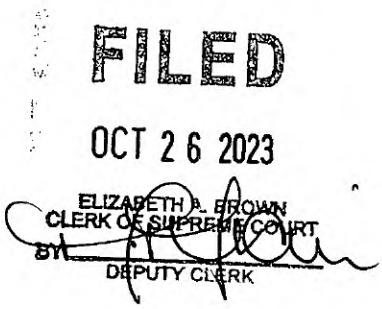
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2006-18, A NATIONAL BANK,
Appellant,
vs.
MARIA G. LOYO-MORALES, AN INDIVIDUAL,
Respondent.

No. 84781



ORDER OF REVERSAL AND REMAND

This is an appeal from a final judgment in a real property action. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Nathaniel Centeno purchased a home within Madeira Canyon Homeowner's Association (HOA). When he defaulted on his mortgage payments and HOA fees, the HOA recorded a lien against the property, and Maria G. Loyo-Morales purchased the home in a November 2012 foreclosure sale. In February 2018, Bank of New York Mellon (BNYM), the successor-in-interest to Centeno's mortgage originator, filed a quiet title action in federal district court, arguing that the foreclosure sale did not extinguish its deed of trust. When Loyo-Morales failed to appear, the clerk entered default, but the district court dismissed the complaint as an untimely challenge to the first foreclosure sale five years earlier. Next, BNYM conducted a nonjudicial foreclosure and purchased the home as the highest bidder and then filed a second quiet title lawsuit against Loyo-Morales in

state district court, claiming it was the true title holder. Loyo-Morales moved to dismiss, arguing that claim and/or issue preclusion barred the second quiet title action because the first was dismissed with prejudice. The district court granted the motion and dismissed the case, finding that claim preclusion barred the second case and that issue preclusion barred the claim that BNYM's deed of trust survived the HOA foreclosure. BNYM appeals.

The issue here is whether the district court should have dismissed the second lawsuit based on either issue preclusion or claim preclusion arising from the first lawsuit. We conclude that neither issue preclusion nor claim preclusion apply to the second lawsuit. Claim preclusion bars a subsequent lawsuit if the moving party shows that three elements are met: 1) the same parties or their privities are involved in both cases, 2) a valid final judgment has been entered, and 3) "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (internal footnote omitted); *see also Bennett v. Fid. & Deposit Co. of Md.*, 98 Nev. 449, 452, 652 P.2d 1178 (1982) (providing that the party asserting res judicata bears the burden of establishing its elements). Issue preclusion requires four elements: "1) the issue decided in prior litigation must be identical to the issue presented in the current action; 2) the initial ruling must have been on the merits and must have become final; 3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and 4) the issue was actually and necessarily litigated." *Five Star*, 124 Nev. at 1055, 194 P.3d at 713 (internal quotation marks, ellipsis, and footnote omitted). "The test for determining whether the claims are barred in a subsequent action is if they are 'based on the same set of facts and

circumstances as the [initial action].'" *Mendenhall v. Tassinari*, 133 Nev. 614, 620, 403 P.3d 364, 370 (2017).

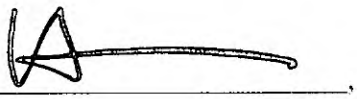
As for claim preclusion, BNYM concedes that the first and second elements are met. The third element, that the subsequent action is based on the same claim or a claim that could have been brought in the first action, is contested. *Five Star*, 124 Nev. at 1055, 194 P.3d at 713. In this case, BNYM's declaratory relief in the second action could not have been brought in the first case because BNYM had not yet purchased the property and could not have introduced the claim that it owned the property free and clear then. The second action presents a substantively different claim based on different circumstances. If a case has some common fact issues, that does not mean that the second case is claim precluded. *See Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 136 Nev. 235, 239-40, 464 P.3d 104, 108 (2020) ("We determine, however, that [plaintiff's] declaratory relief action arising after its tort claims is not precluded just because it is premised on some facts representing a continuance of the same course of conduct as Case 1."); *Round Hill Gen. Improvement Dist. v. B-Neva, Inc.*, 96 Nev. 181, 184, 606 P.2d 176, 178 (1980) ("Where claims arise at different times out of the same transaction, a judgment as to one or more of such claims is no bar to a subsequent action on the claims arising thereafter."). Therefore, we conclude that claim preclusion does not apply because the second lawsuit presents a substantively different claim based on different circumstances.

As for issue preclusion, BNYM next argues that Loyo-Morales cannot establish the fourth element, because of the issue of whether the deed of trust survived the HOA foreclosure was not actually and necessarily litigated. We agree that issue preclusion does not bar BNYM's claim that

its deed of trust survived the HOA foreclosure. Under the fourth element, an issue is actually and necessarily litigated when "an issue is properly raised . . . and is submitted for determination . . .". Restatement (Second) of Judgments § 27 cmt. d (1982); *cf. Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013) (citing the Restatement for this proposition). An issue is necessarily litigated when the "common issue" was . . . necessary to the judgment in the earlier suit." *Frei*, 129 Nev. at 407; 305 P.3d at 72 (internal quotation marks and emphasis omitted). Here, the district court dismissed BNYM's first lawsuit after the limitations period had run and therefore did not determine whether BNYM's deed of trust survived. This issue, then, was not actually or necessarily litigated.

In a similar case, where a federal district court dismissed BNYM's claim that its deed of trust survived an HOA foreclosure because the statute of limitation had expired, this court held that the first dismissal did not preclude BNYM from nonjudicially foreclosing or asserting that its deed of trust survived as a defense against the subsequent action. *Bank of N.Y. Mellon v. SFR Invs. Pool 1, LLC*, No. 81604, 2022 WL 18496103, at *1, *3 (Sept. 13, 2022) (Order Vacating and Remanding). In this case, the first dismissal was also on the basis that the statute of limitations had expired. Because the issue of whether the deed of trust survived the HOA foreclosure was not actually and necessarily litigated, as in *SFR Investments*, the district court erred by finding that issue preclusion applied. We therefore conclude that the district court erred by dismissing the second lawsuit based on claim and issue preclusion. Accordingly, we

ORDER the judgment of the district court **REVERSED AND WE REMAND** the matter to district court for proceedings consistent with this order.



_____, J.
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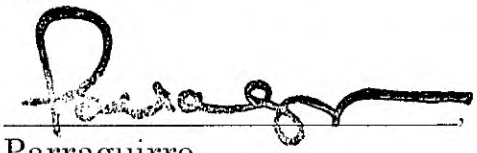

_____, J.
Parraguirre

cc: Hon. David M. Jones, District Judge
Kristine M. Kuzemka, Settlement Judge
ZBS Law, LLP
Cory Reade Dows & Shafer
Eighth District Court Clerk