IN THE COURT OF APPEALS OF THE STATE OF NEVADA

USROF III LEGAL TITLE TRUST 2015-1, BY U.S. BANK NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE,
Appellant,
vs.
LAS VEGAS RENTAL AND REPAIR LLC SERIES 66, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 83784-COA

ORDER OF REVERSAL AND REMAND

USROF III Legal Title Trust 2015-1 (USROF) appeals from a final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

The original owner of the subject property, Darlene Castello, failed to make periodic payments to her homeowners' association (HOA). Through its foreclosure agent, Hampton & Hampton (H&H), the HOA initiated nonjudicial foreclosure proceedings to collect on the past due assessments and other fees pursuant to NRS Chapter 116. Castello made multiple partial payments on the delinquencies to both H&H and the HOA directly, but the HOA ultimately foreclosed on the property and sold it to respondent Las Vegas Rental and Repair LLC Series 66 (LVRR). LVRR then initiated the underlying action seeking, in relevant part, to quiet title to the property, and USROF—the beneficiary of the first deed of trust on

the property at the time[1]—filed a counterclaim seeking declaratory relief, among other relief that need not be addressed in detail here. The matter proceeded to a bench trial, following which the district court ruled in favor of LVRR, concluding that the HOA foreclosed on its superpriority lien such that the foreclosure sale extinguished the first deed of trust.

USROF appealed that determination, arguing, as relevant here, that the district court failed to make any findings regarding amounts H&H disbursed to the HOA after reversing certain charges related to H&H's collection efforts. Specifically, USROF pointed to evidence in the record indicating that, after Castello made payments to H&H totaling $1,222, H&H filed a second notice of delinquent assessment lien and reversed all of the collection costs it had charged in connection with the first notice. USROF pointed to further evidence indicating that H&H then applied $491 from Castello's partial payments to the collection costs owed to it in connection with the second notice, and it issued a check to the HOA for the $731 remaining from the partial payments. Finally, USROF pointed to evidence indicating that the HOA may have then applied the $731 to delinquent assessments accrued in 2007, 2008, and part of 2009. Accordingly, USROF maintained that the superpriority portion of the HOA's lien, which consisted solely of the five months of delinquent assessments in 2007 predating the first notice of delinquent assessment lien

[1]Ownership of the loan secured by the deed of trust subsequently changed hands multiple times, but the transferees were not substituted into this action in place of USROF or otherwise joined as a party. *See* NRCP 25(c) ("If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party.").

(a total of $150), was satisfied such that the deed of trust survived the foreclosure sale.[2]

Because the district court did not address the factual and legal issues surrounding the $731 payment and did not have the benefit of the supreme court's decision in *9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 459 P.3d 227 (2020), which explained how to evaluate whether a homeowner's partial payments satisfied the superpriority portion of an HOA's lien, we vacated the district court's determination that the foreclosure sale extinguished the first deed of trust and remanded for the district court to consider whether the HOA actually applied the $731 payment to Castello's account and, if so, whether it allocated the funds to the five months of delinquent assessments from 2007 that comprised the superpriority component of the HOA's lien. *USROF III Legal Title Tr. 2015-1*, No. 78331-COA, 2020 WL 6598294, at 1-3.

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[2]Although LVRR disagreed with USROF's arguments concerning the $731 payment, both parties agreed that the first notice remained the operative notice for purposes of determining the superpriority amount of the HOA's lien, as H&H only filed the second notice for recordkeeping purposes after it lost records associated with the first notice. Given that agreement and because H&H's representative presented testimony at trial consistent therewith, this court determined that the HOA's superpriority lien consisted of the five months of delinquent assessments from 2007 in resolving USROF's prior appeal. *USROF III Legal Title Tr. 2015-1 v. Las Vegas Rental & Repair LLC Series 66*, No. 78331-COA, 2020 WL 6598294, at *1 & n.2 (Nev. Ct. App. Nov. 10, 2020) (Order Affirming in Part, Vacating in Part and Remanding); *see also Tien Fu Hsu v. Cty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (discussing the law-of-the-case doctrine and explaining that it is "designed to ensure judicial consistency" by requiring that "decisions which are intended to put a particular matter to rest" are followed "throughout [a case's] subsequent progress, both in the lower court and upon subsequent appeal" (internal quotation marks omitted)).

