IN THE SUPREME COURT OF NEVADA

MONICA JONES, Appellant, vs. U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR TBW MORTGAGE-BACKED PASS-THROUGH CERTIFICATE, SERIES 2006-3, Respondent.	CASE NO. 78054 District Court Case No. A-17-755267-C Appeal from the Eighth Judicial District Court, Clark County, Nevada

---

RESPONDENT'S ANSWERING BRIEF

Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Amy J. Smith, Esq.
Nevada Bar No. 14954
WRIGHT, FINLAY & ZAK, LLP
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Tel: 702-475-7964
dnitz@wrightlegal.net
asmith@wrightlegal.net
Attorneys for U.S. Bank National Association as Trustee for TBW Mortgage-Backed Pass-through Certificate, Series 2006-3

CORPORATE DISCLOSURE STATEMENT
(NRAP RULE 26.1)

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Respondent U.S. Bank National Association is a national banking association chartered under the laws of the United States with its main office in Ohio. Counsel is unaware of any publicly-held corporation owning 10% or more of its stock.

The names of all law firms and attorneys who have appeared on behalf of U.S. Bank National Association as Trustee for TBW Mortgage-Backed Pass-through Certificates, Series 2006-3 in this matter are listed below.

- McCarthy & Holthus, LLP
  Kristin A. Schuler-Hintz, Esq. (Nevada Bar No. 7171)
  Daniel B. Cantor, Esq. (Nevada Bar No. 14180)
  Thomas N. Beckom, Esq. (Nevada Bar No. 12554)
  Matthew D. Dayton, Esq., (Nevada Bar No. 11552)
  9510 W. Sahara Ave., Suite 200
  Las Vegas, Nevada, 89117

///

///

///

///

///

- Wright, Finlay & Zak, LLP
  Dana Jonathon Nitz, Esq. (Nevada Bar No. 0050)
  Lindsay D. Robbins, Esq. (Nevada Bar No. 13474)
  Amy J. Smith (Nevada Bar No. 14954)
  7785 W. Sahara Ave., Suite 200
  Las Vegas, NV, 89117

Dated this 28th day of June, 2019.

WRIGHT FINLAY AND ZAK, LLP

/s/ Dana Jonathon Nitz
Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Amy J. Smith, Esq.
Nevada Bar No.14954
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
702-475-7964; Fax 702-946-1345
Attorneys for U.S. Bank National Association as Trustee for TBW Mortgage-Backed Pass-through Certificate, Series 2006-3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. JURISDICTIONAL STATEMENT

This case is properly before the Nevada Supreme Court based on the district court's January 24, 2019 judgment granting Beneficiary's Motion for Summary Judgment. JA155-159.[1] This judgment was a final judgment.

Jones's notice of appeal on the above order was served and filed on January 28, 2019. JA125-152. The notice of appeal was timely as required by NRAP 4(a)(1).

[1] Citations to the record refer to the Joint Appendix PDF page where the matter relied on is to be found. Some of the pages bear a bates number but without any prefix. The pages should all have been bates numbered, but numbering is intermittent and Appellant submitted the "Joint Appendix" without consulting Respondent's counsel.

II. ROUTING STATEMENT

The Supreme Court should retain this matter pursuant to either NRAP 17(a)(12), as "Matters raising as a principal issue a question of statewide public importance." Appellant erroneously takes the position that the Lenders or its assigns may never foreclose if the original promissory note is lost, despite the express language of NRS 104.3309, permitting an Affidavit of Lost Note. This judicial foreclosure action does not fall within any category of cases NRAP 17(b) presumptively assigns to the Court of Appeals.

III. STATEMENT OF THE ISSUES

A Grant of Summary Judgment is appropriate where there is no genuine issue of fact. The district court found that no genuine issue of facts existed and U.S. Bank National Association as Trustee for TBW Mortgage-Backed Pass-through Certificate, Series 2006-3 was entitled to judicially foreclose, when it had produced the Assignment of the Deed of Trust, Deed of Trust, copy of the Note and Affidavit of Lost Note and Appellant admitted she had not paid her mortgage payment for 10 years. Did the district court correctly hold that U.S. Bank National Association as Trustee for TBW Mortgage-Backed Pass-through Certificate, Series 2006-3 was entitled to judicial foreclosure under the Deed of Trust and the Note?

The beneficiary has standing to enforce an instrument it is not in possession of if it meets the requirements under NRS 104.3309. Here, while U.S. Bank is not in possession of the Note, it was entitled to enforce the instrument when loss of possession occurred, where its loss of possession was not the result of a transfer or a lawful seizure; and it cannot reasonably obtain possession of the instrument because the instrument was destroyed or its whereabouts cannot be determined. Upon these facts, did the district court correctly hold U.S. Bank National Association as Trustee for TBW Mortgage-Backed Pass-through Certificate, Series 2006-3 had standing to enforce a Lost Note under NRS 104.3309 and foreclose.

IV. STATEMENT OF THE CASE

This Court is likely familiar with the fact pattern underlying this appeal: a borrower contends that the beneficiary under the deed of trust and the owner of the underlying promissory note lacks standing to foreclose because it was not the original party to the promissory note and it does not possess the original note.[2] Such a finding would be ludicrous.

