IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RH KIDS, LLC,
Appellant,
vs.
DITECH FINANCIAL LLC, F/K/A GREEN TREE SERVICING LLC, A DELAWARE LIMITED LIABILITY COMPANY,
Respondent.

No. 81688-COA

FILED

JUN 28 2021

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

ORDER OF AFFIRMANCE

RH Kids, LLC (RH), appeals from a district court order granting summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

The original owners of the subject property failed to make periodic payments to their 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. A predecessor in interest to RH purchased the property at the resulting foreclosure sale and filed a complaint seeking to quiet title against respondent Ditech Financial LLC (Ditech), the beneficiary of the first deed of trust on the property, which counterclaimed seeking the same. RH later substituted into the action in its predecessor's place, and Ditech ultimately moved for summary judgment. The district court granted Ditech's motion over RH's opposition, concluding that the Federal National Mortgage Association (Fannie Mae) owned the underlying loan such that 12 U.S.C. § 4617(j)(3) (the Federal Foreclosure Bar) prevented the foreclosure sale from extinguishing the deed of trust. This appeal followed.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

On appeal, RH presents two alternative arguments in favor of reversal. First, it contends that summary judgment was inappropriate because conflicting evidence existed as to whether Fannie Mae owned the underlying loan. RH points to the fact that the presale assignment of the deed of trust from Mortgage Electronic Registration Systems, Inc. (MERS), to Bank of America, N.A. (BOA)—both predecessors of Ditech—purported to convey not only the deed of trust, but also the underlying promissory note. For support, it cites *Jones v. U.S. Bank, National Ass'n*, in which our supreme court discussed how a party may demonstrate its authority to enforce a lost, destroyed, or stolen promissory note. 136 Nev. 129, 130, 460 P.3d 958, 960 (2020). There, the appellant argued that U.S. Bank—the beneficiary of the first deed of trust—could not prove its authority to enforce the underlying mortgage loan by foreclosure. *Id.* at 132, 460 P.3d at 961. The deed of trust originally named MERS as the beneficiary as nominee for the lender, and after the lender went bankrupt and the mortgage note was lost, MERS assigned the deed of trust to U.S. Bank. *Id.* at 130-31, 460 P.3d at 960. The bank argued that the MERS assignment gave it the right to enforce the loan. *Id.* at 132, 460 P.3d at 961. The supreme court agreed,

noting that "[t]ransferring a deed of trust . . . also transfers the obligation that it secures unless the parties to the transfer agree otherwise." *Id.* (internal quotation marks omitted); *see Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 517-18, 286 P.3d 249, 257-58 (2012) (recognizing the related presumption that "a transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise" (alteration and internal quotation marks omitted)). Accordingly, RH contends that the assignment of the deed of trust from MERS to BOA creates a genuine dispute of material fact as to whether Fannie Mae owns the underlying loan.

However, the supreme court in *Jones* went on to specifically conclude that the "assignment of the deed of trust *absent any indication that the deed of trust was being transferred split from the note* supports the inference that the note had not been previously transferred . . . and that [the assignor] was exercising its authority to transfer the note with the deed of trust." 136 Nev. at 133, 460 P.3d at 962 (emphasis added). And here, Ditech produced evidence demonstrating that the note had been transferred to Fannie Mae split from the deed of trust prior to the relevant assignment of that security interest. Specifically, Ditech produced business records from Fannie Mae showing that, at the time MERS assigned the deed of trust to BOA, Fannie Mae held the note while BOA became the record beneficiary of the deed of trust solely in its capacity as Fannie Mae's contractually authorized loan servicer. These records were materially identical to the records our supreme court held in *Daisy Trust v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 233-36, 445 P.3d 846, 849-51 (2019), were sufficient, in the absence of contrary evidence, to prove that a regulated entity like Fannie Mae owned the obligation secured by a deed of trust for which its

contractually authorized loan servicer was the record beneficiary.[1] Accordingly, Ditech rebutted "the general presumption that the note traveled with the deed of trust," *Jones*, 136 Nev. at 132, 460 P.3d at 962, and RH fails to identify any contrary evidence.

