IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA MARIE NIVINSKI, AS EXECUTRIX FOR THE ESTATE OF LEE GLENN ALLRED, DECEASED,
Appellant,
vs.
WELLS FARGO HOME MORTGAGE, INC., A CALIFORNIA CORPORATION; RCI MANAGEMENT CORPORATION, A NEVADA CORPORATION; MTC FINANCIAL INC., D/B/A TRUSTEE CORPS; AND FRANK KUJAC,
Respondents.

No. 41184

FILED

APR 18 2006

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment after a bench trial and from a post-judgment order expunging a lis pendens in an action concerning real property. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

In 1978, Lee Glenn Allred signed a promissory note secured by a deed of trust recorded against property he owned in Reno. Allred died in November 2000, leaving approximately $16,577 remaining due on the promissory note. Allred named his daughter, appellant Lisa Marie Nivinski, as executrix of his estate.

Nivinski notified co-respondent Wells Fargo Home Mortgage (WFHM) that she was the executrix of Allred's estate. WFHM sent letters to Nivinski on two separate occasions requesting additional documentation it asserted was necessary before WFHM could recognize Nivinski as Allred's lawful successor.

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In January 2001, after WFHM did not receive the previous December's payment on the note, it sent an acceleration letter to the property address. WFHM sent another letter in March 2001 offering to set up a payment plan.

In March 2001, respondent MTC Financial recorded a notice of default and election to sell under deed of trust and mailed it to the property address. A family friend had been sporadically picking up the mail at the property address and delivering it to Nivinski. Nivinski received WFHM's letters and the notice of default in early May 2001.

After receiving this correspondence, Nivinski and her counsel made efforts to contact WFHM to notify it of Nivinski's efforts to be appointed as executrix of Allred's estate. Nivinski also requested a payoff/reinstatement amount. MTC sent a payoff/reinstatement letter to Nivinski's counsel in May 2001, stating that $6,042.10 was owed on the note and needed to be paid by June 15, 2001, in order to reinstate the loan. Nivinski did not payoff or reinstate the loan.

On June 20, 2001, MTC mailed a notice of trustee's sale to the property address. The notice was also published in the Daily Sparks Tribune on three occasions. MTC did not mail a copy of the notice to Nivinski. A foreclosure sale was conducted by MTC on July 10, 2001, and respondent Frank Kujac purchased the property.

On appeal, Nivinski challenges the district court's finding that she was not entitled to receive the notice of the default or trustee sale. We conclude that Nivinski was entitled to receive notice, and we therefore reverse the district court's judgment and order, and remand this case to the district court for proceedings consistent with this order.

NRS 107.080

Before conducting a trustee sale, a trustee must comply with the notice provisions set forth in NRS 107.080. Under NRS 107.080(3), a trustee must first record a notice of default and election to sell and mail a copy of the notice "to the grantor, and to the person who holds title of record on the date the notice . . . is recorded, at their respective addresses, if known, otherwise to the address of the trust property."[1] The grantor, successor in interest, beneficiary under a subordinate deed of trust, or any other person having a subordinate lien on the property has thirty-five days from the date when the notice of default is recorded and mailed to make good on the deficiency.[2] After this period has expired, but in no case less than three months after the notice was recorded, the trustee must give notice of the sale.[3] Under the statutory scheme as it existed at the time when the trustee sale took place, the notice indicating the time and place of the sale had to be provided "in the manner and for a time not less than that required by law for the sale or sales of real property upon execution."[4]

Nivinski claims that, pursuant to our prior decision in Rose v. First Federal Savings & Loan,[5] she was entitled to receive notice of the trustee sale under NRS 107.080(4). In Rose, we looked to other sections of

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[1]NRS 107.080(3).

[2]NRS 107.080(2).

[3]Id.; NRS 107.080(4).

[4]NRS 107.080(4) (2001).

[5]105 Nev. 454, 777 P.2d 1318 (1989).

NRS 107.080 to determine who must receive notice of a trustee sale in order for the sale to satisfy the former NRS 107.080(4)'s mandate that it be conducted "in the manner . . . required by law for the sale or sales of real property upon execution." At the time Rose was decided, NRS 107.080(3) included successors in interest as those who were entitled to receive the notice of default and election to sell.[6] Thus, in Rose we concluded that notifying the successor in interest of the time and place of the trustee's sale was in accord with the Legislature's intent.[7]

The same year Rose was decided, the Legislature amended NRS 107.080(3) by removing the successor in interest from those entitled to receive the notice of default and election to sell.[8] NRS 107.080(3) now requires that this notice only be mailed "to the grantor, and to the person who holds the title of record on the date the notice . . . is recorded, at their respective addresses, if known, otherwise to the address of the trust

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[6]NRS 107.080(3) (1987) (amended 1989).

[7]In Rose we stated:

> [Only requiring notice be given to the grantor/debtor], however, would be contrary to the apparent intent of the legislature as evidenced in NRS 107.080(3) that the grantor/debtor's successor in interest should receive any notice that the grantor/debtor had the right to receive. Even though NRS 107.080(3) only provides for the earlier notice of default and election to sell, it is the only indication of the legislatively intended recipients of notice in the context of a trustee's sale.

