IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEO KRAMER; AND AUDREY KRAMER, Appellants, vs. NATIONAL DEFAULT SERVICING CORPORATION; AND BRECKENRIDGE PROPERTY FUND 2016, LLC, Respondents.[1]	No. 82379-COA FILED MAY 06 2022 ELIZABETH A. BROWN CLERK OF SUPREME COURT BY [signature] DEPUTY CLERK

ORDER OF AFFIRMANCE

Leo and Audrey Kramer appeal from a district court order granting summary judgment in a real property matter. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

In 2008, the Kramers executed a deed of trust against real property they owned in Fernley to secure repayment of a home equity line of credit from the now-defunct financial institution, Washington Mutual (WaMu). The Federal Deposit Insurance Corporation (FDIC) subsequently placed WaMu into receivership and conveyed certain of its assets and liabilities—including, according to respondents, the Kramers' line of credit—to JPMorgan Chase Bank, N.A. (Chase), pursuant to a Purchase and Assumption Agreement (PAA). Later, in 2017, Chase initiated nonjudicial foreclosure proceedings through its trustee, respondent

[1]We direct the clerk of the court to amend the caption for this case to conform to the caption on this order.

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National Default Servicing Corporation (NDSC), by recording a notice of default and election to sell against the subject property, posting the notice at the property, and mailing it by certified mail both to the property and to another address NDSC had on file for the Kramers. It is undisputed that the Kramers' tenant received the notice and provided it to the property management company, which in turn provided it to the Kramers. It is likewise undisputed that the Kramers obtained actual notice of the subsequently recorded, mailed, posted, and published notice of sale. The sale proceeded as scheduled, at which time respondent Breckenridge Property Fund 2016, LLC (Breckenridge), purchased the property.

Previously, after receiving the notice of default, the Kramers initiated an action in federal district court against Chase and NDSC, among others, essentially arguing that respondents lacked the authority to foreclose, and seeking to invalidate the foreclosure proceedings and thereby prevent the sale. On the day before the sale, the federal district court dismissed the Kramers' complaint, concluding in relevant part that they were estopped from asserting their claims in light of Leo Kramer's failure to disclose them in his prior bankruptcy proceedings.[2] *See Kramer v. JPMorgan Chase Bank, N.A.*, No. 3:18-cv-00001-MMD-WGC, 2018 WL

[2]Notably, in December 2014, the United States Bankruptcy Court for the Northern District of California confirmed a Chapter 13 plan in which Leo acknowledged that Chase held a security interest in the subject property and that the property would be surrendered to Chase upon plan confirmation.

2292753, at *5-6 (D. Nev. May 17, 2018).[3] Then, less than a month after the foreclosure sale, the Kramers initiated the underlying action in the Third Judicial District Court, seeking damages for wrongful foreclosure and/or an order quieting title to the property in their favor.

The district court ultimately dismissed the Kramers' complaint, concluding their claims were materially duplicative of the prior federal action and were therefore barred under the doctrine of claim preclusion. However, the court noted that the Kramers' complaint appeared to present new allegations concerning procedural notice deficiencies in the foreclosure sale, and it granted them leave to file an amended complaint based thereon. The Kramers then filed an amended complaint making many of the same allegations as the original pleading, and respondents again moved for dismissal. The district court granted the motion in part, dismissing all claims with prejudice except for the Kramers' claim for wrongful foreclosure and their associated request for declaratory relief stemming from alleged procedural deficiencies in the sale process.

Respondents ultimately moved for summary judgment on the remaining claims, which the district court granted, concluding in relevant part that NDSC substantially complied with procedural notice requirements in light of the Kramers receiving actual notice of the foreclosure proceedings such that they were not prejudiced by any technical

[3]The United States Court of Appeals for the Ninth Circuit later affirmed the dismissal. *See Kramer v. JPMorgan Chase Bank, N.A.*, 771 F. App'x 358, 359-60 (9th Cir. 2019).

failings under NRS 107.080 or NRS 107.087.[4] The court further determined that NRS 107.090 does not apply to the Kramers and that, even if it did, their actual notice of the foreclosure proceedings likewise cured any failure under that statute. Finally, the court concluded that, because the subject property was a rental property and not owner-occupied, NDSC was not required to comply with NRS 107.086 and NRS 107.500 as alleged by the Kramers. Accordingly, the court entered judgment in favor of respondents,[5] and 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 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.