However, because U.S. Bank, National Association as Trustee for TBW Mortgage-backed Pass-through Certificates, Series 2006-3 (the "Beneficiary") is the beneficiary under the deed of trust recorded on April 28, 2006, under Book and Instrument number 20060428-0002827 ("Deed of Trust"),[3] it also possesses the right to foreclose under the original initial interest note dated April 21, 2006 (the "Note"). JA10-13. Although it was not necessary for Beneficiary to do so, Beneficiary filed a judicial foreclosure action rather than proceed with a non-judicial foreclosure.

[2] This Answering Brief will not address the issues of (1) whether a genuine issue exists, or (2) statute of limitations. Jones's Docketing statement listed these two issues on appeal; however, Jones's Opening Brief did not raise these issues. "Issues not raised in an appellant's opening brief are deemed waived." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011). Since Jones did not raise these issues in her Opening Brief, Beneficiary will only respond to the issues in her Answering Brief.

[3] Joint Appendix (JA) 14-28.

Here, the district court found Beneficiary owned the Note secured by the Deed of Trust on the Property. The district court correctly determined that Beneficiary is entitled to enforce the lost Note pursuant to NRS 104.3309; and the district court granted Beneficiary's motion for summary judgment to judicially foreclose. JA156. The district court then granted the Beneficiary's motion for summary judgment. Jones appealed.

Appellant, Monica Jones (the Appellant or "Jones"), argues that the district court erred in holding that Beneficiary was entitled to judicially foreclose on the property located at 149 Cologne Court, Henderson, Nevada, 89074 APN: 177-13-212-031 (the "Property"), primarily because the Note has been lost. However, this Court has repeatedly held that the transfer of the deed of trust also transfer the right to enforce the Note. *Einhorn v. BAC Home Loans Servicing, LP*, 1208 Nev. 689, 694, 290, P.3d 249, 252 (2012); *Edelstein v. Bank of New York Mellon,* 128 Nev. 505, 286 P. 3d 249 (2012). Here, Beneficiary is the record beneficiary under the deed of trust.

Jones also argues that Beneficiary did not meet the requirement under NRS 104.3309 to enforce the lost note. However, the Affidavit of Lost Note was executed on or about April 6, 2016, by an authorized signer for Ocwen Loan Servicing, LLC ("Ocwen"), the authorized servicing agent for the loan for the Original Lender, Taylor Bean & Whitaker Mortgage Corp.– all of which is

admitted by Jones. Jones's only qualm is that "[n]owhere does the affidavit contain language indicating that U.S. Bank was ever transferred ownership of the note, or rights to enforce the note…." Jones further admits that her original lender was Taylor Bean & Whitaker. See JA161-162. Here, Taylor Bean & Whitaker was the original lender and MERS was the original beneficiary of record and nominee for Taylor Bean & Whitaker and it successors and assigns. On or about March 22, 2017, MERS assigned the Deed of Trust and "the full benefit of all of the powers and all the covenants and provisos therein contained, and … grants and conveys [its] interest under the Deed of Trust" to U.S. Bank National Association, As Trustee For TBW Mortgage-Backed Pass-Through Certificates, Series 2006—3. Thus, the Affidavit of Lost Note, with the Assignment and the Deed of Trust, did meet all of the requirements under NRS 104.3309. As such, As such, the district court properly granted the Beneficiary's motion for summary judgment for judicial foreclosure, and this Court should affirm.

V. STATEMENT OF FACTS

A. Signing of the Deed of Trust and the Note

On or about April 21, 2006, Jones executed a Note secured by a Deed of Trust on the Property for a loan currently in favor of the Beneficiary. JA10-13; 79-82. The Note signed by Jones stated, "I understand that the Lender may transfer the Note." JA79. Further, the Note stated, "[t]he Lender or anyone who takes this

Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" *Id*. On April 28, 2006, the Deed of Trust was recorded in the official records of Clark County Recorder's Office as document number 2006428-0002827. JA14-28; 83-97.

B. Ocwen's Interest in the Note

Ocwen is now, and at all relevant times in this action was, the servicer for the Loan –namely, the Note and Deed of Trust. JA10-28; 79-97. On April 6, 2016, Ocwen executed an Affidavit of Lost Note ("Affidavit"). JA78. The Affidavit shows that Ocwen was the authorized loan servicer, Ocwen kept a record of the payments on the loan, Ocwen attempted without success to locate the Note, and the Note had not been satisfied. *Id*.

The Affidavit states that Ocwen is the authorized servicing agent for the loan secured by the Note executed on April 21, 2006 by Monica Jones and the Original Lender, Taylor Bean & Whitaker Mortgage Corp, as contained in Ocwen's records. *Id*. Second, the Affidavit states Ocwen recorded all transactions relating to the loan at or near the time of those transactions. Ocwen kept a record of the payments on the loan, *Id*. Third, the Affidavit states Ocwen could not locate the Original Note, even though Ocwen "made a good faith, diligent search and inquire to locate the original Note." *Id*. Finally, the Affidavit states, to the best of Ocwen's

representative's knowledge, the Note had not been "satisfied, pledged, assigned, transferred, lawfully seized, or hypothecated." *Id*.

