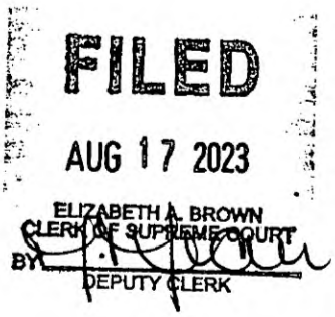
IN THE SUPREME COURT OF THE STATE OF NEVADA

FORT APACHE HOMES, INC., A NEVADA CORPORATION,
Appellant,
vs.
THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-22, A FOREIGN TRUSTEE
Respondent.

No. 84446



ORDER OF REVERSAL AND REMAND

This is an appeal from a district court final judgment in an action to quiet title. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.[1]

The former homeowner, John McMillan, defaulted on his HOA dues. Thereafter, he made payments toward the unpaid balance that exceeded the superpriority portion of the HOA's lien.[2] Contemporaneously, McMillan filed for bankruptcy. As part of his reorganization plan, he agreed to execute a quitclaim deed to respondent Bank of New York Mellon's

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

[2]In light of our resolution of this appeal, we need not determine whether McMillan's payments satisfied the superpriority portion of the HOA's lien. *Cf. generally 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 78-80, 459 P.3d 227, 230-31 (2020) (holding that a property owner, in addition to a first deed of trust beneficiary, can cure a superpriority default so as to preserve the first deed of trust at an ensuing HOA foreclosure sale).

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(BNYM) loan servicer (Bank of America, hereafter BANA) "in full satisfaction of [BNYM's] Allowed Secured Claim." When McMillan executed the deed, however, he conveyed the property to Judy Graves. Thereafter, the HOA held a foreclosure sale, at which appellant Fort Apache Homes placed the winning bid.

Fort Apache then filed the underlying action, seeking a declaration that it owned the property free and clear of BNYM's deed of trust. The district court granted summary judgment for Fort Apache, reasoning that Graves was likely an employee of BANA, such that BNYM had relinquished its deed of trust in exchange for McMillan's deed. On appeal, however, we vacated the district court's summary judgment after identifying disputed questions of fact regarding Graves' connection to BNYM/BANA. *Bank of N.Y. Mellon v. Fort Apache Homes, Inc.*, 2020 WL 2521785, at *1 (Nev. May 15, 2020) (Order Vacating and Remanding). We left to the district court's discretion whether to reopen discovery on remand, but in doing so, we observed that the language in McMillan's bankruptcy reorganization plan and his deed to Graves likely evinced BNYM/BANA's intent that it would accept title to McMillan's property in exchange for relinquishing the deed of trust. *Id.*

On remand, the district court reopened discovery for an additional 120 days. During that period, Fort Apache produced a filing from McMillan's bankruptcy case showing that BANA's attorney voted to approve McMillan's reorganization plan and included a handwritten instruction for McMillan to deed the property as follows: "Attn: Judy Graves 2380 Performance Drive, Richardson, TX 75082." The record also contained evidence that the Richardson, Texas, mailing address was associated with BANA, with the implication being that Graves was associated with BANA.

Nonetheless, the district court granted summary judgment for BNYM on the following apparent alternative grounds: (1) there was insufficient evidence to establish that Graves was an employee of BNYM/BANA; or (2) even if there was sufficient evidence, BNYM/BANA wanted McMillan to convey the subject property to Graves so as to keep BNYM/BANA's lien interest and ownership interest in the subject property separate. Consequently, the district court determined that BNYM's deed of trust remained as an encumbrance on the property at the time of the HOA's foreclosure sale. The district court also found that McMillan's payments to the HOA satisfied the superpriority portion of the HOA's lien, such that the HOA's ensuing foreclosure sale did not extinguish BNYM's deed of trust.

On appeal, Fort Apache contends that the district court overlooked the relevance of the bankruptcy filing from BANA's attorney wherein he instructed McMillan to deed his property to Graves at a BANA-associated address. We agree and conclude that this constitutes the evidence connecting Graves to BNYM/BANA that was missing in the previous appeal. Accordingly, the district court erred when it found that Fort Apache failed to satisfy its summary judgment burden on the issue of Graves' connection to BNYM/BANA. And given that BNYM did not produce evidence showing why BANA's attorney would instruct McMillan to deed his property to "just some random person" (as Fort Apache puts it) who just happened to be associated with BANA, we conclude that no question of material fact exists that Graves is associated with BANA. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (recognizing that summary judgment is appropriate when no genuine issue of material fact exists); *Aldabe v. Adams*, 81 Nev. 280, 285, 402 P.2d 34, 37 (1965) ("When Rule 56 speaks of a 'genuine' issue of material fact, it does so with

the adversary system in mind. The word 'genuine' has moral overtones."), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801 (1998). In other words, it is clear that BANA's counsel either mistakenly instructed McMillan to deed the property to Graves instead of BANA, that McMillan misinterpreted BANA's counsel's instructions as a request to deed the property directly to Graves, or some combination of the two. Regardless, we conclude that no question of material fact exists that, per his bankruptcy reorganization plan that was approved by BANA, McMillan intended to deed his property to BNYM via BANA.

BNYM nevertheless contends that, under the "merger doctrine," its deed of trust remained attached to the property because there was no intent on its part to merge its title interest (by virtue of the deed from McMillan to its loan servicer, BANA), with its lien interest (that arose from its acquisition of the beneficial interest in McMillan's deed of trust). To the extent that the merger doctrine applies here, we are not persuaded. First, McMillan's bankruptcy reorganization plan stated in no uncertain terms that BNYM/BANA would accept McMillan's deed in exchange for BNYM relinquishing its deed of trust.[3] *Cf. Grellet v. Heilshorn*, 4 Nev. 526, 528 (1868) ("To prevent a merger there must be a decisive intention of the mortgagee to keep the titles separate."). Second, BNYM has not explained how it would be in its best interest to maintain a lien on property that it/BANA owns. *Cf. id.* at 529-30 ("The intention to keep the two estates separate is presumed where it is for the interest of the party that they

[3]BNYM does not proffer an alternative interpretation of the reorganization plan that, again, was approved by BANA's counsel. Instead, BNYM relies on a foreclosure deed for another McMillan-owned property, which we do not find persuasive.

should be kept separate."); *cf. also Aladdin Heating Corp. v. Trs. of Central States*, 93 Nev. 257, 261, 563 P.2d 82, 85 (1977) ("If merger is against that party's best interest, it will not be deemed intended by the parties."). In this, we note that BNYM's best interest was served by such a purported arrangement only by happenstance, in that BNYM/BANA could not have anticipated at the time they approved the bankruptcy reorganization plan that McMillan's payments to the HOA would at some point in the future arguably prevent BNYM's deed of trust from being extinguished by the HOA's foreclosure sale.

Accordingly, we conclude that the district court erred in determining that BNYM's deed of trust remained as an encumbrance on the subject property at the time of the HOA's foreclosure sale. On remand, we direct the district court to enter judgment in favor of Fort Apache establishing that it holds title to the property free and clear of BNYM's deed of trust.

It is so ORDERED.

Stiglich, C.J.

Lee, J.

Bell, J.

cc: Hon. Jasmin D. Lilly-Spells, District Judge
Thomas J. Tanksley, Settlement Judge
Hanks Law Group
ZBS Law, LLP
Eighth District Court Clerk