IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRITE GUDENAVICHENE, Appellant, vs. WESTERN PROGRESSIVE-NEVADA, INC. AS TRUSTEE; AND U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR GREENPOINT MORTGAGE FUNDING TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR5, Respondents.	No. 89121-COA

ORDER OF AFFIRMANCE

Brite[1] Gudenavichene appeals from a district court order dismissing a complaint and dissolving a preliminary injunction in a real property action. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Gudenavichene sued respondents Western Progressive-Nevada, Inc., as Trustee and U.S. Bank National Association as Trustee for Greenpoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2006-AR5, which are respectively the trustee and beneficiary of the deed of trust encumbering Gudenavichene's property. The complaint alleged that various notices of default, which were recorded against the property, accelerated the debt secured by the deed of trust such that after

[1]Although appellant is listed as "Brite" in the complaint and in her opening brief, there are documents in the record that use a different spelling, and it is unclear which is correct.

ten years elapsed, the deed of trust was extinguished pursuant to Nevada's ancient-lien statute, NRS 106.240 (providing that a lien on real property is conclusively presumed to be discharged "[ten] years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become[s] wholly due"). Based on that ancient-lien theory, she asserted a claim for negligence per se by violation of NRS 106.240 and sought a temporary restraining order (TRO), preliminary injunction, and declaratory relief. The district court issued a TRO, prohibiting respondents from foreclosing on the property, and later granted a preliminary injunction.

Respondents filed a motion to dismiss the complaint and dissolve the preliminary injunction, arguing that the facts as alleged were insufficient to state a claim for which relief could be granted. Respondents further argued, among other things, that Gudenavichene's claims were barred by judicial estoppel as she filed three prior bankruptcies and her allegations could have been raised in those bankruptcy actions.

Gudenavichene filed an opposition, which presented new legal theories concerning respondents' ability to foreclose. In particular, Gudenavichene argued that *LV Debt Collect, LLC v. Bank of New York Mellon*, 139 Nev. 232, 534 P.3d 693 (2023), and *Posner v. U.S. Bank National Ass'n*, 140 Nev. 201, 545 P.3d 1150 (2024), indicate that a mortgage loan never becomes wholly due until the maturity date of the loan, and thus, she maintained that respondents could not proceed with a foreclosure. She also argued that there was a defect in the deed of trust's chain-of-title, and thus, it was unclear who the successor in interest was. For support, Gudenavichene pointed to an affidavit from a representative at Capital One, N.A., who attested that the servicing rights to the subject

loan were sold to Greenpoint Mortgage Funding, Inc. in July 2006, that the loan was sold to Lehman Brothers, Inc. in September 2006, and that Greenpoint transferred the servicing rights to GMAC Mortgage, LLC. She also argued that she should be permitted to amend her complaint to assert a claim based on respondents' standing to foreclose. She further asserted that judicial estoppel is discretionary and should not bar her complaint.

After holding a hearing, the district court granted respondents' motion to dismiss the complaint and dissolve the preliminary injunction. The court found that the complaint failed to state a claim upon which relief could be granted, as the complaint failed to give details as to when the loan was defaulted or cured, or any indication of when the last payments were made. The court further found Gudenavichene was judicially estopped from asserting her claims based on her previous bankruptcies. And because the court determined Gudenavichene's claims failed, it dissolved the preliminary injunction.[2] This appeal followed.

On appeal, Gudenavichene challenges the dismissal of her complaint. This court reviews an order granting a motion to dismiss for failure to state a claim upon which relief can be granted under NRCP 12(b)(5) de novo. *Brown v. Eddie World, Inc.*, 131 Nev. 150, 152, 348 P.3d 1002, 1003 (2015). We rigorously review a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all the plaintiff's factual

[2]We construe the district court's grant of respondents' motion to dismiss as a denial of Gudenavichene's request to amend her complaint. *See Bd. of Gallery of Hist., Inc. v. Datecs Corp.,* 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (concluding that a district court's failure to rule on a request constituted denial of that request).

allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

In challenging the dismissal of her complaint, Gudenavichene argues that she stated a viable claim for relief because her loan could not be accelerated and, by the terms of the deed of trust, her loan does not become wholly due until 2036, thus precluding foreclosure. We disagree. *LV Debt Collect* and *Posner* simply construed the term 'wholly due' for purposes of evaluating whether NRS 106.240's ten-year period was triggered by the notices of default and judicial foreclosure at issue in those cases. *LV Debt Collect*, 139 Nev. at 232, 534 P.3d at 695 ("At issue in [*LV Debt Collect*] is whether a loan secured by real property becomes 'wholly due' for purposes of NRS 106.240 when a [n]otice of [d]efault is recorded as to the secured loan."); *Posner*, 140 Nev. at 203-04, 545 P.3d at 1153 (considering whether initiation of a judicial foreclosure proceeding caused a secured debt to become wholly due for purposes of NRS 106.240). And nothing in either decision suggests that acceleration and foreclosure cannot occur before a deed of trust's maturity date. *LV Debt Collect*, 139 Nev. at 235-39, 534 P.3d at 697-99; *Posner*, 140 Nev. at 203-04, 545 P.3d at 1153.

Consequently, her argument on this point fails to establish a basis for relief.[3]

Next, Gudenavichene reiterates that there is a defect in the chain-of-title for the deed of trust, such that respondents lack standing to foreclose, and the district court misapplied judicial estoppel to bar this argument, as the doctrine is discretionary. However, even assuming that judicial estoppel did not apply in this matter, Gudenavichene's chain of title argument nevertheless fails to establish a basis for relief. In particular, Gudenavichene failed to assert any claim relating to chain of title or standing in her complaint. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (explaining that "[t]he test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested"). Moreover, while Gudenavichene requested leave to amend her complaint in her opposition to respondents' motion to dismiss, she does not raise any argument on appeal as to the district court's denial of her request to amend the complaint. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that courts follow the "principle of party presentation" on appeal, which requires litigants to frame the issues); *Palmieri v. Clark County*, 131 Nev.

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[3]To the extent Gudenavichene attempts to argue in the alternative in her reply brief that NRS 106.240 applied because the notices of default accelerated the loans ten years ago, the issue is forfeited since it was not raised in the opening brief. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed [forfeited].").

1028, 1033 n.2. 367 P.3d 442, 446 n.2 (Ct. App. 2015) (stating that issues that are not raised on appeal are deemed forfeited).[4]

Thus, we conclude that dismissal of Gudenavichene's complaint was warranted, pursuant to NRCP 12(b)(5).[5] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[6]

Bulla, C.J.

Gibbons, J.

Westbrook, J.

cc: Hon. Tierra Danielle Jones, District Judge
Patrick N. Chapin, Settlement Judge

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[4]We note that the affidavit Gudenavichene attached to her opposition to the motion to dismiss did not establish that "U.S. Bank National Association as Trustee for Greenpoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2006-AR5" was not the beneficiary of the deed of trust and noteholder, as it pertained to a different entity, Greenpoint Mortgage, Inc.

[5]To the extent Gudenavichene challenges the district court dissolving the preliminary injunction, relief is unwarranted in light of the disposition of this appeal. *See Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (explaining that a plaintiff must establish a likelihood of success on the merits to prevail on a request for a preliminary injunction).

[6]Insofar as the parties raise 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 or need not be addressed.

Benjamin B. Childs
Houser LLP / Irvine
Eighth District Court Clerk