

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

LN MANAGEMENT LLC SERIES
5105 PORTRAITS PLACE,

Appellant,

v.

GREEN TREE LOAN SERVICING,
LLC,

Respondent.

Case No.: 69477

**Motion to Strike Issues 3 and 4 of Respondent's Answering Brief, with
Request for Extension of Time to File Reply Brief**

Comes now the Appellant, LN Management LLC Series 5105 Portraits Place ("LN Management"), who moves for the striking Issues 3 and 4 of Respondent Green Tree Loan Servicing, LLC's ("Green Tree's ") Answering Brief, on the grounds the brief raises as issues commercial reasonableness and constitutionality, issues not raised in the District Court, not raised in a cross appeal, and not timely noticed by Respondent to the clerk of the Supreme Court pursuant to NRAP 44.

LN Management further requests a 30 day extension of time after a decision on this motion to file its Reply Brief once this Court has time to address this motion.

Dated September 10, 2016.

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POINTS AND AUTHORITIES

NRAP 28(j) states that all briefs submitted must be free from irrelevant and immaterial matters, and briefs not in compliance may be stricken on motion.

The case below concerns a quiet title action after a HOA foreclose, and the District Court granting Respondent Green Tree's Motion for Summary Judgement. 1PA1 – 1PA13, 2PA159-2PA162.¹

This is not a traditional HOA foreclosure case. Rather, the HOA unknowingly foreclosed on the prior homeowners, the Websters, while they were in a bankruptcy proceeding commenced in the 5th Circuit in the Eastern District of Texas. PA 65-67, PA 160: 25 – 161:5.

The issues on appeal are whether district court erroneously applied 9th Circuit bankruptcy law to a 5th Circuit bankruptcy case concerning the effect of the automatic stay, and whether Green Tree as a creditor has standing to assert a

¹ Plaintiff's Appendix ("PA").

violation of the “automatic stay” of 11 USC § 362(a) of the Bankruptcy Code as a defense to the validity of a foreclosure sale. Docketing Statement, Question 9.

Appellant’s Opening Brief, Statement of the Issues, Page 2.

Green Tree’s Issues on Appeal are:

1. Whether the district court correctly held that an HOA foreclosure in violation of the automatic bankruptcy stay is void ab initio.
2. Whether the district court correctly held that the Deed of Trust’s beneficiary of record and creditor has standing to challenge an HOA foreclosure that violates the automatic bankruptcy stay.
3. Alternatively, whether the HOA’s foreclosure of a delinquent assessment lien is commercially unreasonable when the property sold for approximately 12% of the value of the mortgage loan, the HOA violated the Bankruptcy Stay, and the HOA’s notices were defective.
4. Alternatively, whether NRS 116.3116 is facially unconstitutional, because it does not require notice to all lienholders affected by the foreclosure.

Respondent’s Answering Brief, Statement of the Issues on Appeal, Page 2

Issues 3 and 4, Commercial Reasonableness and Constitutionality, are not relevant or material to LN Management’s issue of whether the district court applied the correct federal law in deciding Green Tree’s Motion for Summary Judgment, as well as were not raised in Green Tree’s Complaint in Intervention, PA 16-24, or any of the proceedings below. Nor did Green Tree file a cross appeal, or file a Docketing Statement “Response by Respondent” pursuant to NRAP 14(f) that it strongly disagreed with LN Management’s issue on appeal.

In addition, the constitutional issues raised for the first time in Green Tree's Answering Brief, Item 4, was not timely noticed by Green Tree to the clerk of the Supreme Court pursuant to NRAP 44² until two weeks after Green Tree filed its Answering Brief, since the state was not a party in the lower proceedings, because the entire case did not revolve around constitutional issues, but rather application of federal bankruptcy law. Two weeks is not "immediately" as required under the rules.

Failure to comply with NRAP 44 is grounds to summarily reject the constitutional arguments. In re Candelaria, 126 Nev. Adv. Op. 40, 245 P.3d 518 (2010).

Candelaria does acknowledge that that this Court has the discretion to address important constitutional questions raised for the first time on appeal, however this Court has in the past declined to address the constitutionality of NRS 116.3116 when raised for the first time on appeal without the matter having been first considered by the lower court. However, the full Court recently heard oral arguments directly on the matter September 8, 2016 in Saticoy Bay LLC Series 350 Durango 104 vs. Wells Fargo Home Mortgage, Case #68630, a case where the

² RULE 44. CASES INVOLVING CONSTITUTIONAL QUESTIONS WHERE STATE IS NOT A PARTY

If a party questions the constitutionality of an Act of the Legislature in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity, the questioning party shall give written notice to the clerk of the Supreme Court immediately upon the filing of the docketing statement or as soon as the question is raised in the court. The clerk shall then certify that fact to the Attorney General.

constitutionality was raised and briefed in the lower court and directly raised on appeal, not as an injection to a case where the matter has never been pled or raised in any fashion.

NRCP 8 (c) requires affirmative pleading of defenses, otherwise they are waived. Second Baptist Ch. v. First Nat'l Bank, 89 Nev. 217, 219-20, 510 P.2d 630, 631 (1973). Green Tree has not pled any “constitutionality defense,” or “commercially unreasonable defense” in Green Tree’s Complaint in Intervention, PA 16-24, or in any pleading in the lower court.

Here Green Tree desires this Court to use this case to avoid the trial court first considering the matter, as well as preventing LN Management from introducing any evidence against Green Tree’s new issues except what is before the Court now in the record on appeal, prepared to address one single issue: the law applied by the district court concerning Green Tree’s Motion for Summary Judgment.

This Court has repeatedly stated it will not review matters not raised first in the trial court below, unless it goes to the jurisdiction of the Court. “A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.” Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Green Tree's constitutionality argument, as well as its commercially reasonable argument, have nothing to do with the issue on appeal: was the correct federal circuit law applied to the case entitling Green Tree to summary judgment.

The parties in the lower court never pled, argued or discussed constitutionality or commercial reasonableness, nor was evidence taken on the issues.

The district court's legal ruling of Green Tree having standing, as well as 9th Circuit bankruptcy law applies, determined the case as a matter of law. Green Tree's Issues 3 and 4 are therefore irrelevant and immaterial, and should be stricken pursuant to NRAP 28(j) and Old Aztec Mine.

Extension of Time for Filing Reply Brief

LN Management's Reply Brief is currently due September 12, 2016.

LN Management further requests a 30 day extension of time, after a decision on this motion, to file its Reply Brief once this Court has time to address this motion, so that LN Management has adequate time to address Green Tree's surviving arguments. NRAP 31(b)(3)(B).

In making this request, LN Management has not previously requested an extension of time to file a Reply Brief.

CONCLUSION

Green Tree's Answering Brief Issues 3 and 4 argue commercial reasonableness and constitutionality, immaterial issues not raised in the district court. In addition, the constitutional issue was untimely noticed two weeks late by Green Tree to the clerk of the Supreme Court pursuant to NRAP 44.

These issues should be stricken pursuant to NRAP 28(j), NRAP 44 and Old Aztec Mine.

LN Management requests 30 day after a decision on this motion to thereafter file its Reply Brief once this Court has time to address this motion, so that it may address Green Tree's surviving arguments.

Dated September 10, 2016. Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 10, 2016, I served a copy of the foregoing pleading upon all counsel of record by allowing the Court's ECF system to serve same upon:

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DATED September 10, 2016. /s/ Kerry P. Faughnan
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