IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VA AFFORDABLE HOMES, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. SEATTLE MORTGAGE COMPANY, A WASHINGTON CORPORATION, Respondent.	No. 84373-COA
VA AFFORDABLE HOMES, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. SEATTLE MORTGAGE COMPANY, A WASHINGTON CORPORATION, Respondent.	No. 85080-COA

ORDER AFFIRMING (DOCKET NO. 84373-COA) AND AFFIRMING IN PART AND REVERSING IN PART (DOCKET NO. 85080-COA)

VA Affordable Homes, LLC (VA Affordable), appeals from a district court order granting summary judgment in a real property matter and a post-judgment order awarding attorney fees and costs, which have been consolidated for purposes of this appeal. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

This is VA Affordable's second time before this court in the same underlying case. By way of background, in 2007, Glenn and Dorothy Gruenewald obtained a reverse mortgage loan from Seattle Mortgage Company (SMC), using their home as security, and signed a deed of trust naming SMC as the beneficiary.[1] Purportedly, due to a clerical error, the deed of trust was misplaced and never recorded. The loan, however, was

[1]We do not recount the facts except as necessary to our disposition.

funded and the Gruenewalds borrowed against their home (the property). Years later, due to the death of Glenn and the ill health of Dorothy, Judy Pheneger (Pheneger), the Gruenewalds' daughter, began assisting her mother in selling the property in order to obtain Medicaid benefits for her. Pheneger attempted to reach an agreement with SMC to purchase the property in lieu of initiating foreclosure proceedings, but SMC declined because there was not "a clear and marketable title to the property" due to the initial deed of trust not having been recorded. Subsequently, Jeffrey Veasley, a real estate investor who would become the manager/owner of VA Affordable, expressed an interest in purchasing the property. He was advised of the reverse mortgage loan, and before purchasing the property he unsuccessfully attempted to resolve the outstanding balance of the loan with SMC. Ultimately, in exchange for $500 and the agreement to pay off the balance of the loan, Veasley purchased the property. Dorothy then quitclaimed the property to the newly formed VA Affordable.

Several months after VA Affordable recorded its quitclaim deed, SMC filed an affidavit of lost document with the Washoe County Recorder that purported to "give notice that the original Deed of Trust did exist but had been lost by inadvertence and mistake by Pacific Title." The affidavit regarding the loan document was not based on personal knowledge of an SMC employee, but rather an employee of First American Title Insurance Company in Arizona, apparently a subsidiary company of SMC.

Eventually, SMC filed a complaint in district court against VA Affordable asserting claims of quiet title and fraudulent transfer, seeking a ruling that VA Affordable purchased the property subject to SMC's superior interest. VA Affordable filed an answer and counterclaim in which it sought an order from the court that it took the property free and clear of SMC's

alleged interest. The district court granted summary judgment in favor of SMC and awarded fees and costs, leading to VA Affordable's first appeal.

On appeal, we agreed that the district court incorrectly applied the summary judgment standard under NRCP 56 by failing to consider VA Affordable's objections to the admissibility of the evidence SMC proffered in support of its purported security interest. In doing so, we concluded that the district court had improperly shifted the burden of proof to VA Affordable to demonstrate a genuine dispute without considering whether SMC's motion for summary judgment was first properly supported under NRCP 56. Therefore, we reversed and remanded for further proceedings.

On remand, SMC filed an addendum to its motion for summary judgment. Specifically, SMC resubmitted excerpts of Pheneger's deposition testimony supporting the authenticity of her parents' signatures on the deed of trust and other loan documents. SMC also submitted a custodian of records affidavit executed by Kathy Hruza, a Vice President of Seattle Bank, successor in interest to SMC, testifying that the loan documents, including the deed of trust, were "true and complete" reproductions of SMC's loan documents pertaining to the property, and made at or near the act or event and in the course of regularly conducted business activity (refinancing the property). Indeed, the district court recognized that Veasley at his deposition offered no testimony to challenge either the fact that the Gruenewalds signed the loan documents or that their signatures were authentic. SMC also rebutted VA Affordable's argument that the loan documents were allegedly not delivered out of escrow, because SMC funded the loan and had possession of the original promissory note executed by the Gruenewalds. Thus, the

district court found that the loan documents were properly authenticated and admissible.[2]

The district court then granted SMC's renewed motion for summary judgment and quieted title in SMC's favor, finding that VA Affordable purchased the property subject to SMC's superior interest. The district court also awarded SMC attorney fees against VA Affordable in the amount of $56,497.20, for bringing frivolous claims and defenses under NRS 18.010(2)(b). This appeal followed.

