IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BANK OF AMERICA, N.A.,
Appellant,
vs.
THOMAS G. LOGAN; AND BRAEWOOD HERITAGE ASSOCIATION,
Respondents.

No. 76407-COA

FILED

MAR 31 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, VACATING IN PART AND REMANDING

Bank of America, N.A. (BOA), appeals from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

The original owner of the subject property failed to make periodic payments to her homeowners' association (HOA), respondent Braewood Heritage Association (Braewood). Braewood 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. Prior to the sale, an agent of BOA—holder of the first deed of trust on the property—sent a payoff request to Braewood's foreclosure agent, seeking information concerning the amount of Braewood's superpriority lien. The foreclosure agent responded by informing BOA's agent that it would need to submit an authorization form signed by the homeowner before the foreclosure agent could provide the requested information. Moreover, the foreclosure agent asserted that NRS Chapter 116's superpriority provisions do not apply under the circumstances of this case; that those provisions would, however, eventually permit Braewood to

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recover late fees, interest, collection costs, and attorney fees as part of its superpriority lien; and that the HOA would accept partial payments of the homeowner's past due balance in the interim. When neither BOA nor its agent took any further action, Braewood proceeded with its foreclosure sale, where respondent Thomas G. Logan purchased the property.

Logan then commenced the underlying action against BOA, seeking to quiet title. BOA counterclaimed for the same, and in the alternative, sought to recover damages from Braewood by way of cross-claims for unjust enrichment, tortious interference with contractual relations, breach of NRS 116.1113's duty of good faith, and wrongful foreclosure. Each party eventually moved for summary judgment. With respect to BOA's and Logan's competing quiet title claims, the district court ruled in favor of Logan, reasoning that BOA's interest in the property was extinguished since it did not tender an amount equal to nine months of past due assessments or otherwise demonstrate that it was entitled to equitable relief. And with respect to BOA's cross-claims against Braewood, the district court ruled in favor of Braewood for reasons that need not be addressed in detail here. This appeal followed.

This court reviews a district court's order granting summary judgment de novo. *See 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 demonstrate that no genuine issue 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 issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

Citing the foreclosure agent's statements in its response to BOA's payoff request, BOA argues on appeal that its obligation to tender was excused as a matter of law because any tender would have been futile. BOA also argues in the alternative that its payoff request, combined with its contemporaneous ability to pay, constituted sufficient tender. Logan and Braewood disagree.

As a preliminary matter, we agree with Logan that BOA's payoff request, standing alone, did not constitute sufficient tender to preserve its deed of trust. *See 7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev., Adv. Op. 6, 458 P.3d 348, 350 (2020) (holding that "a promise to make a payment at a later date or once a certain condition has been satisfied cannot constitute a valid tender"). However, because the parties and the district court did not have the benefit of the supreme court's recent decision in *7510 Perla Del Mar*, the issue of whether a tender of the superpriority portion of the HOA's lien would have been futile and possibly excused as a matter of law was not fully developed. *See id.* at 351 (acknowledging that the obligation to tender is excused when the lienor would have rejected it). And since the foreclosure agent's response to BOA's payoff request demonstrates that the HOA's foreclosure agent might have either rejected or accepted an offer from BOA to pay the superpriority portion of the HOA's lien, a genuine issue of material fact remains as to whether tender would have been futile. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. Accordingly, we vacate the district court's order granting summary judgment in favor of Logan.[1]

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[1] Insofar as Logan contends that Braewood's foreclosure agent ultimately would have been justified in rejecting any tender by BOA, Logan's contention fails since the subjective good faith of the foreclosure

571, 575, 747 P.2d 230, 233 (1987) (providing that Nevada's appellate courts "will affirm the order of the district court if it reached the correct result, albeit for different reasons").

Lastly, with respect to the parties' dispute concerning BOA's unjust enrichment claim against Braewood, if the district court was correct that Braewood foreclosed on the superpriority portion of its lien and thereby extinguished BOA's interest in the property, then Braewood could not properly use proceeds from the foreclosure sale to satisfy its subpriority lien without the debt that was secured by BOA's deed of trust having first been satisfied from such proceeds. *See* NRS 116.31164(7)(b)(4) (requiring the trustee conducting a foreclosure sale to apply proceeds in the order of priority of any subordinate claim to the superpriority lien); *JPMorgan Chase Bank, N.A. v. 1209 Village Walk Tr., LLC*, Docket No. 69784 (Order Affirming in Part, Reversing in Part and Remanding, March 20, 2018) (reaching the same conclusion on the ground that an HOA's subpriority lien was inferior to a first deed of trust); *see also Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002) (reviewing questions of law addressed in a summary judgment order de novo). Since the district court erred insofar as it reached a contrary conclusion, we reverse the district court's entry of summary judgment against BOA on its unjust enrichment claim. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

To summarize, we affirm the district court's entry of summary judgment against BOA on its claims against Braewood for tortious interference, wrongful foreclosure, and breach of the duty of good faith. But we vacate the district court's entry of summary judgment against BOA with respect to BOA's and Logan's respective quiet title claims, and remand the matter for further proceedings consistent with the supreme court's decision in *Perla Del Mar*. We also reverse the district court's entry of summary judgment against BOA on its unjust enrichment claim against Braewood and remand for further proceedings consistent with this order.

It is so ORDERED.

_______________, C.J.
Gibbons

Tao
_______________, J.
Tao

_______________, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Department 6, Eighth Judicial District Court
Akerman LLP/Las Vegas
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