NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BANK OF NEW YORK MELLON, FKA Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-OA10 Mortgage Pass-Through Certificates, Plaintiff-Counter-Defendant-Appellee, v. WILLISTON INVESTMENT GROUP, LLC, Defendant-Counter-Claimant-Appellant.	No. 19-16201 D.C. No. 2:18-cv-00161-APG-NJK MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Submitted November 16, 2022[**]
San Jose, California

Before: SCHROEDER, GRABER, and FRIEDLAND, Circuit Judges.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Real property in Nevada was sold at a homeowners' association ("HOA") foreclosure sale after the homeowners failed to pay required HOA assessments. The holder of the beneficial interest in the deed of trust, Plaintiff Bank of New York Mellon, sued various parties, including the current owner of the property, Defendant Williston Investment Group, LLC. Plaintiff sought a declaration that the deed of trust remained an encumbrance on the property. Defendant asserted counterclaims, arguing that it took title free and clear of all preexisting lien interests. Both parties moved for summary judgment. The district court ruled that Plaintiff's claim was untimely under the applicable four-year state statute of limitations. But the court ruled in Plaintiff's favor on Defendant's counterclaim to quiet title, because Plaintiff had tendered the full superpriority amount of the lien before the HOA sale occurred, thus preserving Plaintiff's first-position interest in the property. Defendant timely appeals. On de novo review, Feldman v. Allstate Ins. Co., 322 F.3d 660, 665 (9th Cir. 2003), we affirm.

1. Because this is a diversity action, we apply Nevada law. Defendant argues that a two- or three-year statute of limitations applies. Recently, the Nevada Supreme Court held that, under Nevada Revised Statutes section 11.220, a titleholder has four years within which to institute an action to quiet title. U.S. Bank, N.A. v. Thunder Props., Inc., 503 P.3d 299, 302 (Nev. 2022). Plaintiff filed

this action more than four years after the foreclosure sale and more than four years after Defendant valued the property as unencumbered. The district court's holding of untimeliness is therefore correct.

2. Defendant also argues that the district court should have granted summary judgment on Defendant's counterclaim to quiet title because the untimeliness of Plaintiff's claim demonstrates that Plaintiff's defense is not cognizable. Plaintiff responded to Defendant's counterclaim by providing evidence that it had tendered the full superpriority amount of the HOA lien before the sale took place, thus defeating Defendant's claim to quiet title. See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC, 427 P.3d 113, 121 (Nev. 2018) ("[A]fter a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.").

Just as Defendant was entitled to have its counterclaim considered, Plaintiff was entitled to defend against the counterclaim by demonstrating that full tender of the superpriority portion of the HOA lien preserved its first-position interest in the property. Renfroe v. Carrington Mortg. Servs., LLC, 456 P.3d 1055, 2020 WL

762638, at *1–2 (Nev. Feb. 14, 2020) (unpublished).[1] Although Plaintiff's affirmative case was time-barred, Nevada law recognizes that a party retains the right to assert the affirmative defense of tender notwithstanding the statute of limitations.[2] Id. at *2. Notably, Defendant has not argued that it abandoned its counterclaim or asked that its counterclaim be considered only in the event that Plaintiff's claim was not time-barred.[3] In sum, the district court, after considering the facts underlying Plaintiff's tender defense, correctly concluded that Defendant's purchase of the property was subject to Plaintiff's preserved first-

[1] When determining the substance of Nevada law, we may rely on unpublished Nevada Supreme Court opinions. U.S. Bank, N.A. v. White Horse Ests. Homeowners Ass'n, 987 F.3d 858, 863 (9th Cir. 2021). That course of action is especially appropriate here, because Nevada law has long recognized that "[l]imitations do not run against defenses." Dredge Corp. v. Wells Cargo, Inc., 389 P.2d 394, 396 (Nev. 1964).

[2] The question whether the statute of limitations affects Plaintiff's ability to raise tender as an affirmative defense is a substantive question that we must evaluate under state law. See Healy Tibbitts Const. Co. v. Ins. Co. of N. Am., 679 F.2d 803, 804 (9th Cir. 1982) (per curiam) ("While state law defines the nature of the defenses, the Federal Rules of Civil Procedure provide the manner and time in which defenses are raised and when waiver occurs."). Here, the nature and validity of a defense are at issue.

[3] Defendant correctly points out that Plaintiff did not set forth its tender defense in the manner required by Federal Rule of Civil Procedure 8. But Defendant forfeited its objection by not raising it until filing a Federal Rule of Appellate Procedure 28(j) letter after briefing in the case already had concluded. See Sabra v. Maricopa Cnty. Cmty. Coll. Dist., 44 F.4th 867, 881–82 (9th Cir. 2022) (discussing forfeiture).

position security interest and that judgment should be entered in favor of Plaintiff on Defendant's counterclaim.

AFFIRMED.