IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS OF THE CWALT TRUST, INC., ALTERNATIVE LOAN TRUST 2004-18CB MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2004-18CB,
Appellant,
vs.
NEVADA SANDCASTLES, LLC,
Respondent.

No. 79749-COA

FILED

DEC 28 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

The Bank of New York Mellon (BNYM) appeals from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

The original owner of the subject property failed to make periodic payments to her homeowners' association (HOA). The HOA initiated nonjudicial foreclosure proceedings to collect on the past due assessments and other fees pursuant to NRS Chapter 116. Prior to the sale, BNYM—holder of the first deed of trust on the property—tendered payment for the entire delinquency to the HOA, which then rescinded the foreclosure. However, after the original owner again failed to pay assessments, the HOA initiated foreclosure proceedings for a second time. The HOA then failed to mail BNYM the statutory notice of default, but it did later mail the notice of sale. Despite receiving actual notice of the sale 20 days before it occurred, BNYM failed to take any action to preserve its interest, and the HOA sold the property to respondent Nevada Sandcastles, LLC (Sandcastles).

Sandcastles then initiated the underlying action to quiet title to the property, and BNYM counterclaimed seeking the same. The district court later granted summary judgment in favor of BNYM, concluding that the failure to mail the statutory notice of default rendered the foreclosure sale void. Our supreme court reversed that decision and remanded the case to the district court, concluding that the district court failed to account for the requirement that a party suffer prejudice as a result of defective notice for the sale to be rendered void. *Nev. Sandcastles, LLC v. Bank of N.Y. Mellon*, Docket No. 74522 (Order of Reversal and Remand, September 13, 2018).[1] On remand, the matter proceeded to a bench trial, following which the district court ruled in Sandcastles' favor, finding that BNYM was not prejudiced and that it was not entitled to equitable relief. 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

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[1]In this appeal, Sandcastles contends that, in light of the supreme court's ruling, no trial should have taken place and the district court should have simply entered judgment in Sandcastles' favor on remand. But Sandcastles fails to identify any portion of the record below where it raised this objection. *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."). Moreover, the supreme court did not direct the district court to enter judgment on remand. *Cf. SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 135 Nev. 346, 352, 449 P.3d 461, 466 (2019) (reversing an order granting one party summary judgment and directing entry of judgment on the opposing party's countermotion for summary judgment); *SFR Invs. Pool 1, LLC v. First Horizon Home Loans*, 134 Nev. 19, 25, 409 P.3d 891, 895 (2018) (doing the same). Accordingly, because the district court allowed the parties to conduct further discovery and try the case on the merits, we review the final judgment following trial.

evidence." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

On appeal, BNYM presents multiple arguments in support of reversal. First, BNYM contends that the HOA did not foreclose on the superpriority portion of its lien and instead foreclosed only on the subpriority portion. But none of BNYM's arguments on this point are meritorious, as the foreclosure deed unambiguously provided that the HOA conveyed "all its right, title and interest" in the property to Sandcastles, thus demonstrating that no superpriority interest in the property remains. *See City Motel, Inc. v. State ex rel. State Dep't of Highways*, 75 Nev. 137, 141, 336 P.2d 375, 377 (1959) ("It is the intent of the parties to the deeds which . . . must determine the nature and extent of the estate conveyed . . . , and [where the underlying facts are not in dispute], that intent can be ascertained only from the language of the deeds themselves."). Moreover, the mortgage-protection clause in the HOA's CC&Rs that BNYM identifies as proof of the HOA's intent to foreclose on only the subpriority portion of its lien amounted to an unenforceable waiver of its superpriority rights under NRS 116.1104. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 757-58, 334 P.3d 408, 418-19 (2014). And finally, the post-sale distribution of proceeds was not entirely consistent with a subpriority-only sale as BNYM suggests, as the HOA would not have been entitled to the amount comprising the superpriority portion of its lien following such a sale, and the evidence at trial indicates that the HOA satisfied its entire lien from the proceeds.

BNYM next argues that the district court should have declared the foreclosure sale void to the extent it purported to extinguish the first deed of trust. Specifically, BNYM contends that it did not receive timely

notice of the original owner's default and that it was thereby prejudiced because it would have cured the deficiency had it received such notice. Sandcastles counters that the district court appropriately found that BNYM failed to demonstrate prejudice because it received actual notice of the sale with sufficient time for it to take action to preserve its interest.

