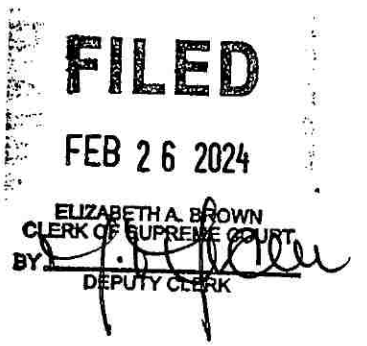
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LISSETTE SALAZAR NAPOLEONI, AN INDIVIDUAL,
Appellant,
vs.
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE IMPAC SECURED ASSETS CORP. MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-1,
Respondent.

No. 84696-COA



ORDER OF AFFIRMANCE

Lissette Salazar Napoleoni appeals from a district court summary judgment in a real property action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

In 2006, Napoleoni obtained a home loan evidenced by a promissory note secured by a deed of trust. The note promised repayment to lender Impac Funding Corporation dba Impac Lending Group (Impac), and the deed of trust named as beneficiary Mortgage Electronic Registration Systems, Inc. (MERS), as nominee of Impac. In 2010, MERS, on behalf of Impac, executed an assignment of the deed of trust to respondent Deutsche Bank National Trust Company (Deutsche Bank) in which it also indicated that it was assigning the note to Deutsche Bank and had endorsed the instrument. Deutsche Bank later learned that the note had been lost. As a result, Deutsche Bank commenced the underlying proceeding against Napoleoni, seeking a declaratory judgment that it was

entitled to enforce the note pursuant to NRS 104.3309, which allows a party to establish its right to enforce a lost instrument by showing that it or its predecessor in interest was entitled to enforce the instrument when possession of it was lost.

Deutsche Bank eventually moved for summary judgment, arguing that, as relevant here, it had established its right to enforce the note under NRS 104.3309 based on a 2017 lost note affidavit from a representative of its loan servicer, Select Portfolio Servicing, Inc. (SPS), who attested that the company conducted a diligent search of its records, was unable to locate the note, believed that Deutsche Bank owned the instrument, and was entitled to enforce it when possession was lost. Napoleoni opposed that motion based, in part, on a 2012 lost note affidavit from Deutsche Bank's prior loan servicer, Bank of America, National Association (BANA), which she asserted was filed in her prior bankruptcy action and was inconsistent with SPS's lost note affidavit. In BANA's lost note affidavit, a representative of BANA attested that the company acquired possession of the note and began servicing Napoleoni's loan in December 2006, that BANA conducted a diligent search for the instrument but was unable to locate it, and that Deutsche Bank was entitled to enforce the instrument when possession was lost. Following a hearing, the district court entered an order granting Deutsche Bank's motion in which it, among other things, referenced SPS's lost note affidavit and concluded that Deutsche Bank satisfied NRS 104.3309's requirements. Napoleoni subsequently moved for reconsideration, which the district court denied. This appeal followed.

On appeal, Napoleoni contends that summary judgment in favor of Deutsche Bank was inappropriate because it failed to satisfy NRS 104.3309. This court reviews a district court order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine disputes of fact. *Id.* at 731, 121 P.3d at 1030-31.

As mentioned above, NRS 104.3309 establishes the procedure by which a party may enforce a note or other instrument when the original instrument is unavailable because it has been lost, destroyed, or stolen. *Jones v. U.S. Bank Nat'l Ass'n*, 136 Nev. 129, 131, 460 P.3d 958, 961 (2020). In particular, a party that does not have possession of a note may nevertheless enforce the instrument if the party establishes the following: (1) the party was entitled to enforce the instrument when possession was lost or it acquired ownership, whether directly or indirectly, from a prior owner that was entitled to enforce the instrument when it was lost; (2) possession was not lost due to a transfer by the party or lawful seizure; and (3) the party cannot reasonably obtain possession of the instrument because it was lost, destroyed, or stolen. NRS 104.3309(1); *Jones*, 136 Nev. at 131, 460 P.3d at 961. The party seeking to enforce a note under such circumstances bears the burden of establishing, by a preponderance of the evidence, both the terms of the note and its right to enforce the instrument.

