IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS & KATHLEEN GARLAND FAMILY TRUST; AND COURTNEY DOLAN, AN INDIVIDUAL,
Appellants,
vs.
RAYMOND L. MELTON, AN INDIVIDUAL; COUNTRYWIDE HOME LOANS, A CALIFORNIA CORPORATION, A/K/A BANK OF AMERICA, A NORTH CAROLINA CORPORATION, D/B/A BAC HOME LOANS SERVICING, LP, A CALIFORNIA CORPORATION; BANK OF NEW YORK MELLON, ON BEHALF OF CWALT, INC., ALTERNATIVE LOAN TRUST A-2204-24CB, A NEW YORK CORPORATION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., A DELAWARE CORPORATION; MERS CORP, INC., A VIRGINIA CORPORATION; AND NEVADA TITLE COMPANY, A NEVADA CORPORATION,
Respondents.

No. 77182-COA

ORDER AFFIRMING IN PART AND VACATING IN PART

Courtney Dolan and the Thomas & Kathleen Garland Family Trust appeal from a district court order granting summary judgment. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

In 2004, Dolan secured a mortgage for the purchase of a home located in Las Vegas, Nevada, with the assistance of her mortgage agent,

respondent Raymond Melton.[1] Nevada Title Company (NTC) handled the escrow, and Dolan properly executed a promissory note and deed of trust in favor of the lender, which later transferred its servicing rights to another bank. Ultimately, Bank of America, N.A. (BOA) acquired the servicing rights.[2] A few months after she purchased the home, Dolan conveyed the property to the Thomas & Kathleen Garland Family Trust (the Trust). Dolan, however, continued to make timely payments on the note. Between 2012 and 2014, Dolan began sending correspondence to BOA, requesting various documents related to her mortgage, and eventually, she submitted an application for loan modification. BOA complied with Dolan's requests, but ultimately denied her modification request because her application was incomplete.

In 2015, after her modification request was denied, Dolan and the Trust (collectively Dolan) commenced the instant action against, as pertinent here, Melton, NTC, and the Bank Respondents, alleging claims of fraud, conspiracy, deceptive trade practices, and intentional infliction of emotional distress, among others. Some of the claims were initially dismissed, and Dolan filed an amended complaint. After conducting discovery, the respondents moved for summary judgment, which the district court granted. Dolan then moved to disqualify the district court judge, arguing that she was biased. The chief judge denied Dolan's motion to

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

[2]Bank of New York Mellon (BoNYM), Bank of America, N.A. (BOA), and Mortgage Electronic Registration Systems, Inc. (MERS) are all parties to this appeal and share legal representation in this matter. For purposes of this order, we refer to the parties either individually, using the aforementioned acronyms, or collectively, as Bank Respondents.

disqualify, prompting Dolan to petition the supreme court for a writ of mandamus or certiorari. This court subsequently denied Dolan's petition, concluding that "petitioners have not demonstrated that our extraordinary intervention is warranted." *Thomas & Kathleen Garland Family Tr. v. Eighth Judicial Dist. Court*, Docket No. 76546-COA (Order Denying Petition For Writs of Mandamus and Certiorari, Oct. 24, 2018). Dolan now appeals from the district court's order granting summary judgment, which we address here.

As preliminary matter, it appears that the Trust is appearing on its own behalf in this case. However, a trust is not an independent legal entity which is separate and distinct from its trustees. *Presta v. Tepper*, 102 Cal. Rptr. 3d 12, 16 (Ct. App. 2009). In contrast to a corporation, which is a distinct legal entity, *see, e.g., Canarelli v. Eighth Judicial Dist. Court*, 127 Nev. 808, 814, 265 P.3d 673, 677 (2011), a "trust is not a person but rather a fiduciary relationship with respect to property. Indeed, an ordinary express trust is not an entity separate from its trustees." *Presta*, 102 Cal. Rptr. 3d at 16 (citations and internal quotation marks omitted). For this reason, "a trust itself can neither sue nor be sued in its own name." *Id.* Instead, it is the trustee who is the real party in interest and entitled to bring suit. *Causey v. Carpenters S. Nev. Vacation Tr.*, 95 Nev. 609, 610, 600 P.2d 244, 245 (1979); *see also* NRCP 17(a) (enumerating real parties in interest).

Here, no trustee of the Trust was named as a party in the complaint. Further, there is no evidence in the record that Dolan was the trustee for the Trust, or that she was authorized to institute the action on behalf of the Trust. And we decline to assume that Dolan was in fact the trustee since she only appears as an individual in the complaint and such

an assumption is not supported by the record. Likewise, we also decline to assume that she was authorized to act on behalf of the Trust as only the trustee could properly do so. Moreover, a trust is a nonexistent entity, and a judgment in favor of or against a nonexistent entity is void *ab initio* and has no legal effect. *Cf. Causey*, 95 Nev. at 610, 600 P.2d at 245 (holding that a district court's judgment in favor of a trust was void because "[a] judgment for a legally nonexistent entity is a nullity"). Therefore, the Trust is not a proper party to the underlying action, rendering the judgments against the Trust a nullity.

