

SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTA L. ALBICE, a married woman, and BART A. TECCA and KAREN L. TECCA, husband and wife,

Respondents,

v.

PREMIER MORTGAGE SERVICES OF WASHINGTON, INC., a Washington Corporation; OPTION ONE MORTGAGE CORPORATION, a California Corporation,

Defendants,

RON DICKINSON and "JANE DOE" DICKINSON, husband and wife,

Petitioners.

RON DICKINSON,

Petitioner,

v.

CHRISTA L. ALBICE fka CHRISTA L. DEYOUNG and BART A. TECCA and KAREN L. TECCA, husband and wife; Any Subtenants, and All Others Acting By or Through Them,

Respondents.

No. 85260-0

STATEMENT OF ADDITIONAL
AUTHORITIES OF
RESPONDENTS ALBICE AND
TECCA

CLERK

BY RONALD R. CARPENTER

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RECEIVED
SUPREME COURT
STATE OF WASHINGTON

ORIGINAL

COME NOW, the Respondents and submit the following additional authorities to the Court pursuant to RAP 10.8:

Lee v. HSBC Bank USA, 218 P.3d 775 (Hawai'i 2009) (failure to comply with deed of trust act in a non-judicial foreclosure voids a sale; purchaser is entitled to a refund of money paid plus interest; such a result is consistent with the three goals of the deed of trust act outlined in *Cox*).

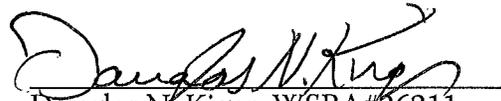
Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp., 149 P.3d 150 (Or. App. 2006) (forbearance agreement suspended trustee's statutory power of sale and made the sale void).

Taylor v. Just, 59 P.3d 308 (Id. App. 2002) (foreclosure sale void as against successful bidder at sale where forbearance agreement was in place; because bidder at sale did not acquire title, bidder could not be a bona fide purchaser for value).

DATED this 19 day of September, 2011.

Respectfully Submitted,

BLADO KIGER BOLAN, P.S.


Douglas N. Kiger, WSBA#26211
Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the 14th day of September, 2011, I placed with ABC Legal Messengers, Inc. an original Statement of Additional Authorities of Respondents Albice and Tecca for filing with the Supreme Court, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Attorneys for Petitioners, Ron Dickinson and Cheryl Dickinson:

Richard Ditlevson
Ditlevson Rodgers Dixon, P.S.
324 West Bay Drive NW, Suite 201
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Philip A. Talmadge
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Tukwila, WA 98188

DATED this 14th day of September, 2011, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.



Heather Medina, Paralegal

218 P.3d 775
Supreme Court of Hawai'i.

Steven D. LEE and KMK Holdings,
LLC, Plaintiffs-Appellants,

v.

HSBC BANK USA, National Association as
Trustee Under Pooling and Servicing Agreement
Dated as of April 1, 2007 SG Mortgage Securities
Trust 2007 NC1 Asset Backed Certificates,
Series 2007 NC1, Defendants-Appellees,
and

John Does 1-10; Jane Does 1-10; Doe Corporations
1-10; Doe Partnerships 1-10; Doe Trusts
1-10; and Doe Entities 1-10, Defendants.

No. 29744. Nov. 5, 2009.

Synopsis

Background: Winning bidder of property at nonjudicial foreclosure auction sued mortgagee for breach of contract, seeking specific performance or damages after mortgagor attempted to rescind the sale. The mortgagee removed case from circuit court to federal district court. The United States District Court for the District of Hawai'i certified question.

Holdings: The Supreme Court, Duffy, J., held that:

- 1 as case of first impression, the foreclosure sale was invalid, and
- 2 the bidder was only entitled to return of his downpayment plus accrued interest.

Question answered.

West Headnotes (4)

1 Appeal and Error

⚡ Cases Triable in Appellate Court

An issue of law presented by a certified question is reviewed by the Supreme Court de novo under the right/wrong standard of review.

1 Cases that cite this headnote

2 Mortgages

⚡ Effect of defects or irregularities in proceedings

Mortgages

⚡ Operation and effect

When a mortgagor cures its default prior to a foreclosure proceeding pursuant to statute authorizing nonjudicial foreclosure under a power of sale clause contained in a mortgage, but an auction inadvertently goes forward, the agreement created at the foreclosure sale to convey the property is invalid, void, and unenforceable. HRS § 667-5.

2 Cases that cite this headnote

3 Mortgages

⚡ Right to foreclose

A mortgagee, or an entity acting on its behalf, cannot proceed with a nonjudicial foreclosure under a power of sale clause in the mortgage unless it complies with either statute authorizing foreclosure by power of sale, or statute governing alternative power of sale process; without such compliance, the mortgagee has no legal authority to exercise its power of sale in a nonjudicial foreclosure sale. HRS §§ 667-5, 667-21.

1 Cases that cite this headnote

4 Mortgages

⚡ Effect of defects or irregularities in proceedings

High bidder at a foreclosure sale conducted pursuant to statute authorizing nonjudicial foreclosure under a power of sale clause contained in a mortgage is not entitled to lost profits, but only to return of his or her downpayment plus accrued interest, where the sale is invalid under the statute. HRS § 667-5.

3 Cases that cite this headnote

Attorneys and Law Firms

**776 Steven K.S. Chung and Chanelle M. Chung (of Steven Chung and Associates LLC), Honolulu, on the briefs, for plaintiffs-appellants Steven D. Lee and KMK Holdings, LLC.

Paul Alston and J. Blaine Rogers (of Alston Hunt Floyd & Ing), Honolulu, on the briefs, for defendants-appellees HSBC Bank USA, National Association as Trustee under Pooling and Servicing Agreement Dated as of April 1, 2007 SG Mortgage Securities Trust 2007 NC1 Asset Backed Certificates, Series 2007 NC1.

MOON, C.J., NAKAYAMA, ACOBA, and DUFFY, JJ. and Intermediate Court of Appeals Judge FUJISE, assigned by Reason of Vacancy.

Opinion

Opinion of the Court by DUFFY, J.

*288 The United States District Court for the District of Hawai'i (District Court) certified the following question of law to the Hawai'i Supreme Court:

Where a mortgagor cures its default prior to a foreclosure proceeding pursuant to [Hawai'i Revised Statutes (HRS)] § 667-5, but an auction inadvertently goes forward, is a valid agreement created entitling the high bidder at the auction to lost profits?

Based on the analysis below, we hold that a valid agreement *is not* created in such a situation and that the high bidder is entitled only to a return of his or her downpayment plus interest.

I. BACKGROUND

A. Factual Background

Defendants-Appellees HSBC Bank USA, National Association as Trustee under Pooling and Servicing Agreement Dated as of April 1, 2007 SG Mortgage Securities Trust 2007 NC1 Asset Backed Certificates, Series 2007 NC1; John Does 1-10; Jane Does 1-10; Doe Corporations 1-10; Doe Partnerships 1-10; Doe Trusts 1-10; and Doe Entities 1-10 (collectively Defendant) is the holder of a mortgage (the mortgage) dated October 2, 2006, recorded in the State of Hawai'i Bureau of Conveyances, on real property located at 1228 Nohea Street in Kalaheo, County of Kaua'i, Hawai'i (the Property). The mortgage secures a loan of \$134,500 to mortgagors James and Claudette Muchmore (the Muchmores).

