IN THE SUPREME COURT OF THE STATE OF NEVADA

THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE, FOR THE CERTIFICATEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-25,

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

Supreme Court No. 81604

District Court Case No. A790150

Appeal from the Eighth Judicial District Court, Clark County, Nevada

APPELLANT'S SUPPLEMENTAL BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed.

The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWABS, Inc. Asset-Backed Certificates, Series 2006-25 ("BNYM") is a New York Banking institution. The Bank of New York Mellon Corporation, a Delaware corporation, owns 100% of BNY Mellon.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWABS, Inc. Asset-Backed Certificates, Series 2006-25
- Specialized Loan Servicing LLC

There are no other known interested parties.

ZBS Law, LLP fka Zieve, Brodnax & Steele, LLP fka Law Offices of Les Zieve has represented Bank of New York Mellon in this matter since its inception.

DATED this 28th day of February, 2022

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As detailed in prior briefing, on April 4, 2018, The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2006-25 ("BNYM" or "Appellant") filed a complaint for quiet title/declaratory relief in the United States District Court, District of Nevada (Case No. 2:18-cv-00599-APG-CWH) (the "Federal Court Action"). (*See*, Federal Court Complaint, Appendix Vol. I, p. 1). In the complaint, BNYM asserted that its deed of trust was not extinguished by way of an HOA's September 19, 2012, lien foreclosure due to a pre-sale tender of the superpriority lien amount. *Id*. at p. 3. Following briefing on a Motion to Dismiss filed by SFR Investments Pool 1, LLC ("SFR" or "Respondent"), the district court dismissed BNYM's complaint as time-barred, as it was filed more than four years after the HOA's foreclosure. (See, Order, Appendix Vol. I, p. 76). Importantly, the district court's order contained no declaration as to the effect of the HOA's lien sale on BNYM's deed of trust. *Id*. at p. 78.

Because the loan underlying BNYM's deed of trust remained in default, on January 15, 2019, Sables, LLC, as trustee for BNYM, recorded a Notice of Breach and Default and Election to Sell the Real Property Under Deed of Trust. (*See*, Complaint, Appendix Vol. I, p. 81). On February 27, 2019, SFR filed its complaint in the Eighth Judicial District Court for cancellation of instrument under NRS 106.240 - Nevada's ancient mortgage statute that sets a 10-year time period

in which a lien is presumed expired after the underlying loan's maturity date (the "State Court Action"). *Id*. at p. 79. SFR's contention was that the loan was made "wholly due" for NRS 106.240 purposes when BNYM's predecessor-in-interest recorded a Notice of Default and Election to Sell Under Deed of Trust on April 29, 2008.

Following discovery, the parties filed cross-motions for summary judgment. The district court ultimately found that BNYM made its loan "wholly due by virtue of the Notice of Default recorded on April 29, 2008." *Id*. at p. 403. The court reasoned that "[t]he Notice of Default clearly and unequivocally states in relevant part, "present beneficiary…has declared and does declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby." *Id*. As a result, the court deemed the loan presumed satisfied pursuant to NRS 106.240 on April 29, 2018. *Id*. at 403.

This appeal followed, and BNYM's opening and reply briefs were submitted on January 20, 2021, and July 21, 2021, respectively. On January 13, 2022, this Court requested supplemental briefing regarding the differences between claim and issue preclusion, and whether BNYM retained its affirmative defense of tender in the State Court Action despite the earlier dismissal of the Federal Court Action based on the 4-year statute of limitations.

ISSUES REQUESTED FOR SUPPLEMENTAL BRIEFING

In its January 13, 2022, Order, this Court requested supplemental briefing on two primary issues. First, this Court requested briefing on the differences between claim and issue preclusion, which doctrine might apply here, and why. Second, this Court requested briefing on whether BNYM remains the affirmative defense of tender, given that the preclusive presumption under NRS 106.240 has not yet run due to the nonjudicial nature of BNYM's foreclosure proceeding and that it is asserting the ongoing validity of its deed of trust defensively.

