

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

7510 PERLA DEL MAR AVE TRUST,
Appellant,
vs.
BANK OF AMERICA, N.A.,
Respondent.

No. 75603-COA

FILED

JUN 11 2019

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

ORDER OF REVERSAL AND REMAND

7510 Perla Del Mar Ave Trust appeals from a judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

The original owner of the subject property failed to make periodic payments to its homeowners' association (HOA). The HOA 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. Counsel on behalf of respondent Bank of America, N.A. mailed a letter to the HOA offering to pay the superpriority lien amount once that amount was determined. The HOA did not respond to the letter and Bank of America did not attempt to actually pay the superiority lien amount to the HOA. Later, the property went to a foreclosure sale.

7510 Perla Del Mar Ave Trust (Trust) purchased the subject property at the HOA foreclosure sale. Trust then filed an action for quiet title, asserting that the foreclosure sale extinguished Bank of America's deed of trust encumbering the subject property. The litigation went to a bench trial, after which the district court ruled in favor of Bank of America,

finding that Bank of America's letter offering to pay the superpriority lien was sufficient to constitute a valid tender and therefore extinguished the HOA's superpriority lien. Thus, the district court found Trust took the property subject to Bank of America's first deed of trust. This appeal followed.

Following "a bench trial, this court reviews the district court's legal conclusions de novo." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev., Adv. Op. 74, at *4, 426 P.3d 593, 596 (2018). The district court's factual findings will not be set aside "unless they are clearly erroneous or not supported by substantial evidence." *Id.*

Trust argues the district court erred by finding Bank of America's letter offering to pay the superpriority portion of the HOA's lien, once that amount was determined, was sufficient to constitute a valid tender such that the first deed of trust was not extinguished by the foreclosure sale. We conclude the district court erred. The Nevada Supreme Court has stated "it is the generally accepted rule that a promise to make a payment at a later date or once a certain condition has been satisfied cannot constitute a valid tender." *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev., Adv. Op. 7, at *6, 435 P.3d 1217, 1219 (2019).¹ Therefore, Bank of America's "offer to pay the yet-to-be-determined superpriority amount was not sufficient to constitute a valid tender." *Id.* at * 7, 435 P.3d at 1220.

Moreover, the district court erred by finding Bank was excused from its obligation to tender the superpriority amount because any attempt at tender would have been futile as HOA would have rejected the payment.

¹We recognize the district court did not have the benefit of this decision when it entered its order resolving this matter.

To excuse Bank of America's obligation to provide valid tender, HOA must have actually rejected an attempt at tender. *Cf. id.* at * 7-8 (explaining the HOA's letter informing the bank that it would not accept the tender offered by the bank excused the bank's obligation to tender the superpriority portion of the lien). At trial, Bank of America's former counsel testified that HOA did not respond to the offer-to-pay letter, he considered HOA's non-response to the offer-to-pay letter to be a rejected tender attempt, and Bank of America did not otherwise attempt to tender the superpriority portion of the lien. Because Bank of America did not actually attempt to tender the superpriority portion of the lien and HOA at no time actually rejected an attempt to tender the superpriority portion of the lien, Bank of America's obligation to tender that amount was not excused if it wished to preserve its first deed of trust.

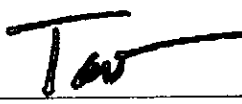
Because Bank of America's offer-to-pay letter indicating its willingness to pay a yet-to-be-determined amount was not valid tender and Bank of America's obligation to pay the superpriority portion of the lien in order to preserve its first deed of trust was not excused, the district court erred by finding Bank of America had preserved its first deed of trust.² *Cf.*

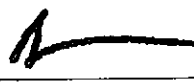
²Bank of America also argued it was entitled to equitable relief because the sale was not commercially reasonable. Bank of America contended the sales price was improperly low and the HOA's failure to respond to its offer-to-pay letter amounted to unfairness or oppression. The district court denied this claim and found the sales price was not affected by fraud, unfairness, or oppression. *See Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev., Adv. Op. 91, 405 P.3d 641, 643 (2017) (observing that there must be "some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price" (quoting *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 58, 366 P.3d 1105, 1111 (2016))). The record supports the district court's

SFR Invs. Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) (observing that an HOA's proper foreclosure of its superpriority lien extinguishes a deed of trust). Therefore, we conclude the basis for the district court's judgment was erroneous.³ In light of the foregoing analysis, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for further proceedings regarding the status of the superpriority lien and the first deed of trust in light of Bank of America's failure to make a valid tender.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jerry A. Wiese, District Judge
Law Offices of Michael F. Bohn, Ltd.
Akerman LLP/Las Vegas
Eighth District Court Clerk

findings in this regard. Therefore, the district court did not err by rejecting this claim.

³Based on our conclusion that Trust is entitled to relief due to the previously addressed issues, we do not address the remaining issues raised on appeal.