IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS, INC., CHL MORTGAGE PASS-THROUGH TRUST 2004-12, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2004-12,
Appellant,
vs.
COLLEGIUM FUND LLC SERIES 13, A NEVADA LIMITED LIABILITY COMPANY; AND ELDORADO NEIGHBORHOOD SECOND HOMEOWNERS' ASSOCIATION,
Respondents.

No. 79496-COA

FILED

FEB 17 2021

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Bank of New York Mellon (BNYM) appeals from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

The original owner of the subject property failed to make periodic payments to respondent Eldorado Neighborhood Second Homeowners' Association (the HOA). Through its foreclosure agent, Assessment Management Services (AMS), 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 servicer of the loan secured by BNYM's

deed of trust retained counsel (Miles Bauer) to facilitate payment of the delinquency sufficient to preserve the deed of trust in the event of foreclosure. BNYM claims that, after obtaining a ledger from AMS reflecting the amounts owed, Miles Bauer sent a runner to deliver a check in an amount exceeding the superpriority portion of the HOA's lien—along with a letter stating that the tender operated to preserve the deed of trust—to AMS. BNYM further claims that AMS rejected the tender and that it was then returned to Miles Bauer.

The HOA ultimately foreclosed on its lien and sold the property to respondent Collegium Fund LLC Series 13 (Collegium), which initiated the underlying action against BNYM seeking to quiet title to the property. BNYM counterclaimed seeking the same, and it asserted crossclaims against the HOA. The matter proceeded to a bench trial, following which the district court found that BNYM failed to prove that the tender was actually delivered to AMS. The district court focused principally upon the absence of certain pieces of evidence in the record—including a run slip or receipt from the runner that supposedly delivered the tender and a scanned copy of the voided check following the supposed rejection—that were present in other similar cases involving Miles Bauer tenders. Accordingly, the district court quieted titled in favor of Collegium on grounds that the HOA foreclosed on its superpriority lien and thereby extinguished BNYM's deed of trust. The district court also declined to set the sale aside in equity,

and it entered judgment in favor of the HOA on BNYM's crossclaims.[1] 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).

BNYM presents multiple arguments in favor of reversal. First, it contends that the district court erred or otherwise abused its discretion in finding that BNYM failed to prove that Miles Bauer delivered the tender. We agree with BNYM that certain crucial findings in the district court's written decision are clearly erroneous and unsupported by substantial evidence. Notably, the district court found that "there is no evidence that the alleged 'tender' ever left the Miles Bauer office." But this finding is belied by the record, as BNYM produced substantial evidence of delivery in the form of Miles Bauer's business records—including notations in the firm's internal filing system indicating delivery and rejection—as well as the trial testimony of the firm's managing partner, Doug Miles, explaining the records and the firm's standard practices. Additionally, the district court found that the absence of any copy of the tender letter or check in AMS's files indicated that delivery had not occurred, but such absence was

[1]BNYM does not challenge the district court's rulings with respect to the crossclaims in this appeal. The HOA's participation as a respondent in this matter was limited solely to opposing BNYM's argument that this court should direct the district court to set the foreclosure sale aside in equity.

irrelevant in light of the trial testimony from AMS's representative confirming that it would not have kept any record of a rejected tender.

In light of these clearly erroneous findings, we cannot conclude that the district court would have reached the same decision on this issue in the absence of error. We therefore reverse the district court's judgment insofar as it determined that BNYM failed to prove delivery of the tender, and we remand for further consideration of the tender issue.[2] *See Radecki*, 134 Nev. at 621, 426 P.3d at 596; *cf. In re Guardianship of B.A.A.R.*, 136 Nev., Adv. Op. 57, 474 P.3d 838, 844 (Ct. App. 2020) ("[B]ecause it is not clear that the district court would have reached the same conclusion . . . had it [not erred], we must reverse the district court's decision and remand for further proceedings.").

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[2]BNYM also contends that the district court inappropriately relied on the adverse inference set forth in *Bass-Davis v. Davis*, which applies when evidence is negligently lost or destroyed. 122 Nev. 442, 449, 134 P.3d 103, 107 (2006). In response, Collegium does not directly defend the district court's ruling on this point; instead, it cites to *Cuzze v. University & Community College System of Nevada*, which provides that "[w]hen an appellant fails to include necessary documentation in the record, [the appellate courts] necessarily presume that the missing portion supports the district court's decision." 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). But that presumption is inapplicable here, as the joint appendices submitted to this court include all portions of the record necessary for our review of the district court's judgment. We therefore treat Collegium's failure to substantively respond to BNYM's arguments on this point as a confession of error with regard to this issue. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating respondent's failure to respond to an argument as a confession of error).

BNYM alternatively contends that this court should reverse and remand for entry of judgment in its favor because its obligation to tender was excused on grounds of futility. *See 7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev. 62, 63, 458 P.3d 348, 349 (2020) ("[F]ormal tender is excused when evidence shows that the party entitled to payment had a known policy of rejecting such payments."). However, because the district court did not address this issue in its written findings of fact and conclusions of law, we decline to do so in the first instance.[3] *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) ("[T]his court will not address issues that the district court did not directly resolve . . . .").

