

FILED

NOV 18 2022

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. BANK, N.A., as trustee for Merrill
Lynch Mortgage Investors Trust,
Mortgage Loan Asset Back Certificates
Series 2005-A8,

Plaintiff-Appellee,

v.

BDJ INVESTMENTS, LLC, a Nevada
Limited Liability Company,

Defendant-Appellant,

and

LONE MOUNTAIN QUARTETTE
COMMUNITY ASSOCIATION, a
Nevada Non-Profit Company,

Defendant.

No. 21-16669

D.C. No.
2:16-cv-00866-GMN-BNW

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

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

Submitted November 16, 2022**
San Jose, California

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

BDJ Investments, LLC appeals the summary judgment entered in favor of U.S. Bank, N.A. in an action arising from a nonjudicial foreclosure by a homeowners' association ("HOA"). The district court concluded that U.S. Bank had demonstrated that tender of the amount of the HOA's lien would have been futile. On de novo review of the grant of summary judgment, *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011), we affirm. The district court did not err by reaching a different result than did our court in *CitiMortgage v. Corte Madera Homeowners Ass'n*, 962 F.3d 1103 (9th Cir. 2020). In that case, CitiMortgage failed to introduce evidence supporting a finding of futility. *Id.* at 1109. In this case, U.S. Bank did make such a showing through a letter demonstrating the policy of Absolute Collections Services ("ACS") to reject tender payments, as well as Rock Jung's declaration that ACS rejected hundreds of requests to pay the superpriority amounts.

The district court did not abuse its discretion in considering the materials supporting U.S. Bank's court-ordered supplement. *See Wong v. Regents of Univ.*

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

of Cal., 410 F.3d 1052, 1060 (9th Cir. 2005). BDJ offers no reason why the Jung declaration should have been rejected under Federal Rule of Civil Procedure 37(c). Both Jung and Kelly Mitchell were listed as witnesses in the initial disclosures, and BDJ did not rely on any testimony of Shane Cox. The failure to disclose certain exhibits was not prejudicial because they were either not relied on by the district court or constituted testimony of witnesses who were disclosed.

AFFIRMED.