

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR.,
and VICENTA LINCICOME,

Appellants,

vs.

SABLES, LLC, a Nevada limited liability company, as trustee of the deed of trust given by Vicenta Lincicome and dated 5/23/2007; FAY SERVICING, LLC, a Delaware limited liability company and subsidiary of Fay Financial, LLC; PROF-2013- M4 LEGAL TITLE TRUST by U.S. BANK, N.A., as Legal Title Trustee; BANK OF AMERICA, N.A.; BRECKENRIDGE PROPERTY FUND 2016, a Utah limited liability company; NEWREZ, LLC dba SHELLPOINT MORTGAGE SERVICING, LLC; 1900 CAPITAL TRUST II, by U.S. BANK TRUST NATIONAL ASSOCIATION; and MCM-2018-NPL2,

Respondents.

Electronically Filed
Mar 02 2022 02:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

NEVADA SUPREME COURT

CASE NO.: 83261

APPEAL FROM
THIRD JUDICIAL DISTRICT
COURT CASE NO.: 18-CV-01332

Appeal from the Order of the Third Judicial District Court of the State of Nevada In and For the County of Lyon

SABLES, LLC'S ANSWERING BRIEF

Respectfully Submitted by:
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CORPORATE DISCLOSURE STATEMENT

PURSUANT TO N.R.A.P. 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 so that the judges of this court may evaluate possible disqualification or recusal.

Respondent Sables, LLC, is a Nevada limited liability company, and is 100% owned by Les Zieve, a resident of Los Angeles, California.

DATED: March 2, 2022.

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STATEMENT OF THE CASE

The underlying action centers on a dispute between plaintiff borrowers ALBERTO ELLIS LINCICOME, JR. and VICENTA LINCICOME (hereafter together “Lincicomes”) and their lenders. A disinterested party in this dispute, Sables, LLC (“Sables”) is the substituted trustee under the deed of trust at issue. Sables’ does not owe a fiduciary duty to the grantors, and its role is limited to performing its statutory duties as set forth in NRS 107.080. *See* NRS 107.028(6). Sables’ actions in the underlying dispute are limited to recording the Notice of Default, the Notice of Sale, and subsequently, the Trustee’s Deed upon completing the foreclosure. Sables has not committed any acts, and none are alleged, outside of its statutory duties as trustee set forth in NRS 107.080.

Lincicomes seek relief from the Order granting Sables’ Declaration of Non-Monetary Status pursuant to NRS 107.029 (“DNMS”). Lincicomes make allegations of errors pertaining to their lenders concerning prior dealings which do not concern Sables. Sables, as trustee, is entitled to rely on the information provided by the beneficiary of the deed of the trust in performing its duties under NRS Chapter 107 (NRS 107.028(6)). Lincicomes’ allegations of errors pertaining to their loan are properly directed at the lender defendants, and not the trustee. Importantly, not one allegation or stated fact in Plaintiff’s Complaint or its proposed Amended Complaint alleges that Sables violated any statutory duty of a

trustee found in NRS Chapter 107, or NRS 107.080 specifically. The Complaint focuses on the content of the recorded documents, which is provided by the beneficiary of the deed of trust, also a defendant participating in the underlying action. (AA00001). Accordingly, the DNMS was properly sustained over Lincicomes' objection.

Lincicomes continue to try to pin monetary liability on Sables solely due to Sables' recordation of the Notice of Default in the underlying non-judicial foreclosure. However, recording of the notice is the statutory duty of the trustee, and is not actionable. Lincicomes' dispute as to the substance of the notices lies with the lender defendants, not Sables. The information contained in the notices is provided by the lender beneficiary of the deed of trust. Sables merely performs the ministerial acts of recording and mailing the notices to interested parties pursuant to the statutes. Based on the facts and claims plead in the Complaint, the district court properly sustained Sables' DNMS.

