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Bank of America, N.A. v. SFR Inv.'s Pool 1, LLC, 134 Nev. Adv. Op. 72 (Sept. 13, 2018) (en banc)

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Bank of America, N.A. v. SFR Inv.'s Pool 1, LLC, 134 Nev. Adv. Op. 72 (Sept. 13, 2018) (en banc)[1]

PROPERTY LAW: SUPERPRIORITY

Summary

The Court determined that because the holder of the first deed of trust provided valid tender of the superpriority portion of an HOA's lien, the HOA's foreclosure on the lien was void as to the superpriority portion. Further, an HOA has no right to convey full title to the property because the holder's first deed of trust remains after foreclosure. Thus, when the holder unconditionally tenders the superiority amount due, the buyer at an HOA lien foreclosure sale takes the property subject to the deed of trust.

Background

I.

In 2012, the original owner of the disputed property failed to make his HOA payments. In turn, the HOA began foreclosure proceedings. After receiving the HOA's notice of default, Bank of America, the holder of the first deed of trust on the property, contacted the HOA and offered to pay the $720 superpriority amount in full. Bank of America's letter, included with the tender, stated that by accepting the offer, the HOA agreed that Bank of America no longer had any financial obligation toward the HOA. The HOA rejected the offer and sold the property at foreclosure to respondent. After the sale, both parties entered suit claiming title to the property. The district court granted SFR's motion for summary judgment and denied Bank of America's cross motion for summary judgment. After Bank of America timely appealed, the court of appeals reversed and remanded. This Court granted SFR's petition for review of the decision under NRAP 402B(a).

Discussion

II.

Bank of America argues it tendered the right amount to meet the superpriority portion of the HOA lien and was not obligated to act further.

A.

While a valid tender of payment can discharge a lien,[2] the HOA rejected Bank of America's tender because it did not meet both the superpriority and subpriority portions of the lien. A plain reading of NRS § 116.3116[3], detailing the share of the lien with superpriority status, shows that the superpriority share of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments. Further, SFR waived its argument that Bank of America's tender was not sufficient since it did not include attorney's fees and collection costs because SFR failed to argue it in district court or on appeal. Thus, because the bank tendered nine months' worth

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[1] By Esteban Hernández.

[2] Power Transmission Equip. Corp. v. Beloit Corp., 201 N.W.2d 13, 16 (Wis. 1972).

[3] NEV. REV. STAT. § 116.3116 (2017).

of assessment fees totaling $720 to the HOA, and the HOA did not argue the property had any maintenance or nuisance abatement charges, Bank of America correctly tendered the amount necessary to meet the superpriority share of the lien on the property.

B.

The district court agreed with SFR's argument that Bank of America's tender was not sufficient because it included an impermissible condition that accepting the tender would satisfy the superpriority share of the lien and reestablish the bank's interest in the property. The district court justified its conclusion by indicating Bank of America's tender required the HOA to possibly accept a lower amount than it was due under NRS § 116.3116 because the full extent of the superpriority share of the HOA's lien was not clear at the time of the tender.

However, the Court held that the bank had a legal right to insist on its condition.[4] A plain reading of NRS § 116.3116 shows that tender by Bank of America, the first deed of trust holder, was sufficient to meet the superpriority share of the lien. Thus, this issue was clear, and Bank of America's tender did not have an impermissible condition.

C.

SFR unsuccessfully argues that the tender is not valid because the HOA's rejection was based on the good-faith belief that the bank had to tender the whole amount of the lien. Bank of America responds that SFR's argument is unsubstantiated because the HOA never offered why it rejected the bank's tender. Bank of America contacted the HOA to determine the property's assessment fees so it could pay the superiority share of the lien. After the HOA demanded Bank of America pay the entire HOA lien to stop foreclosure proceedings, the bank tendered nine months of the property's assessment fees. Without explanation, the HOA rejected Bank of America's tender and pursued foreclosure proceedings.

The Court found that SFR did not argue its good-faith rejection argument in district court[5] and supported its argument with unpersuasive authorities. Thus, the Court rejected SFR's claim that it rejected the bank's tender in good-faith, thereby allowing the HOA to pursue the sale and eliminate Bank of America's first deed of trust.

D.

1.

