IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SAMSARA INVESTMENTS LLC SERIES #4,
Appellant,
vs.
CARRINGTON MORTGAGE SERVICES, LLC,
Respondent.

No. 79876-COA

FILED

JUN 17 2021

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

ORDER OF AFFIRMANCE

Samsara Investments LLC Series #4 (Samsara) appeals from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

The original owner of the subject property failed to make periodic payments to his homeowners' association (HOA). The HOA—through its foreclosure agent, Hampton & Hampton, LLC (H&H)—initiated nonjudicial foreclosure proceedings to collect on the past due assessments and other fees pursuant to NRS Chapter 116. After Samsara purchased the property at the ensuing foreclosure sale for $3,000, respondent Carrington Mortgage Services, LLC (Carrington)—the beneficiary of the first deed of trust on the property—initiated the underlying action seeking to quiet title against Samsara, which counterclaimed seeking the same. The matter ultimately proceeded to a bench trial, following which the district court ruled in Carrington's favor, finding that H&H failed to mail the requisite notices of default and sale to Carrington's predecessor, Bank of America, N.A. (BOA), that BOA did not have actual notice of the sale, and that BOA was thereby deprived of the opportunity to tender the superpriority portion

of the HOA's lien to H&H. Accordingly, the district court concluded that the foreclosure sale was void as to the superpriority portion of the lien. Alternatively, the district court determined that the sale was voidable in equity, and it set the sale aside to the extent it purported to extinguish the first deed of trust. 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, Samsara sets forth multiple arguments in favor of reversal. We first address its arguments concerning the district court's ruling that the underlying foreclosure sale was void as to the superpriority portion of the HOA's lien. *See U.S. Bank, Nat'l Ass'n ND v. Res. Grp., LLC*, 135 Nev. 199, 205, 444 P.3d 442, 448 (2019) (holding that a district court may "declare [an HOA foreclosure] sale void to the extent it purport[ed] to extinguish [a first] deed of trust" if the HOA or its foreclosure agent failed to substantially comply with statutory notice requirements, the beneficiary of the first deed of trust did not receive actual notice of the sale, and the beneficiary suffered prejudice as a result). Samsara primarily contends that the evidence adduced at trial—namely, the testimony of H&H's representative and documentary evidence from H&H's business records[1]—

[1]H&H's representative testified regarding the company's standard practice of mailing deed of trust beneficiaries the notices of default and sale, as well as its practice of preparing certificates to reflect such mailings in its own files, which were present in the file maintained for the subject property. However, as found by the district court, no further proof of mailing appeared in H&H's records.

proved that H&H substantially complied with the requisite statutes by mailing the notices of default and sale to BOA by first-class mail such that it received actual notice of the foreclosure sale. Accordingly, Samsara contends that the district court clearly erred in finding that there was no evidence that the notices were mailed.

Although we agree with Samsara that it presented substantial evidence at trial that the notices were mailed, there was likewise substantial evidence presented that the notices were not mailed, and the district court gave more weight to that evidence. In particular, the district court relied on testimony from BOA's representative providing that if the notices had properly been mailed to the bank at the address listed on the deed of trust, scanned images of them would have appeared in BOA's internal document imaging platform, but neither of them so appeared.[2] The district court further relied on testimony from Carrington's representative confirming that if BOA had received the notices, they would have been included in the documents that BOA provided to Carrington when it assigned the deed of trust. Moreover, the district court found as a factual matter that, had H&H mailed the notices and BOA received them, BOA would have tendered the superpriority portion of the HOA's lien to preserve

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[2]On this point, the district court found that such scanning of HOA foreclosure notices was a regularly conducted activity and that the absence of the scanned images therefore supported the notion that the notices were not mailed. For support, it cited NRS 51.145, which provides that "[e]vidence that a matter is not included in the . . . records . . . , in any form, of a regularly conducted activity is not inadmissible under the hearsay rule to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a . . . record . . . was regularly made and preserved." Samsara does not dispute this finding.

its deed of trust in accordance with its regular custom, but no such tender occurred here. Thus, the district court weighed conflicting evidence concerning whether H&H mailed the requisite notices, it determined that the notices were not so mailed and were not received, and we will not reweigh that evidence on appeal.[3] *See Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal).

