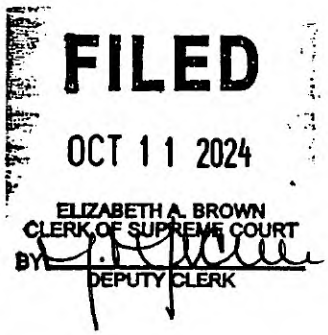
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CINDY KIRBY,
Appellant,
vs.
HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR HOMESTAR 2004-6,
Respondent.

No. 85503-COA



ORDER OF AFFIRMANCE

Cindy Kirby appeals from a final judgment in a judicial foreclosure action. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

In 2004, Kirby purchased real property. To facilitate the purchase, she executed a deed of trust secured by a promissory note that promised repayment to the predecessor in interest to respondent HSBC Bank USA (HSBC). In 2008, Kirby stopped making payments towards the note. In 2009, the trustee, acting on behalf of HSBC's predecessor, issued a notice of default and informed Kirby she had an opportunity to cure the default and explained how she could do so.

However, Kirby did not cure the default. HSBC subsequently obtained the promissory note and became the beneficiary of the deed of trust. In 2010, the parties participated in the foreclosure mediation program (FMP) but were unable to reach an agreement. In 2011, the FMP issued a foreclosure certificate and the trustee thereafter recorded it.

24-38335

In 2014, HSBC filed a complaint in the district court in which it sought judgment in its favor in the amount outstanding under the note and requesting judicial foreclosure. HSBC served Kirby by publication and thereafter obtained a default judgment. However, Kirby subsequently moved to set aside the default judgment. The parties later stipulated to set aside the default judgment and the district court entered an order setting aside that judgment. Kirby later filed an answer to the complaint.

In 2017, shortly after Kirby filed her answer, HSBC filed a motion for summary judgment, together with supporting exhibits and affidavits, contending that there was no genuine dispute of fact as to whether it was entitled to judgment in its favor. Kirby opposed the motion. Kirby contended that summary judgment was not appropriate because HSBC's notice of default failed to comply with NRS 107.500, no discovery had been conducted, and because the parties had not engaged in an early case conference or filed a joint case conference report. The district court subsequently requested supplemental briefing concerning the foreclosure mediation program and the parties filed supplements in furtherance of the district court's requests. In 2018, the district court entered an order granting HSBC's motion for summary judgment, explaining that it had reviewed the motion, opposition, supplemental briefing, and supporting documents and concluded that there was no genuine dispute of fact such that HSBC was entitled to summary judgment in its favor.

In 2022, HSBC moved for entry of judgment and issuance of a decree of foreclosure. HSBC contended that the outstanding principal under the note amounted to $600,000 plus interest. HSBC also sought attorney fees and costs. Kirby opposed the motion and requested

reconsideration of the district court's order granting summary judgment, as Kirby asserted any debt secured by the deed of trust was invalidated pursuant to NRS 106.240 as it had been more than ten years since the debt became due. Kirby also moved for dismissal of this matter pursuant to NRCP 41(e) because HSBC failed to bring it to trial within five years of the filing of the complaint and pursuant to NRCP 16.1(e) because HSBC failed to engage in an early case conference or file a joint case conference report.

The district court subsequently entered judgment in favor of HSBC in the following amounts: $600,000 in unpaid principal under the note; $192,267.13 in interest from October 1, 2008, to June 16, 2017; $52,331.96 in escrow advances, accumulated charges, and recoverable balances; and $471.63 in costs and attorney fees. The district court also foreclosed upon the deed of trust and issued a writ of special execution to the sheriff, directing him to seize and sell the property to satisfy the judgment. The district court also denied Kirby's motion to dismiss. This appeal followed.

Summary Judgment

On appeal, Kirby argues that the district court erred by granting respondents' motion for summary judgment. 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. The party moving for summary judgment must meet its initial burden of production to show there exists no genuine disputes of material fact. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). The nonmoving party must then "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine [dispute] of material fact." *Id.* at 603, 172 P.3d at 134.

