IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLIE L. UTTER AND SANDRA L. UTTER,
Appellants,
vs.
JUDGE LAMAR F. MELVILLE; DIXIE T. MELVILLE; STEWART TITLE OF NORTHEASTERN NEVADA; CLARENCE L. DREW, JR.; AND MARY DREW,
Respondents.

ELIZABETH A. DICKINSON,
Cross-Appellant,
vs.
BILLIE L. UTTER AND SANDRA L. UTTER,
Cross-Respondents.

No. 43832

FILED

DEC 26 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court judgment in a real property dispute. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

This case involves the sale, foreclosure, and subsequent resale of real property located in White Pine County, Nevada (the Property). On or about January 2, 1996, appellants Billie L. Utter and Sandra L. Utter purchased the Property from respondents Lamar F. Melville and Dixie T. Melville. To effectuate the purchase and sale, the Utters executed a secured promissory note (the Note) in the principal sum of $81,000 payable to the Melvilles in annual installments of $10,000 plus interest on the unpaid principal at the rate of ten percent per annum. The Note was secured by a duly recorded deed of trust, which, to the understanding of

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Billie L. Utter, gave the Melvilles a lien on the Property as well as a right of repossession in the event the Utters failed to make annual installment payments, which were scheduled to begin on February 23, 1997.

At the time of the purchase and sale, there also existed a prior lien on the Property in the form of a Deed of Trust executed by the Melvilles in favor of respondents Clarence L. Drew and Mary Drew (the Melville-Drew Deed). The Melville-Drew Deed represented security for debt incurred by the Mevilles in connection with their purchase of the Property from the Drews. Though this debt remained outstanding at the time of the purchase and sale, the Drews recorded a partial reconveyance that cleared the Melville-Drew Deed and permitted the Utters to receive clear title to the Property in the form a joint tenancy grant, bargain, and sale deed duly executed by the Melvilles.[1]

Starting February 1997, and continuing each year through February 2000, the Utters made annual installment payments pursuant to the terms of the Note. In the latter of part of 2000, however, the Utters attempted to renegotiate the Note through their agent Jeanne Herman, a Nevada licensed real estate broker. In January 2001, Herman initiated

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[1]Lamar F. Melville and Dixie T. Melville were divorced prior to the purchase and sale. Although Lamar F. Melville subsequently received all of the equity in the Property, Dixie T. Melville testified that her name appeared on the record title since the original quitclaim deed, signed in favor of Lamar F. Melville, was never recorded.

Thus, to effectuate the purchase and sale, Lamar F. Melville and Dixie T. Melville signed the joint tenancy grant, bargain, and sale deed even though Dixie T. Melville no longer possessed any interest in the Property.

contact with Lamar F. Melville, via email, regarding the possibility of renegotiation. In response, Lamar F. Melville sent correspondence to Herman outlining "a proposed and preliminary start for an agreement" on the Property "between the seller and lien holders Clarence L. and Mary Drew and the purchasers Billie and Sandra Utter." The January 8, 2001 correspondence then set forth the terms and conditions of a novation of the Melville deed and a refinancing and new deed of trust involving the Drews, including the precondition that the Utters pay interest for the year 2000 in full. Three days later, Lamar F. Melville sent another correspondence to Herman, stating that the Drews wanted payment of the annual installment for the year 2000, in addition to the interest, before any consideration regarding refinancing and novation was made.

On January 20, 2001, Herman responded to Lamar F. Melville with a counterproposal in which the Utters suggested an alternate refinancing schedule. Approximately two weeks later, Lamar F. Melville sent an email to Herman stating, in pertinent part, "I got a message from Drew and they state they will go with the last offer from Utter, they will send more information at a later date. [W]ill check with you around valentines [sic]." Shortly thereafter, Lamar F. Melville sent another email to Herman stating, in pertinent part, "I have had email from Drew today, asking how things are going and if Utter is in agreement, they will accept the last payment plan we talked about."

However, on March 13, 2001, after having not received a response from the Utters, Lamar F. Melville sent an email to Herman informing her that the Drews were no longer interested in refinancing and novation. The email indicated that the Utters were approximately $17,000 in arrears, which included nonpayment of the annual installment

for the year 2000. The email further indicated that the Utters had to satisfy the delinquent amounts by April 20, 2001 or face possible legal action.

After failing to obtain an extension to this deadline, the Utters voluntarily vacated the Property and elected not to make the annual installment payment due under the Note. As a result, Lamar F. Melville initiated foreclosure on the Property, which was eventually purchased by cross-appellant Elizabeth Dickinson and her husband, William Dickinson.

Shortly thereafter, the Utters commenced suit and filed two complaints in connection with the sale, foreclosure, and subsequent resale of the Property. The Utters' original complaint against the Melvilles, the Drews, the Dickinsons, and respondent Stewart Title of Northeastern Nevada (Stewart Title) alleged seven counts for (1) fraud, (2) breach of the covenant of good faith and fair dealing, (3) negligence, (4) conspiracy and interference with prospective contractual relations, (5) wrongful foreclosure, (6) wrongful sale for less than fair market value, and (7) entitlement to the Property by way of adverse possession. Upon a motion by the respondents, however, the district court granted summary judgment on all counts, concluding that no genuine issues of material fact existed and that the respondents were entitled to judgment as a matter of law.

