IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL LAKES, AN INDIVIDUAL,
Appellant,
vs.
U.S. BANK TRUST, TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,
Respondent.

No. 79324-COA

ORDER OF REVERSAL AND REMAND

Daniel Lakes appeals from a district court order granting summary judgment, certified as final pursuant to NRCP 54(b), in a quiet title action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

When the original owner purchased the subject property ("the property"), the owner executed a note and deed of trust, which were eventually sold to the Federal Home Loan Mortgage Corporation (Freddie Mac). The owner subsequently failed to make periodic payments to his homeowners' association (HOA), which recorded a notice of delinquent assessment lien and later a notice of default and election to sell to collect on the past due assessments and other fees pursuant to NRS Chapter 116. Ocwen Loan Servicing, LLC (Ocwen), which held the deed of trust for Freddie Mac and serviced the underlying loan at the time, responded by tendering payment to the HOA's foreclosure agent in an amount exceeding nine months of past due assessments, which the agent accepted. Nevertheless, on August 25, 2015, the HOA proceeded with its foreclosure sale, at which Parcelnomics, LLC purchased the property.

That same day, a deed that transferred the property from Parcelnomics to Investment Deals was recorded by Investment Deals. Approximately two months later, another deed of sale was recorded that transferred the property from Investment Deals to Noune Graeff, an individual. This deed specifically indicated that "title to the property [was taken] subject to any claims, liens and other encumbrances." Further, no warranties regarding title to the property were given. Meanwhile, Freddie Mac sold and transferred its interest in the loan that encumbered the property to respondent U.S. Bank Trust (U.S. Bank) on December 6, 2015, but U.S. Bank did not record its acquisition of an interest in the loan at that time. Approximately six weeks later, on January 20, 2016, Lakes purchased the property from Noune Graeff for $112,000 pursuant to a deed of sale, and recorded his interest. This deed also indicated that Lakes would be taking the property subject to any claims, liens and other encumbrances and once again with no warranties regarding the title. Then, on May 17, 2016, Ocwen executed a formal written assignment of the deed of trust on the property to U.S. Bank, which was recorded on May 27, 2016.

Lakes subsequently commenced the underlying quiet title action against U.S. Bank, which counterclaimed seeking the same. U.S. Bank eventually moved for summary judgment, asserting that Ocwen's tender satisfied the superpriority portion of the HOA's lien and that Lakes therefore took title subject to its deed of trust.[1] Lakes opposed that motion, arguing that U.S. Bank failed to demonstrate that the tender was for an

[1]U.S. Bank also asserted that 12 U.S.C. § 4617(j)(3) (the Federal Foreclosure Bar) prevented the HOA's foreclosure sale from extinguishing the deed of trust since Freddie Mac owned the underlying loan at the time of the sale. But U.S. Bank ultimately withdrew its Federal Foreclosure Bar argument—apparently because it purchased Freddie Mac's interest in the loan following the sale.

amount sufficient to satisfy the HOA's superpriority lien. And Lakes further contended that, even if the deed of trust survived the HOA's foreclosure sale, U.S. Bank did not record its interest in the loan in general or the deed of trust specifically until after he acquired the property and recorded his interest. Thus, Lakes maintained that he did not have notice of U.S. Bank's competing interest in the property and that title should therefore be quieted in his favor because he was a bona fide purchaser (BFP). For support, Lakes cited NRS 111.325, which provides that, when a party fails to timely record a conveyance, the conveyance is void as to any subsequent purchaser of the same real property who acquired an interest in good faith and for a valuable consideration and is the first to record. *See Berge v. Fredericks*, 95 Nev. 183, 188, 591 P.2d 246, 248 (1979) (analyzing whether a subsequent purchaser qualified for NRS 111.325's protection based on whether she qualified as a BFP). The district court ruled in U.S. Bank's favor, finding that the tender satisfied the superpriority portion of the HOA's lien, that Lakes's BFP argument was irrelevant, and that Lakes therefore took title to the property subject to U.S Bank's deed of trust. This appeal followed.