Although Mortgage Electronic Registration Systems, Inc. ("MERS") transferred the beneficial interest from the original Lender Taylor Bean & Whitaker to Beneficiary, on March 29, 2017, Ocwen continually serviced the loan secured by the Note, before and after[4] the Deed of Trust was assigned by MERS to Beneficiary.

C. Beneficiary's Interest in the Note

On March 29, 2017, a Corporate Assignment was recorded in the official records of the Clark County Recorder's Office as document number 20170329-0000813. JA29-32; 98-101. The Corporate Assignment assigned the beneficial interest under the Note and the Deed of Trust securing its performance to the Beneficiary. *Id*. Beneficiary is now, and at all times relevant to this action was, the beneficial interest holder under the Deed of Trust. *Id*. Jones defaulted under the terms of the Note and the Deed of Trust. JA105-112.

[4] The Corporate Assignment of the Deed of Trust reflects that the Assignee U.S. Bank, National Association is "care of Ocwen" and the recording was requested by Ocwen with directions to return the recording to Ocwen. JA29. And the Affidavit of Lost Note shows Ocwen is still servicing as of April 6, 2016, the date of execution. JA77-78.

D. Default and Judicial Foreclosures

On March 1, 2009, the default began, because Jones failed to make the monthly payments. JA105. On June 6, 2016, Ocwen, as servicer of the loan, sent a Demand letter to Jones. JA105-112. On May 10, 2017, Beneficiary filed a complaint for judicial foreclosure. JA01-07.

E. Jones's Acknowledged She Has not Paid on the Loan for over 10 years.

During the January 15, 2019 hearing on the Motion for Summary Judgment, Jones stated she has been living in the home without paying the mortgage since 2009 because she cannot determine who "to give the house back to" in the following exchange with the court:

> THE COURT: Are you still in the home?
> MS. JONES: Yes.
> THE COURT: You've been there – how long you been there without paying the mortgage?
> MS. JONES: Well, my lender, Taylor, Bean & Whitaker –
> THE COURT: How long have you been there without paying a mortgage?
> MS. JONES: -- in 2009 --
> THE COURT: Okay.
> MS. JONES: -- is when they --
> THE COURT: That's ten years you've been living for free.
> MS. JONES: I've been looking for, where's my note for ten years.
> THE COURT: Okay.
> MS. JONES: Who do I give the house back to? And nobody showed up. This is the fourth law firm.

JA161-162.

F. Procedural History

On May 10, 2017, Beneficiary filed a complaint for judicial foreclosure. JA1-45. The causes of action in the complaint were (1) Reestablishing Lost Note; (2) Judicial Foreclosure; and (3) Deficiency Judgment on Deed of Trust. JA3-6. Jones filed a Motion to Dismiss (JA48-51) and a Motion for More Definitive (sic) Statement (JA61-66); and the court denied the Motion to Dismiss. JA65-66. Jones never filed an answer. JA161.

On November 1, 2018, Beneficiary filed a Motion for Summary Judgment (JA70-154); and, following briefing, the district court granted Beneficiary's Motion, on January 24, 2019. JA155-158. Notice of Entry was filed and served January 28, 2019. JA153-154. This appeal followed by timely Notice of Appeal filed January 26, 2019. JA125.

VI. STANDARD OF REVIEW

"This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005).

A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Id.*; NRCP 56(c).

Once the moving party has met its burden, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts demonstrating the existence of a genuine issue for trial. Nev.R.Civ.P.56(e). When this rule speaks of a "genuine" issue of material fact, it does so with the adversary system in mind. The word "genuine" has moral overtones; it does not mean a fabricated issue. *Aldabe v. Adams,* 81 Nev. 280, 402 P.2d 34 (1965). In addition, the adverse party must come forward with documentation admissible in evidence in the form of specific facts to show the existence of a genuine issue of material fact; otherwise the court is required to enter judgment according to the law. Nev.R.Civ.P.56(e); *Posadas v. City of Reno,* 109 Nev. 448, 452 (1991). Conclusory statements along with general allegations do not create an issue of material fact. *Michaels v. Sudeck,* 107 Nev. 332 (1991). Not only must the party opposing the motion set forth specific evidence, that evidence must be admissible as well. *Posadas v. City of Reno,* 109 Nev. 448, 452 (1991). The opposing party is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. *Collins v. Union Fed. Sav. & Loan Ass'n,* 99 Nev. 284, 662 P.2d 610 (1983).

