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### **U.S. Bank, N.A. v. Thunder Properties, Inc., 138 Nev. Adv. Op. 3 (Feb. 3, 2022)**

Kim Strauss

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*U.S. Bank, N.A. v. Thunder Properties, Inc.*, 138 Nev. Adv. Op. 3 (Feb. 3, 2022)<sup>1</sup>

## **NO STATUTE OF LIMITATIONS EXEMPTION FOR DECLARATORY RELIEF UNDER *CITY OF FERNLEY***

### **Summary**

The Nevada Supreme Court received certified questions from the Ninth Circuit Court of Appeals under Rule 5 of the Nevada Rules of Appellate Procedure. The questions that the Ninth Circuit certified to the Nevada Supreme Court were: (1) whether the Nevada Supreme Court's holding in *City of Fernley v. State, Department of Taxation*<sup>2</sup> exempts declaratory relief actions from statutes of limitations; and if not, (2) which period of limitation would apply to a claim brought by a lienholder seeking a declaratory judgment that the lien was not extinguished by a subsequent foreclosure on the property, and (3) what triggers the running of the limitations period for such a claim?

The Nevada Supreme Court held that its previous holding in *City of Fernley* did not categorically exempt declaratory relief actions from statutes of limitations periods. Next, the Court held that an action brought to determine the validity of a lien under NRS 40.010 was subject to the four-year catch-all statute of limitations under NRS 11.220. Finally, the Court held that a foreclosure sale does not necessarily trigger the four-year statute of limitations in such an action but rather begins to run when the titleholder affirmatively repudiates the lien.

### **Background**

The appellant, U.S. Bank, N.A., held a deed of trust on a residential real property. In 2011, the HOA foreclosed the due to unpaid HOA assessments, and the bank did not challenge the foreclosure sale at the time. Subsequently, the property was transferred to the respondent, Thunder Properties, Inc. In 2016, the bank filed suit seeking to quiet title on the property as well as declaratory relief determining that the bank's interest in the property was not extinguished by the foreclosure sale. Respondent argued that the foreclosure sale triggered the running of the statute of limitations and because of that, the bank's suit was time-barred and should be dismissed.

The federal district court dismissed the action as time-barred, and the Ninth Circuit certified the above-referenced three questions to the Nevada Supreme Court.

### **Discussion**

*City of Fernley does not hold that declaratory relief actions are categorically exempt from statutes of limitations*

The court first discussed the issue of whether *City of Fernley* created a blanket rule exempting claims for prospective relief exempt from statutes of limitations. The Court highlighted the different application of limitations statutes between retrospective relief and

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<sup>1</sup> By Kim Strauss.

<sup>2</sup> *City of Fernley v. State, Department of Taxation*, 132 Nev. 32, 366 P.3d 699 (2016).

prospective relief. The Court also stated that the constitutional supremacy doctrine precludes a statute of limitations from barring challenge to an unconstitutional statutory provision because a party has the right to protect themselves from future violations of their constitutional rights. In doing so, the Court clarified that *City of Fernley* provides that the failure to file a claim within the statute of limitations period does not bar all relief. However, *City of Fernley* did not create a categorical exemption from statutes of limitation for declaratory relief.

Conversely, the Court stated that absent an ongoing violation of a party's constitutional rights, a declaratory relief action cannot circumvent the statute of limitations. Rather, if a legal remedy would be time-barred under the same substantive claim as an action for declaratory relief, such declaratory relief would also be time-barred. Thus, for the first certified question, the Court held that actions for declaratory relief are not exempt from statutes of limitation when there is not an ongoing violation of a party's constitutional rights.

*This is a quiet title action under NRS 40.010*

Next, the Court considered which statute of limitations would apply to the case at hand. The Court highlighted the fact that when determining which statute of limitations to apply to declaratory relief, courts consider the substantive claim on which the relief is based. Both parties agreed that respondent's property title was not in dispute, but rather the parties disputed the validity of the bank's lien on that title. The Court determined that the bank sought to quiet title and determine that its lien had not been extinguished. After considering and rejecting both parties' arguments asserting analogous limitations periods, the Court held that the NRS 11.220 four-year catch-all statute of limitations applied to the bank's claim for declaratory relief.

