IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS L. CORNWELL, A NEVADA RESIDENT, Appellant,

v.

NEIL E. SCHULTZ, A NEVADA RESIDENT, A/K/A THE NEIL E. SCHULTZ TRUST DATED JANUARY 29, 2016, Respondent.

Supreme Court No. 82106

First Judicial District Court
Case No. 18 RP 00018 1B

APPELLANT'S REPLY BRIEF

GARMAN TURNER GORDON LLP
ERIC R. OLSEN
NVBN 03127
7251 Amigo Street, Suite 210
Las Vegas, Nevada 89119
eolasen@gtg.legal
Tel: (725) 777-3000
Fax: (725) 777-3112
Pro Bono Counsel for Appellant THOMAS J. CORNWELL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. SUMMARY OF REPLY

Respondent neither disputes nor acknowledges that Appellant is an innocent party harmed by quieting title in favor of Respondent. For him, this is a purely business transaction. Respondent does not dispute, however, that he had the burden of proving his claim to quiet title. In fact, Respondent argues he met that burden, essentially, by offering one sentence of admittedly hearsay testimony – "Uh, [my predecessor] did tell me it was delinquent that no payments had been made s- -- uh, last payment was 2010." This testimony is inadmissible and insufficient to "prove his … claim to the property in question," and Respondent failed to meet his burden. The district court clearly erred by improperly shifting the burden of proof to Appellant and considering this testimony. The judgment must be reversed.

Furthermore, the district court, sitting in equity, was required to consider the entirety of the circumstances, including the status and actions of the parties and whether an innocent party might be harmed in granting quiet title to Respondent. At issue is a parcel of land, on which sits Appellant's mobile home. Mr. Cornwell, at all times and to this day, resided in the home. A senior citizen of modest means, the Appellant also believed that he had equity in the Property and home. Appellant believed the mobile home was part of the land as did the previous owner. Moreover, Appellant maintains he was not in default on the note, and Respondent failed to prove he was. Appellant, therefore, urges the Court to reverse the decision of the

district court; if not on the ground that the district court granted relief based on inadmissible hearsay evidence and improper burden shifting, then on equitable grounds, and that the Court instruct Respondent if he wishes to obtain title to the Property, he must proceed to commence a nonjudicial foreclosure following the provisions of NRS Chapter 107 that give a homeowner like Mr. Cornwell notice and mechanisms for a possible resolution provided to homeowners like him.

II. LEGAL ARGUMENT

A. District Court improperly relied on hearsay evidence and incorrectly shifted the burden of proof to the Appellant.

In his brief, Respondent did not dispute having the burden of proving his quiet title claim.[1] However, the argument that he met that burden fails, because it depends upon inadmissible hearsay evidence.

Respondent Schultz only acquired the note and deed of trust by assignment, on March 30, 2018. Yet, Respondents' case asserted that the promissory note went into default in 2010, and that no payments were made after June 5, 2010. Respondent offered no admissible evidence to support these assertions at trial and points to none in his brief. He lacked any personal knowledge of a default in 2010, the payment history thereafter, or the balance owed. Moreover, the note seller, Soetje, did not

[1] See, *Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. 314, 319, 302 P.3d 1103, 1106 (2013).

testify at trial, and nothing in the record suggests the Soetje's actual business records were offered.

In his opening statement at trial, Mr. Bartlett said, "Um, and [Ms. Clarke] majorly defaulted after that and, um, my client, or Mr. [Soetje] maintains and informed Mr. Schultz at the time he purchased the note in 2018 that no payments had been made by Ms. Clarke since 2010."[2] Counsel's statement, itself citing rank hearsay, was never substantiated with admissible evidence. At one point in the trial, Respondent offered a hearsay affidavit, to which Appellant objected.[3] The record is unclear as to whether the affidavit was admitted, but Respondent's Brief states that it was not.[4] Respondent's reliance on hearsay statements of Soetje, however, goes beyond that affidavit.