VII. SUMMARY OF ARGUMENT

The district court correctly held that Beneficiary possesses the right to enforce the Note and foreclose on the Property. The district court correctly concluded that under Nevada law, the beneficiary under the deed of trust has the right to enforce the initial interest note. *See e.g.*, *Edelstein v. Bank of New York Mellon,* 128 Nev. 505, 286 P. 3d 249 (2012). And Beneficiary met all of the requirements to satisfy NRS 104.3309(1), "Enforcement of lost, destroyed or stolen instrument," which provides:

> 1. A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (a) The person seeking to enforce the instrument:
>
> (1) Was entitled to enforce the instrument when loss of possession occurred; or
>
> (2) Has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
>
> (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
>
> (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

The evidence Beneficiary submitted with its motion for summary judgment—the Assignment of the Deed of Trust and Ocwen's Affidavit of Lost Note for the beneficiary—sufficed to establish that Beneficiary has the right to enforce the Note and foreclose on the Property. This Court should affirm.

VIII. ARGUMENT

This Court, the federal district court for the District of Nevada, and the Ninth Circuit have all rejected the arguments that a lender cannot foreclose because the note is split from the deed of trust, that the note is extinguished by not being produced, and that the beneficiary under a lost note is a "sham beneficiary." *Meiri v. Hayashi*, 2018 WL 4700735 (Unpublished) (Nev. Sept. 28, 2018); *In re Nordeen*, 489 B.R. 203 (D. Nev. 2013); *Zadrozny v. Bank of New York Mellon*, 720 F.3d 1163 (9th Cir. 2013). In light of this authority, Jones's arguments attempting to avoid foreclosure lack merit.

A. Jones Waived Any Claim of Lack of Standing, Because She Failed to Raise Lack of Standing in the District Court

Jones did not raise any issue of standing in the district court. Jones erroneously cites to Unpublished Nevada Court of Appeal decisions for the proposition that this Court may consider the issue of Standing – for the first time – on appeal. Further, Jones incorrectly states that the issue of standing is not waivable. To support this position, Jones tries to convince the court that lack of standing is a jurisdictional defense. However, a complete reading of the only citable case Jones used for this proposition shows that an issue of standing to bring a claim is not a jurisdictional issue**.**

B. Jones Did NOT Raise the Issue of Standing in the District Court

Without any legal or factual basis, Jones represented to this Court that the issue of standing was raised in the district court. Jones tries to represent she raised the issue of standing in her Motion for More Definitive (sic) statement.[5] The Opening Brief, at p. 7, argues "The motion for a more definite (sic) statement questions U.S. Bank's authority to foreclose, citing *Leyva*'s statement that a foreclosing party must prove that the party foreclosing 'actually owns the note…'" (JA62) as an attempt to demonstrate standing was raised below. The attempt must fail, for nowhere in the Motion is the word "standing" used. The phrase "actually owns the note" is actually just a part of a bigger quote from *Leyva v. National Default Servicing Corp*., App. No. 55216, Appeal from the Clark Co. District Court, A-10-600-651, 127 ___, ___ P.3d ___ (Adv. Op. No. 40, July 7, 2011), and no argument follows from the bare citation[6]. In the Motion, Jones prayed for an order directing U.S. Bank to provide a "true and correct copy of the Assignment,"

---

[5] Jones's "Motion for More Definitive Statement" was not even considered by the district court. Jones had already filed a Motion to Dismiss. At that point, once the Motion to Dismiss was denied, an Answer to the Complaint should have been filed. *See* N.R.C.P. 12(e) ("The motion [for more definite statement] must be made before filing a responsive pleading…."). The Motion for More Definitive Statement was therefore a fugitive document and not properly considered by the district court – or this Court.

[6] EDCR 2.20(i) ("A memorandum of points and authorities which consists of bare citations to statutes, rules, or case authority does not comply with this rule and the court may decline to consider it.").

"showing when and how [U.S. Bank] thinks it acquired an interest in the Note." It is undisputed that Beneficiary produced the Deed of Trust, the Assignment of the Deed of Trust, a copy of the Note, and Ocwen's Affidavit of Lost Note. Beneficiary did, in fact, produce the Assignment of the Deed of Trust. JA029-32; JA098-101. While the original Note was not produced, a copy was and Beneficiary did produce an Affidavit of Lost Note from its servicer Ocwen. JA009; JA078. U.S. Bank did produce, without court order, the Assignment which was the "assignment," and the Assignment showed how U.S. Bank acquired its interest in the Note. Jones never argued these were insufficient so she never raised the issue of standing below, and therefore did not preserve the issue for appeal. Thus, Jones cannot raise an issue of standing to bring a claim for the first time in her Opening Brief.

C. An Issue Not Raised in the District Court is Waived on Appeal

"A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

This Court has held that it will not consider arguments regarding who owns a loan where the issues of ownership were not raised below. *Nevada New Builds, LLC v. Nationstar Mortgage, LLC*, 2019 WL 1245616 (Unpublished) (Nev. March 15, 2019) (holding, "[a]lthough appellant raises an array of arguments on appeal

regarding whether Fannie Mae truly owned the subject loan and whether evidence of that ownership needed to be publicly recorded, we decline to consider those arguments because they were not raised below").

