IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD L. MOYER,
Appellant,
vs.
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., FORMERLY A PENNYSLVANIA CORPORATION; AND REAL TIME RESOLUTIONS, INC., A TEXAS CORPORATION,
Respondents.

No. 88266-COA

ORDER OF AFFIRMANCE

Richard L. Moyer appeals from a district court order granting summary judgment in a real property action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

In 2005, Moyer and his late wife borrowed $210,000 from nonparty GMAC Mortgage Corporation to purchase a home and the loan was secured by a deed of trust against the property (the first loan). The same day the Moyers executed the first loan, they also entered into a Home Equity Line of Credit (HELOC) agreement, also with GMAC (the second loan). The second loan allowed the Moyers to draw up to $15,000 and was likewise secured by a deed of trust against the property. Initially, GMAC was named as a beneficiary of the deed of trust for the second loan and held the servicing rights for that loan. Unbeknownst to the Moyers, in 2009, GMAC transferred the beneficial interest in the deed of trust for the second loan to nonparty U.S. Bank and likewise transferred the servicing rights to nonparty Specialized Loan Servicing (SLS).

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Also in 2009, the Moyers filed for bankruptcy. In their bankruptcy petition the Moyers averred that they had two loans with GMAC and that the outstanding balance of the first loan was $202,054 and the outstanding balance of the second loan was $14,356. During the bankruptcy proceedings, GMAC filed a motion which alleged that the outstanding principal balance for the first loan was $197,665.65 and that the Moyers owed $8,878.05 in arrearages. GMAC also alleged the outstanding balance for the second loan was $14,356. Ultimately, the Moyers elected to reaffirm both the first and second loans, which allowed them to retain the home.

In 2011, the Moyers and GMAC entered into a loan modification agreement (2011 modification). Discussing the promissory note for the first loan, the agreement stated the parties were amending "that certain promissory note ("Note") dated September 8, 2005, in the original principal sum of Two Hundred Ten Thousand Dollars and No Cents." The modification agreement further stated that the principal balance under the modification was now $216,095.08. The agreement also included a provision that neither party had made any representations or agreements other than that which was set forth in the 2011 modification. Notably, the 2011 modification did not contain any reference to the second loan. According to Richard, the Moyers ceased making payments on the second loan following the modification because they believed the modification had consolidated the first and second loans into a single loan.

In 2018, SLS provided the Moyers notice that it was transferring its service rights to respondent Real Time Resolutions, Inc. (RTR). The notice did not specifically identify the second loan or otherwise contain balance information. It appears the Moyers did not take any action

following receipt of this notice. Also in 2018, RTR provided the Moyers with a notice that it was now the servicing agent for the second loan, that the outstanding principal balance was $14,158.58, and that the outstanding interest balance was $10,331.58. The notice further indicated the beneficial interest in the deed of trust for the second loan had been sold to nonparty RRA CP Opportunity Trust (RRA), but that RTR was servicing the second loan. In response, the Moyers retained counsel to dispute the validity of the debt.

After the parties were unable to resolve their dispute, Richard and RTR[1] filed competing complaints seeking declaratory relief as to the validity of the second loan. Following discovery, RTR filed a motion for summary judgment, arguing that it held the servicing rights for the second loan; it was the servicing agent for RRA, which held the beneficial interest in the deed of trust for the second loan; and the plain language of the 2011 modification did not modify or extinguish the second loan. Attached to the motion were various exhibits, including the original HELOC agreement and deed of trust for the second loan; the Moyers' bankruptcy petition where the Moyers stated the outstanding balance of the second loan was $14,356; the 2011 modification agreement; the 2018 SLS notice of transfer of servicing rights; an assignment of deed of trust for the second loan transferring the beneficial interest to RRA; and an RTR account statement showing an outstanding balance, which included interest and fees of $23,290.85.

[1]It appears Richard's wife passed away before the filing of the complaint and thus was not a party to the litigation. Further, although Mortgage Electronic Registration Systems, Inc. (MERS) was named as a defendant in Richard's complaint, the parties later stipulated to dismissing MERS as a party. Accordingly, our order discusses only Richard and RTR's filings and arguments.

However, RTR did not include an authentication declaration for these exhibits.