I. NEITHER CLAIM PRECLUSION NOR ISSUE PRECLUSION APPLY TO PREVENT BNYM FROM ASSERTING ITS AFFIRMATIVE DEFENSE OF TENDER.

Generally speaking, a valid judgment on the merits is a conclusive adjudication of the matters decided and binds the parties and persons in privity with them. *LaForge v. State*, 116 Nev. 415, 419-20, 997 P.2d 130, 133-34 (2000) (common issue previously litigated and determined by valid judgment in federal court precluded in state court). To be entitled to preclusive effect, a judgment must be (1) valid, meaning rendered with proper court authority over the subject matter of the dispute and the parties; (2) a final judgment; and (3) on the merits. A judgment is "on the merits" when it determines the substantive legal rights of the parties in connection with the dispute. While a motion to dismiss without prejudice is not a judgment on the merits, a motion to dismiss that disposes of the

substantive legal rights is with prejudice and therefore, is on the merits. *Clark v. Columbia/HCA, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001)*.

In the now-dismissed Federal Court Action, BNYM argued that its lien remained valid and enforceable following the HOA's foreclosure because its loan servicer issued a valid tender of the HOA's superpriority lien amount prior to SFR taking title. In contrast, SFR's claims in the State Court Action rest solely on the argument that BNYM's Deed of Trust has now been extinguished by way of NRS 106.240 rather than by way of the HOA's foreclosure.

Thus, SFR's claim in this case was not a claim that BNYM could have (or would have) asserted in the Federal Court Action. Moreover, SFR's argument certainly was not litigated and decided in the Federal Court Action, which was dismissed purely on statute of limitations grounds based on a 4-year statute of limitation triggered by the date of the HOA's foreclosure. Thus, the court made no finding whatsoever regarding the impact of the HOA's foreclosure on BNYM's deed of trust.

A. Claim Preclusion Cannot Apply, as it Does Not Prevent BNYM from Asserting its Affirmative Defense of Tender.

Under the doctrine of claim preclusion, a decision in a case involving a claim typically results in a final determination of the matter and precludes further litigation on the subject as between those parties. *Clark*, 117 Nev. at 468; s*ee also Executive Mgmt v. Ticor Title Ins. Co*., 114 Nev. 823, 835, 963 P.2d 465, 473

(1998); *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994).

More recently, this Court set forth the following three-part test for determining whether claim preclusion should apply: 1) The parties or their privies are the same; 2) the final judgment is valid, and 3) the subsequent action is based on the same claim or any part of them that were or could have been brought in the first case. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 712-713 (2008).

In that decision, this Court noted that "[w]hile the requirement of a valid final judgment does not necessarily require a determination on the merits, it does not include a case that was dismissed without prejudice or for some reason (jurisdiction, venue, failure to join a party) that is not meant to have preclusive effect. *Id*. at FN 27, citing Moore's Federal Practice § 131.30[3][a] (3d ed. 2008); Restatement (Second) of Judgments § 19 cmt. a, § 20 (1982); NRCP 41(b).

In determining whether the subsequent action is based on the same claim that was brought in the first case, the prevailing view is that "claim preclusion embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted…" *Tarkanian,* 110 Nev. at 600, 879, P.2d at 1192. *See also, Burrell v. Southern Pacific Co.*, 13 Ariz.App. 107, 474 P.2d 466 (Ct.1970*); B*

& E Installers v. Mabie & Mintz, 25 Cal.App.3d 491, 101 Cal.Rptr. 919 (Ct.App.1972); *Gies v. Nissan Corp*., 57 Wis.2d 371, 204 N.W.2d 519, 523 (1973).

Here, BNYM concedes that the parties are the same in both the Federal Court Action and the State Court Action and that the Court's Dismissal Order was a valid final judgment meant to have preclusive effect.