Prior to August 22, 2008, the Muchmores were in default on the loan secured by the Mortgage. Defendant, through its servicing agent HomEq Servicing (HomEq), began nonjudicial foreclosure on the Property. To that end, in July

and August 2008, Defendant's foreclosure counsel, Leu & Okuda, published notice of Defendant's intent to foreclose pursuant to Hawai'i Revised Statutes (HRS) sections 667-5 through 667-10 by public auction to be held on August 26, 2008.

On August 20, 2008, HomEq faxed a letter to the Muchmores providing them a reinstatement quote to bring their payments on the loan current. The letter calculated that the Muchmores owed \$14,399.86, through August 26, 2008. The letter explained that HomEq

expressly reserves its right to continue with any enforcement action until the loan is fully reinstated (no longer delinquent) or is paid in full. Nothing herein constitutes nor shall be construed as a waiver of the rights of the lender pursuant to the terms of your loan documents.

The Muchmores wired \$14,399.86 to HomEq on August 22, 2008, which HomEq accepted, as indicated by its internal system noting that the Muchmores' loan was reinstated. On August 25, 2008, HomEq advised its vendor to stop the foreclosure sale, but the vendor failed to advise Defendant's foreclosure counsel, Leu & Okuda, to stop the foreclosure sale.

On August 26, 2008, Leu & Okuda-unaware that the Muchmores had brought their loan current-conducted the foreclosure auction on the Property. Plaintiff Steven Lee (Lee), attending the auction individually and in his capacity as manager of Plaintiff KMK Holdings, LLC (KMK) (collectively Plaintiffs), submitted the winning bid of \$302,000 for the Property. Lee gave Leu & Okuda checks totaling \$33,000 as a downpayment on the Property. In return, Leu & Okuda provided Lee a Receipt and Disclosure stating *289 **777 that the Property was to be conveyed by Defendant's quitclaim conveyance within 35 days of recording the Affidavit of Sale and upon payment by Lee of all costs related to the sale of the Property.

Leu & Okuda later informed Lee that the Muchmores had reinstated the loan prior to the auction and therefore returned Lee's downpayment checks totaling \$33,000 as well as a check for \$99.45 representing accrued interest. On September 10, 2008, counsel for Plaintiffs sent a demand letter to Leu & Okuda stating that Lee was ready, willing, and able to purchase the Property and therefore rejected Defendant's attempted rescission of the auction sale. Defendant has since asserted that the sale of the Property is void due to the loan reinstatement, resulting in Plaintiffs being entitled only to the return of their downpayment checks and accrued interest.

B. Procedural Background

On October 15, 2008, Plaintiffs filed their Complaint in the State of Hawai'i Circuit Court of the First Circuit, alleging claims for breach of contract seeking specific performance or damages (counts I-II), and violation of HRS section 480-2(a) (count III). On December 4, 2008, Defendant removed the case to the District Court.

On January 8, 2009, Plaintiffs filed their Motion for Partial Summary Judgment on their breach of contract claim for damages. On February 12, 2009, Defendant filed its Counter Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment. On February 19, 2009, Plaintiffs filed their Opposition to Defendant's Counter Motion for Summary Judgment and Reply in support of their Motion for Summary Judgment. On February 25, 2009, Defendant filed its Reply in support of its Counter Motion. A hearing was held on the parties' respective Motions for Summary Judgment on March 2, 2009. The District Court issued its Certified Question on April 6, 2009. This court issued its Order On Certified Question on April 20, 2009, allowing the parties to file briefs on the Certified Question in accordance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28.

II. STANDARD OF REVIEW

A. Certified Question

"The supreme court shall have jurisdiction and powers ... [t]o answer, in its discretion ... any question or proposition of law certified to it by a federal district or appellate court if the supreme court shall so provide by rule [.]'" HRS § 602-5(a) (2) (Supp.2008).

"When a federal district court or appellate court certifies to the Hawai'i Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawai'i that is determinative of the cause and that there is no clear controlling precedent in the Hawai'i judicial decisions, the Hawai'i Supreme Court may answer the certified question by written opinion." HRAP 13(a).

1 An issue of law presented by a certified question is reviewed by this court *de novo* under the right/wrong standard of review. *Francis v. Lee Enter., Inc.*, 89 Hawai'i 234, 236, 971 P.2d 707, 709 (1999).

III. DISCUSSION

A. The Foreclosure Sale was Invalid Under HRS Section 667-5.

HRS section 667-5 authorizes nonjudicial foreclosure under a power of sale clause contained in a mortgage. HRS § 667-5 (Supp.2008). Section 667-5 reads in relevant part:

Foreclosure under power of sale; notice; affidavit after sale. (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale *upon breach of a condition of the mortgage*, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

- (1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), *290 **778 the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and
- (2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

Id. (emphasis added). This section specifically requires breach of a condition of the mortgage as a condition precedent to foreclosure. *Id.*

The Muchimores' mortgage contains a power of sale clause, which reads in relevant part:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument ... The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert

the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law.

This clause requires the Muchmores to be in default and to have failed to cure the default by the date specified in the notice before Defendant can invoke its power of sale.

Prior to August 22, 2008, the Muchmores were in default and Defendant, through its attorney Leu & Okuda, published a notice of Defendant's intent to foreclose pursuant to HRS section 667-5 by public auction to be held on August 26, 2008. On August 20, 2008, HomEq sent a letter to the Muchmores stating that they owed \$14,399.84 to bring their loan current and that HomEq "expressly reserve [d] its right to continue with any enforcement action *until the loan is fully reinstated (no longer delinquent) or is paid in full.*" On August 22, 2008, the Muchmores wired \$14,399.86 to HomEq, which HomEq accepted, thereby reinstating the loan.¹

On August 25, 2008, HomEq advised its vendor to inform Defendant's foreclosure counsel Leu & Okuda to stop the foreclosure sale. The vendor, however, failed to so advise Leu & Okuda and the foreclosure sale went forward on August 26, 2008.

****779 *291 2** HRS section 667-5 specifically requires a "breach of a condition of the mortgage" before a nonjudicial foreclosure sale can be effected. *See* HRS § 667-5. In *Silva v. Lopez*, we stated that "[t]o effect a valid sale under power, all the directions of the power must be complied with ... this is unquestioned." 5 Haw. 262, 263 (Haw. Kingdom 1884). In that case, the mortgage required the mortgagee to effect entry and possession of the property prior to exercising the power of sale, which the mortgagee failed to do. *Id.* at 264-65. We held that the subsequent sale of the property was invalid pursuant to HRS section 667-5² because the mortgagee failed to comply with the conditions prescribed in the power of sale in the mortgage. *Id.* at 265.