In their supplemental complaint, the Utters filed a separate claim for conversion against the Dickinsons, alleging that the Dickinsons wrongfully converted miscellaneous personal property left on the Property at the time of the foreclosure sale. Following the order granting summary judgment as to the original complaint, Elizabeth Dickinson moved the district court for an order deeming her as a prevailing party and disposing

of the supplemental complaint.[2] The district court denied the motion, adjudicated the conversion claim, and ultimately entered judgment in favor of the Utters.

This appeal and cross-appeal followed. In their appeal to the summary judgment order, the Utters contend that the district court erred in granting summary judgment as there existed genuine issues of material fact with respect to their original complaint. Conversely, on cross-appeal, Elizabeth Dickinson argues that the district court erred in ruling in favor of the Utters with respect to the conversion claim.

Summary judgment

Summary judgment is appropriate when, after an examination of the record viewed in a light most favorable to the non-moving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law.[3] Here, we conclude, upon de novo review, that the order granting summary judgment in favor of the respondents as to the original complaint was warranted.[4]

As to the initial sale of the Property, the Utters allege that there was a second outstanding and undisclosed lien against the Property created by the Melvilles in favor of the Drews. This allegation, however, is unsupported by the evidence in the record, which indicates that no liens

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[2]William Dickinson, a named defendant to the Utters' supplemental complaint, passed away during the course of the litigation.

[3]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[4]Id. (noting that the standard of review for a summary judgment order is de novo).

existed against the Property in favor of the Drews after their recording of a Partial Reconveyance of the Melville-Drew Deed. Nor does the record support the allegations that the Melvilles breached the underlying purchase and sale agreement since the transaction occurred after Dixie T. Melville had relinquished equity interest in the Property and before Lamar F. Melville's marriage to his current wife.

Likewise, we conclude that there are no genuine factual issues as to the validity of the foreclosure and resale of the Property. The record indicates that the foreclosure sale was properly conducted in the county where the Property was situated. We have previously held that the mere inadequacy of the sale price, without proof of some element of fraud, unfairness, or oppression, is not sufficient to warrant the setting aside of a trustee's sale on the foreclosure of a deed of trust.[5] Further, the record indicates that the Property was sold due to the Utters' failure to make their annual installment payment and that Lamar F. Melville neither intended to prevent nor knew of any prospective contractual relationship between the Utters and third party purchasers.[6]

Finally, the Utters argue summary judgment was improper because there existed an enforceable contract to refinance the property. We disagree. Since there was no "meeting of the minds" with respect to

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[5]See Golden v. Tomiyasu, 79 Nev. 503, 514-17, 387 P.2d 989, 994-96 (1963).

[6]The Utters also contend, on appeal, that they possess actionable claims for disparagement and chilling of prospective sales. As the Utters did not raise these claims in their original complaint, we conclude that these causes of action are waived on appeal. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

the essential terms of the proposed refinancing, we conclude that the email correspondences between the Utters' agent, Jeanne Herman, and Lamar F. Melville failed to establish an enforceable contract.[7] Moreover, we conclude that any agreement to refinance was conditioned on the receipt of the Utters' annual installment payment, which, according to the evidence in the record, remained unpaid prior to the foreclosure.

Accordingly, we conclude that the district court's order granting summary judgment in favor of the respondents as to the original complaint was warranted.[8]

Conversion

"[W]here the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence."[9] Here, upon a review of the record, we conclude that there exists substantial evidence to support the district court's determination that the

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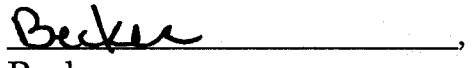
[7]See Back Streets, Inc. v. Campbell, 95 Nev. 651, 652, 601 P.2d 54, 55 (1979) ("A contract is founded upon the meeting of the minds of the parties as to ascertainable terms." (citing Smith v. Recrion Corp., 91 Nev. 666, 541, P.2d 663 (1975))).

[8]The Utters separately contend, on appeal, that the district court abused its discretion in failing to rule on their motion to compel the production of documents. We conclude that this contention lacks merit because the motion to compel was rendered moot in light of the district court's order granting summary judgment. Moreover, the existence of any such documents could have been questioned at the Drew deposition. No such questions were asked.

[9]Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996) (citing Trident Constr. Corp. v. West Elec., Inc., 105 Nev. 423, 427, 776 P.2d 1239, 1241 (1989)).

Dickinsons wrongfully converted miscellaneous personal property owned by the Utters and left on the Property at the time of the foreclosure sale.[10] Accordingly, we

ORDER the judgments of the district court AFFIRMED.

 , J.
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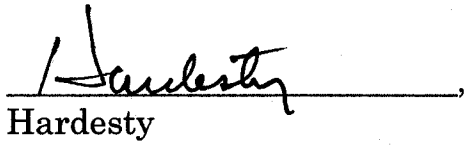 , J.
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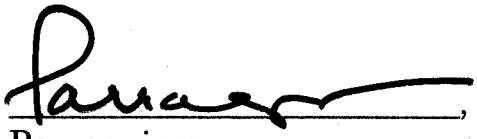 , J.
Parraguirre

cc: Hon. Steve L. Dobrescu, District Judge
Carolyn Worrell, Settlement Judge
Wilson & Barrows, Ltd.
G. C. Backus
Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd.
Law Offices of Gary D. Fairman
White Pine County Clerk

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[10]Elizabeth Dickinson also contends, on cross-appeal, that the district court erred in denying her motion to be included as a prevailing party to the summary judgment order. We conclude that this contention lacks merit since the conversion claim, raised only in the Utters' supplemental complaint, was not subject to the district court's order granting summary judgment.