Here, Jones weakly attempts to convince this Court that the issue of standing was raised in the district court. Jones stated that "it is clear that the issue of U.S. Bank's standing to enforce the note was challenged." Opening Brief, p. 7. What is actually "clear" – and factually accurate – is **Jones never used the word "standing" in any of her written pleadings or papers or oral arguments in the district court.** *See* JA1-165. Jones just argues that because the original Note could not be produced that no one could foreclose on the Property. *Id*. Consequently, this standing argument is waived. *See Schuck v. Signature Flight Support of Nev., Inc*., 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) ("[A] de novo standard of review does not trump the general rule that [a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.") (second alteration in original) (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). Jones cannot raise the issue of standing on appeal, because the issue of standing was not raised in the district court.

Even if she had preserved the issue, Summary Judgment was properly granted because standing is sufficiently demonstrated by the publically recorded

documents which show Beneficiary, U.S. Bank, is the beneficiary of record under the Deed of Trust and thus had standing to enforce the Note and Deed of Trust and foreclose.

D. The Unpublished Nevada Court of Appeal Decisions Should note be Considered by this Court Because These Decisions Cannot be Cited for Any Purpose

Since Jones did not raise the issue of standing in the district court, she is attempting to raise the issue of standing – for the first time – on appeal. In her effort, in the Opening Brief, at p. 8, she improperly cites an unpublished order of the Court of Appeals. Jones ignores NRAP 36(c) and cites two cases which cannot be cited "for any purpose" to support her position that she can raise an issue of lack of standing to bring a claim for the first time on appeal. She cites *Garmong v. Lyon County Board of Commissioners*, No. 74644 (Nev. May 3, 2019), which in turn cites *Wallace v. Smith*, No. 70574 (Nev. Court of Appeals Mar. 5, 2018) – neither of which are published.

The tops of every unpublished Nevada Court of Appeals case have a warning that NRAP 36(c) should be reviewed prior to citing the case. Pursuant to NRAP 36(c)(3), "**unpublished dispositions issued by the Court of Appeals may not be cited in any Nevada court for any purpose**. (Emphasis added.)" Here, Jones cited to two unpublished cases from the Nevada Court of Appeals. Jones relies on sources which cannot be cited in an attempt to convince the Court that she

can bring issues which she did not bring in the district court. Since these two cases should not be cited to "for any purpose," these cases should not be considered by this Court. Nonetheless, even if the issue were properly considered on this appeal, U.S. Bank has demonstrated its standing to enforce the Note and Deed of Trust and foreclose. Summary Judgment was appropriately granted and should be affirmed.

E. Any Standing Argument is Waived, Because Jones's Standing Argument Does not Raise an Issue of Lack of Subject matter Jurisdiction

Interestingly, the case Jones cites for the proposition that standing is a jurisdictional challenge that can be raised at any time actually determined that in that case there was no valid jurisdictional challenge which could be raised for the first time on appeal. Rather, the court determined that the standing issue raised actually challenged the merits of the case and the plaintiff's ability to prove the elements of the claim, not whether the plaintiff could bring the claim in the first instance. Jones cites *Arbaugh v. Y & H Corp.,* 546 U.S. 500 (2006), as follows:

> "The United States Supreme Court has long observed this rule. *Arbaugh v. Y & H Corp*., 546 U.S. 500 (Supreme Court 2006) ('The objection that a federal court lacks subject-matter jurisdiction, see Federal Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own intuitive, at any stage in the litigation, even after trial and the entry of judgment.')."

Opening Brief, p. 8. The rest of that paragraph in *Arbaugh* states:

> By contrast, the objection that a complaint 'fails to state a claim upon which relief can be granted, Rule 12(b)(6), may not be asserted post-trial. Under Rule 12(h)(2), that objection endures up to, but not

> beyond trial on the merits: A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings, or at trial on the merits.

546 U.S. at 507.

Arbaugh was an action originally brought in a federal court in Louisiana. The plaintiff alleged her employer violated Title VII of the Civil Rights Act of 1964 by sexually harassing her. *Id*. at 503. After the jury awarded a verdict in favor of the plaintiff, the defendant appealed, claiming that the court did not have subject matter jurisdiction over the case, because the employer did not meet the 15 employee- numerical requirement to be subject to Title VII. *Id.* at 507.

The Court rejected the categorization that the issue was a challenge to the court's subject matter jurisdiction and held that the employee-numerical threshold related to the substantive adequacy of the Title VII claim, and therefore could not be raised defensively late in the lawsuit, *i.e.,* after the close of trial on the merits. *Id.* at 504 (internal quotes omitted). The Supreme Court described what it calls the "subject-matter jurisdiction/ingredient-of-claim-for relief dichotomy" as follows: "[s]ubject matter jurisdiction . . . is sometimes erroneously conflated with plaintiff's need and ability to prove the defendant bound by the . . . law asserted as the predicate for relief—a merits-related determination." *Id.* at 513 (internal quotes omitted). The Supreme Court goes on to describe "such unrefined

dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect'…." *Id.* (internal citation omitted).

