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Winter 1-2020

### Benko v. Quality Loan Serv. Corp. 135 Nev. Adv. Op. 64 (Dec. 26, 2019)

Elizabeth Davenport

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## NONJUDICIAL FORECLOSURE: OWNERSHIP & LICENSING

### **Summary**

The Court affirmed the district court's order granting the motion to dismiss and determined that deed of trust trustees engaged in nonjudicial foreclosure would not be required to be licensed. The Court settled the conflicting provisions of NRS 107 governing the nonjudicial foreclosure process and NRS 649 governing agencies engaged in debt collection in Nevada by determining the comprehensive and specific scheme of NRS 107 for deed of trust trustees exercised authority over the generalized nature of NRS 649 governing debt collecting agency licensing requirements for nonjudicial foreclosures.<sup>2</sup> Therefore, under NRS 107 deed of trust trustees are not required to be licensed for nonjudicial foreclosures.

### **Background**

Jeffrey Benko ("Benko"), along with eighteen other individuals, collectively filed a putative class action against Quality Loan Service Corporation and others (collectively "respondents"), for alleged claims of statutory consumer fraud based on violations of NRS 649.075 and 649.171, the applicable statutes governing agencies engaged in debt collection in Nevada.<sup>3</sup> Benko claimed that respondents essentially acted as collection agencies when pursuing payments for nonjudicial foreclosures, and therefore must be licensed under NRS 649.075 and 649.171.<sup>4</sup> Respondents filed a motion to dismiss, claiming they were not required to be licensed, since this was not required for trust trustees under NRS 107 between 2008 and 2011 (the time the disputed actions took place).<sup>5</sup>

The district court dismissed Benko's class action complaint, in favor of respondents because the court determined that NRS 107's plain language shows governance over deed of trust trustee nonjudicial foreclosures, permitting the respondent trustees to conduct debt collection activities through nonjudicial foreclosure without a license. The district court further determined that NRS 649 was intended to exclude deed of trust trustees engaged in nonjudicial foreclosure from the licensing requirement because enforcement of a security interest was not considered conducting business and therefore did not require licensing.

Benko appealed the dismissal, claiming respondents' activities should be governed by NRS 649 and respondents should be required to be licensed for their activities.

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<sup>1</sup> By Elizabeth Davenport

<sup>2</sup> NEV. REV. STAT. § 107 (1927), NEV. REV. STAT. § 649 (1931).

<sup>3</sup> NEV. REV. STAT. § 649.075 (1931), NEV. REV. STAT. § 649.171 (2005).

<sup>4</sup> *Id.*

<sup>5</sup> NEV. REV. STAT. § 107.028 (2011) (In 2011 the Nevada legislature clarified whether deed of trust trustees must be licensed under NRS 649 by enacting NRS 107.028 enumerating who may act as a trustee under a deed of trust, which includes among many other enumerated persons, licensed debt collectors under NRS 649).

## Discussion

The Court reviewed the order granting NRCP 12(b)(5) motion to dismiss, reviewing all legal conclusions and statutory constructions de novo, and recognizing all factual allegations as true, with inferences in the favor of the complainant.<sup>6</sup>

The issue here is whether Benko raised a viable cause of action in claiming respondents are required to be licensed under NRS 649 to conduct nonjudicial foreclosures under NRS 107. First, the Court addressed whether NRS 107's comprehensive scheme demonstrates the legislature intended deed of trust trustees to be exempted from NRS 649. A recent Supreme Court case *Obduskey v. McCarthy & Holthus LLP* determined that foreclosure is considered a method of debt collection under the federal Fair Debt Collection Practices Act (FDCPA).<sup>7</sup> NRS 649 defines debt collection similarly to the federal FDCPA, and therefore the Court concluded, in light of *Obduskey* that the district court erred in concluding nonjudicial foreclosures are not considered debt collection.<sup>8</sup>

However, because when two statutes conflict courts are permitted to look beyond statutes themselves and read the statutes in a way that harmonizes and reconciles the two, the Court next considered the comprehensiveness of NRS 107 that specifically governs nonjudicial foreclosure in Nevada to determine whether the respondents required a license.<sup>9</sup> Under NRS 107, Nevada legislature created a comprehensive statutory scheme to govern the trustee's role in nonjudicial foreclosure and when a borrower defaults, the trustee may pursue nonjudicial foreclosure pursuant to the procedures in NRS 107.<sup>10</sup> Although NRS 649 empowers regulation of collection agencies in general, because a specific statute controls over a general statute, the Court determined that the specific nature of NRS 107 identifying duties of trustees in nonjudicial foreclosure therefore governs trustee nonjudicial foreclosure licensing requirements and thus trustees are not required to obtain licensing for nonjudicial foreclosure in Nevada pursuant to NRS 107.<sup>11</sup> The legislature intended NRS 107 to exempt deed of trust trustees as debt collectors so long as they act within the bounds of NRS 107.<sup>12</sup>

Second, the Court addressed the district court's order granting the motion to dismiss for failure to state a claim. The Court determined that Benko's allegations against respondents were all within the scope of allowed actions under NRS 107, and therefore the respondents correctly

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<sup>6</sup> FED. R. CIV. P. 12(b)(5); *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008).

<sup>7</sup> Fair Debt Collection Practices Act of 1968 § 1692, 15 U.S.C. § 1692 (2012); *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1036–38, 203 L. Ed. 2d 390 (2019).

<sup>8</sup> *Obduskey* 139 S. Ct. at 1036–38.

<sup>9</sup> NEV. REV. STAT. § 107 (1927); *Westpark Owner's Ass'n v. Eight Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3e 421, 427 (2007); *State, Dep't of Bus. & Indus., Fin. Insts, Div. v. Nev. Ass'n Servs., Inc.*, 128 Nev. 362, 368, 294 P.3d 1223, 1227 (2012).

<sup>10</sup> NEV. REV. STAT. § 107.020 (1927), NEV. REV. STAT. § 107.028 (2011), NEV. REV. STAT. § 107.080 (1927); *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 513, 268 P.3d 249, 254–55 (2012).

<sup>11</sup> NEV. REV. STAT. § 107 (1927), NEV. REV. STAT. § 649 (2017); *State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 129 Nev. 775, 778, 312 P.3d 475, 478 (2013).

<sup>12</sup> NEV. REV. STAT. 107.080 (1927); *Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 203 (2005).

conducted their trustee nonjudicial foreclosure actions; Benko had not pleaded a cognizable cause of action.

### **Conclusion**

The Court held that Nevada's comprehensive statutory scheme under NRS 107 specifically governs actions for deed of trust trustee nonjudicial foreclosure, and therefore such actions are not governed by the more general NRS 649, which would otherwise govern debt collection agencies and their licensing requirements. Therefore, respondents were not required to be licensed under NRS 649. Finally, because respondents' actions were all actions allowed under NRS 107, Benko had not pleaded a cognizable cause of action and the Court affirmed the district court's order granting the motion to dismiss for failure to state a claim.