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[4]The foreclosure statutes at issue in this case—namely, NRS 107.080, NRS 107.086, NRS 107.087, NRS 107.090, and NRS 107.500—were all amended after the underlying nonjudicial foreclosure proceedings took place. We therefore apply and cite the versions of those statutes that were in effect at all relevant times herein (i.e., October 2017 through May 2018).

[5]Concurrently with the summary judgment, the district court entered an order denying the Kramers' motion for leave to amend their complaint to add a fraud claim against Chase, as well as an order granting NDSC's motion in limine to exclude and disqualify the Kramers' proffered expert.

The Kramers set forth multiple arguments in favor of reversal on appeal. First, they contend there is a genuine dispute of material fact concerning whether NDSC gave them proper notice of the foreclosure sale. However, although they vaguely contend that they were deprived of proper notice and would have challenged the sale and/or redeemed their interest in the property had they received such notice, the Kramers fail to dispute or otherwise challenge the district court's determination that they received actual notice of the foreclosure proceedings almost immediately—and even initiated the federal action in response to such notice in order to challenge the validity of the proceedings—such that they were not prejudiced by any technical failing under the relevant notice statutes. *See U.S. Bank, Nat'l Ass'n ND v. Res. Grp., LLC*, 135 Nev. 199, 203-05, 444 P.3d 442, 446-48 (2019) (reaffirming existing precedent providing that actual notice of foreclosure proceedings and a lack of prejudice stemming from a failure to strictly comply with statutory notice requirements will generally cure any such failure). In light of their failure to cogently address the district court's rationale or respondents' arguments on this issue, the Kramers have failed to demonstrate any error in this portion of the district court's decision. *See 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).[6]

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[6]The Kramers likewise fail in their opening brief to challenge the district court's determinations that NRS 107.086, NRS 107.090, and NRS 107.500 do not legally apply to them and that, even if NRS 107.090 does apply, any failure to comply with it was cured by the Kramers receiving actual notice of the foreclosure proceedings. We therefore decline to reach

Next, the Kramers contend there is a genuine dispute of material fact concerning whether NDSC had the authority to foreclose on behalf of Chase in light of an allegedly fraudulent or otherwise deficient assignment of the deed of trust. But in their opening brief, the Kramers ignore the fact that the district court declined to entertain these issues on their merits and instead dismissed the Kramers' claims concerning them on grounds of claim preclusion in light of the judgment resolving the earlier federal action. *See Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 136 Nev. 235, 238, 464 P.3d 104, 107 (2020) (setting forth the elements of claim preclusion). And in their reply briefs, to the extent they rely on materials prepared by their proffered expert in this matter, William Paatalo, to contend that the federal judgment was supposedly entered as a result of fraud and was therefore without preclusive effect, we reject this argument. The district court entered an order excluding and disqualifying Paatalo as an expert, and the Kramers fail to explain on appeal why they believe the district court's decision on that point amounted to an abuse of discretion.[7]

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these issues. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; *see also Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (providing that issues raised for the first time in a reply brief are deemed waived); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

[7]On this issue, we note that the district court granted the motion to exclude Paatalo "for the reasons stated on the record." And although the Kramers complied with their duty under the Nevada Rules of Appellate Procedure to request a transcript of the September 8, 2020, hearing on the motion, they failed to file a copy of the transcript with the clerk of the

See Leavitt v. Siems, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (reviewing the district court's decision concerning the admissibility of expert witness testimony for an abuse of discretion); *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005) ("A district court's ruling on a motion in limine is reviewed for an abuse of discretion.").