Following an HOA's foreclosure on the superpriority portion of its lien, a district court may declare the foreclosure sale void as to that portion if the HOA failed to provide the holder of the first deed of trust on the property with adequate statutory notice of the homeowner's default, the deed of trust holder did not receive timely notice by other means, and it suffered prejudice as a result. *U.S. Bank, Nat'l Ass'n ND v. Res. Grp., LLC*, 135 Nev. 199, 205, 444 P.3d 442, 448 (2019) (holding that, if all of the aforementioned factors are satisfied, "the district court should determine whether, under NRS 107.080 (2011), it should declare the sale void to the extent it purports to extinguish [the] deed of trust"). Here, it is undisputed that the notice of default was never mailed to BNYM and that BNYM did not otherwise receive actual notice of the default or sale until 20 days before the sale occurred, which was far less than the 90-day statutory grace period afforded to deed of trust holders to allow them "time to cure, compromise, or contest the default." *Id.* at 204, 444 P.3d at 447 (citing the pre-2015 and pre-2019 versions NRS 116.31162 and NRS 107.090(3), respectively). Accordingly, the only question on this issue for the district court to resolve was whether BNYM suffered prejudice as a result of the failure to provide timely notice.

Following trial, the district court found that BNYM was not prejudiced because the notice of sale it received 20 days before the sale included the full payoff amount of the HOA's lien and, within those 20 days,

BNYM could have inquired as to the superpriority portion of the lien or paid the full amount and requested a refund.[2] *See SFR*, 130 Nev. at 757, 334 P.3d at 418 (noting that "nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance"). And although the representative for Bayview Loan Servicing, LLC (Bayview)—BNYM's loan servicer at the time of the underlying foreclosure—indicated at trial that 20 days was not enough time to handle the type of transaction at issue here and that 30 days would have been a reasonable amount of time, he also testified that the transaction potentially could have been handled on an urgent basis if BNYM had forwarded the notice of sale to Bayview, but that Bayview's files did not contain any record of the notice.

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[2]BNYM argues that the amount stated in the notice of sale was merely an approximation of the total payoff amount, thereby supporting BNYM's contention that it needed more time to obtain final payoff figures from the HOA's foreclosure agent before it could satisfy the lien. But even if BNYM tendered only the amount listed in the notice of sale, the tender would have necessarily included the superpriority portion of the HOA's lien, and it therefore would have been sufficient to preserve BNYM's interest. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018) (holding that an unconditional tender of the superpriority amount preserves the first deed of trust); *see also* NRS 116.3116(2) (2012) (describing the superpriority component of an HOA's lien as "the assessments for common expenses . . . which would have become due . . . during the 9 months immediately preceding institution of an action to enforce the lien"); *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 25-26, 388 P.3d 226, 231 (2017) (recognizing that, under the pre-2015 version of NRS 116.3116, serving a notice of delinquent assessments constitutes institution of an action to enforce the lien).

On this point, BNYM contends that—as the district court specifically found—it took 38 days following the notice of default for BNYM and its prior loan servicer, Bank of America, N.A. (BOA), to pay off the HOA's previous lien. BNYM reasons that, presuming the normal course of business was followed as required under NRS 47.250(18)(c),[3] it would have taken roughly the same amount of time for BNYM and Bayview to effectuate a payment with respect to the lien at issue in this case. But the evidence admitted at trial reveals that BNYM had forwarded the notice of default with respect to the HOA's previous lien to BOA within about 10 days of receiving it. And based on the testimony of Bayview's representative, had BNYM forwarded the notice of sale to Bayview with similar expedience, Bayview may have been able to address the situation, especially in light of the fact that BOA had satisfied the previous lien within eight days of receiving the payoff amount.

Additionally, Bayview's representative testified only in general terms about how long it would have reasonably taken for Bayview to handle the transaction; he did not testify that Bayview would have actually tendered any portion of the lien had it received the notice of sale or if BNYM had received the notice of default. *Cf. Res. Grp.*, 135 Nev. at 204, 444 P.3d at 447 (noting that a bank representative's testimony that, "had [the bank] received notice of default, it would have paid the lien off and charged its borrower," if credited, "establishes the lack of notice and prejudice needed to void the sale"). On this evidentiary record, we cannot conclude that the

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[3]We note that—from the record on appeal—it does not appear that BNYM presented any argument regarding this presumption below. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983.

district court clearly erred in finding that BNYM failed to demonstrate prejudice as a result of the statutorily defective notice.[4] *See id.* at 205, 444 P.3d at 448; *Radecki*, 134 Nev. at 621, 426 P.3d at 596.