The district court's findings on this point are further bolstered by its finding that H&H admittedly did not mail the notices to BOA by registered or certified mail, return receipt requested, which the district court determined—and Samsara does not dispute on appeal—was required under the relevant statutes. *See* NRS 107.090(3), (4) (2009) (requiring mailing of the notices of default and sale to holders of subordinate interests by registered or certified mail, return receipt requested); NRS 116.31168(1) (2005) ("The provisions of NRS 107.090 apply to the foreclosure of an

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[3]To the extent Samsara contends that the district court ignored evidence indicating that rejected or otherwise undelivered mail would have been returned to H&H and that no such mail was returned here, such evidence is inapposite in light of the district court's finding that the notices were not mailed to begin with. Samsara also argues that the district court wrongly disregarded testimony from its representative at trial that she had previously mailed loan-modification documents to BOA on multiple occasions—in connection with unrelated loans—that the bank ended up losing. But the district court specifically provided that it gave no weight to this testimony because it was not probative as to how the bank routinely handled the HOA foreclosure documents at issue here and because it was inadmissible character evidence under NRS 48.045(1). We decline to reweigh the evidence on this point, and Samsara fails to set forth any argument with respect to the ruling on character evidence. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

association's lien as if a deed of trust were being foreclosed."); *SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon*, 134 Nev. 483, 489, 422 P.3d 1248, 1253 (2018) (holding that the relevant version of NRS 116.31168 fully incorporated the mandatory notice provisions of NRS 107.090). Given that the purpose of such a requirement is plainly to ensure that notice is actually provided, *see Harper v. Catherton*, 255 A.2d 492, 493 (D.C. 1969) (providing that a "return receipt is proof that notice was received"), we conclude that H&H's failure to comply with it was relevant to the question of whether the notices were sent and received, and it provides further reason for this court to defer to the district court's determination that H&H failed to mail the requisite notices and that BOA did not receive them. *See Radecki*, 134 Nev. at 621, 426 P.3d at 596.

Turning to the question of actual notice, Samsara attempts to demonstrate that—even assuming the notices were not mailed pursuant to the relevant statutes—the district court should have inferred or presumed that BOA nevertheless received actual notice of the sale by other means. Specifically, Samsara contends that Carrington had access to various BOA servicing records—including records relating to a loan modification obtained by the original homeowner while the underlying nonjudicial foreclosure proceedings were pending—that likely would have shown that BOA had actual notice of the foreclosure proceedings and the homeowner's HOA delinquencies, but it failed to disclose those records in discovery. Thus, Samsara reasons, the district court should have inferred or presumed that the records were adverse to Carrington. *See Bass-Davis v. Davis*, 122 Nev. 442, 445, 134 P.3d 103, 105 (2006) (holding that "a permissible inference that missing evidence would be adverse applies when evidence is negligently lost or destroyed," while a presumption that such evidence is

adverse under NRS 47.250(3) applies when a party destroyed the evidence with the intent to harm another party).

This argument fails for multiple reasons. First, Samsara is essentially attempting to litigate a discovery dispute that it failed to properly address below. As argued by Carrington, Samsara requested the records at issue in discovery, but Carrington objected to the request for production on various grounds. Rather than meeting and conferring with Carrington concerning this dispute, *see* EDCR 2.34(d) (providing that "[d]iscovery motions may not be filed unless" the parties have made a good faith effort to confer and resolve the dispute), presenting a motion to compel production to the discovery commissioner, *see* EDCR 2.34(a) ("Unless otherwise ordered, all discovery disputes . . . must first be heard by the discovery commissioner."); *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 172-73, 252 P.3d 676, 679-80 (2011) (providing that the failure to raise an issue presentable to the discovery commissioner results in a waiver of that issue), or requesting the records directly from BOA in discovery or serving it with a subpoena under NRCP 45,[4] Samsara opted to wait until trial to raise any issue with respect to these servicing records.

