Bank of America, N.A. v. Bar Arbor Glen at Providence Homeowners Association et al

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * BANK OF AMERICA, N.A.,

Plaintiff(s), v. BAR ARBOR GLEN AT PROVIDENCE HOMEOWNERS ASSOCIATION, et al.,

Defendant(s).

Case No. 2:16-CV-2535 JCM (GWF)

ORDER

Presently before the court is motion for summary judgment. (ECF No. 38). Defendant Williston Investment Group LLC Williston (ECF No. 45) and defendant Bar Arbor Glen at Providence Homeowners Association (ECF No. 41) filed responses, to which BANA replied (ECF Nos. 46, 48).

ummary judgment. (ECF No. 36). Plaintiff filed a response (ECF No. 40). Williston has not filed a reply, and the time for doing so has since passed.

Also before the court is motion for summary judgment. (ECF No. 39). BANA filed a response (ECF No. 42), to which the HOA replied (ECF No. 47). I. Facts

This case involves a dispute over property that was subject to a superpriority lien for delinquent assessment fees. On August 21, 2008, Gaines Day Duvall, Jr. and Tiffany Ruth Duvall Universal American Mortgage Company, LLC to purchase property located at 10420 Scotch Elm Avenue, Las Vegas, Nevada, 89166 ECF No. 38-1). The note was secured by a deed of trust, recorded on August 27, 2008, 1

identifying Mortgage Electronic Registration and assigns. Id. On October 12, 2011, MERS assigned the deed of trust to BANA. (ECF No. 38-

3).

On December 28, 2011, Nevada Association Services NAS HOA, recorded a notice of delinquent assessment lien, stating an amount due of $1,102.96. (ECF

No. 1). On February 13, 2012, NAS, on behalf of the HOA, recorded a notice of default and election to sell under homeowners association lien. (ECF No. 1). The notice of default stated the amount due to the HOA was $2,221.71. Id.

On July 3, 2012, NAS , which stated the amount due to the HOA was $3,451.66 and anticipated a sale date of July 27, 2012. (ECF No. 1). On December 28, 2012, Williston purchased the property at the foreclosure sale for $4,908. (ECF No. 1). A foreclosure deed in favor of Williston was recorded on January 7, 2013. (ECF No. 1).

On November 1, 2016, BANA filed the underlying complaint, alleging six causes of action: (1) quiet title/declaratory judgment against the all defendants; (2) breach of NRS 116.1113 against the HOA and NAS; (3) wrongful foreclosure against the HOA and NAS; and (4) injunctive relief against Williston. (ECF No. 1).

In an order dated April 28, 2017 for breach of NRS 116.1116 and wrongful foreclosure and time barred. (ECF No. 28). The court also dismissed Id.

In the instant motions, BANA, the HOA, and Williston move for summary judgment as to . (ECF Nos. 36, 38, 39). II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

1 The deed of trust was rerecorded on September 9, 2008 to add a corrected notary jurat. (ECF No. 1). vant is entitled to a Celotex Corp. v. Catrett, 477 U.S. 317,

323 24 (1986). For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. , 497 U.S. 871, 888 (1990). However, to be

Id. In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. bear the burden of proof at trial, it must come forward with evidence which would entitle it to a

directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of

the non-) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party party will bear the burden of proof at trial. See Celotex Corp., 477 U.S. at 323 24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not e. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient , 809 F.2d 626, 631 (9th Cir. 1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. See Celotex, 477 U.S. at 324.

truth, but to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 249 (1986). Id. at 255. But if the evidence of the

nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. See id. at 249 50. III. Discussion 2

an estate or interest in real property, adverse to the person bringing the action for the purpose of

Nev. Rev. Stat. § 40.010. plea to quiet title does not require any particular elements, but each party must plead and prove his or her own claim to the property s right to Chapman v. Deutsche Bank Nat l Trust Co., 302 P.3d 1103, 1106 (Nev. 2013) (citations and internal quotation marks omitted). Therefore, for a party to succeed on its quiet title action, it needs to show that its claim to the property is superior to all others. See also Breliant v. Preferred Equities Corp., 918 In a quiet title action, the burden of proof rests with the plaintiff to .

2 The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where otherwise indicated, the references in this order to statutes codified in NRS Chapter 116 are to the version of the statutes in effect in 2013 14, when the events giving rise to this litigation occurred.