Turning to the merits of this appeal, we are presented with three dispositive issues: (1) whether the district court erred when it granted summary judgment in favor of respondents; (2) whether the district court erred when it concluded that certain claims were barred by the statute of limitations; and (3) whether the chief judge of the district court erred when she failed to disqualify the trial judge. Because we have already concluded that the Trust is not a proper party to this action, we address these claims only as they relate to Dolan.

Dolan contends that the district court erred when it granted summary judgment because there existed genuine issues of material fact. Additionally, Dolan argues that discovery was still ongoing; that she was not permitted to take NRCP 30(b)(6) depositions related to MERS; and that her motion for NRCP 56(f) relief should have been granted.[3]

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[3]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). All orders in this case were entered

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[A] district court's refusal of an NRCP 56(f) continuance is reviewed for an abuse of discretion." *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669, 262 P.3d 705, 713 (2011). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. All evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

Having reviewed the record, we conclude that summary judgment was appropriate and that the district court correctly denied Dolan's request for NRCP 56(f) relief. Although Dolan avers that genuine issues of material fact exist as to almost every cause of action contemplated in her complaint, her appellate brief fails to enumerate each cause of action and further fails to provide any cogent legal analysis supporting her assertions. And while Dolan references facts in the record, she does not clearly connect those facts to any particular cause of action or party, explain how those facts are material, or demonstrate that there is or was a remaining genuine dispute as to any of those facts. Thus, Dolan has failed to cogently argue her claims on appeal. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims that are not cogently argued or supported by relevant authority). Moreover, Dolan's arguments fail to clearly establish any basis for relief because they are either too conclusory or not supported

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before March 1, 2019. Accordingly, we cite the prior version of the Nevada Rules of Civil Procedure herein.

by the record. *See Wood*, 121 Nev. at 732, 121 P.3d at 1031 (providing that "[t]he nonmoving party is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture" (internal quotation marks omitted)).

We are also unpersuaded by Dolan's other assertions—namely, that discovery was still ongoing; that she was not permitted to depose MERS' NRCP 30(b)(6) witnesses; and that she should have been granted NRCP 56(f) relief. First, it appears that although the motion for summary judgment was filed prior to the close of discovery, the district court did not grant it until after discovery had closed. Nevertheless, even if discovery was still ongoing, this does not necessarily render a district court's decision to grant summary judgment before the close of discovery premature or improper. *See* NRCP 56. Second, although the discovery commissioner initially granted MERS' motion for a protective order related to NRCP 30(b)(6) depositions, this was because of the unavailability of counsel for MERS as is reflected in the minutes. There was no prohibition on deposing the MERS NRCP 30(b)(6) witnesses on a future date. The record also reveals that the deponents were out-of-state residents and would need to be deposed where they resided. In addition, the first topic was deemed to be overly broad. Furthermore, nothing in the record indicates that Dolan filed an objection with the district court regarding the discovery commissioner's recommendations, including the scope of the NRCP 30(b)(6) depositions or conducting the depositions at a future time. Thus, the issue has not been preserved for appellate review. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that "[a] point not urged in the trial

court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal").[4]

Further, Dolan's affidavits in support of her NRCP 56(f) request were too vague to demonstrate that additional discovery was likely to uncover genuine issues of material fact. *See, e.g., Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669, 262 P.3d 705, 714 (2011) ("[A] motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact." (internal quotation marks omitted)). It also appears that Dolan did not diligently pursue discovery. For example, she failed to renotice the NRCP 30(b)(6) depositions related to MERS, or explain how additional discovery if permitted would defeat summary judgment. *Id.* (explaining that "if the movant has previously failed diligently to pursue discovery, it is not an abuse of discretion for the district court to deny the motion" (internal quotation marks omitted)). Therefore, the district court did not err when it granted respondents' motions for summary judgment and denied Dolan NRCP 56(f) relief.

Next, Dolan argues that, pursuant to the discovery rule, all statutes of limitations should have been tolled and therefore the district court improperly dismissed some of her claims. Specifically, Dolan argues that in 2004 Melton made representations that she was receiving a government-backed mortgage, when in fact she was receiving a subprime

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[4]The Honorable Bonnie Bulla, Judge, was the discovery commissioner for the discovery proceedings below. However, because the discovery issues related to the NRCP 30(b)(6) depositions were not preserved for appeal, and the summary judgment motion was granted by the district court judge *after* the close of discovery, Judge Bulla participated in the decision of this matter on appeal.

conventional mortgage, and that she did not discover this fact until after the limitations period had run. Further, Dolan contends that she was unaware of which entity owned the promissory note until 2013.

