

IN THE SUPREME COURT OF THE STATE OF NEVADA

TAHOE FRESH HOLDING COMPANY,
L.L.C.,
Appellant,
vs.
WELLS FARGO BANK, NA, AS
TRUSTEE FOR ABFC 2005-OPT1
TRUST, ABFC ASSET-BACKED
CERTIFICATES, SERIES 2005-OPT1,
Respondent.

No. 85220

FILED

SEP 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a complaint in an action to quiet title. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.¹

The former homeowner took out a loan secured by a deed of trust, which was thereafter assigned to respondent Wells Fargo. In 2009, Wells Fargo recorded a notice of default, indicating that the former homeowner had defaulted on their loan and that Wells Fargo “has declared and does hereby declare all sums secured thereby immediately due and payable.”

In 2010, the former homeowner filed an action against Wells Fargo and other entities in which they made various allegations of fraud in connection with their home loan (the 2010 action). Wells Fargo did not assert any counterclaims in that action, and the district court eventually granted summary judgment against the former homeowner with respect to their claims against Wells Fargo.

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

In 2017, Wells Fargo filed an action for judicial foreclosure against the former homeowner (the 2017 action). While that action was pending, Wells Fargo's trustee recorded a notice of rescission in 2018 that rescinded the 2009 notice of default. At the time this appeal was filed, the 2017 action remained pending, but the appellate record reflects that during briefing for this appeal, the district court dismissed the 2017 action under NRCP 41(b).

In 2018, the former homeowner's HOA foreclosed on its lien for unpaid assessments, after which appellant Tahoe Fresh Holding Company acquired the property in 2021. It is undisputed that Wells Fargo paid the HOA the superpriority component of its lien before the HOA's foreclosure sale, such that the sale did not extinguish Wells Fargo's deed of trust. See generally *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) (holding that a superpriority tender prevents a first deed of trust from being extinguished by an HOA's foreclosure sale).

In 2022, Tahoe Fresh filed the underlying quiet title action, seeking a declaration that Wells Fargo's deed of trust was no longer enforceable under two alternative theories. First, Tahoe Fresh alleged that the 2009 notice of default accelerated the former homeowner's loan and rendered it "wholly due" for purposes of NRS 106.240. And despite the 2018 notice of rescission nullifying the 2009 notice of default, cf. *SFR Invs. Pool 1, LLC v. U.S. Bank N.A.*, 138 Nev., Adv. Op. 22, 507 P.3d 194, 195-98 & n.2 (2022) (assuming that a notice of default can trigger NRS 106.240 and holding that a notice of rescission nullifies any potential triggering effect), Tahoe Fresh alleged that the notice of rescission was ineffective in light of various judicial admissions that Wells Fargo had made in the 2017 action suggesting that the former homeowner's loan was "wholly due." Second,

Tahoe Fresh argued that the deed of trust was no longer enforceable because Wells Fargo was required to assert a compulsory counterclaim for judicial foreclosure in the 2010 action.

Tahoe Fresh moved for summary judgment, and Wells Fargo contemporaneously moved to dismiss Tahoe Fresh's complaint. Following a hearing, the district court granted Wells Fargo's motion and denied Tahoe Fresh's motion, reasoning, among other things, that (1) Wells Fargo did not make any statements in the 2017 action that would constitute a judicial admission, and (2) Wells Fargo's judicial foreclosure claim was not a compulsory counterclaim that needed to be raised in the 2010 action.

On appeal, Tahoe Fresh reasserts its same two theories.² We disagree with both and conclude that the district court correctly dismissed Tahoe Fresh's complaint. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (reviewing de novo a district court's dismissal of a complaint under NRCP 12(b)(5)). In reviewing a district court's dismissal under NRCP 12(b)(5), we accept as true the factual allegations in the plaintiff's complaint. *Id.* at 228, 181 P.3d at 672. Here, however, Tahoe Fresh acknowledges that there are no factual disputes and that "[o]nly the legal effect of those facts are at issue."

With regard to Tahoe Fresh's judicial-admission argument, we agree with the district court that Wells Fargo did not make any statements in the 2017 action that would amount to a judicial admission. *See Reyburn*

²We recently held in *LV Debt Collect, LLC v. Bank of New York Mellon*, 139 Nev., Adv. Op. 25, 2023 WL 5490314 (Aug. 24, 2023), that recording a notice of default does not make a secured loan "wholly due" and trigger NRS 106.240's 10-year time frame. That decision effectively rejects all of Tahoe Fresh's arguments except arguably the two addressed in this disposition.

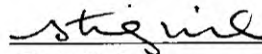
Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) (“Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party’s knowledge. What constitutes a judicial admission should be determined by the circumstances of each case” (internal citations and quotation marks omitted)). This is particularly so in light of Tahoe Fresh’s failure to identify any inconsistent statement in the 2017 action that Wells Fargo made after the notice of rescission was recorded.


Relatedly, Tahoe Fresh suggests that Wells Fargo should be judicially estopped from claiming it did not accelerate the former homeowner’s loan. But Tahoe Fresh has not attempted to apply the judicial-estoppel factors to the facts of this case, nor is that application self-evident. *See Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (observing that it is a party’s responsibility to provide cogent arguments supported by salient authority); *see also NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (listing factors for when judicial estoppel may apply, some of which are inapplicable to the facts of this case).

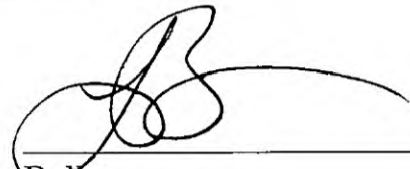
With regard to Tahoe Fresh’s second theory, as a preliminary matter, it is unclear how Wells Fargo’s failure to assert a judicial foreclosure counterclaim in the 2010 action could render its deed of trust altogether unenforceable, which appears to be the thrust of Tahoe Fresh’s argument. *Cf. Facklam v. HSBC Bank USA*, 133 Nev. 497, 499, 401 P.3d 1068, 1070 (2017) (“When the grantor defaults on the note, the deed-of-trust beneficiary can select the judicial process for foreclosure pursuant to NRS 40.430 or the nonjudicial foreclosure-by-trustee’s sale procedure under NRS Chapter 107.” (internal quotation marks omitted)). In any event, Tahoe Fresh’s

opening brief did not identify any allegations in the former homeowner's 2010 action that the loan was not in default so as to potentially implicate NRCP 13(a)(1)'s compulsory-counterclaim provision. See NRCP 13(a)(1)(A) (requiring a party to assert a counterclaim if that counterclaim "arises out of the transaction or occurrence that is the subject of the opposing party's claim"). Tahoe Fresh's reply brief does identify a single allegation from the former homeowner's complaint in the 2010 action. But aside from this argument being procedurally improper, see *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (explaining why this court does not consider arguments raised for the first time in a reply brief), the identified allegation is premised on Wells Fargo not being the entity to enforce the loan, as opposed to the loan not being in default so as to potentially implicate NRCP 13(a). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Stiglich, C.J.


_____, J.
Lee


_____, J.
Bell

cc: Hon. Barry L. Breslow, District Judge
Debbie Leonard, Settlement Judge
Simons Hall Johnston PC/Reno
Wright, Finlay & Zak, LLP/Las Vegas
Washoe District Court Clerk