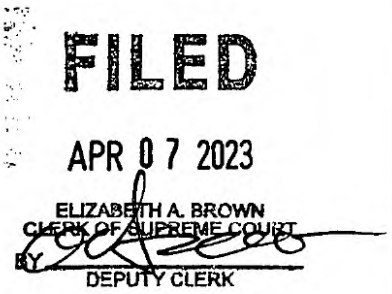
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS, INC., CHL MORTGAGE PASS-THROUGH TRUST 2004-12, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-12,
Appellant,
vs.
COLLEGIUM FUND LLC SERIES 13, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 83932-COA



ORDER OF AFFIRMANCE

Bank of New York Mellon (BNYM) appeals from a final judgment in a quiet title action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

The district court originally entered judgment following a bench trial in favor of respondent Collegium Fund LLC Series 13 (Collegium) in the underlying quiet title action stemming from a homeowners' association (HOA) foreclosure sale conducted pursuant to NRS Chapter 116. On appeal, this court affirmed the judgment in part, but reversed in part and remanded for further proceedings concerning whether BNYM—through its agent, the law firm of Miles Bauer—preserved its deed of trust by tendering the superpriority portion of the HOA's lien to its foreclosure agent (AMS) or whether tender was legally excused in light of AMS's policy of rejecting superpriority tenders. *Bank of N.Y. Mellon v. Collegium Fund LLC Series 13*, No. 79496-COA, 2021 WL 631487 (Nev. Ct. App. Feb. 17, 2021) (Order Affirming in Part, Reversing in Part and Remanding). In relevant part, this

court concluded that the district court erroneously found that "there is no evidence that the alleged 'tender' ever left the Miles Bauer office," as there was substantial evidence in the record that Miles Bauer delivered the tender. *Id.* at *1-2 (internal quotation marks omitted). Accordingly, this court stated that it could not "conclude that the district court would have reached the same decision on this issue in the absence of error," and it reversed the judgment in part and remanded "for further consideration of the tender issue." *Id.* at *2. This court also declined to reach the excused-tender issue, as the district court did not address it in the first instance. *Id.*

On remand, the district court directed the parties to submit supplemental briefing on how they believed the district court should enter judgment in a manner consistent with this court's partial reversal. In their briefs, the parties focused principally on the factual issue of whether Miles Bauer delivered the tender to AMS. Concerning the issue of whether tender was excused, Collegium emphasized BNYM's failure to properly raise the issue at trial, while BNYM merely requested in a footnote an "opportunity to brief the issue of futility." Subsequently, without directing any further briefing or holding a hearing, the district court entered a written order again quieting title in favor of Collegium. The district court acknowledged that, although there was some evidence introduced at trial indicating that Miles Bauer delivered the tender—namely, testimony from managing partner Doug Miles concerning the firm's usual custom in handling superpriority tenders and an email from a firm attorney informing BNYM's servicer that a tender had been rejected—BNYM failed to produce certain pieces of evidence that Miles confirmed would generally appear in the firm's records following a rejection, including a copy of the returned check stamped "void," as well as a run slip from a courier indicating delivery and rejection. The district court determined that, in the absence of such evidence and without the testimony of anyone who had personal knowledge of the specific

transaction at issue in this case, BNYM failed to meet its burden to show that it delivered the tender. The district court further determined that, because BNYM failed to introduce evidence that either it or any of its agents knew of AMS's policy of rejecting superpriority tenders during the relevant time period, it failed to demonstrate that the obligation to tender was excused. This appeal followed.

On appeal, BNYM argues that the district court failed to follow the law of the case as established by this court in the prior appeal. Specifically, BNYM contends that this court conclusively determined that Miles Bauer did, in fact, deliver the tender to AMS, and that the district court therefore violated the law of the case and the mandate doctrine by finding otherwise. BNYM also argues that it presented sufficient evidence to demonstrate its servicer's knowledge of AMS's policy of rejecting superpriority tenders such that tender was legally excused. Alternatively, BNYM requests that this court remand the case for further proceedings concerning futility of tender. We address each argument in turn.

Under the law-of-the-case doctrine, "the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." *Hsu v. Cty. of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007). And the mandate rule requires a lower court "to effectuate a higher court's ruling on remand." *Estate of Adams v. Fallini*, 132 Nev. 814, 819, 386 P.3d 621, 624 (2016). We review the application of these principles de novo. *Id.* at 818-19, 386 P.3d at 624. But we will not disturb a 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).

