

IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD FAMILY TRUST, A TRUST; TODD  
J. MCMILLAN, AN INDIVIDUAL; AND  
TODD J. MCMILLAN, AS TRUSTEE FOR  
THE TODD FAMILY TRUST,

Appellants,

vs.

COUNTRYWIDE HOME LOANS, INC., AS A  
SERVICER FOR BANKERS TRUST COMPANY  
OF CALIFORNIA, N.A., A CALIFORNIA  
CORPORATION,

Respondent.<sup>1</sup>

No. 36865

**FILED**

APR 02 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER DISMISSING IN PART AND

AFFIRMING IN PART

This is a proper person appeal from a district court order granting summary judgment against appellant Todd J. McMillan. We affirm the district court's order.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.<sup>2</sup> "In reviewing a grant of summary judgment, this court accepts as true all evidence and reasonable inferences favorable to the party against whom summary judgment was entered."<sup>3</sup>

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<sup>1</sup>To the extent McMillan, who is not an attorney, appeals on behalf of the Todd Family Trust, this court lacks jurisdiction over the appeal and orders it dismissed. See *Guerin v. Guerin*, 116 Nev. 210, 993 P.2d 1256 (2000). We direct the clerk of this court to amend the caption on the court's docket to correspond to the caption on this order.

<sup>2</sup>NRCP 56(c).

<sup>3</sup>*Busch v. Flangas*, 108 Nev. 821, 823, 837 P.2d 438, 439 (1992).

A deed of trust creates a lien on the described property when it is executed and delivered by the trustor to the beneficiary<sup>4</sup> or the beneficiary's agent.<sup>5</sup> "[A]s a general rule, different interests in the same real property have priority among themselves according to the time of their creation."<sup>6</sup>

Here, the Department of Veterans Affairs (VA) acquired its lien against the Muainas' property on the morning of February 26, 1997, based on the Muainas' execution of the purchase money deed of trust and the contemporaneous delivery of the deed of trust to the VA's agent, McMillan. The Todd Family Trust (TFT), on the other hand, acquired its lien against the Muainas' property later that afternoon when the Muainas executed the "Second Deed of Trust" and delivered it to McMillan. Thus, the VA's lien was senior to TFT's lien.

That seniority was not lost by the VA's failure to record its deed of trust before McMillan recorded the "Second Deed of Trust." "Nevada is a race notice state."<sup>7</sup> Consequently, an unrecorded deed of trust creates an enforceable lien against the trustor and against any subsequent encumbrancers who receive their interest with

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<sup>4</sup> Harry D. Miller, California Real Estate § 11:93, at 229 (3d ed. 2000).

<sup>5</sup> See 5 id.; 23 Am. Jur. 2d Deeds §§ 138, 179 (1983).

<sup>6</sup> Miller, supra note 4, § 11:1, at 8.

<sup>7</sup> Buhecker v. R.B. Petersen & Sons, 112 Nev. 1498, 1500, 929 P.2d 937, 939 (1996) (citing NRS 111.320 (providing that recordation imparts constructive notice to subsequent purchasers and mortgagees) and NRS 111.325 (providing that unrecorded conveyances of real property are void as against subsequent good faith purchasers who record their conveyance first)).

knowledge or notice of the prior unrecorded lien.<sup>8</sup> In other words, "[a] prior unrecorded interest has priority over a subsequent interest acquired by a person who is not a bona fide purchaser [or encumbrancer],<sup>[9]</sup> whether or not the subsequent interest is recorded."<sup>10</sup> Thus, Nevada's recording statutes protect "subsequent purchasers and [encumbrancers] against prior secret conveyances and [e]ncumbrances."<sup>11</sup>

McMillan certainly knew of the VA's unrecorded lien at the time TFT acquired its lien. Indeed, McMillan testified at deposition that he had intended for the VA to possess a superior lien. Such an intention is clear from the fact that the deed to TFT recites that it is a "Second" deed of trust.<sup>12</sup>

TFT's lien retained its junior priority when the VA assigned its interest under the first deed of trust to Bankers Trust Company of California, N.A., whose servicer is respondent Countrywide Home Loans, Inc. (collectively, CHL). Like an assignee of a mortgage, the assignee of a deed of trust takes any priority of lien and power of sale that the

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<sup>8</sup>5 Miller, supra note 4, § 11:93, at 230.