Here, at the time of the foreclosure sale, the Muchmores were no longer in default and, thus, were no longer in breach of the a condition of the mortgage. Without such breach, Defendant could not invoke the mortgage's power of sale clause. The subsequent foreclosure sale did not comply with the requirements of HRS section 667-5 and was, thus, invalid.

See Silva, 5 Haw. at 263-65; *see also* HRS § 667-8 (1993) (allowing an affidavit filed by mortgagee describing the foreclosure sale to be admitted as evidence that the power of sale was duly executed where affiant "has in all respects complied with the requirements of the power of sale and the statute").

B. A Valid Agreement Was Not Formed Between Plaintiffs and Defendant.

Plaintiffs argue that, even if the foreclosure sale is illegal under HRS section 667-5, a valid and enforceable contract was nevertheless formed between Plaintiffs and Defendant for purchase of the Property. In response, Defendant argues that because it no longer had the power of sale at the time of the foreclosure auction, the sale of the Property to Plaintiffs is void as a matter of law.

1. The Purposes of HRS Section 667-5

The question thus becomes whether a contract to purchase foreclosed property at auction is void where the foreclosure sale was invalid under HRS section 667-5. The text of the statute does not explicitly address this question and the legislative history is not helpful in providing an answer. In determining whether a contract is void when made in violation of a statute, we have stated:

courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly ... [T]he statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so ... When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.

Carey v. The Discount Corp., 36 Haw. 107, 124-25 (Haw.Terr.1942) (quoting *Miller v. Ammon*, 145 U.S. 421, 426, 12 S.Ct. 884, 36 L.Ed. 759 (1892)).

In general, the purposes behind nonjudicial foreclosure statutes are threefold:

First, the nonjudicial foreclosure process should protect the debtor from a wrongful loss of property; second, the process should ensure that *properly conducted sales* are

final between the parties and conclusive as to bona fide purchasers; and third, the process should give creditors a quick, inexpensive remedy against defaulting debtors.

Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 Emory Bankr.Dev. J. 139, 151 (Fall 2006) (emphasis added) (citing, e.g., *Cox v. Helenius*, 103 Wash.2d 383, 693 P.2d 683, 685-86 (1985); *Moeller v. Lien*, 25 Cal.App.4th 822, 830, 30 Cal.Rptr.2d 777 (Cal.Ct.App.1994)).

The text of HRS section 667-5 shows it to be consistent with these purposes. The statute's requirements that there be a breach of condition of the mortgage and that the mortgagee give public notice of its intent to foreclose *292 **780 before it can exercise the power of sale evince the desire to protect the mortgagor from a wrongful loss of property. The statute requires the mortgagee to file an affidavit setting forth the mortgagee's acts in the premises fully and particularly. See HRS § 667-5(d). That the affidavit shall be admitted as evidence that the power of sale was duly executed demonstrates the legislature's intent to promote the finality of properly conducted sales. See HRS § 667-8 (1993).³ Allowing mortgagees to foreclose by power of sale pursuant to HRS section 667-5, rather than through judicial foreclosure,

is relatively quick and inexpensive. It does not require a lengthy time period between the notice of default and foreclosure sale, and does not require court costs and legal fees associated with discovery and drafting of pleadings. Georgina W. Kwan, *Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai'i*, 24 U. Haw. L.Rev. 245, 253 (Winter 2001) (internal citations omitted).⁴

2. Holding a Nonjudicial Foreclosure Sale Void Where the Sale was Invalid Under HRS Section 667-5 is Consistent with the Purposes of the Statute.

³ Plaintiffs note that "no state statute creates a right in mortgagees to proceed by non-judicial foreclosure; the right is created by contract." A mortgagee, or an entity acting on its behalf, cannot, however, proceed with a nonjudicial foreclosure under a power of sale clause in the mortgage unless it complies with either HRS section 667-5, or its alternative HRS sections 667-21, *et seq.*⁵ Without such compliance, the mortgagee has no legal authority to exercise its power of sale in a nonjudicial foreclosure sale. Enforcing

a contract arising out of an invalid foreclosure sale would not serve any of the purposes of HRS section 667-5. See *Carey*, 36 Haw. at 125 ("When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.").

Thus, we hold that an agreement created at a foreclosure sale conducted pursuant to HRS section 667-5 is void and unenforceable where the foreclosure sale is invalid under the statute. The high bidder at such a sale is entitled only to return of his or her downpayment plus accrued interest.

a. Authority from other jurisdictions.

This conclusion is in accord with other states that have considered the issue.⁶ In *293 **781 *Residential Capital, LLC v. Cal-Western Reconveyance Corp.*, 108 Cal.App.4th 807, 811, 134 Cal.Rptr.2d 162 (Cal.Ct.App.2003), the borrower negotiated a repayment plan with its bank that cured its default and reinstated the loan. The borrower and the bank agreed to postpone the foreclosure sale. *Id.* at 811-12, 134 Cal.Rptr.2d 162. The foreclosure sale went forward, however, because the foreclosure trustee failed to read an email instructing it to postpone the sale. *Id.* at 812, 134 Cal.Rptr.2d 162. The day after the bidding, the foreclosure trustee realized its mistake, advised the purchaser that it did not have the authority to conduct the sale and that the trustee's deed would not be issued, and returned the purchaser's checks with interest. *Id.*

The purchaser, like Plaintiffs in the instant case, argued that the foreclosure sale "was not void but merely illegal" and as such it was entitled to benefit-of-the-bargain damages. *Id.* at 813-14, 134 Cal.Rptr.2d 162. The Purchaser further argued that it was the innocent party and that the mistaken party should bear the consequences of its mistake. *Id.* at 815-16, 134 Cal.Rptr.2d 162.

The court enumerated the purposes of California's nonjudicial foreclosure statutes as: 1) protecting debtor from a wrongful loss of property, 2) providing an inexpensive and efficient remedy for creditors, and 3) promoting the finality of properly conducted sales. *Id.* at 821, 134 Cal.Rptr.2d 162. The court stated that the proper inquiry

is whether, recognizing the purposes of the statutory scheme, there is a substantial defect in the statutory procedure that is prejudicial to the interests of the [borrower] and claimants. It seems inconsistent for [plaintiff] to contend that although a postponement of the sale occurred and the [borrower] was not bound by

the sale, a separate conflicting contractual sale obligation nevertheless came into existence on its behalf against the trustee and [bank]. The agreement to postpone the sale [pursuant to the nonjudicial foreclosure statute] cannot be disregarded in evaluating whether the sale procedure was substantially defective. Only a properly conducted foreclosure sale, free of substantial defects in procedure, creates rights in the high bidder at the sale.

Id. at 822, 134 Cal.Rptr.2d 162 (internal citations omitted). Because the borrower's statutory right to postpone the nonjudicial foreclosure sale by agreement with the bank was not complied with, the sale was substantially defective and did not create rights in the high bidder. *Id.* at 822-23, 134 Cal.Rptr.2d 162. The court went on to find that because the defect in procedure was detected before the trustee's deed issued, plaintiff was not prejudiced and was entitled only to a return of its downpayment plus interest. *Id.* at 823-24, 134 Cal.Rptr.2d 162.