First, Kirby argues that a dispute of fact remains concerning whether the notice of default mailed to Kirby complied with NRS 107.500. Kirby contends that the notice did not provide all of the necessary information required by NRS 107.500, including information concerning the applicable interest rate, prepayment fees, contact information and how to obtain additional information concerning the note and deed of trust, and information concerning foreclosure prevention alternatives. Kirby further contends that the district court should have dismissed this action due to HSBC's failure to mail her a notice of default in compliance with NRS 107.500.

Among other things, before initiation of a judicial foreclosure action stemming from a borrower's default, NRS 107.500 requires a mortgage servicer, mortgagee or beneficiary of the deed of trust to mail a notice to the borrower that provides certain information concerning the default, the loan, and contact information for the borrower to obtain information concerning the loan and programs to aid the borrower.

Here, HSBC filed the 2009 notice, along with affidavits and other documents in support of its motion for summary judgment. HSBC specifically contended that the notice, affidavits, and other documents

produced in support of its motion for summary judgment demonstrated that no genuine dispute of fact remained as to whether Kirby had been provided with the required notice of default prior to HSBC's initiation of a judicial foreclosure action.

In opposition, Kirby simply argued that the motion for summary judgment should be denied because HSBC's motion "does not indicate compliance with NRS 107.500, etc. seq., commonly known as the homeowners bill of rights." Kirby did not provide any affidavits or other admissible evidence to show that the notice of default was somehow insufficient.

Kirby's argument in opposition to the motion for summary judgment was inaccurate, as HSBC specifically contended that it provided the required notice to Kirby. Moreover, Kirby did not identify any specific deficiencies in the notice provided to Kirby, but instead made a general allegation that the notice did not comply with NRS 107.500 which is insufficient to create a genuine dispute of fact. *See Wood*, 121 Nev. at 729, 121 P.3d at 1030-31. In addition, HSBC provided affidavits and documents in support of its contention that it provided adequate notice of default to Kirby, which required Kirby to introduce specific facts by affidavit or other admissible evidence to demonstrate that there remained a genuine dispute of fact, *see Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134, but Kirby failed to do so. Based on the foregoing, we conclude that Kirby failed to demonstrate a genuine dispute of fact remained as to this issue.

Further, while Kirby asserted in her opposition that HSBC failed to indicate it complied with the notice requirements of NRS 107.500, Kirby did not provide specific argument as to why the notice HSBC mailed

to her was insufficient. Kirby attempts to reframe her argument on appeal and provide a more detailed and specifically focused argument than what she provided in opposition to HSBC's motion for summary judgment. However, because Kirby did not raise these contentions in her opposition to HSBC's motion for summary judgment, Kirby has waived these points. *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, on appeal, Kirby has not provided relevant authority in support of her argument that noncompliance with NRS 107.500 required the district court to dismiss this action. As a result, this court need not consider this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38 130 P.3d 1280, 1288 n.38 (2006) (explaining that Nevada's appellate courts need not consider issues unsupported by citation to relevant legal authority).

Nonetheless, even if we were to consider this argument, relief would be unwarranted. NRS 107.560 sets forth a borrower's civil remedies for violations of NRS 107.400-.560, but it does not provide for a dismissal of a related judicial foreclosure action. Rather, the remedies include "bring[ing] an action for injunctive relief to enjoin a material violation of [those provisions]" prior to the impending foreclosure sale, as well as "bring[ing] a civil action . . . to recover his or her actual economic damages resulting from a material violation of [those provisions]" after the property has already been sold. NRS 107.560(1)-(2). The statute further provides that "[a] violation of [the relevant provisions] does not affect the validity of a sale to a bona fide purchaser for value and any of its encumbrancers for

value without notice," NRS 107.560(4), thereby indicating that such violations do not render related foreclosure proceedings void. *Cf. Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018) ("A party's status as a [bona fide purchaser] is irrelevant when a defect in the foreclosure proceeding renders the sale void."). Thus, because dismissal of a related judicial foreclosure action is not included as one of a borrower's civil remedies for violations of NRS 107.400-NRS 107.560, Kirby is not entitled to relief based on this argument.

