NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BANK OF NEW YORK MELLON, FKA Bank of New York, Successor Trustee to JPMorgan Chase Bank, N.A., as Trustee for the Structured Asset Mortgage Investments II Trust, Mortgage Pass-Through Certificates, Series 2006-AR3,

Plaintiff-Appellee,

v.

NEVADA NEW BUILDS, LLC; et al.,

Defendants-Appellants,

and

CANYON WILLOW TROPICANA, Canyon Willow East Unit 1,

Defendant.

No. 21-15635

D.C. No. 2:16-cv-02894-RFB-EJY

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware II, District Judge, Presiding

Submitted October 19, 2022**

* 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).

San Francisco, California

Before: GILMAN,[***] CALLAHAN, and VANDYKE, Circuit Judges.

Nevada New Builds, LLC ("NNB"), Affluent Real Estate Investors, LLC ("Affluent"), and Equity Holding Corp. ("EHC") (collectively "Defendants") appeal from the district court's entry of summary judgment in favor of Bank of New York Mellon ("Mellon") in a quiet title and declaratory relief action involving residential property located in Las Vegas, Nevada. We have jurisdiction under 28 U.S.C. § 1291, review de novo, *Berezovsky v. Moniz*, 869 F.3d 923, 927 (9th Cir. 2017), and affirm.

This case arises from a foreclosure sale to satisfy a homeowners association ("HOA") lien on the property. Nevada law provides that if a homeowner fails to pay a certain portion of HOA dues, the HOA is authorized to foreclose on a "superpriority lien" in that amount, extinguishing other liens and encumbrances on the delinquent property, including a previously recorded first deed of trust. *See* Nev. Rev. Stat. § 116.3116. However, a lender holding a first deed of trust may avoid extinguishment of its lien by tendering payment on the "superpriority" portion of the unpaid HOA dues. *See Bank of Am., N.A. v. Arlington W. Twilight Homeowners Ass'n*, 920 F.3d 620, 622–23 (9th Cir. 2019); *see also Bank of Am.,*

[***] The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

N.A. v. SFR Invs. Pool 1, LLC, 427 P.3d 113, 116-17 (Nev. 2018).

Defendants raise two issues on appeal: (1) the district court lacked diversity jurisdiction because Mellon "failed to allege and establish the citizenship of" NNB and Affluent; and (2) "the district court committed reversible error in ruling the superpriority portion of the HOA lien was discharged by an attempted tender by [Mellon's] predecessor."

1. Defendants admit that they did not challenge subject matter jurisdiction in the district court but argue that (1) Mellon has the burden of establishing federal court jurisdiction, (2) federal court jurisdiction can be raised at any time, and (3) Mellon failed to allege and establish the citizenship of itself, NNB, and Affluent. Defendants assert that NNB and Affluent, as limited liability companies, are citizens of every state in which their members are citizens. *See Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006).

Federal jurisdiction is not waivable and may be raised for the first time on appeal. *See Clinton v. City of New York*, 524 U.S. 417, 428 (1998); *Animal Legal Def. Fund v. United States Dep't of Agric.*, 933 F.3d 1088, 1092 (9th Cir. 2019). However, the failure to raise the issue in the district court may have consequences. *See United States v. Ceja-Prado*, 333 F.3d 1046, 1050-51 (9th Cir. 2003); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1994), as amended on denial of rehearing (Apr. 28, 1995). But Mellon did not base federal court

jurisdiction solely on diversity. It also alleged that the case involved a federal question: "whether the HOA sale violates the U.S. Constitution."

Defendants did not address federal question jurisdiction in their opening brief. We "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief." *Miller v. Fairchild Indus., Inc*, 797 F.2d 727, 738 (9th Cir. 1986); *see also Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1152 (9th Cir. 2018). Furthermore, contrary to Defendants' assertion in their reply brief, our opinions in *Bank of America, N.A. v. Arlington West Twilight Homeowners Association*, 920 F.3d 620 (9th Cir. 2019), and *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016), confirm that Mellon's complaint alleged a viable basis for federal jurisdiction. Therefore, Defendants have not shown that the district court lacked jurisdiction to consider Mellon's complaint.

2. Defendants' second argument on appeal is a challenge to the district court's factual determination that a tender was actually made and rejected. They object that there was no evidence of a post-marked envelope, run-slip from a courier service, or receipt that a check was received. However, we need not determine whether the evidence proffered by Mellon conclusively established the tender because Defendants have failed to challenge on appeal the district court's alternate holding. After holding that the record "supports that the tender was sent

and rejected," the district court found, "in the alternative, that there was a known policy as it relates to the rejection of these checks by [National Association Services, Inc.] and that that is established and that that would also have excused or did excuse the tender to the extent it didn't occur." The Nevada Supreme Court has held that a known policy of rejecting checks for the superpriority portion of a homeowners association's lien excuses formal tender. *7510 Perla Del Mar Ave. Tr. v. Bank of Am., N.A.*, 458 P.3d 348, 349 (Nev. 2020). Defendants, having failed to address on appeal the district court's alternate futility determination, have waived any arguments they may have as to that determination. *See Freedom From Religion Found.*, 896 F.3d at 1152.

The district court's grant of summary judgment in favor of Mellon is **AFFIRMED**.