Case No. 81604

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.

Electronically Filed
Apr 13 2022 12:49 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable DAVID JONES, District Judge
District Court Case No. A-19-790150-C

RESPONDENT'S RESPONDING SUPPLEMENTAL BRIEF

KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
Email: karen@hankslg.com
HANKS LAW GROUP
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 758-8434
Attorneys for SFR Investments Pool 1, LL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

A. What is the Difference Between Claim and Issue Preclusion, Which Doctrine Applies Here, and Why.

1. What is the difference between claim and issue preclusion?

Claim preclusion prevents a party from re-litigating a claim i.e. a cause of action that was already brought or could have been brought to a valid final judgment on the merits.[1] In other words, a party is precluded from re-litigating the cause of action the judgment addresses. For example, party A sues party B for rear-ending his vehicle and alleges negligence. In support of his negligence theory, party A claims party B ran a red light. The case goes to final judgment and party A loses. Party A cannot sue party B again for negligence under a new theory i.e. party B was drunk at the time of the accident. That claim — negligence — is now precluded.

In contrast, issue preclusion precludes a party from re-litigating a disputed question within a claim.[2] For example, issues might include was the green car speeding, was the doctor under the influence of alcohol while he operated on the patient, did the casino ignore the wet floor. For a working hypothetical, Party A (an entertainer) and Party B (a venue) enter into a contract for Party A to perform a show. The contract provides Party A must remain sober for 24 hours before and

[1] *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (identifying the elements of collateral estoppel also known as claim preclusion.)
[2] *Executive Mgmt v. Ticor Title Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465, 473 (1998) (discussing the general rule of issue preclusion)

throughout the performance. On the evening of the performance, Party A performs terribly; his speech is slurred, he stumbles on the stage and otherwise acts erratically. Not only is the show ruined, but also during this erratic behavior, Party A damages stage equipment. Party B (the venue) sues for breach of contract alleging Party A was inebriated in violation of the terms of the contract. But Party A presents evidence he was having an adverse reaction between medication he was lawfully prescribed, and which should not have affected his mental state. The jury finds for Party A.

Party B, however, not happy with this outcome, now sues Party A for negligence in an attempt to recoup the cost of the damage to the stage equipment and again alleges Party A was inebriated. Even though this is a different claim, the *issue* of inebriation was resolved by the first case, so issue preclusion kicks in and precludes it from being re-litigated in the second case.[3]

2. What doctrine applies here and why?

In this action, the only party who asserted claims is SFR. One for cancellation of written instrument as to the notice of default and another for cancellation of written instrument as to the deed of trust based on NRS 106.240. (1AA_0079.) At no time at the district court level, or on appeal has BNY Mellon ever alleged SFR's claims are precluded under the doctrine of res judicata. Additionally, BNY Mellon

[3] It bears noting, claim preclusion would also likely kick in as Party B could have raised the negligence claim in the first action.

has never argued the issues presented by these claims are precluded. In fact, as BNY Mellon correctly points out neither of these claims could have been raised in the Federal Court Action because they were not ripe at that time. Additionally, the issue of whether NRS 106.240 operated was not decided by the federal court. Thus, without question, neither issue nor claim preclusion applies to SFR's claims.

This leaves us with whether claim and issue preclusion applies against BNY Mellon, and the answer is yes. BNY Mellon distorts the analysis. The question is not whether BNY Mellon could have brought SFR's claim i.e. the NRS 106.240 claim, the question is whether BNY Mellon's quiet title claim based on tender was already adjudicated and/or whether the issue of tender was already decided. As BNY Mellon recognizes, a judgment granting a motion to dismiss with prejudice disposes the substantive legal rights and is therefore on the merits.[4] Thus, BNY Mellon is both precluded from raising quiet title again as a claim based on any theory, and it is equally precluded from raising the issue of tender because this "fact" was decided by the federal court.

In the present case, BNY Mellon did not attempt to re-file a claim for quiet title, but if it had, claim preclusion would apply and precluded any such attempt. BNY Mellon, did however, attempt and even on appeal attempts, to get affirmative

[4] *See* Page 4 of Supplemental Brief citing *Clark v. Columbia/HCA*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001).

relief by way of a judgment in its favor finding the deed of trust "remains a valid and enforceable lien on title,"[5] but because this is a veiled attempt to re-litigate the quiet title claim, claim preclusion applies and prohibits such conduct.