The Court distinguished when standing is jurisdictional and when it is not. The Court explained that when a court lacks subject-matter, there is an issue of jurisdiction. *Id*. Conversely, where the plaintiff does not have grounds to bring a claim, there is an issue regarding the merits of the case. *Id.* Ultimately, the Court held that "the threshold number of employees for application of Title VII is an element of plaintiff's claim for relief, not a jurisdictional issue," and reversed the lower court's finding that the question was jurisdictional. *Id*. at 515

"[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh*, at 514. Jones never disputed that the district court had the power to hear the case; and it is undisputed that a district *court has subject matter jurisdiction over judicial foreclosure*. Jones's jurisdictional statement admits that this Court has jurisdiction over the final order by the district court granting Beneficiary's Motion for Summary Judgment. Since Jones did not raise the issue of standing in the district court, Jones waived any right to challenge Beneficiary's standing.

Here, Jones cites to the fact that, "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the **merits** of the dispute…." Opening Brief, p. 5 (emphasis added). Whether the Beneficiary has a

right to enforce the mortgage, is an element of NRS 104.3309; and therefore, is not a jurisdictional issue. Jones discusses how in order to prove standing, "the foreclosing party must show that it is the proper party to proceed against the Property." *Id*. at 6.

F. <u>Beneficiary Did – and Does – Have the Right to Foreclose, Because the Requirements of NRS 104.3309 are Met</u>

Beneficiary obtained its interest under the Note through assignment of the Deed of Trust. NRS 104.3309(1)(a) provides as follows:

> 1. A person not in possession of an instrument is entitled to enforce the instrument if:
> (a) the person seeking to enforce the instrument:
> (1) Was entitled to enforce the instrument when loss of possession occurred; or
> (2) Has **directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred**;

Jones repeatedly alleges that Beneficiary has to prove it had possession of the Note after it obtained its interest and before the Affidavit of Lost Note was executed. Opening Brief 2-3; 5-6; 9-13. That is chronologically impossible; because at the time the Affidavit of Lost Note was executed no assignments had occurred. Any representation to the contrary is incorrect. At the time Ocwen executed the Affidavit, it was the servicer of the loan; and to date, Ocwen remains the servicer of the loan.

First, on April 21, 2008, Jones signed the Note. JA10-12. Second, on April 6, 2016, Ocwen, the loan servicer, executed an Affidavit of Lost Note. JA9. Finally, on March 29, 2017, *after* the Affidavit of Lost Note had been executed, the original beneficiary, MERS, assigned the beneficial interest to Beneficiary. JA29-32.

Jones stated Beneficiary must show it is the proper party to proceed against the property. Opening Brief, p. 6. Beneficiary has done that. Even though Beneficiary has shown it is the proper party to proceed with foreclosure, Jones contends that since the original Note cannot be produced that no one can ever foreclose, and she can continue to live in the residence without paying the Note or the Deed of Trust. Opening Brief, p. 11. Jones cites to *Edelstein* for the proposition that "a mortgage can not [sic] be enforced unless a party has both the note and the deed of trust." Opening Brief, p. 11.

First of all, *Edelstein* was a non-judicial foreclosure action. *Edelstein v. Bank of New York Mellon,* 128 Nev. 505, 286 P. 3d 249 (2012). Second, *Edelstein* actually says, "We further conclude that such separation [of the promissory note and the deed of trust] is not irreparable or fatal to either the promissory note or the deed of trust, but it does prevent enforcement of the deed of trust through foreclosure unless the two documents are ultimately held by the same party." *Edelstein* at 260. In *Edelstein,* this Court expressly stated, "We adopt the approach

of the Restatement (Third) of Property…." *Id*. "Under the Restatement approach, a promissory note and a deed of trust are automatically transferred together unless the parties agree otherwise." *Id*. at 257. "[T]ransfer of either the promissory note or the deed of trust generally transfers *both* documents." *Id*. at 258.

Here, the Affidavit of Lost Note effectively replaced the Note, which was transferred through the assignment of the Deed of Trust. When MERS assigned the beneficial interest in the Deed of Trust, it also assigned its nominee's interest in the Note, because neither the Assignment, nor any other document, stated that MERS or its nominee would retain any interest in the Note after the Deed of Trust was assigned. JA029-32.

IX. CONCLUSION

For the foregoing reasons, the Court should find that the district court was correct and affirm its decision.

Dated this 28th day of June, 2019.

WRIGHT FINLAY AND ZAK, LLP

/s/ Dana Jonathon Nitz, Esq.
Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Amy J. Smith, Esq.
Nevada Bar No. 14954
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
702-475-7964; Fax 702-946-1345
Attorneys for Respondent Ocwen Loan Servicing, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, contains 4,774 words, and does not exceed 30 pages. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of June, 2019.