*The four-year catch-all statute of limitations applies*

Finally, the Court considered what would trigger the running of the four-year statute of limitations in such a case. A recent ruling in *Berberich v. Bank of America, N.A.*<sup>3</sup> provided clarification on this matter. In *Berberich*, a plaintiff bought property at a foreclosure sale and six years later sought to quiet title in himself by way of judicial determination that the foreclosure sale extinguished the lender's original deed of trust. In *Berberich*, the Nevada Supreme Court held mere notice of an adverse claim is not enough to trigger the running of the statute of limitations. Rather, the statute of limitations begins to run when the property owner has notice of disturbed possession. The Court noted that while *Berberich* was not controlling in this case, it was highly instructive.

*The four-year limitations period is not triggered until the titleholder repudiates the lien*

In this case, the Court held that the statute of limitations does not begin to run against a lienholder until it has something analogous to a notice of disturbed possession, such as a repudiation of the lien. In this case, the foreclosure sale, by itself, was not sufficient to trigger the running of the statute of limitations because a foreclosure sale may or may not extinguish a bank's deed of trust. The Court likened the disclosure sale to notice of an adverse claim rather

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<sup>3</sup> *Berberich v. Bank of America, N.A.*, 136 Nev. 93, 460 P.3d 440 (2020).

than notice of disturbed possession and stated that affirmative action is required to rise to the level that would trigger the limitations period.

### **Conclusion**

The Court answered the Ninth Circuit's certified questions as follows:

- 1) *City of Fernley* did not create a rule that categorically exempts declaratory relief from being time-barred by statutes of limitation.
- 2) The four-year catch-all statute of limitations under NRS 11.220 applies to U.S. Bank, N.A.'s claim for quiet title and declaratory relief.
- 3) Some type of affirmative action, such as repudiation of the lien, is required before the four-year statute of limitations begins to run against a lienholder.

### **Concurrence and Partial Dissent**

The partial dissent differed in opinion from the majority regarding what triggers the running of the statute of limitations on a deed of trust holder's claim for equitable relief on a foreclosure sale. The dissent criticized the majority's opinion as advisory and as presenting a one-size-fits-all approach. The dissent argued that quiet title and declaratory judgment actions can bring a variety of claims. Due to that, the dissent argued that the Court should have answered the Ninth Circuit's questions as related directly to the claims alleged in the bank's complaint rather than in the abstract.

First, regarding the bank's claim that the foreclosure sale was unfair, and that equity should invalidate it, the dissent agreed with the majority that the four-year statute of limitations under NRS 11.220 applied because there was no analogous limitations statute that could be applied.

However, the dissent argued that the majority's holding of what triggers the statute of limitations conflicts with equitable claims that seek to set aside HOA foreclosure sales. The dissent stated that it would instead rule that the HOA foreclosure sale triggers the four-year statute of limitations.

Next, the dissent addressed the bank's second claim regarding tender futility. The dissent argued that under this theory, the bank's deed of trust survived the HOA foreclosure sale, and the buyer took title to the property subject to the bank's deed of trust. Because of this, the dissent argued that the four-year statute of limitations did not apply to the bank's tender/tender futility claim but rather the deed of trust would remain enforceable until it expired under the applicable statutes.

Finally, the dissent stated that *City of Fernley* involved different questions, and thus, it would leave analysis of this question for a different time.

In refuting the dissent's arguments, the majority stated that its opinion was not advisory, but rather the question of whether a triggering action was present was beyond the scope of the Court's analysis. Next, the majority stated that its opinion did not provide a one-size-fits-all approach, but rather that the majority focused on the substantive claims presented rather than the

labels of quiet title and declaratory relief in answering the question of whether the bank's interest persisted as a consequence of the HOA foreclosure sale.