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Summary of SFR Investments Pool 1, LLC v. U.S. Bank, 120 Nev. Adv. Op. 75

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PROPERTY LAW: HOA LIENS

Summary

The Court determined that (1) an HOA receives a true superpriority lien on a homeowner's property under NRS 116.3116 making an HOA lien, with limited exceptions, "prior to all other liens and encumbrances" on the property, including first deeds of trust recorded before the dues became delinquent; and (2) an HOA lien can be foreclosed on nonjudicially.

Background

In 2010, the HOA and U.S. Bank began nonjudicial foreclosure proceedings on a delinquent property. SFR Investments Pool 1 LLC (SFR) purchased the property from the HOA's trustee's sale in September of 2012. SFR filed an action to quiet title and enjoin US Bank's trustee sale on the property that was to take place in December 2012, maintaining that the HOA trustee's deed terminated U.S. Bank's deed. The district court granted U.S. Bank's motion to dismiss because the district court held an HOA must foreclose judicially. SFR appealed.

Discussion

A.

An HOA receives its right to a lien on a homeowners' property under NRS 116.3116(1). An HOA lien is elevated over all other liens by NRS 116.3116(2), except in three instances including when "(b) A first security interest on the unit [is] recorded before the date on which the assessment sought to be enforced became delinquent . . ." Thus, a first deed of trust generally has priority over an HOA lien. However, NRS 116.3116(2) further creates a partial exception to (2)(b)'s exception for first security interests. This partial exception states that "[t]he [HOA] lien is also prior to all security interests described in paragraph (b) to the extent of any [maintenance and nuisance-abatement] charges . . . and to the extent of the assessments for common expenses [i.e., HOA dues]" which would have been due during the nine months before an action was taken to enforce the lien.²

Accordingly, a HOA lien is split into two parts by NRS 116.3116(2) – a superpriority and a subpriority part. The superpriority aspect of an HOA lien consists of nine months of unpaid dues, maintenance, and nuisance charges, which is "prior to" first deeds of trust.³ The subpriority aspect consists of any other fees owed to the HOA, which is secondary to first deeds of trust.⁴

The Nevada Legislature adopted NRS 116.3116 largely based off of the Uniform Common Interest Ownership Act of 1982 (UCIOA). The purpose of adopting the UCIOA was

¹ By Amber Lilienthal.

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

³ *Id.*

⁴ *Id.*

“to make uniform the law with respect to [its] subject [matter] among states enacting it.”⁵ Though NRS 116.3116 largely follows the UCIOA, the Legislature created specific provisions (NRS 116.31162 through NRS 116.31168) governing HOA liens separate from the UCIOA.

Under NRS 116.31162 through NRS 116.31168, to foreclose on a property, an HOA must notify the owner of his or her delinquency and the HOA may record a notice of default and sell the property if the owner does not pay in 30 days. NRS 116.31168 differs from the UCIOA here because general third-party notice is not required, only specific timing and notice requirements are necessary. “The HOA must provide the homeowner notice of default and election to sell; it also must notify ‘[e]ach person who has requested notice pursuant to NRS 107.090 or 116.31168’ and ‘[a]ny holder of a recorded security interest encumbering the unit’s owner’s interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest.’”⁶

B.

U.S. Bank argued that “NRS 116.3116(2) merely create[d] a payment priority” between a HOA lien and a first deed of trust. Thus the dues, maintenance, and nuisance-abatement aspect of an HOA lien would not become a superpriority lien until after the beneficiary of the first deed of trust foreclosed, and the buyer would have to pay the HOA lien to receive clear, insurable title. However, if the superpriority aspect of an HOA lien is a true priority lien, then the HOA lien would be prior to the first deed of trust and it could be foreclosed resulting in termination of a first deed of trust.

U.S Bank argues that the HOA lien must only have a “payment priority” and not a true priority or else NRS 116.3116 would create an unprecedented split lien where the super priority aspect of an HOA lien (nine months of unpaid HOA dues, maintenance, and nuisance-abatement charges) has priority over a first deed of trust but the remaining subpriority aspect does not. The court, however, demonstrates this is exactly what NRS 116.3116 was intended to do. First, the statute does not contain the phrase “payment priorities” as it could have easily and instead states the “lien...is prior to”. Thus the text of NRS 116.3116 supports that it was intended to by a true priority lien. The UCIOA also sheds light by stating that the split lien was created to balance enforcing collection of unpaid HOA dues and the need to protect the security interest of lenders. The UCIOA also states that lenders would likely pay the dues owed to the HOA rather than letting the HOA foreclose on the property. Yet, if the superpriority aspect of an HOA lien only created a payment priority, then the UCIOA addressing lenders paying off the HOA’s superpriority aspect of the lien to prevent foreclosure would be unnecessary.

The superpriority aspect of NRS 116.3116(2) does not simply create a payment priority for delinquent payments but instead creates a true priority lien. The court then explains that the rationale behind is that “when a homeowner walks away from the property and the first deed of trust holder delays foreclosure, the HOA has to ‘either increase the assessment burden on the remaining unit/parcel owners or reduce the services the association’. To avoid having the community subsidize first security holders who delay foreclosure the superpriority lien was enacted.