WRIGHT FINLAY AND ZAK, LLP

/s/ Dana Jonathon Nitz, Esq.
Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Amy J. Smith, Esq.
Nevada Bar No. 14954
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for Respondent U.S. Bank National Association as Trustee for TBW Mortgage-Backed Pass-through Certificate, Series 2006-3

CERTIFICATE OF SERVICE

I certify that I electronically filed on the 28th day of June, 2019, the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

Robert Kern, Esq.
Nevada State Bar No.10104
KERN LAW Ltd.
601 S. 6th Street
Las Vegas, Nevada 89101
Tele: 702-518-4529
Fax: 702-825-5872
Email: Robert@Kernlawoffices.com
Admin@Kernlawoffices.com
Attorneys for Appellant, Monica Jones

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Tonya Sessions
An Employee of WRIGHT, FINLAY & ZAK, LLP

RESPONDENT'S ADDENDUM

INDEX TO ADDENDUM

WESTLAW

427 P.3d 123 (Table)
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.

Shlomo MEIRI, Appellant/Cross-Respondent,
v.
Steve HAYASHI; Comett LV, LLC, a Nevada Limited Liability Company; and Lulu Aya, LLC, a Nevada Limited Liability Company, Respondents/Cross-Appellants.
Shlomo Meiri, Appellant,
v.
Nevada Title Company, a Nevada Corporation; Michele Dobar; and Sue Dudzinski, Respondents.

No. 71120
FILED SEPTEMBER 28, 2018

Attorneys and Law Firms

Paul C. Ray, Chtd.

Skrinjaric Law Office

Johnson & Gubler, P.C.

R. Clay Hendrix, P.C.

ORDER OF AFFIRMANCE

*1 This is an appeal and cross-appeal from a district court judgment after a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant/cross-respondent Shlomo Meiri challenges the district court's determination that Mr. Meiri obtained only a possessory interest in the subject properties following the foreclosure sale. Mr. Meiri also challenges the district court's determination that respondent Nevada Title is liable for only $4,100 in damages in connection with Mr. Meiri's negligence claim. Respondent/cross-appellant Comett LV, LLC challenges the district court's determination that Mr. Meiri is entitled to $250,000 arising from the breach-of-contract claim that was assigned to Mr. Meiri. Respondents/cross-appellants Steve Hayashi and Lulu Aya, LLC challenge the district court's determination that they were not prevailing parties entitled to costs. We address these four arguments in turn and affirm.

1. Mr. Meiri obtained only a possessory interest in the properties following the foreclosure sale

Mr. Meiri contends that Tara Jackson executed a deed of trust in which she pledged as security her personal ownership interest in the subject properties, as opposed to Ultra New Town Tavern's possessory interest, such that following the foreclosure sale Mr. Meiri obtained fee title to the subject properties. We disagree. *See Davis v. Beling,* 128 Nev. 301, 321, 278 P.3d 501, 515 (2012) (reviewing de novo issues of contract interpretation). The re-recorded deed of trust unambiguously refers to Ultra New Town Tavern as the "Borrower" and the "Trustor," and there is no indication in the deed of trust or the accompanying promissory note that Ms. Jackson signed the deed of trust as "Owner" of the properties as opposed to "Owner" of Ultra New Town Tavern. Accordingly, we conclude that the deed of trust unambiguously pledged as security Ultra New Town Tavern's possessory interest in the properties. *Id.* (observing that unambiguous contracts are enforced as written). The district

court therefore correctly determined that Mr. Meiri obtained only a possessory interest in the properties following the foreclosure sale.[1]

2. Nevada Title is liable for only $4,100 in damages in connection with Mr. Meiri's negligence claim

The district court determined that Nevada Title was liable to Mr. Meiri for $4,100 in damages in connection with Mr. Meiri's negligence claim, which represented the amount of money Mr. Meiri paid Nevada Title to conduct the foreclosure proceedings. On appeal, Mr. Meiri contends that Nevada Title should be liable for money damages equal to the amount of income he would have earned if he had obtained fee title to the subject properties and had been able to operate a casino on the properties. In opposition, Nevada Title contends that its negligence was not the proximate cause of Mr. Meiri's lost profits. *Cf. Yamaha Motor Co., U.S.A. v. Arnoult,* 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (recognizing that a plaintiff is entitled to damages that are proximately caused by a defendant's negligence). In particular, Nevada Title argues that even if it had discovered the discrepancies in the note, deed of trust, and foreclosure documents before it held the foreclosure sale, and even if it had not communicated with Yoshi Sugiyama following the foreclosure sale, Mr. Meiri still would have needed to institute a court action seeking judicial foreclosure and an interpretation of the note and deed of trust, which he would have lost for the same reasons he lost in the underlying action.

***2** Mr. Meiri does not address Nevada Title's contention, which we otherwise find persuasive. *See Ozawa v. Vision Airlines, Inc.,* 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious). Accordingly, we conclude that substantial evidence supported the district court's determination that Nevada Title was liable for only $4,100 in damages. *See Yamaha Motor Co.,* 114 Nev. at 238, 955 P.2d at 664-65 (observing that proximate cause is a factual issue and that the district court's factual determinations will be upheld if they are supported by substantial evidence).

