6-25-2023

Wishengrad v. Carrington Mortg. Servs. [State of Nevada], 139 Nev. Adv. Op. 13 (May 18, 2023)

Keaunui Harris

Wishengrad v. Carrington Mortg. Servs. [State of Nevada], 139 Nev. Adv. Op. 13 (May 18, 2023)[1]

A HELOC MAY CONSTITUTE A NEGOTIABLE INSTRUMENT AND A PROMISSORY NOTE UNDER NRS 104.3104; PROPERTY HELD IN THE NAME OF ITS RESIDENTS' TRUST IS "OWNER-OCCUPIED"

Summary

NRS 104.3104 provides that certain documents may constitute "negotiable instruments" for the purpose of enforcing a promise to pay. Under NRS 104.3104(1), a home equity line of credit agreement (HELOC) may be classified as a negotiable instrument if it has a defined maturity date and closed draw period. The same HELOC may also be classified as a "promissory note" under NRS 104.3104(5). When the borrowers fail to repay funds provided to them under the terms of an HELOC, the loan servicer and trustee are entitled to foreclose upon the borrowers' home. Finally, even if a borrower's property is held in the name of a trust, the property is considered "owner-occupied" when the borrower-trustee is the owner of the home and occupies the home as their primary residence.

Background

Appellants, the Wishengrads, obtained a HELOC through Bank of America, N.A. ("BANA") in February 2007, documenting the HELOC's terms in a document known as the "Maximizer Agreement." To secure repayment of the HELOC, the Appellants executed a deed of trust against their home; however the deed of trust was executed in the Appellants' capacity as the trustees of the Evan & Beth Wishengrad Revocable Living Trust ("Trust") dated May 23, 2004. Although the home is held in the name of the Trust, Appellants have always resided at the home.

The Wishengrads withdrew the entire amount of funds available under the Maximizer Agreement but failed to repay it. BANA assigned the deed of trust to Wilmington Savings Fund Society, FSB, as Trustee of Stanwich Mortgage Loan Trust A ("Wilmington"). Carrington Mortgage Services, LLC ("Carrington Mortgage") is Wilmington's loan servicer and attorney-in-fact for the Wishengrads' loan. Carrington Mortgage designated Carrington Foreclosure Services, LLC ("Carrington Foreclosure") as trustee under the deed of trust through a substitution of trustee document recorded in April 2018.

In June 2017, after four years without payment under the Maximizer Agreement, Carrington Mortgage notified the Wishengrads that they were in default and facing foreclosure. One year later, Carrington Foreclosure mailed the Wishengrads a notice of default pursuant to NRS Chapter 107, and a foreclosure certificate was issued on October 12, 2018. Carrington Foreclosure recorded a notice of trustee's sale on October 19, 2018.

The Wishengrads sued Carrington Mortgage and Carrington Foreclosure (collectively "Carrington") in November 2018, asserting claims for declaratory relief/permanent injunction, IIED, violation of NRS 107.028(7), and slander of title. After the district court dismissed the IIED and slander of title claims, Carrington answered and counterclaimed for judicial foreclosure in September 2019. The district court granted summary judgment to Carrington, concluding that Carrington is entitled to both judicial and nonjudicial foreclosure on the property. The Wishengrads appealed.

---

[1] By Keaunui Harris.

Discussion

The Maximizer Agreement is a negotiable instrument

NRS Chapter 104 defines "negotiable instrument" as an "unconditional promise or order to pay a fixed amount of money" if it "(a) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (b) is payable on demand or at a definite time," and "(c) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money."[2]

Appellants argued that the Maximizer Agreement is not a negotiable instrument because the agreement is "essentially a revolving line of credit—akin to a credit card—rather than an unconditional promise to pay a fixed amount of money." Paragraph 1 of the Maximizer Agreement states that the Appellants' account was a "revolving credit arrangement" in which the Appellants would receive advances in funds, allowing them to repay them and take additional advances. The Appellants focused on this language to argue that they only needed to pay the "total of all Advances—an uncertain amount—rather than a fixed sum."

The Court disagreed with Appellants' argument, relying on the analysis in *Webster Bank NA v. Mutka*, where the Arizona Court of Appeals rejected the argument that the defendant's HELOC was akin to a credit card account.[3] The *Mutka* court explained that the main difference between a credit card account and a HELOC depends on the statute of limitations. The defendant in *Mutka* had a HELOC with a specified maturity date on which the entire debt would become due. Even though the amount potentially borrowed would not be known until the end of the initial draw period, "the amount of the principal indebtedness would be fixed" after the maturity date, and the loan agreement established a "repayment schedule."[4]

In the present case, the Court reasoned that the Maximizer Agreement is "substantially similar to the HELOC at issue in *Mutka*." The Maximizer Agreement required the Appellants to make monthly payments during the draw period, followed by a 15-year repayment period requiring the Appellants to pay down the outstanding balance monthly. The outstanding indebtedness would become due and payable upon the specified maturity date. The agreement also contained an acceleration clause, which Carrington expressly exercised upon filing a counterclaim for judicial foreclosure in September 2019, as the Appellants stopped making payments in 2013.