That said, the third prong of the claim preclusion test is simply not satisfied here. As set forth in Tarkanian, "claim preclusion embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted…" *Tarkanian,* at 600, 1192. Here, SFR's claim sounds exclusively in NRS 106.240. SFR contends that because BNYM's predecessor recorded a Notice of Default in April 2008, that the loan was made "wholly due" at that time, and therefore that the loan was presumed satisfied and the deed of trust extinguished as of April 2018. This is not in any way a claim that BNYM brought or could have brought in the federal court action, as BNYM was arguing that its lien interest remained valid following the HOA's foreclosure. In fact, SFR itself did not bring (and could not have brought) its cancellation of instrument claim in the Federal Court Action since BNYM's federal court complaint was filed on April 4, 2018 – well within 10 years following the Notice of Default's recording on April 29,

2008.[1]

Since BNYM did not (and could not) file a claim in the Federal Court Action contending that its lien was no longer valid and enforceable pursuant to NRS 106.240, the doctrine of claim preclusion simply does not apply here and the district court's order must be reversed.

B. Issue Preclusion Does Not Apply Because These Issues Were Not Actually Litigated in the Federal Court Action.

As for the doctrine of issue preclusion, it is slightly narrower and more fact-specific than claim preclusion. The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid, final judgment, the determination is conclusive in a subsequent action between the parties. *Executive Mgmt*, at 835, 473.

In *Five Star*, this Court set forth a bright-line test regarding the application of the issue preclusion doctrine. The four-factor *Five Star* test is as follows: (1) The issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation, and (4) the issue was actually and necessarily litigated. *Five Star* at 1055.

[1] BNYM does not concede that anything other than the terms of the loan documents themselves - or any extensions thereto – operate to trigger an analysis under NRS 106.240.

Applying the *Five Star* factors to the facts of this case, in the Federal Court Action, BNYM asserted a single claim for quiet title/declaratory relief. The party asserting a quiet title claim bears the burden of proof "to prove good title in himself." *Res. Grp., LLC, as Tr. of E. Sunset Rd. Tr. v. Nevada Ass'n Servs., Inc*., 135 Nev. 48, 51 (2019) (en banc). Thus, a "plaintiff's right to relief [ultimately]…depends on superiority of title. *Id*. (quotation omitted). A quiet title claim "does not require any particular elements." *Id*. Rather, "each party must plead and prove his or her own claim to the property in question." *Chapman v. Deutsche Bank Natl Tr. Co*., 129 Nev. 314, 318 (2013) (en banc).

Conversely, in this State Court Action, SFR asserts two claims against BNYM in its complaint, neither of which are premised upon the HOA's foreclosure and its effect on BNYM's deed of trust. Rather, SFR contends that the loan underlying BNYM's deed of trust is presumed satisfied under NRS 106.240, and that BNYM's recorded deed of trust and foreclosure notices should be cancelled and expunged from title. This issue was not raised by SFR in the Federal Court Action and it certainly was not addressed by the district court in its dismissal order. For that reason alone, issue preclusion does not apply here.

As to the next factor, the disposition of the Federal Court Action was on the merits as the Court found BNYM's Complaint to be time-barred based on the

running of the 4-year statute of limitation. As to the third *Five Star* factor, BNYM concedes that the judgment was entered against it in the Federal Court Action.

Finally, and as argued above, the issue asserted in the State Court Action by SFR has nothing to with the HOA's foreclosure following BNYM's valid tender of the superpriority lien amount. Rather, SFR's contention here is that BNYM accelerated its loan balance by recording a Notice of Default in April 2008, that more than ten years have passed since that date, and that BNYM's lien is presumed extinguished as a result under NRS 106.240. It is undisputed that this issue was not actually or necessarily litigated in the Federal Court Action and the doctrine of issue preclusion does not come into play here as a result.

II. BNYM'S AFFIRMATIVE DEFENSE OF TENDER TEMAINS VALID AS THE UNITED STATES DISTRICT COURT MADE NO DETERMINATION AS TO THE EFFECT OF THE HOA FORECLOSURE ON THE VALIDITY OF BNYM'S DEED OF TRUST.

In its January 13, 2022, Order, this Court also requested supplemental briefing as to whether BNYM retained the affirmative defense of tender in the State Court Action. Here, BNYM asserted the affirmative defense of payment/tender in its Answer to SFR's Complaint. (App. Vol. 1, p. 91). This Court has acknowledged that a lender may preserve its interest by determining "the precise super priority amount" and tendering it "in advance of the sale," which is

what happened here. *SFR Investments Pool 1 v. U.S. Bank,* 130 Nev. 742, 757 (2014).

