IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KRISTAL GLASS, INDIVIDUALLY,
Appellant,
vs.
SELECT PORTFOLIO SERVICING, INC., AS SERVICING AGENT FOR U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE HARBORVIEW MORTGAGE LOAN TRUST 2006-1 MORTAGE LOAN PASS-THROUGH CERTIFICATES, SERIES 2006-1, A NATIONAL ASSOCIATION,
Respondent.

No. 84338-COA

FILED
JUL 27 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kristal Glass appeals from a district court order dismissing a request for appropriate relief in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

This case concerns a long running foreclosure dispute between Glass and respondent Select Portfolio Servicing, Inc. (SPS)—the servicer of her home loan, which is secured by a deed of trust that is held by U.S. Bank National Association, as Trustee, on Behalf of the Holders of the Harborview Mortgage Loan Trust 2006-1 Mortgage Loan Pass-Through Certificates, Series 2006-1 (U.S. Bank). In 2012, SPS commenced a judicial foreclosure action against Glass and obtained a summary judgment in its favor. However, this court reversed that decision, concluding that SPS lacked standing to judicially foreclose on Glass's property because it did not possess the mortgage note or otherwise establish that the right to enforce the note was properly transferred to it pursuant to the Uniform Commercial

Code. *Glass v. Select Portfolio Servicing, Inc.*, No. 68816, 2016 WL 7188709, at *1-2 (Nev. Ct. App. Nov. 22, 2016) (Order of Reversal).

In 2018, Glass initiated a quiet title action against SPS. SPS then moved for summary judgment, asserting that it found the original note, which SPS maintained was conclusive proof of the existence of a lien on Glass's property as well as its standing to enforce the note. Glass, in turn, filed an opposition and countermotion in which she argued that, among other things, issue preclusion barred SPS from asserting standing to enforce the note. The district court entered summary judgment in SPS's favor, reasoning that the deed of trust remained a valid lien on title to the property, which the supreme court later affirmed. *Glass v. Select Portfolio Servicing, Inc.*, No. 78325, 2020 WL 3604042 (Nev. Jul. 1, 2020) (Order of Affirmance). In the relevant portion of the supreme court's decision, the court held that, although the elements of issue preclusion were satisfied, the doctrine nevertheless did not bar SPS from asserting standing to enforce the note based on two exceptions to the issue preclusion doctrine, which are discussed in detail below. *Id.* at *2.

In 2021, SPS initiated a nonjudicial foreclosure, and Glass elected to participate in Nevada's Foreclosure Mediation Program (FMP). The subsequent mediation was unsuccessful, and the mediator recommended that an FMP certificate issue. Glass then filed a petition for judicial review, which was essentially a request for appropriate relief under FMR 20(2). For support, Glass argued that SPS was precluded from pursuing nonjudicial foreclosure under the issue preclusion doctrine based on this court's standing determination in Docket No. 68816. SPS filed an opposition in which it argued that issue preclusion did not apply because this court's decision in Docket No. 68816 concerned a defect in the chain of

title for Glass's loan instruments, which was subsequently corrected. Although this court's decision in Docket No. 68816 focused on the chain of title for the note, the purported defect that SPS specifically argued that it corrected related to the chain of title for the deed of trust, which SPS maintained was resolved with the recording in 2018 of a corrective corporate assignment of the deed of trust.[1] The district court agreed with SPS, dismissed Glass's request for appropriate relief, and directed the issuance of an FMP certificate. This appeal followed.

In an FMP matter, we give deference to the district court's factual determinations, but we review legal issues de novo, including the question of whether a party has standing to foreclose. *Pascua v. Bayview Loan Servicing, LLC*, 135 Nev. 29, 31, 434 P.3d 287, 289 (2019); *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011).

As below, Glass argues on appeal that SPS is barred under the issue preclusion doctrine from asserting its standing to foreclose based on this court's decision in Docket No. 68816. For its part, SPS maintains that issue preclusion only applies in the context of judicial actions, which SPS contends means that the doctrine is inapplicable here since a nonjudicial foreclosure is not a judicial action, as the name implies. In the alternative,

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[1]At the time of this court's decision in Docket No. 68816, the operative assignment of the deed of trust identified the assignee as U.S. Bank National Association, as Trustee, for Harborview 2006-1 Trust Fund, which was inconsistent with the pooling and servicing agreement (PSA) that apparently governed the transfer, which identified U.S. Bank as U.S. Bank National Association, as Trustee, for Haborview Mortgage Loan Trust 2006-1 Mortgage Loan Pass-Through Certificates, Series 2006-1. The corrective corporate assignment of the deed of trust, which was recorded in 2018, modified the name of the assignee to correspond to the name set forth in the PSA.

SPS points to the exemptions from the issue preclusion doctrine that the supreme court relied on in Docket No. 78325 and argues that they are equally applicable in the context of a nonjudicial foreclosure, such that it was not barred from asserting its standing to foreclose.

