IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SEPTEMBER FLOWER STREET TRUST,
Appellant,
vs.
BANK OF AMERICA, N.A.,
Respondent.

No. 79809-COA

ORDER OF AFFIRMANCE

September Flower Street Trust (September) appeals from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

The original owner of the subject property failed to make periodic payments to her 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, respondent Bank of America, N.A. (BOA)—the beneficiary of the first deed of trust on the property—tendered payment to the HOA's foreclosure agent for nine months of past due assessments, but the agent rejected the tender and proceeded with its foreclosure sale. After purchasing the property at the sale, September initiated the underlying action seeking to quiet title against BOA, which counterclaimed seeking the same. The matter proceeded to a bench trial, following which the district court ruled in BOA's favor, finding that the tender satisfied the superpriority portion of the HOA's lien such that September took title to the property subject to BOA'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 determined that the tender of nine months of past due assessments satisfied the superpriority lien such that September took the property subject to BOA's deed of trust. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018). We reject September's argument that BOA's assertion of tender was time-barred under various statutes of limitations, as the district court properly concluded that BOA raised tender as an affirmative defense and that affirmative defenses are not subject to statutes of limitations.[1] *See Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798-99, 801 P.2d 1377, 1381-82 (1990) (applying equitable principles and reasoning that, although the filing of a complaint does not toll the statute of limitations

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[1]The district court alternatively concluded that even if September was correct that a three-year statute of limitations applied to BOA's assertion of tender, it was still timely because the district court stayed the case for nearly a year after September filed its complaint and the stay tolled the statute of limitations. Although we need not address the issue in light of our disposition, we note that September failed to challenge the district court's alternative conclusion on this point in its opening brief, *see Hillis v. Heineman*, 626 F.3d 1014, 1019 n.1 (9th Cir. 2010) (affirming the district court's ruling where the appellants failed to challenge an alternative ground the district court provided for it); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (noting that issues not raised in an opening brief are deemed waived), and we need not reach issues raised for the first time in a reply brief. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (concluding that an issue raised for the first time in a reply brief was waived).

governing a defendant's compulsory counterclaim, the defendant may nevertheless raise the same theory as an affirmative defense); *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 102, 389 P.2d 394, 396 (1964) ("Limitations do not run against defenses."); *see also City of Saint Paul v. Evans*, 344 F.3d 1029, 1033-34 (9th Cir. 2003) (concluding that statutes of limitations do not apply to defenses because "[w]ithout this exception, potential plaintiffs could simply wait until all available defenses are time barred and then pounce on the helpless defendant").

We likewise reject September's argument that the tender did not satisfy the superpriority lien and instead constituted an assignment of the HOA's superpriority rights to BOA. *See Bank of Am.*, 134 Nev. 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, to the extent September contends that the tender was impermissibly conditional, the conditions in the letter accompanying the tender were "conditions on which the tendering party ha[d] a right to insist." *Id.* at 606-07, 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 BOA tendered, no further actions were required to preserve the tender for it to satisfy 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).

Finally, given that the underlying sale was void as to the superpriority amount of the HOA's lien as a matter of law, September's arguments that it was a bona fide purchaser and that it should prevail in

equity are unavailing. *See id.* 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 BOA, *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. Rob Bare, District Judge
Law Offices of Michael F. Bohn, Ltd.
Akerman LLP/Las Vegas
Eighth District Court Clerk

[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.