Second, Kirby argues that a dispute of fact remains as to whether HSBC complied with NRS 107.086(2)(e) because it did not record a certificate from Home Means Nevada, Inc. concerning the parties' participation in the foreclosure mediation program.

The parties participated in the foreclosure mediation program in 2010-2011. Therefore, the mediation was governed by laws in effect when the foreclosure mediation took place. *See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 473 n.2, 255 P.3d 1275, 1277 n.2 (2011) (applying the law in effect at the time of the relevant mediation); *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 464 n.3, 255 P.3d 1281, 1283 n.3 (2011) (same); *Pascua v. Bayview Loan Servicing, LLC*, 135 Nev. 29, 32 n.3, 434 P.3d 287, 289 n.3 (2019) (applying the law in effect as of the date "[t]he foreclosure proceedings were commenced"). At that time, the effective version of NRS 176.086 required the trustee to record a certificate provided by the Mediation Administrator which either stated that no mediation was required or that the mediation had been completed. 2011 Nev. Stat., ch. 306, § 20.7, at 1683. Here the certificate required by the controlling statutes was issued and recorded by the trustee. HSBC later initiated the

underlying action for judicial foreclosure. Accordingly, there was no genuine dispute of fact as to whether HSBC properly obtained and recorded the foreclosure mediation certificate under the law effective when the mediation took place.

To the extent that Kirby contends that she should have been afforded the opportunity to again participate in the foreclosure mediation program following the amendments to NRS 107.086 in 2017, thus requiring HSBC to obtain a new foreclosure mediation certificate under the amended statute, she is not entitled to relief. In 2017, the Legislature made several amendments to NRS 107.086 concerning the foreclosure mediation program, including requiring the trustee to record a certificate provided by Home Means Nevada, Inc. or its successor organization stating either that no mediation was required or that the mediation had been completed. 2017 Nev. Stat., ch. 571, § 2, at 4091-96. The Legislature also allowed persons against whom a judicial foreclosure action had been initiated against before the effective date of the amendments to NRS 107.086 to enroll in the revised foreclosure mediation program, but such a person had to enroll within 30 days of the effective date of the amendments. 2017 Nev. Stat., ch. 571, §§ 9.5-10, at 4106. The amendments to NRS 107.086 became effective on June 12, 2017, 2017 Nev. Stat., ch. 571, § 12, at 4106 (stating the "act becomes effective upon passage and approval"); Nevada Electronic Legislative Information System, https://www.leg.state.nv.us/App/NELIS/REL/79th 2017/Bill/5695/Overview (last visited October 7, 2024) (SB490 approved by Governor on June 12, 2017), and Kirby did not enroll within 30 days of the effective date of those amendments. Accordingly, there was no genuine dispute as to whether HSBC needed to obtain an additional foreclosure

mediation certificate under the 2017 amendments to NRS 107.086(e). Based on the foregoing, we conclude that there was no genuine dispute of fact concerning this issue, and the district court did not err by rejecting Kirby's argument.

Third, Kirby argues that a dispute of fact remains as to whether any lien created by the deed of trust was extinguished pursuant to NRS 106.240 because more than ten years had passed since the debt secured by the deed of trust became due. Kirby contends that the debt became due when she received the notice of default in 2009. However, the Nevada Supreme Court has recently considered and rejected a similar argument because "a Notice of Default is not identified in NRS 106.240 as a document that can render a secured loan 'wholly due' for purposes of triggering the statute's 10-year time frame, (2) Nevada law requires a cure period following a Notice of Default before acceleration of the entire outstanding debt, and (3) acceleration can only occur if its exercise is clear and unequivocal." *LV Debt Collect, LLC v. Bank of New York Mellon*, 139 Nev., Adv. Op. 25, 534 P.3d 693, 699 (2023). The court also explained that, even if a notice of default in certain circumstances could render a loan wholly due, a notice that declared sums were due and payable but also provided the borrower with the opportunity to cure the default constituted the sort of conflicting language that did not amount to a clear and unequivocal announcement of the lender's intention to declare a debt wholly due. *Id.*

Here, not only is the notice of default not a document identified by NRS 106.240 that can render a secured loan wholly due, but the notice of default in this matter provided a cure period and did not amount to a clear and unequivocal announcement of HSBC's predecessor's intent to

declare the debt wholly due at that time. *Id.* Accordingly, there was no genuine dispute that NRS 106.240 extinguished any lien created by the deed of trust as the debt did not become fully due upon issuance of the 2009 notice of default.

