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U.S. Bank Nat'l Ass'n ND vs. Resources Grp., LLC, 135 Nev. Adv. Op. 26 (July 3, 2019)[1]

CONSTITUTIONAL LAW: NOTICE REQUIREMENTS

Summary

The Court determined that (1) previous case law and the NRS require an HOA that is seeking to foreclose a superpriority lien to send the holder of a recorded first deed of trust a notice of default and notice of sale, even when they have not been formally requested.[2] Additionally, they held that (2) the district court would have to decide questions of fact to determine whether Resources Group was a bona fide purchaser.

Background

A homeowner/borrower defaulted on his Home Owner Association ("HOA") dues. As a result, the HOA initiated lien foreclosure proceedings under NRS Chapter 116.[3] Alessi and Koenig, agents for the HOA, gave the homeowner proper notice of default and notice of sale, however, they failed to provide the same notice to the U.S. Bank. The notice of default was sent to an unaffiliated entity due to a clerical error and, though records suggest the HOA agents mailed the notice of sale to the correct address, the U.S. Bank's files do not show that it received that document either. The HOA agents set the lien foreclosure sale to occur thirty-three days after it recorded the notice of sale. When no one attended the sale, the agents continued it for the duration of sixty days. When neither the homeowner nor U.S. Bank attended the rescheduled sale, the property was sold to Resources Group, LLC's principal, Iyad Eddie Haddad, for $5,331. This was approximated to be between ten and fifteen percent of the property's fair market value. Mr. Haddad initially took the title in the name of a trust he had created but later transferred the property to Resources Group, LLC.

Once the homeowner passed away, his estate defaulted on a loan that the U.S. Bank deed of trust secured. The U.S. bank then commenced judicial foreclosure proceedings against the estate several months after the HOA foreclosure sale. Upon discovery of the HOA sale, the bank added Resources Group as a defendant. Resources Group, in response, counterclaimed for a judgment quieting title in itself reasoning that, in addition to the attempted notice, Mrs. Haddad was a bona fide purchaser of the property. The district court held a bench trial and ruled in favor of Resources Group reasoning that U.S. Bank did not have an entitlement to notice because it did not request it. Additionally, they found that the HOA agents gave adequate notice despite it not reaching the banking institution.

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[1] By Christopher Gonzalez.

[2] *See* Nev. Rev. Stat. § 107.090(3)(b) (2015); Nev. Rev. Stat. § 116.3116(2)(b) (2015); Nev. Rev. Stat. § 116.31162(1)(c) (2015); Nev. Rev. Stat. § 116.311635 (2015). *See also* SFR Invs. Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 745, 334 P.3d 408, 411 (2014).

[3] It is noted that the NRS 116 references are the pre-2015 version of those statutes, which are applicable to this specific dispute.

Discussion

U.S. Bank urged the Court to invalidate the HOA foreclosure sale because the agents that conducted it did not provide notice as required under NRS 116.31168 and NRS 107.090. In addition, they argue that the lack of notice renders the sale void or voidable.[4] The Court reviewed the district court's legal conclusions de novo but gave deference to the factual findings provided that they were supported by substantial evidence or not clearly erroneous.

This Court referenced recent case law that was decided after the district court's decision and the NRS to restate that the statutory protections that applies to home owners also extends to a first deed of trust holder such as the U.S. Bank.[5] This provides protection for those who fail to request the notices of default and of sale from the HOA organization much like the appealing party in this case. Therefore, this Court determined that the district court erred when it ruled that U.S Bank was not entitled to notice of default based off the reasoning that it had not requested it.

The court considered how recent case law failed to address instances where notice was attempted and had failed. Without a formal notice, a foreclosing HOA is presented with the difficulty of determining which address they should send the notice to. In this case, the U.S. Bank did not file a request for notice, however, the publicly recorded deed of trust stated that any required notice "shall be given by delivering it or mailing it by first class mail to the appropriate party's address on page 1." Despite being given instruction on the deed of trust, the HOA agents did not follow them and mailed the notice of default to a "return to" name appearing on the same deed of trust. The U.S. Bank provided evidence that they were not affiliated with the "return to" entity nor were the notice of default documents subsequently forwarded to them. As a result, the court found that the District Court "clearly erred" when it determined that the U.S. Bank was given adequate notice of default.