This court reviews a district court's 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 issue 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 issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

On appeal, Lakes only challenges the district court's tender determination by arguing that U.S. Bank failed to produce evidence to show

that Ocwen's tender was sufficient to satisfy the HOA's superpriority lien. But the July 9, 2008, notice of delinquent assessment lien attached to U.S. Bank's motion for summary judgment indicated that, as of that date, the maximum possible amount of unpaid assessments for which the HOA could claim a superpriority lien was $625.04, which was far less than the $3,241.52 tendered by Ocwen. *See* NRS 116.3116 (2013)[2] (describing the superpriority component of an HOA's lien as "the assessments for common expenses . . . which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien"); *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 26, 388 P.3d 226, 231 (2017) (recognizing that under the pre-2015 version of NRS 116.3116, serving a notice of delinquent assessment constitutes institution of an action to enforce the lien); *cf. Prop Plus Invs., LLC v. Mortg. Elec. Registration Sys., Inc.*, 133 Nev. 462, 467, 401 P.3d 728, 731-32 (2017) (holding that the HOA must restart the foreclosure process to enforce a second superpriority lien).

In the absence of clear evidence to the contrary, the notice of delinquent assessment lien and tender check were sufficient to satisfy U.S. Bank's burden of demonstrating that the tender satisfied the superpriority

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[2]The events giving rise to this appeal took place over a protracted period, as the notice of delinquent assessment lien was recorded in July 2008, the foreclosure sale occurred in September 2015, and summary judgment was granted in U.S. Bank's favor in July 2019. During the intervening period, the Nevada Legislature amended NRS 116.3116 numerous times. U.S. Bank argues that this appeal is governed by NRS 116.3116 (2013) because that is the version of the statute that was in effect at the time of the foreclosure sale. Since Lakes does not challenge U.S. Bank's position in this regard, he waived any challenge thereto, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived), and we therefore look to NRS 116.3116 (2013) to resolve this appeal.

portion of the HOA's lien. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (discussing the burdens of production that arise in the context of a motion for summary judgment); *see also Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 52, 437 P.3d 154, 158 (2019) ("Payment of a debt is an affirmative defense, which the party asserting has the burden of proving."). To the extent Lakes contends that he presented contrary evidence in the form of a declaration in which he stated that he paid past due fees and assessments after acquiring the property based on a demand from the HOA, his contention fails. Indeed, the declaration does not provide any indication of what the past due fees and assessments were for or when they accrued. Moreover, because the HOA ultimately conveyed all of its rights, title, and interest to Parcelnomics following the foreclosure sale, any HOA fees and assessments that were unpaid at the time Lakes acquired the property must have accrued after the foreclosure sale, such that they are irrelevant to the question of whether Ocwen's tender satisfied the superpriority lien. Thus, Lakes has failed to demonstrate that the district court erred by concluding that the deed of trust survived the HOA's foreclosure sale. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029; *see also Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018) (holding that the "unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust).

Turning to the BFP issue, Lakes contends that because he did not rely on his purported BFP status as a basis for disputing whether the deed of trust survived the HOA's foreclosure sale, the district court improperly rejected his BFP argument as to notice of legal encumbrances as irrelevant. U.S. Bank disagrees, arguing that the supreme court's decision in *Bank of America* supported the district court's decision. But although *Bank of America* holds that a party's status as a BFP is irrelevant

to the legal effect of a foreclosure sale following a superpriority tender because such sales are rendered void by the tender, 134 Nev. at 612, 427 P.3d at 121, that holding does not extend to the issue that Lakes raised here, which is whether NRS 111.325 permits U.S. Bank to enforce the deed of trust against Lakes post-foreclosure sale given its failure to promptly record its interest in that instrument or the underlying loan.[3] Thus, insofar as the district court relied on *Bank of America* as a basis to conclude that Lakes's BFP argument was irrelevant and to grant U.S. Bank's motion for summary judgment, it erred.[4] *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

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[3]A similar issue arose in *Daisy Trust v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 233-34, 445 P.3d 846, 849 (2019), where the purchaser at a foreclosure sale argued that the Federal Foreclosure Bar does not apply unless Freddie Mac establishes its ownership interest in a loan by recording that interest pursuant to, as relevant here, NRS 111.325. The supreme court concluded that Freddie Mac was not required to record its interest in the loan under that statute since its contractually authorized servicer was the record beneficiary of the deed of trust. *Id. Daisy Trust's* rationale does not apply in the present case, however, as U.S. Bank does not argue, nor does the record suggest, that following its acquisition of the loan, it was in an agency relationship with Ocwen, which was the record beneficiary of the deed of trust until it eventually assigned that instrument to U.S. Bank. *Cf. Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 519, 286 P.3d 249, 259 (2012) ("[I]t is prudent to have the recorded beneficiary be the actual beneficiary and not just a shell for the 'true' beneficiary.").

