

IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 81584

OELLA RIDGE TRUST

Appellant

v.

SILVER STATE SCHOOLS CREDIT UNION

Respondent

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Elizabeth A. Brown
Clerk of Supreme Court

On Appeal from the Eighth Judicial District Court, Clark County
Case No. A-20-809078-C
THE HONORABLE MARK DENTON

RESPONDENT'S BRIEF

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I. DISCLOSURE STATEMENT IN COMPLIANCE WITH NRAP 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.

1. SILVER STATE SCHOOLS CREDIT UNION (hereinafter “Silver State”) is a nonprofit cooperative corporation.
2. Michael R. Brooks, Esq. is, and has been at all times relevant to the commencement of litigation subject to the Oella Ridge’s appeal, the attorney of record for Silver State Schools Credit Union. Since 2020, Michael R. Brooks has been a partner of the law firm of HUTCHISON & STEFFEN,

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PLLC. No other partners or associates from Hutchison & Steffen are expected to appear before this Court with respect to the appeal now pending.

DATED May 12, 2021.

HUTCHISON & STEFFEN, PLLC

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II. JURISDICTIONAL STATEMENT

This is an appeal from an Order of the district court that qualifies as a final judgment. Silver State, agrees with Oella Ridge's jurisdictional statement to the extent that it addresses the appeal from the final judgment regarding Silver State's Motion to Dismiss.

III. ROUTING STATEMENT

Silver State, agrees with Oella Ridge's routing statement to the extent that it represents that no section of NRAP 17(b) applies directly to this appeal.

IV. INTRODCUTION

Silver State is the owner of a note and deed of trust that contains an unconditional right to recover attorneys fees and costs incurred in defending its lien position. Silver State's right to recover fees and costs is no different than its right to recover property tax advances or insurance advances without court approval. Nevertheless, Oella Ridge contends that Silver State was obligated to seek an award of attorneys fees following the lien priority litigation. There is no such obligation and Oella Ridge cannot cite to any authority imposing a condition upon the recovery of fees and costs. Moreover, Oella Ridge does not account for the fact that its position would undermine the anti-deficiency protections that Nevada consumers receive when they are foreclosed. Oella Ridge's arguments would impose liability on homeowners that the Nevada Legislature specifically sought to prevent.

V. STATEMENT OF FACTS

On or about May 11, 2004, Silver State made a loan in the original principal sum of \$160,000.00 to Theodore Efthymeou and Jolene Efthymeou. The loan was evidenced by a promissory note (the “Note”). Repayment of the Note was secured by a Deed of Trust on real property located at 193 Oella Ridge Court, Henderson, Nevada 89012 (the “Property”).

As a result of payment defaults by the borrowers on the HOA assessments, on November 2, 2012, Oella Ridge Trust purchased the Property at a foreclosure sale on a homeowners’ association’s lien. On November 8, 2012, a Foreclosure Deed was recorded in the Office of the Clark County Recorder, vesting title of the Property to Oella Ridge.¹ *See* Foreclosure Deed, attached hereto as RA 1.

On December 11, 2012, Oella Ridge filed a quiet title action against Silver State seeking a determination that Oella Ridge took possession of the Property free and clear of Silver State’s Deed of Trust (the “Lien Priority Litgation”). The district court initially sided with Oella Ridge after a bench trial, but this Court ultimately reversed the district court’s finding on July 11, 2019 in case no. 76382, holding that the foreclosure sale did not extinguish the Deed of Trust. *See* Order of Remand in Case No. 76382, attached hereto as RA 2. Upon remand, the district court signed a

¹ RA - Respondent’s Appendix

Judgment ordering that Oella Ridge owned the Property subject to Silver State's Deed of Trust. *See* District Court Judgment following Remand, attached hereto as RA 3.

Notably, the Deed of Trust allows Silver State to charge the borrower for additional debt, including attorneys fees, incurred in defending its interest in the Property. *See* Deed of Trust, attached hereto as RA 4. The Deed of Trust provides that if "there is a legal proceeding that might significantly affect [Silver State's] interest in the Property and/or rights under this Security Interest," then the Deed of Trust authorizes Silver State to act to protect its interest in the Property and Deed of Trust including, but not limited to, appearing in court and paying reasonable attorneys fees. *Id.* Moreover, the Deed of Trust mandates that "[a]ny amounts disbursed by [Silver State] under this Section 9 shall become additional debt of Borrower secured by this Security Instrument." *Id.* Finally, the Deed of Trust provides that "[Silver State] may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting [Silver State's] interest in the Property and rights under [the Deed of Trust], including, but not limited to, attorney's fees, property inspection and valuation fees." *Id.* Section 9 further specifies, however, that any amounts disbursed by Silver State for this purpose "shall become additional debt of Borrower secured by this Security Instrument" and that the "amounts shall bear interest at the Note rate from the date

of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.” *Id.* The plain text of these two clauses authorizes attorneys fees to be added to the loan amount; section 9 does not provide for a separate award of attorney fees.

