after July 1, 2011). And because Shepard does not argue that she stated any other claims against these respondents that were viable and not barred by claim preclusion or the settlement agreement, she has not demonstrated that the district court erred by dismissing her case against these respondents under NRCP 12(b)(5). *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Shepard's Claims Against Bayview, Akerman and Powell

Turning to Bayview, Akerman and Powell, to the extent that Shepard challenges the district court's decision to dismiss her claims for breach of contract, intentional misrepresentation and unjust enrichment against these respondents, her challenges fail.[2] Indeed, despite Shepard's suggestion to the contrary, the district court correctly determined that she failed to state a breach of contract claim, as she did not show the existence of a valid contract by simply alleging that she applied to these respondents in an effort to be considered for a foreclosure prevention alternative. *See Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006)

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).

[2]While Shepard asserts that she stated a viable quiet title claim against these respondents, her assertion fails for the reasons set forth above in the analysis of Shepard's arguments concerning the asserted quiet title claim against BOA, Countrywide and Recontrust.

(recognizing that, to prevail on a breach of contract claim in Nevada, a plaintiff must establish the existence of a valid contract) (citing *Richardson v. Jones & Denton*, 1 Nev. 405, 405 (1865)); *see also May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) (explaining that, "[w]ith respect to contract formation, preliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms").

And because Shepard does not address the district court's rationale for dismissing her intentional misrepresentation claim, she waived any challenge thereto. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011). Moreover, insofar as Shepard contends that she stated an unjust enrichment claim against these respondents based on the costs she incurred to maintain the property following the foreclosure sale, her contention fails since her allegations indicate that BNYM is the record titleholder of the subject property, and she does not argue or explain how Bayview, Akerman and Powell benefited from her expenditures to maintain it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument); *see also Topaz Mut. Co., Inc. v. Marsh*, 108 Nev. 845, 856, 839 P.2d 606, 613 (1992) (stating that one of the elements of an unjust enrichment claim is a "benefit conferred on the defendant by the plaintiff"). Thus, given the foregoing, Shepard failed to demonstrate that the district court erred by dismissing her claims against these respondents for breach of contract, intentional misrepresentation, unjust enrichment and quiet title. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Shepard further asserts that she stated claims against these respondents relating to a violation of a provision from Nevada's Homeowners' Bill of Rights. Specifically she purports to have asserted claims stemming from NRS 107.530 which, broadly speaking, provides that certain requirements must be satisfied once a borrower applies for a foreclosure prevention alternative before a foreclosure sale may proceed. Shepard further argues that the district court failed to consider that claim before dismissing her case against these respondents.

But a review of the record reveals that these respondents' argued that Shepard did not state a claim under NRS 107.530 because the property did not constitute owner-occupied housing as required by the statute in their motion to dismiss, and the district court ultimately granted their motion in its entirety even though it did not expressly address NRS 107.530. *See* 2013 Nev. Stat., ch. 403, preamble, at 2183-85 (enacting Nevada's Homeowners' Bill of Rights and stating that the act creates "civil remedies for failure to comply with certain provisions governing the foreclosure of owner-occupied property securing a residential mortgage loan"); *Sheriff v. Smith*, 91 Nev. 729, 734, 542 P.2d 440, 443 (1975) (explaining that "the stated purpose of legislation is a factor considered by courts in interpreting a given statute" and looking to the preamble to a session law to divine that purpose). On appeal, Shepard disputes whether the subject property constituted owner-occupied housing for purposes of NRS 107.530. But although Shepard alleged in her complaint that she resided at the subject property, she failed to oppose these respondents' argument, set forth in the motion to dismiss, that the property did not constitute owner-occupied housing, and as a result, she waived the issue.

Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.3d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."). Thus, given the foregoing, Shepard failed to demonstrate that the district court erred by granting these respondents' motion to dismiss her claims against them under NRCP 12(b)(5). *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Scott N. Freeman, District Judge
Jewel D. Shepard
Akerman LLP/Las Vegas
Washoe District Court Clerk

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[3]Insofar as Shepard raises 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.