IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE HOLDERS OF THE LEHMAN MORTGAGE TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-3, A NATIONAL BANK,
Appellant,
vs.
SATICOY BAY LLC SERIES 4509 MELROSE ABBEY,
Respondent.

No. 81491-COA

ORDER OF AFFIRMANCE

Wilmington Trust, National Association (Wilmington), appeals from a district court summary judgment 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 recorded a notice of delinquent assessment lien and later a notice of default and election to sell to collect on past due assessments and other fees pursuant to NRS Chapter 116. Prior to the sale, the original owners made multiple payments to the HOA in an amount exceeding the superpriority portion of the HOA's lien. Nevertheless, the HOA proceeded with its foreclosure sale and sold the property to respondent Saticoy Bay LLC Series 4509 Melrose Abbey (Saticoy Bay).

Wilmington, which is the beneficiary of the first deed of trust on the property, later filed an action seeking to quiet title against Saticoy Bay in federal district court, but the court dismissed the action, concluding that it was time-barred pursuant to the statute of limitations set forth by NRS 11.220. *Wilmington Tr., Nat'l Ass'n v. Royal Highlands St. & Landscape Maint. Corp.*, No. 2:18-cv-00245-JAD-PAL, 2018 WL 2741044, at *3 (D. Nev. June 6, 2018).

Wilmington later recorded a notice of breach and election to sell under its deed of trust, and Saticoy Bay commenced the underlying action seeking to quiet title against Wilmington, which essentially sought the same relief in its answer. Wilmington and Saticoy Bay eventually filed competing motions for summary judgment, and the district court ruled in Saticoy Bay's favor. In particular, the district court found that the HOA complied with the statutory requirements for foreclosure. Moreover, based on the dismissal of Wilmington's federal court action, the district court concluded that claim preclusion barred Wilmington's defense against Saticoy Bay's quiet title claim, which was that the original owners' payments to the HOA satisfied the HOA's superpriority lien such that Saticoy Bay took title to the property subject to the deed of trust. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 79, 459 P.3d 227, 230 (2020) (holding that payments made by a homeowner may cure the default on the superpriority portion of an HOA's lien and thereby prevent an HOA's foreclosure sale from extinguishing the first deed of trust on a property). This appeal followed.

On appeal, Wilmington does not challenge the district court's determination that Saticoy Bay complied with the statutory requirements for foreclosure. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived). Instead, Wilmington maintains that claim preclusion did not bar it from asserting the defense of payment by the original owners to dispute the effect of the foreclosure sale.

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 dispute 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 disputes of fact. *Id.* at 731, 121 P.3d at 1030-31. Claim preclusion applies when "(1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the [subsequent] lawsuit as they were in the previous lawsuit." *Weddell v. Sharp*, 131 Nev. 233, 235, 350 P.3d 80, 81 (2015) (discussing the test for evaluating the applicability of claim preclusion). We review the district court's determinations concerning claim preclusion de novo. *Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 136 Nev. 235, 237, 464 P.3d 104, 107 (2020).

Wilmington concedes the first and third elements of claim preclusion, but disputes whether the second element was implicated by arguing that it was the defendant in the underlying proceeding and raised the issue of the original owners' payments to the HOA as a defense rather than a claim.[1] But this does not establish a basis for relief because the supreme court has recognized that claim preclusion applies to both claims and defenses.[2] *See Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 891, 266 P.3d 602, 605 (2011) (recognizing that claim preclusion applies to defenses

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[1]"Payment of a debt is an affirmative defense" that is generally waived if not plead in a party's responsive pleading. *See Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 52-53, 53 n.5, 437 P.3d 154, 158-59, 159 n.5 (2019) (citing NRCP 8(c) and *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 755 n.12, 191 P.3d 1175, 1179 n.12 (2008)). Although Wilmington raised the payment issue in its motion practice rather than its answer to Saticoy Bay's complaint, Saticoy Bay does not argue in its answering brief that it was prejudiced by the delay, *see id.* at 53 n.5, 437 P.3d at 159 n.5 (recognizing that an unplead affirmative defense may be considered if "fairness so dictates and prejudice will not follow" (internal quotation marks omitted)), and we therefore decline to consider whether Wilmington waived the matter. *See Frazier v. Drake*, 131 Nev. 632, 645 n.11, 357 P.3d 365, 374 n.11 (Ct. App. 2015) (declining to consider an issue that respondents failed to raise in their answering brief).