After the district court entered its judgment on September 16, 2019, subjecting Oella Ridge to Silver State’s Deed of Trust, Oella Ridge requested a payoff from Silver State of the Note. In response, Silver State provided a payoff to Oella Ridge, which it refused to pay on the basis that the payoff included unsubstantiated attorneys fees. Indeed, the fees included within the payoff were incurred by Silver State during the seven year litigation between the parties, whereby Silver State was forced to defend its interest in the Property against Oella Ridge.

Subsequently, on January 23, 2020, Oella Ridge brought a declaratory relief action against Silver State, requesting that Silver State’s attorneys fees be removed from the payoff. *See* Complaint for Declaratory Relief, attached hereto as RA 5. On March 9, 2020, the district court granted partial summary judgment in favor of Silver State as to the addition of its attorneys fees and costs to the underlying obligation on the Note and ordered supplemental briefing on all other issues. *See* District Court Order Granting Partial Summary Judgment, attached hereto as RA 6. After all supplemental briefing was submitted and considered by the district court, it granted Silver State’s Motion to Dismiss in its entirety.

VI. SUMMARY OF ARGUMENT

After purchasing the Property at a HOA foreclosure sale, Oella Ridge took title subject to Silver State's first position Deed of Trust. Silver State's security interest was publicly recorded in the Office of the Clark County Recorder, thereby providing Oella Ridge constructive notice of the same. Nonetheless, Oella Ridge's lien priority litigation unsuccessfully sought to quiet title against Silver State. Because the Deed of Trust includes an additional debt provision, affording Silver State its attorneys fees should it ever have to defend its security interest, Silver State is entitled to the fees it incurred in defending its interest against Oella Ridge for nearly seven years in litigation. Oella Ridge would rather have the District Court enter a fee award against the foreclosed upon former owners of the Property in derogation of Nevada anti-deficiency protections. The district court did not err in granting Silver State's Motion to Dismiss and its ruling must be affirmed.

VII. STANDARD OF REVIEW

Silver State agrees with Oella Ridge that the appropriate Standard of Review is *de novo*, being that the district court treated Silver State's Motion to Dismiss as a Motion for Summary Judgment.

VIII. DISCUSSION

A. The Deed of Trust authorizes the attorneys fees incurred by Silver State in defending its interest in the Property.

Oella Ridge contends that Silver State unilaterally awarded itself attorneys fees pursuant to NRS 18.110. This argument improperly assumes that Silver State was obligated to apply for an award of fees following the conclusion of the Lien Priority Litigation. Oella Ridge makes this argument even though it properly recognizes that there is no Nevada statutory or case law directly on point. (Opening Brief, p. 8).

There is analysis of this issue from California, in nearly identical factual circumstances, where the California Court of Appeals has examined the exact same language in the Deed of Trust at issue. In *Chacker v. JP Morgan Chase Bank, N.A.*, the Court looked at the actual language of the Deed of Trust and determined that the Deed of Trust only contained a right to add attorneys fees spent in defense of a claim against title as additional debt. *See generally Chacker v. JPMorgan Chase Bank, N.A.*, 27 Cal. App. 5th 351, 237 Cal. Rptr. 3d 921 (2018), as modified on denial of reh'g (Oct. 17, 2018). In the end, the Court stated: “As we have explained, the trust deed is properly read (only) to permit attorney fees to be added to the borrower’s promissory note obligation, and the terms of the trust deed itself are all the “authority” that is necessary under the circumstances.” *Id.* at 356-357; 925.

A number of other cases have reviewed whether an award of attorneys fees is the proper, and only, way for a secured lender to seek recovery of attorneys fees spent in defense of its Deed of Trust. *See Hart v. Clear Recon Corp.*, 27 Cal.App.5th 322, 237 Cal.Rptr.3d 907 (2018); *Valencia v. Carrington Mortg. Servs., LLC*, 2013 WL 3223628, at 2 (D. Haw. June 25, 2013). In each case, it has been determined that a Court-ordered award of fees is not necessary, and more importantly, is improper.

Indeed, Oella Ridge is not harmed by the imposition of attorneys fees and costs added to the debt because the Deed of Trust made it clear that Oella Ridge, as the successor in interest, knew that it would be subject to fees and costs advanced in defense of Silver State's interest in the Property. When parties provide for attorneys fees by express contractual provisions, the objective in interpretation, as with all contracts, is to discern the intent of the contracting parties. *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). “[T]raditional rules of contract interpretation [are employed] to accomplish that result.” *Id.* Therefore, the initial focus is on whether the language of the contract is clear and unambiguous; and, if it is, the contract will be enforced as written. *Pardee Homes of Nevada v. Wolfram*, 135 Nev. 173, 178, 444 P.3d 423, 427 (2019). There is no question that the language of the Deed of Trust clearly intended to give Silver State the right to recover attorneys fees

and costs. The only question before this Court is the proper method, if any, for recovering those fees.