To the extent RH contends that the assignment somehow could have transferred the loan even despite Fannie Mae's status as holder of the note and its intent that BOA serve merely as its agent, the common law "has long recognized that an assignment operates to place the assignee in the shoes of the assignor, and provides the assignee with the same legal rights as the assignor had before assignment." *First Fin. Bank v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014) (internal quotation marks omitted); *see* 6A C.J.S. *Assignments* § 111 (2021 update) ("An assignee . . . ordinarily obtains only the rights possessed by the assignor at the time of the assignment, and no more."); *see also Reynolds v. Tufenkjian*, 136 Nev. 145, 151-53, 461 P.3d 147, 153 (2020) (relying on 6A C.J.S. *Assignments* (2016) to set forth general legal principles governing assignments). And the evidence submitted to the district court below—including excerpts from the Fannie Mae Servicing Guide, which governs the relationship between Fannie Mae and its loan servicers—indicated that when Fannie Mae acquires loans, it is at all times the owner and holder of the mortgage note while its agent serves merely as the beneficiary of the

[1]We note that at the time of the HOA's foreclosure sale, the servicing rights for the underlying loan had been transferred to Ditech, but BOA continued to serve as the record beneficiary of the deed of trust. Ditech points out in its answering brief that BOA, as a former servicer, nevertheless remained contractually bound under the Fannie Mae Servicing Guide to protect Fannie Mae's interests in the same manner it would as a current servicer, and RH does not dispute this point.

deed of trust. *See Daisy Tr.*, 135 Nev. at 234 n.3, 445 P.3d at 849 n.3 (discussing the analogous guide governing Freddie Mac's relationships with its servicers).

Thus, in light of RH's failure to identify any evidence indicating that MERS held the promissory note or had any right to transfer it at the time of the assignment to BOA, or that Fannie Mae otherwise intended to transfer its ownership interest in the loan, it follows that the language in the assignment purporting to transfer the note to BOA had no legal effect beyond conveying the beneficial interest in the deed of trust. *See First Fin. Bank*, 130 Nev. at 978, 339 P.3d at 1293; 6A C.J.S. *Assignments* § 111 (2021 update); *see also In re Phillips*, 491 B.R. 255, 259 n.2 (Bankr. D. Nev. 2013) (acknowledging the distinction between transferring a property interest by assignment on the one hand, and the U.C.C.'s narrower definition of "transfer" with respect to negotiable instruments on the other). RH has therefore failed to demonstrate a genuine dispute of material fact as to Fannie Mae's ownership of the loan sufficient to overcome summary judgment.[2] *See Wood*, 121 Nev. at 729, 121 P.3d at 1029; *see also Cuzze v.*

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[2]RH also argues that the language in the assignment purporting to transfer the loan amounted to a false representation concerning title under NRS 205.395—a category C felony—and that Ditech should not be permitted to gain advantage from this alleged wrong. But RH fails to cogently argue this point, and it does not appear from the record that it raised the issue below. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that the appellate courts need not consider claims unsupported by cogent argument or relevant authority); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (setting forth the parties' respective burdens of production and persuasion on summary judgment).

RH alternatively argues that, in spite of the Federal Foreclosure Bar, it took the subject property free and clear of Fannie Mae's interest because Fannie Mae failed to record its acquisition of the underlying loan.[3] *See* NRS 111.325 (providing that "[e]very conveyance of real property within this State . . . which shall not be recorded . . . shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property . . . where his or her own conveyance shall be first duly recorded"). Specifically, RH contends that Fannie Mae's acquisition of the loan itself amounted to a conveyance of land as defined by statute, *see* NRS 111.010(1) (defining "[c]onveyance" to "embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned or surrendered"), and that our supreme court did not address this specific question in *Daisy Trust*, where—according to RH—it simply held that an entity like Fannie Mae need not be the record beneficiary of the deed of trust to benefit from the Federal Foreclosure Bar, *see* 135 Nev. at 233-34, 445 P.3d at 849, not that such an entity is not required to record anything at all in connection with the acquisition of the underlying loan. We disagree.

