IN THE COURT OF APPEALS OF THE STATE OF NEVADA

USROF III LEGAL TITLE TRUST 2015-1, BY U.S. BANK NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE,
Appellant,
vs.
LAS VEGAS RENTAL AND REPAIR LLC SERIES 66, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 78331-COA

FILED

NOV 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART AND REMANDING

USROF III Legal Title Trust 2015-1 (USROF) 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, Darlene Castello, failed to make periodic payments to her homeowners' association (HOA). Through its foreclosure agent, Hampton & Hampton (H&H), the HOA initiated nonjudicial foreclosure proceedings to collect on the past due assessments and other fees pursuant to NRS Chapter 116. Castello made multiple partial payments on the delinquencies to both H&H and the HOA directly, but the HOA ultimately foreclosed on the property and sold it to respondent Las Vegas Rental and Repair LLC Series 66 (LVRR). LVRR then initiated the underlying action seeking, in relevant part, to quiet title to the property, and USROF—the beneficiary of the first deed of trust on the property—filed a counterclaim seeking the same and asserting a claim

of unjust enrichment. The matter proceeded to a bench trial, following which the district court ruled in favor of LVRR, concluding that the HOA foreclosed on its superpriority lien such that the foreclosure sale extinguished the first deed of trust. The district court further concluded that USROF failed to prove its unjust-enrichment claim.[1] This appeal followed.

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).

On appeal, USROF primarily contends that the district court failed to make any findings regarding amounts H&H disbursed to the HOA after reversing certain charges related to H&H's collection efforts. Specifically, USROF points to evidence in the record indicating that after Castello made payments to H&H totaling $1,222, H&H filed a second notice of delinquent assessment lien and reversed all of the collection costs it had charged in connection with the first notice.[2] USROF points to further

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[1]LVRR also asserted an unjust-enrichment claim, but it withdrew that claim at trial. Nevertheless, in its findings of fact and conclusions of law, the district court proceeded to rule against LVRR on that claim. LVRR has not challenged that ruling by way of a cross-appeal, nor does it dispute USROF's position on appeal that the claim was withdrawn.

[2]Despite some argument on this point below, both parties agree on appeal that the first notice remained the operative notice for purposes of

evidence indicating that H&H then applied $491 from Castello's partial payments to the collection costs owed to it in connection with the second notice, and it issued a check to the HOA for the $731 remaining from the partial payments. Finally, USROF points to evidence indicating that the HOA may have then applied the $731 to delinquent assessments accrued in 2007, 2008, and part of 2009. Accordingly, USROF contends that the superpriority portion of the HOA's lien, which consisted solely of the five months of delinquent assessments in 2007 predating the first notice of delinquent assessment lien (a total of $150), was satisfied such that the deed of trust survived the foreclosure sale.

LVRR counters that substantial evidence supports the district court's determination that the superpriority portion of the HOA's lien was not satisfied prior to the foreclosure sale. Although LVRR acknowledges that "the district court did not explain its calculations or reconcile the accounting," it nevertheless contends that the district court weighed the evidence—including conflicting accounting ledgers and testimony from representatives of H&H and the HOA's management company regarding what delinquencies remained unsatisfied at the time of foreclosure—and appropriately resolved any conflicts in favor of LVRR.

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determining the superpriority amount of the HOA's lien, as H&H only filed the second notice for record keeping purposes after it lost records associated with the first notice. Moreover, trial testimony from H&H's representative confirmed the agent's intent to foreclose on the delinquency identified in the first notice.

Although we defer to a district court's findings of fact when they are supported by substantial evidence in the record, *see Radecki*, 134 Nev. at 621, 426 P.3d at 596, the district court did not make any findings of fact regarding the $731 payment to the HOA, nor did it determine whether the HOA actually applied those funds to Castello's account and, if so, how they were applied.[3] Instead, despite USROF devoting a significant portion of its closing argument to the facts surrounding the $731 payment and its legal effect, the district court simply concluded that the HOA was not obligated—under its CC&Rs or otherwise—to apply payments to the superpriority portion of its lien before applying them to other charges. The district court further concluded that H&H's practice of applying payments to its collection fees and costs before disbursing any remaining funds to the HOA did not constitute unfairness that, combined with the inadequate sale price, would warrant unwinding the sale or otherwise preserving the deed of trust. These determinations pertained only to the HOA's legal obligations and the fairness of its agent's collection policies; they did not resolve open factual questions as to the nature of the $731 payment from H&H and whether it was applied to particular charges in the HOA's lien.