Section 116.3116(1) of the Nevada Revised Statutes gives an HOA a lien on its

priority to that HOA lien over all other liens and encumbrances with limited exceptions such as irst security interest on the unit recorded before the date on which the assessment sought to

security interests. See Nev. Rev. Stat. § 116.3116(2). In SFR Investments Pool 1 v. U.S. Bank, the Nevada Supreme Court provided the following explanation:

As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement other HOA fees or assessments, is subordinate to a first deed of trust. SFR Investments Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority lien by nonjudicial foreclosure sale. Id. at 415. Thus Id. at 419; see

also upon compliance with the statutory notice and timing rules).

Subsection (1) of NRS 116.31166 provides that the recitals in a deed made pursuant to NRS 116.31164 of the following are conclusive proof of the matters recited:

(a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell; (b) The elapsing of the 90 days; and (c) The giving of notice of sale[.] Nev. Rev. Stat. § 116.31166(1)(a) (c). 3

conclusive recitals concern default, notice, and publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale

3 The statute further provides as follows:

2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money. as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and give context to NRS 116.31166. Shadow Wood Homeowners Assoc. v. N.Y. Cmty. Bancorp., Inc., 366 P.3d 1105 (Nev. 2016) Shadow Wood . Nevertheless, courts retain the equitable authority recitals. See id. at 1112.

Based on Shadow Wood, the recitals therein are conclusive evidence that the foreclosure lien statutes were complied with i.e., that the foreclosure sale was proper. See id.; see also Nationstar Mortg., LLC v. SFR Investments Pool 1, LLC, No. 70653, 2017 WL 1423938, at *2 (Nev. App. Apr. 17, 2017) And because the recitals were conclusive evidence, the district court did not err in finding that no genuine issues of material fact remained regarding whether the foreclosure sale was proper and granting summary judgment in favor of SFR Therefore, pursuant to SFR Investments Williston, the foreclosure sale was proper and extinguished the first deed of trust.

Notwithstanding, the court retains the equitable authority to consider quiet title actions See Shadow Wood Homeowners Assoc., 366 P.3d at 1112 entirety of the circumstances that bear upon the

equities. This includes considering the status and

actions of all parties involved, including whether an innocent party may be harmed by granting the Williston and the HOA BANA must raise colorable equitable challenges to the foreclosure sale or set forth evidence

demonstrating fraud, unfairness, or oppression.

In its motion for summary judgment, BANA sets forth the following relevant arguments: (1) the foreclosure sale is invalid because NRS Chapter 116 is facially unconstitutional pursuant

3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption.

Nev. Rev. Stat. § 116.31166(2) (3). to Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 832 F.3d 1154 (9th Cir. 2016), cert. denied, No. 16- Bourne Valley ; (2) the foreclosure sale was commercially unreasonable; (3) the HOA lien statute is preempted as applied to FHA-insured mortgages because it frustrates the FHA insurance program; and (4) Williston does not qualify as a bona fide purchaser. (ECF No. 38). The court will address each in turn.

While the court will analyze equitable challenges regarding its quiet title, the court notes that the failure to utilize legal remedies makes granting equitable remedies unlikely. , 646 P.2d 549, 551 (Nev. 1982) (declining to allow equitable relief because an adequate remedy existed at law). Simply ignoring legal remedies does not open the door to equitable relief.

1. Due process BANA argues that the HOA lien statute is facially unconstitutional because it does not mandate notice to deed of trust beneficiaries. (ECF No. 38). BANA further contends that any factual issues concerning actual notice are irrelevant pursuant to Bourne Valley Court Trust v. Wells Fargo Bank, N.A. Bourne Valley 38 at 8).

BANA has failed to show that Bourne Valley interpretation to the contrary, Bourne Valley did not hold that the entire foreclosure statute was

facially unconstitutional. At issue in Bourne Valley was the constitutionality of the - provision of NRS Chapter 116, not the statute in its entirety. Specifically, the Ninth Circuit held - that it intended to foreclose only if the lender had affirmatively requested notice, facially violated Bourne Valley, 832 F.3d at 1157 58. As identified in Bourne Valley, NRS 116.31163(2) - unconstitutionally shifted the notice burden to holders of the property interest at risk not NRS Chapter 116 in general. See id. at 1158.