With respect to this court's order resolving the prior appeal, BNYM mischaracterizes its legal effect. Contrary to BNYM's assertion, the prior order did not conclude that Miles Bauer delivered the tender, and it

did not direct the district court to enter judgment in favor of BNYM; rather, the order simply remanded "for further consideration of the tender issue" in light of certain clearly erroneous findings made by the district court. *See Bank of N.Y. Mellon*, No. 79496-COA, 2021 WL 631487, at *1-2. And the fact that the prior order noted there was substantial evidence in the record supporting the claim that Miles Bauer delivered the tender does not by itself mean that no reasonable mind could reach a different conclusion. *See King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018) (defining substantial evidence as "that which a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).

On remand, the district court weighed conflicting evidence and reasonably determined that, in light of the absence of certain records in Miles Bauer's files that were otherwise frequently kept, BNYM failed to meet its burden to prove delivery of the tender.[1] *See Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 52, 437 P.3d 154, 158 (2019) ("Payment of a debt is an affirmative defense, which the party asserting has the burden of proving."). And because we are not at liberty to reweigh the evidence presented to the district court, BNYM fails to demonstrate any reason for reversal on this point.[2] *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev.

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[1]We note that our supreme court has acknowledged—albeit in an unpublished order—that the absence of a run slip in Miles Bauer's files can create a triable issue of fact concerning delivery of tender. *See Bank of Am., N.A. v. Las Vegas Rental & Repair, LLC Series 57*, No. 76914, 2019 WL 6119134, at *1 (Nev. Nov. 15, 2019) (Order Affirming in Part, Reversing in Part and Remanding).

[2]To the extent BNYM argues that the district court improperly relied on the adverse inference concerning negligently lost or destroyed evidence set forth in *Bass-Davis v. Davis*, 122 Nev. 442, 449, 134 P.3d 103, 107 (2006), assuming the district court erred on this point, any such error was harmless. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("When an error is harmless, reversal is not warranted."). Even in the

233, 238, 955 P.2d 661, 664 (1998) (noting that appellate courts are "not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party").

Turning to BNYM's arguments concerning futility of tender, we likewise discern no basis for reversal. Although Miles testified generally that his firm handled thousands of cases like this one and that HOA foreclosure agents would often reject superpriority tenders, the district court correctly determined that BNYM failed to present any evidence that, at the time in question, either it or its agents were specifically aware of AMS's policy of rejecting tenders. *See 7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev. 62, 66, 458 P.3d 348, 351 (2020) (holding that the obligation to tender is excused where the obligee has a "known policy of rejecting" tenders). And although BNYM cites various cases on appeal that it contends prove that Miles Bauer was aware of AMS's policy at the time in question, BNYM failed to present these cases or any argument whatsoever concerning futility to the district court, despite having an

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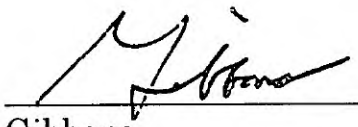
absence of any finding that evidence was negligently lost or destroyed, the district court was within its fact-finding authority to infer that delivery and rejection of the tender did not occur in the absence of commonly kept documentation like a run slip in Miles Bauer's files. *See Bank of Am.*, No. 76914, 2019 WL 6119134, at *1.

Additionally, with respect to BNYM's argument that the district court failed to apply the disputable presumption under NRS 47.250(18)(c) "[t]hat the ordinary course of business has been followed," BNYM raises the argument for the first time in its reply brief, and it is therefore waived. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (citing NRAP 28(c) and concluding that an issue raised for the first time in an appellant's reply brief was waived). And even if BNYM had properly preserved the issue, the district court essentially determined that the absence of certain evidence rebutted the presumption.

opportunity to do so in its supplemental brief on remand.[3] BNYM likewise failed to request that the district court allow it to present additional evidence concerning futility and instead makes such a request for the first time on appeal. These arguments are therefore waived. *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.").

In light of the foregoing, we

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



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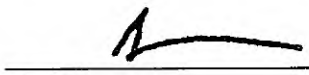
Gibbons



_____, J.
Bulla

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Westbrook

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[3]BNYM contends that it did not have an opportunity to address futility because the district court directed the parties to not reargue the case in their supplemental briefs and to instead limit the briefs to addressing what they thought should appear in the post-remand judgment. We are not persuaded that the district court's vague directive in any way precluded BNYM from presenting how it believed the court should address the futility issue in the final judgment.

[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: Hon. Gloria Sturman, District Judge
Akerman LLP/Las Vegas
Clark Newberry Law Firm
Eighth District Court Clerk