Next, SFR claims Bank of America had to record its tender pursuant to NRS § 111.315[6] or NRS § 106.220.[7] However, the Court reasoned that NRS § 111.315 does not apply to the bank's tender because, consistent with the statute's requirements, the superpriority share of the HOA's lien did not create, alienate, assign, or surrender an interest in land. Instead, Bank of America's tender preserved a pre-existing interest, something that does not need recording.[8] Thus, the bank was not required by NRS § 111.315 to record its tender.

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[4] Heath v. L.E. Schwartz & Sons, Inc., 416 S.E.2d 113, 114-15 (Ga. Ct. App. 1992).

[5] *But see* Schuck v. Signature Flight Support of Nev., Inc., 126 Nev. 434, 436, 245 P.3d 542, 544 (Nev. 2010).

[6] NEV. REV. STAT. § 111.315 (2017).

[7] NEV. REV. STAT. § 106.220 (2017).

[8] *See* Baxter Dunaway, Interests and Conveyances Outside Acts—Recordable Interests, 4 L. of Distressed Real Est. § 40:8 (2018).

Further, the Court held NRS § 106.220 does not apply because Bank of America's tender did not change the priority in the property's interests as a result of a written legal document, but by operation of law.[9] NRS Chapter 116's statutory scheme allows banks to tender the amount needed to meet the superpriority share of the HOA lien and maintain its superior interest as the first deed of trust holder.[10] Because the lien was not discharged by way of an instrument, which would fall under the purview of NRS § 106.220, NRS § 106.220 does not apply.

2.

SFR insinuates that Bank of America did not keep its tender good because it did not take further action such as paying the money into court. Bank of America responds that NRS Chapter 116 does not specify further action be taken beyond tender of the superpriority share of the lien. The Court found there is no need to pay the money into court to keep a rejected tender good because the HOA's lien is a statutory lien governed by NRS Chapter 116.[11] There are no statutes in NRS Chapter 116 that suggest that a party tendering a superpriority share of an HOA lien is required to pay the share into court. Imposing this rule would require the tendering party to pursue litigation to achieve discharge of the superpriority share of the lien. This contradicts the purpose of the HOA split-lien scheme: prompt and efficient payment of HOA assessment fees on defaulted properties.[12] Therefore, a party is not obligated to pay the tendered amount into court once said party has tendered the superpriority share of an HOA lien to maintain its senior interest as the first deed of trust holder.

E.

SFR argues that its status as a bonafide purchaser gives it title to the property over Bank of America's interest even if the bank's tender discharged the superpriority portion of the HOA lien. The Court reasoned that SFR's status as a bonafide purchaser was irrelevant because the HOA had no power to convey an interest in land securing a note or other obligation that was not in default.[13] When a party provides valid tender of the superpriority portion of an HOA lien, the lien is no longer in default.[14] Accordingly, a foreclosure sale on a mortgage lien is void as to the superpriority share. Because Bank of America provided valid tender of the superpriority share of the HOA's lien, the HOA's foreclosure on the lien was void as to the superpriority portion. Consequently, the HOA had no right to convey full title to the property because the bank's first deed of trust remained intact after the foreclosure. Thus, the Court held SFR purchased the property subject to Bank of America's deed of trust.

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[9] *See* § 116.3116; 53 C.J.S. Liens § 14 (2017).

[10] § 116.3116(1)-(3); *see also* Unif. Common Interest Ownership Act (UCIOA) § 3-116 cmt. (amended 2008), 7 pt. 2 U.L.A. 124 (2009).

[11] *See* Phifer v. Gulf Oil Corp., 401 S.W.2d 782, 785 (Tenn. 1966).

[12] UCIOA § 3-116 cmt. (amended 2008), 7 pt. 2 U.L.A. 124 (2009).

[13] *See* Baxter Dunaway, *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. §17:16 (2018); *cf.* Deep v. Rose, 364 S.E.2d 228 (Va. 1988).

[14] *See* 1 Grant S. Nelson, Dale A. Whitman, Ann M Burkhart & Ft. Wilson Freyermuth, Real Estate Finance Law § 7:21 (6th ed. 2014).

Conclusion

The Court held SFR did not acquire title to the property interest because Bank of America provided valid tender of the superpriority share of the HOA's lien thereby voiding the HOA's foreclosure sale on the lien. The Court reversed the district court's grant of summary judgment to SFR and remanded for further proceedings consistent with this opinion.