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Horizons at Seven Hills v. Ikon Holdings, 132 Nev. Adv. Op. 35 (Apr. 28, 2016) (en banc)¹

PROPERTY LAW: HOA LIENS, SUPERPRIORITY

Summary

The Court determined that (1) a superpriority lien for common expense assessments pursuant to NRS 116.3116(2)² does not include collection fees and foreclosure costs incurred by a homeowners' association; and (2) a superpriority lien in a homeowners association's covenants, conditions, and restrictions is superseded by NRS 116.3116(2).³

Background

In 2009, a homeowner in Horizons at Seven Hills Ranch became delinquent on his mortgage payments. His lender, OneWest Bank FSB, recorded a default notice that same month. In August 2009, Horizons recorded a default notice against the homeowner for failure to pay association assessments and other fees. OneWest foreclosed on the property and held a foreclosure auction before Horizons could foreclose on the property. Scott Ludwig purchased the property at auction and transferred it to Ikon Holdings via quitclaim deed later that year.

Horizon informed Ikon of its unextinguished superpriority lien on the property, and demanded \$6,000 to extinguish it. That amount included unpaid assessments and about \$2,700 in collection fees and foreclosure costs. Ikon acknowledged Horizons' superpriority lien, but disagreed about the amount of unpaid assessments and the collection fees and foreclosure costs Horizons sought.

The parties could not settle their dispute, so Ikon filed a declaratory relief action. Ikon asked the court to rule that the superpriority portion of a homeowners association's lien consists of nine months' worth of assessments and does not include collection fees and foreclosure costs under NRS 116.3116(2).⁴ Horizons' opposition argued that the superpriority provision in NRS 116.3116(2)⁵ includes nine months of assessments and collection fees and foreclosure costs.

The district court granted partial declaratory relief in Ikon's favor. It reasoned Horizons' covenants, conditions, and restrictions ("CC&Rs") limited its superpriority lien to six months of assessments. It found this amount did not offend the superpriority provision under NRS 116.3116(2),⁶ which provides for nine months of assessments. On appeal, Horizons argued Ikon owed it nine months' worth of unpaid assessments, as well as collection fees and foreclosure costs. Ikon conceded it owed Horizons six months of unpaid homeowners association's dues, but argued Horizons was not entitled to another three months of dues, as well as collection fees and foreclosure costs.

¹ By Lena Rieke.

² NEV. REV. STAT. § 116.3116(2) (2013).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Discussion

The superpriority lien under NRS 116.3116(2) does not include fees or collection costs related to foreclosure

Horizons argued that canons of statutory interpretation dictate that the superpriority lien includes fees and collection costs, and that NRS 116.3116(2)⁷ should be read in conjunction with NAC 116.470.⁸ Ikon contended these fees and foreclosure costs cannot be collected under NRS 116.3116(2).⁹ The Court considered NRS 116.3116(2),¹⁰ NAC 116.470,¹¹ legislative history, and advisory opinions before determining that NRS 116.3116(2)¹² does not include an additional amount to collect fees and foreclosure costs which a homeowners association incurs preceding a foreclosure sale, but rather that the statute is limited to nine months of common expense assessments.

NRS 116.3116

NRS 116.3116(1)¹³ establishes an HOA lien on a homeowner's property for unpaid assessments, construction penalties, and fines against the unit, and NRS 116.3116(2)¹⁴ establishes the priority of that lien. NRS 116.3116(2)¹⁵ further splits that lien into a superpriority portion and a subpriority portion.¹⁶ The superpriority portion includes, among other things, the last nine months of unpaid HOA dues.¹⁷

The Court was not persuaded by Horizons' argument that NRS 116.3116(2) provided a look-back provision designed to place the HOA in the same position it would have been over the previous nine months if the homeowner had not defaulted. It additionally did not find the holding in a similar Connecticut case persuasive in this instance.¹⁸ First, NRS 116.3116(2) does not mention collection fees and foreclosure costs, and specifically provides that the superpriority lien is limited to the common expense assessments. Second, the Legislature defined the scope of the superpriority lien and did not provide for the recovery of collection fees and costs under the different provisions of the statutory scheme. Third, the HOA in the Connecticut case brought an action to judicially foreclose on the property, which Horizons did not do here.

NAC 116.470

⁷ *Id.*

⁸ NEV. ADMIN. CODE § 116.470 (2015).

⁹ NEV. REV. STAT. § 116.3116(2).

¹⁰ *Id.*

¹¹ NEV. ADMIN. CODE § 116.470.

¹² NEV. REV. STAT. § 116.3116(2).

¹³ NEV. REV. STAT. § 116.3116(1).

¹⁴ NEV. REV. STAT. § 116.3116(2).

¹⁵ *Id.*

¹⁶ *SFR Invs. Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 411 (2014).

¹⁷ *Id.*

¹⁸ *See Hudson House Condominium Ass'n, Inc. v. Brooks*, 611 A.2d 862 (Conn. 1992).

Horizons argued that if NRS 116.3116(2) was interpreted not to include collection fees and foreclosure costs, it would contradict NAC 116.470, which provides a cap on collectible fees and costs that applies in most foreclosure sales. The Court found these statutes reconcilable. Interpreting the superpriority lien to exclude fees and foreclosure costs did not mean fees and costs could not be incurred up to the cap provided in NAC 116.470. Additionally, NAC 116.470 simply provides a cap for fees and costs, and does not have a bearing on lien priority.

Legislative History

The Legislature did not intend for collection fees and foreclosure costs incurred to be included in the superpriority lien under NRS 116.3116(2). The Legislature had the opportunity to allow for these fees to be recovered when it amended NRS Chapter 116 in 2009. But the Legislature did not add language to NRS 116.3116(2) which would allow the fees and costs to become part of the HOA's lien and superpriority lien.

Advisory Opinions

Although Horizon contended the Court should give a Commission for Common Interest Communities advisory opinion deference, a Nevada Real Estate Division ("NRED") advisory opinion was actually persuasive in this case because NRED is charged with administering NRS Chapter 116.¹⁹ NRED analyzed the legislative history behind NRS 116.3116 and found the Legislature did not intend to make collection costs part of the superpriority lien. Thus, the HOA's lien does not include collection fees or foreclosure costs.

Horizon's CC&Rs are superseded by NRS 116.3116

NRS 116.1206(1) provides that any provision in a CC&R that violates the provisions of NRS Chapter 116 is superseded by NRS Chapter 116, regardless of whether the provision became effective before the Legislature enacted the pertinent provision of NRS Chapter 116.²⁰ Therefore, the Court found Horizons' CC&Rs are superseded by NRS 116.3116 because they violate that provision of the Chapter by (1) limiting the prioritized time period to six months when the statute provides for a nine month time limit and (2) including certain fees and costs as collectible when the statute does not. The district court erred when it limited the superpriority lien to six months of common expense assessments and included certain fees and costs as recoverable as part of the superpriority lien.

Conclusion

NRS 116.3116(2) does not include an additional amount for collecting fees and foreclosure costs that an HOA incurs preceding a foreclosure sale. The superpriority lien is limited to nine months of common expense assessments. Horizons' CC&Rs are superseded by NRS 116.3116(2) to the extent they create a superpriority lien that includes collecting fees and foreclosure costs, and which limits the time frame for common expense assessments to six months.

¹⁹ *SFR*, 130 Nev. Adv. Op. 75, 334 P.3d at 416; *see also* NEV. REV. STAT. § 116.615 (2013).

²⁰ *See* NEV. REV. STAT. § 116.1206(1) (2013).