IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD KOBEL AND CARRIE KOBEL,
Appellants,
vs.
CHASE MANHATTAN BANK,
Respondent.

No. 38566

FILED

MAR 17 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in favor of respondent Chase Manhattan Bank.

On or around March 12, 1997, appellants Howard and Carrie Kobel purchased a home and financed the property by securing a mortgage. The Kobels defaulted on the mortgage in February of 1999, and a notice of default and election to sell was recorded on September 10, 1999. On January 5, 2000, the property was sold at a trustee's foreclosure sale to Chase. The Kobels remained on the property and on February 22, 2000, Chase sued them for unlawful detainer. The Kobels counterclaimed for wrongful foreclosure and argued they were not delinquent on their mortgage payments. Chase moved for summary judgment. At the summary judgment hearing on July 30, 2001, the district court ordered the Kobels to produce documentary evidence to prove they were not in default. On August 22, the Kobels still had not produced this evidence, and the district court granted summary judgment. On October 3, 2001, the Kobels appealed.

03-04391

This court reviews summary judgment orders de novo.[1] Summary judgment is warranted when the record, viewed in a light most favorable to the non-moving party, indicates no triable issues of material fact and that the moving party is entitled to judgment as a matter of law.[2] A genuine issue of material fact exists "where the evidence is such that a reasonable jury could return a verdict for the non-moving party."[3] The Kobels assert that a genuine issue of material fact exists as to whether they were delinquent on their mortgage payments at the time the notice of default was recorded, and therefore, the district court erred by granting summary judgment.

Chase sued the Kobels for unlawful detainer. Thus, it had to prove that it owned the property, as it did by submitting a deed of trust on the property, and that the Kobels continued in possession thereof without Chase's consent, which was not disputed.[4] Chase moved for summary judgment and had the burden of proving the absence of any genuine issue of material fact.[5] In its motion for summary judgment, Chase pointed out that the Kobels failed to produce any evidence that they were not in default on their mortgage payments. The Kobels had the burden to prove

---

[1]University of Nevada, Reno v. Stacey, 116 Nev. 428, 431, 997 P.2d 812, 814 (2000).

[2]NRS 56(c); Auckenthaler v. Grundmeyer, 110 Nev. 682, 684, 877 P.2d 1039, 1040 (1994).

[3]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

[4]NRS 40.250; NRS 40.251.

[5]Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758 (1993).

their non-delinquency as it was an essential element of their counterclaim for wrongful foreclosure, as well as their defense to the unlawful detainer suit. Because Chase demonstrated an absence of evidence supporting this essential element, Chase satisfied its burden of proof.[6]

Once the moving party meets its burden of proof, the adverse party must then set forth facts, by affidavit or otherwise, establishing a genuine issue for trial.[7] The non-moving party must present specific facts to preclude summary judgment.[8] "[C]onclusory statements along with general allegations do not create an issue of material fact."[9] The Kobels submitted an affidavit by Howard in which he attested that he and Carrie were not delinquent on their mortgage payments. Howard's sworn answers to Chase's interrogatories also make the same assertion. However, the Kobels fail to refer to any specific facts or documentation, such as dates on which payments were made, bank records, or receipts, to prove their non-delinquency.[10] Because Howard's assertions are conclusory and not properly supported, this court need not accept them as

---

[6]NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1156, 946 P.2d 163, 167 (1997).

[7]Maine, 109 Nev. at 727, 857 P.2d at 759.

[8]Posadas, 109 Nev. at 452, 851 P.2d at 442 (holding that a non-moving party cannot oppose summary judgment through whimsy, speculation, and conjecture).

[9]Michaels v. Sudeck, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1991).

[10]See Bird v. Casa Royale West, 97 Nev. 67, 71, 624 P.2d 17, 19 (1981) (holding that an affiant's bald assertion, without any specific facts, such as documentation, was conclusory).

true.[11] Absent evidence that they were not in default, a reasonable jury would not return a verdict for the Kobels.[12] Thus, there is no genuine issue of material fact as to whether the Kobels were in default.[13]

The Kobels contend that a rescission notice, which withdrew a prior notice of default and demand for sale, infers that the Kobels were not delinquent on their mortgage payments when the notice of default at issue here was filed. Only "reasonable inferences of the party opposing summary judgment must be accepted as true."[14] The rescission notice specifically states that "this rescission shall not in any manner be construed as waiving or affecting any breach or default past, present or future." Further, on the day that the representative withdrew the prior notice of default, that same representative filed another notice of default. Thus, we conclude that the Kobels' inference is unreasonable and does not create a genuine issue of material fact.

The Kobels also allege that they never received notice of the default or of the trustee's sale and that this is a genuine issue of material fact. However, the trustee listed on the deed of trust complied with NRS 107.080, which provides the proper notice procedure for foreclosure sales.[15]

---

[11]Michaels, 107 Nev. at 334, 810 P.2d at 1213.

[12]See Miller v. Jones, 114 Nev. 1291, 1296, 970 P.2d 571, 574 (1998) (noting that a genuine issue only exists if a reasonable jury could return a verdict for the party opposing summary judgment).

[13]Id.

[14]Michaels, 107 Nev. at 334, 810 P.2d at 1213.

[15]See Rose v. First Federal Savings & Loan, 105 Nev. 454, 456, 777 P.2d 1318, 1319 (1989) (describing the requirements imposed by NRS 107.080).

This court has held that "[t]he statute does not require proof that the notice be received."[16] As long as a trustee complies with NRS 107.080, the foreclosure sale is valid. Thus, the issue of whether the Kobels actually received notice is immaterial and summary judgment was proper. Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Valorie Vega, District Judge
Simon & Berman
Callister & Reynolds
Clark County Clerk

---

[16]Turner v. Dewco Services, Inc., 87 Nev. 14, 16, 479 P.2d 462, 464 (1971).