

IN THE SUPREME COURT OF THE STATE OF NEVADA

TANWEER NISAR-KAHN AND AZRA
NISAR,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
JENNIFER TOGLIATTI, DISTRICT
JUDGE,

Respondents,

and

HANS DORWEILER, AN INDIVIDUAL;
PAUL WYLIE, D/B/A METRO VISTA
MORTGAGE; METRO VISTA
MORTGAGE, A DIVISION OF
METROCITIES MORTGAGE, LLC, A
DELAWARE LIMITED LIABILITY
COMPANY QUALIFIED TO CONDUCT
BUSINESS IN THE STATE OF
NEVADA; AND PATTI OSTBOE, AN
INDIVIDUAL,
Real Parties in Interest.

No. 46257

FILED

MAR 22 2006

BY *JANETTE M. BLOOM*
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order that expunged a notice of lis pendens.

The underlying case involves the recordation by real party in interest Hans Dorweiler of a "deed in lieu of foreclosure" five days after the petitioners defaulted on a second loan to finance the purchase of a Las Vegas home. After Dorweiler recorded his deed in lieu of foreclosure, petitioners filed a complaint and recorded a notice of lis pendens on the property.

When, as in the underlying case, a hearing on a notice of lis pendens is requested, NRS 14.015(2) requires the party who recorded the notice to establish the following:

- (a) The action is for the foreclosure of a mortgage upon the real property described in the notice or affects the title or possession of the real property described in the notice;
- (b) The action was not brought in bad faith or for an improper motive;
- (c) He will be able to perform any conditions precedent to the relief sought in the action insofar as it affects the title or possession of the real property; and
- (d) He would be injured by any transfer of an interest in the property before the action is concluded.

Additionally, NRS 14.015(3) requires the party who recorded the notice to establish to the satisfaction of the court either:

- (a) That he is likely to prevail in the action; or
- (b) That he has a fair chance of success on the merits in the action and the injury described in paragraph (d) of subsection 2 would be sufficiently serious that the hardship on him in the event of a transfer would be greater than the hardship on the defendant resulting from the notice of pendency.

The district court's order expunging the notice of lis pendens concluded that petitioners had failed to establish that they were able to perform the conditions precedent to the relief sought as required by NRS 14.015(2)(c) because they had admitted that they could not immediately re-pay the loan to Dorweiler. The district court also determined that the petitioners had not shown a likelihood of success on the merits of their complaint.

In making its determination, the district court apparently agreed with Dorweiler that the deed in lieu of foreclosure operated to convey absolute title to him and did not require him to go through the statutory process for a foreclosure or trustee sale as required for a deed of trust. But in so concluding, the district court did not consider the legal impact of the petitioners' separate note and deed of trust with Dorweiler, which was signed on the same day as the deed in lieu of foreclosure. This deed of trust would require Dorweiler to follow the procedures set forth in NRS 107.080 before foreclosing on the property. Although NRS 107.080 requires notice to be provided and gives a defaulting party thirty-five days to cure the default, Dorweiler recorded his deed in lieu of foreclosure only five days after petitioners' payment of his loan came due.

And, as petitioners point out, because Dorweiler has admitted that the deed in lieu of foreclosure was signed on the same date as the deed of trust "[t]o further secure [petitioner Nisar-]Khan's timely performance and payment under the Note," the deed in lieu of foreclosure could be deemed a deed of trust or mortgage securing performance of an obligation or payment of a debt. If so, then the deed in lieu of foreclosure could be viewed as unlawfully seeking to waive petitioners' statutory rights in violation of NRS 40.495.¹

Because petitioners demonstrated a likelihood of prevailing in their action, and because, if they prevail, the deed in lieu of foreclosure

¹See Beeler v. American Trust Co., 147 P.2d 583, 594-95 (Cal. 1944) (stating that a deed absolute on its face may be shown, by parol evidence, to be intended as a mortgage to secure performance of an obligation, and should be carefully scrutinized to prevent a debtor from being deprived of his right of redemption).

cannot operate to circumvent the procedures set forth in NRS 107.080, the district court erred in expunging the notice of lis pendens. As petitioners have shown a likelihood of success in their action, the district court should have considered whether petitioners had established an ability to pay off the loan within the time constraints of NRS 107.080. Accordingly, we grant this petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order expunging petitioners' notice of lis pendens.²

It is so ORDERED.³


_____ J.

Maupin


_____ J.

Gibbons


_____ J.

Hardesty

²NRS 34.160; see Zhang v. Dist. Ct., 120 Nev. 1037, 103 P.3d 20 (2004).

³In light of this order, we vacate our stay entered on December 8, 2005. We also grant petitioners' January 19, 2006 motion to file a reply and direct the court clerk to file petitioners' reply, which was provisionally received on that date.

cc: Hon. Jennifer Togliatti, District Judge
Asaro Keagy Freeland McKinley & Bartz, LLP
Neil J. Beller, Ltd.
Greenberg Traurig, LLP
O'Reilly Law Group
Clark County Clerk