

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

BANK OF AMERICA, N.A.; AND
THE BANK OF NEW YORK
MELLONG, F/K/A THE BANK OF
NEW YORK, AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF CREDIT
TRUST, INC., ALTERNATIVE LOAN TRUST
2006 J-8, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES
2006-J8,

CASE NO. 81239

(Appeal from 8th Judicial District
Court Case No. A-13-685203-C)

Appellants,

vs.

NV EAGLES, LLC,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

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Respondent NV EAGLES, LLC, hereby Petitions the Court for rehearing of the Opinion released on June 16, 2021.

This Court may grant review if the Court has misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority. NRAP Rule 40(a)(2). NV EAGLES, LLC (“EAGLES”) submits that this Court misapprehended material questions of fact and law in determining that the district court’s judgment should be vacated and the case remanded in order that the district court can apply *7510 Perla Del Mar Ave. Tr. v. Bank of America, N.A.* (“*Perla Del Mar*”), 136 Nev. 62, 458 P.3d 348 (2020) to the facts of the case. Further, the Court made incorrect findings of fact regarding the reason for rejection of the tender and whether the district court considered BANA’s futility arguments.

I. ARGUMENT

A. The Panel Should Have Affirmed The District Court’s Judgment Based On The Undisputed Fact That a Tender Was Made In An Amount Insufficient To Cure The Default of The Super-Priority Component of The Association’s Lien.

Despite being provided with uncontested evidence that BANA actually made a tender that was insufficient to cure the super-priority default, the Panel nonetheless determined that this case should be remanded so that the district court could reconsider the facts under *Perla Del Mar*. This decision makes the exception to

tendering (futility) now the rule. The facts of this case simply do not justify vacating nor remand. In its opinion, the Panel provided the following footnote:

n2. The district court found, and the parties do not dispute, that appellants' check was \$54 short of the superpriority amount.

Based on this finding alone, by both the district court and the Panel, all analysis should have ended, because this finding clearly reveals that a tender was in fact made and it was insufficient to cure the super-priority component of the prior owner's default.

B. The Panel Erred In Stating The Reason For Rejection Was That The Tender Did Not Cover The Entire Lien. The Tender Was Rejected Because It Did Not Cover The Super-Priority. The District Court Stated Such As A Finding of Fact On The Record.

In its order, the Panel erroneously states that the tender was rejected because it was not for the full amount of the whole lien- this is incorrect. The Order states: "NAS returned the check because it was for an amount less than the full amount of the lien." (Order at 2). However, when rendering its decision in open court, the district court actually made a factual finding that the reason for rejection was that the tender did not satisfy the entirety of the super- priority portion of the lien:

So, the bottom line, Mr. Garner, the reason why I think Mr. Hong's client does not take the property subject to the bank's lien is because as I look at it, the -- I'll just say it because I always say it the way I think it, I think Mr. Jung made a mistake. That's what I really think. And he, on behalf of the bank, sent the wrong amount, it was off by not a lot of money, but it was below what it needed to be. And, I think that mainly *Diamond Spur* sends a clear message that it has to be at least up to the minimum.

(RA 901-902)

And so, I end up agreeing and I make a Finding of Fact that I agree with the Plaintiff's side of it that the actual nine-month superpriority assessment amount was 540. So, Miles Bauer sent a check for 486, which was less than that and so that's what happened.

(RA 904, emphasis added)

That's not determinative of the whole case, but I want to make a finding that that is solid evidence that a primary reason for rejecting was that it wasn't a sufficient payment. Although, the Court, of course, does accept and knows it to be true, that there was a general pattern of rejecting these, anyway. But, here we do have affirmative evidence that a primary reason was it wasn't the right amount.

(RA-905, emphasis added)

So, there's a passage that I think gives the best guidance. And that is, again, the Supreme Court answers this question, does it have to be payment in full, or could it be close, or could it be less? I think *Diamond Spur* does stand for the proposition that it has to be payment in full in order to be a valid tender, and that's not what we have here. And so, that's what wins the day for Mr. Hong's client in this spot, because it's clear to me it wasn't payment in full, and I said the bank's lawyer made a mistake, because I think they did.

