


IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN AND LISA NILES,
Appellants,
vs.
NATIONAL DEFAULT SERVICING
CORPORATION, AN ARIZONA
CORPORATION; BARCLAYS CAPITAL
REAL ESTATE, INC. D/B/A HOMEQ
SERVICING, A CALIFORNIA
CORPORATION,
Respondents.

No. 54758

FILED

DEC 20 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a real property foreclosure action. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellants Justin and Lisa Niles defaulted on their mortgage, and respondents National Default Servicing Corporation and Barclays Capital Real Estate, Inc., d.b.a. HomeQ Servicing (collectively, National), initiated foreclosure on the real property by trustee's sale. The Nileses brought an action against National for injunctive and declaratory relief due to deficient notice of the trustee's sale, quiet title, and unfair lending practices. Subsequently, National filed a motion for summary judgment, which was granted by the district court. This appeal followed.

The sole issue raised in this appeal is whether the district court erred in granting summary judgment on the Nileses' claim for injunctive and declaratory relief due to an allegedly deficient notice of the

trustee's sale.¹ For the reasons set forth below, we conclude that the district court properly granted National's motion for summary judgment. Accordingly, we affirm the district court's order granting summary judgment. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

The district court did not err in granting summary judgment on the Nileses' claim for injunctive and declaratory relief due to National's deficient notice of the trustee's sale

The Nileses argue that the district court erred in granting summary judgment. They make two principal arguments in this regard. First, they contend that the district court erred in taking judicial notice of various loan documents and foreclosure notices. Second, they assert that summary judgment was improper because the affidavit of Cassandra Hayden, their attorney's paralegal, established a genuine issue of fact.

Standard of review

We "review[] a district court's grant of summary judgment de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary

¹The district court granted summary judgment in favor of National on all of the Nileses' claims. The Nileses, however, did not present arguments in their opening brief concerning their quiet title and unfair lending practices claims, but rather, raised them for the first time in their reply brief, which is improper. Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) (arguments raised for the first time in the reply brief need not be considered). Thus, we decline to address these arguments and affirm the district court's summary judgment with respect to the quiet title and unfair lending practices claims.

judgment is appropriate “when the pleadings and other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.’” *Id.* (alteration in original) (quoting NRCP 56(c)).

When the moving party is a defendant, who does not bear the ultimate burden of persuasion at trial, it may: “(1) submit[] evidence that negates an essential element of the nonmoving party’s claim, or (2) ‘point[] out . . . that there is an absence of evidence to support the nonmoving party’s [claim].” *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (alteration in original) (citation omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). “In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact” or have summary judgment entered against him. *Id.* at 603, 172 P.3d at 134.

Judicial notice

The Nileses contend that the district court erred in taking judicial notice of various loan documents and foreclosure-related notices, which, they argue, formed the basis of the district court’s grant of summary judgment as to their claim for injunctive and declaratory relief due to deficient notice of the trustee’s sale.²

²In their opposition to National’s motion for summary judgment, the Nileses objected to the district court taking judicial notice of the notice of default, alleging that the certified mailing receipts of the notice were fabricated. The Nileses did not object, however, to the district court’s taking notice of the other loan and foreclosure-related documents (note,

continued on next page . . .

“[A] court may take judicial notice of matters of public record.” Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (internal quotations omitted); see also Breliant v. Preferred Equities Corp., 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (court may consider matters of public record in ruling on a motion to dismiss). In particular, courts may take judicial notice of publicly recorded notices of default. See Tiqui v. First National Bank of AZ, No. 09cv1750 BTM (BLM), 2010 WL 1345381, at *1 n.2 (S.D. Cal. April 5, 2010) (citing Lee and taking judicial notice of notice of default and notice of trustee’s sale); Champlaie v. BAC Home Loans Servicing, LP, 706 F. Supp. 2d 1029, 1039 (E.D. Cal. 2009) (taking judicial notice of recorded notice of default and notice of trustee’s sale); Fortaleza v. PNC Financial Services Group, Inc., 642 F. Supp. 2d 1012, 1018-19 (N.D. Cal. 2009) (concluding that notice of trustee’s sale and notice of default were matters of public record, and therefore, court would take judicial notice).

The district court considered the notice of default that National sent to the Nileses. The notice of default was recorded with the Washoe County Recorder and, therefore, was public record. Because the

... continued

deed of trust, notice of assignment, sale or transfer of servicing rights, assignment of deed of trust, substitution of trustee, and notice of trustee’s sale). Because the Nileses failed to do so, they waived their arguments relating to the other loan and foreclosure-related documents. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.”). Accordingly, we only consider whether the district court erred in taking judicial notice of the notice of default.

notice of default was a matter of public record, the district court properly took judicial notice of it in ruling on National's motion for summary judgment.

Notice of trustee's sale

The Nileses assert that the district court erred when it granted summary judgment in favor of National because Hayden's affidavit created a genuine issue of material fact with respect to their claim that the trustee's sale notice was deficient.

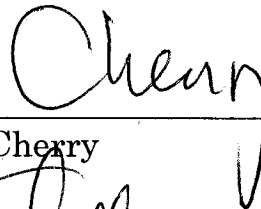
NRS 107.080 governs trustees' sales and sets forth the notice provisions with which one must comply in conducting such sales, by stating that the trustee must record a notice of default and election to sell and mail the debtor a copy of that notice. NRS 107.080(2)-(3). Three months after the recording of the notice of default, the trustee must give notice of the sale. NRS 107.080(4).

The Nileses sought injunctive and declaratory relief, based on National's failure to provide them with adequate notice of the trustee's sale under NRS 107.080. In its motion for summary judgment, National produced evidence establishing that on January 26, 2009, it recorded a notice of default and election to sell with the Washoe County Recorder. The notice of default was mailed, by regular and certified mail, to the Nileses on February 3, 2009. On April 28, 2009, more than three months after recording the notice of default, National notified the Nileses of the trustee's sale. Accordingly, the evidence produced by National demonstrated that they complied with the notice provisions of NRS 107.080.


Further, upon production of this evidence, the Nileses, as plaintiffs below, were required to "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a

genuine issue of material fact” in order to defeat summary judgment. Cuzze, 123 Nev. at 603, 172 P.3d at 134. As the district court correctly found, the Nileses only produced one affidavit in support of their opposition, which did not support their claim of deficient notice of trustee’s sale. The allegations in the Nileses’ complaint were confined to National’s alleged deficient notice of the trustee’s sale. The affidavit, however, only stated that the trustee’s sale did not occur and did not speak to any issue concerning the deficiency of National’s notices. Further, Hayden’s affidavit demonstrates that the Nileses had actual knowledge of the trustee’s sale. Because the Nileses were required to set forth specific facts establishing a genuine issue of material fact and could not rely on their pleadings, we conclude that the district court properly found that no genuine issue of material fact remained. Accordingly, the district court properly granted National’s motion for summary judgment. For the reasons stated above, we


ORDER the judgment of the district court AFFIRMED.


_____, J.

Cherry


_____, J.

Saitta


_____, J.

Gibbons

cc: Hon. Jerome Polaha, District Judge
Robert G. Berry, Settlement Judge
Cooper Castle Law Firm, LLC
Houser & Allison, APC
Law Offices of Roderic A. Carucci
Washoe District Court Clerk