Further, the holding in Bourne Valley contentions are not predicated on an unconstitutional shift of

the notice burden, which required it actual or otherwise, of the event that affected the deed of trust (i.e., the foreclosure sale).

Furthermore, BANA confuses constitutionally mandated notice with the notices required to conduct a valid foreclosure sale. Due Process Clause protects only against deprivation of existing interests in life, liberty, or property. Serra v. Lappin, 600 F.3d 1191, 1196 (9th Cir. 2010); see also, e.g., Spears v. Spears, 596 P.2d 210, 212 (Nev. 1979) that one who is not prejudic). To

constitutionally protected liberty or property interest, and (2) a denial of adequate procedural

pr Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 982 (9th Cir. 1998).

BANA has satisfied the first element as a deed of trust is a property interest under Nevada law. See Nev. Rev. Stat. § 107.020 et seq.; see also Mennonite Bd. of Missions v. Adams, 462 U.S.

However, BANA fails on the second prong.

Due process does not require actual notice. Jones v. Flowers, 547 U.S. 220, 226 (2006). parties of the pendency of the action and afford them an opportu

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); see also Bourne Valley, 832 F.3d at 1158.

Here, adequate notice was given to the interested parties prior to extinguishing a property right. The HOA has provided proof of mailing for the notice of default and the notice of foreclosure sale to BANA and other interested parties. (ECF No. 39-4). As a result, the notice of in NRS 116.31163(2) as it put BANA on notice that its interest was subject to pendency of action and offered all of the required information. . . . . .

2. Commercial Reasonability BANA contends that judgment in its favor is appropriate because the sale of the property for less than 4% of its alleged fair market value is grossly inadequate as a matter of law. (ECF No. 38). BANA also contends it can establish evidence of fraud, unfairness, or oppression. Id. However, BANA overlooks the reality of the foreclosure process. The amount of the lien not the fair market value of the property is what typically sets the sales price.

BANA further argues that the Shadow Wood court adopted the restatement approach, quot of a specific percentage of fair market value, generally . . . a court is warranted in invalidating a

sale where the price is less than 20 percent of fair market value . . . . ECF No. 38 at 11).

Nevada. See - see also SFR Investments, 334 P.3d at 410. Numerous courts have interpreted the

UCIOA and NRS 116.3116 as imposing a commercial reasonableness standard on foreclosure of association liens. 4

In Shadow Wood set as at 1110; see also Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC, 184 F. Supp. 3d 853, 857 58

(D. Nev. 2016). foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a

4 See, e.g., Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d 1222, 1229 (D. Nev. 2013) was probably worth somewhat more than half as much when sold at the foreclosure sale, raises serious doubts as to commercial reasonableness. SFR Investments, 334 P.3d at 418 n.6 (noting Thunder Props., Inc. v. Wood, No. 3:14-cv-00068-RCJ-WGC, 2014 WL 6608836, at *2 (D. Nev. than 2% of the amounts of the deed of Rainbow Bend v. Wilder, No. 3:13-cv-00007-RCJ-VPC, 2014 WL 132439, at *2 (D. Nev. property free and clear of all encumbrances for the price of delinquent HOA dues would raise grave doubts as to the commercial reasonableness of t Will v. Mill , 848 A.2d 336, 340 (Vt. 2004) (discussing commercial reasonableness showing of fraud, unfairness, or opp Id. at 1112; see also Long v. Towne, 639 P.2d 528, Golden v. Tomiyasu, 387 P.2d

989, 995 (Nev. 1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere

some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy

The Shadow Wood court did not adopt the restatement. Compare Shadow Wood, 366 P.3d at 1112 13 (citing the restatement as secondary authority to warrant use of the 20% threshold test for grossly inadequate sales price), with St. James Village, Inc. v. Cunningham, 210 P.3d 190, 213 (Nev. 2009) (explicitly adopting § 4.8 of the Restatement in specific circumstances); Foster v. Costco Wholesale Corp. Cucinotta v. Deloitte &

Touche, LLP, 302 P.3d 1099, 1102 (Nev. 2013) (affirmatively adopting the Restatement (Second) of Torts section 592A). Because Nevada courts have not adopted the relevant section(s) of the restatement at issue here, the Long test, which requires a showing of fraud, unfairness, or oppression in addition to a grossly inadequate sale price to set aside a foreclosure sale, controls. See 639 P.2d at 530.