Richard filed an opposition which argued that: (1) RTR failed to include a declaration as required by NRCP 56; (2) various attached documents were inadmissible hearsay and thus could not support summary judgment; (3) there remained a factual dispute as to whether RTR had standing to collect the debt because the 2018 transfer notice from SLS was insufficient to establish standing; (4) there remained a factual dispute as to whether the 2011 modification included the second loan because the modification total was nearly identical to the combined principal balances of the first and second loans at the time of the Moyers' bankruptcy; and (5) there remained a factual dispute as to the total of the debt for the second loan because RTR failed to produce receipts showing the draw amounts and was instead attempting to rely on documentation submitted during the bankruptcy proceedings to establish the debt amount.

RTR filed a response which argued NRCP 56 did not require that every motion for summary judgment include a declaration and instead only established the requirements for any attached declaration. Further, RTR argued that the exhibits were not inadmissible hearsay because they consisted of public records or business records and thus a declaration or affidavit was unnecessary. However, RTR argued to the extent a declaration was required, it had attached an authenticating declaration to the reply and thus cured any alleged deficiency. The reply further attached a MERS business record which contained a timeline showing every time the beneficial interest in the deed of trust or servicing rights for the second loan were transferred. This timeline demonstrated that GMAC transferred the servicing rights to the second loan to SLS, which then transferred the

servicing rights to RTR. The timeline further showed that GMAC assigned the beneficial interest in the deed of trust for the second loan to U.S. Bank, which then assigned the beneficial interest to RRA. The attached declaration, which was made pursuant to RTR's corporate counsel's personal knowledge, stated that the objected-to exhibits, as well as the new exhibits attached to the reply, were made as part of RTR's regularly conducted business and were true and accurate copies of these documents.

Following a hearing, the district court granted RTR's motion for summary judgment. Relevant here, the court found that Richard substantiated the active balance by submitting an accounting statement from 2020 for $14,158.58. The court observed that the 2011 modification agreement did not contain any language relating to, or referencing, the second loan and instead refers only to the first loan. Further, the court found GMAC transferred its beneficial interest in the deed of trust and servicing rights for the second loan to different entities before the 2011 modification. Regarding standing, the court found that RTR obtained the servicing rights for the second loan and that RRA obtained the beneficial interest in the deed of trust for the second loan. Finally, the court found that Richard conceded there was an active balance on the loan and that he has not paid on the loan since 2011. Accordingly, the court concluded that the 2011 modification did not extinguish the second loan and further found that RTR had a legally protected interest in the home. Richard now appeals.

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 demonstrates 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 movant bears the burden of production and therefore must either "submit[ ] evidence that negates an essential element of the [non-moving party's] claim" or "point[ ] out . . . that there is an absence of evidence to support the nonmoving party's case." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (internal quotation marks omitted). If the movant does so, then the nonmoving party must "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine [dispute] of material fact" in order to avoid summary judgment. *Id.* at 603, 172 P.3d at 134.

Richard first argues RTR failed to meet the standards and requirements entitling it to summary judgment because it failed to provide an affidavit or declaration to support its motion in compliance with NRCP 56(c)(4). Richard further argues such deficiency cannot be rectified with an attachment to a reply as the rule requires a declaration be filed in support of the motion, and because RTR failed to do so, summary judgment cannot be predicated on any of the papers submitted.

We disagree. Richard's argument that any authentication declaration must be attached to the initial motion for summary judgment does not address NRCP 56(e)(1). This rule provides district courts with the discretion to allow a party that failed "to properly support an assertion of fact . . . an opportunity to properly support or address the fact." Here, although RTR did not attach an authentication declaration to its motion for summary judgment, it included one with its reply in support of the motion,

which the court had discretion to consider pursuant to NRCP 56(e)(1). And importantly, Richard does not argue the inclusion of the declaration in the reply brief prejudiced him or that he was otherwise prevented from addressing the declaration during the court's motion hearing. *See Exber, Inc., v. Sletten Constr. Co.*, 92 Nev. 721, 733, 558 P.2d 517, 524 (1976) (holding the failure to comply with the formal requirements of NRCP 56 is subject to harmless error review); *see also Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("When an error is harmless, reversal is not warranted); *cf.* NRCP 61 (directing that courts "must disregard all errors and defects that do not affect any party's substantial rights."). Thus, we conclude that Richard has failed to demonstrate a basis for relief in this respect.