<sup>9</sup>"A 'bona fide encumbrancer' is an encumbrancer acting in good faith and for value who receives a lien or encumbrance on real property, . . . without knowledge or notice of competing liens on the same property . . . ." 5 Miller, supra note 4, § 11:49, at 130 (emphasis added).

<sup>10</sup>5 Miller, supra note 4, § 11:49, at 129 (italics omitted; underscore added).

<sup>11</sup>*Strohecker v. Mutual B. & L. Assn.*, 55 Nev. 350, 354, 34 P.2d 1076, 1077 (1934) (quotation omitted; emphasis added).

<sup>12</sup>See *Rothermich v. Weber's St. Charles Lanes*, 957 S.W.2d 509, 511 (Mo. Ct. App. 1997) (observing that a deed of trust which, on its face, recites that it is a second deed of trust, is clear and unambiguous evidence of an intent to assume a subordinate position).

assignor may have had.<sup>13</sup> Consequently, CHL's foreclosure of its senior lien extinguished TFT's lien,<sup>14</sup> and CHL obtained an unencumbered title.<sup>15</sup> CHL was therefore entitled to recover the \$16,987 expended to clear TFT's extinguished lien.

Further, the foreclosure sale was not invalid because CHL failed to notify TFT of the sale. It was undisputed that McMillan was aware of the foreclosure proceedings.<sup>16</sup>

Finally, although the Nevada Department of Business and Industry's Insurance Division found that the concealment from Joanna Brooks of TFT's purported lien violated NRS

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<sup>13</sup>See 59 C.J.S. Mortgages §§ 354, 357 (1998); see, e.g., City Bank & Trust Co. of Moberly v. Thomas, 735 S.W.2d 121, 122 (Mo. Ct. App. 1987); accord Bowen v. Kicklighter, 183 S.E.2d 10, 12 (Ga. Ct. App. 1971) ("A transferee of the security deed and the indebtedness secured thereby steps into the shoes of the grantee therein, and is generally entitled to the same rights and priorities under the deed.").

<sup>14</sup>See Arnold v. Eaton, 910 S.W.2d 181, 184 (Tex. App. 1995); see, e.g., Aladdin Heating v. Trustees, Cent. States, 93 Nev. 257, 262, 563 P.2d 82, 86 (1977). Although "[t]he foreclosure sale of a senior deed of trust eliminates the liens of junior lienors, . . . the junior liens attach to any surplus sales proceeds." 5 Miller, supra note 4, § 11:94, at 238. Here, there were no surplus sales proceeds leftover after CHL's foreclosure. CHL was "not required to bid the full amount of its debt but [could] intentionally make an underbid in an amount less than the unpaid balance of the obligation owed to it." 4 Miller, supra note 4, § 10:204, at 623.

<sup>15</sup>See 5 Miller, supra note 4, § 11:94, at 233 (stating that "the title of the purchaser at the foreclosure sale is not subject to the lien of any deed of trust that was junior to the lien of the trust deed that was foreclosed").

<sup>16</sup>See In re Madrid, 10 B.R. 795, 799 (Bankr. D. Nev. 1981) (recognizing that actual knowledge of foreclosure proceedings is fatal to a challenger's claim of omitted notice), rev'd on other grounds, 21 B.R. 424 (B.A.P. 9th Cir. 1982), aff'd, 725 F.2d 1197 (9th Cir. 1984).

692A.105(1)(d),<sup>17</sup> McMillan lacks standing to challenge that concealment.<sup>18</sup>

As we have reviewed the record on appeal and determined that summary judgment was properly granted, we affirm the district court's order.

Young J.  
Young

Leavitt J.  
Leavitt

Becker J.  
Becker

cc: Hon. Michael L. Douglas, District Judge  
Graham & Wilde  
Todd J. McMillan  
Clark County Clerk

<sup>17</sup>NRS 692A.105(1)(d) provides that "[t]he commissioner [of insurance] may . . . suspend or revoke any [title or escrow agent's] license or impose a fine" if the agent has "intentionally or knowingly made any misrepresentation or false statement to, or concealed any essential or material fact known to him from, any principal or designated agent of the principal in the course of the escrow business."

<sup>18</sup>See *In re Report Washoe Co. Grand Jury*, 95 Nev. 121, 123, 590 P.2d 622, 623-24 (1979) (noting that an individual who was the subject of a grand jury investigation and report, and who sought to expunge from the report references to other individuals, lacked standing).