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[3]Conversely, the district court did specifically find that multiple later payments Castello made directly to the HOA were not applied to the superpriority portion of its lien and were instead applied to later-incurred assessments, and that finding is supported by substantial evidence in the record. Likewise, the district court's finding that the HOA and H&H had agreed that all amounts collected by H&H would first be applied to H&H's collection fees and costs before being disbursed to the HOA is supported by substantial evidence. However, neither of those findings resolve the question of how the HOA applied the $731 disbursed to it by H&H.

We note that at the time it entered judgment, the district court did not have the benefit of the recent opinion in *9352 Cranesbill Trust v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 459 P.3d 227 (2020), which our supreme court issued just days after LVRR filed its answering brief in this appeal. In that case, the supreme court held that "[a]llocating partial payments by a homeowner to her HOA depends on the express or implied intent and actions of the homeowner and the HOA and, if indeterminate, an assessment of the competing equities involved." *Id.* at 82, 459 P.3d at 232. Specifically, the court noted that a debtor generally has the right to appropriate a partial payment to particular obligations outstanding, but if she does not do so, "the creditor may determine how to allocate the payment." *Id.* at 80, 459 P.3d at 231. Moreover, if the creditor makes an allocation, it may not thereafter allocate the payment to a different debt, and its right to make an allocation terminates when a controversy surrounding application of the funds arises.[4] *Id.* Finally, if neither the

[4]LVRR maintains that the entirety of Castello's $1,222 in payments was applied first to collection fees and costs—and not to assessments—based upon the agreement between the HOA and H&H that payments would be so applied. But it is not clear how the $731 in question could have been applied to collection costs when it appears that H&H disbursed that amount to the HOA precisely because no such costs then existed. LVRR also cites to testimony from the representative for the HOA's management company indicating that the HOA's prior management company had mistakenly applied the $731 to assessments when that amount should have been applied to collection fees and costs. But again, it does not appear that any such costs existed at the time the $731 was disbursed to the HOA, and LVRR does not explain how the HOA—if it did in fact apply the funds to

debtor nor the creditor specifically allocate the payment, the court must determine how to allocate it in equity.[5] *Id.*

Because the district court did not have the benefit of *Cranesbill*, and because it did not address the factual and legal issues surrounding the $731 payment from H&H, we vacate the judgment in part and remand for the district court to address these issues in the first instance.[6] *Id.* at 81,

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assessments mistakenly—would have been entitled to change its allocation once it was already made. Nevertheless, because the district court did not address these largely factual issues below, we decline to resolve them here. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.").

[5]On this point, the supreme court noted that "[o]ther jurisdictions have stated a legal preference for paying the earliest matured debts," *Cranesbill*, 136 Nev. at 81, 459 P.3d at 231, which, under the facts and circumstances presented here, are the 2007 assessments comprising the superpriority portion of the HOA's lien.

[6]USROF also contends on appeal that the district court overlooked the HOA's own internal collection policy that was in effect at the time the payments at issue were made. That policy provided in relevant part that, unless otherwise specified in a written agreement or if there was good cause to diverge from the policy in a particular case, the HOA would apply partial payments first to the oldest delinquent assessments and then to all other charges. Although we recognize—as argued by LVRR and as determined by the district court—that the HOA and H&H had entered into their own agreement whereby H&H would apply any payments it received to its own collection fees and costs first, trial testimony from the representative of the HOA's management company indicates that the HOA's policy would have applied to payments received directly by the HOA. The extent to which this

459 P.3d at 232 ("[W]e vacate and remand for the parties to develop and the district court to determine the proper allocation of the homeowner's payments under the principles and authorities just discussed."). We likewise vacate the judgment insofar as the district court determined that LVRR was a bona fide purchaser. Assuming LVRR qualifies as such, that status would not override the void sale that would result should the district court rule in USROF's favor on remand. *Id.* at 82, 459 P.3d at 232.