3. Mr. Meiri is entitled to $250,000 arising from the assigned breach-of-contract claim

Based on the part performance doctrine, *see Summa Corp. v. Greenspun,* 96 Nev. 247, 253, 607 P.2d 569, 572 (1980), the district court determined that Mr. Sugiyama orally agreed to sell the subject properties to Comett (Mr. Hayashi's company) for $300,000 even though Mr. Hayashi gave Mr. Sugiyama a $50,000 check when the deeds were executed and the deeds contained language stating "VALUABLE CONSIDERATION, Dollars $ RECEIPT ACKNOWLEDGED." On cross-appeal Comett does not dispute the applicability of the part performance doctrine but instead contends that Mr. Meiri (having been assigned Mr. Sugiyama's breach-of-contract claim) failed to establish the existence of the orally agreed-upon $300,000 purchase price "by an extraordinary measure or quantum of evidence." *Id.* In opposition, Mr. Meiri relies on the district court's finding that Comett borrowed $250,000 from Lulu Aya (another Hayshi-owned company) after the sale took place. According to Mr. Meiri and the district court, the amount of this loan constituted the required "extraordinary measure or quantum of evidence" necessary to satisfy the part performance doctrine. *Id.*

Comett does not address Mr. Meiri's contention and the district court's finding, which we otherwise believe are persuasive. *See Ozawa,* 125 Nev. at 563, 216 P.3d at 793. Additionally, and although the district court did not make an express finding in this respect, we note that Comett prepared to borrow the $250,000 just four days after the June 13, 2013, sale of the properties,[2] which further supports the district court's determination that the loan's purpose was to pay the balance of the orally agreed-upon $300,000 purchase price. Accordingly, we are not persuaded that the district court clearly erred in finding that the agreed-upon purchaser price for the properties was $300,000. *See Weddell v. H20, Inc.,* 128 Nev. 94, 101, 271 P.3d 743, 748 (2012) (reviewing a district court's factual findings for clear error). The district court therefore correctly entered judgment for $250,000 in favor of Mr. Meiri on his assigned breach-of-contract claim.

4. Mr. Hayashi and Lulu Aya are not entitled to costs

The district court denied Mr. Hayashi and Lulu Aya's request for costs under NRS 18.020 because Mr. Meiri prevailed on his assigned breach-of-contract claim and neither side was therefore a "prevailing party." *Cf. Glenbrook Homeowners Ass'n v. Glenbrook Co.,* 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (recognizing that the district court has discretion to determine whether a party is a "prevailing party" when each side wins on some issues and loses on others). In district court and again on appeal, Mr. Hayashi and Lulu Aya contend that because Mr. Meiri only asserted his breach-of-contract claim against Comett, he did not prevail on that claim vis-a-vis them, meaning *Glenbrook* is inapposite. While we agree with

Mr. Hayashi and Lulu Aya that they were technically prevailing parties under NRS 18.020, we nevertheless conclude that the district court properly denied their request for costs, as all three parties submitted a joint memorandum of costs and there was no intelligible way for the district court to allocate the costs attributable to the claims brought only against Mr. Hayashi and Lulu Aya. *See Cadle Co. v. Woods & Erickson, LLP,* 131 Nev. 114, 120-21, 345 P.3d 1049, 1054 (2015) (observing that a party requesting costs must provide justifying documentation, with the implication being that the documentation must demonstrate that the costs were incurred on the requesting party's behalf). In light of the foregoing, we

*3 ORDER the judgment of the district court AFFIRMED.

All Citations

427 P.3d 123 (Table), 2018 WL 4700735

Footnotes

1 In light of our conclusion that Mr. Meiri obtained only a possessory interest in the properties, Mr. Meiri necessarily failed to establish his slander of title claim against Nevada Title. *See Rowland v. Lepire,* 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983) (recognizing that an element of a slander of title claim is that the defendant spoke false words about the plaintiff's title to property).

2 The note and deed of trust both indicate that they were prepared on June 17, 2013. We recognize that those documents were not formally executed until July 9, 2013.

End of Document

WESTLAW

435 P.3d 1225 (Table)
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.

NEVADA NEW BUILDS, LLC, Appellant,

v.

NATIONSTAR MORTGAGE, LLC, Respondent.

No. 72243
FILED MARCH 15, 2019

Attorneys and Law Firms

Hong & Hong

Ayon Law, PLLC

Akerman LLP/Las Vegas

Arnold & Porter Kaye Scholer LLP

Fennemore Craig P.C./Reno

ORDER OF AFFIRMANCE

*1 This is an appeal from a district court order granting summary judgment, certified as final under NRCP 54(b), in an action to quiet title. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge. Reviewing the summary judgment de novo, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), we affirm. [1]

Consistent with this court's opinions in *Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Ass'n*, 134 Nev., Adv. Op. 36, 417 P.3d 363, 367-68 (2018), and *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. 247, 250-51, 396 P.3d 754, 757 (2017), the district court correctly determined that respondent had standing to assert 12 U.S.C. § 4617(j)(3) (2012) (the Federal Foreclosure Bar) on Fannie Mae's behalf and that the HOA's foreclosure sale did not extinguish the first deed of trust because Fannie Mae owned the loan secured by the deed of trust at the time of the sale. Although appellant raises an array of arguments on appeal regarding whether Fannie Mae truly owned the subject loan and whether evidence of that ownership needed to be publicly recorded, we decline to consider those arguments because they were not raised below. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

The district court correctly determined that appellant took title to the property subject to the first deed of trust. We therefore

ORDER the judgment of the district court AFFIRMED.

All Citations

435 P.3d 1225 (Table), 2019 WL 1245616

Footnotes

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

End of Document