IN THE COURT OF APPEALS OF THE STATE OF NEVADA

63 MEGAN TRUST, A NEVADA TRUST; DAVID TOTH; AND SIRWAN TOTH, TRUSTEES,
Appellants,
vs.
MORTGAGE ELECTRONIC REGISTRATION SYSTEM, AN ILLINOIS CORPORATION; AND BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP, A TEXAS CORPORATION,
Respondents.

No. 80098-COA

FILED

APR 29 2021

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

ORDER OF AFFIRMANCE

63 Megan Trust, David Toth, and Sirwan Toth (collectively referred to herein as Megan Trust) appeal from a district court order granting a motion for summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

The original owners of the subject property failed to make periodic payments to their 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, respondent Bank of America, N.A. (BOA)—the current beneficiary of the first deed of trust—tendered payment to the HOA foreclosure agent for the superpriority amount of the HOA's lien, but the agent rejected the tender and proceeded with its foreclosure sale, at which Megan Trust purchased the property. Megan Trust filed the underlying quiet title action against BOA and

respondent Mortgage Electronic Registration System (MERS), which counterclaimed seeking the same. BOA and MERS eventually moved for summary judgment, which the district court granted, finding that the tender satisfied the superpriority portion of the HOA's lien such that Megan Trust took title to the property subject to BOA's deed of trust. Megan Trust then moved to alter or amend the judgment under NRCP 59(e), which the district court denied. 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. "Although not separately appealable as a special order after judgment, an order denying an NRCP 59(e) motion is reviewable for abuse of discretion on appeal from the underlying judgment." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).

Here, the district court correctly found that the tender of nine months of past due assessments satisfied the HOA's superpriority lien such that Megan Trust took the property subject to BOA'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 Megan Trust's argument that BOA and MERS waived the affirmative defense of tender by waiting to raise the issue until their motion for summary judgment. *See Res. Grp., LLC v. Nev. Ass'n*

Servs., Inc., 135 Nev. 48, 52, 437 P.3d 154, 158-59 (2019) ("Payment of a debt is an affirmative defense, which the party asserting has the burden of proving." (citing NRCP 8(c) and *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979))). Indeed, Megan Trust did not suffer any prejudice due to BOA and MERS's failure to plead the affirmative defense—which was heavily litigated below—and fairness dictates that we reach the issue of tender, which is crucial for evaluating the legal effect of the underlying sale. *See id.* at 53 n.5, 437 P.3d at 159 n.5 (relying on the same rationale to reject an argument that a party waived the issue of tender by failing to raise it in a responsive pleading).

We also reject Megan Trust's argument that BOA and MERS failed to prove the superpriority amount of the HOA's lien because they relied on a statement of account from a separate property within the same HOA when calculating the superpriority portion. The ledger constituted unrebutted circumstantial evidence of the superpriority amount, and Megan Trust's assertion that the amount may have included maintenance or nuisance abatement charges is mere speculation.[1] *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (discussing the burdens of production that arise in the context of a motion for summary judgment); *see also In re Connell Living Tr.*, 133 Nev. 137, 140,

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[1]BOA and MERS also submitted a statement of account for the subject property after briefing on the underlying summary judgment motion was completed. While the parties dispute whether this statement of account is properly before us on appeal, we need not resolve this dispute or consider this subsequently filed statement, since the statement of account for the separate property that was submitted with BOA and MERS' motion for summary judgment constitutes unrebutted evidence of the superpriority amount of the HOA's lien as discussed above.

393 P.3d 1090, 1093 (2017) (recognizing that speculation is insufficient to defeat summary judgment).

Thus, we conclude that no genuine issue of material fact exists to prevent summary judgment in favor of BOA and MERS, *see Wood*, 121 Nev. at 729, 121 P.3d at 1029, and that the district court did not abuse its discretion by denying Megan Trust's motion to alter or amend the judgment. *See AA Primo*, 126 Nev. at 589, 245 P.3d at 1197. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 2
Hong & Hong
Akerman LLP/Las Vegas
Eighth District Court Clerk

[2]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.