Finally, BNYM contends that several factors—in tandem with the grossly inadequate sale price—warrant setting aside the underlying foreclosure sale in equity. *See Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 748, 405 P.3d 641, 647 (2017) (noting that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale absent additional proof of some

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[3]We note that the supreme court issued its first opinion concerning the futility exception, *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. 42, 435 P.3d 1217 (2019), during the trial in this matter. And while this appeal was pending, the supreme court issued its opinion in *Perla Del Mar* and vacated the *Jessup* opinion on reconsideration en banc, *see Jessup*, Docket No. 73785 (Order Affirming in Part, Reversing in Part, and Remanding, May 7, 2020), thereby effectively replacing it with *Perla Del Mar* as the seminal futility-of-tender decision in our jurisdiction.

element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price" (internal quotation marks omitted)). Specifically, it argues that the HOA misleadingly represented in its CC&Rs that it would protect first security interests, and also that AMS set the opening bid at the sale in an unfair manner.[4] But these arguments are unavailing. BNYM contends that the mortgage-protection clause in the HOA's CC&Rs lulled it into a false sense of security and chilled bidding at the sale, but BNYM fails to point to any evidence in the record in support of these assertions. Indeed, BNYM's loan servicer retained Miles Bauer for the specific purpose of preserving the deed of trust, thereby undermining its claim that it believed the HOA would protect it. Moreover, the fact that Collegium was the only bidder at the sale does not necessarily mean that the CC&Rs chilled

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[4]BNYM also points to AMS's supposed rejection of the tender, but because we are remanding for further consideration of that issue, we need not address this point. Likewise, because we conclude that BNYM failed to demonstrate that it is entitled to equitable relief, we need not address its arguments concerning Collegium's purported bona fide purchaser (BFP) status. *See Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 63-64, 366 P.3d 1105, 1114-15 (2016) (providing that courts sitting in equity must consider a purchaser's potential BFP status). However, we note that if the district court determines on remand that BNYM sufficiently proved tender, or if it reaches the issue of futility and concludes that BNYM's obligation to tender was excused, the underlying sale would be void as to the superpriority portion of the HOA's lien, and Collegium's purported BFP status would be inapposite. *See Perla Del Mar*, 136 Nev. at 67, 458 P.3d at 352; *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018). And such status is likewise inapposite following a valid superpriority foreclosure, as a purchaser "ha[s] no obligation to establish BFP status" in such cases. *Radecki*, 134 Nev. at 621, 426 P.3d at 596.

bidding, especially presuming that potential bidders were aware of NRS 116.1104. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 757-58, 334 P.3d 408, 418-19 (2014) (holding that mortgage-protection clauses of the sort at issue here constitute an impermissible waiver of the HOA's superpriority rights under NRS 116.1104); *Smith v. State*, 38 Nev. 477, 481, 151 P. 512, 513 (1915) ("Every one is presumed to know the law and this presumption is not even rebuttable.").

Turning to its claim that the opening bid was unfairly set, BNYM essentially contends that setting the bid for the entire amount of the HOA's lien—as opposed to only the superpriority portion—chilled bidding. But BNYM fails to identify any binding authority concerning the amount at which an opening bid at an HOA foreclosure sale must be set. Moreover, the version of NRS 116.31164 in effect at the time of the sale provided that an HOA "may purchase [the property] by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien," NRS 116.31164(2) (2005), and BNYM fails to cogently explain how it is that an HOA can lawfully acquire the property by a credit bid in that amount, but it is nevertheless somehow unfair to allow the HOA's foreclosure agent to open the bidding at that amount.[5] *See*

[5]BNYM cites our supreme court's unpublished decision in *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), in support of its argument on this point. However, in that case, the supreme court did not conclude that setting the opening bid for the full lien amount rather than the superpriority amount constituted unfairness; it merely

Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate courts need not consider claims unsupported by cogent argument or relevant authority). Additionally, BNYM fails to identify any evidence in the record demonstrating that it was the opening bid that caused there to be only one bidder at the sale, and given that Collegium was the only bidder, the property may have sold for even less (i.e., the sale price may have been even more grossly inadequate) had the HOA opened the bidding at the superpriority amount.

Finally, BNYM also seems to contend that the HOA set the opening bid too low, as it paled in comparison to the value of the deed of trust and ultimately left little to no excess proceeds for BNYM to collect after the sale. Again, BNYM fails to identify any authority requiring the HOA to set the opening bid at a certain amount, let alone one that is likely to ensure a sizable amount of excess proceeds for holders of first security interests. *Id.* And to the extent BNYM points to the post-sale distribution of proceeds as evidence of unfairness, any impropriety in the distribution necessarily occurred after the sale and therefore could not have impacted the sale or the events leading up to it. *See Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 55, 437 P.3d 154, 160-61 (2019) (providing that a

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identified that circumstance as a factor for the district court to consider in weighing the equities on remand. And the supreme court did not address the extent to which it is permissible for an HOA to credit bid the full amount of its lien under NRS 116.31164(2) (2005). Accordingly, we are not persuaded that *Village Walk* in any way compels reversal in this case.

district court may set the sale aside if "*the sale itself* was affected by fraud, unfairness, or oppression" (internal quotation marks omitted)). We therefore discern no abuse of discretion in the district court's refusal to set the sale aside in equity, and we affirm the judgment with respect to that decision. *See id.* at 55, 437 P.3d at 160 ("A district court's decision [concerning whether] to set aside a foreclosure sale on equitable grounds is subject to an abuse of discretion standard of review.").

Given the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[6]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[6]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.

cc: Hon. Gloria Sturman, District Judge
Akerman LLP/Las Vegas
Clark Newberry Law Firm
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Eighth District Court Clerk