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This court reviews a district court's grant of summary judgment de novo. *Iliescu v. Reg'l Transp. Comm'n of Washoe Cty.*, 138 Nev., Adv Op. 72, 522 P.3d 453, 458 (Ct. App. 2022). Before a district court may grant summary judgment, the moving party must first "[show] that there is no genuine dispute as to any material fact." NRCP 56(a). Indeed, "[t]he party moving for summary judgment bears the initial burden of production to show the absence of a genuine [dispute] of material fact." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).

Pertinent here, and as this court previously acknowledged, "each party in a quiet title action has the burden of demonstrating superior title in

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[2]On appeal, VA Affordable argues that the district court should not have considered SMC's addendum on remand because SMC should have included that information in its initial summary judgment motion. We disagree since we reversed and remanded the matter because the district court failed to first consider whether SMC's motion for summary judgment was properly supported with admissible evidence as required by NRCP 56. Nothing in our prior order prohibited SMC from submitting additional information to authenticate its documents and to support a renewed motion for summary judgment, nor did we prohibit the district court from considering any supplemental information in revisiting the motion.

himself or herself." *Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 48, 437 P.3d 154, 156 (2019). And because "[a] plea to quiet title does not require any particular elements, . . . each party must plead and prove his or her own claim to the property in question." *Id.* at 51, 437 P.3d at 158 (alterations in original) (internal quotation marks omitted). And, as we recognized in our initial order, the nonmoving party may object to the admissibility of evidence offered at the summary judgment stage. NRCP 56(c)(2). Presuming that the moving party has properly supported its motion for summary judgment, "[t]he nonmoving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine [dispute of material fact]" to withstand summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (internal quotation marks omitted).

In resolving SMC's renewed summary judgment motion, the district court considered NRS 52.460, which provides as follows:

> 1. The content of records of a banking or financial institution, if otherwise admissible, may be proved by a copy of the record which is authenticated by a custodian of the records of a banking or financial institution in a signed affidavit. The custodian must verify in the affidavit that the copy is a true and complete reproduction of the original record and that the original record was made at or near the time of the act or event concerning which information was recorded, by or from information transmitted by a person with knowledge of the act or event, and in the course of a regularly conducted activity.
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> 2. The affidavit required by subsection 1 must be substantially in the form prescribed in subsection 3 of NRS 52.260.[3]

[3]We note that VA Affordable did not challenge the form of the Hruza affidavit.

In accordance with NRS 52.460, we conclude that the district court did not err in finding that SMC properly authenticated its loan documents with the submission of the Hruza custodian of records affidavit. Thus, the burden of proof shifted to VA Affordable to demonstrate that a genuine dispute of material fact remained in order to defeat SMC's renewed motion for summary judgment. VA Affordable argues that summary judgment should not have been granted because SMC's original deed of trust was "lost and never recorded" and VA Affordable's quitclaim was recorded, and therefore, the recorded quitclaim deed was superior to the unrecorded deed of trust. We disagree.

NRS 111.325, on which the district court relied, addresses unrecorded conveyances as follows:

> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded.

While VA Affordable recorded its quitclaim deed and SMC's deed of trust was unrecorded, the district court properly recognized that this was only part of the analysis as the ownership of the property is not necessarily dependent on which party records its conveyance first. As the Nevada Supreme Court explained in *Allison Steel Manufacturing Co. v. Bentonite, Inc.*, 86 Nev. 494, 499, 471 P.2d 666, 669 (1970):

> Under our recording act, it is not enough that a subsequent purchaser record his conveyance first, he must also be a purchaser 'in good faith.' A subsequent purchaser with notice, actual or constructive, of an interest in the land superior to that which he is purchasing is not a purchaser in good faith, and not entitled to the protection of the recording act.

