

IN THE SUPREME COURT OF THE STATE OF NEVADA

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LN MANAGEMENT LLC SERIES
5105 PORTRAITS PLACE,

Appellant,

v.

GREEN TREE LOAN SERVICING,
LLC,

Respondent.

Case No.: 69477

Appeal

**From the Eighth Judicial District Court, Clark County, Nevada
The Honorable Douglas E. Smith
District Court Case A-13-679816-C**

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Iyad Haddad – Managing Trustee

Ryan Welch – Managing Trustee

Kerry P. Faughnan, Esq. ,who has represented Plaintiff/Appellant in the state court case and during this appeal.

Dated June 6, 2016.

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JURISDICTIONAL STATEMENT

This is an appeal from an Order granting Respondent Green Tree Servicing LLC's Motion for Summary Judgment, PA 159-163¹, after a default judgment had been entered against William Webster and Betty Webster November 19, 2014, PA 12-15, and the final defendant, Zion's First National Bank, was voluntarily dismissed by Plaintiff/Appellant December 13, 2015, PA 173.

The written order granting the Motion to Dismiss was entered September 23, 2015, PA 159 – 163, and notice of entry of same was filed December 3, 2015, PA 164-172.

Notice of Appeal was filed December 18, 2015, PA 174-175, which is within the 30 day time period required by NRAP 4(a)(4)(B).

This Court has jurisdiction as an appeal may be taken from a district court in a civil action of a final judgment entered in a proceeding. NRAP 3A(b)(1).

¹ Plaintiff's Appendix ("PA").

STATEMENT OF THE ISSUES

I.

Was the District Court erroneous in finding as a matter of law that Respondent Green Tree Servicing had standing to assert a violation of the “automatic stay” of 11 USC § 362(a) of the Bankruptcy Code as a defense to the validity of a foreclosure sale which took place in Nevada?

II.

Was the District Court erroneous in finding that 9th Circuit law applies to bankruptcy proceedings commenced in Texas, which is in the 5th Circuit, concerning a real property asset of the bankruptcy estate located in Nevada?

STATEMENT OF THE CASE

The state court proceeding is an action to quiet title and for declaratory relief of real property commonly known as 5105 Portraits Place, Las Vegas, NV 89149, (the “Subject Property.”) Complaint PA 1.

The Subject Property came to Appellant LN Management as a result of a January 23, 2013 HOA foreclosure sale for delinquent assessments conducted pursuant to NRS Chapter 116, Trustee’s Deed, PA 10-11. Title was originally taken in the name of a trust, and subsequently transferred by quitclaim deed April 9, 2013 to Appellant LN Management LLC Series 5105 Portraits Place. PA 6-8.

Appellant LN Management initiated the district court case April 10, 2013 to quiet title in LN Management’s name against any and all interested parties, so that Appellant LN Management could obtain title insurance on the Subject Property, Complaint PA 3, Paragraph 12.

Judgment by default was entered against the prior homeowners of the Property, William Webster and Betty Webster November 19, 2014. PA 12-15.

At the time of the foreclosure, a note and first deed of trust against the Subject Property was held by Bank of America. Order Granting Green Tree’s Motion for Summary Judgment, PA 160:9-11. After the foreclosure, the note and deed of trust was assigned to Everbank, and during the course of the litigation, the

deed of trust was assigned to Respondent Green Tree Servicing, LLC. Order Granting Green Tree's Motion for Summary Judgment, PA 160:16-20.

After assignment of the note and deed of trust , Green Tree filed a Complaint in Intervention in the case, then moved for summary judgment. PA 16 – 24, PA 25-114.

The motion for summary judgment was heard by the district court August 18, 2015, and the district court entered a written order granting the motion to dismiss September 23, 2015. PA 159-163.

Notice of Entry of Order Granting Green Tree Servicing, LLC's Motion for Summary Judgment was filed December 3, 2015. PA 164-172.

