IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LN MANAGEMENT LLC SERIES 3111 BEL AIR 24G,
Appellant,
vs.
DITECH FINANCIAL LLC, F/K/A GREEN TREE SERVICING LLC,
Respondent.[1]

No. 82534-COA

FILED

APR 21 2022

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

ORDER OF AFFIRMANCE

LN Management LLC Series 3111 Bel Air 24G (LNM) appeals from a district court summary judgment 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 subsequently 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. LNM purchased the property at the resulting foreclosure sale and filed the underlying complaint seeking to quiet title against Bank of America, N.A. (BOA)—the beneficiary of the first deed of trust on the property at the time of the sale.

[1]We direct the clerk of the court to amend the caption for this case to conform to the caption on this order.

A little over five years later, the district court dismissed the case pursuant to NRCP 41(e)(2)(B),[2] which mandates dismissal of actions that are not brought to trial within 5 years after they are filed. Shortly thereafter, LNM moved to set aside the dismissal order pursuant to NRCP 60(b). In its motion, LNM did not specifically address NRCP 41(e)(2)(B), but it asserted that the parties needed the district court to determine their rights with respect to the property, that its prior failure to bring a motion for summary judgment concerning its claims was the result of excusable neglect, and that it would promptly file such a motion if the court set aside the dismissal so that its claims could be resolved. The district court subsequently granted LNM's motion as unopposed.

The same day, LNM moved for summary judgment on its claims, but the district court orally denied the motion at the hearing that followed. The case then went into another period of dormancy after respondent Ditech Financial LLC (Ditech), which had succeeded to BOA's interest in the deed of trust and substituted into the action in BOA's place, filed a notice of bankruptcy filing. But eventually Ditech moved for summary judgment, arguing that the Federal National Mortgage Association (Fannie Mae) owned the underlying loan such that 12 U.S.C. § 4617(j)(3) (the Federal Foreclosure Bar) prevented the foreclosure sale from extinguishing its deed of trust. LNM opposed that motion, asserting that dismissal was required because NRCP 41(e)(2)(B)'s five-year period

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[2]The Nevada Rules of Civil Procedure (NRCP) were amended several times during the pendency of this case. As the amendments do not affect our disposition of this appeal, we cite to the current version of the NRCP.

had expired. Moreover, LNM argued that Ditech did not timely assert the Federal Foreclosure Bar or produce documentation to support its applicability. The district court granted Ditech's motion, concluding, among other things, that LNM was judicially estopped from obtaining dismissal under NRCP 41(e)(2)(B) and that the Federal Foreclosure Bar applied. 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 dispute 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 disputes of fact. *Id.* at 731, 121 P.3d at 1030-31.

On appeal, LNM initially challenges the district court's determination that it was judicially estopped from obtaining dismissal pursuant to NRCP 41(e)(2)(B). "Judicial estoppel prevents a party from stating a position in one proceeding that is contrary to his or her position in a previous proceeding." *Kaur v. Singh*, 136 Nev. 653, 657, 477 P.3d 358, 362 (2020). The doctrine applies when, among other things, a party takes two totally inconsistent positions in judicial proceedings. *Id.* at 657, 477 P.3d at 362-63 (setting forth the elements of judicial estoppel). Here, LNM only disputes the district court's application of the judicial estoppel doctrine insofar as it asserts that it did not present two totally inconsistent positions

in the underlying proceeding even though it initially moved to set aside the NRCP 41(e)(2)(B) dismissal of its claims pursuant to NRCP 60(b), yet later moved for its claims to be dismissed under that same rule once Ditech moved for summary judgment. According to LNM, this is the case since, when it moved to set aside the NRCP 41(e)(2)(B) dismissal, it did not seek an open-ended extension of the rule's five-year period or otherwise waive its requirements, but instead, it sought to briefly reopen the case so that it could file a motion for summary judgment, which the district court purportedly denied at the first hearing after the proceedings on LNM's claims were reopened.[3]

Although LNM requested that the district court permit it to file a motion for summary judgment when it moved to set aside the NRCP 41(e)(2)(B) dismissal of its claims pursuant to NRCP 60(b), we are not

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[3]While the minutes from the relevant hearing indicate that the district court orally denied LNM's motion, it does not appear from the record or the district court docket sheet that the district court ever entered a written order to that effect. *See State, Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 451, 454, 92 P.3d 1239, 1243, 1245 (2004) (providing that dispositional court orders must be entered before they become effective and that, before such an order is entered, the district court remains free to reconsider its oral pronouncements). But we need not determine when the district court's decision to deny LNM's motion became effective, because we agree with the district court's determination that LNM asserted inconsistent positions in the underlying proceeding for the reasons stated below.