Therefore, actual or constructive notice of a superior interest in purchased property means that a purchaser of such property cannot claim bona-fide-purchaser (BFP) status. *Id.*; *see Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 64, 366 P.3d 1105, 1115 (2016) ("A subsequent purchaser is bona fide under common-law principles if it takes the property for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." (internal quotation marks omitted)). Further, a member or owner's individual knowledge of a superior interest in property is imputed to the entity that actually purchases the property. *See Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 355, 34 P.2d 1076, 1077 (1934). If a purchaser does not have the status of a BFP, then the purchaser acquires no greater interest in the property than that which the seller had, including being subject to a deed of trust. *See Mendenhall v. United States*, 556 F. Supp. 444, 451 (D. Nev. 1982).

Here, SMC has established that VA Affordable could not have been a BFP because it had *actual* knowledge of SMC's security interest and, therefore, was not entitled to take the property free and clear via the quitclaim deed. Further, contrary to VA Affordable's position, there is no requirement that the specific dollar amount of a superior interest be known, only that the existence of a superior interest in the property be known. *See Allison Steel*, 86 Nev. at 499, 471 P.2d at 669. Therefore, VA Affordable has failed to present anything to dispute that it knew of SMC's superior interest in the property—it clearly did—and therefore could not be deemed a BFP to obtain clear title. Instead, VA Affordable takes the property subject to SMC's

superior interest. Therefore, we affirm the district court's order granting summary judgment in favor of SMC.[4]

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[4]VA Affordable raises several other issues for our consideration. We are not persuaded that any warrant reversal. First, VA Affordable suggests that the district court did not follow the law of the case. We note that the lower court must "effectuate a higher court's ruling on remand." *Estate of Adams v. Fallini*, 132 Nev. 814, 819, 386 P.3d 621, 624 (2016). VA Affordable argues that the district court failed to ensure that SMC proved the enforceability of its deed of trust. Specifically, VA Affordable argues that SMC failed to prove the deed of trust was delivered to SMC, since depositing the deed of trust into escrow does not constitute delivery under NRS 112.200. We disagree based on the Hruza affidavit that authenticated the loan documents, SMC's possession of the original promissory note, and the fact that the loan was funded. Second, VA Affordable suggests that the district court failed to consider the overall equities of the situation. VA Affordable offers no cogent argument as to why it should be the beneficiary of the inequities that the Gruenewalds may have suffered due to the failure to record the deed of trust so as to void SMC's superior interest of which VA Affordable was aware before it purchased the property. *See Edwards v. Emperor's Garden Rest.*, 122 Nev 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues unsupported by cogent argument). Third, VA Affordable argues that the district court erred in dismissing its counterclaims. We disagree. With respect to slander of title, because VA Affordable could not claim BFP status when it purchased the property, the subsequent filing of the affidavit of "lost document" could not have disparaged VA Affordable's title causing special damage. *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 842, 963 P.2d 465, 478 (1998) (stating that slander of title involves "false and malicious communications, disparaging to one's title in land, and causing special damage" (internal quotation marks omitted)). Further, once the loan documents were authenticated, and without VA Affordable establishing BFP status, the district court did not err in denying VA Affordable's counterclaim for declaratory relief to quiet title in its favor.

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We next turn to the district court's post-judgment order awarding attorney fees and costs.[5] An award of attorney fees is within the sound discretion of the district court and will not be reversed absent a "manifest abuse of discretion." *Edwards*, 122 Nev. at 330, 130 P.3d at 1288 (internal quotation marks omitted). Relevant here, NRS 18.010(2)(b) permits the district court to award attorney fees to a prevailing party "when the court finds that the claim, counterclaim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." Further, "[t]he court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations," as "[i]t is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions . . . in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses." *Id.* And, "[f]or purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009).