Allowing a borrower in default to sue a non-judicial foreclosure trustee based on a dispute with the lender, solely because the trustee performed its duties by recording the statutorily required notices, would render the DNMS statute NRS 107.029 meaningless. Sables has no interest in the loan, the property, or the outcome of the dispute. Despite its DNMS being granted, Sables remains bound by the district court's determinations. Accordingly, if the district court had found

some actionable or reversible error concerning the loan balance or other information set forth in the notices, Sables would then be obligated to comply with the court's ruling as to same, including rescission if required. However, no such error was found by the District Court.

SUMMARY OF THE ARGUMENTS

As set forth more fully herein, Sables argues that the district court correctly upheld its Declaration of Non-Monetary Status ("DNMS"), because Lincicomes did not allege any actionable error on the part of Sables in performing its limited duties as trustee. Lincicomes entire lawsuit is premised on alleged errors concerning a loan modification and the resulting loan balance by its lenders. (AA00001). Lincicomes argue Sables had a duty to rescind the foreclosure notices or correct the alleged errors upon notice of the dispute by Lincicomes, and that failure to do so makes Sables liable. *Id.* Sables is entitled to rely on the information provided by the beneficiary, and did not commit any errors in performing its duties as trustee. Lincicomes suit is properly targeted at its lenders, not Sables. Should the Lincicomes' allegations be established as actionable through litigation, Sables would be bound to abide by the Court's orders concerning same. Lastly, Sables as trustee is not subject to liability under the HOBR statutes, and the HOBR statutes do not provide a cause of action or grounds for attorney's fees for alleged violation of statutes outside of the HOBR statutes.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY UPHELD SABLES' DECLARATION OF NON-MONETARY STATUS.

A. Sables, as trustee, performed its limited duties set forth in NRS Chapter 107.

Lincicomes' allegations in the Complaint as to Sables all stem from its recording of the Notice of Default ("NOD"), which is a statutorily required function of a trustee under NRS Chapter 107. *Id.* Lincicomes appear to take issue with the content of the notice and the attached affidavit, however that information is provided by the beneficiary of the deed of trust, which is a party to this case.

Sables has no right or duty to perform an audit of the loan information provided, but on the contrary, is entitled to rely on the information provided by the beneficiary. Indeed, "A rebuttable presumption that a trustee has acted impartially and in good faith exists if the trustee acts in compliance with the provisions of NRS 107.080. (NRS 107.028(6)).

Lincicomes have not alleged that Sables violated any provision of NRS 107.080, but have merely alleged that Sables "caused to be recorded the NOD with an Affidavit that does not comply with NRS 107.0805." Lincicomes then allege, without basis, that the "Affidavit does not comply with the requirements of

NRS 107.0805(1)(b)(3) because the facts sworn to are not reasonably contemporaneous to the date of recording.” (AA00011, 73-74).

First, Nothing in NRS Chapter 107 obligates a trustee to review and verify an affidavit of the beneficiary prior to recording. This would be unfeasible, if not impossible, as the trustee is a disinterested third party with no right or obligation to inspect a lender’s loan records. As stated above, a trustee is protected by “A rebuttable presumption that a trustee has acted impartially and in good faith exists if the trustee acts in compliance with the provisions of NRS 107.080. (NRS 107.028(6)). Lincicomes have not alleged that Sables violated any provision of NRS 107.080, therefore the presumption remains unrebutted.

Second, trustee Sables complied with NRS 107.080 and 107.0805 by recording the required NOD and affidavit – the extend of its duties found in the statutory scheme.

Sables is caught in the middle of a dispute between the borrower Lincicomes and their lender defendants, and is not an independent source of, nor an auditing authority of the contested information. Such disputes between lenders and borrowers are common, which is the entire purpose of shielding the trustee from liability in NRS 107.029. Accordingly, the presumption of good faith and impartiality remains as to Sables, and its DNMS was properly sustained.

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B. No error has been established requiring correction by Sables.

NRS 107.028(6) provides: “In performing acts required by NRS 107.080, the trustee incurs no liability for any good faith error resulting from reliance on information provided by the beneficiary regarding the nature and the amount of the default under the obligation secured by the deed of trust if the trustee corrects the good faith error not later than 20 days after discovering the error.” Lincicomes allege that Sables was on notice of errors alleged by Lincicomes, however, these remain merely allegations in a litigated case, not actionable or established errors.