Plaintiff/Appellant voluntarily dismissed defendant Zion First National Bank pursuant to NRCP 41(a)(1) December 13, 2015, PA 173, the last defendant in the case, and then filed Notice of Appeal December 18, 2015. PA 174-175.

STATEMENT OF FACTS

Appellant LN Management does not contest the district courts chronological Findings of Fact set out in the Order Granting Green Tree's Motion for Summary Judgment, PA 160:1 – 161:12, which are supported by Green Tree Servicing, LLC's Motion for Summary Judgment . PA 25 – 114.

To summarize:

William and Betty Webster encumbered the Subject Property with a note and deed of trust in 2003. PA 35-52.

The Websters commenced a Chapter 13 in the Eastern District of Texas June 3, 2011, PA 65-67, which is in the 5th Circuit.

While listing the Subject Property in their bankruptcy Schedule A, PA 69, the Websters did not include the home owners association in their mailing matrix, or list them as a creditor. PA 129-130.

The Plan filed by the Websters May 17, 2012, was for the Websters to surrender and abandon the Subject Property to their creditors. PA 126.

During the bankruptcy, the HOA recorded Notice of Default, Notice of Sale, and ultimately sold the Subject Property at auction to Plaintiff/Appellant January 23, 2013. PA 160: 25 – 161:5.

The HOA did not seek relief from the automatic stay before recording Notice of Default, Notice of Sale, or sale of the Subject Property at auction to Plaintiff/Appellant. PA 84 – 102, PA 161:18-121.

SUMMARY OF THE ARGUMENTS

I.

The district court erroneously applied 9th Circuit bankruptcy law to the case when the Websters' bankruptcy was commenced in the 5th Circuit, requiring reversal and remand for further proceedings in conformity with applicable law.

II.

The district court erroneously stated that as a matter of law that Respondent Green Tree Servicing had standing to assert a violation of the "automatic stay" of 11 USC § 362(a) of the Bankruptcy Code as a defense to the validity of a foreclosure sale. Under both 5th Circuit and 9th Circuit law, only a debtor and the bankruptcy trustee have standing to assert the defense, not a lender, requiring reversal and remand for further proceedings in conformity with applicable law.

STANDARD OF REVIEW

“This Court reviews questions of law de novo.” Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 121 P.3d 599 (2005).

ARGUMENT

I.

THE DISTRICT COURT ERRED IN APPLYING CONFLICT OF LAW PRINCIPALS WHEN THERE WAS NO CONFLICT OF LAW REGARDING LACK OF STANDING IN THE 9th CIRCUIT AND THE 5th CIRCUIT

The district court declared. “That Green Tree, as the current beneficiary under the Deed of Trust and as a creditor of the Websters’ bankruptcy estate, had standing to enforce the automatic stay protection pursuant to 11 USC § 362(a).” Order Granting Green Tree Servicing LLC’s Motion for Summary Judgment, PA 162:4-6.

“When the laws of more than one state potentially apply, before undertaking a conflict-of-law analysis, a court should determine whether a conflict of law actually exists.” Tri-County Equipment & Leasing v. Klinke, 128 Nev. Adv. Op. 33, 286 P.3d 593(2012).

As pointed out to the district court, both the 9th Circuit and the 5th Circuit clearly hold that lenders do not have standing to object to a violation of the

automatic stay, which is only a right of a debtor and their trustee. Summary judgment should have been denied pursuant to the authorities cited by Appellant LN Management to the district court of In re Pointer, 952 F.2d 82 (5th Cir. 1992), “In general, as well as under § 549, only trustees and debtors-in-possession, not creditors, have standing to invoke avoidance powers”, and In re Fuel Oil Supply and Terminaling, Inc., 30 B.R. 360, and 362 (Bankr.N.D.Tex. 1983), cited in In re Brooks, 79 B.R. 479, 481 (Bankr. 9th Cir.1987), “. . . if the debtor or the trustee chooses not to invoke the protections of § 362, no other party may attack any acts in violation of the automatic stay..” PA 116: 9-28. PA 138:3-12.