In *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp.*, 209 Or.App. 528, 149 P.3d 150, 152 (2006), the borrower and bank entered into a forbearance agreement and, in accordance with that agreement, the bank agreed to postpone the nonjudicial foreclosure sale. Due to a miscommunication between the bank and its foreclosure trustee, the sale went forward. *Id.* at 153. After the bank learned of the sale, it instructed the foreclosure trustee not to issue the trustee's deed to plaintiff, the high bidder at auction. *Id.* The foreclosure trustee returned plaintiff's purchase funds the next day. *Id.*

The court determined that, under terms of the forbearance agreement, there was no default for which the power of sale was authorized under Oregon's nonjudicial foreclosure **782 statutes. *Id.* at 154. The court stated that the purposes of Oregon's nonjudicial foreclosure *294 statutes are to protect debtors from unauthorized foreclosure and wrongful loss of property and to provide creditors with a quick and efficient remedy against a defaulting debtor. *Id.* at 157. Voiding the foreclosure sale was consistent with Oregon's statutory scheme because

[t]hose provisions reflect the legislature's intent to protect the [debtor] against the unauthorized loss of its property and to give the [debtor] sufficient opportunity to cure the default. The ability of the [debtor] to postpone the sale by entering into, and complying with, a forbearance agreement with the [creditor] furthers that legislative intent. Enforcing a sale of the property at auction despite

the existence of such an agreement would undermine that purpose of the Act.

Id. at 158. The court further held that

although plaintiff was the high bidder at the foreclosure sale, the discovery of the agreement to postpone the sale before execution of the trustee's deed renders the contract void and plaintiff's remedy is limited to return of the purchase funds and, if applicable, interest. This result properly restores the parties to the positions they would have occupied had the wrongful sale not occurred.

Id.

In *Taylor v. Just*, 138 Idaho 137, 59 P.3d 308, 310 (2002), the borrowers entered into a forbearance agreement with their bank under which the bank agreed not to proceed with the scheduled foreclosure sale. The bank sent an email to the foreclosure trustee, but due to a problem with his Internet provider, the trustee did not receive the email until a day after the foreclosure sale had taken place. *Id.* Four days after the foreclosure sale, the foreclosure trustee informed plaintiff, the high bidder, of the mistake and returned the purchase price. *Id.*

The court found that the Idaho nonjudicial foreclosure statutes require the borrower to be in default at the time the foreclosure sale takes place. *Id.* at 311. Due to the forbearance agreement, the borrowers were not in default at the time of the foreclosure sale. *Id.* at 312. For this reason, the court held the foreclosure sale was void for failure to comply with the statute and the subsequent contract between the high bidder and the bank was likewise void. *Id.* at 312-13.

Plaintiffs argue that this court should follow the decision of the District of Columbia Court of Appeals in *Basiliko v. Pargo Corp.*, 532 A.2d 1346 (D.C.1987). In that case, the borrowers cured their default five minutes before close of business on the day before the foreclosure sale. *Id.* at 1347. The payment, while credited in the bank's computer, did not come to the attention of the foreclosure trustees who continued with the sale. *Id.* The foreclosure trustees refused to convey the property to plaintiff, the high bidder, because they had been without authority to hold the sale. *Id.*

The court noted that the general rule in the District of Columbia is that the seller who breaches an executory contract for the sale of real property is liable to the would-be purchaser for benefit-of-the-bargain damages. *Id.* at 1348. Though the foreclosure sale in *Basiliko* was conducted

pursuant to a power of sale clause in the deed of trust, the court did not engage in any discussion of a nonjudicial foreclosure statute, nor did it state whether the District of Columbia has a statute that governs such sales. The court held that it could "find no justification in law or policy for such exceptional treatment in the case of a foreclosure sale." *Id.* Because the *Basiliko* court did not analyze the impact of a nonjudicial foreclosure statute on the contract at issue, *Basiliko* is distinguishable from the present case and of less persuasive value than the *Residential Capital*, *Staffordshire*, and *Taylor* cases cited above.

b. Plaintiffs' arguments regarding encouraging competitive bidding are unpersuasive.

Plaintiffs contend that a purpose of HRS section 667-5, protecting mortgagors, is served by encouraging competitive bidding at public auction, which would reduce "the risk that the mortgaged property will be sold for less than the loan balance." Plaintiffs argue that failure to enforce their contract with *295 **783 Defendant would "send a signal to prospective bidders at non-judicial foreclosure sales that their contractual expectations are not subject to protection, and would dampen competitive bidding." Further, failure to enforce the contract would, Plaintiffs argue, encourage "sloppy business practices" by mortgagees because mortgagees would be assured "that they will not be held contractually accountable to purchasers if they fail to exercise due care in foreclosing under power of sale."

Plaintiffs are correct that encouraging competitive bidding promotes the protection of mortgagors, one of the purposes of HRS section 667-5. However, their argument that failure to enforce the contract at issue would discourage competitive bidding is unpersuasive. The situation at issue in this case, where a mortgagor cures its default prior to a foreclosure sale conducted pursuant to HRS section 667-5, but through the mortgagee's mistake the sale goes forward anyway, is apparently rare as this is a case of first impression in this jurisdiction despite the fact that HRS section 667-5 was enacted in 1874. *See* HRS § 667-5 (Supp.2008). Plaintiffs' argument that failure to enforce its contract with Defendant would discourage competitive bidding at nonjudicial foreclosure sales is simply too attenuated.

Further, there is no reason to think that failure to enforce the contract at issue would encourage "sloppy business practices" by mortgagees. It is in the mortgagees' best interests to conduct a foreclosure sale in compliance with the dictates of

HRS section 667-5, rather than going through costly litigation to correct an invalid sale.

Finally, the parties have been returned to the position they would have occupied had the wrongful sale not occurred. Plaintiffs are entitled to, and have received, return of their downpayment plus accrued interest.

3. Plaintiffs' Remaining Arguments Are Inapposite

4 Plaintiffs make several other arguments in support of their position that they are entitled to lost profits from their contract with defendant.⁷ These arguments, however, are inapposite because they fail to discuss the enforceability of land sale contracts conducted pursuant to Hawai'i's nonjudicial foreclosure statutes.

For example, Plaintiffs cite *Territory of Hawai'i v. Branco*, 42 Haw. 304, 316 (Haw.Terr.1958), for the proposition that "[i]t is elementary in the law of contracts that at an auction an enforceable contract is formed upon the fall of the hammer." The auction in question was not conducted under HRS section 667-5. Further, the court found that the auction was conducted pursuant to legal authority. *Id.* at 312-16.