NRS 104.3309(2); *Jones*, 136 Nev. at 131, 460 P.3d at 961. The district court may only permit a party to enforce a note pursuant to NRS 104.3309 if the court finds that the payor under the instrument is adequately protected from third party claims. NRS 104.3309(2); *Jones*, 136 Nev. at 132, 460 P.3d at 961.

Napoleoni disputes whether Deutsche Bank satisfied NRS 104.3309(1)(a) by establishing that it was entitled to enforce the note when possession was lost or that it acquired the instrument from the entity that was entitled to enforce it when the loss occurred. In particular, Napoleoni contends that the BANA and SPS lost note affidavits were insufficient to establish the foregoing because they were inconsistent and did not demonstrate precisely when loss of possession occurred.

Initially, we disagree with Napoleoni's assertion that the BANA and SPS lost note affidavits were inconsistent, which is premised on the proposition that both servicers purported to have lost the note. Indeed, BANA's lost note affidavit indicates that it acquired possession of the note in 2006 when it began servicing Napoleoni's loan and lost possession of the instrument sometime between 2006 and 2012 when the affidavit was executed,[1] while SPS's lost note affidavit simply indicated that it was the

[1]While Napoleoni contends that the BANA lost note affidavit falsely asserts that BANA acquired possession of the note in December 2006 because its predecessor through merger did not begin servicing her loan until 2007, the question of whether the predecessor first acquired possession of the note in December 2006 or February 2007 is not material to the question of whether one of these entities eventually lost the note at a time that would satisfy the requirements of NRS 104.3309(1)(a). *See Wood*, 121 Nev. at 730, 121 P.3d at 1030 (providing that facts are material when

current servicer for Napoleoni's loan in 2017 and had checked its records for the note but could not locate it. Thus, her argument on this point lacks merit.

Before considering Napoleoni's assertion that the BANA and SPS lost note affidavits were insufficient to satisfy NRS 104.3309(1)(a) because they did not precisely establish when loss of possession occurred, we must briefly address the validity of the 2010 assignment of the deed of trust and note since that assignment is an inflection point in our analysis of who was entitled to enforce the note when loss of possession occurred. As discussed above, MERS executed the 2010 assignment on behalf of Impac to transfer ownership of the deed of trust and note to Deutsche Bank, which it was authorized to do under the deed of trust, acting as the beneficiary of the deed of trust and Impac's agent. *See Jones*, 136 Nev. at 132, 460 P.3d at 961 (reaching the same conclusion); *Davis v. U.S. Bank, Nat'l Ass'n*, No. 56306, 2012 WL 642544, at *1 n.3 (Nev. Feb. 24, 2012) (Order of Affirmance) (recognizing that, when MERS is appointed as the beneficiary of the deed of trust and lender's nominee, it may assign the lender's ownership in a note even when it lacks a beneficial ownership interest in the instrument).

Although Napoleoni contends that the 2010 assignment was defective because it listed the incorrect loan identification number, included a handwritten parcel number, was executed in violation of an internal MERS policy against assigning notes on behalf of lenders, and effected a transfer into a securitization trust several years after the trust was

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they "might affect the outcome of the suit under the governing law" (internal quotation marks omitted)).

established and later dissolved, such purported defects would, at most, render the assignment voidable, and Napoleoni lacks standing to challenge a voidable assignment. *See Wood v. Germann*, 130 Nev. 553, 556-57, 331 P.3d 859, 861 (2014) (providing that homeowners lack standing to challenge voidable deed of trust assignments and concluding that a deed of trust assignment executed after the closing date of a pooling and servicing agreement was merely voidable); *see also Hosseini v. Wells Fargo Bank, N.A.*, No. C-13-02066 DMR, 2013 WL 4279632, at *3 (N.D. Cal. Aug. 9, 2013) (reasoning that the plaintiff could not challenge an assignment of a deed of trust into a securitization trust on the basis that the assignment occurred after the securitization trust dissolved because plaintiffs lack standing to challenge the process by which their mortgages are securitized); *Galvan v. Nationstar Mortg., LLC*, No 76214-COA, 2020 WL 3970205, at *4 (Nev. Ct. App. July 13, 2020) (Order of Affirmance) (concluding that, if an assignment from MERS was executed without MERS authorization, the assignment would merely be voidable); Restatement (Second) of Contracts § 7 (Am. Law Inst. 1981) (explaining that a voidable contract is one in which a party has the power to avoid or ratify the legal obligations imposed by it). Insofar as Napoleoni relies on the foregoing to assert that the 2010 assignment was fabricated in connection with this litigation, the record is devoid of any evidence showing that the assignment was not properly executed in 2010, and Napoleoni cannot rely "on the gossamer threads of whimsy, speculation, and conjecture" to avoid summary judgment. *See Wood*, 121 Nev. at 732, 121 P.3d at 1031 (internal quotation marks omitted).

