IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF ALTERNATIVE LOAN TRUST 2006-OC6, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-OC6,
Appellant,
vs.
HOLM INTERNATIONAL PROPERTIES, LLC, A UTAH LIMITED LIABILITY COMPANY REGISTERED AS A FOREIGN LIMITED LIABILITY COMPANY IN NEVADA,
Respondent.

No. 80178-COA

FILED

MAR 12 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

The Bank of New York Mellon (BNYM) appeals from a district court judgment, certified as final pursuant to NRCP 54(b),[1] 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 his homeowners' association (HOA). The HOA's foreclosure agent, Alessi & Koenig, LLC (Alessi), 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. Alessi proceeded with foreclosure and sold the property to

[1]Both the Eighth Judicial District Court Rules and the Nevada Rules of Civil Procedure have been amended since entry of the primary orders at issue in this appeal. Because the amendments do not affect our analysis, we cite the current versions of the rules herein.

respondent Holm International Properties, LLC (Holm), which initiated the underlying action seeking to quiet title. BNYM—the beneficiary of the first deed of trust recorded against the property—filed an answer in which it asserted as an affirmative defense, among other things, satisfaction of the HOA's superpriority lien. BNYM also counterclaimed for quiet title against Holm, alleging in relevant part that the servicer for the underlying loan "attempted to tender to Alessi the super priority amount, but which offer was refused." It also asserted claims for quiet title and for damages against the HOA and Alessi.

Holm later moved for summary judgment against BNYM, which the district court granted over BNYM's opposition and countermotion for the same. Because BNYM did not make any arguments or present any evidence concerning tender at that time,[2] the district court concluded that Holm purchased the property at a valid foreclosure sale conducted pursuant to NRS Chapter 116, that BNYM had not satisfied the HOA's superpriority lien, and that the sale therefore extinguished BNYM's deed of trust. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) ("NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust."). Accordingly, the district court ruled that the recorded deed of trust and any assignments thereof were cancelled and that BNYM no longer had any interest in the property. It also concluded that Holm was protected as a bona fide purchaser (BFP). BNYM appealed from that order, and the supreme court ultimately dismissed the appeal for lack of jurisdiction on grounds that the order was not a final judgment, as claims remained

[2]We note that BNYM also failed to request the opportunity to conduct further discovery on this point under NRCP 56(d).

pending before the district court. *See The Bank of N.Y. Mellon v. Holm Int'l Props., LLC*, Docket No. 71319 (Order Dismissing Appeal, May 11, 2017).

Following the dismissal of the appeal, BNYM moved for summary judgment on its claims against the HOA and Alessi. At the very beginning of its written memorandum of points and authorities in support of the motion, BNYM represented that it was the current beneficiary of the first deed of trust on the subject property and that it was seeking a determination that the deed of trust was not extinguished by the underlying foreclosure sale. However, BNYM also acknowledged the district court's previous order quieting title in favor of Holm and cancelling the deed of trust, and it stated that it brought the instant motion against the HOA and Alessi because it was their wrongful foreclosure sale that resulted in the district court's previous order. Along with the motion, BNYM presented evidence to the district court for the first time that counsel for a predecessor in interest had tendered an amount in excess of the superpriority portion of the HOA's lien to Alessi and that Alessi rejected the tender.[3] In light of this and the district court's previous order quieting title in favor of Holm, BNYM argued that it was entitled to summary judgment on all of its claims against the HOA and Alessi. And in the motion's conclusion, BNYM requested in relevant part that the district court determine that the HOA and Alessi are liable for all of the claims against them and that it award damages to BNYM in the amount of the property's current fair market value, to be determined in subsequent proceedings.

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[3]We note that BNYM was the record beneficiary of the deed of trust at the time of the alleged tender, but it claims that counsel made the tender on behalf of Bank of America, N.A., as servicer for BNYM's predecessor, Mortgage Electronic Registration Systems, Inc.

After the HOA and Alessi failed to oppose BNYM's motion, BNYM filed a notice of non-opposition with the district court. The district court then issued a written order—prepared by BNYM's counsel—granting BNYM's motion for good cause appearing. The order granted summary judgment in favor of BNYM on all of its claims against the HOA and Alessi, and it specifically concluded that BNYM's predecessor had tendered an amount in excess of the HOA's superpriority lien and that the property remained subject to BNYM'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) ("[A] first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust.").