Plaintiffs cite *Warner v. Denis*, 84 Hawai'i 338, 347-48, 933 P.2d 1372, 1381-82 (App.1997) and *Farrow v. Sunra Coffee, LLC*, Civil No. 05-00715, 2006 WL 2884086, *7-9 (D.Haw. Oct.6, 2006), for the proposition that the defense of impossibility does not excuse performance of a land sale contract and does not shield the seller from damages. Neither case dealt with a nonjudicial foreclosure sale that must be conducted pursuant to the requirements of HRS section 667-5. *Cf. State v. Kahua Ranch, Ltd.*, 47 Haw. 28, 36, 384 P.2d 581, 586 (1963) (where a statute forbade any agreement between the State and a prospective bidder for a lease of State land inconsistent with the terms of the notice of sale as published, we held that "[a]ny such agreement contrary to the terms of the published notice of sale would be illegal and unenforceable. Otherwise, the statutory requirements become meaningless.").

Plaintiffs contend that in *Burgess v. Arita*, 5 Haw.App. 581, 589-90, 704 P.2d 930, 937 (1985), Hawai'i adopted the "American Rule," *296 **784 under which the buyer of land is entitled to recover ordinary contract damages, measured by the difference between the contract price and the market value of the land, when the seller breaches the land sale contract. While true, this proposition does not answer the question of whether Plaintiffs are entitled to damages from a contract arising out of an invalid nonjudicial foreclosure

sale. For instance, in *Residential Capital*, 108 Cal.App.4th at 822-24, 134 Cal.Rptr.2d 162, the California Court of Appeal found that a disappointed purchaser in a sale which was invalid under California's nonjudicial foreclosure statutes was entitled only to a return of the purchase price plus interest, despite the fact that California is an American Rule jurisdiction. *See* Cal. Civ.Code § 3306; *see also Burgess*, 5 Haw.App. at 590 n. 11, 704 P.2d 930 (listing California as an American Rule jurisdiction).

Plaintiffs also argue that the District of Columbia Court of Appeals in *Basiliko* held that the American Rule applied in nonjudicial foreclosure sales. For reasons discussed earlier herein, *Basiliko* is distinguishable from the present case and unpersuasive.

Footnotes

- 1 In their Opening Brief, Plaintiffs state that they reserve their right to argue that the Muchmores did not cure their loan. They note that any reference to "cure" or "reinstatement" is for the purpose of argument only and should not be interpreted as a statement of fact, belief, acknowledgment or concession by Plaintiffs. In their Reply Brief, Plaintiffs expressly argue that the Muchmores did not cure their default prior to the foreclosure sale because paragraph 19 of the mortgage required the Muchmores to cure their default at least five days prior to auction, whereas they paid the reinstatement quote four days prior to auction. "Accordingly, the foreclosure auction did not violate any provision of the mortgage" because Defendant retained the power of sale. In its Certified Question, the District Court addressed this issue as follows:

During the March 2, 2009 [summary judgment] hearing, for the first time, Plaintiff[s] argued that the court need not determine [the issue presented by the Certified Question] because the Mortgage granted Defendant the power to auction the Property regardless of whether the Muchmores cured their default prior to the auction. The court rejects this argument. First, regardless of whatever the Mortgage provides, such fact would not obviate the question of whether a mortgagee may foreclose on property pursuant to HRS § 667-5 where the mortgagor has cured the default. Second, HomEq's offer and the Muchmores' acceptance of reinstatement modified any terms of the Mortgage that colorably provide otherwise. The reinstatement offer expressly reserved HomEq's right to continue with the foreclosure until either "the loan is fully reinstated or paid in full." Def.'s Ex. 1 (emphasis added). Because the loan was reinstated before the auction, Defendant no longer had the power of sale.
- 2 Previously referred to as Chapter XXXIII of the Acts of 1874. *See Silva*, 5 Haw. at 264.
- 3 HRS section 667-8 states as follows:

Affidavit as evidence, when. If it appears that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed.

HRS § 667-8 (1993).
- 4 In 1998, the legislature passed an alternative nonjudicial foreclosure measure, which is more detailed than HRS section 667-5. *See* HRS §§ 667-21, *et seq.* (Supp.2008). The legislative history behind this alternative process gives some insight into the purposes behind HRS section 667-5. In passing HRS sections 667-21, *et seq.*, titled "Alternative Power of Sale Foreclosure Process", the "legislature sought to 'provide[] an alternate nonjudicial foreclosure process which *reduces the time and cost of the current foreclosure process* and contains *additional safeguards* not required in the current power of sale foreclosure law that are needed to protect the interests of consumers.'" *Ames Funding Corp. v. Mores*, 107 Hawai'i 95, 102, 110 P.3d 1042, 1049 (2005) (emphasis added) (quoting Conf. Com. Rep. No. 75, in 1998 House Journal, at 979).
- 5 A mortgagee may elect to proceed either under HRS section 667-5 or HRS 667-21, *et seq.* *See* HRS § 667-21 (Supp.2008); *see also* David C. Farmer, Esq., *Hawaii Enacts Expedited Nonjudicial Foreclosure Process*, 2-NOV Haw. B.J. 42 (November, 1998). Here, Defendant elected to proceed under HRS section 667-5.
- 6 Plaintiffs argue that the persuasive value of non-Hawai'i authorities is limited because "there are striking textual differences" between HRS section 667-5 and the nonjudicial foreclosure statutes from other jurisdictions. While it is true that HRS section 667-5 is less detailed and protective than the non-judicial foreclosure statutes in California (Cal. Civ.Code §§ 2924-2924k), Oregon (Oregon

IV. CONCLUSION

Based on the foregoing analysis, we hold that an agreement created at a foreclosure sale conducted pursuant to HRS section 667-5 is void and unenforceable where the foreclosure sale is invalid under the statute and that the high bidder at such a sale is entitled only to return of his or her downpayment plus accrued interest.

Parallel Citations

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Revised Statutes §§ 86.705-86.735) and Idaho (Idaho Code §§ 45-1505 through 45-1508), it still shares the same basic purposes. *See Residential Capital, LLC v. Cal-Western Reconveyance Corp.*, 108 Cal.App.4th 807, 821, 134 Cal.Rptr.2d 162 (Cal.Ct.App.2003) (“[T]he purposes of the nonjudicial foreclosure sale statutes are to protect the trustor (debtor) from wrongful loss of the property and to provide a quick, inexpensive, and efficient remedy for creditors of defaulting debtors ... In addition ... the statutory scheme also evidences an intent that a properly conducted sale be a final adjudication of the rights of creditor and debtor and the sanctity of title of a bona fide purchaser be protected.”); *see also Staffordshire Inv., Inc. v. Cal-Western Reconveyance Corp.*, 209 Or.App. 528, 149 P.3d 150, 155, 157 (2006) (noting that Oregon and Idaho have similar nonjudicial foreclosure statutes and holding that Oregon's nonjudicial foreclosure statutes “represent a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor.”).

- 7 Plaintiffs' additional arguments are: 1) Hawai'i courts recognize the general rule that a contract is formed at the fall of the auction hammer, 2) Where title is not passed at auction, Hawai'i case law suggests that the seller's acceptance of the high bid creates an executory contract to convey real property, 3) Under Hawai'i law, where a party contracts to convey real property, inability to convey for lack of good title ordinarily does not discharge contractual liability to purchaser, 4) The “American Rule” followed by Hawai'i courts entitles a disappointed purchaser of real property to the benefit of its bargain, and 5) The American Rule has been applied in the context of nonjudicial foreclosure sales conducted in wrongful exercise of the mortgagee's power of sale.