His brief says that Respondent relied upon Soetje's hearsay statement when he purchased the note. Asked at trial, in a leading question from his counsel, whether Soetje gave him a status of the note, Respondent merely replied, "Uh, he did tell me it was delinquent that no payments had been made s- -- uh, last payment was 2010."[5] This halting testimony constitutes the statement of a person not present in the court

[2] See Trial Transcript, AA-306 , line 25 to AA307, line 4.

[3] See Trial Transcript, AA-312, line. 19 to AA-313, line 2.

[4] Responding Brief at 10, l. 1-2.

[5] See Trial Transcript, AA-349 at 48, line 24 to AA- 350, line 5.

and subject to cross-examination, offered for the truth of the matter asserted. The testimony, all that exists on the topic, is woefully insufficient to prove Respondent's case. It also fits precisely within the NRS 51.035 definition of inadmissible hearsay evidence. Respondent does not dispute this, but simply argues that Mr. Cornwell, the pro se defendant below, did not object to that testimony. However, Respondent cannot with a straight face assert that testimony so patently inadmissible (i.e. "he did tell me") to the eyes and ears of a trained attorney or judge should be allowed because an unsophisticated proper person defendant did not know to make a formal objection. A pro se party must follow the rules, but he cannot be expected to possess the level of understanding evidentiary objections that springs from training as a lawyer, and years of practical experience. In circumstances like this Nevada courts note that pro se litigants are entitled to leniency, including in the "legal intricacies of the rules of evidence."[6]

Similarly, Respondent argues that Exhibit 12, a handwritten note from Mr. Soetje supports the default and balance due.[7] This document, however, is also rank hearsay offered for the truth of the matter asserted. Again, Respondent does not dispute the hearsay nature of the document but attempts to excuse it by claiming that

---

[6] See, e.g. *Pattison v. Department of Corrections*, Not Reported in Pac. Rptr., 134 Nev. 993, 2018 WL 6721231, FN 5 (citing *Pouncil v. Tilton*, 704 F.3d 568, 574-75 (9th Cir. 2012)). Provided as persuasive authority, pursuant to NRAP 36(c)(3).

[7] Responding Brief at 10, line 17.

the pro se Appellant did not object to its admission. This time, however, the justification that Appellant failed to object is factually incorrect. At trial, the district court and Appellant had the following exchange:

> THE COURT: Okay. But I'm not clear on your answer. I think Mr. Bartlett is thinking that you don't have an objection to exhibits one through 24. If you don't I'm going to admit those.
>
> MR. CORNWELL: Well, judge, I really I -- I neglect to want to say anything because I don't have legal representation. I'm not sure if there's anything in here that I should object to.
>
> THE COURT: Okay. So you don't agree that they be admitted.
>
> MR. CORNWELL: Well, I should go through all this stuff again. I mean, there are some of this --the -- the wording is -- is stuff that I don't understand, judge. I -- I'm just trying to be honest. All I can go -- I can't go leave by legally, I can just go by what's right and wrong.
>
> THE COURT: So what I -- what I think I'm hearing is you do not want to agree to me admitting those at this point.
>
> MR. CORNWELL: Not without –
>
> THE COURT: One through 24.
>
> MR. CORNWELL: Not without somebody that's --that's got more legal savvy than I do looking over them.
>
> THE COURT: Okay. It sounds like there is not an agreement to admit one through 24.

In short, Appellant did lodge an objection to Exhibit 12, and the court noted it. Respondent offered no evidence of default beyond hearsay and thus failed to meet his burden of proving entitlement to quieting title to the Property.

