IN THE COURT OF APPEALS OF THE STATE OF NEVADA

5333 SPICEBUSH ST TRUST, Appellant, vs. DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT RELATING TO IMP AC SECURED ASSETS CORP., MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-4, Respondent.	No. 80955-COA FILED APR 29 2021 ELIZABETH A. BROWN CLERK OF SUPREME COURT BY S. Young DEPUTY CLERK

ORDER OF AFFIRMANCE

5333 Spicebush St Trust (Spicebush) appeals from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

The original owner of the subject property failed to make periodic payments to her homeowners' association (HOA). 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. Prior to the sale, Bank of America, N.A., on behalf of respondent Deutsche Bank National Trust Company (Deutsche Bank)—the beneficiary of the first deed of trust on the property—tendered payment to the HOA's foreclosure agent in an amount exceeding nine months of past due assessments, but the agent rejected the tender and

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proceeded with its foreclosure sale, at which Spicebush purchased the property.

Deutsche Bank later filed an action seeking to quiet title against Spicebush in federal district court, but the court dismissed the action without prejudice. *See Deutsche Bank Nat'l Tr. Co. v. 5333 Spicebush St Tr.*, No. 2:17-CV-1978 JCM (CWH), 2018 WL 1245493, at *7 (D. Nev. Mar. 9, 2018). Spicebush subsequently filed the underlying action seeking to quiet title against Deutsche Bank, which filed an answer and counterclaim seeking the same and asserting tender as an affirmative defense. The district court dismissed Deutsche Bank's counterclaim on grounds that it was time-barred, but when the parties later filed competing motions for summary judgment on Spicebush's claim, the district court ruled in Deutsche Bank's favor, concluding that the tender satisfied the HOA's superpriority lien such that Spicebush took the property subject to Deutsche Bank's deed of trust. This appeal followed.

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.

Here, the district court correctly determined that the tender of an amount exceeding nine months of past due assessments satisfied the HOA's superpriority lien such that Spicebush took the property subject to Deutsche Bank's deed of trust. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018). We reject Spicebush's argument that Deutsche Bank's assertion of tender was time-barred under various statutes of limitations, as the district court properly concluded that Deutsche Bank raised tender as an affirmative defense and that affirmative defenses are not subject to statutes of limitations. *See, e.g., Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798-99, 801 P.2d 1377, 1381-82 (1990) (applying equitable principles and reasoning that, although the filing of a complaint does not toll the statute of limitations governing a defendant's compulsory counterclaim, the defendant may nevertheless raise the same theory as an affirmative defense); *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 102, 389 P.2d 394, 396 (1964) ("Limitations do not run against defenses."); *see also City of Saint Paul v. Evans*, 344 F.3d 1029, 1033-34 (9th Cir. 2003) (concluding that statutes of limitations do not apply to defenses because "[w]ithout this exception, potential plaintiffs could simply wait until all available defenses are time barred and then pounce on the helpless defendant").

We likewise reject Spicebush's argument that Deutsche Bank was time-barred from seeking affirmative equitable relief from the conclusive recital of default in the foreclosure deed, as Deutsche Bank's affirmative tender defense did not amount to such a request for relief. *See Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing LLC*, 136 Nev.,

Adv. Op. 85, 478 P.3d 376, 379 (2020) (confirming that "a valid tender cures a default '*by operation of law*'—that is, without regard to equitable considerations"). And although we need not consider Spicebush's arguments raised for the first time in its reply brief that the tender was impermissibly conditional and that the HOA's foreclosure agent had a good-faith basis for rejecting it, *see Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (concluding that an issue raised for the first time in a reply brief was waived), we nevertheless conclude that they are without merit. *See McLaren*, 136 Nev., Adv. Op. 85, 478 P.3d at 379 (evaluating a materially identical tender and rejecting these same arguments).

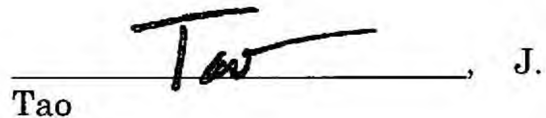
Further, given that the underlying sale was void as to the superpriority amount of the HOA's lien as a matter of law, Spicebush's arguments that it was a bona fide purchaser and that it should prevail in equity are unavailing. *See Bank of Am.*, 134 Nev. at 612, 427 P.3d at 121 (noting that a party's bona fide purchaser status is irrelevant when a defect in the foreclosure renders the sale void as a matter of law). And to the extent Spicebush contends that Deutsche Bank's tender defense was precluded under the doctrines of claim and issue preclusion, neither the federal district court's dismissal without prejudice nor the interlocutory dismissal in this matter constituted final judgments, meaning neither doctrine of preclusion applied. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054 n.27, 194 P.3d 709, 713 n.27 (2008) (noting that a dismissal without prejudice does not constitute a valid final judgment for purposes of preclusion); *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5-6, 106 P.3d 134, 136-37 (2005) (recognizing that interlocutory orders are not final); 18A

Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4434 (3d ed. 2021) ("Preclusion should not apply within the framework of a continuing action.").

In light of the foregoing, the district court properly granted summary judgment in favor of Deutsche Bank, *see Wood*, 121 Nev. at 729, 121 P.3d at 1029, and we

ORDER the judgment of the district court AFFIRMED.[1]

_______________, C.J.
Gibbons



_______________, J.
Tao

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Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Bohn & Trippiedi
Akerman LLP/Las Vegas
Eighth District Court Clerk

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[1]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.