Finally, BNYM contends that even if the sale was not void, it is nevertheless voidable in equity on grounds that the defective notice, in tandem with the grossly inadequate sale price, amounted to fraud, unfairness, or oppression affecting the sale. *See Res. Grp.*, 135 Nev. at 206, 444 P.3d at 449 (recognizing that equitable relief is available even if defective notice does not render a sale void and that a grossly inadequate sale price, combined with a failure to mail the notice of default to the deed of trust holder—even if it received the notice of sale—"presents a classic claim for equitable relief" under Nevada precedent); *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 749 n.11, 405 P.3d 641, 648 n.11 (2017) (noting that the "irregularities that may rise to the level of fraud, unfairness, or oppression include an HOA's failure to mail a deed of trust beneficiary the statutorily required notices"). However, we note that the supreme court stated in its order of reversal and remand

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[4]In light of our disposition of this issue, we need not consider the district court's alternative determination that BNYM was barred from raising its claim of prejudice under the doctrine of laches. Further, we need not address Sandcastles' argument that BNYM was required to challenge the defective notice within 90 days of the sale under NRS 107.080, as it failed to raise that issue below. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Finally, we reject Sandcastles' contention that BNYM was precluded from litigating this action under the election-of-remedies doctrine, as that doctrine merely prevents the pursuit of inconsistent remedies in litigation, which BNYM did not do here. *See J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 289, 89 P.3d 1009, 1017 (2004) (recognizing that litigants may pursue alternative claims for relief and are not required to elect a remedy until after the verdict).

in this matter that, "[i]n the absence of prejudice, [BNYM] likewise would not have been entitled to equitable relief if the district court had analyzed the sale under the 'fraud, unfairness, or oppression' standard." *Nev. Sandcastles, LLC*, Docket No. 74522 (citing *Shadow Canyon*, 133 Nev. at 747-50, 405 P.3d at 647-49 (discussing cases and reaffirming that inadequate price alone is insufficient to set aside a foreclosure sale absent "fraud, unfairness, or oppression")).

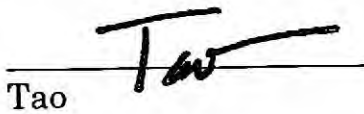
Although the supreme court's opinion in *Resources Group*—which was issued almost one year after its unpublished order in this matter—seems to indicate that equitable relief might still be available to a party like BNYM even in the absence of a showing of direct prejudice stemming from the defective notice (i.e., that the failure to mail the notice of default in and of itself, regardless of whether the deed of trust beneficiary later received actual notice by other means that would have allowed it to take action to preserve its interest, may constitute the slight evidence of unfairness needed to warrant equitable relief where the sale price was grossly inadequate, *see Shadow Canyon*, 133 Nev. at 741, 405 P.3d at 643), the supreme court did not explicitly hold as much. And, consistent with its prior decision in this case, multiple other decisions from the supreme court predating *Resources Group* seem to acknowledge prejudice as a requirement for equitable relief in these types of matters. *See, e.g.*, *Shadow Canyon*, 133 Nev. at 752-53, 405 P.3d at 650 (holding that a deed of trust beneficiary was not entitled to equitable relief on grounds of a technical irregularity in the notice of sale because there was no evidence that the beneficiary "was confused or otherwise prejudiced by the notice of sale"); *U.S. Bank Nat'l Ass'n v. RJRN Holdings, LLC*, Docket No. 72212 (Order of Affirmance, March 15, 2018) (concluding that "U.S. Bank did not introduce evidence

that it or its predecessor were somehow misled or prejudiced by" a failure to include certain information in the foreclosure notices).

Accordingly, because it is not clear that *Resources Group* constitutes a change in controlling law, we remain bound by the supreme court's prior order in this case. *See* NRAP 36(c)(2); *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44-45, 223 P.3d 332, 334 (2010) (discussing the law-of-the-case doctrine); *Hsu v. Cty. of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007) ("[W]hen this court issues an intervening decision that constitutes a change in controlling law, courts subject to the previously decided law of the case may depart from it and apply the new rule of law."). BNYM's failure to demonstrate prejudice is therefore fatal to its claim for equitable relief, and we

ORDER the judgment of the district court AFFIRMED.[5]

_____, C.J.
Gibbons



_____, J.
Tao

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Bulla

[5]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. Stefany Miley, District Judge
Akerman LLP/Las Vegas
The Wright Law Group
Eighth District Court Clerk