IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRASHED HOME CORPORATION, A NEVADA CORPORATION,
Appellant,
vs.
BANK OF AMERICA, N.A.,
Respondent.

No. 78923-COA

ORDER OF REVERSAL AND REMAND

Trashed Home Corporation (Trashed Home) appeals from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

The original owner of the subject property failed to make periodic payments to his homeowners' association (HOA). Through its foreclosure agent, Absolute Collection Services, LLC (ACS), 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. The holder of the first deed of trust on the property, respondent Bank of America, N.A. (BOA), responded through its counsel, Miles, Bauer, Bergstrom & Winters, LLP (Miles Bauer), by sending a payoff request to ACS prior to the sale to inquire 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, ACS 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 HOA eventually proceeded with its foreclosure sale, where Trashed Home purchased the property.

Trashed Home then initiated the underlying action seeking to quiet title to the property, and BOA counterclaimed seeking the same. The matter eventually proceeded to a bench trial, and the district court ruled in BOA's favor. In particular, the district court determined that ACS's response to the offer to pay the superpriority amount constituted a rejection and that the offer and rejection operated to satisfy the superpriority portion of the HOA's lien and to preserve BOA's deed of trust pursuant to *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). And because the district court ruled based on the excuse-of-tender doctrine, it did not address BOA's alternative argument that the sale should be set aside in equity. This appeal followed.

On appeal, the parties dispute whether the evidence and trial testimony supported the district court's application of the excuse-of-tender doctrine. 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).

Initially, we recognize that the present case involves correspondence between Miles Bauer and ACS that is substantially similar to the correspondence at issue in *Thomas Jessup* and that the district court reached the same conclusion in the present case with respect to the excuse-

of-tender doctrine as the supreme court reached in *Thomas Jessup*. 135 Nev. at 46-47, 435 P.3d at 1220 (construing a letter from ACS that is substantially similar to the letter in the present case as a rejection of an offer to pay and concluding that the offer and rejection operated to satisfy the superpriority portion of the HOA's lien and preserve the first deed of trust). But after the district court entered the final judgment in the underlying proceeding, the supreme court granted a petition for en banc reconsideration of the *Thomas Jessup* decision, vacated that decision, and affirmed the final judgment in favor of the purchaser at the underlying foreclosure sale based in part on its determination that the excuse-of-tender doctrine did not apply. *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). In reaching that decision, the supreme court applied another opinion that was entered after the final judgment in the underlying proceeding, *7510 Perla Del Mar Ave Trust v. Bank of America, N.A.*, 136 Nev. 62, 458 P.3d 348 (2020), which clarified that the excuse-of-tender doctrine applies "when evidence shows that the party entitled to payment had a known policy of rejecting such payments." *Thomas Jessup*, Docket No. 73785 (Order Affirming in Part, Reversing in Part, and Remanding, May 7, 2020). In particular, the court concluded that the district court did not clearly err in finding that the evidence introduced at trial was insufficient to meet that standard. *Id.*; *see 928 Country Rack Tr. v. Bank of Am., N.A.*, Docket No. 79543 (Order of Reversal and Remand, September 18, 2020) (recognizing that, in the *Thomas Jessup* dispositional order, the supreme court deemed the underlying evidence insufficient to meet the *Perla Del Mar* standard).

In the present case, insofar as the district court found that ACS had a known policy of rejecting superpriority tenders, its decision was not supported by substantial evidence, as the evidence here is substantially identical to the evidence addressed in the *Thomas Jessup* dispositional order discussed above that the supreme court deemed insufficient to make such a showing—specifically, the correspondence between Miles Bauer and ACS and the trial testimony of Kelly Mitchell and Rock Jung.[1] *See Radecki*, 134 Nev. at 621, 426 P.3d at 596. And although BOA argues that we may nevertheless affirm the final judgment in its favor on grounds of fraud, unfairness, or oppression based on ACS's conduct in responding to the offer to pay the superpriority amount, *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

---

[1]BOA argues, based on extrajurisdictional authority, that the excuse-of-tender doctrine also applies where a debt is only ascertainable from a creditor's books and the creditor refuses to disclose the amount of the debt. But while BOA asserts that it could not learn the superpriority amount and tender payment because ACS refused to provide a statement of account for the property, BOA offers no argument or explanation as to why it could not ascertain the superpriority amount by other means, such as by asking the homeowner, the HOA, or the HOA's management company what the HOA's monthly assessments were. Moreover, BOA fails to explain why it could not have tendered an amount corresponding to the HOA's entire lien, as set forth in its foreclosure notices, and requested a refund of the subpriority portion if the tender was accepted. *Cf. SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 757, 334 P.3d 408, 418 (2014) (rejecting a due process challenge to a foreclosure notice that did not specifically state the superpriority amount of the HOA lien since, among other things, the bank could have simply paid the entire lien and requested a refund). Thus, we discern no basis for relief in this regard.

first time on appeal. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (noting that "this court will not address issues that the district court did not directly resolve"). Thus, given the foregoing, we reverse the judgment in favor of BOA and remand this matter for the district court to address the parties' equitable arguments in the first instance.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Hong & Hong
Akerman LLP/Las Vegas
Eighth District Court Clerk