Following *Mutka*'s reasoning, the Court concluded that a HELOC with a closed draw period and specified maturity date, similar to the Maximizer Agreement, is an "unconditional promise to pay a fixed amount of money pursuant to NRS 104.3104(1), rather than a revolving line of credit." Even though the total amount the Appellants would borrow during the draw period was unknown, that sum would become a "fixed debt with principal due upon the maturity date in 15 years." Because the Maximizer Agreement meets the remaining elements in NRS 104.3104(1)(a)-(c), the Court held that "the agreement is a negotiable instrument pursuant to NRS Chapter 104." The district court did not err in finding that Carrington was entitled to enforce the agreement under NRS Chapter 104, and the agreement is "not subject to the notice

---

[2] NEV. REV. STAT. 104.3104(1).
[3] Webster Bank NA v. Mutka, 481 P.3d 1173 (Ariz. Ct. App. 2021).
[4] *Id.* at 1175.

requirements of NRS 106.300 to NRS 106.400 because it is not an encumbrance to secure future advances."

Furthermore, the Court concluded that Carrington's judicial foreclosure counterclaim was not "time-barred" pursuant to *Mutka*'s application of the statute of limitations to HELOCs. Under *Mutka*, "the statute of limitations for debt owed under HELOC agreements with a defined maturity date begins to run—as to unpaid mature installments—upon the installment's due date, or—as to unmatured future installments, upon the date the lender exercises the optional acceleration clause."[5] Because Carrington counterclaimed for judicial foreclosure in 2019, the action was timely under NRS 104.3118(1).

The Maximizer Agreement is a promissory note

Under NRS 104.3104(5), "[a negotiable] instrument is a 'note' if it is a promise."[6] Because the Maximizer Agreement contains a promise to pay a fixed amount of money, the Court concluded that the agreement is a promissory note pursuant to NRS 104.3104(5). For the same reasons explained above, the Court rejected the Appellant's argument that "the agreement was not a promissory note because it did not require a certain or fixed amount."

The home is owner-occupied

NRS Chapter 107 defines "owner occupied housing" as "housing that is occupied by an owner as the owner's primary residence."[7] The district court held that the home is not owner-occupied because it was "in the name of the Wishengrad Trust, not the Wishengrads" and "the Trust does not live in it."

The Court here agreed with the Appellants that the district court erred in so holding, "as the court's conclusion is inconsistent with the law pertaining to trusts." The United States Supreme Court has clarified that "[t]raditionally, a trust was not considered a distinct legal entity, but a fiduciary relationship between multiple people" and that because a trust was not a "thing that could be haled into court," any "legal proceedings involving the trust were brought by or against the trustees in their own name."[8] The United States Court of Appeals for the Seventh Circuit also explained that "a trustee has title to the assets of the trust, but the beneficiaries are the real owners because they are entitled to the income or other benefits that the assets of the trust yield, minus only the trustee's reasonable fee for managing the assets."[9]

Here, the Trust at issue most accurately resembles a fiduciary relationship between the settlors, trustees, and beneficiaries rather than a thing capable of residing in the home. Because the Appellants are each of these three parties, the Appellants therefore hold legal title to the home "as trustees and are the equitable owners of the home as Trust beneficiaries." Consequently, because the Appellants own the home and occupy the home as their primary residence, the home is "owner-occupied" pursuant to NRS 107.015(6) and NRS 40. 437(12)(c).

Despite the district court's erroneous holding, this error was harmless. Carrington "substantially complied" with the notice provisions under NRS 40.437 by providing the Appellants with the requisite documentation during nonjudicial foreclosure proceedings. Accordingly, the Appellants were not prejudiced by Carrington's failure to "strictly comply" with NRS 40.437. The

---

[5] *Mutka*, 481 P.3d at 1174.
[6] NEV. REV. STAT. 104.3104(5).
[7] NEV. REV. STAT.
[8] Americold Realty Tr. v. Conagra Foods, Inc., 577 U.S. 378, 383 (2016).
[9] Wellpoint, Inc. v. Comm'r of Internal Revenue, 599 F.3d 641, 648 (7th Cir. 2010).

Court therefore concluded that, "albeit for different reasons," the district court correctly determined that Carrington was entitled to judicial foreclosure.[10]

The Court also agreed with the Appellants that "nonjudicial foreclosure was subject to NRS 107.085, which imposes heightened requirements upon trustees seeking to exercise the power of a sale on a deed of trust concerning owner-occupied housing."[11] However, the Court disagreed with the Appellants that Carrington failed to comply with NRS 107.085.The Appellants argued that the Maximizer Agreement cannot satisfy NRS 107.085 because it is "not a promissory note." But because the Court has already concluded that the agreement *is* a promissory note and Carrington included a copy of the agreement with the notice of default, NRS 107.085 is satisfied.

Conclusion

The Court agreed with the district court that the Maximizer Agreement was "both a negotiable instrument and a promissory note," but the Court also concluded that the district court erred in finding that the home was not owner-occupied. Nonetheless, the error was harmless. Because the Appellants' remaining arguments on appeal were "without merit," the district court correctly granted summary judgment to Carrington "because the record indicates that Carrington is entitled to judicial foreclosure or, alternatively, to nonjudicial foreclosure as a matter of law." The Court further affirmed the district court's dismissal of the Appellants' affirmative claims for IIED and slander of title.

---

[10] *Cf.* Saavedra-Sandoval v. Wal-Mart Stores, Inc., 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (recognizing that the Supreme Court may affirm the district court where it "reached the correct result, even if for the wrong reason").

[11] NEV. REV. STAT. 107.085(1)(b).