In the absence of such evidence, Respondent argues that Appellant "corroborated Mr. Schultz testimony" at one point.[8] The record, however, neither supports that assertion nor cures the error of admitting hearsay evidence on the central issue. Respondent cites to three lines of testimony from Appellant, vague at best, concerning Soetje's statements to him claiming Ms. Clarke had not made payments since 2010. Soetje's claim -- also hearsay – does not prove either a default of the note or a balance due. Moreover, a review of Appellant narrative response to counsel's question reveals he never once agreed that a default existed or a balance was due. Instead, Appellant only commented, "And I was well aware of payments that Karen had made, I don't know if she missed payments or not, but, uh, [Soetje] just likes to go around saying that."[9]

At one point in the brief, Respondent does fallback to the fact, as noted in the district court's ruling, that Appellant did not provide checks as evidence of each payment made during and after 2010.[10] This argument, however, underscores the district court's error of putting the burden of proof on the Appellant. Respondent, as his brief initially acknowledges, had to burden of proving his entitlement to quiet title. He had the burden of proving he properly foreclosed, by proving a default and

[8] Responding Brief at 10, line 11 to 14.

[9] See Trial Transcript, AA374, line 17 to 20; see also, AA373, line 14 to AA375, line 5.

[10] Responding Brief at 11 to 17.

the amount of the debt due. That never happened, so the burden never properly shifted to Appellant for rebuttal.[11] The buck stopped with the Respondent. His evidence, however, comes down to one hearsay statement, "Uh, he did tell me it was delinquent that no payments had been made s- -- uh, last payment was 2010"; a statement so clearly inadmissible and in sufficient, that it cannot possible be used as the means to remove Appellant from his home and any equity he may have in it.

Respondent does not even attempt to defend the district court's backstop finding that the due on sale clause in the note supported the foreclosure. That provision, found in the deed of trust alone, only provides that transfer of the property makes "ALL OBLIGATIONS SECURED BY THIS INSTRUMENT… IMMEDIATELY BECOME DUE AND PAYABLE."[12] However, Respondent offered no admissible evidence of any obligation outstanding at the time of transfer.

Respondent failed to "prove his or her own claim to the property in question."[13] He offered no admissible and sufficient evidence to meet his burden.

---

[11] Respondent references Exhibit 9, a list including over 30 payments (many by money order) made during the period from 2011 through 2016. This document itself undermines Respondent's case, because the existence of just one payment – let alone 40 months' worth – contradicts both the position that no payments were made after April 2010 and the balance used to conduct the foreclosure. AA-072.

[12] AA254, line 18-21.

[13] *Chapman* at 129 Nev. 319, P.3d 1106.

The district clearly erred by improperly shifting the burden of proof to Appellant and ruling in Respondent's favor and, thus, the judgment must be reversed.

B. As a matter of equity, Appellant is entitled to notice and procedures provided for under NRS Chapter 107.085, 107.086 and 107.0865, and other protections afforded homeowners in a foreclosure.

Respondent's rebuttal to Appellant's argument for equity is very cut and dried: Mr. Cornwell's home is not a "residence" for purposes of Chapter 107, ergo he is not entitled to any more notice than he received. Thus, Respondent rejects the law that, when trying a quiet title claim, the court sits in equity.

> When sitting in equity, however, courts must consider the 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 desired relief. *Smith v. United States*, 373 F.2d 419, 424 (4th Cir.1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); see also *In re Vlasek*, 325 F.3d 955, 963 (7th Cir.2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney,* 248 Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.").[14]

The district court, sitting in equity, was required to consider the entirety of the circumstances, including the status and actions of the parties and whether an

[14] *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 63-64, 366 P.3d 110, 114-115 (2016).

innocent party might be harmed in granting quiet title to Mr. Schultz. Great harm will result to an innocent party here.

At issue is a parcel of land, on which sits Appellant's mobile home. Mr. Cornwell, at all times in issue and to this day, resided in the home on the Property. While a senior citizen of modest means, the Appellant believed that he had equity in the Property and home. Appellant's longtime partner, Ms. Clarke, and he bought the property in 2003. It was initally titled in her name, but Appellant testified that his money made monthly payments. When he and Ms. Clarke split in 2017, she quitclaimed the Property to Appellant. He believed the mobile home was part of the land as apparently did the previous owner, Childers, who recorded a conversion affidavit, but did so the day after he sold the Property to Ms. Clarke's predecessor, Cavendish.