Under Tri-County, since there was no conflict, then the law of the forum state should have be applied, which would be Texas and 5th Circuit law. The district court, in declaring standing for Respondent Green Tree Servicing, cited no authority for its rule of law, PA 162:4-6, and erroneously applied the incorrect law to reach the court’s ultimate conclusion that Green Tree’s deed of trust continues to encumber the Subject Property. PA 162:21-23.

Without standing, even if the HOA acts violated the automatic stay, Respondent Green Tree Services is barred as a matter of law from raising the defense, and summary judgment was improper.

Reversal and remand for further proceedings in conformity with applicable law is required.

II.

THE DISTRICT COURT ERRED IN FINDING 9th CIRCUIT BANKRUPTCY LAW APPLIED TO THIS CASE WHEN THE WEBSTER BANKRUPTCY WAS COMMENCED IN THE 5th CIRCUIT

Because there was no conflict regarding standing, the law of the forum state should be applied, which would be Texas and 5th Circuit law, pursuant to Tri-County.

The Websters chose the Bankruptcy Court for the Eastern District of Texas as their forum to commence their Chapter 13 bankruptcy case, which is in the 5th Circuit.

Under 5th Circuit law, violations of the “automatic stay” are voidable, not void ab initio. Cissne v. Robertson, 782 S.W.2d 912, 919 (Tex. Ct. App. 1989). “. . . we answer the threshold question by noting that filing a complaint in an unknowing violation of the automatic stay is voidable, not void,” citing Sikes v. Global Marine, Inc., 881 F.2d 176, (5th Cir. 1989), which states at 179, “We are persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void. We agree that ‘the characterization of every violation of section 362 as being absolutely void is inaccurate and overly broad.’ Fuel Oil Supply, 30 B.R. at 362.”

Respondent Green Tree Servicing is correct that in the 9th Circuit, acts taken in violation of the automatic stay are void ab initio, regardless of whether there was notice or not, citing In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992).

The Websters chose to commence their case in Texas because they satisfied the jurisdictional requirements of the Texas bankruptcy court. The Websters chose to have the Texas federal exemptions under 11 USC § 522(b)(2) apply to their case. PA 145. By filing in Texas, the bankruptcy estate was a Texas bankruptcy estate, not a Nevada bankruptcy estate, therefore Texas law should apply. Federal rule should apply when bankruptcy choice of law questions arise because the exemptions are governed by the federal law of the forum state chosen by the debtors.

Without analysis or citation to authority, the district court simply declared that 9th Circuit law controls because the Subject Property of the Texas bankruptcy Estate was in Nevada. PA 162:2-3.

The district court's result is unjustifiable. Under the district court's holding, the acts of foreclosure were void, therefore even though the district court granted default judgment against the Websters, PA 12-15, the voided sale seems to reverse its own judgment. PA 159-163. This court should then ask, to what effect? If the real property goes back to the debtors because the sale is void, but at the same time the property is abandoned under the plan because the debtors didn't want the

property since they couldn't afford it, there is neither a benefit to the estate, or the debtors. In fact, one could argue all the district court did was create new post-petition debt and liability for the debtors.

The lack of citation to any authority or analysis by the district court of conflict of law principals amply demonstrates the district court erred in applying 9th circuit law to declare the acts of the HOA as being void.

Reversal and remand for further proceedings in conformity with applicable 5th Circuit law is required.

CONCLUSION

The district court erred in its application of law to the case. Reversal and remand for further proceedings in conformity with applicable 5th Circuit law is required.

Dated June 6, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

Proportionately spaced, has a typeface of 14 points or more, and contains approximately 1,938 words;

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated June 6, 2016.

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CERTIFICATE OF SERVICE

I certify that on June 6, 2016, I served a copy of the foregoing upon all counsel of record by allowing the Court's ECF system to serve same upon:

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ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court because the matter is not one of the enumerated case categories presumptively assigned to the Court of Appeals under NRAP 17(b).

DATED June 6, 2016.

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