(RA 907)

Thus, a finding by the Panel that the reason for rejection of the tender was because it was not for the full amount of the lien is incorrect.¹ The district court actually found that the tender was rejected because it was insufficient to cure the

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It is important that the Panel correct its finding because its Order, if the case is remanded, becomes law of the case and the judge who heard the case is no longer on the bench. Thus, it is imperative that the record on remand correctly reflect the prior proceedings and that the replacement judge apply the facts in that lens. A remand, after having had a trial on the merits, should not be an opportunity for a party to change the facts as determined by the fact finder who presided over the trial.

super-priority default. Therefore, rejection of the tender was proper and the deed of trust (“DoT”) was extinguished.

C. The Panel Also Erred in Concluding That The District Court Did Not Address The Bank’s Futility Arguments. Futility Was Addressed By The District Court and Determined, As A Factual Matter, Not To Be Applicable In This Case.

The Panel further erred when it concluded that the district court made no findings concerning futility (“[t]he district court, however, made no findings regarding appellants’ futility argument”) (Order at 2). The district court actually addressed this issue when discussing both *Resources Group, LLC v. Nevada Association Services, Inc.*, 437 P.3d 154 (Nev. 2019) (“*Resources Group*”) and *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 435 P.3d 1217 (referred to hereafter as “*Jessup I*”). The district court judge stated:

Now, going back to the Bank’s brief. . . part of the argument the bank had in the case was look, yeah -- and this is my way of paraphrasing it, you know, yeah, we see that we might have sent less than what was required, we sent 486 instead of 540, but that’s insignificant because the practice was to reject anyway, so basically they were going to reject it even if it was the right amount. I see that. But, I’m going to tell you there’s evidence in the case to suggest something different than that and that is at 141. There is an exhibit in here that I think tells a bit of a story on this and that is Exhibit 9, page 141, and if you look at that exhibit you can see that there’s a notation on this slip that gives us insight as to why the item was rejected. And, what it says there, again on page 141 of Exhibit 9 at the bottom, on this little slip: won’t accept, not paid in full, per Carly. So, that’s evidence that the reason the 486 is not accepted is because it’s not enough. And, that’s -- that is evidence of that. That’s not determinative of the whole case, but I want to make a finding that that is solid evidence that a primary reason for rejecting was that it wasn’t a sufficient

payment. Although, the Court, of course, does accept and knows it to be true, that there was a general pattern of rejecting these, anyway. But, here we do have affirmative evidence that a primary reason was it wasn't the right amount.

(RA 904-905)

But, looking at the *Jessup* case -- all right, we have the Rock Jung scenario, the key to our situation, again, not using *Jessup* as controlling authority but getting some, you know, message from the Court. On page four of *Jessup*, it gets into something I want to make a finding on, separate and distinct from even this guidance that I get from *Jessup*. But, *Jessup* does say on page four, that following the facts, neither Miles Bauer nor the bank took any actions to protect the first deed of trust.

So, that -- just by way of some guidance, does say that here Mr. Jung sent the letter, he gets back the rejection, and we look at all the evidence in the case and it's clear that there was plenty of time now to deal with that rejection to, you know, maybe re-look at the page -- what we have in here as page 134 of Exhibit 9, or to do something to further inquire or otherwise deal with the fact that the thing got rejected, at least as I said, primarily because it wasn't the right amount. And, I think that's important. I think it's important to say that there was plenty of opportunity to cure any problems with the defective tender. And, for whatever reason in addition to making the initial mistake they, I think, compounded it by not doing anything further once they knew the thing got rejected. And so, it becomes an insufficient tender.

RA 907-908

While the district court did not have the benefit of *Perla Del Mar* or *Jessup* 2- it did have *Jessup 1* and considered it. The district court considered the futility arguments and rejected them because of the fact that the case law has two different fact patterns: 1) invalid tender and thus the DoT was extinguished, and 2) failure to tender because of a known policy of rejection rendering duty to tender relieved. We

have fact pattern one in this case, a failed tender. The analysis ends here unless the court wishes to address the missing element of the futility exception, which is, reliance on the policy of rejection in deciding not to tender. Because if the analysis does not require reliance the policy of rejection has no impact on the actions of the parties, yet it controls the outcome, *ex post facto*, will rule the day. Sound logic dictates that this is an absurd result. Reliance must be required to 1) create consistency between *Resources Group* and *Jessup*, and 2) to avoid a policy that has no impact on the parties' action or contemplation, ending up ruling the day - the proverbial tail wagging the dog.