As this Court noted in its January 13, 2022, Order, the affirmative defense of tender is not subject to a statute of limitations. *SFR Invs. Pool 1, LLC v. Bank of New York Mellon*, No. 76644, 2020 WL 5634162, at *1 (Nev. Sept. 18, 2020), citing *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798-99, 801 P.2d 1377, 1381-82 (1990) (reasoning that a party could raise an affirmative defense despite the statute of limitations based on equitable considerations); *Dredge Corp. v. Wells Cargo, Inc.*, 180 Nev. 99, 102, 389 P.2d 394, 396 (1964) ("Limitations do not run against defenses."); *see also City of Saint Paul v. Evans*, 344 F.3d 1029, 1033-34 (9th Cir. 2003) (concluding that statutes of limitation do not apply to defenses because "[w]ithout this exception, potential plaintiffs could simply wait until all available defenses are timebarred and then pounce on the helpless defendant").[2]

Here, BNYM acknowledges that it filed a quiet title action in federal court that was dismissed on statute of limitations grounds. That the matter was dismissed had no bearing on BNYM's lien, as the dismissal was made without a

[22] The *City of Saint Paul* court did find that in some instances, defenses that are masquerading as time-barred claims are impermissible. *City of Saint Paul* at 1029. This consideration does not impact this appeal, however, because SFR's claims for cancellation of instrument pursuant to NRS 106.240 were not and could not have been raised in the Federal Court Action.

judicial determination that the deed of trust had been extinguished by the HOA's foreclosure. Accordingly, BNYM commenced nonjudicial foreclosure proceedings consistent with the loan documents and Nevada law, and was well within its rights to do so. *Facklam v. HSBC Bank USA*, 133 Nev. 497, 499 (2017). In fact, this Court in *Facklam* expressly recognized that "[f]or over 150 years, this court's jurisprudence has provided that lenders are not barred from foreclosing on mortgaged property merely because the statute of limitations for contractual remedies on the note has passed. *Id*.

Courts have also recognized that a deed of trust holder may assert the validity of the lien defensively, where its quiet title claim may have otherwise been time-barred by a statute of limitations. *Bank of New York Mellon v. The Springs at Centennial Ranch Homeowners Ass'n*, No. 2:17-cv-01673-JAD-GWF, 2019 WL 1532859, at *4-*5 (D. Nev. Apr. 8, 2019) (unpublished disposition). This makes sense in light of the general rule that a bank may proceed with nonjudicial foreclosure outside of any statute of limitations concerns coupled with the long-standing principal that limitations periods do not run against defenses.

As a result of the above, BNYM's affirmative defense was properly plead, is not subject to any statute of limitations analysis, and BNYM's valid tender preserved its lien interest in the Property.

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CONCLUSION

In summary, BNYM's defenses of tender in this matter is not barred by the doctrines of claim preclusion or issue preclusion because SFR's NRS 106.240-based claims were not brought in the Federal Court Action and were likewise not actually litigated and decided. BNYM's defenses are similarly not barred under the rare carve-out set forth in *City of Saint Paul v. Evans*, because SFR's claim for cancellation of instrument could not possibly have been brought in the Federal Court Action. Finally, since BNYM's affirmative defense of tender is not subject to a statute of limitations analysis given the facts at hand, the district court erred by not finding that BNYM's deed of trust survived the HOA's foreclosure and remained a valid and enforceable lien on title.

DATED: February 28, 2022. ZBS LAW, LLP

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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 Times New Roman and 14-point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 31(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 2,714 words.

FINALLY, I HEREBY CERTIFY that I have read this **APPELLANT'S SUPPLEMENTAL OPENING 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 be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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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: February 28, 2022

ZBS LAW, LLP

By: /s/ J. Stephen Dolembo
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of ZBS LAW, LLP, and that on this __**28th**__ day of February, 2022, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **APPELLANT'S SUPPLEMENTAL BRIEF**, through this Court's electronic filing system to the following:

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Sara Hunsaker, an employee of
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