Thus, based on the forgoing analysis, we conclude that Kirby's arguments that the district court erred in granting summary judgment to HSBC are without merit.

Dismissal

Next, Kirby contends that the district court should have dismissed this matter pursuant to NRCP 41(e)(2)(B) because HSBC failed to bring the matter to trial within five years of the filing of the complaint. "Because application of NRCP 41(e) is an issue of law, we review" arguments concerning application of NRCP 41(e) de novo. *Monroe v. Columbia Sunrise Hosp. & Med. Ctr.*, 123 Nev. 96, 99, 158 P.3d 1008, 1010 (2007). Generally, the district court must dismiss an action for want of prosecution when "a plaintiff fails to bring the action to trial within 5 years after [it] was filed." NRCP 41(e)(2)(B). However, "the submission of a motion for summary judgment which is subsequently granted constitutes bringing an action to trial." *United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. v. Manson*, 105 Nev. 816, 817, 783 P.2d 955, 956 (1989); *see also Monroe*, 123 Nev. at 101-02, 158 P.3d at 1011 ("[W]e conclude that the district court's grant of complete summary judgment with respect to [appellant's] claims constituted a trial of her action under NRCP 41(e).").

Here, the district court's order granting summary judgment in favor of HSBC resolved the claims against Kirby and operated as a complete

grant of summary judgment as to all of the outstanding claims. Although the order granting summary judgment did not enter a specific award of damages or issue a decree of foreclosure such that it was not a final judgment, *see Sandstrom v. Second Jud. Dist. Ct.*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005) (stating "a final order [is] one that disposes of all issues and leaves nothing for future consideration"), it nevertheless resolved all of the claims against Kirby, *see Monroe*, 123 Nev. at 101-02, 158 P.3d at 1011. Because HSBC submitted a motion for summary judgment that implicated all of the claims against Kirby and the district court later granted that motion in its entirety, we conclude that the grant of summary judgment constituted bringing this matter to trial under NRCP 41(e). *See United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus.*, 105 Nev. at 817, 783 P.2d at 956. Thus, dismissal was not required on this basis.

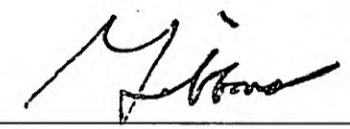
Finally, Kirby contends that the district court should have dismissed this matter pursuant to NRCP 16.1(e) because HSBC failed to participate in an early case conference or file a joint case conference report. We review a district court's decision on a motion to dismiss due to failure to comply with NRCP 16.1(e) deadlines for an abuse of discretion. *Arnold v. Kip*, 123 Nev. 410, 415, 168 P.3d 1050, 1052 (2007). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotation marks omitted).

Here, Kirby moved for dismissal pursuant to NRCP 16.1(e) more than four years after the district court issued its order granting

summary judgment in favor of HSBC. Under these circumstances, we cannot say that the district court's decision to reject her motion for dismissal pursuant to NRCP 16.1(e) was arbitrary or capricious or exceeded the bounds of law or reason. *See Arnold*, 123 Nev. at 415-16, 168 P.3d at 1053 (discussing a non-exhaustive list of factors when reviewing a motion to dismiss pursuant to NRCP 16.1(e)).

In sum, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 29
Hon. David M. Jones, Senior Judge
William C. Turner, Settlement Judge
Law Offices of Michael F. Bohn, Ltd.
Malcolm Cisneros\Las Vegas
Eighth District Court Clerk