persuaded that this request somehow limited the scope of the proceedings that could occur once the case was reopened, such that the district court was required to once again dismiss LNM's claims pursuant to NRCP 41(e)(2)(B) when it did not immediately grant LNM's motion for summary judgment. In presenting its request, LNM asserted that its failure to file a motion for summary judgment prior to the expiration of NRCP 41(e)(2)(B)'s five-year period was the result of excusable neglect, and further represented that it was "dedicated to getting this case resolved in an expeditious manner" and "prepared [to] file [a motion for summary judgment] immediately upon the Court setting aside the dismissal." Essentially, LNM was conveying its intent to diligently litigate this case if it were reopened. In doing so, LNM did not suggest that, if its motion for summary judgment was not immediately successful, the court should simply dismiss its claims rather than allowing them to be resolved through further proceedings. Nor did LNM propose a date by which it claims would need to be resolved if they were reinstated. Instead, LNM emphasized that the parties needed the district court to issue a final judgment that determined their rights with respect to the property.

The foregoing leads us to construe LNM's NRCP 60(b) motion as having requested that the district court set aside the original dismissal order so that LNM's claims could be resolved on their merits, which is inconsistent with the position that LNM subsequently took in its opposition to Ditech's motion for summary judgment—that LNM's claims should be dismissed because NRCP 41(e)(2)(B)'s five-year period had run. *See Kaur*, 136 Nev. at 657, 477 P.3d at 362-63. And because LNM does not challenge

the district court's findings with respect to the remaining elements of judicial estoppel or otherwise assert that the doctrine is inapplicable under these circumstances, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived), it fails to demonstrate that the court erred by concluding that it was judicially estopped from obtaining dismissal pursuant to NRCP 41(e)(2)(B). *See Kaur*, 136 Nev. at 656, 477 P.3d at 362 (providing that the applicability of the judicial estoppel doctrine is a question of law subject to de novo review); *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002) (reviewing questions of law addressed in a summary judgment order de novo).

LNM next challenges the summary judgment in favor of Ditech by asserting that Ditech waived the Federal Foreclosure Bar by failing to timely raise the issue or produce supporting evidence. In doing so, LNM does not offer any specific argument or explanation as to when it believes the deadline was for raising the Federal Foreclosure Bar, but even assuming that it was an affirmative defense that should have been pleaded in BOA/Ditech's answer under NRCP 8(c), *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 393, 168 P.3d 87, 94 (2007) (stating that a defense falls under NRCP 8(c)'s catchall provision when it "raise[s] new facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all allegations in the complaint are true" (internal quotation marks omitted)); *see also Fifth Third Bank ex. rel. Tr. Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005) (providing that "[f]ederal preemption is an affirmative defense"), relief is unwarranted. Indeed, LNM had reasonable

notice and an opportunity to respond once Ditech raised the Federal Foreclosure Bar, including in the context of Ditech's motion for summary judgment, and fairness dictated that the district court consider this issue, which did not prejudice LNM. *See Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 53 n.5, 437 P.3d 154, 159 n.5 (2019) (noting that the court may consider an unpleaded affirmative defense "if fairness so dictates and prejudice will not follow" (internal quotation marks omitted)); *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 860, 619 P.2d 1219, 1221 (1980) (providing that a defendant's "[f]ailure to timely assert an affirmative defense may operate as a waiver if the opposing party is not given reasonable notice and an opportunity to respond"); *see also* 5 Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice & Procedure* § 1278, at 700-03 (4th ed. 2021) ("[T]he substance of many unpleaded Rule 8(c) affirmative defenses may be asserted by pretrial motions, particularly in the absence of any showing of prejudice to the opposing party and assuming it has had an opportunity to respond.").

Moreover, Ditech produced its documentation concerning the Federal Foreclosure Bar well before filing its motion for summary judgment, and even assuming that the disclosure of these materials was untimely, which Ditech disputes, LNM could have moved for a continuance under NRCP 56(d) if it believed that additional discovery would have revealed evidence supporting its opposition. *Cf. Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 450 (1st Cir. 1995) (holding that the denial of a defendant's motion for leave to amend its answer was not an abuse of discretion where the motion was filed five days before trial and, if granted,

would have required additional discovery, research, and preparation by the plaintiff). Thus, Ditech did not waive the Federal Foreclosure Bar, despite LNM's assertion to the contrary. *See Nationstar Mortg., LLC v. Guberland LLC-Series 3*, No. 70546, 2018 WL 3025919, at *1 (Nev. June 15, 2018) (Order Vacating Judgment and Remanding) (rejecting a similar argument for the reasons set forth above); *see also* NRAP 36(c)(3) (providing that post-2015 unpublished Nevada Supreme Court orders are citable for their persuasive value). And because LNM does not otherwise challenge the district court's determination that the Federal Foreclosure Bar prevented the foreclosure sale from extinguishing Ditech's deed of trust, *see Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3, LNM fails to demonstrate that the district court erred by granting summary judgment in favor of Ditech. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[4]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[4]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. Mark R. Denton, District Judge
Janet Trost, Settlement Judge
Kerry P. Faughnan
Akerman LLP/Las Vegas
Eighth District Court Clerk