Further, the alleged errors do not pertain to any statutory duty of the trustee, but center on the loan information provided by the beneficiary. The allegations concerning the loan balance were at issue in the underlying litigation, which until resolved, remained only allegations. If this Court were to find that a trustee is subject to liability simply because it recorded a Notice of Default that a borrower disagrees with, a flood of litigation naming trustees would ensue, and the DNMS statute would be rendered useless. Simply put, there is no statutory duty of a trustee to either: 1) independently verify a lender’s loan information, or 2) halt foreclosure, or rescind foreclosure notices where a borrower sends notice of a dispute with its lender.

Notably, Sables has complied with all orders of the district court, including the injunction, but Lincicomes then failed to post the required bond, allowing the

sale to proceed per order of the Court and the direction of the beneficiary. Sables takes no side in the dispute and has complied with all applicable law and court orders. Should the Court find that there was an error requiring rescission of the foreclosure notices, Sables would immediately comply with the Court's order to correct any errors, in compliance with NRS 107.028(6).

C. Sables' compliance with its statutory duties under NRS Chapter 107 did not cause any prejudice to Lincicomes.

NRS 107.080 imposes a "substantial compliance" requirement, not a strict compliance standard. Schleining v. Cap One. Inc., 326 P.3d 4, 10-11 (Nev., 2014). "Substantial compliance is sufficient where actual notice occurs and there is no prejudice to the party entitled to notice." Id., at 12.

Lincicomes do not allege Sables failed to provide notice, nor have they alleged any resultant prejudice from Sables' recordation of the notices. Lincicomes did not make payments on the loan for nearly a decade, but now allege errors with the loan balance associated with a disputed loan modification are contained in the Notice of Default.

However, without any articulable or alleged prejudice, these items are not actionable, especially as to Sables, which relies on the beneficiary to provide its loan balance and default information. Lincicomes cannot argue they were prejudiced by the foreclosure notices, as they subsequently attended foreclosure

mediation (AA02905-AA02908), and obtained an injunction order (AA00809) but failed to post a bond in amount less than the stated default amount. If Lincicomes were able to cure the default, surely they would have posted the bond of a lesser amount. Lincicomes' inability to post the bond is conclusive that they suffered no prejudice from Sables' recordation of the NOD. Lincicomes received all required notices, and have not alleged and cannot allege any prejudice resultant from Sables' recordation thereof. Accordingly, Sables has complied with the requirements of NRS 107.080 *et seq.*, and its DNMS should stand.

Lincicomes attempt to put the cart before the horse by alleging Sables was on notice of errors, however, the errors were merely *allegations* in the underlying case, not undisputed facts. This highlights the policy of the DNMS statute. The dispute is between Lincicomes and their lenders, as it pertains to the history of the loan and loan balance. The trustee is merely a third-party bystander to the dispute, aside from Lincicomes' attempts to pin liability on the trustee for recording the notices required by NRS 107.080.

Lincicomes have not alleged that they could cure the default, or that they have been prejudiced by the alleged errors in the NOD. The District Court granted the injunction provided that Lincicomes pay the security bond, but Lincicomes either refused to pay it or were unable to. After not making payments on the mortgage loan for roughly a decade, the Lincicomes should have had funds set

aside equal to their missed payments. These funds would demonstrate some good faith on the part of Lincicomes in resolving their dispute with the lender. Importantly, Lincicomes did not have these funds, meaning Lincicomes were unjustly enriched by prolonged use and possession of the Property without mortgage payments, and further establishing that Plaintiff's never intended, nor were able to cure the default. It is their own failure to do equity that caused the sale to proceed. Not the acts of the foreclosure trustee.

Since Lincicomes' claims in the complaint against Sables are centered on nothing more than Sables' act of recording the NOD as required of a trustee by NRS 107.080, the DNMS must stand.

D. HOBR statutes NRS 107.400 - 107.560 do not provide for liability as to trustee Sables.

In the Complaint, Lincicomes allege violations of HOBR statutes found at NRS 107.500 and NRS 107.560. (AA0011, 73 – 77). Again, the thrust of the allegations is that their lenders did not provide them accurate information, which Sables has no control over.