[4]To the extent that *Bank of America* holds that a purchaser's BFP status is irrelevant, there is a tension between that case, which specifically concerned a purchaser's lack of knowledge of a superpriority tender, and NRS 111.325, which more broadly concerns the enforceability of interests in real property where a purchaser takes without notice of those interests. As it is not clear that the supreme court intended *Bank of America* to mean that, because an HOA cannot convey full title to a property following a superpriority tender, subsequent purchasers cannot be BFP's under NRS 111.325 relative to the deed of trust holder, notwithstanding subsequent transfers of both the deed of trust and the property, we conclude that NRS 111.325 governs under the circumstances of this case.

Nevertheless, U.S. Bank contends that reversal is unwarranted because Lakes does not qualify as a BFP for purposes of NRS 111.325. In particular, U.S. Bank argues that Lakes had a duty of inquiry to determine the status of the recorded deed of trust, that he failed to fulfill that duty, and that he is therefore charged with constructive notice of anything a diligent inquiry would have revealed. *See Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 64, 366 P.3d 1105, 1115 (2016) ("A subsequent purchaser is bona fide under common-law principles if it takes the property . . . without notice of the prior equity, and *without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry.*" (emphasis added) (internal quotation marks omitted)).

U.S. Bank's inquiry notice argument implicates a key difference between this appeal and *Bank of America*, which is that Lakes did not purchase the property at a foreclosure sale. Had he done so, one could potentially argue that he should have known that, given the long and complex history of the law governing HOA foreclosures sales in Nevada, any title procured during such a foreclosure sale might not be entirely clear of every potential encumbrance, including potentially unresolved encumbrances lingering from before the HOA foreclosed upon the property. At the very least, the factual scenario would more closely implicate *Bank of America*. But Lakes did not purchase the property that way. Instead, he purchased the property later, in a private arms-length transaction, from a successor in interest to another party who previously purchased the property at the HOA foreclosure sale. As a purchaser of the property through a subsequent private transaction, Lakes arguably was considerably more entitled to assume that it came free and clear of any encumbrances arising from events that happened *before* the earlier HOA foreclosure sale in which he was not involved. *See Brophy Mining Co. v. Brophy & Dale*

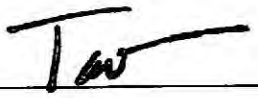
Gold & Silver Mining Co., 15 Nev. 101, 107 (1880) (concluding that a party was not deprived of BFP status merely because a conveyance was made by way of a quitclaim deed).

But questions of inquiry notice ultimately turn on the scope of the investigation that a reasonable person would have conducted and what the investigation would have revealed. *See Huntington v. Mila, Inc.*, 119 Nev. 355, 357, 75 P.3d 354, 356 (2003) (recognizing that a duty of inquiry arises where a purchaser has knowledge of facts that would lead a reasonable person to conduct an investigation that would disclose the existence of prior unrecorded rights, and explaining that the purchaser is charged with constructive notice of facts that such an investigation would reveal). These are questions that the district court did not address below in light of its erroneous determination that Lakes's BFP argument was irrelevant. And although the parties do not dispute the facts underlying the inquiry notice issue, the inferences to be drawn from those facts in light of Lakes's level of sophistication in real estate matters are themselves questions of facts reserved for the district court to consider in the first instance. *See id.; see also In re Weisman*, 5 F.3d 417, 421 (9th Cir. 1993) ("Whether the circumstances are sufficient to require inquiry as to another's interest in property [for purposes of determining whether a party is a bona fide purchaser] is a question of fact, even where there is no dispute over the historical facts."); *U.S. Bank, Nat'l Ass'n ND v. Res. Grp., LLC*, 135 Nev. 199, 206-07, 444 P.3d 442, 449 (2019) (discussing evidence presented at trial concerning whether a sophisticated purchaser was on inquiry notice without identifying any discrepancies in that evidence, and concluding that inquiry notice was ultimately a question of fact for the district court's resolution); *Telegraph Rd Tr. v. Bank of Am, N.A.*, Docket No. 67787 (Order of Affirmance, September 16, 2016) (citing *In re Weisman*). Consequently,

we reverse the district court's summary judgment for U.S. Bank and remand this matter for further proceedings consistent with this order.[5]

It is so ORDERED.

_____, C.J.
Gibbons



_____, J.
Tao

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cc: Hon. Ronald J. Israel, District Judge
Hartwell Thalacker, Ltd.
Ballard Spahr LLP/Las Vegas
Eighth District Court Clerk

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[5]The status of discovery in the underlying proceeding is unclear from the record before us. But whether it will be necessary to extend or reopen discovery to fully evaluate if Lakes was on inquiry notice is within the district court's discretion. *See Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (recognizing the district court's discretion with respect to discovery matters).