Moreover, to the extent the Kramers take issue with the fact that the assignment of the deed of trust from WaMu to Chase was not recorded until April 2018 while the foreclosure proceedings were pending, we note that, at the time Chase purportedly acquired the Kramers' line of credit from the FDIC in 2008,[8] Nevada's statutes did not require the

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Nevada Supreme Court, despite the fact that Michel Loomis of Capitol Reporters filed a notice with the supreme court reflecting that they had sent the transcript to the Kramers and filed it in district court. *See* NRAP 9(b) (providing that "[a] pro se appellant in a civil appeal shall identify and request all necessary transcripts"), (b)(1)(B) (providing that, upon receiving the transcript from the court reporter, the requesting party "shall file a copy of the transcript with the clerk of the Supreme Court"). And the transcript does not otherwise appear in the record on appeal. Accordingly, the Kramers have failed to meet their burden to provide this court with an adequate appellate record, and we therefore presume the missing transcript supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

[8]Although the Kramers argue that WaMu sold their line of credit before that entity was placed into receivership by the FDIC, all they point to in support of that contention are the Paatalo materials excluded by the district court. We therefore reject this argument for the reasons discussed above. We likewise reject the Kramers' argument that WaMu could not have effectuated the assignment in 2018 in light of its status as a defunct entity because—as argued by Breckenridge—the PAA through which Chase acquired assets and liabilities from WaMu gave Chase and the FDIC

recording of assignments of the beneficial interest under a deed of trust. *See Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 233-34, 445 P.3d 846, 849 (2019) (acknowledging that NRS 106.210(1) (1965), which was in effect until 2011, made the recording of such assignments permissive, not mandatory, and holding that an entity does not necessarily have to obtain the beneficial interest under a deed of trust by assignment in order to own the secured obligation). And to the extent the Kramers contend that NDSC was not properly serving as the trustee under the deed of trust because it was not listed as such in the security instrument or any assignment thereof when it initiated foreclosure proceedings, they fail to identify any legal authority in support of such a requirement, *see Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38, and NDSC recorded a substitution of trustee against the property in 2013 providing that Chase was the beneficiary under the deed of trust and was substituting NDSC in place of the prior trustee. *See* NRS 107.028(4)(a) (providing that a beneficiary of record may replace its trustee with another trustee), (5) (indicating that a substitution of trustee is effective upon recordation). We therefore reject these arguments.

Finally, the Kramers argue that the district court abused its discretion in denying them leave to amend their complaint to add a fraud claim against Chase. *See Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 130-31 (2013) (reviewing an order denying a motion for leave to amend for an abuse of discretion). But

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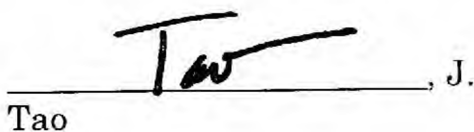
authority to execute and deliver any additional instruments or documents necessary to facilitate the transaction.

to the extent they again rely on the materials prepared by Paatalo and their arguments concerning the supposedly fraudulent nature of the deed of trust, we reject those arguments for the same reasons we did above. Moreover, as argued by respondents, the Kramers make no effort to explain how they supposedly demonstrated good cause under the standards set forth in *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 284-87, 357 P.3d 966, 970-72 (Ct. App. 2015), for seeking amendment months after the deadline for doing so had passed. And the supposedly new evidence on which they relied—Paatalo's report—was prepared months before the amendment deadline. Under these circumstances, we discern no abuse of discretion in the district court's denial of leave to amend. *See Holcomb*, 129 Nev. at 191, 300 P.3d at 130-31.

In light of the foregoing, the Kramers have failed to demonstrate that reversal is warranted, and we therefore

ORDER the judgment of the district court AFFIRMED.[9]

_______________, C.J.
Gibbons


_______________, J.
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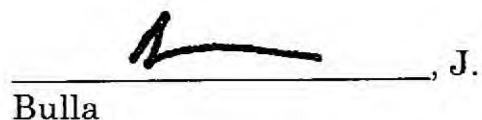
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[9]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. John Schlegelmilch, District Judge
Audrey Kramer
Leo Kramer
Tiffany & Bosco, P.A./Las Vegas
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Third District Court Clerk