IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TIM RADECKI,
Appellant,
vs.
THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS OF THE CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2006-BC5,
Respondent.

No. 80892-COA

FILED

JUN 04 2021

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

ORDER OF AFFIRMANCE

Tim Radecki appeals from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

The original owners of the subject property failed to make periodic payments to their homeowners' association (HOA). The HOA—through its foreclosure agent, Nevada Association Services, Inc. (NAS)—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. Radecki purchased the property at the ensuing foreclosure sale and initiated the underlying action seeking to quiet title against respondent The Bank of New York Mellon (BNYM)—the beneficiary of the first deed of trust on the property and the owner of the underlying loan—which counterclaimed seeking the same.

The matter proceeded to a bench trial, following which the district court entered judgment in favor of BNYM. The court found that NAS never sent copies of the notices of default and sale to BNYM's predecessor and that, as a result, Bank of America, N.A. (BOA)—then the servicer of the underlying loan—did not have enough time to follow its standard practice of directing its counsel (Miles Bauer) to tender the superpriority portion of the HOA's lien to NAS. Thus, the court determined that there was at least slight evidence of unfairness that, in tandem with the inadequate sale price, warranted setting aside the foreclosure sale with respect to BNYM and preserving its deed of trust in equity. In light of its ruling, the district court explained that it did not need to reach BNYM's argument that NAS would not have accepted a superpriority tender such that the obligation to tender would have been excused as a matter of law. 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).

On appeal, Radecki contends that the district court erred in determining that NAS's failure to mail notices to BNYM's predecessor resulted in prejudice that warranted setting the sale aside as to BNYM. He further contends that the district court should have concluded that BNYM's claims were barred by the doctrines of laches and election of remedies. BNYM counters that the district court appropriately exercised its equitable

powers in preserving the deed of trust, and also that laches and election of remedies do not apply here. However, it further argues that affirmance is warranted on the alternative ground that the obligation to tender the superpriority portion of the HOA's lien was excused as a matter of law, as the evidence admitted at trial showed that BOA was aware that NAS would have rejected a superpriority tender of the sort that BOA—through Miles Bauer—routinely made to NAS during the relevant time period. We agree with BNYM on this point, and we affirm the district court's judgment on this alternative ground. And although we need not address whether the district court properly preserved BNYM's deed of trust in equity in light of our disposition, we agree with BNYM that neither laches nor election of remedies provide a basis for reversal.

As our supreme court recently held, "formal tender [of the superpriority portion of an HOA's lien] is excused when evidence shows that the party entitled to payment had a known policy of rejecting such payments." *7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev. 62, 63, 458 P.3d 348, 349 (2020). Although the district court did not resolve this issue below in light of its disposition, BNYM correctly points out that the evidence admitted at trial demonstrates that NAS would have rejected a superpriority tender of the sort BOA routinely made to it at the time in question and that BOA was aware of this policy. And Radecki does not dispute this point on appeal; instead, he argues that the issue is not properly before this court because the district court did not resolve it. But it is well established that affirmance is warranted where the district court "reached the correct result, albeit for different reasons," *Rosenstein v. Steele*,

103 Nev. 571, 575, 747 P.2d 230, 233 (1987), and this court may resolve legal issues where the underlying material facts are undisputed, *see Pink v. Busch*, 100 Nev. 684, 691, 691 P.2d 456, 461 (1984) (providing that an appellate court may enter judgment or remand for entry of judgment "where the material facts have been fully developed at trial and are undisputed such that the issues remaining are legal rather than factual"). We are therefore not persuaded that we should decline to reach this issue.

Radecki alternatively argues that the excuse-of-tender doctrine cannot apply here because BOA never even requested that Miles Bauer attempt to tender the superpriority amount of the HOA's lien. But all that is required for excuse of tender under *Perla Del Mar* is that the obligee had a policy of rejecting tenders and that the obligor was aware of that policy; our supreme court did not hold that the obligor must take any preliminary steps in furtherance of tender for this doctrine to apply. *See* 136 Nev. at 66-67, 458 P.3d at 351-52. Radecki further contends that the doctrine does not apply because the representative for Ditech Financial, LLC—the entity that succeeded BOA as servicer of the underlying loan just before NAS sent the notice of sale to BOA—unequivocally testified at trial that it would have paid the HOA's entire lien had BOA forwarded it the notice of sale, and testimony at trial established that NAS would have accepted such a tender. But that does not change the fact that NAS would have rejected a tender limited to the superpriority portion of the lien, which is all that was required to preserve the 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 hold that 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."); *see also Perla Del Mar*, 136 Nev. at 67, 458 P.3d at 351-52 (holding that tender was excused where the evidence at trial showed "that NAS had a known business practice to systematically reject any check tendered for less than the full lien amount").

Turning to Radecki's remaining arguments, he fails to demonstrate that the district court abused its discretion in denying him relief under the equitable doctrine of laches. *See Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) ("Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." (internal quotation marks omitted)); *see also Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 55, 437 P.3d 154, 160 (2019) (reviewing the district court's weighing of the equities concerning an HOA foreclosure for an abuse of discretion). He vaguely contends that he was disadvantaged because he "could have made an informed decision about whether he wanted to move forward with his purchase of the property" if BNYM had taken earlier action to provide notice that it would challenge the HOA's foreclosure sale. But the arguments of Radecki's counsel are not evidence, *see Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014), and Radecki—who did not testify at trial—fails to identify any evidence in the record to support the notion that he would have proceeded differently if BNYM had provided earlier notice that it would contest the sale, *see* NRCP 8(c)(1)(L) (providing that laches is an affirmative defense); *Res. Grp.*, 135

Nev. at 52, 437 P.3d at 158-59 (providing that the proponent of an affirmative defense bears the burden to prove it). And with respect to election of remedies, that doctrine merely prevents parties from pursuing inconsistent remedies in litigation, which BNYM did not do here. *See J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 289, 89 P.3d 1009, 1017 (2004) (recognizing that litigants may pursue alternative claims for relief and are not required to elect a remedy until after the verdict).

Accordingly, because the undisputed evidence at trial confirms that the obligation to tender was excused such that BNYM's deed of trust survived the foreclosure sale as a matter of law, and because Radecki has failed to set forth any grounds for reversal, we

ORDER the judgment of the district court AFFIRMED.[1]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[1]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. 23
The Wright Law Group
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Eighth District Court Clerk