This finding was supported by the fact that the HOA agents had a title report that identified U.S. Bank as the deed of trust beneficiary and they later mailed the notice of sale to the address listed for it on page one of the deed of the trust. In turn, the court found that the failure to mail the notice of default at the address given was in violation of NRS. 116.31168 and NRS 107.090(3).[6] The court distinguished this from *West Sunset 2050 Trust* and *Schleining* by finding that, despite statutory notice deficiencies, the parties complaining about prejudice and the defective notice IN those cases had actual notice of the foreclosure proceedings before the sale occurred. [7] Without receiving notice from other source, failing to mail the required notice of default deprives the property owner of the statutory grace period allotted to cure, compromise, or contest the default. This court referenced testimony by a U.S. Bank's collection officer that stated the loan secured by the deed of trust included a future advances clause that, in light of a notice of default, it would have paid off the lien and charged the borrower. Without such action from the bank, the court suggested that the testimony, if credited, establishes the lack of notice and prejudice needed to

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[4] *See* Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963); Title Insurance & Trust Co. v. Chicago Title Insurance Co., 97 Nev. 523, 634 P.2d 1216 (1981).
[5] *See supra* note 2.
[6] *Id.*
[7] *See* Schleining v. Cap One, Inc., 326 P.3d 4, 8—9 (2014); West Sunset 2050 Trust v. Nationstar Mortgage, 420 P.3d 1032, 1035 (2018).

void the sale. The Court stated that no finding on actual notice or prejudice was made because of the erroneous finding that the statutory notice of default was either unnecessary or acceptable.

The Court restates that the HOA agent's actions did not comply with the statutory requirement that it was to serve the U.S. Bank with notice of default, and U.S. bank may or may not have received the notice of sale. This Court dictates the district court to find whether the HOA agents complied with NRS 116.31168 and NRS. 107.090(3) to determine if U.S. Bank did not receive timey notice by alternative means and suffered prejudice as a result. If so, the district court should consider whether, under NRS 107.080(2011), it should find the property sale void to protect the interests of U.S. Bank.[8] The voiding of the sale would overcome a competing title even if it was a bona fide purchaser for value.

The Court expresses that, even if the sale was not void, it was voidable. Due to the low sale price, noticed deficiencies, and other irregularities that establish that the transaction was affected by some element of fraud, unfairness, or oppression.[9]These claims were given little evaluation because the district court's erroneous determination on the statutorily complaint notice issue. However, the Court states that the irregularities that arose out of this claim present a classic rise for equitable relief under *Shadow Canyon*, *Shadow Wood*, and *Golden*.[10] In addition, this oversight led to the lack of consideration of whether Resources Group's principal, Haddad, knew or should have known about the defective notice. This, taken in conjunction with his testimony should have warranted more scrutiny by the courts in light of the potential for fraudulent activity. Thus, the Court vacated the district court's findings that Resources Group occupied bona fide purchaser status.

Conclusion

Allowing the HOA's lien foreclosure sale to stand would violate the statutory requirements to provide timely and adequate notice of foreclosure to the holder of a recorded first deed of trust. Additionally, this misapprehension affected the decision on whether Resources Group was a BFP because it made it unnecessary to consider if their principal knew about the sale irregularities. The Court reversed the ruling of the district court, vacated the partial judgement in favor of the Resources Group that it was a bona fide purchaser, and remanded the case for further proceedings.

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[8] *See* Nev. Rev. Stat. § 107.080 (2011).
[9] *See Golden*, 387 P.2d 989, 995 (1963).
[10] See Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 405 P.3d 641, 646 (2017); *Shadow* Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bankcorp, Inc., 366 P.3d 1105, 1110 (2016); *Golden*, at 387 P.2d 99, 995 (1963).