6-28-2018

West Sunset 2050 Trust v. Nationstar Mortgage, L.L.C., 134 Nev. Adv. Op. 47 (Jun. 28, 2018)

Shaneka J. Malloyd
University of Nevada, Las Vegas -- William S. Boyd School of Law

West Sunset 2050 Trust v. Nationstar Mortgage, L.L.C., 134 Nev. Adv. Op. 47 (Jun. 28, 2018)[1]

CIVIL PROCEDURE: REAL ESTATE LAW; HOMEOWNERS ASSOCIATIONS

Summary

The Court found that a foreclosure sale is not invalid due to lack of notice where: (1) a homeowners association (HOA) fails to serve the Notice of Default (NOD) to the recorded beneficiary of the deed of trust and (2) that recorded beneficiary's successor in interest is unable to demonstrate how it was prejudiced or injured by the defective notice to their predecessor in interest. Further, a HOA does not lose standing to foreclose on a property when it enters into a factoring agreement that does not change the relationship between debtor and lender.

Background

A homeowner purchased 7255 W. Sunset Road, Unit 2015 (the Property) in 2005 with a $176,760 home loan from New Freedom Mortgage Corporation. New Freedom secured the loan and recorded a senior deed of trust. The deed of trust was later assigned to a company that merged with Bank of America. Then the deed of trust was reassigned to Nationstar Mortgage, LLC, the respondent. The Property is located in the Tuscano Homeowners Association (the HOA). The HOA's covenants, conditions, and restrictions gave the HOA authority to impose a lien on the property if the homeowner failed to pay monthly assessments. The homeowner failed to meet that condition. Subsequently, the HOA recorded a lien on the Property and a Notice of Default (NOD). The HOA mailed the NOD to New Freedom although at the time, Bank of America was the recorded beneficiary of the deed of trust.

The HOA sold its "interest in any and all [proceeds on past income] arising from or relating to the [Property's] Delinquent Assessment[]" to First 100, LLC. The HOA remained obligated under the contract to maintain attempts to collect past-due assessments and forward the payments to First 100. "On May 29, 2013, the HOA recorded a Notice of Foreclosure Sale" and mailed it to New Freedom, Bank of America, Nationstar, and others. As the assessments remained delinquent, the HOA sold the Property to West Sunset, the appellant, in a nonjudicial foreclosure sale for $7,800. West Sunset made a claim to quiet title against Nationstar, Bank of America, and others. Nationstar counterclaimed to quiet title. Both parties made motions for summary judgment and the district court granted Nationstar's motion. The court found that Nationstar's deed of trust survived the foreclosure sale because the HOA failed to provide notice of foreclosure to the beneficiary of the senior deed of trust. Thereafter, West Sunset appealed and argued that the district court erred.

Discussion

Notice and due process

Nationstar argued that the HOA failed to make statutorily mandated notice of the foreclosure sale. Nationstar argued that the foreclosure sale was invalid because the HOA failed to mail its predecessor in interest, Bank of America, the NOD. Nationstar had record notice of the NOD as the HOA properly recorded it.[2] Nationstar does not claim that it was injured or

[1] By Shaneka J. Malloyd.

[2] SFR Invs, Pool 1, LLC v. First Horizon Home Loans (SFR II), 134 Nev., Adv. Op. 4, 409 P.3d 891, 893−94 (Nev. 2018).

prejudiced by the HOA's failure to serve the NOD to Bank of America. Further, the evidence does not show that the HOA failed give "any foreclosures notices to the beneficiary of the senior deed of trust." The evidence shows that the HOA served notice to the Nationstar, thus they were provided notice as the beneficiary of the senior deed of trust. Moreover, Nationstar was unable to show how it was prejudiced by the HOA's failure to serve the NOD to Bank of America. Accordingly, the district court erred in finding that Nationstar's deed of trust remained after the foreclosure sale due to lack of notice.

The Edelstein[3] issue

Nationstar also argued that the foreclosure was invalid because the HOA did not have standing to foreclose on the property after it entered into a factoring agreement selling its interest in receiving the past-due assessments to First 100. This argument relies on *Edelstein*[4] where the Court found that a foreclosing entity must simultaneously hold the promissory note and the deed of trust in order to have standing to foreclose.

While the Court agrees that a HOA's superpriority lien is comparable to a deed of trust, the Court distinguishes this case from *Edelstein* by concluding that the factoring agreement is not analogous to the transfer of a promissory note like in *Edelstein* because the HOA's factoring agreement did not alter the relationship between debtor and lender. The homeowner continued to be indebted to the HOA to pay the delinquent fees and the HOA continued its exclusive right to collect. The factoring agreement simply instructed the HOA to pass along any collected payments to First 100.

Therefore, the factoring agreement here did not strip the HOA of its standing to foreclose on the property. As a matter of policy and practicality, the Court concludes that HOAs should not be discouraged from executing factoring agreements because it provides them with financial resources to maintain their communities.

Conclusion

The Court reversed the district court's entry of summary judgment in favor of Nationstar and remanded the matter back to the district court. The Court found that the district court erred because Nationstar's rights were not prejudiced when the HOA failed to serve Bank of America the NOD; therefore, statutorily mandated notice obligations were met. Further, *Edelstein* does not apply to the HOA factoring agreement in this case.

[3] Edelstein v. Bank of N.Y. Mellon, 128 Nev. 505, 286 P.3d 249 (Nev. 2012) (a party cannot foreclose on a property if it does not concurrently hold a promissory note and a lien on the property securing that note).
[4] *Id*. at 252.