Second, Richard argues that RTR failed to put forth any competent evidence pertaining to its ability to enforce the second loan. Specifically, Richard argues that RTR did not demonstrate it had the right to enforce the claim or had a significant interest in the litigation because the 2018 notice of transfer of servicing rights from SLS to RTR was unverified, inadmissible hearsay. Richard contends the notice constitutes hearsay because there was no affidavit or declaration of personal knowledge attached to the motion. As noted above, RTR provided an authenticating declaration in its reply which asserted the 2018 notice was a business record. On appeal, Richard does not challenge whether the 2018 notice constituted a business record[2] or otherwise address the MERS

[2]RTR's answering brief asserts Richard provides only vague speculation to support his hearsay argument and that Nevada law does not require the moving party to provide the original notes demonstrating a transfer of ownership. RTR further points to the MERS documentation

documentation which established that in 2009, GMAC transferred its servicing interest under the second loan to SLS who subsequently transferred its interest to RTR. Because Richard does not identify any evidence disputing RTR's documentation regarding its standing, we conclude the district court did not err in finding there was no genuine dispute of material fact regarding RTR's standing. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 134.

Third, Richard contends that he put forth specific evidence demonstrating that the second loan was absorbed into the 2011 loan modification agreement. Specifically, Richard provided a declaration attesting that any amounts owed pursuant to the second loan were included in the modification. Further, Richard argues the principal balance owed in the 2011 modification was $216,095.08, which is "virtually the same amount" as the combined balance of the first and second loans ($216,410) at the time of the Moyers' bankruptcy.[3] In response, RTR contends that pursuant to the plain language of the 2011 modification agreement, only the first loan was modified because there is no reference to the second loan or any other loan or note.

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demonstrating the transfer of the servicing and beneficial interests to support its position. Richard did not file a reply brief responding to these arguments.

[3]Richard's opening brief argues that the second loan may be unenforceable pursuant to the doctrine of laches. However, because Richard concedes he did not raise this argument before the district court, we conclude he has forfeited the argument and thus we do not address it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court," is forfeited).

"This court initially determines whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Am. First. Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (internal quotations marks omitted). A contract is not considered ambiguous "simply because the parties disagree on how to interpret their contract." *Galardi v. Naples Polaris, LLC,* 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (internal citation omitted). Here, Richard does not identify a specific contractual term in the 2011 modification that he contends is ambiguous. Instead, he cites to his own belief concerning the 2011 modification's effect and the fact that the combined amount of the first and second loans at the time of the Moyers' bankruptcy was "virtually the same amount as" the 2011 modification amount.

Because Richard failed to demonstrate any term in the 2011 modification was ambiguous, the district court did not err by enforcing the contract as written. Specifically, nothing in the 2011 modification references the second loan and instead it explicitly refers to only the first loan.[4] Further, the plain language of the contract expressly states that the parties had no other agreement or made any other representation besides that which was in the signed agreement. Thus, Richard's subjective belief

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[4]Although Richard additionally asserts that the parties' conduct following the execution of the modification agreement demonstrates the second loan was extinguished during the modification, the plain language of the agreement demonstrates the second loan was not modified. And because the modification agreement is not ambiguous, Richard has not demonstrated the district court, or this court, must look to parol evidence to interpret this agreement. *Trans W. Leasing Corp. v. Corrao Constr. Co.*, 98 Nev. 445, 447, 652 P.2 1191, 1183 (1982) ("The [c]ourt may look to circumstances surrounding the execution of the contract and the subsequent acts or declarations of the parties to interpret unclear contract provisions.").

that the 2011 modification included the second loan, and the fact that the modified amount was "virtually the same" as the combined amount of the first and second loans at the time of the Moyers' bankruptcy, is insufficient to create a genuine dispute regarding the interpretation of the 2011 modification.[5] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Susan Johnson, District Judge
Stephen E. Haberfeld, Settlement Judge
Flangas Law Group
Dickinson Wright PLLC/Las Vegas
Eighth District Court Clerk

[5]Insofar as Richard raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.