

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY J. THOMAS,
Appellant,

vs.

BAC HOME LOANS SERVICING, LP,
D/B/A BANK OF AMERICA HOME
LOANS SERVICING, LP, A FOREIGN
LIMITED PARTNERSHIP; AND
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., A
FOREIGN ENTITY,
Respondents.

No. 56587

FILED

DEC 20 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingrossa*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order in a foreclosure action. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Terry Thomas obtained a \$242,000 mortgage from First Magnus Financial Corporation to purchase real property. Thomas executed a promissory note in favor of Magnus and a deed of trust naming Magnus as the lender and respondent Mortgage Electronic Registration Systems, Inc., (MERS) as the nominee beneficiary. Magnus negotiated¹ Thomas's mortgage to Countrywide Bank, who subsequently negotiated it to Countrywide Home Loans. Countrywide Home Loans placed a blank endorsement on the promissory note. In 2008, Countrywide Home Loans

¹The term "negotiated," as used in the context of this appeal, means "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." NRS 104.3201.

was acquired by Bank of America. The loan was serviced by respondent BAC Home Loans Servicing, LP, d.b.a. Bank of America Home Loans Servicing, LP.

BAC sent Thomas a letter in late 2009, stating that BAC was now the loan servicer for his mortgage and Freddie Mac was the owner of the note due to a separate contractual relationship with Bank of America. In September 2009, Thomas commenced a quiet title action against BAC, Magnus, and MERS. All of the defendants defaulted, and the district court entered a default judgment against them. BAC, Bank of America,² and MERS (collectively, respondents), filed a motion to set aside the default judgment, which the district court granted.³ Subsequently, respondents filed an answer to the quiet title action and a motion for summary judgment. The district court found that because respondents were in possession of the promissory note and deed of trust, they were entitled to judgment as a matter of law. Thomas now appeals.

²There is a dispute between the parties regarding the nature of the relationship between Bank of America and BAC; however, because this fact is not material to Thomas's claims, we do not address this issue. Moreover, although Thomas argues that Bank of America was improperly joined to the action, Thomas offered no arguments or authority to support this contention. Accordingly, we decline to consider an issue that was not briefed by the appellant as required by NRAP 28.

³Thomas argues that MERS was never represented by respondents' counsel and that it never appeared in this action. This contention is without merit and contrary to the evidence in the record.

Discussion

Thomas presents multiple issues for review, only two of which we address in detail in this order:⁴ (1) whether the district court erred in granting summary judgment, and (2) whether the Nevada Legislature indirectly established the level of documentation necessary for foreclosure actions with the creation of the Foreclosure Mediation Program.⁵

We conclude that there is no genuine issue of material fact at issue in this case and respondents are entitled to judgment as a matter of law. Furthermore, we hold that the Nevada Legislature did not limit the admissibility and authentication of promissory notes, deeds of trusts and assignments in civil proceedings to original or certified copies. Rather, the Nevada Rules of Evidence govern the admissibility and authentication of

⁴Thomas also argues that BAC and Bank of America lacked standing to file a motion to set aside the district court's default judgment. We find this contention to be without merit and decline to address it in this order.

⁵Thomas's opening brief lists six issues but fails to discuss three: (1) whether Bank of America was improperly joined to this action, (2) whether documents filed by the Washoe County Recorder's office should be treated like business records for evidentiary purposes, and (3) whether BAC and MERS "have legally cognizable standing to be awarded summary judgment."

NRAP 28(a)(8)(A) requires an appellant's brief to contain "appellant's contentions and the reasons for them" in its argument section. Because Thomas's brief does not comply with NRAP 28 with respect to these three issues, we do not consider them. See NRAP 28(j).

Furthermore, Thomas also argues that respondents lacked standing to file a motion to set aside default judgment. We conclude that this contention is wholly without merit.

these negotiable instruments and security instruments. Accordingly, we affirm the district court's judgment.

I. The district court did not err in granting summary judgment for respondents

Thomas argues that the district court erred in granting summary judgment because (1) respondents did not present any admissible evidence in support of their motion, and (2) respondents have no legal right to the promissory note.⁶ Thomas contends that respondents did not proffer any admissible evidence to support their motion and only offered counsel's statements, and uncertified and unauthenticated photocopies of the promissory note and deed of trust. Thomas also argues that respondents could not claim ownership of the promissory note because the endorsement from Magnus to Countrywide Bank was on a separate page, and Countrywide Home Loans' endorsement did not contain a payee. Thomas contends that respondents cannot claim

⁶Thomas notes correctly that the district court's order referring to a prior order directing respondents to produce a certified or original copy of the promissory note was erroneous because no such order was ever issued by the district court. Thomas, however, does not demonstrate how this error was prejudicial to him. After an examination of the record, we conclude that this misstatement was entirely harmless.