Moreover, as the district court specifically concluded, Samsara fails to demonstrate that any evidence was actually lost or destroyed such that the principles set forth in *Bass-Davis*, 122 Nev. at 445, 134 P.3d at 105, even apply. Instead, Samsara focuses principally upon the extent to which Carrington had access to the records and failed to disclose them. Samsara

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[4]BOA was previously a party to the underlying action and was therefore subject to the rules of discovery, but the district court later dismissed it from the case.

fails to set forth any argument that either BOA or Carrington lost the records or destroyed them with the intent to harm it, and to the extent Samsara complains that BOA "purged" its records of relevant phone calls between itself and the original homeowner, it fails to set forth any argument that such evidence was *negligently* destroyed. *See id.*; *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate courts need not consider claims unsupported by cogent argument). We therefore reject Samsara's arguments on this point.[5]

We turn now to the district court's finding that BOA—and therefore Carrington—was prejudiced by H&H's failure to provide notice of the sale on grounds that BOA would have tendered the superpriority portion of the HOA's lien had it received such notice. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018) (providing that "a first deed of trust holder's unconditional tender of the

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[5]Samsara also contends that BOA received actual notice of the sale because the evidence at trial supposedly demonstrated that BOA would have learned of the pending HOA foreclosure proceedings when the original homeowner sought and obtained a loan modification. Specifically, it contends that BOA's representative confirmed that BOA would have asked about HOA delinquencies as part of the loan-modification process. But BOA's representative did not so testify; rather, she confirmed that a standard application form from 2012—shown to her by Samsara's counsel—inquired as to whether the applicant was current on HOA dues, but she testified that the 2009 form the original homeowner filled out in this case did not ask for such information. Samsara also contends that BOA would have performed a title search in connection with the loan-modification application that would have revealed the pending foreclosure proceedings, but for support, it cites only Carrington's representative's testimony providing that Carrington—not BOA—would have conducted a title search in connection with a loan-modification request, and BOA's representative did not testify that BOA would have taken any such action.

superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust"); *see also Res. Grp.*, 135 Nev. at 204, 444 P.3d at 447 (holding that testimony from a bank's representative that it would have paid the HOA's lien had it received notice of the sale "establishes the lack of notice and prejudice needed to void the sale"). Samsara contends that the district court should not have assumed that BOA would have made such a tender in light of evidence that there were instances when BOA had notice of HOA foreclosure sales and nevertheless failed to tender. But this simply goes to the weight the district court gave the testimony of BOA's representative providing that such tender would have been made, and as noted above, we will not reweigh evidence on appeal. *See Quintero*, 116 Nev. at 1183, 14 P.3d at 523. And to the extent Samsara contends that the representative's testimony that BOA "always" made such tenders was hyperbolic and therefore not credible, we likewise decline to reweigh witness credibility on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007).

Accordingly, because the district court appropriately determined that the HOA failed to substantially comply with statutory notice requirements, that BOA did not receive actual notice of the sale, and that it was prejudiced as a result, it likewise appropriately concluded that the sale was void as to the superpriority portion of the HOA's lien such that the sale failed to extinguish the first deed of trust. *See Res. Grp.*, 135 Nev. at 205, 444 P.3d at 448.

Although—given our above noted disposition—we need not address the district court's alternative decision to preserve the deed of trust in equity or its determination that Samsara was not a bona fide purchaser (BFP), *compare id.* ("A void sale, in contrast to a voidable sale, defeats the

competing title of even a bona fide purchaser for value."), *with Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 63-64, 366 P.3d 1105, 1114-15 (2016) (providing that, "[w]hen sitting in equity, . . . courts must consider the entirety of the circumstances that bear upon the equities," including a party's putative status as a BFP), we nevertheless conclude that affirmance is also warranted on this point. *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 [sale] price is great, a court may grant [equitable] relief based on slight evidence of fraud, unfairness, or oppression.").

Samsara contends that Carrington failed to demonstrate a causal connection between any alleged unfairness and the inadequate sale price.[6] *See id.* (noting that for a court to provide equitable relief, the inadequate price must be accompanied by proof of unfairness that "accounts for and brings about the inadequacy of price" (internal quotation marks omitted)). But our supreme court has specifically acknowledged that "an HOA's failure to mail a deed of trust beneficiary the statutorily required notices" is an irregularity that may rise to the level of unfairness sufficient to set aside a foreclosure sale, *id.* at 749 n.11, 405 P.3d at 648 n.11; *see Res.*

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[6]Samsara also contends that there was no evidence to support the district court's determination that the sale price was greatly inadequate because Carrington's expert appraiser had no knowledge of the repairs Samsara had to make to the property after the sale. We reject this argument, as the district court specifically found that, even with Samsara's estimated cost of repairs deducted from the appraisal amount, the sale price was still only 3.6 percent of the property's fair market value. *See Res. Grp.*, 135 Nev. at 206, 444 P.3d at 448-49 (acknowledging that a sale price for even as much as 15 percent of the property's fair market value is "grossly inadequate").