Additionally, issue preclusion applies to the "fact" of tender. Issue preclusion is governed by three elements: (1) the issue decided in the prior litigation is identical to the issue presented in the current action; (2) the initial ruling was on the merits and was final; and (3) the party against whom the judgment was asserted was a party or in privity with a party to the prior litigation.[6] Again, a judgment dismissing with prejudice is a ruling on the merits, thus it is inconsequential the federal court made no findings; legally, the federal court adjudicated the issue of tender. Contrary to BNY Mellon's contentions, that judgment serves as an adjudication of the merits of the effect of the Association sale on the deed of trust irrespective of the fact it was dismissed based on the statute of limitations. Thus, BNY Mellon is precluded from raising the *issue* of tender in this action in any form either through a claim or a defense.

---

[5] AOB at 22.

[6] *See Executive Mgmt.*, 114 Nev. at 835 *citing Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994).

B. Whether BNY Mellon retains the defense of tender given NRS 106.240 has not ran and given that BNY Mellon is asserting the ongoing validity of the deed of trust defensively?

Frankly, SFR does not really understand the Court's question, but it will do its best to answer the question based on what it thinks the Court is asking. In asking this question, the Court cites *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), which is a case where despite finding the Bank's quiet title claim was time-barred, SFR had filed a counter quiet title claim, and thus the Court ruled in favor of the Bank based on the Bank's defenses to SFR's quiet title claim, which happened to include tender. While SFR disagreed with this decision,[7] a purchaser has zero obligation to file a quiet title action to validate an Association sale. This runs afoul of the entire construct of NRS Chapter 116.3116.

Nevertheless, SFR did not file a counter quiet title claim in either the Federal Action or this case. In this case, SFR filed a claim for cancellation of instrument based on NRS 106.240. What is more, tender is not a defense to this claim. It is inconsequential whether BNY Mellon tendered prior to the Association sale because even if it had, this is separate and distinct from the issue of whether the deed of trust is terminated by operation of NRS 106.240. Put another away, assume the Federal Court Action did not get dismissed for statute of limitations purposes, and instead,

[7] SFR did not appeal/complete the appeal because the case was later settled.

BNY Mellon received a judgment in its favor finding it tendered and therefore the foreclosure sale did not extinguish the deed of trust, SFR's claim for cancellation of instrument based on NRS 106.240 would still be ripe, and serves as a wholly separate basis to find the deed of trust was terminated under Nevada law. A tender in connection with a super-priority lien has no bearing on the invocation and operation of NRS 106.240.

Thus, when this Court states, in its question, "given NRS 106.240 has not ran," SFR is confused by this statement as this is the whole issue on appeal. But of course NRS 106.240 has ran. BNY Mellon recorded a notice of default on April 29, 2008. (2AA_0253.) The notice of default stated "beneficiary…has declared and does hereby declare all sums secured thereby immediately due and payable." *Id.* A panel of this Court, albeit in an unpublished disposition, already acknowledged a notice of default which accelerates the maturity date on a home loan makes the loan wholly due for purposes of NRS 106.240.[8] Then, most recently, in a published decision this Court found the same.[9] But unlike, either *Glass* or *Marsh Butte*, BNY Mellon never rescinded the notice of default, thus the 10-year clock under NRS 106.240 ran and therefore the deed of trust terminated. This is irrespective of whether BNY Mellon

[8] *Glass v. Select Portfolio Servicing, Inc*., 466 P.3d 939, 2020 WL 3604042 (Nev. 2020) (unpublished).

[9] *SFR Investments Pool 1, LLC v. U.S. Bank*, 138 Nev. Adv. Op 22 (Apr. 7, 2022) ("*Marsh Butte*").

tendered; an issue, however, BNY Mellon cannot revive because of issue preclusion. But again, even if it could, tender is not a defense to the operation of NRS 106.240. For these reasons, this Court should affirm the district court's judgment in favor of SFR.

DATED: April 13, 2022.

HANKS LAW GROUP

/s/ Karen L. Hanks
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for SFR Investments Pool 1, LLC

CERTIFICATE OF COMPLIANCE

1. I 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 with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and does not exceed 15 pages per this Court's order.
3. I hereby certify that I have read this 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

…

…

…

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

DATED: April 13, 2022.

HANKS LAW GROUP

/s/ Karen L. Hanks
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for SFR Investments Pool 1, LLC

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of April, 2022. Electronic service of the foregoing **Respondent's Responding Supplemental Brief** shall be made in accordance with the Master Service List.

DATED: April 13, 2022.

/s/ Candi Fay
an employee of Hanks Law Group