BNYM then filed a motion for reconsideration of the district court's prior order quieting title in favor of Holm, pointing to the inconsistency between that order and the order granting summary judgment against the HOA and Alessi. BNYM also argued that reconsideration was warranted on grounds that the tender evidence was newly discovered and previously unavailable, and it attached a declaration from its counsel to the motion setting forth that she was previously unaware of the evidence because it was not in BNYM's former loan servicer's business records, and BNYM's new loan servicer brought it to her attention after the prior appeal in this matter was dismissed. Finally, BNYM argued that the district court's prior decision—including its conclusion that Holm was a BFP—was clearly erroneous in light of the tender evidence and recent developments in the law concerning NRS Chapter 116 foreclosure sales.

Holm opposed BNYM's motion and filed a countermotion for reconsideration, arguing that the district court should amend the order

granting summary judgment in favor of the HOA and Alessi to clarify that it was solely entered against those parties and did not impact the prior order quieting title in favor of Holm. The district court then denied BNYM's motion and granted Holm's motion in a written order, concluding that BNYM's motion was untimely under EDCR 2.24(b), that the evidence of tender was available to BNYM since 2012 and therefore could have been presented at the time Holm and BNYM sought summary judgment against each other, and that BNYM failed to demonstrate that the court's prior conclusion that Holm was a BFP was clearly erroneous. The district court subsequently entered an amended order granting summary judgment in favor of BNYM against the HOA and Alessi that removed the language preserving BNYM's deed of trust, as well as any reference to the tender. BNYM then filed a motion to alter or amend the amended order under NRCP 59(e), which the district court denied, concluding that the amended order accurately reflected its ruling on BNYM's motion for summary judgment against the HOA and Alessi. BNYM then stipulated with the HOA to dismiss all of the claims against it with prejudice, and this appeal followed, during which BNYM and Holm stipulated to obtain certification from the district court pursuant to NRCP 54(b) that judgment was final with respect to their claims against each other. The issue of damages with respect to BNYM's claims against Alessi remains unresolved.

On appeal, BNYM contends that the district court should have reconsidered its order granting summary judgment in favor of Holm to account for that order's inconsistency with the later order granting summary judgment against the HOA and Alessi, as well as the newly discovered evidence of tender. *See Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489

(1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."). Specifically, it argues that the district court incorrectly determined that the motion for reconsideration was untimely, as courts retain authority under NRCP 54(b) to revise orders that "adjudicate fewer than all of the claims or the rights and liabilities of all the parties" at any time before the entry of a final judgment. *Barry v. Lindner*, 119 Nev. 661, 670, 81 P.3d 537, 543 (2003) (citing NRCP 54(b)), *superseded by rule on other grounds as stated in LaBarbera v. Wynn Las Vegas, LLC*, 134 Nev. 393, 395, 422 P.3d 138, 140 (2018).

But even though BNYM is correct that the district court retained such authority,[4] that does not necessarily mean that the district court abused its discretion in denying the motion, especially since untimeliness was not the sole basis for the district court's order.[5] *See AA*

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[4]We note that the record does not reflect that BNYM ever identified NRCP 54(b) to the district court as authority in support of reconsideration; rather, it sought relief pursuant to EDCR 2.24(b), NRCP 59(e), and NRCP 60(b). And although our supreme court has applied NRCP 54(b) to uphold a district court's decision to reconsider an order even when neither the parties nor the district court relied on that rule, *see Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 716 (2009), BNYM has not presented any authority in support of the notion that we must reverse the district court for failing to expressly acknowledge its reconsideration authority under NRCP 54(b) sua sponte. Regardless, in light of our disposition, we need not reach this issue.

[5]We reject BNYM's alternative contention that its motion was timely under NRCP 60(b)—and that it was entitled to relief under that rule—as the rule applies only to final judgments, *see Barry*, 119 Nev. at 669, 81 P.3d at 542, and BNYM concedes that there was no final judgment in this matter until the district court entered its order concerning NRCP 54(b) certification

Primo Builders, LLC v. Washington, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (reviewing the denial of a motion for reconsideration for an abuse of discretion); *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007) (indicating that a district court has discretion in determining whether to consider issues presented for the first time in a motion for reconsideration).

Turning to the district court's conclusion that reconsideration was unwarranted because the tender evidence was available to BNYM since 2012 and therefore should have been introduced sooner, BNYM contends that the only evidence presented below concerning the availability of the tender evidence was the declaration of its counsel, which demonstrates that the evidence was previously unavailable. But the declaration does not at all explain why it is that BNYM could not, with reasonable diligence, have discovered the evidence in time to present it in opposition to Holm's motion for summary judgment. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir. 1994) ("Evidence is not newly discovered if it was in the party's possession at the time of summary judgment or could have been discovered with reasonable diligence."); *cf. Drespel v. Drespel*, 56 Nev. 368, 45 P.2d 792, 793-94 (1935) (affirming the denial of a motion for a new trial and noting that "[t]here [wa]s no statement of facts in the affidavit showing that reasonable diligence had been exercised by the defendant prior to the trial to discover the [new evidence], nor is there an intimation of such diligence"), *modified in part on other grounds on reh'g*, 56 Nev. 368, 54 P.2d 226 (1936).