Grp., 135 Nev. at 206, 444 P.3d at 448-49 (stating that a grossly inadequate price, combined with notice irregularities, "presents a classic claim for equitable relief"), and also that a deed of trust beneficiary's efforts to tender payment to the HOA are relevant to a weighing of the equities. *See Shadow Canyon*, 133 Nev. at 753, 405 P.3d at 650 (noting that, in spite of a technical irregularity in the form of a notice of sale, "there [wa]s no evidence in the record to suggest that [the deed of trust beneficiary] ever tried to tender payment in any amount to the HOA, much less that [it] was confused or otherwise prejudiced by the [irregular] notice of sale"). Thus, it follows that the district court acted within its discretion when it determined that H&H's failure to mail the requisite notices to BOA prevented it from tendering the superpriority portion of the HOA's lien and therefore amounted to unfairness affecting the sale. *See Res. Grp.*, 135 Nev. at 206, 444 P.3d at 448 (noting that inadequate price "should be considered together with any alleged irregularities in the sales process to determine whether the sale was affected by . . . unfairness" (internal quotation marks omitted)); *Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 55, 437 P.3d 154, 160 (2019) (reviewing a district court's decision to set an HOA foreclosure sale aside in equity for an abuse of discretion).

Finally, with respect to the district court's determination that Samsara was not a BFP, Samsara simply distinguishes itself from Iyad Haddad, the investor discussed in *U.S. Bank, National Ass'n ND v. Resources Group, LLC*, about whom our supreme court identified certain characteristics relevant for the district court's consideration of whether the respondent in that case was a BFP on remand. *See* 135 Nev. at 207, 444 P.3d at 449 (identifying Haddad's sophistication and extensive experience in real estate, the frequency with which he attended foreclosure sales, his

close relationship with the HOA's foreclosure agent, and his prior acknowledgment that title to the subject property would be contested, as factors to be considered in determining whether he was on inquiry notice of a defect in the foreclosure sale). But the supreme court did not hold that BFP status is defeated only when a purchaser shares all of those characteristics; rather, it held that the determination of whether a purchaser is a BFP in cases similar to this one is a question of fact, wherein the district court must determine whether the purchaser knew or should have known of a defect in the sale, particularly in light of the purchaser's experience with real estate. *Id.*

Here, the district court—considering Samsara's sophistication and experience with real estate—specifically found that the absence of a recorded notice of delinquent assessment lien or notice of sale with respect to the subject property put Samsara on inquiry notice of H&H's failure to comply with statutory foreclosure requirements. The district court further concluded that, because Samsara was on inquiry notice, it was presumed to have knowledge of statutory defects in the sales process—i.e., the failure to provide notice to BOA—and it failed to rebut that presumption because it failed to make any investigation into the propriety of the sale. *See Berge v. Fredericks*, 95 Nev. 183, 189-90, 591 P.2d 246, 249 (1979) (providing that a party on inquiry notice is presumed to have purchased the property with knowledge of a prior competing interest, and the party may rebut that presumption by showing that it made due investigation without discovering the interest). Because Samsara fails to set forth any argument challenging the district court's specific rationale with respect to inquiry notice, and instead summarily contends that Samsara was not as experienced as the investor discussed in *Resources Group*, *see Edwards*, 122 Nev. at 330 n.38,

130 P.3d at 1288 n.38; *see also Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3, we defer to the district court's factual determination that Samsara was not a BFP.[7] *See Radecki*, 134 Nev. at 621, 426 P.3d at 596.

Thus, given that Samsara has failed to set forth any valid grounds for reversing the district court's judgment, we

ORDER the judgment of the district court AFFIRMED.[8]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Mark R. Denton, District Judge
Clark Newberry Law Firm
Akerman LLP/Las Vegas
Eighth District Court Clerk

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[7]In light of Samsara's failure to cogently argue the issue, we take no position as to whether the district court appropriately relied on the absence of a recorded notice of delinquent assessment lien or notice of sale in determining that Samsara was on inquiry notice of statutory defects.

[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.