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149 P.3d 150

Court of Appeals of Oregon.

STAFFORDSHIRE INVESTMENTS, INC., an Oregon corporation, Respondent-Cross-Appellant,

v.

CAL-WESTERN RECONVEYANCE CORPORATION, a California corporation, Cross-Respondent,

and Bankers Trust Company of California, N.A., a national banking association, Defendant, and

Homecomings Financial Network, a Delaware corporation, Appellant-Cross-Respondent.

0204-03942; A121664. Argued and Submitted Oct. 28, 2004. Decided Dec. 6, 2006.

Synopsis

Background: Purchaser of property at nonjudicial foreclosure sale sued mortgagee and deed trustee alleging breach of contract and breach of warranty of authority, seeking to recover lost profits it would have realized after reselling the property, after mortgagee voided the sale and returned the purchase funds. Mortgagee and purchaser both moved for summary judgment. The Circuit Court, Multnomah County, Ann L. Fisher, Judge pro tempore, granted purchaser's motion. Mortgagee appealed, purchaser cross-appealed dismissal of breach of warranty of authority claim against deed trustee.

Holdings: The Court of Appeals, Armstrong, J., held that: in a matter of first impression, 1 deed trustee's statutory authority to sell the property was suspended by forbearance agreement, and 2 sale agreement was void and unenforceable.

Reversed and remanded with instructions in part; vacated and remanded in part.

West Headnotes (6)

1 Contracts

Language of contract

In ascertaining the terms of a contract, courts examine the parties' objective manifestations of

intent, as evidenced by their communications and acts.

1 Cases that cite this headnote

2 Contracts

Existence of ambiguity

Provisions in a contract are ambiguous if they have no definite meaning or are capable of more than one sensible and reasonable interpretation in the context of the agreement as a whole.

1 Cases that cite this headnote

3 Mortgages

Right to foreclose

Forbearance agreement between mortgagor and mortgagee suspended deed trustee's statutory power of nonjudicial foreclosure sale for default during term of agreement provided mortgagor met his obligations under the agreement; agreement was intended to permit mortgagor to bring loan current during which mortgagee would refrain from foreclosing on the property, and there were no sums past due unless and until mortgagor failed to make a payment under the agreement. West's Or.Rev. Stat. Ann. §§ 42.230, 86.735.

4 Cases that cite this headnote

4 Contracts

Violation of Statute

Contracts

Effect of Illegality

An agreement may not generally be enforced if it is illegal, and an agreement is illegal if it violates a statute or cannot be performed without violating a statute.

5 Mortgages

Right to foreclose

In the absence of an express statutory provision voiding an agreement of sale in nonjudicial foreclosure process, the question of the contract's enforceability is one of legislative intent.

1 Cases that cite this headnote

6 Mortgages

☛ Right to foreclose

The Trust Deed Act represented a well-coordinated statutory scheme to protect mortgagors from unauthorized foreclosure and wrongful sale of property while protecting mortgagees with quick efficient remedy against defaulting mortgagor, and thus, agreement of sale at nonjudicial foreclosure sale was void and unenforceable due to forbearance agreement between mortgagor and mortgagee executed prior to sale in which mortgagee agreed to postpone the sale provided mortgagor made payments specified under the agreement. West's Or.Rev. Stat. Ann. §§ 86.705-86.795.

4 Cases that cite this headnote

Attorneys and Law Firms

****151** Peter Salmon argued the cause for appellant-cross-respondent and cross-respondent Cal-Western Reconveyance Corporation. On the briefs were David E. McAllister and Moss Pite & Duncan, LLP.

James N. Esterkin, Portland, argued the cause and filed the brief for respondent-cross-appellant.

Before LANDAU, Presiding Judge, and BREWER, Chief Judge, and ARMSTRONG, Judge.

Opinion

ARMSTRONG, J.

531** Defendant Homecomings Financial Network appeals from a judgment for plaintiff on plaintiff's claim for breach of contract.¹ *152** Defendant assigns error to the trial court's grant of summary judgment in plaintiff's favor on its breach of contract claim and to the denial of defendant's motion for summary judgment on that claim. Plaintiff cross-appeals from the trial court's dismissal of its claim against Cal-Western Reconveyance Corporation (Cal-Western) for breach of warranty of authority. On appeal, we reverse the judgment in favor of plaintiff and remand with instructions to

enter judgment for defendant; on the cross-appeal, we vacate and remand.

When a trial court grants a motion for summary judgment and denies a cross-motion for summary judgment, and the party assigns error to both rulings, we can review both rulings on appeal. *Eden Gate, Inc. v. D & L Excavating and Trucking, Inc.*, 178 Or.App. 610, 622, 37 P.3d 233 (2002). We review the record to determine if there are genuine issues of material fact and, if there are none, we decide which party is entitled to judgment as a matter of law, viewing the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the party opposing the motion. ORCP 47 C; *Jones v. General Motors Corp.*, 325 Or. 404, 420, 939 P.2d 608 (1997); *Powell v. Bunn*, 185 Or.App. 334, 338, 59 P.3d 559 (2002), *rev. den.*, 336 Or. 60, 77 P.3d 635 (2003).

Bickell mortgaged a property to Headlands Mortgage Company (Headlands) on July 9, 1999. At that time, Rainey was a cotrustee of Bickell's living trust and had a power of attorney from Bickell to act on her behalf in financial transactions. The loan was secured by a trust deed that provided for the foreclosure sale of the property in the event of default by the grantor. Headlands was designated as the beneficiary of the trust, and Chicago Trust was the trustee.

***532** Headlands assigned its interest under the trust deed to Bankers Trust Company of California, N.A. (Bankers Trust), on March 27, 2000. Defendant serviced the loan for Bankers Trust. In January 2001, Bickell defaulted on her loan. Based on that default, Bankers Trust initiated a nonjudicial foreclosure sale of the property. Cal-Western was substituted for Chicago Trust as trustee for purposes of the foreclosure sale. Cal-Western recorded a notice of default on June 26, 2001, in Multnomah County. A notice of sale was published on July 23 and 30, 2001, and August 6 and 13, 2001, setting the sale date for November 8, 2001.

Rainey received notice of Bickell's default and Bankers Trust's election to sell on August 17. On September 10, 2001, Cal-Western recognized that, due to a late service of the notice, it would need to postpone the scheduled sale until December 17, 2001. Because the sale had been noticed for November 8, 2001, Cal-Western determined that it would be necessary to publicly announce the postponement at the sale on November 8. Bickell, who had been ill since late 1999, died on September 25, 2001, and Rainey was named the executor of her estate. On November 8, Cal-Western, through the auctioneer it authorized as its agent, announced the postponement of the sale until December 17, 2001. Also

on November 8, defendant entered into a loan forbearance agreement with Rainey. However, on December 1, 2001, Rainey failed to make a scheduled payment under that forbearance agreement. On December 14, defendant sent an e-mail to Cal-Western, instructing it to proceed with the sale scheduled for December 17. On December 15, Rainey and defendant entered into a new forbearance agreement and, in accordance with that agreement, defendant told Rainey that the December 17 sale would be postponed. However, defendant did not notify Cal-Western of the new forbearance agreement or that it had agreed to postpone the sale.