On remand, the parties submitted supplemental briefing addressing the legal and factual issues surrounding the $731 payment, and the district court subsequently entered judgment in favor of LVRR, concluding once again that the foreclosure sale extinguished the first deed of trust. In reaching that decision, the district court found that the contractual arrangement between H&H and the HOA provided for H&H to allocate any payments that it received from a homeowner to its collection costs before any remaining funds would be disbursed to the HOA to be applied to delinquent assessments and late fees. In light of that contractual arrangement, the district court further found that H&H allocated the $1,222 that it received from Castello to collection costs since the collection costs associated with the first notice of delinquent assessment lien exceeded $1,222. The district court also found that the $731 disbursement from H&H to the HOA was the result of a bookkeeping error in which H&H determined that Castello paid $731 dollars more than she actually paid. Consequently, the district court essentially treated the $731 payment as a nullity notwithstanding that the court also found that the HOA credited $731 against Castello's outstanding balance on its ledger after receiving a check for the corresponding amount from H&H. This appeal followed.

On appeal, USROF argues that H&H did not apply the full $1,222 that it received from Castello to collection costs and that the $731 disbursement from H&H was not the result of a bookkeeping error. Moreover, USROF contends that the HOA applied the $731 payment to the five months of delinquent assessments from 2007 that comprised its superpriority lien, such that the foreclosure sale did not extinguish the deed of trust. LVRR disagrees on both points.

This court reviews a district court's legal conclusions following a bench trial de novo, but we will not disturb the district court's factual findings "unless they are clearly erroneous or not supported by substantial evidence." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

When a homeowner satisfies the superpriority portion of an HOA's lien, a subsequent foreclosure sale "will not extinguish a [prior deed of trust on the property], and the buyer at the sale will take the unit subject to [the deed of trust]." *See Bank of Am., N.A. v. SFR Invs. Pool 1*, LLC, 134 Nev. 604, 612-13, 427 P.3d 113, 121 (2018) (internal quotation marks omitted); *Cranesbill*, 136 Nev. at 79, 459 P.3d at 230 ("While the first deed of trust holder can pay off a superpriority lien default, so, too, can the homeowner."). Determining whether a homeowner's partial payments satisfied the superpriority portion of an HOA's lien requires evaluating whether the payments were allocated in a particular manner, and if not, how they should be allocated. *See Cranesbill*, 136 Nev. at 80-81, 459 P.3d at 231. "Allocating partial payments by a homeowner to her HOA depends on the express or implied intent and actions of the homeowner and the HOA and, if indeterminate, an assessment of the competing equities involved." *Id.* at 82, 459 P.3d at 232. A debtor generally has the right to appropriate a partial payment to particular obligations outstanding, but if she does not do so, "the creditor may determine how to allocate the payment." *Id.* at 80, 459 P.3d at 231. Moreover, if the creditor makes an allocation, it may not thereafter allocate the payment to a different debt, and its right to make an allocation terminates when a controversy surrounding application of the funds arises. *Id.* Finally, if neither the debtor nor the creditor specifically

allocates the payment, the court must determine how to allocate it in equity. *Id.*

Here, it is undisputed that Castello did not direct an allocation of the $1,222 that she paid to H&H; therefore, we focus on whether the HOA or its agents made an allocation of the funds. The record demonstrates that when Castello paid $1,222 to H&H in May 2008, H&H's collection costs exceeded that amount, which is what prompted the district court to conclude that H&H allocated all of the funds to its collection costs in light of the contractual arrangement between H&H and the HOA. However, at trial, H&H's representative testified that, in May 2012, the company determined that it had lost various records associated with the first notice of delinquent assessment lien that it recorded, such that it needed to reverse all of the prior charges to Castello's account for its collection costs, record a new notice of delinquent assessment lien, and reperform the various steps necessary to proceed with a nonjudicial foreclosure sale. H&H's representative further testified that it subsequently sent the HOA a check for $731 on July 27, 2012, because that amount was determined to be the overage after H&H applied a portion of the $1,222 it received to the collection costs associated with the second notice of delinquent assessment lien that had accrued.

The H&H representative's testimony in this respect is largely corroborated by comparing H&H's pre- and post-May 2012 statements of account. For example, H&H's statement of account from April 11, 2008, showed that $2,881 in collection costs accrued against Castello's account between October 24, 2007, and April 10, 2008, while H&H's June 7, 2013, statement of account showed that H&H disbursed $731 to the HOA on July

27, 2012, and that between that date and October 24, 2007, only $556 in collection costs accrued against Castello's account.[3]

Thus, in light of the H&H representative's testimony and H&H's corroborating statements of account, we conclude that the district court's findings were clearly erroneous insofar as it determined that H&H applied the full $1,222 in payments to its collection costs and subsequently remitted funds to the HOA as a result of a bookkeeping error.[4] *See Radecki*, 134 Nev. at 621, 426 P.3d at 596; *see also Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272, 1273 (1981) (recognizing that "[a] finding is clearly erroneous when although there is

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[3]There is one minor discrepancy between the H&H representative's testimony and H&H's June 7, 2013, statement of account in that subtracting the $556 in collection costs shown in that statement from Castello's $1,222 in payments yields a figure of $666 rather than $731. However, that discrepancy was de minimis, as H&H properly disbursed funds to the HOA that were more than sufficient to satisfy the HOA's $150 superpriority lien. And because LVRR does not address the discrepancy, it has waived any argument concerning its legal affect. *See Frazier v. Drake*, 131 Nev. 632, 645 n.11, 357 P.3d 365, 374 n.11 (Ct. App. 2015) (declining to consider an issue that respondents failed to raise in their answering brief).