105 Nev. at 457, 777 P.2d at 1319-20 (emphasis added).

[8]1989 Nev. Stat., ch. 750, §12, at 1770-1772.

property." However, the Legislature's purpose in amending NRS 107.080(3) was not to overturn Rose, but to clarify the one action rule.[9] As we did in Rose, we believe it appropriate to look to all provisions of NRS 107.080 to determine what notice is contemplated by NRS 107.080(4). While the Legislature removed reference to "successor in interest" from NRS 107.080(3), it added "successor in interest" language to NRS 107.080(2), and did not change the notice provisions of NRS 107.080(4). Thus, the Legislature recognized that a successor in interest had a concern in making good on the debt on an affected property. Without notice of a final sale, the successor in interest is not able to fully pay the debt. Thus, under the current statutes and our Rose decision, Nivinski, as the successor in interest, was entitled to receive notice of the foreclosure under NRS 107.080(4).

In addition, we note that WFHM knew that Nivinski was allegedly in the process of becoming the executrix of Allred's estate. WFHM had received from the estate's counsel Allred's death certificate and the probate court's order appointing Nivinski as executrix. MTC had also sent a payoff/reinstatement letter to the estate's counsel. Under the circumstances, MTC could have easily sent notice of the trustee's sale to Nivinski or the estate's counsel.

Violation of due process

Nivinski also argues that the failure to provide her with actual notice of the trustee sale constituted a due process violation, resulting in

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[9]Hearing on S.B. 479 Before the Senate Comm. on Judiciary, 65th Leg. (Nev., May 30, 1989).

the taking of her property interest without notice. We conclude that this claim lacks merit.

"Due process restrictions apply only to activities which can be characterized as state action."[10] Although Nevada has enacted statutes regulating non-judicial foreclosure sales, we agree with the Ninth Circuit Court of Appeals that "[t]he statutory source of the Nevada power of sale . . . does not necessarily transform a private, non[-]judicial foreclosure into state action."[11] In holding that there is insufficient state action, we reach the same conclusion as the overwhelming majority of other jurisdictions faced with due process challenges to non-judicial foreclosure sales.[12]

Conclusion

We conclude that Nivinski was entitled to receive the notice of trustee sale under NRS 107.080. We also conclude that because non-judicial foreclosure sales do not involve state action, the lack of notice did not amount to a due process violation. We have considered Nivinski's other claims and conclude they are without merit. Accordingly, we

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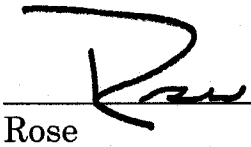
[10]Tarkanian v. Nat'l Collegiate Athletic Ass'n, 103 Nev. 331, 335, 741 P.2d 1345, 1347 (1987), rev'd on other grounds, 488 U.S. 179.

[11]Charmicor v. Deaner, 572 F.2d 694, 695 (9th Cir. 1978).

[12]See Levine v. Stein, 560 F.2d 1175, 1176 (4th Cir. 1977); Barrera v. Security Building & Investment Corp., 519 F.2d 1166, 1174 (5th Cir. 1975); Kenly v. Miracle Properties, 412 F. Supp. 1072, 1075-76 (D. Ariz. 1976); Lawson v. Smith, 402 F. Supp. 851, 855 (N.D. Cal. 1975); Y Aleman Corp. v. Chase Manhattan Bank, 414 F. Supp. 93, 95-96 (D. Guam 1975); Garfinkle v. Superior Court of Contra Costa Cty., 578 P.2d 925, 932-33 (Cal. 1978); Putensen v. Hawkeye Bank of Clay County, 564 N.W.2d 404, 410 (Iowa 1997); Northup v. Poling, 761 A.2d 872, 875-76 (Me. 2000); Leininger v. Merchants & Farmers Bank, Macon, 481 So. 2d 1086, 1088-90 (Miss. 1986); Dennison v. Jack, 304 S.E.2d 300, 308-09 (W. Va. 1983).

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order and VACATE the district court's order expunging Nivinski's lis pendens.



_____, C.J.
Rose

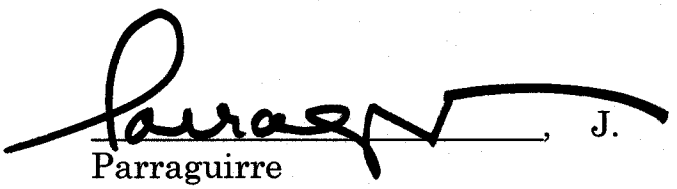
_____, J.
Douglas

cc: Hon. Janet J. Berry, District Judge
Goedert & Michaels
Erica Michaels Hollander
Beesley, Peck & Matteoni, Ltd.
Molof & Vohl
Robison Belaustegui Sharp & Low
Washoe District Court Clerk

PARRAGUIRRE, J., dissenting:

I disagree with the majority's reasoning that the legislature's inclusion of "successor in interest" in NRS 107.080(2) mandates that Nivinski was entitled to notice of the trustee sale. NRS 107.020(2) provides a successor in interest with the right to cure a deficiency; it does not govern who is entitled to notice of foreclosure proceedings.

Instead, NRS 107.080(3) is the relevant provision concerning notice. In Rose, we held that all recipients entitled to receive the notice of default and election to sell under NRS 107.080(3) should be entitled to notice of the trustee sale under NRS 107.080(4).[1] As the majority noted, NRS 107.080(3) no longer includes successors in interest in the list of those entitled to receive the notice of default and election to sell. Adhering to our reasoning in Rose, because the successor in interest is not entitled to receive this notice, I believe they are not entitled to receive notice of the trustee sale. As a result, I respectfully dissent.



_____, J.
Parraguirre

[1]Rose v. First Federal Savings & Loan, 105 Nev. 454, 457, 777 P.2d 1318, 1319-20 (1989).