D. Perla Del Mar Should Not Be Applied To This Case:

Even if *Perla Del Mar* could be applied here, the legal principle of “excused tender” as provided in *Perla Del Mar* is overwhelmingly fact/evidence-dependent because if applied as a broad sweeping principle, “excused tender” would conflict with existing and controlling Nevada law. As provided in *Resources Group*, the party contesting the validity of the HOA’s foreclosure of its super-priority lien bears the burden of demonstrating that it tendered its “delinquency-curing checks” and that it paid the correct delinquency amount in full prior to the sale. *Resources Group*, 437 P.3d 154, 159 (2019). *Resources Group* clearly and unequivocally sets forth that it

is the bank's burden to show that the super-priority component of the HOA lien, was paid in full. Thus, the district court made the correct finding.

Perla Del Mar confirms *Resources Group*, “[w]e conclude that an offer to pay the superpriority amount in the future once that amount is determined, does not constitute tender sufficient to preserve the first deed of trust...” *Perla Del Mar*, 136 Nev. Adv. Op. 6 at page 2. (emphasis added). What *Perla Del Mar* actually does is create a very fact specific carve out: “[w]e further conclude, however, that formal tender is excused when evidence shows that the party entitled to payment had a known policy of rejecting such payments.” *Id.* This Court expressly points out that “excused tender” is based on the specific facts and specific evidence. *Id.* The facts in *Perla Del Mar* and the instant case are far from similar.

Reliance on the “futility” argument requires the bank to establish that futility is the reason Miles Bauer did not tender. There must be a nexus between the “knowing” and the inaction on the part of Miles Bauer. Thus, futility cannot be applicable if Miles Bauer actually tendered. *Perla Del Mar* simply does not apply here.

1. The Supreme Court Reversed *Jessup I* While Considering *Perla Del Mar*:

As noted above, the district court relied on *Jessup I* and concluded that futility was not applicable. However, *Jessup I* was subsequently overturned by the Supreme

Court on reconsideration. In *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, (*en banc* reconsideration), on May 7, 2020 (“*Jessup II*”), this Court held that there must be evidence in the record of a known policy of rejecting a super-priority tender such that a formal tender should have been excused. In fact, the Court in *Jessup II* cited to *Perla Del Mar* stating “[f]ormal tender is excused when evidence shows that the party entitled to payment had a known policy of rejecting such payments,” but nonetheless ruled against the bank. The Court stated:

Although appellants argue that ACS intentionally refused Miles Bauer’s superpriority tender, Miles Bauer did not make such a tender, and as noted above, we perceive no clear error in the district court’s finding that appellants did not demonstrate that ACS had a known policy of rejecting superpriority lien tenders such that Miles Bauer’s failure to formally tender should be excused.

Id at 4-5.

The bank must demonstrate a “known” policy, upon which the tendering party was aware before tender will be excused. Inherent in the requirement that the creditor “had a known policy” of rejection are two elements that must be proven by the bank. The use of the word “had” means that the policy was in existence at the time that the tender was due. “Known” means that the policy was understood by person withholding tender. Why does the Court require that the person withholding tender to have known that the creditor had a policy of rejecting tender? The only logical explanation is to require the person withholding tender to prove that the *reason* it

withheld tender was *because* it knew tendering payment would be rejected and thus the act was futile. The law does not make one engage in futile acts. The law also does not reward those who fail to protect themselves with windfalls by uncovering facts years later of which they never relied. To do so would be to relieve one party of its duty to act in good faith, encourage bad behaviour, breaches or tortious conduct in the hopes of later redeeming oneself through protracted litigation or chance. Clearly, the reason to require proof that the creditor “had a known policy” is to require the one claiming futility to prove reliance on the belief that making payment would be futile. This, the bank has failed to do in this case.

E. BANA Should Be Required to Show Reliance on A Rejection Policy to Establish Futility and Excused Tender.

Applying *Perla Del Mar* to cases where tender was actually made, is making the exception the rule. This Court has not fully expressed the proper parameters of when the exception applies, and thus, it is being applied, as in the Panel’s decision, far too broadly, to the point where the exception has become the rule. While the Court states the policy has to be known by the obligor, this Court has never explained why that “knowledge” is an element. The only logical reason is because the obligor would have to had relied on that knowledge in not tendering and that theory is borne out in the authorities cited to by this Court in expressing the exception to tender rule.