NRS 107.500 and 107.560, parts of the Nevada Homeowner's Bill of Rights ("HOBR") codified in NRS 107.400 – NRS 107.560, is not applicable to a trustee such as Sables. This statutory scheme does not once reference the duties of a trustee, much less liability of a trustee.

The HOBR statutes, including NRS 107.500 and NRS 107.560 cited by Lincicomes in the Complaint, routinely reference the duties and liabilities of a “mortgage servicer, mortgagee, beneficiary of the deed of trust or an authorized agent,” which arguably pertains to the other defendants in this action. The statutes do not impose obligations or liability on the trustee and are thus inapplicable to Sables.

“Trustee” is a statutorily defined term in NRS 107.015(15) and is routinely referred to as “trustee” throughout NRS Chapter 107. The HOBR statutes cited by Lincicomes do not impose any obligations or liability on the trustee. This lends the inference that the legislature intentionally left trustee liability out of NRS 107.400 - 107.560, rather than include it by its role as defined by the statute. The legislature’s intent to not include trustee obligations in the HOBR statutes, much less provide for liability of the trustee in these statutes is compelling evidence that trustees are not liable under the HOBR statutes for alleged errors by a beneficiary or servicer. Accordingly, affirmation of the May 30, 2019 Order sustaining Sables’ DNMS is proper.

E. NRS 107.560 does not provide liability for violation of NRS 107.0805.

Lincicomes sole allegation as to Sables in seeking liability under the HOBR statutes is that it “caused to be recorded the NOD with an Affidavit that does not

comply with NRS 107.0805.” (AA00011, 73-74). Lincicomes then make a huge leap, alleging that “the failure to provide the Lincicomes with accurate information is a material violation of the Homeowner’s Bill of Rights.” (AA00011, 77). Lincicomes then seek attorney’s fees for this alleged violation pursuant to NRS 107.560. (AA00014, 105-106). However, no liability is afforded under NRS 107.560 for a violation of NRS 107.0805. NRS 107.560 specifically and clearly limits any award of damages under this statute to “actual economic damages resulting from a material violation of NRS 107.400 to 107.560,” and costs and reasonable attorney’s fees in an action brought pursuant to this section.

NRS 107.560 is limited in scope to NRS 107.400 – NRS 107.560, and does not provide liability for alleged violation of NRS 107.0805. Further, it is not applicable to trustee Sables, as set forth above. For these reasons, the District Court properly granted Sables’ DNMS, and the Appeal should be denied.

F. The necessary parties are in the case without Sables’ participation.

Even without Sables as a party defendant, the necessary parties are present to afford Lincicomes the relief requested in the complaint. The beneficiary of the deed of trust and the prior lenders and servicers responsible for the loan at issue are parties to the case, and appropriate relief is available without the participation of Sables. As stated previously, Sables has no interest in the loan, the property, or

the outcome of the dispute. Sables will continue to perform its duties as trustee, as directed by the court and the applicable statutes.

CONCLUSION

For the foregoing reasons, this Court should deny the Appeal and affirm the Order of the District Court, finding that: 1) Sables' recordation of the notices as required by NRS 107.080 is not actionable by Lincicomes; 2) Sables' Declaration of Non-Monetary Status was properly upheld by the District Court where Lincicomes fail to allege violations of statutes governing the trustee's duties in NRS 107.080; and 3) the HOBR statutes NRS 107.500 and NRS 107.560, cited by Lincicomes do not provide a basis for liability against the trustee.

DATED: March 2, 2022.

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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 Times New Roman and 14-point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 31(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 2630 words.

FINALLY, I HEREBY CERTIFY that I have read this **SABLES, LLC’S ANSWERING 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 be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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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: March 2, 2022

ZBS LAW, LLP

By: /s/ Shadd A. Wade
Shadd A. Wade, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of ZBS LAW, LLP, and that on this 2nd day of March, 2022 and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **SABLES, LLC’S ANSWERING BRIEF**, through this Court’s electronic filing system to the following:

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Case Category Civil Appeal

Information current as of: Mar 02 2022 02:00 p.m.

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