**IN THE SUPREME COURT OF THE STATE OF NEVADA**

*****



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 REPLY BRIEF

Kerry P. Faughnan, Esq., NSB# 12204
PO Box 335361
North Las Vegas, NV 89033
(702) 301-3096
(702) 331-4222-Fax
kerry.faughnan@gmail.com

Attorney for Appellant

## TABLE OF CONTENTS



**CASES**



**RULES**

**STATUTES**



**TREATIES**



**INDEX**

## I. THE WEBSTERS' CHOSE TEXAS AS THE FORUM OF THEIR BANKRUPTCY: GREEN TREE MAY NOT ALTER THAT FORUM, AND FURTHER, GREENTREE'S PREDECESSOR IN INTEREST CONSENTED TO THAT FORUM

Greentree acknowledges the Websters commenced a Chapter 13 bankruptcy case in the Eastern District of Texas June 3, 2011, PA 65-67, which is in the 5th Circuit, and that Greentree's predecessor in interest, EverBank, went to Texas and moved for relief of the "Automatic Stay" before the Bankruptcy Court in the Eastern District of Texas. PA 112-114. Answering Brief, 12:20 – 13:1.

By voluntarily appearing in Texas and obtaining an order from the Texas bankruptcy court under the laws of the 5th Circuit, EverBank, and therefore Greentree who stands in EverBank's shoes as a result of EverBank's subsequent assignment of the Websters' note and deed of trust to Greentree, consented to the jurisdiction the bankruptcy courts in the 5th Circuit.

This Court should cease any further analysis. 5th Circuit law applies, and pursuant to of In re Pointer, 952 F.2d 82 (5th Cir. 1992) and In re Fuel Oil Supply and Terminaling, Inc., 30 B.R. 360 (Bankr.N.D.Tex. 1983), Greentree lacks standing to object to a claimed violation of the automatic stay, which under 5th Circuit law, are voidable, not void ab initio.

## II. EXEMPTIONS ARE NOT LIMITED TO THE GEOGRAPHICAL JURISDICTION OF A BANKRUPTCY COURT

As further evidence that 5th Circuit law applies and not 9th Circuit, a debtor's exemptions in bankruptcy are not limited by the geographical jurisdiction of a bankruptcy court.

When a debtor files for bankruptcy, 11 USC § 541 (a) states that at the commencement of a bankruptcy case, an estate is created of the property of the debtor, ". . . wherever located and by whomever held:"

The applicable exemptions under 11 USC § 522 (d)[1] apply to estate property in the same manor, wherever located and by whomever held. The Bankruptcy Code makes no geographic limitation on what a debtor may claim is exempt.

A classic example is the homestead exemption under the bankruptcy code. A debtor is entitled to the exemptions only in the forum he filed in, even if the location of the property might be in a jurisdiction with a better exemption.

In re Arrol, 170 F.3d 934, 937 (9th Cir. 1999), is a case where California's homestead exemption statute was applied to a residence in Michigan. In re Jevne, 387 B.R. 301, 305 (Bankr. S.D. Fla. 2008) was a case where the Rhode Island homestead statute applied to debtor's Florida residence; In re Stratton, 269 B.R. 716, 719 (Bankr. D. Or. 2001), a case where Oregon's homestead exemption statute

[1] The Websters chose the federal exemptions in their Texas bankruptcy. PA 145 – 146.

was applied to a residence located in California, and In re Fernandez, 2011 WL 3423373 (Aug. 5, 2011 W.D. Tex.), was a case where a Texas bankruptcy court followed the majority of courts and determined that a homestead exemption can be applied to out-of-state property.

4 Collier on Bankruptcy ¶ 522.06 (16th ed. rev. 2007) also is of the opinion that courts "must give effect to those exemptions allowed by the law of the state," and that "it makes no difference where the property is situated or where the petition is filed, so long as the property is exempt in the law of the domiciliary state."

An individual debtor in a Chapter 7 or 13 bankruptcy get one set of exemptions based upon those available in the jurisdiction the case is commenced. There is nothing in 11 USC § 522 that states a debtor's bankruptcy exemptions are determined by the geographic location of each asset of the debtor.

Because a debtor choses the forum and thus his exemptions when he commences his case, there is no conflict of rules analysis that must be applied to assets located to another state. The exemptions are governed by the law of the forum selected by the debtor.