In *Jessup II*, this Court again held that there must be evidence that established a known policy of rejection before tender will be excused. While the district court did not specifically address the issue of *reliance* on a known policy as the basis for failing to tender, it is implicit when establishing a rule which requires knowledge of a policy that in fact that knowledge had some role in why the tender was not made. Otherwise, the knowledge element has no useful purpose in the analysis and it should be removed from same.

This is not a futility case. This is a case of Miles Bauer making an insufficient tender. Miles Bauer and BANA were simply not reasonable stewards of their own common interest. The district court should not be required to blindly apply *Perla Del Mar*, when the substantial evidence reflects that Miles Bauer did, in fact, tender.

It has long been held that there must be evidence that there was a causal connection between the futility of tender and the failure to tender. The tender would have been made but for the policy of rejection.

[T]here must be what shall be called an actual offer of the actual money; it must amount to that. "Mere readiness and willingness to pay the debt amount to nothing without an offer or tender of payment, and a refusal by the creditor." 25 *Am. & Eng. Enc. Law*, 916; *Moore v. Harnsberger's Ex'rs*, 26 Gratt. 667; *Moynahan v. Moore*, 77 Am. Dec. 474. Though it is claimed in this case that the parties entitled to the money at the time of this alleged tender refused to allow a redemption, and that such refusal dispenses with the production of actual money, yet it must be clear that the offer to pay was an actual offer, with money present on the person of the tenderer, though not presented to sight. If the party had not the money, and his proposals to pay were a mere pretense, surely it would be no good tender. Therefore the circumstances must be such as to show that the party was ready to make actual

payment, and that he would have done so *but for* such refusal. "Actual tender of money is dispensed with if the debtor is willing and ready to pay, and about to produce it, **but is prevented by the creditor declaring he will not receive it.**" *McCalley v. Otey*, (Ala.) 42 Am. St. Rep. 87 (s. c. 12 So 406).

Shank v. Groff, 32 S.E. 248, 249 (1898) (emphasis added). This Court has followed the same principles. In *Jessup I* the authorities cited by this Court in defining the futility exception all acknowledged that the obligor was prevented from tendering by the words or conduct of the creditor. In *Jessup I*, this Court stated:

Alternatively, the Bank contends that its obligation to tender the superpriority amount was excused because ACS stated in its fax that it would reject any such tender if attempted. We agree with the Bank, as this is generally accepted exception to the above-mentioned rule. *Guthrie v. Curnutt*, 417 F.2d 764, 765 (10th Cir. 1969) (“[W]hen a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced.”); *In re Pickel*, 493 B.R. 258, 271 (Bankr. D.N.M. 2013) (“Tender is unnecessary if the other party has stated that the amount due would not be accepted.”); *Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) (“Tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, and acceptance of it will be refused.” (Internal quotation marks and alterations omitted)); 74 Am. Jur. 2d Tender § 4 (2012) (“A tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted.”); 86 C.J.S. Tender § 5 (2017) (same); cf. *Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) (“The law is clear . . . that any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract.”).

135 Nev. Adv. Op., at 7 (March 7, 2019). In *every* instance cited above, the obligating party would have tendered but for the words or conduct of the other party - the known

policy. Thus, there must be a nexus between the alleged policy and failure to tender. But, there was a tender in this case, just in an insufficient amount.

It is BANA's burden to establish that NAS's policy was the reason it failed to tender a sufficient amount in this case. Not by chance. Not by BANA benefiting from its own neglect. This necessarily involves a requirement that BANA provide evidence that it actually relied on the policy in order to satisfy what is being defined as the *Perla Del Mar* standard. BANA supplied no such evidence and cannot, because it tendered. Thus, the exception cannot apply in a case where a failed tender was made and rightfully rejected.

F. BANA And Miles Bauer Have Never Believed Tendering Would Be Futile and Could Not Have Relied on a "Known Policy" of Rejection:

BANA's futility claims are simply arguments of sheer convenience contrived more than a decade after the events in this case. While BANA suggests that any amount would have been futile, the facts reveal that neither BANA nor Miles Bauer ever relied on any NAS policy when determining whether and in what amount to tender. It was BANA's policy to retain Miles Bauer to pay the super-priority amount of the lien. In fact, BANA hired Miles Bauer to pay the super-priority lien in this case. This clearly begs the question that if it were futile to tender, why did BANA hire Miles Bauer to pay the super-priority amount, albeit in an insufficient amount?