On December 17, Rainey mailed a payment under the new forbearance agreement to defendant. He then went to the scheduled sale and informed the bidders and Cal-Western's auctioneer that he had entered into a new forbearance agreement and that the sale should therefore not proceed. The auctioneer made several attempts to contact defendant **153 by telephone. While the auctioneer attempted to *533 reach defendant, Rainey showed the bidders the receipt for the cashier's check that he had mailed to defendant as his first payment under the new forbearance agreement. The auctioneer's attempts to reach defendant were unsuccessful, according to Rainey. However, plaintiff's president stated in an affidavit that the auctioneer "received a return [phone] call from his office, announced that he had authority to conduct the sale and thereafter conducted the sale." In his own affidavit, Rainey stated that, after the auctioneer's telephone calls, the auctioneer, "despite [Rainey's] objections, eventually conducted the sale." Plaintiff was the high bidder at the auction and tendered a cashier's check to the auctioneer for the purchase price. Rainey contacted defendant about the auction later that day. After defendant learned that Cal-Western had auctioned the property, defendant contacted Cal-Western and instructed it not to issue the trustee's deed to plaintiff. On December 18, Cal-Western returned plaintiff's purchase funds.

Plaintiff subsequently filed this action for breach of contract and breach of warranty of authority, seeking to recover lost profits that it would have realized after reselling the property.² Defendant answered that the sale of the property was void because Rainey was not properly notified of the December 17 foreclosure sale, because the forbearance agreement between defendant and Rainey deprived Cal-Western of the power of sale, because the auctioneer mistakenly believed that he had authority to sell the property, and because defendant had redeemed the sale on Rainey's behalf by returning plaintiff's funds. Both parties moved for summary judgment. The trial court granted plaintiff's

motion for partial summary judgment (reserving the issue of damages) and denied defendant's motion in its entirety. Thereafter, the court entered a judgment against defendant for plaintiff's damages, which were stipulated to be the difference in the fair market value of the subject property and plaintiff's high bid at the foreclosure sale, and dismissed plaintiff's case against Cal-Western.

Defendant appeals from that judgment and from the court's denial of its motion for summary judgment and entry *534 of summary judgment for plaintiff on its breach of contract claim. Plaintiff cross-appeals, arguing that, if we conclude that defendant was entitled to summary judgment on plaintiff's breach of contract claim, then we should reverse the trial court's dismissal of plaintiff's claim for breach of warranty of authority against Cal-Western.

On appeal, defendant reiterates its position before the trial court and asserts four assignments of error. Because we conclude that Cal-Western lacked the statutory power of sale due to the forbearance agreement between defendant and Rainey, we resolve the appeal on that ground and do not consider the others.

Defendant argues that the forbearance agreement deprived Cal-Western of the power of sale under ORS 86.735 absent any default under the forbearance agreement. In those circumstances, according to defendant, contract formation is precluded as a matter of law, and the sale is therefore void. Plaintiff responds that, because the forbearance agreement provided that the default under the trust deed continued until performance under the forbearance agreement was completed, all of the statutory prerequisites to a foreclosure sale "remained in existence" and the trustee was obligated to execute and deliver a trustee's deed conveying the property to plaintiff.

The question is one of first impression in Oregon. ORS 86.735 provides:

"The trustee may foreclose a trust deed by advertisement and sale in the manner provided in ORS 86.740 to 86.755 if:

" * * * * *

"(2) There is a default by the grantor or other person owing an obligation, the performance of which is secured by the trust deed, or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision[.]"

****154** Thus, in Oregon, as a precondition to the trustee's exercise of the power of sale, there must be a present default by the grantor for which sale is authorized by the terms of the deed. We therefore examine the effect of the parties' forbearance ***535** agreement on Bickell's default. That agreement, "[i]n consideration of the Lender's forbearance of its right to pursue remedies for default," established a revised payment plan for payments due under the trust deed. Specifically, it established monthly payments of \$1,840.56, beginning December 25, 2001, and continuing through May 25, 2002, and one additional payment of \$1,106.55, due June 25, 2002, after which time, according to the terms of the agreement, "[b]orrowers shall resume normal monthly payments." The agreement also included the following relevant provisions:

"We agree that the default continues to exist until this Agreement is fully and completely performed.

"If the above-referenced payments are not **RECEIVED** on or before each Due Date, the Lender will continue with any remedies, as outlined in the terms of my loan documents, including but not limited to foreclosure, without further notice or demand.

"During the terms of this Agreement, we shall not have the benefit of a grace period.

"We acknowledge receipt of all notice required by law. Acceleration and/or foreclosure may continue under the notices of default, acceleration, and/or sale that were previously delivered and/or recorded.

"Lender has not waived its right to proceed with existing acceleration and/or foreclosure by acceptance of partial payments unless and until we make all payments due under this Agreement by the Due Dates referenced above.

" * * * * "

"As long as this Agreement remains active and until we have fully performed our payment obligations under this Agreement, any scheduled foreclosure sale shall be considered postponed by mutual agreement by the signing parties.

"Nothing in this Agreement modifies or nullifies the terms of the Note and Deed of Trust/Mortgage, which shall remain in full force and effect."

(Boldface and capitalization in original.)

1 2 In ascertaining the terms of a contract, we examine the parties' objective manifestations of intent, as evidenced ***536** by their communications and acts. *Kabil Developments Corp. v. Mignot*, 279 Or. 151, 157-58, 566 P.2d 505 (1977). We follow the analysis described in *Yogman v. Parrott*, 325 Or. 358, 361, 937 P.2d 1019 (1997), the first step of which is to examine the text of disputed provisions in the context of the document as a whole. If the text's meaning is unambiguous, we decide the provisions' meaning as a matter of law. *Id.* The provisions are ambiguous if they have no definite meaning or are capable of more than one sensible and reasonable interpretation in the context of the agreement as a whole. *Id.* at 362-63, 937 P.2d 1019; *Quality Contractors, Inc. v. Jacobsen*, 139 Or.App. 366, 370-71, 911 P.2d 1268, *rev. den.*, 323 Or. 691, 920 P.2d 550 (1996). In determining whether a contractual term is ambiguous, a court may consider evidence of the circumstances underlying the formation of the contract. ORS 42.220; *Batzer Construction, Inc., v. Boyer*, 204 Or.App. 309, 315-17, 129 P.3d 773, *rev. den.*, 341 Or. 366, 143 P.3d 239 (2006).

3 Applying those principles, we conclude that the forbearance agreement modified the payment terms under the trust deed and note such that, as long as Rainey made each payment by the specified due date, there was no default for which power of sale was authorized under ORS 86.735. In other words, the forbearance agreement suspended Cal-Western's statutory power of sale during the term of the agreement to the extent that Rainey continued to meet his obligations under the agreement.