We turn now to the district court's ruling with respect to USROF's unjust-enrichment claim. USROF contends that the district court incorrectly ruled against it on this claim because it and its predecessor conferred a benefit on LVRR by continuing to pay taxes and maintain an insurance policy for the property after the foreclosure sale, and because LVRR should reimburse it for those expenses. LVRR counters that USROF paid those expenses to benefit itself and that the voluntary-payment doctrine precludes recovery. Although USROF pleaded its unjust-enrichment claim in the alternative in the event that it lost its security interest and we are remanding for further proceedings to determine whether that occurred, we nevertheless conclude that USROF has failed to demonstrate that it would be entitled to relief on this claim.

To recover for unjust enrichment, a plaintiff must show that it conferred a benefit on the defendant, that the defendant appreciated the benefit, and that the defendant accepted and retained the benefit under

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policy may be relevant to the $731 disbursement and how the HOA may have intended to apply those funds is a matter for the district court to examine in light of *Cranesbill* on remand.

circumstances where it would be inequitable for the defendant not to reimburse the plaintiff. *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012). Here, the district court concluded that USROF's unjust-enrichment claim failed because the evidence at trial did not demonstrate that USROF paid taxes and maintained insurance on the property with the intent to confer a benefit on LVRR and with a reasonable expectation of repayment. But the district court did not identify—and LVRR does not identify on appeal—any authority indicating that USROF must show that it intended to benefit LVRR. Rather, the law of unjust enrichment—as set forth by our supreme court and as acknowledged elsewhere—focuses on the mere fact of a conferred benefit and whether the plaintiff ought to be reimbursed in equity.[7] *See id.*; *see also Limbach Co. v. City of Phila.*, 905 A.2d 567, 577 (Pa. Commw. Ct. 2006) ("The polestar of the unjust enrichment inquiry is whether the defendant has been *unjustly* enriched; the intent of the parties is irrelevant."). Moreover, it is generally recognized that a plaintiff may be

[7]Although our supreme court acknowledged in *Certified Fire Protection* that a reasonable expectation of repayment may be relevant to whether a plaintiff is entitled to recover for unjust enrichment, it did so in the context of discussing the specific remedy of quantum meruit, which is generally defined as "[l]iability in restitution for the market value of goods or services." 128 Nev. at 380-81, 283 P.3d at 256-57 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 49 cmt. f (Am. Law Inst. 2011)). Moreover, in the same section of the treatise that the *Certified Fire Protection* court cited concerning the reasonable expectation of repayment, the author noted that "[t]he duty to pay arises not from the intent of the parties but from the law of natural justice and equity." 26 Richard A. Lord, *Williston on Contracts* § 68:1 (4th ed. 2019).

entitled to restitution if it incurs an expense to protect its property interest and thereby confers a benefit on another who also claims an interest in the property. *See* Restatement (Third) of Restitution and Unjust Enrichment § 26 (Am. Law Inst. 2011).

However, although the district court did not explicitly rely on it in the written judgment, LVRR argued below and again argues on appeal that USROF is precluded from recovery for unjust enrichment under the voluntary-payment doctrine, which "provides that one who makes a payment voluntarily cannot recover it on the ground that he was under no legal obligation to make the payment." *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 954, 338 P.3d 1250, 1253 (2014) (internal quotation marks omitted). In determining whether a payment was voluntary, the doctrine "considers the willingness of a person to pay a bill *without protest as to its correctness or legality*." *Id.* (internal quotation marks omitted). And as relevant here, the district court found that USROF never made any demand upon LVRR for repayment, and there is no indication from the record that USROF otherwise made the relevant payments under protest. Moreover, although a payment made in defense of property constitutes an exception to the voluntary-payment doctrine, the risk of losing the property must be imminent, and USROF has not demonstrated that any such risk existed at the time it made the payments at issue here. *See id.* at 958, 338 P.3d at 1256.

Finally, we note that USROF—even though the parties addressed the issue below—did not present any argument concerning the voluntary-payment doctrine in its opening brief, nor did it attempt to rebut

LVRR's arguments concerning the doctrine in its reply brief. We therefore deem the issue waived, *see Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position"), and we affirm the district court's judgment insofar as it rejected USROF's unjust-enrichment claim.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[8]

_____, C.J.
Gibbons

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Tao

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Bulla

[8]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.

cc: Hon. Susan Johnson, District Judge
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