G. BANA Should Have Taken Measures To Protect Itself and Failed To.

Even if *Perla Del Mar* could be applied in this case, the district court rightfully noted that once the tender was rejected for being insufficient to cure the super-priority default, BANA should have taken additional steps to protect itself. The district court stated in open court:

They should have sent the right amount, but even if they didn't, I'm going to cover something else I found and I -- it's going to, I think, be in *Jessup*, actually.

(RA 907)

And, I think that's important. I think it's important to say that there was plenty of opportunity to cure any problems with the defective tender. And, for whatever reason in addition to making the initial mistake they, I think, compounded it by not doing anything further once they knew the thing got rejected. And so, it becomes a insufficient tender.

(RA 908)

I am specifically finding that there was -- again, there was plenty of time to cure that problem and send over the right amount or otherwise deal with it, which the bank didn't do. So they made -- I think the bank made two mistakes that now equate to invalid tender, one: wrong amount, two: never fixed it once they knew it was rejected and had plenty of opportunity to do that.

(RA 909)

The district court's opinion is consistent with the this Court's prior holdings in *U.S. Bank v. SFR Investments Pool 1*, 334 P.3d 408 (2014) and *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.* 366 P.3d 1105 (2016).

In *U.S. Bank v. SFR Investments Pool 1*, 334 P.3d 408 (2014), the Court held that a bank must do more to prevent the loss of its security:

[N]othing appears to have stopped the U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance. *Cf. In re Medaglia*, 52 F.3d 451 455 (2d Cir. 1995) (“**[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.**”)

(*SFR* at 418, emphasis added). This holding was reinforced two years later in *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.* 366 P.3d 1105 (2016) wherein the bank actually tendered the nine months of assessments, but the agent for the association demanded additional assessments, fees and costs and the bank refused and did nothing more to prevent the sale of the property. The Court held that the bank is required to do more to protect its security interest:

Against these inconsistencies, however, must be weighed NYCB’s (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed.

Shadow Wood. at 1114. When it is apparent, despite its attempted tender, that the foreclosure sale is going forward, the bank cannot simply sit back and do nothing.

This Court said that if there is an active dispute, the bank must be proactive in protecting its security interests.

Thus, the Court has made it clear that a bank must take action to protect its interests. Today, however, if the district court were required to blindly apply *Perla del Mar*, a bank could take any position it wants at the time of foreclosure, but can later rely on a discovered misunderstanding of the law by the collection agency as an excuse for paying an insufficient amount, or in some instances, not even trying to pay the super-priority portion of the HOA lien. It is readily apparent that during all relevant times when these HOA foreclosures were occurring, (between 2010 and the 2015 amendment to NRS § 116.3116, et seq.) no bank was saying it did not tender because the collection agents would not accept their tender. Rather, despite any collection agents' policies, BANA and Miles Bauer were, in fact, making thousands of tenders.

Under NRS §116.1113, every contract or duty governed by the statutes imposes an obligation of good faith in its performance or enforcement. Here the bank has an obligation to tender the correct amount in order to preserve its priority lien status. However, if the district court is required to blindly apply *Perla Del Mar* it would be relieving the duty of the bank to tender the proper amount without justification. By

doing so, the Court establishes a policy which relieves the bank of its duty of good faith, *ex post facto*.

II. CONCLUSION

Based on all the foregoing, appellant NV EAGLES, LLC requests that the Court grant its Petition for Rehearing and Affirm the district court judgment.

DATED this 21st day of July, 2021.

Respectfully submitted by:
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP Rule 32 (a)(4), the typeface requirement of NRAP Rule 32(a)(5) and the type style requirement of NRAP Rule 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X6 in 14 point and Times New Roman.

2. I further certify that this brief complies with the page- or typed-volume limitations of NRAP Rule 32(a)(7) because excluding the parts of the brief that are exempted by NRAP Rule 32(a)(7)(), it is proportionately spaced, has a typeface of 14 points or more and contains 4,532 words.

3. Finally, I hereby certify that I have read this Petition for Rehearing, 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP Rule 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 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 this 21st day of July, 2021.

Respectfully submitted by:
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CERTIFICATE OF SERVICE

I certify that I electronically filed on July 21, 2021, the foregoing **RESPONDENT'S PETITION FOR REHEARING** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Dayana Shakerian

An employee of **THE WRIGHT LAW GROUP, P.C.**