[2]Insofar as Wilmington suggests that the claim preclusion doctrine does not apply because it was on opposite sides of the litigation in the federal court action and the underlying proceeding, it likewise has not demonstrated a basis for relief since the supreme court has applied claim preclusion under similar circumstances. *See Mendenhall v. Tassinari*, 133 Nev. 614, 618-24, 403 P.3d 364, 368-73 (2017) (applying claim preclusion against a party who was the defendant in the prior proceeding and the plaintiff in the subsequent proceeding because the doctrine's elements were satisfied).

that were available in the prior action); *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008) ("[C]laim preclusion applies to all grounds of recovery that were or could have been brought in the first case."). Instead, the critical question is whether the underlying proceeding and the prior federal court action were based on the same set of facts and circumstances. *See Mendenhall*, 133 Nev. at 620, 403 P.3d at 370 ("The test for determining whether the claims, or any part of them, are barred in a subsequent action is if they are based on the same set of facts and circumstances as the [initial action]." (internal quotation marks omitted)).

The record reflects that both cases were based on the same facts and circumstances—the acquisition of the subject property by Saticoy Bay at an HOA foreclosure sale—and concerned the same central legal issue—whether Wilmington's deed of trust survived the foreclosure sale. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) (holding that proper foreclosure of an HOA's superpriority lien extinguishes a first deed of trust). And Wilmington does not suggest that it was unable to present the legal theory supporting its defense against Saticoy Bay's quiet title claim in the underling proceeding—payment by the original owners—to support its quiet title claim against Saticoy Bay in the federal court action. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3. Thus, Wilmington failed to demonstrate that its defense of payment by the

original owners did not implicate the second element of claim preclusion and that, by extension, the doctrine did not apply to its defense.[3]

Nevertheless, Wilmington argues that it should be permitted to proceed with its defense of payment by the original owners based on *City of Saint Paul v. Evans*, wherein the United States Court of Appeals for the Ninth Circuit concluded that statutes of limitations do not apply to affirmative 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." 344 F.3d 1029, 1033-34 (9th Cir. 2003). But in the present case, we are not confronted with the question of whether Wilmington's defenses are barred by the statute of limitations. To the contrary, the issue before this court is whether Wilmington, after having lost on statute of limitations grounds in the federal court action, may assert a defense against Saticoy Bay's quiet title claim in the underlying proceeding based on a theory that Wilmington could have advanced in the federal court action, notwithstanding the claim preclusion doctrine. Because *City of Saint Paul* does not contemplate this scenario, much less

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[3]Although Wilmington maintains that Saticoy Bay's quiet title claim is barred by claim preclusion for the same reasons that its defense of payment by the original owners is barred, Wilmington did not raise this issue below and waited until its reply brief to address it on appeal. Consequently, we conclude that Wilmington waived the issue. *See 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."); *see also Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (providing that arguments raised for the first time in a reply brief are waived).

address the interplay between affirmative defenses, statutes of limitation, and claim preclusion, Wilmington's reliance on the case is misplaced. And since Wilmington does not advance any other arguments to demonstrate that the district court erroneously concluded that claim preclusion applied to its defense of payment by the original owners, *see Rock Springs*, 136 Nev. at 237, 464 P.3d at 107, it has not established that the court erred by granting summary judgment for Saticoy Bay. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[4]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[4]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, Department 23
ZBS Law, LLP
Roger P. Croteau & Associates, Ltd.
Eighth District Court Clerk