IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VILLA VECCHIO CT. TRUST,
Appellant,
vs.
DITECH FINANCIAL LLC, F/K/A GREEN TREE SERVICING LLC,
Respondent.

No. 79054-COA

FILED

SEP 04 2020

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

*ORDER OF AFFIRMANCE*

Villa Vecchio Ct. Trust (Villa Vecchio) appeals from a final 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 his 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. Prior to the sale, the predecessor to respondent Ditech Financial LLC (Ditech)—holder of the first deed of trust on the property—tendered payment to the HOA foreclosure agent in an amount exceeding nine months of past due assessments, but the agent rejected the tender and proceeded with its foreclosure sale, at which Villa Vecchio's predecessor purchased the property. Villa Vecchio later acquired the property and filed the underlying action seeking to quiet title against Ditech. The matter eventually proceeded to a bench trial, and following the trial, the district court ruled in favor of Ditech, finding that the tender satisfied the superpriority portion of the HOA's lien such that Villa Vecchio



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took title to the property subject to Ditech's deed of trust. This appeal followed.

This court reviews a district court's legal conclusions following a bench trial de novo, but we will not disturb the district court's factual findings "unless they are clearly erroneous or not supported by substantial evidence." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

Here, the district court correctly found that the tender of an amount exceeding nine months of past due assessments satisfied the superpriority lien such that Villa Vecchio took the property subject to Ditech's deed of trust.[1] *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018). We reject Villa Vecchio's argument that the tender did not satisfy the superpriority lien and instead constituted an assignment of the HOA's superpriority rights to Ditech's predecessor. *See id.* at 609, 427 P.3d at 119 ("Tendering the superpriority portion of an HOA lien does not create, alienate, assign, or surrender an interest in land."). Further, the conditions that Villa Vecchio challenges in the letter accompanying the tender are "conditions on which the tendering party ha[d]

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[1]Villa Vecchio contends that Ditech waived the affirmative defense of tender, which it had the burden of proving, *see Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 52, 437 P.3d 154, 158 (2019) ("Payment of a debt is an affirmative defense, which the party asserting has the burden of proving." (citing NRCP 8(c) and *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979))), because it failed to assert it in a responsive pleading below. But as our supreme court did in *Resources Group*, we reject that argument because Villa Vecchio did not suffer any prejudice due to Ditech's failure to plead the affirmative defense—which was heavily litigated below—and fairness dictates that we reach the issue of tender, which is crucial for evaluating the legal effect of the underlying sale. *See id.* at 53 n.5, 437 P.3d at 159 n.5.

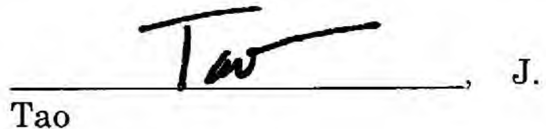
a right to insist." *Id.* at 607-08, 427 P.3d at 118 (stating that a plain reading of NRS 116.3116 indicates that tender of the superpriority amount, *i.e.*, nine months of back due assessments, was sufficient to satisfy the superpriority lien and the first deed of trust holder had a legal right to insist on preservation of the first deed of trust). And once Ditech's predecessor tendered, no further actions were required to preserve the tender for it to extinguish the superpriority lien. *See id.* at 609-11, 427 P.3d at 119-21 (rejecting the buyer's arguments that the bank was required to record its tender or take further actions to keep the tender good).

Additionally, we reject Villa Vecchio's argument that the tender could not have extinguished the superpriority lien because the HOA's foreclosure agent had a good-faith basis for rejecting it. The subjective good faith of the foreclosure agent in rejecting a valid tender cannot validate an otherwise void sale. *See id.* at 612, 427 P.3d at 121 ("[A]fter a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property."); Restatement (Third) of Prop.: Mortgs. § 6.4(b) & cmt. c (Am. Law Inst. 1997) (indicating that a party's reasons for rejecting a tender may be relevant insofar as that party may be liable for money damages but that the reason for rejection does not alter the tender's legal effect). Moreover, given that the sale was void as to the superpriority amount, Villa Vecchio's argument that it was a bona fide purchaser and that the equities therefore warranted eliminating the deed of trust is unavailing. *See Bank of Am.*, 134 Nev. at 612, 427 P.3d at 121 (noting that a party's bona fide purchaser status is irrelevant when a defect in the foreclosure renders the sale void as a matter of law). Thus, in light of the

foregoing, we conclude that the district court properly entered judgment in favor of Ditech, *see Radecki*, 134 Nev. at 621, 426 P.3d at 596, and we

ORDER the judgment of the district court AFFIRMED.[2]

_______________, C.J.
Gibbons



_______________, J.
Tao

_______________, J.
Bulla

cc: Hon. Jerry A. Wiese, District Judge
Law Offices of Michael F. Bohn, Ltd.
Wolfe & Wyman LLP
Eighth District Court Clerk

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[2]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.