

IN THE SUPREME COURT OF THE STATE OF NEVADA

KATHARINA N. BLANCATO,
Appellant,
vs.
QUALITY LOAN SERVICE
CORPORATION; AND NATIONSTAR,
Respondents.

No. 56183

FILED

APR 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *T. Malone*
DEPUTY CLERK

ORDER AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

This is a proper person appeal from an order dismissing a complaint in a wrongful foreclosure action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant executed a deed of trust in November 2006 in favor of respondent Nationstar naming Fiserve Fulfillment Services, Inc., as trustee, to secure a loan that she used to purchase a home located in Sparks, Nevada. In November 2008, Nationstar, as beneficiary of the deed of trust, executed a substitution of trustee appointing respondent Quality Loan Services Corporation (QLSC) as trustee. Appellant became delinquent in her payments on the loan. On July 8, 2009, appellant filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. Respondents sought and obtained relief from the automatic bankruptcy stay, and on November 5, 2009, QLSC recorded a notice of default and election to sell.

Appellant subsequently filed a verified complaint in the district court contending that respondents (1) had engaged in unfair lending practices under NRS 598D.100 and NRS 598D.110, (2) were attempting to wrongfully foreclose on her home because the trustee lacked proper authority to foreclose, and (3) had violated several notice

provisions of NRS Chapter 107. Respondents filed a motion to dismiss, which was granted by the district court. This appeal followed.

On appeal, appellant contends that (1) she was not required to disclose her state district court claims in the Chapter 7 proceeding, and thus, the district court erred in concluding she was judicially estopped from bringing her actions based on nondisclosure; (2) the district court improperly concluded that the substituted trustee QLSC had standing to initiate foreclosure; and (3) respondents violated NRS Chapter 107 notice provisions.

This court reviews de novo a district court's legal conclusion that a plaintiff has failed to state any legitimate causes of action under NRCP 12(b)(5). See Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (explaining that a "complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.")

Judicial estoppel does not bar this action

In this case, the district court concluded that appellant was judicially estopped from proceeding with her claims because she had not disclosed the claims she asserted in district court suit on her bankruptcy schedules. Judicial estoppel may apply when a court has "accepted" a previous inconsistent statement. Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. 2001). In Hamilton, the United States Court of Appeals for the Ninth Circuit held that acceptance may be established if the bankruptcy court granted a discharge, even if the discharge is later vacated, or took other action in reliance on the previous inconsistent statement such as approving a plan for reorganization or lifting a stay. Id. at 784. Causes of action that accrue before filing a bankruptcy

petition belong to the bankruptcy estate. 11 U.S.C. § 541(a)(1) (2006); Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707-08 (9th Cir. 1986). Appellant's causes of action for unfair lending practices under NRS 598D.100 and NRS 598D.110 accrued when the loan originated in 2006 and became part of the bankruptcy estate when appellant filed for bankruptcy in 2009. Their nondisclosure on the debtor's schedules prevented the bankruptcy court from determining whether the claims had value and should be pursued for the benefit of creditors or should be abandoned. Accordingly, dismissal of the unfair lending practices claims was appropriate.

Nationstar properly appointed QLSC as trustee to foreclose

On appeal, and in the district court, appellant contended that the foreclosure proceedings were improper because Nationstar lacked standing to substitute QLSC as trustee in place of the original trustee Fiserv. In the district court, respondents submitted copies of recorded documents showing that Nationstar was the originator of the loan and the beneficiary of the deed of trust.¹ The district court concluded that Nationstar properly substituted QLSC as trustee under the procedure for substituting trustees contained in the deed of trust and QLSC subsequently recorded the notice of default. Thus, because the substitution of trustee by the beneficiary of the deed of trust was in accordance with the deed of trust and Nevada law, the district court properly concluded that respondents had standing to pursue foreclosure.

¹Appellant did not challenge the authenticity or completeness of the recorded documents; her arguments solely concerned her misunderstanding of the procedure for substituting trustees and commencing foreclosures.

See Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279-81 (2011) (explaining that the deed of trust identifies the proper party to initiate foreclosure).

Appellant properly stated claims for violations of NRS Chapter 107's notice requirements

Respondents did not substantively challenge appellant's allegations that they violated certain provisions of NRS Chapter 107 concerning required notices. These NRS Chapter 107 notice-based claims accrued after appellant filed her petition for bankruptcy and appellant has standing to prosecute them. NRCP 17(a); 11 U.S.C. § 541(a)(1); see Hamilton, 270 F.3d at 784. Therefore, the district court erred in dismissing appellant's claims concerning respondents' failure to comply with the statutory provisions of NRS Chapter 107. Buzz Stew, LLC, 124 Nev. at 227-28, 181 P.3d at 672.

Accordingly, we affirm the portion of the district court's order dismissing appellant's unfair lending practices claims and improper trustee-based wrongful foreclosure claims, and we reverse the portion of the district court's order dismissing appellant's claims regarding violations of NRS Chapter 107's notice requirements and remand that portion of this matter to the district court for further proceedings.

IT IS SO ORDERED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Steven P. Elliott, District Judge
Katharina N. Blancato
McCarthy & Holthus, LLP/Las Vegas
Washoe District Court Clerk