The district court erred when it looked at the location of the real property and considered choice of law because at all times the real property was an asset of a Texas bankruptcy estate, and thus solely controlled by 5th Circuit law and the exemptions authorized in that jurisdiction, a jurisdiction chosen by the debtors the

Websters. Nothing in the Bankruptcy Code permits Greentree to change the laws of the chosen forum state selected by the debtors because of the location of an estate asset. The law remains that of the forum, the 5th Circuit.

## III. GREENTREE CONFUSES STANDING TO CHALLENGE THE HOA FORECLOSURE SALE WITH CHALLENGING A VIOLATION OF THE AUTOMATIC STAY

Appellant disagrees with Greentree's interpretation of In re Brooks, 79 B.R. 479, 481 (Bankr. 9th Cir.1987), that 9th Circuit law permits Greentree to have standing in state court to allege a violation of the automatic stay.

Greentree has standing to attack the sale itself, but not allege a violation of the automatic stay, which under the bankruptcy code, are the exclusive providence of the debtor and the trustee. In re Brooks.

The cases cited by Greentree as authority are either unpublished or from other Circuits, and should not be considered as persuasive authority.

Also, Greetree overlooks that there is no 9th Circuit bankruptcy court with jurisdiction over this debtor: to bring any action to challenge the alleged automatic stay violation, the action would have to be where the bankruptcy was filed – in Texas, in the 5th Circuit, where 5th Circuit law applies, where Greentree's predecessor in interest already voluntarily appeared, and where Greentree has no standing. In re Fuel Oil Supply and Terminaling, Inc.

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.

## IV. COMMERCIAL REASONABLENESS WAS NOT RAISED IN THE DISTRICT COURT THEREFORE THE ARGUMENT IS WITHOUT MERIT AS AN ALTERNATIVE THEORY TO AFFIRM

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 in Green Tree's Complaint in Intervention, PA 16-24, or in any pleading in the lower court.

This Court has repeatedly stated it will not review matters not raised first in the trial court below. "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).

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

If such had been pled, first it would have been pointed out to the district court that any challenge to commercial reasonableness must raise material

questions of fact, which precludes this Court from considering the matter. In this case there is no appraisals in the record of appeal to even discuss a 20% threshold.

Second, there is no legal duty to obtain a price greater than the amount of the lien being foreclosed upon

Third, there is no commercial reasonableness requirement in NRS Chapter 116 or Chapter 107.

Fourth, while also Shadow Wood Homeowner's Ass'n Inc. v. New York Comty. Bankcorp, Inc. 132 Nev. Adv. Op. 5 (Jan 28, 2016) discusses a 20% line to determine gross inadequacy of price, Shadow Wood does not overrule Long v. Towne, 98 Nev. 11, 639 P.2d 528 (1982) and its progeny where mere inadequacy of price is not sufficient to justify setting aside a foreclosure sale, absent a showing of fraud, unfairness or oppression that accounts for and brings about the inadequacy of price, Golden v. Tomiyasu, 79 Nev. 503, 514, 387 P.2d 989 (1963), and this Court's requirement to consider the equities of the parties. Thus, price alone still does not justify setting aside a foreclosure sale. Here there is no evidence, (since it was an unpled, un-argued issue), that the HOA's foreclosure trustee did anything that brought about the alleged inadequacy of price. Without numerous findings of fact and the district court performing a Shadow Wood analysis comparing the equities of the parties, grounds do not exist to affirm because of Greentree's allegations the sale was commercially unreasonable.

## V. CONSTITUTIONALITY WAS NOT RAISED IN THE DISTRICT COURT THEREFORE THE ARGUMENT SHOULD BE DISREGARDED AS AN ALTERNATIVE THEORY TO AFFIRM

Green Tree also did not plead unconstitutionality in Green Tree's Complaint in Intervention, PA 16-24, or in any pleading in the lower court, therefore while In re Candelaria, 126 Nev. Adv. Op. 40, 245 P.3d 518 (2010) does acknowledge that that this Court has the discretion to address important constitutional questions raised for the first time on appeal, because 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, this Court should disregard this argument since constitutionality by itself would not resolve whether the HOA foreclosure sale was still valid against the Websters.

Constitutionality has also been considered by this Court in numerous cases as far back as SFR Investments Pool v. U.S. Bank, 130 Nev. Adv Op. 75, 334 P.3d 408 (2014) when constitutionality was raised in an amicus brief, and this Court has fully considered the argument, the statute is constitutional, as applied as well as facially.