Appellant maintains he was not in default on the note. Respondent failed to prove that he was in default. Furthermore, as practical matter, a reasonable person must question the claim that no payment had been made for eight years prior to Respondent's purchase of the note. How is it possible that in that time Respondent's predecessor in interest took no action on the debt? If true, the note could not be enforced through any judicial proceeding, because the statute of limitations ran in

2016.[15] Nor did Respondent present evidence of notice of a default being sent in 2010 or at any time. He could not, because he had no personal knowledge of a default, and no testimony from Soetje. On the other hand, Appellant did not have an attorney. His pleadings in the district court, make his misapprehension of the law and the process very apparent.

Yet, if the judgement stands, Appellant will no longer have a home or any of the equity he claims to have in it.

The terse argument of his answering brief reflects the fact that for Respondent the whole affair is purely business. Respondent testified that he bought the note and deed of trust because he believed the price he paid Soetje would net him $20,000 in equity.[16] Respondent made no demand for payment and commenced foreclosure shortly after acquiring the note and deed of trust. For him, the home was incidental. Clearly, he knew Appellant lived there, but he proceeded to foreclose on the land without regard to notices a homeowner would receive under NRS 107. Perhaps legally correct, but certainly inequitable.

Appellant is the innocent party harmed by quieting title in favor of Respondent. The district court ruling does not result in his "possible detriment," but

---

[15] Appellant acknowledges that the non-judicial foreclosure itself in not subject to the statute of limitation. See, *Facklam v. HSBC Bank USA for Deutsche ALT–A Securities*, 133 Nev. 497 401 P.3d 1068 (2017).

[16] AA-343, lines 23-25 and AA-349, lines 16-23.

his certain and absolute detriment. The district court ruling does not result in equity but in inequity.

While he cannot urge this Court to strike the deed of trust, Appellant urges the Court to reverse the decision of the district court. If the Court reverses on the ground that the district court granted relief based on inadmissible hearsay evidence and improper burden shifting, the matter ends. If not, Appellant asks this Court reverse on equitable grounds and that it instruct Respondent if he wishes to obtain title to the Property, he must proceed to commence a nonjudicial foreclosure following the provisions of NRS Chapter 107 that give a homeowner like Mr. Cornwell notice and mechanisms for a possible resolution provided to homeowners like him.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

III. CONCLUSION

For the reasons stated above, this Court should hold that the district court erred in entering judgment to quiet title in favor of Respondent and should reverse that judgment.

DATED this 5th day of October 2021.

GARMAN TURNER GORDON LLP

/s/ Eric R. Olsen
ERIC R. OLSEN
Nevada Bar No. 3127
7251 Amigo St., Suite 210
Las Vegas Nevada 89119
Pro Bono Counsel for Appellant

IV. CERTIFICATE OF COMPLIANCE

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 Office 365 Word in 14-point Times New Roman font.

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 either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 3378 words; or

☐ does not exceed 30 pages.

Finally, I hereby certify that I have read this 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 this 5th day of October 2021.

GARMAN TURNER GORDON LLP

/s/ Eric R. Olsen

ERIC R. OLSEN
Nevada Bar No. 3127
7251 Amigo St., Suite 210
Las Vegas Nevada 89119
Pro Bono Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that on the 5th day of October 2021, I served a copy of this completed **APPELLANT'S REPLY BRIEF** upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By E-Service through Nevada Supreme Court; email and by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

John Bartlett, Esq.
755 N. Roop St.
Carson City, NV 89701
Attorneys for Respondent

/s/ CM Wrangham
An employee of
GARMAN TURNER GORDON LLP

4845-8957-4398, v. 1