In determining whether attorney fees under NRS 18.010(2)(b) are appropriate, the actual circumstances of the case must be considered. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 688 (1995). "A district court may award attorney fees when it finds that the opposing party brought or maintained a claim without reasonable grounds." *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 580, 427 P.3d 104, 113 (2018).

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[5]VA Affordable does not challenge the district court's award of costs to SMC as the prevailing party on appeal, and we therefore affirm the district court's order to that extent.

Here, VA Affordable proffers two primary arguments challenging the attorney fee award under NRS 18.010(2)(b). First, VA Affordable contends that, at the time SMC filed its complaint, it was not in possession of the original deed of trust naming it as the beneficiary, nor had the deed of trust been recorded, and SMC was therefore unable to enforce its security interest in the property without moving to quiet title and prove its superior interest. *See Res. Grp.*, 135 Nev. at 51, 437 P.3d at 157-58. And, as VA Affordable was named as a party, it had to answer and defend its position and assert mandatory counterclaims. Thus, VA Affordable argues the district court abused its discretion in awarding fees from the inception of the litigation based on the premise that VA Affordable maintained frivolous claims or defenses from day one.

Second, although VA Affordable was advised there was a reverse mortgage on the property and agreed to pay some of the Gruenewald loan as a compromise without the existence of a recorded deed of trust, VA Affordable contends this did not preclude VA Affordable from legally challenging SMC's superior interest in the property based on the proof problems associated with the deed of trust.

In contrast, SMC argues that VA Affordable had ample information before litigation commenced to know that its claim that it took title free and clear of SMC's deed of trust was baseless. Further, after litigation began, VA Affordable "doubled-down" and filed counterclaims against SMC and continues to pursue frivolous litigation. SMC also notes that VA Affordable does not contest the reasonableness of the amount of attorney fees awarded and that the district court did not manifestly abuse its discretion in awarding the fees.

At the time SMC initiated its lawsuit for quiet title, it had not authenticated the deed of trust. And arguably SMC delayed in doing so, until

this court reversed the district court's initial grant of summary judgment quieting title in SMC's favor. After authentication of the deed of trust—which was supported in an addendum on remand—it is unclear whether VA Affordable continued to maintain a legal position that could be characterized as frivolous or groundless, or if there was some attempt to resolve the matter by the parties.

Nevertheless, we agree with VA Affordable that its initial participation in litigation with SMC does not fall into the frivolous or groundless arena, particularly since this court reversed the district court's initial grant of summary judgment based on evidentiary concerns. On the other hand, we recognize that VA Affordable knew about the reverse mortgage loan from the inception of the litigation and would not have been considered a BFP. It also appears that the district court was troubled by the fact that VA Affordable was attempting to seek a windfall by challenging SMC's superior interest, in that it desired to take the property free and clear for $500, an amount well below market value. However, under Nevada law, for SMC to prove its property interest was superior to that of VA Affordable's recorded quitclaim deed, and to prevail on summary judgment, SMC was required to authenticate its deed of trust and loan documents. Further, in order to quiet title, without a recorded deed of trust, SMC would have had to seek equitable relief from the court, which is why SMC initiated a lawsuit. The district court awarded the attorney fees solely on the ground that the VA Affordable defended the case and asserted meritless counterclaims when it knew the facts would not support its position from the outset of litigation. Yet as we have explained above, that finding mischaracterizes the situation at the time litigation commenced. Therefore, under these facts and circumstances, we conclude that the district court abused its discretion in awarding attorney fees under NRS 18.010(2)(b).

In summary, we affirm the district court's order granting summary judgment in favor of SMC and reverse the district court's order awarding attorney fees against VA Affordable, but we affirm that order to the extent it awarded costs.

It is so ORDERED.[6]

_____, C.J.
Gibbons

_____, J.
Westbrook

_____, Sr. J.
Silver

cc: Hon. Egan K. Walker, District Judge
Jonathan L. Andrews, Settlement Judge
Jack I. McAuliffe, Chtd.
Bader & Ryan
Washoe District Court Clerk

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[6]Insofar as the parties raise arguments that are not specifically addressed in this order, we need not reach them in light of our disposition.

The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.