"Under the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). In a tort action, the tortfeasor's identity "is a critical element of an enforceable claim." *Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998) (internal quotation marks omitted). But plaintiffs must exercise due diligence and are not permitted to remain willfully ignorant of reasonably accessible pertinent facts. *Id.* at 1394, 971 P.2d at 807 ("Plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars within their reach." (internal quotation marks omitted)).

Here, most, if not all, of the facts relevant to Dolan's claims against Melton occurred in 2004, including that Melton allegedly misrepresented the nature of the mortgage—i.e., whether it was conventional or government-backed. In addition, it is undisputed that Melton was Dolan's mortgage agent in 2004; and all of the mortgage documents clearly indicated that Dolan was receiving a conventional loan. Thus, the record plainly demonstrates that the facts giving rise to Dolan's causes of action against Melton accrued in 2004 and that Dolan was necessarily aware of the alleged tortfeasor's identity—that is, Melton.

Similarly, Dolan's assertion that she was unware of the identity of the true owner of the promissory note until 2013 is equally unpersuasive for two reasons. First, the record indicates the mortgage documents that

Dolan signed contained the note holder's information. And second, even if the note was subsequently assigned, that information would have been reasonably accessible to Dolan by way of either the loan servicer or the public domain; therefore, Dolan was not diligent in her fact finding. *Siragusa*, 114 Nev. at 1393-94, 971 P.2d at 807. Accordingly, we conclude that on these facts Dolan was not entitled to the benefit of the discovery rule.

Finally, Dolan argues that the district court erred when it refused to disqualify the trial judge. Specifically, Dolan contends that the judge filed an improper opposition to her motion to disqualify and that she was biased because of her alleged personal relationships with attorneys who represented the Bank Respondents, namely, that they were campaign supporters and former law clerks. We disagree.

NRS 1.235 provides the procedural basis for disqualifying district court judges. Once a party moves to disqualify a judge, "the judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall . . . [i]f the judge is a district [court] judge, immediately transfer the case to another department . . . or request the judge of another district court to preside at the trial or hearing of the matter." NRS 1.235(5)(a). But the original judge "may challenge an affidavit alleging bias or prejudice by filing a written answer with the clerk of the court within 5 judicial days after the affidavit is filed." NRS 1.235(6).

"[T]he test for whether a judge's impartiality might reasonably be questioned is objective, and presents a question of law [such that] this court will exercise its independent judgment of the undisputed facts." *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011) (alteration in original) (internal citation and quotation marks omitted). Judges are

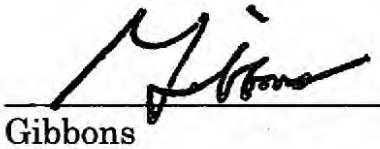
presumed to be impartial, and "the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification." *Id.* (internal quotation marks omitted). Thus, a reviewing court must determine "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [the judge's] impartiality." *Id.* (alteration in original) (internal quotation marks omitted).

Here, Dolan's contention that the trial judge filed an improper opposition is not supported by relevant authority. The record shows that the motion was assigned to the chief judge and that the trial judge subsequently filed an affidavit opposing Dolan's motion to disqualify. Because NRS 1.235(6) permits a judge to "challenge an affidavit alleging bias or prejudice by filing a written answer with the clerk of the court," the trial judge's filing was not improper.

Furthermore, Dolan's affidavit in support of her motion to disqualify contends, among other things, that the trial judge was biased because "[she] and her staff have personal and professional relationships with defense counsel for Bank of America," and that some of the attorneys involved in the matter supported the judge's judicial campaigns. Based on Nevada caselaw, however, the district court correctly concluded that such allegations did not warrant disqualification. *See, e.g., Ivey v. Eighth Judicial Dist. Court*, 129 Nev. 154, 162, 299 P.3d 354, 359 (2013) ("Campaign contributions made within statutory limits cannot constitute grounds for disqualification of a judge under Nevada law."); *see also In re Petition to Recall of Dunleavy*, 104 Nev. 784, 791, 769 P.2d 1271, 1275 (1988) (rejecting allegations of bias based on personal relationships, concluding that "allegations of bias based upon a judge's associations with counsel for a litigant pose a particularly onerous potential for impeding the

dispensation of justice"). Therefore, we affirm the district court's order denying appellant's motion to disqualify the trial judge. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATE the judgment as to the Thomas & Kathleen Garland Family Trust.[5]



_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Jacqueline Bluth, District Judge
Hon. Linda Marie Bell, Chief Judge
Dolan Law Group, Ltd.
Akerman LLP/Las Vegas
Vegas Valley Law, LLC
Skrinjaric Law Office
Eighth District Court Clerk

[5]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.