While recently the 9th Circuit, in a 2 – 1 decision in Bourne Valley Court Trust v. Wells Fargo, Case 15-15233 (9th Cir. August 12, 2016) found NRS 116.3116 unconstitutional, Bourne Valley is not binding law on Nevada courts. Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 633, 748 P.2d 494, 500

(1987). ". . . the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court." This court also took oral arguments on this very issue September 8, 2016 in Saticoy Bay LLC Series 350 Durango 104 vs. Wells Fargo Home Mortgage, Case #68630, because this Court believes Bourne Valley is not binding on Nevada Courts, all reason to deny considering this issue raised for the first time on appeal.

To prevail under a facial constitutional challenge, Greentree must establish that no set of circumstances exist under which a statute would be valid, not only that there is a conceivable set of circumstances which the statute might operate unconstitutionally. "To succeed in a typical facial attack, Stevens would have to establish 'that no set of circumstances exists under which §48 would be valid,'" United States v. Stevens, 559 US 460, 470 (2010), citing United States v. Salerno, 481 U.S. 739, 745 (1987). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment." Salerno.

Greentree, and the majority in Bourne Valley, misinterprets NRS 116.31158, the Request for Notice Statute, which refers to NRS 107.090. NRS 116.31158 is an additional option for any interested party to receive notice of HOA lien proceedings at another specific address. It is not an unconstitutional "opt-in" notice system.

All junior liens already get notice of the default and the notice of sale, as Bank of America got notice, (the original holder of the note and deed of trust before EverBank and then Greentree) pursuant to NRS 107.090(3) & (4). NRS 116.31158, simply provides a methodology for a secondary notice opportunity for a lender to receive notice at another address of their choosing: it is not the only notice they get.

NRS 116.31163(2) requires a HOA mail notice to "[a]ny holder of a recorded security interest encumbering the unit owner's interest who has notified the association, 30 days before the recording of the notice of default, of the existence of the security interest."

The original recording of the deed of trust and the subsequent assignment gave notice to the association of the security interest. NRS 111.315, Recording of conveyances and instruments: Notice to third persons. "Every conveyance . . . whereby any real property may be affected . . . to operate as notice to third persons, shall be recorded . . . ." NRS 111.320, Filing of conveyances or other instruments

is notice to all persons, . . . "Every such . . . instrument of writing . . . recorded . . . from the time of filing the same . . . impart notice to all persons of the contents thereof. . . ." First Nat. Bank. V. Meyers, 40 Nev. 284, 161 P. 929, 931 (1916). "One need but revert to the fact that recordation is for the purpose of giving notice to the world."

Thus, a foreclosing HOA must give notice to three sets of people: (1) those having requested notice, (2) those persons holding subordinate interests, which is basically everyone, including first deed of trust holders, and (3) those who have recorded their interests at least 30 days before the recording of the notice of default. NRS 116.31163, NRS 107.090, NRS 116.31168.

Bank of America, without any effort on its part, would therefore have received notice either as a recorded security interest holder or as a party holding a subordinate interest.

NRS 116.31158 does not burden shift. Actual notice would have been received pursuant to statute, and with this Court having already found circumstances under which the statute would be valid, NRS 116.3116 et seq. is not subject to a facial unconstitutional challenge, and affirmation because of facial unconstitutionality must be denied.

## 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 January 13, 2017.

/s/ Kerry P. Faughnan
Kerry P. Faughnan, Esq., NSB #12204
P.O. Box 335361
North Las Vegas, NV 89033
(702) 301-3096
(702) 331-4222 – FAX
Kerry.faughnan@gmail.com
Attorney for Appellant

## 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 2,331 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 January 13, 2017.

/s/ Kerry P. Faughnan
Kerry P. Faughnan, Esq., NSB #12204
P.O. Box 335361
North Las Vegas, NV 89033
(702) 301-3096
(702) 331-4222 – FAX
Kerry.faughnan@gmail.com

Attorney for Appellant

## CERTIFICATE OF SERVICE

I certify that on January 13, 2017, I served a copy of the foregoing upon all counsel of record by allowing the Court's ECF system to serve same upon:

Colt B. Dodrill, Esq.
WOLFE & WYMAN LLP
980 Kelly Johnson Drive, Ste. 140
Las Vegas NV 89119

Attorney for Respondent Green Tree Loan Servicing, LLC

DATED January 13, 2017.

/s/ Kerry P. Faughnan_
Kerry P. Faughnan, Esq.
Nevada Bar No. 12204
P.O. Box 335361
North Las Vegas, NV 89033
(702) 301-3096
(702) 331-4222 – FAX
Kerry.faughnan@gmail.com

Attorney for Appellant