Nevada has not clearly defined reasonableness. The few Nevada cases that have discussed commercial reasonableness state,

every aspect of the disposition, including the method, manner, time, place, and terms, must be Levers v. Rio King Land & Inv. Co., 560 P.2d 917, 920 (Nev. 1977). ice obtained at the auction, [and] the number of bidders in attendance. Dennison v. Allen Grp. Leasing Corp., 871 P.2d 288, 291 (Nev. 1994)

(citing Savage Constr. v. Challenge Cook, 714 P.2d 573, 574 (Nev. 1986)).

Nevertheless, BANA fails to set forth sufficient evidence to show fraud, unfairness, or oppression so as to justify the setting aside of the foreclosure sale. BANA asserts that there was massive legal uncertainty at the time of the foreclosure sale as to its effect on the first deed of trust. See -priority lien, nothing prevented them from naming the super-priority amount and explaining how they calculated it. But

that would constitute fraud, oppression, or unfairness. The inaction described by plaintiffs does not, in this context, rise to the level of fraud, unfairness, or oppression.

failed to set forth evidence of fraud, unfairness, or oppression. See, e.g., Nationstar Mortg., LLC,

No. 70653, 2017 WL 1423938, at *3 Sale price alone, however, is never enough to demonstrate that the sale was commercially unreasonable; rather, the party challenging the sale must also make a showing of fraud, unfairness, or oppression that brought about the low sale price.

3. FHA insurance program BANA argues that the HOA lien statute cannot interfere with the federal mortgage insurance program or extinguish mortgage interests insured by the FHA. (ECF No. 38).

The single-family mortgage insurance program allows FHA to insure private loans, expanding the availability of mortgages to low-income individuals wishing to purchase homes. , 117 F. Supp. 2d 970, 980 81 (C.D. Cal. 2000) (discussing program); Wash. & Sandhill , No. 2:13- cv-01845-GMN-GWF, 2014 WL 4798565, at *1 n.2 (D. Nev. Sept. 25, 2014) (same). If a borrower under this program defaults, the lender may foreclose on the property, convey title to HUD, and submit an insurance claim. 24 C.F.R. § generates funds to finance the program. See 24 C.F.R. § 291.1.

Multiple courts in this district, and the Supreme Court of Nevada, have held that the FHA insurance program does not conflict with the Nevada foreclosure statutes. See Bank of America, N.A. v. Hollow de Oro Homeowners Association, --- F. Supp. 3d ----, 2018 WL 523354, at *9 (D. Nev. Jan. 23, 2018); JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC, 200 F. Supp. 3d 1141, 1166 Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC, 106 F. Supp. 3d 1174, 1184 (D. Nev. 2015) HOA- ; Renfroe v. Lakeview Loan Servicing, LLC, 398 P.3d 904, 909 (Nev.

nce program clearly contemplate and anticipate statutory schemes such as NRS 116.3116, the doctrine of conflict preemption does not

The court holds that the Nevada foreclosure statutes do not directly conflict with the FHA insurance program for preemption purposes. See Hollow de Oro, 2018 WL 523354, at *9. Thus,

4. Bona fide purchaser status Because the court concludes that BANA failed to properly raise any

equitable challenges to the foreclosure sale, the court need not address Williston was a bona fide purchaser for value. See Nationstar Mortg., LLC, No. 70653, 2017 WL

1423938, at *3 n.3. IV. Conclusion

In light of the aforementioned, the court finds that BANA has failed to raise a genuine dispute so as to preclude summary judgment in favor of the HOA and Williston quiet title claim and quiet title claim. Nor has BANA established that it is entitled to summary judgment in its favor. BANA did not tender the amount provided in the notice of default or notice of foreclosure sale, as statute and the notices themselves instructed, and did not meet its burden to show that no genuine issues of material fact existed regarding the proper amount of the

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that motion for summary judgment (ECF No. 38) be, and the same hereby is, DENIED. be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that motion for summary judgment (ECF No. 39) be, and the same hereby is, GRANTED. IT IS FURTHR ORDERED that Williston shall prepare a proposed judgment consistent with this order and submit it to the court within thirty (30) days for signature.

DATED May 7, 2018. _____ UNITED STATES DISTRICT JUDGE