Thomas also asks us to compare a promissory note and endorsement submitted in a related federal court case involving him and Freddie Mac. However, the federal court submissions and the federal court's order were not presented to the district court below. See Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (stating that this court cannot consider matters not properly appearing in the record on appeal and has no power to look outside the record of a case). Further, Thomas did not ask this court to take judicial notice of the submitted materials. Therefore, we decline to consider these materials.

ownership if they were not named in the promissory note and the note was not endorsed to them.

We review orders granting summary judgment de novo. Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1094 (1995). Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c); see Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The burden of proving that there is no genuine issue of material fact lies with the moving party. Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758 (1993). However, once the moving party satisfies his or her burden, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. Id. at 727, 857 P.2d at 759. “[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” Wood, 121 Nev. at 729, 121 P.3d at 1029.

A. Respondents' motion for summary judgment was supported by admissible evidence

NRCP 56(c) requires a party's motion for summary judgment to contain a concise statement of facts that it claims to be disputed or undisputed with citation to “any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies.”⁷ Evidence introduced in support of, or opposition to, a motion for

⁷Thomas argues that respondents' motion did not contain a concise statement as required by NRCP 56(c), but this claim is not supported by the record.

summary judgment must be admissible evidence. NRCP 56(e); Henry Prods., v. Tarmu, 114 Nev. 1017, 1019, 967 P.2d 444, 445 (1998). Because authentication is a condition precedent to admissibility, all evidence presented in connection with a summary judgment proceeding must be authenticated. NRS 52.015.

In this case, Thomas presented no evidence to rebut the authenticity of the promissory note or the deed of trust, nor does he even claim that the documents were not genuine. Furthermore, the testimony of a witness with personal knowledge that a matter is what it is claimed to be is sufficient for authentication purposes. NRS 52.025. Respondents submitted an affidavit by counsel to authenticate the promissory note and deed of trust. Counsel's affidavit stated that he had personal knowledge of the matter, that he was in possession of the original documents, and that the copies attached to the motion were true and correct copies of the relevant documents. Therefore, the promissory note and deed of trust used to support respondents' motion for summary judgment were properly authenticated and are admissible. Thus, respondents' motion was supported by admissible evidence.

B. Thomas's arguments concerning ownership of the promissory note are without merit

Thomas makes four arguments regarding the enforceability of the promissory note: (1) because the endorsement by Magnus to Countrywide Bank was on a separate page, it was invalid, (2) Countrywide Home Loans' endorsement was improper because it did not state a payee, (3) an entity cannot claim an interest in a promissory note if it is not named in the promissory note, and (4) there is no evidence that BAC is a beneficiary under the deed of trust. An examination of the

applicable authority demonstrates that these arguments are without merit.

A promissory note that satisfies the requirements of NRS 104.3104 is a negotiable instrument.⁸ A negotiable instrument is enforceable by a holder or a nonholder who has the rights of a holder. NRS 104.3301. A holder is a person who acquires the instrument by negotiation. NRS 104.3201. An instrument that is payable to an identified person is negotiated by the transfer of possession and endorsement by the holder. Id. An instrument payable to bearer, however, may be negotiated by mere transfer of possession alone. Id.

An endorsement is a signature on an instrument for the “purpose of negotiating the instrument, restricting payment of the instrument, or incurring endorser's liability on the instrument.” NRS 104.3204. There are two types of endorsements: special and blank. NRS 104.3205. A special endorsement is made by the holder and payable to an identified person, while a blank endorsement is made by the holder and is not made payable to an identified person. Id. A negotiable instrument with a blank endorsement is payable to bearer. Id. Regardless of whether the instrument is payable to an identified person or payable to bearer, the holder may convert the instrument by using either a special endorsement or a blank endorsement. Id. Furthermore, a paper affixed to the instrument is considered to be a part of the instrument for the purpose of

⁸The parties do not dispute that Article 3 of the Uniform Commercial Code as adopted by the Nevada Legislature (NRS 104.3101 through NRS 104.3605) applies in this case. See NRS 104.1101, NRS 104.3101.

determining whether a signature was made on the instrument. NRS 104.3204.