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while this appeal was pending. However, we take no position as to whether BNYM would be entitled to future relief from the final judgment in either the underlying proceeding or in an independent action. *See* NRCP 60(c)(1) (setting forth the timing requirements for a motion under NRCP 60(b)), (d)(1) (providing that NRCP 60 does not limit a court's power to entertain an independent action for relief from a judgment).

Instead, it simply states that the evidence was previously unavailable because it was not in the business records of BNYM's previous loan servicer, and only when the loan was transferred to a new servicer was the evidence brought to counsel's attention. The declaration fails to explain why the former servicer did not have the records, how the new servicer was able to obtain them when the former servicer was apparently unable to do so, or whether BNYM—the record beneficiary of the deed of trust both now and when the tender allegedly occurred—had previously exercised diligence in inquiring with former servicers and/or interest holders to determine whether they were in possession of records relevant to the claims and defenses at issue in this case.

Accordingly, on this record, we are not persuaded that no reasonable judge would have denied reconsideration of the order quieting title in favor of Holm. *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances."); *cf. Fox v. Fox*, 87 Nev. 416, 417-18, 417 n.1, 488 P.2d 548, 549-50, 549 n.1 (1971) (concluding that, despite appellant's citation to the district court's reconsideration authority under NRCP 54(b) to support his argument that the court should have considered newly submitted evidence with respect to a previously decided issue, "equity does not require a remand to permit appellant to proffer explanatory matter he should have adduced at the first hearing of this cause"). And given that the district court appropriately exercised its discretion to disregard the belated tender evidence as it pertains to the claims between Holm and BNYM, we do not reach the parties' arguments concerning the merits of BNYM's reconsideration

motion.[6] *See Arnold*, 123 Nev. at 417, 168 P.3d at 1054 ("[I]f the reconsideration order and motion are properly part of the record on appeal from the final judgment, and *if the district court elected to entertain the motion on its merits*, then we may consider the arguments asserted in the reconsideration motion in deciding an appeal from the final judgment." (emphasis added)).

Finally, BNYM cites our supreme court's unpublished decision in *Renfroe v. Carrington Mortgage Services, LLC*, Docket No. 76450 (Order of Affirmance, February 14, 2020), in support of the notion that, regardless of what occurred in this litigation, in light of the alleged tender, the underlying foreclosure sale was void as to the HOA's superpriority lien, and the deed of trust was preserved as a matter of law. Specifically, BNYM cites the portion of the court's decision in which it held that the deed of trust beneficiary in that case "had no obligation to prevail in a judicial action as a condition precedent to enforcing its deed of trust that had already survived the HOA's foreclosure sale." *Id.* But the court reached that conclusion in the context of rejecting the appellant's argument that the beneficiary was time-barred from asserting its tender defense, and that case did not involve procedural considerations like those at issue here, *id.*, so we

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[6]BNYM also contends that the district court's ruling in favor of Holm—especially its conclusion that Holm was a BFP—was clearly erroneous in light of later developments in Nevada jurisprudence concerning tender and BFP status in the context of HOA foreclosure sales. But this concern is irrelevant in light of the district court's refusal to consider the belated tender evidence with respect to Holm, and the district court's conclusion that Holm was a BFP is inapposite in light of its separate conclusion that the sale was superpriority in nature and extinguished BNYM's deed of trust. *See Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018) (concluding that a purchaser "had no obligation to establish BFP status" following a valid HOA foreclosure sale).

are not persuaded that the same reasoning applies. The disposition in *Renfroe* does not stand for the proposition that deed of trust beneficiaries involved in similar matters, whenever it turns out that a tender actually occurred, are somehow exempted from their duties to litigate diligently and follow all applicable rules of procedure in investigating and presenting their claims and defenses.

Because the district court appropriately granted summary judgment in favor of Holm in light of the absence at that time of any evidence that the HOA's superpriority lien had been satisfied, and because it appropriately exercised its discretion to deny reconsideration of that order under the circumstances presented in this case, we are constrained to

ORDER the judgment of the district court AFFIRMED.[7]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[7]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: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 32
Wright, Finlay & Zak, LLP/Las Vegas
Bohn & Trippiedi
Eighth District Court Clerk