IN THE SUPREME COURT OF THE STATE OF NEVADA

CLINT C. FREED; SAMANTHA S. FREED; AND WILLIAM C. FREED,
Appellants,
vs.
GREEN TREE SERVICING, LLC; BANK OF AMERICA HOUSING SERVICES; FIDELITY NATIONAL TITLE INSURANCE; LAURIE SCHIFF; AND SCHIFF & SHELTON,
Respondents.

No. 58089

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is a proper person appeal from a district court order dismissing appellants' complaint in a wrongful foreclosure and deceptive trade practices action. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Appellants filed a petition in the district court seeking the production of the original promissory note after a foreclosure by trustee's sale conducted by respondents' trustee. Subsequently, respondents filed a summary eviction unlawful detainer proceeding in the justice court. In response, appellants filed a second petition under the same district court case number seeking relief from the eviction. Appellants then filed a motion seeking to either compel respondents to respond to the petitions or to take respondents' default.[1] Respondents filed a response to appellants'

[1]Although appellants' pleadings in the district court were imprecise, fairly construed, their pleadings satisfy the requirements for a wrongful foreclosure complaint pursuant to NRS 107.080(5). Here, the trustee's sale occurred on October 26, 2010, and the initial petition was filed on October 28, 2010, well within the 90-day period allowed under NRS 107.080(5)(d). Respondents did not move to dismiss for insufficient process or insufficient service of process, NRCP 12(b)(3) and (4), but filed a

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petitions, addressing their substantive merits and requesting dismissal for failure to state a claim for relief and providing copies of the promissory note and trustee's deed upon sale. The district court granted the motion to dismiss under NRCP 12(b)(5).[2] Because the district court considered matters outside of the pleadings, the motion to dismiss is treated as a motion for summary judgment under NRCP 56. See NRCP 12(b).

We review a district court summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Id. The pleadings and other proof must be construed in a light most favorable to the nonmoving party, but if the movant properly supports the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions and must instead set forth specific facts demonstrating the existence of a genuine issue of material fact for trial. NRCP 56(c); Wood, 121 Nev. at 731, 121 P.3d at 1031.

On appeal, appellants contend that they did not receive actual notice of the impending trustee's sale because they did not understand the notices they actually received. Appellants do not contend that the notices were not served in accordance with NRS Chapter 107's notice and service requirements. In the district court, appellants stated that they were

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substantive response addressing the merits of appellants' pleadings. NRCP 12(h)(1).

[2]The district court order stated that it both granted the motion to dismiss and denied the petitions. But once the action was dismissed, the petitions' merits were no longer amenable to substantive denial.

provided with the notice of default and that the notice of trustee's sale was posted to the property. Appellants' own pleadings before the district court demonstrate that respondents complied with the notice requirements of NRS Chapter 107, thus there was no material issue of genuine fact concerning the notices. Appellants' lack of understanding concerning the notices does not warrant relief from a properly noticed trustee's sale. See NRS 107.080(5)-(7) (listing circumstances in which a trustee's sale must be voided). As such, the district court properly granted summary judgment on appellants' notice claim.

Next, appellants argue that respondents engaged in deceptive trade practices by funding a loan beyond appellants' ability to pay. Appellants, however, rely on the revision to NRS 598D.100(1)(b), effective October 1, 2007.[3] Appellants' loan was originated and disbursed in 1998, and the 2007 amendment does not retroactively apply to appellants' loan.[4] Thus, the district court properly granted summary judgment as to appellants' deceptive trade practices cause of action.

Appellants next argue that foreclosure was improper because respondents did not produce the original note, but the production of the original promissory note is not a prerequisite to foreclosure by notice and trustee's sale under NRS 107.080. While a party facing foreclosure may

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[3]Respondents contend that this argument is raised for the first time on appeal, but appellants included this argument in their reply in the district court.

[4]Newly enacted statutory requirements operate prospectively, unless the statute itself clearly demonstrates legislative intent to apply retroactively. See Matter of Estate of Thomas, 116 Nev. 492, 495-96, 998 P.2d 560, 562 (2000). No such intent appears in the language of NRS 598D.100(1)(b).

challenge the foreclosing entities' standing to foreclose, for purposes of determining standing in a wrongful foreclosure matter on summary judgment, a copy of the note is sufficient when properly authenticated. NRCP 56(e); NRS 52.015; cf. Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279-81 (2011) (discussing the sufficiency of copied documents in the Foreclosure Mediation Program). Here, respondents provided a copy of the promissory note, and averred to actual possession of the original note, specifically describing its location and offering to produce the note if the district court so ordered. The district court could accept this for purposes of authenticating the copy of the note, although no affidavit or certified copy was provided. See NRS 52.015(2) (providing that provisions of NRS 52.025 to 52.105 are illustrative and not restrictive).

Appellants also argue that their note had been transferred, calling into question respondents' standing and authority to foreclose. Cf. Leyva, 127 Nev. at ___, 255 P.3d at 1279-81 (discussing the effect of note transfer on the right to initiate foreclosure in context of the Foreclosure Mediation Program). The copy of the promissory note and security agreement provided by respondents demonstrated that BankAmerica Housing Services, a division of Bank of America, FSB, was the original lender. Respondents also provided a copy of a notarized trustee's deed upon sale, reciting that Green Tree Servicing, LLC, as agent for BankAmerica Housing Services was the foreclosing beneficiary of the security instrument. In the district court, respondents argued that the note had never been assigned. But the last page of the promissory note and security instrument bears a stamp stating that the contract (note and security instrument) had been assigned to the First National Bank of Chicago. The stamp was not addressed in respondents' pleadings. This

stamp creates a genuine issue of material fact as to whether the note was transferred to First National Bank of Chicago. Thus, respondents failed to satisfy NRCP 56's initial burden of production. NRCP 56(c); Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 172 P.3d 131 (2007); see Leyva, 127 Nev. at ___, 255 P.3d at 1281 (explaining that mere possession of a note alone does not prove standing to foreclose when the note is made to the order of another entity). Thus, the district court erred in granting summary judgment on the issue of whether respondents were the proper parties to initiate foreclosure. Accordingly, we affirm in part, reverse in part, and remand this matter to the district court for further proceedings on this issue consistent with this order. NRS 107.080(5).

It is so ORDERED. [5]

Saitta, J.
Saitta

Pickering, J.
Pickering

Hardesty, J.
Hardesty

[5]Appellants also appear to challenge their post-foreclosure eviction, contending that the five-day notice to quit was defective and improperly served. The justice court heard the eviction matter, and ultimately granted a writ of restitution. The district court has final appellate jurisdiction over matters originating in the justice court, and, thus we lack jurisdiction to address appellants' challenge to the eviction. Waugh v. Casazza, 85 Nev. 520, 458 P.2d 359 (1969); see also K.J.B. Inc. v. District Court, 103 Nev. 473, 745 P.2d 700 (1987).

We have considered all other arguments raised by appellants and conclude that they do not warrant reversal. We deny all other outstanding requests for relief.

cc: Hon. Robert W. Lane, District Judge
Clint C. Freed
Samantha S. Freed
William C. Freed
James H. Woodall
Nye County Clerk