Thus, we conclude that the 2010 assignment of the deed of trust and note was valid. And although we recognize that the record includes two

subsequent assignments in which MERS purported to transfer the deed of trust and note to Deutsche Bank on behalf of Impac, the operative assignment is the 2010 assignment because it was valid and MERS could not transfer interests that it had already assigned. *See Zakarian v. Option One Mortg. Corp.*, 642 F. Supp. 2d. 1206, 1213 (D. Haw. 2009) ("Once a valid and unqualified assignment is made, all interests and rights of the assignor are transferred to the assignee[, and] the assignor loses all control over the thing assigned . . . .").

Given that the 2010 assignment of the deed of trust was valid and that Napoleoni failed to present any material evidence to contradict BANA's lost note affidavit, which established that the note was lost while it was in BANA's possession within an approximately six-year period ending in 2012, one of two things must be true. Either the note was lost prior to the 2010 assignment, in which case one of NRS 104.3309(1)(a)'s alternate requirements was satisfied because Deutsche Bank acquired ownership of the note from Impac, which was entitled to enforce the instrument at the time by way of its agency relationship with BANA.[2] *See*

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[2]If the note was lost prior to the 2010 assignment, then the statement in that assignment that MERS endorsed the note would necessarily be false. However, even without the endorsement, the 2010 assignment would have effectively transferred the deed of trust, together with the note. This is necessarily so because "[t]ransferring a deed of trust . . . also transfers the obligation that it secures unless the parties to the transfer agree otherwise." *See Jones*, 136 Nev. at 132, 460 P.3d at 961(internal quotation marks omitted). Here, the 2010 assignment specifically indicated that MERS was assigning both the deed of trust and the note to Deutsche Bank on behalf of Impac, and nothing in the record suggests that the parties to the transaction agreed upon a different course.

Edelstein v. Bank of N.Y. Mellon, 128 Nev. 505, 523-24, 286 P.3d 249, 261-62 (2012) (concluding that the bank was entitled to enforce both the note and the deed of trust because its trustee had physical possession of the note); *see also In re Montierth*, 131 Nev. 543, 548, 354 P.3d 648, 651 (2015) (holding that reunification of the note and the deed of trust is unnecessary where there is a principal-agent relationship between the holder of the note and the holder of the deed of trust). Alternatively, the note was lost after the 2010 assignment, in which case NRS 104.3309(1)(a)'s other alternate requirement was satisfied because Deutsche Bank was entitled to enforce the instrument by way of its agency relationship with BANA when loss of possession occurred.[3] *See Edelstein*, 128 Nev. at 524, 286 P.3d at 261-62; *see also In re Montierth*, 131 Nev. at 548, 354 P.3d at 651. Thus, in either scenario, Deutsche Bank presented sufficient evidence to satisfy one of NRS

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[3]If MERS did endorse the note in connection with the 2010 assignment, this would not necessarily mean that the note left BANA's possession, and because BANA's uncontroverted lost note affidavit indicates that it did not lose possession as a result of a transfer, it would not be reasonable to draw an inference that a transfer of possession from BANA to MERS occurred given the way that the MERS system is widely recognized to operate. *See, e.g., Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W. 2d 487, 491 (Minn. 2009) (discussing the MERS system and explaining that when documentation such as an assignment is necessary to effect a transfer of a mortgage loan, "MERS does not draft or execute the paperwork on behalf of its members," but instead "instructs its members to have someone on their own staff become a certified MERS officer with authority to sign on behalf of MERS"); *Edelstein*, 128 Nev. at 515-16, 286 P.3d at 256 (approvingly citing to *Jackson* in discussing the MERS system); *see also Wood*, 121 Nev. at 729, 121 P.3d at 1029 (providing that, when reviewing a motion for summary judgment, all *reasonable* inferences from the evidence must be drawn in favor of the nonmoving party).