Lastly, even though HOA liens are generally nominal compared to first deeds of trust, the inequity was of U.S. Banks own making because it could have paid off the HOA lien to avert

⁵ *Id.* at § 116.1109(2).

⁶ *Id.* at §§ 116.31163(1) – (2).

loss of its security or established an escrow for HOA assessments to avoid having to use its own funds to pay delinquent dues.

C.

NRS 116.075 allows an HOA to “foreclose its lien by sale,” which, under NRS 116.31162(1), includes an HOA foreclosing on a property with a nonjudicial sale.⁷ NRS 116.3116(1) and NRS 116.31162, taken together, allow an HOA to nonjudicially foreclose on the HOA’s entire lien, not only the subpriority aspect.

U.S. Bank maintained that the word “action” in the phrase “institution of an action to enforce the lien” in NRS 116.3116(2) means a civil action and a lawsuit.⁸ However, “action” does not exclude nonjudicial foreclosure proceedings because foreclosure proceedings can be instituted both judicially and nonjudicially.⁹ Should the Legislature have intended “action” to mean only civil action or judicial action, it would not have used the broader term “action.” Additionally, NRS 116.3116(2) does not make the superpriority aspect of an HOA lien dependent on if an action has occurred; an action is instead a way to measure the part of the lien that is a superpriority. The UCIOA also uses the phrase “institution of an action to enforce the lien” as a way to describe the superpriority lien, just like NRS 116.3116(2), and repeatedly references to judicial or nonjudicial foreclosures of HOA liens.¹⁰ Thus, the use of the word “action” in NRS 116.3116(2) does not mean only civil action, but also includes nonjudicial proceedings.¹¹

Further, the Nevada Legislature enacted NRS 116.31162 through NRS 116.31168 to address the aspects of the nonjudicial foreclosure process authorized by NRS 116.31162. This indicates the Legislature’s desire for HOA liens to have nonjudicial foreclosures.

U.S. Bank argued that judicial foreclosure is necessary to provide notice and opportunity to be heard, among other safeguards. However, “this argument assumes that requiring the superpriority piece of an HOA lien to be judicially foreclosed will actually afford such protections without need of further amendment to Chapter 116, and this is far from clear.” Allowing foreclosure of the subpriority aspect of an HOA lien would create the same issues “for homeowners and junior lienholders that are cited as policy reasons for requiring judicial foreclosure of the superpriority” aspect of an HOA lien. The Legislature did not explicitly state this distinction, and thus did not intend it.

The Legislature chooses the foreclosure methods for HOA liens, and the Legislature chose to allow nonjudicial foreclosure for HOA liens “subject to the special notice requirements and protections handcrafted by the Legislature in NRS 116.31162 through NRS 116.31168.” Judicial foreclosures would delay HOA funds to a common-interest community and would force those in the community to make up the dues deficiencies or abandon amenities and maintenance, thus lowering the value of their homes. It is not for the court to revise the foreclosure methods of NRS Chapter 116, but instead for the Legislature.

⁷ *Id.* at §§ 116.075, 116.31162(1).

⁸ *Id.* at § 116.3116(2).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

D.

The court then rejects U.S. Bank's further arguments that [1] the nonjudicial foreclosure in this case violated its due process rights and [2] that the mortgage savings clause in the CC&Rs subordinates the HOA's lien to the first deed of trust.

1.

The court found that U.S. Bank's argument that the statutory scheme that gives an HOA a superpriority lien that can be foreclosed nonjudicially offends due process is not valid by relying on precedent. The court then rejected U.S. Bank's assertion that the content of the notice it received was deficient by noting that SFR complied with all statutorily required notices under NRS 116.31162 through NRS 116.31168 and NRS 107.090 by incorporation, stated that the superpriority portion of the HOA lien was not paid prior to the foreclosure sale, and stated the specific lien amounts contrary to U.S. Bank's assertion.

2.

U.S. Bank further argued that the mortgage savings clause in the community the property was located subordinated the HOA's superpriority lien to the first deed of trust. However, the application of NRS 116.3116(2) is not affected by the mortgage savings clause because "provisions may not be varied by agreement, and rights conferred by it may not be waived . . . [e]xcept as expressly provided in" Chapter 116.¹² NRS 116.3116 does not expressly provide for a waiver of an HOA's superpriority lien.¹³ Therefore, the mortgage saving clause did not subordinate the HOA's lien to the first deed of trust.

Conclusion

An HOA has a true superpriority lien under NRS 116.3116(2) and nonjudicial foreclosure, permitted under Chapter 116, terminates first deeds of trust. Further, proper notices were sent and received in this case according to SFR's complaint. The Court reversed the district court's order of dismissal, vacated the order denying preliminary injunctive relief, and remanded the case for further proceedings.

¹² *Id.*

¹³ *See* 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 979 F. Supp. 2d 1142, 1153 (D. Nev. 2013).