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[3]Implicit in this argument is the notion that Nevada's recording statutes are not preempted by the Federal Foreclosure Bar. However, like our supreme court in *Daisy Trust*, 135 Nev. at 234, 445 P.3d at 849, we need not address this issue in light of our disposition.

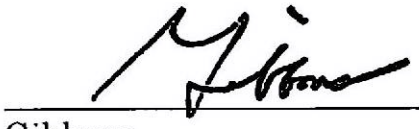
To the extent the opinion in *Daisy Trust* did not squarely address the argument RH advances here, the supreme court did specifically characterize the appellant in that case as arguing "that Nevada's recording statutes required Freddie Mac to record *its interest in the loan*," and it proceeded to broadly reject that argument by stating that it "agree[d] with the district court that Nevada's recording statutes did not require Freddie Mac to publicly record *its ownership interest* as a prerequisite for establishing that interest." *Id.* (emphasis added). Thus, although the *Daisy Trust* court largely focused on the extent to which it is permissible for an entity like Fannie Mae to own a mortgage loan while its agent serves as the record beneficiary of the deed of trust, and it stated that it was "not persuaded . . . that NRS 111.325 is implicated because there is no requirement that the beneficial interest in the deed of trust needed to be 'assigned' or 'conveyed' to Freddie Mac in order for Freddie Mac to acquire ownership of the loan," *id.* at 233, 445 P.3d at 849, the supreme court impliedly rejected the notion that the acquisition of a promissory note is a conveyance as defined in NRS Chapter 111. And later unpublished orders from the supreme court applying *Daisy Trust* support this understanding.[4] *See, e.g., BDJ Invs., LLC v. Ditech Financial LLC*, Docket No. 77347 (Order of Affirmance, September 18, 2020) (citing *Daisy Trust* in support of the notion that "we recently held that Nevada law does not require a federal

[4]We note that the United States Bankruptcy Court for the District of Nevada has held that negotiation of a promissory note, which is the manner in which an entity like Fannie Mae acquires its interest in a home loan, *see Daisy Tr.*, 135 Nev. at 234 n.3, 445 P.3d at 849 n.3, does not amount to a conveyance of an interest in real property under Nevada law. *In re Phillips*, 491 B.R. at 271 (concluding that "[n]egotiation of a promissory note . . . does not convey an interest in real property" and that it therefore does not implicate Nevada's statute of frauds).

entity, such as Fannie Mae, to publicly record its ownership interest in the subject loan, and that its acquisition of a loan is not a conveyance within the meaning of NRS 111.325"); *Premier One Holdings, Inc. v. Ditech Financial, LLC*, Docket No. 77526 (Order of Affirmance, May 15, 2020) (same); *see also* NRAP 36(c)(3) (providing that post-2015 unpublished Nevada Supreme Court orders are citable for their persuasive value); *U.S. Bank, N.A. v. White Horse Estates Homeowners Ass'n*, 987 F.3d 858, 863-67 (9th Cir. 2021) (looking to unpublished Nevada Supreme Court orders to contextualize that court's existing published precedent).

In light of the foregoing, RH has failed to demonstrate that reversal is warranted, and we

ORDER the judgment of the district court AFFIRMED.[5]



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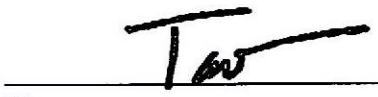

_____, J.
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[5]At this time, we decline to impose sanctions against RH or its counsel under NRAP 38 as requested by Ditech. Nevertheless, we note that full review of this matter was made possible only by Ditech's decision to file supplemental appendices, and we remind RH and its counsel of their obligation to provide this court with an adequate appellate record. *See* NRAP 30(b)(3); *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 4
Hong & Hong
Wolfe & Wyman LLP
Eighth District Court Clerk