

IN THE SUPREME COURT OF THE STATE OF NEVADA

MOBASHIR N. AHMAD,
Appellant,
vs.
FIRST AMERICAN TITLE COMPANY
OF NEVADA; MARLYS BYRD; ROY
BYRD; AND OPTION ONE MORTGAGE
COMPANY, A CALIFORNIA
CORPORATION,
Respondents.

No. 39350

FILED

APR 18 2002

DATE FILED IN CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying an injunction to prevent a foreclosure sale. The sale was held on March 15, 2002.

Appellant Mobashir Ahmad contends that the foreclosure was invalid because he was not in default on his obligation to respondents Marlys and Roy Byrd at the time the notice of default and election to sell was recorded in November 2001. Ahmad asserts that he included extra amounts in the previous installments he paid to the Byrds, and that if the extra amounts are applied to future installments, then he was not in default.

The Byrds maintain that they were only required to apply the extra amounts to future installments if Ahmad had requested that they do so at the time the payments were made. Since Ahmad simply paid the amounts with no instructions as to how they were to be applied, and in light of the promissory note's terms providing for prepayment of principal, the Byrds contend that they properly applied the excess amounts to

principal, not to future installments. Accordingly, when Ahmad failed to make payments in September and October 2001, he was in default.

Application of installment payments is governed by the terms of the agreement between the parties.¹ The promissory note in this case provided that Ahmad would pay to the Byrds a total of \$46,600, plus interest at 10% per annum, as follows:

The sum of \$408.96 per month, including interest at the rate of 10% per annum. The first monthly installment shall be due on June 26, 1999, and continue thereafter on the same day of each succeeding month until May 26, 2004, at which time the then remaining principal balance, plus accrued interest, shall be paid in full.

Makers reserve the right to prepay all or any portion of the indebtedness evidenced by this note at any time, without penalty. Any sums prepaid shall first be applied to accrued interest on the principal balance then unpaid.

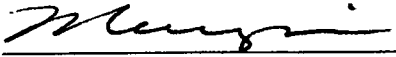
By its terms, then, the note does not provide that any excess amounts paid by Ahmad should be applied to future installments; rather, the note clearly indicates that excess payments should be applied to any unpaid accrued interest, and then to principal. While the terms of the note could arguably be read to permit application of excess payments to future installments had Ahmad indicated at the time that he wished them to be

¹See generally Annotation, Excess of Payment for One Period as Applicable to Subsequent Period Under Contract or Mortgage Providing for Periodic Payments, 89 A.L.R.3d 947, 949 (1979); see also Dudrey v. Milner, 80 Nev. 447, 451, 396 P.2d 30, 32, as amended, 399 P.2d 455 (1964) (construing partnership agreement to determine how payments were to be allocated).


applied in that manner, Ahmad does not allege that he communicated any such intention to the Byrds at the time he made the payments.²

We therefore conclude that the district court properly determined that Ahmad was in default when he failed to make the September and October 2001 installments, and thus, that an injunction preventing the foreclosure sale was not warranted. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Maupin


_____, J.
Shearing


_____, J.
Becker

²See generally 60 Am. Jur. 2d Payment § 101 (1987) (noting that a debtor who wishes to direct the application of excess payments must give direction before or at the time of payment; otherwise, any right to direct the payment is lost because the funds are no longer his, but the creditor's, to be applied as the creditor sees fit); see id. at § 99 (stating that the debtor's intention alone is insufficient; rather, the debtor's intention concerning application of excess payments must be communicated to the creditor).

³Although appellant was not granted leave to file papers in proper person, see NRAP 46(b), we have considered the proper person documents received from him, and deny the relief requested as moot in light of this order. Similarly, we deny the Byrds' motion to vacate injunction or to dismiss this appeal as moot.

cc: Hon. Brent T. Adams, District Judge
Mobashir N. Ahmad
Richard G. Hill
Lyle & Murphy
Option One Mortgage Company
Washoe District Court Clerk