As a preliminary matter, SPS failed to preserve the question of whether the issue preclusion doctrine is applicable in the context of nonjudicial foreclosure, as it did not raise the issue below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (providing that issues not raised before the district court are deemed waived). But regardless, although the standard formulation of the issue preclusion doctrine presupposes two separate judicial actions, *see Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008) (setting forth the test for applying issue preclusion, which is framed in terms of a prior and current "action"/"litigation"), a nonjudicial foreclosure, with its procedure for requesting appropriate relief from the district court, is sufficiently analogous to a judicial action for the same basic issue-preclusion principles to apply. *Cf. Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 169, 368 P.3d 1219, 1224-25 (Ct. App. 2016) (recognizing that claim and issue preclusion apply even when one of the proceedings in question was not a traditional lawsuit, but was instead a dispute before an administrative agency, so long as the agency acted in a judicial capacity and resolved disputed issues of fact that the parties had the opportunity to litigate).

Because issue preclusion is applicable in the context of a nonjudicial foreclosure, the next question before us is whether the elements of the test for applying issue preclusion are satisfied with respect to the standing issue. When confronted with a substantively identical question in the context of the 2018 quiet title action, the supreme court answered in the

affirmative, reasoning that the issue of SPS's standing was the same in the 2012 judicial foreclosure action and the 2018 quiet title action, that the 2012 judicial foreclosure action resulted in a final decision on the merits, and that Glass and SPS were "clearly in privity" with parties to the 2012 judicial foreclosure action (they were parties to that action). *Glass*, No. 78325, 2020 WL 3604042, at *2 (citing *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 419, 997 P.2d 130, 133 (2000)).

Glass maintains that the foregoing analysis is equally applicable here. By contrast, SPS makes no attempt to address the elements of issue preclusion, notwithstanding that, during the underlying proceeding, it seemingly attempted to demonstrate that the standing issue in the present case was different from the standing issue in the 2012 judicial foreclosure action and the 2018 quiet title action by asserting that issue preclusion did not apply because a corrective corporate assignment of the deed of trust was recorded in 2018. As a result, SPS waived any challenge to Glass's argument in this respect. *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (concluding that respondents confessed error by failing to respond to appellant's argument); *cf.* NRAP 31(d)(2) (providing that the appellate courts may treat a respondent's failure to file an answering brief as a confession of error). And regardless, because the supreme court concluded that the standing issue in the 2012 judicial foreclosure action and the 2018 quiet title action was the same notwithstanding that SPS found the note following the 2012 judicial foreclosure action, we discern no basis to conclude that the 2018 recording of the corrective corporate assignment of the deed of trust somehow rendered the standing issue in the present case different from the one presented in the prior actions.

As a result, we must consider whether an exemption to the issue-preclusion doctrine applies in the present case. As discussed above, in the context of the 2012 quiet title action, the supreme court determined that SPS was not barred from asserting its standing to foreclosure based on two exemptions to the issue-preclusion doctrine. *Glass*, No. 78325, 2020 WL 3604042, at *2. Those exemptions allow for an issue to be relitigated when "[t]here is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest, . . . or (c) because the party sought to be precluded . . . did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." *Id.* (quoting Restatement (Second) of Judgments § 28 (1982)). Applying those exemptions, the supreme court specifically determined that permitting Glass to quiet title to the property without an adjudication of the underlying indebtedness was counter to the public interest and that application of the issue-preclusion doctrine was inappropriate since SPS did not have sufficient incentive to prove standing in the 2012 judicial foreclosure action when compared to the incentives it faced in the 2018 quiet title action. *Id.*

Although Glass argues that this rationale indicates that the supreme court determined that the foregoing exemptions do not apply in the context of a foreclosure proceeding, whether judicial or nonjudicial, the supreme court did not limit its decision in Docket No. 78325 in any such way. And we conclude that the public-interest exemption is equally applicable in the context of a nonjudicial foreclosure, although for a slightly different reason than the one that the supreme court enunciated in Docket No. 78315. In particular, it is not in the public interest to forever bar SPS, and those who are in privity with SPS, from enforcing the note and deed of

trust based solely on its inability to establish the chain-of-title for the note in the context of the 2012 judicial foreclosure action, which is essentially what Glass seeks. *Cf. U.S. Bank Nat. Ass'n v. Kimball*, 27 A.3d 1087, 1095 (Vt. 2011) (concluding that a mortgage company's prior inability to prove it had standing to enforce a note did not prevent it from subsequently seeking foreclosure when it was "prepared to prove the necessary elements" since a homeowner could not be relieved of her obligation under the note without adjudication of the underlying indebtedness).

Thus, for the foregoing reasons and because Glass does not dispute that SPS complied with the FMP's requirements, we discern no basis for reversal, and we therefore affirm the district court's order dismissing Glass's request for appropriate relief and directing the issuance of a foreclosure certificate.

It is so ORDERED.[2]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[2]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. 7
William C. Turner, Settlement Judge
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McCarthy & Holthus, LLP/Las Vegas
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Eighth District Court Clerk