104.3309(1)(a)'s alternate requirements, and we therefore discern no basis for relief in this respect.[4]

Moreover, the record further demonstrates that Deutsche Bank satisfied NRS 104.3309's remaining requirements for enforcing a lost note. In particular, Deutsche Bank demonstrated that possession of the note had not been lost due to a transfer or lawful seizure by producing the BANA and SPS lost note affidavits wherein the representatives of those companies averred to the foregoing fact. *See* NRS 104.3309(1)(b). The BANA and SPS representatives also averred that the note could not be reasonably obtained because its whereabouts could not be determined or it had been destroyed. *See* NRS 104.3309(1)(c). The averments that the note had not been transferred and could not be located are bolstered by Napoleoni's repeated assertions throughout these proceedings that she did not know to whom to

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[4]To the extent that Napoleoni cites caselaw from New York for the proposition that a lost note affidavit must provide specific details as to where, when, and how a note was lost as well as the type of search that was conducted to locate the note, we are unpersuaded, as the Nevada Supreme Court has relied, at least in part, on a similarly vague lost note affidavit to conclude that a bank established its entitlement to enforce a lost note pursuant to NRS 104.3309. *See Jones*, 136 Nev. at 130, 132-33, 460 P.3d at 960, 961-62 (considering a lost note affidavit wherein the affiant represented that a bank's loan servicer had conducted a diligent search to locate a note, which could not reasonably be obtained because it had been lost or destroyed); *see also, e.g., Sabido v. Bank of N.Y. Mellon*, 241 So. 3d 865, 867 (Fla. Dist. Ct. App. 2017) (stating that a bank seeking to reestablish a lost note need not prove "when, how, and by whom the note was lost," but instead, need only show that it or its predecessor in interest were entitled to enforce the note when loss of possession occurred (internal quotation marks omitted)).

make the mortgage payments, which support an inference that, aside from Deutsche Bank and its servicers, no other party has claimed a right to enforce the note since Deutsche Bank acquired ownership of the instrument. *See Jones*, 136 Nev. at 133, 460 P.3d at 962 (drawing a similar inference based on a homeowner's representation that she did not know to whom to make mortgage payments). Deutsche Bank also established the terms of the note by producing a copy that corroborated its description of the instrument's terms. *See* NRS 104.3309(2). And Deutsche Bank demonstrated that Napoleoni would be adequately protected from any loss that might occur as a result of another party asserting a right to enforce the note by producing the SPS lost note affidavit, wherein SPS's representative averred that SPS would indemnify Napoleoni against damages arising from any such claims.[5] *See id.*

Because the record is devoid of any evidence to contradict the foregoing, we conclude that Deutsche Bank established by a preponderance of the evidence its right to enforce the note. *See* NRS 104.3309(2); *Jones*, 136 Nev. at 131, 460 P.3d at 961. Consequently, we further conclude that the district court did not err by granting Deutsche Bank's motion for

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[5]The district court's order does not include any specific findings as to whether Napoleoni will be adequately protected from potential third-party claims; however, in light of the representation in SPS's lost note affidavit, we discern no prejudice to Napoleoni. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (providing that a prejudicial error is one that "affects [a] party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"); *cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all error and defects that do not affect any party's substantial rights.").

summary judgment, albeit for reasons slightly different than those relied on by the district court. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029; *see also Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (providing that Nevada's appellate courts "will affirm the order of the district court if it reached the correct result, albeit for different reasons"). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[6]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Susan Johnson, District Judge
Lissette Salazar Napoleoni
Smith Larsen & Wixom
Eighth District Court Clerk

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[6]Insofar as Napoleoni raises arguments that are not specifically addressed herein, we have reviewed them and conclude they do not warrant relief.