Finally, a deed of trust conveys to the trustee the legal title of the property for the purpose of securing the borrower's performance under the note and deed of trust for the benefit of the beneficiary. See NRS 107.020. Generally, the transfer or assignment of a negotiable promissory note carries with it the deed of trust. 55 Am. Jur. 2d Mortgages § 927 (2009) ("The mortgage follows the debt, in the sense that the assignment of the note evidencing the debt automatically carries with it the assignment of the mortgage.").

Here, Thomas executed a promissory note naming Magnus as the payee. Magnus then transferred the promissory note with an endorsement naming Countrywide Bank as the payee on a separate piece of paper affixed to the instrument, which is permissible under NRS 104.3204. Countrywide Bank subsequently negotiated the note to Countrywide Home Loans. Finally, Countrywide Home Loans converted the promissory note from one payable to an identified person to one payable to bearer by placing a blank endorsement on the promissory note.⁹

⁹Thomas notes that in a separate but related action in the United States District Court, District of Nevada, that he instituted against Freddie Mac, Freddie Mac had claimed ownership of the promissory note. He makes an argument in his reply brief that "holder" is synonymous with "owner," and questions how both BAC and Freddie Mac could claim ownership of the note. NRS 104.3301(2) specifically states that "a person entitled to enforce the instrument" may be one who "is not the owner of the instrument or is in wrongful possession of the instrument." Furthermore, the status of holder merely pertains to one who may enforce the debt and is a separate concept from that of ownership. U.C.C. § 3-203 cmt. 1 (2004). BAC, as a holder of the note, is entitled to enforce the note

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Because BAC is now in possession of the original promissory note and is the holder of the note, BAC is entitled to enforce the instrument against Thomas. Additionally, since the transfer of the promissory note carried with it the deed of trust, MERS as the nominee beneficiary holds the deed of trust for BAC's benefit.

Thus, respondents hold a valid and legal debt against Thomas that is secured by a deed of trust on the subject property. Therefore, because no genuine issue of material fact exists regarding the legal title to the property at issue, respondents are entitled to judgment as a matter of law.

II. The Legislature did not indirectly establish a level of documentation with the creation of the Foreclosure Mediation Program

Thomas argues that the Nevada Legislature indirectly adopted a level of documentation necessary to support foreclosure actions with the creation of the Foreclosure Mediation Program. He claims that

... continued

regardless of who has legal title over the instrument. Finally, BAC does not appear to ever have claimed ownership of the instrument. It merely maintains that it has the status of a holder.


Thomas also argues that respondents provided no proof of the alleged contractual relationship between BAC and Freddie Mac, or that BAC is a wholly owned subsidiary of Bank of America. These contentions are irrelevant because they do not affect Thomas's obligations under the deed of trust and promissory note, or respondents' rights. Thomas does not contend that he is subject to multiple claims and any third-party relationships have no bearing on the relationship between Thomas and the note holder.

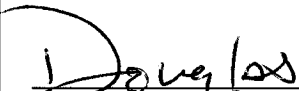
only original or certified copies of promissory notes and deeds of trust are admissible into evidence.

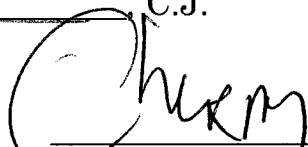
Statutory interpretation is a question of law, and we review the district court's interpretation of a statute de novo. Sims v. Dist. Ct., 125 Nev. 126, 129-30, 206 P.3d 980, 982 (2009). "Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." Madera v. SIIS, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) (quoting Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995)).

The language of NRS 107.086 is plain and unambiguous. By its very terms, the requirements and procedures set forth within its provisions apply only to proceedings in the Nevada Foreclosure Mediation Program. NRS 107.086(4) (The beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note.) Therefore, it has no applicability to judicial actions, and Nevada's rules of evidence apply. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Saitta, C.J.



Douglas, J.


Cherry, J.


Gibbons, J.


Pickering, J.


Hardesty, J.


Parraguirre, J.

cc: Hon. Steven R. Kosach, District Judge
Patrick O. King, Settlement Judge
Terry J. Thomas
Miles, Bauer, Bergstrom & Winters, LLP
Washoe District Court Clerk