Instead, Oella Ridge would have this Court impose a requirement on fees and costs that would be substantially prejudicial to the former homeowners and undermine Nevada's anti-deficiency protections. Nevada courts have long held that an award of attorneys fees is enforceable as a separate judgment. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000)(stating "[a] final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs. A post-judgment order awarding attorney's fees and/or costs may be appealed as a special order made after final judgment, pursuant to NRAP 3A(b)(2).").

Here, the parties' relationship is governed by the Deed of Trust which clearly and unambiguously authorizes Silver State to add any attorneys fees incurred by it in protecting its interest in the Property to the loan balance. Oella Ridge fails to recognize that it automatically became obligated for any attorneys fees incurred by Silver State after Oella Ridge initiated legal proceedings against Silver State on December 11, 2012, challenging Silver State's interest in the Deed of Trust. Undoubtedly, Oella Ridge had constructive notice of the additional debt provision within Silver State's Deed of Trust prior to filing suit. Even assuming *arguendo* that

Oella Ridge did not have notice of the provision prior to initiating legal action against Silver State, once the District Court ordered that Oella Ridge owned the Property subject to Silver State's security interest, such judgment bound Oella Ridge to the entirety of the debt as described within Silver State's Deed of Trust. *Cf. O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 561, 429 P.3d 664, 673 (Nev. App. 2018)(finding that pursuant to NRS 18.010(3), a district court may award attorneys fees with or without additional evidence when it has presided over protracted litigation and witnessed a lengthy trial in which a party overcame numerous challenges to prevail). Accordingly, the District Court correctly held that there are no triable issues of fact regarding Silver State's ability to add attorneys fees expended in connection with the defense of its security interest as additional debt to the Note pursuant to the Deed of Trust.

B. Oella Ridge, as the moving party, prompted the attorneys fees incurred by Silver State and is solely liable for the debt.

Oella Ridge claims that Silver State should not be awarded its attorneys fees because it never timely applied for fees after the conclusion of the 2012 case, and thus failed to comply with NRCP 54(d)(2)(C). However, Oella Ridge basis its claim on the premise that "Nevada borrowers are entitled to have reasonableness of fees determined, when challenged, and in the prior, 2012 case, the borrower was a co-defendant." There are three problems with Oella Ridge's argument. First, it assumes that Oella Ridge is a borrower. Oella Ridge is not a borrower but a speculative

investor in HOA superpriority liens. Secondly, Oella Ridge had an opportunity to to have Silver State's fees incurred in an accounting matter in this case. The Court determined that the fees were reasonable.

Third and finally, Oella Ridge fails to consider Nevada's anti-deficiency protections for actual borrowers. In Nevada, if a judgment creditor or beneficiary of a deed of trust is a financial institution, the court may not award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust, even if there is a deficiency of the proceeds of the sale and a balance remaining due the judgment creditor or beneficiary of the deed of trust, if: (a) The real property is a single-family dwelling and the debtor or grantor was the owner of the real property at the time of the foreclosure sale; (b) The debtor or grantor used the amount for which the real property was secured by the mortgage or deed of trust to purchase the real property; (c) the debtor or grantor continuously occupied the real property as the debtor's or grantor's principal residence after securing the mortgage or deed of trust; and (d) the debtor or grantor did not refinance the mortgage or deed of trust after securing it. *See* NRS 40.455 (3).

In this case, Silver State could not seek a deficiency judgment to recover its fees against the Property's prior owner in the 2012 case because it would have been barred from doing so by the anti-deficiency protections.

Silver State began incurring attorneys fees to protect its Deed of Trust as a result of Oella Ridge, not the prior owner of the property. Moreover, because judgment ultimately determined that Oella Ridge purchased the Property subject to Silver State's security interest, the practical effect of such ruling meant that the terms within the Deed of Trust governed Oella Ridge and Silver State's relationship following the HOA's foreclosure sale. As such, because Oella Ridge became bound by the Deed of Trust's additional debt provision prior to Oella Ridge initiating legal action against Silver State, Oella Ridge is indebted to Silver State for its attorneys fees. Any argument otherwise would be inequitable, in that the HOA's foreclosure sale effectively relinquished the prior owners from the Deed of Trust. Thus, the District Court correctly found that Silver State has a legal basis to recover attorneys fees incurred in the defense of its Deed of Trust to the outstanding balance of the debt.

IX. CONCLUSION

The district court properly determined that there are no triable issues of fact regarding Silver State's ability to add attorneys fees expended in connection with the defense of its security interest as additional debt to the Note pursuant to the Deed of Trust. But-for the seven year-long litigation initiated by Oella Ridge against Silver

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State seeking declaratory relief to quiet title, Silver State would not have incurred attorneys fees and costs. Accordingly, this Court should dismiss this appeal.

DATED May 12, 2021.

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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 Microsoft Word 2010 in 14 point Times New Roman

2. I further certify that this brief complies with the page- or typevolume 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 2,639 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 May 12, 2021.

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CERTIFICATE OF SERVICE

I certify that on May 12, 2021, 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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