[4]In concluding that H&H made a bookkeeping error, the district court's concern was not with the discrepancy identified above. Instead, the district court essentially concluded that H&H mistakenly credited Castello's accounts for payments totaling $1,953, rather than $1,222, because the June 7, 2013, statement of account listed payments totaling $1,222 as well as a payment of $731. However, in reaching this conclusion, the district court overlooked that the statement of account also included a charge to Castello's account of $731 for the funds H&H disbursed to the HOA, which offset the $731 credit, such that the credit had no net effect on Castello's outstanding balance. As H&H's representative testified at trial, H&H employed the offsetting debit and credit as an accounting mechanism that allowed it to record the $731 remittance to the HOA on its books without altering Castello's outstanding balance.

evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (internal quotation marks omitted)).

Turning to the question of whether the HOA made an allocation of the $731 disbursement, the evidence before this court demonstrates that the HOA allocated the funds to Castello's delinquent assessments, including the five months of delinquent assessments from 2007 that comprised the superpriority portion of the HOA's lien. In particular, H&H's representative and a representative from the HOA's management company that handled the HOA's internal collection process at the time of trial, Colonial Property Management (Colonial), both testified that the funds were applied to delinquent assessments, with Colonial's representative more specifically indicating that the funds were applied to Castello's delinquent assessments from 2007, 2008, and part of 2009.[5] The foregoing testimony was corroborated by Colonial's ledgers, which indicated that

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[5]Colonial's representative also testified that, following her deposition in this case, she looked into the matter further and determined that the funds were a reimbursement to the HOA for its payment of H&H's collection costs. According to Colonial's representative, the HOA's prior management company, which received the funds, should have offset the purported reimbursement with a corresponding administrative charge, but because it failed to do so, the funds were mistakenly allocated to delinquent assessments. However, Colonial's representative also testified that she did not actually see any indication that the HOA paid any of H&H's collection costs, although she did not specifically research the matter. Moreover, Colonial's representative conceded that H&H's representative was in a better position to know the source of the funds and was surprised to learn that H&H's representative indicated that the funds derived from payments by Castello that H&H disbursed to the HOA. And regardless, the HOA could not change the allocation of the funds after they were applied to delinquent assessments. *See Cranesbill*, 136 Nev. at 80, 459 P.3d at 231.

Castello had no outstanding balance for assessments from 2007, 2008, and part of 2009. The testimony was also corroborated by a March 2013 email in which Colonial instructed H&H that the HOA wished to proceed with foreclosure if Castello did not agree to a proposed payment plan since her "assessments [we]re delinquent from 2009" and "[i]t [wa]s not fair to the rest of the community to continue to allow [her] account to remain [that] delinquent." Lastly, the testimony was corroborated by the HOA's collection policy that was in effect at the time H&H disbursed the funds to the HOA, which provided that "all payment received by the [HOA] . . . will be directed to the oldest assessment balance first."

Taking the foregoing testimony and evidence together, the record before this court shows that the HOA applied the first $150 of the $731 disbursement that it received from H&H to the five months of delinquent assessments from 2007 that comprised the superpriority portion of the HOA's lien. And because this allocation cured the superpriority default, the HOA's foreclosure sale was void as to the superpriority portion of the HOA's lien regardless of what other delinquent assessments remained outstanding following the HOA's allocation of the funds. *See Bank of Am.*, 134 Nev. at 612, 427 P.3d at 121 ("[A]fter a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.").

LVRR disagrees with the foregoing and directs this court's attention to various statements of accounts, foreclosure notices, and excerpts from the testimony of H&H's representative in an effort to demonstrate that some portion of the HOA's superpriority lien remained unsatisfied following any allocation by the HOA. But none of that evidence

or testimony directly speaks to how the HOA allocated the $731 disbursement or otherwise raises a reasonable question as to whether the HOA allocated the disbursement in a manner that satisfied the superpriority component of its lien. Accordingly, USROF was entitled to a judgment that the deed of trust survived the HOA's foreclosure sale, and that LVRR acquired title to the property subject to the same. *See id.* at 612-13, 427 P.3d at 121 (holding that the purchaser at an HOA foreclosure sale took title subject to the first deed of trust since the superpriority portion of the HOA's lien had previously been satisfied); *Cranesbill*, 136 Nev. at 79, 459 P.3d at 230. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[6]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[6]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: Hon. Susan Johnson, District Judge
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