The parties agreed to a revised payment plan with specified amounts and due dates. They also agreed that, at the conclusion of the agreement, normal monthly payments would "resume." In addition, the agreement explicitly states that "any scheduled foreclosure sale shall be considered postponed" as long as the agreement remained active. Finally, the agreement provides that "[i]f the ****155** above-referenced payments are not **RECEIVED** on or before each Due Date, the Lender will continue with any remedies * * * including but not limited to foreclosure, without further notice or demand." (Boldface and capitalization in original.) Those provisions indicate that the agreement was intended to give Rainey an opportunity to bring the loan current, during which time defendant would refrain from foreclosing on the property. If, ***537** however, Rainey failed to make the payments as required under the revised plan, defendant preserved its right to continue with the foreclosure proceedings it had previously initiated, without further notice.

Other provisions of the agreement initially appear inconsistent with this conclusion. As plaintiff points out, the agreement expressly states that the loan is in default and that the default "continues to exist" until the agreement is fully and completely performed. The agreement, by its terms, would not be completely performed until June 25, 2002, the date the final payment was due under the forbearance agreement. The agreement also specifies that "Lender has not waived its right to proceed with the existing * * * foreclosure by acceptance of partial payments unless and until [Borrower] make [s] all payments due under this Agreement."

Considering the agreement as a whole, however, and giving meaning to each of its provisions, *Yogman*, 325 Or. at 361, 937 P.2d 1019; see also ORS 42.230 ("where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all"), the only reasonable interpretation of the forbearance agreement is that, while it preserved the underlying predicate facts that established the default under the trust deed-facts that would entitle defendant to foreclose the property in the event that the borrower did not meet his obligations under the forbearance agreement-it also modified the payments due under the trust deed during the life of the agreement such that, at the time of the foreclosure sale, there were no sums past due and, therefore, no default for which the power of sale was authorized under ORS 86.735. Put another way, although the parties agreed that a default exists, they also agreed that that default did not entitle defendant to foreclose the trust deed as long as Rainey complied with the terms of the forbearance agreement.

We note that the Idaho Supreme Court recently considered similar facts under Idaho Code section 45-1505(2) (1997), a provision of that state's nonjudicial foreclosure statutes. *Taylor v. Just*, 138 Idaho 137, 59 P.3d 308 (2002). Although the Idaho court's construction of Idaho law does not control our construction of Oregon law, it is helpful because *538 ORS 86.735 is similar to Idaho Code section 45-1505(2) (1997).³ See *State v. Stalheim*, 23 Or.App. 371, 376, 542 P.2d 913 (1975), *aff'd*, 275 Or. 683, 552 P.2d 829 (1976) (federal and New York interpretations of statutory term not binding on Oregon, but they are persuasive because the statutes are similar). In *Taylor*, the beneficiary and the grantor had agreed, two days before a scheduled foreclosure sale, that the beneficiary would forbear from foreclosing the trust deed. The trustee learned of the forbearance agreement after it had conducted the foreclosure sale but before it issued the deed to the high bidder. The trustee returned the bidder's check, and the bidder brought an action seeking a declaratory judgment

that he was the owner of the property and, alternatively, damages from the trustee and beneficiaries for breach of the contract of sale. 138 Idaho at 139, 59 P.3d at 310.

The forbearance agreement at issue in *Taylor* modified the payments due under the promissory note and provided that, during the term of the agreement, "so long as Borrower(s) does not default in any performance required by this Agreement and does not default in any performance required by the Note (except as modified by this Agreement) and Mortgage lender agrees to forbear from scheduling a sheriff's sale, and to forbear from proceeding with the filing of a Foreclosure." **156 138 Idaho at 140, 59 P.3d at 311. It further provided,

"Should Borrower(s) fail to make any payment required by this Agreement or perform any other act required by this Agreement or should any representation or warranty given by Borrower(s) be untrue or shall be breached, Lender shall have the right to pursue all remedies available to it under the Note, Mortgage and/or Final Judgment. In executing this agreement, Borrower(s) specifically acknowledges that the Notice of Default shall not be rescinded and shall be an instrument or record until withdrawn by Lender."

*539 *Id.*, 59 P.3d at 311. The court construed the agreement to mean

"(1) that the terms of the promissory note were modified so that there were no longer any sums that were past due; (2) that [Lender] could not proceed with foreclosing the deed of trust unless there was a new default in the Agreement or in the promissory note; and (3) that if there was a future default then [Lender] could pursue all remedies available to it."

Id. at 141, 59 P.3d at 312. Thus, the court concluded, "the Agreement by its terms cured the default because under the Agreement, there were no longer any sums past due. Under its terms, it would require a new default by the [Borrower] for [Lender] to be able to foreclose the deed of trust." *Id.*, 59 P.3d at 312. Based on that analysis, the court held that the contract of sale was void under Idaho Code Section 45-1505(2).

Although the parties in *Taylor* explicitly recognized that the repayment agreement modified the underlying promissory note, the effect is the same here. Once the forbearance agreement was executed, there were no sums past due unless and until Rainey failed to make the payments specified in that agreement. Only this construction gives effect to the entire agreement between the parties. To conclude otherwise would

require us to ignore several key provisions of the agreement, particularly those establishing the revised payment plan and postponing the foreclosure sale.

This interpretation of the agreement is also consistent with evidence in the summary judgment record of the circumstances surrounding the formation of the contract. *Batzer Construction, Inc.*, 204 Or.App. at 315-17, 129 P.3d 773. In support of defendant's motion for summary judgment, Matthews, employed as a default specialist for defendant, stated in his affidavit that he spoke by telephone with Rainey on December 15, 2001, about entering into a new repayment plan "to cure the default under the loan and to postpone the foreclosure sale." Defendant subsequently approved this repayment plan and agreed to postpone the sale.

Under the terms of the forbearance agreement, the first payment was due on or before December 25, 2001. Consequently, at the time of the foreclosure sale on December 17, 2001, no payments were yet due under the forbearance *540 agreement.⁴ Thus, for the purposes of ORS 86.735, there was no default for which sale of the property was authorized at that time. Because the preconditions to Cal-Western's exercise of the power of sale under ORS 86.735(2) were not satisfied, we conclude that Cal-Western lacked the statutory authority to sell the property.

4 5 We next must consider the effect of that lack of authority on the purported agreement of sale. The leading case considering the validity of an agreement in which one of the parties has violated a statute is *Uhlmann v. Kin Daw*, 97 Or. 681, 193 P. 435 (1920). As the Supreme Court explained in that case, the general rule is that an agreement may not be enforced if it is illegal: "[S]tating the rule broadly, an agreement is illegal if it violates a statute or cannot be performed without violating a statute." *Id.* at 689, 193 P. 435. However, the court also stated that

"[t]he rule that an agreement is illegal and unenforceable if it conflicts with the provisions of a statute is not inexorable and unbending. * * * The inquiry is as to the **157 legislative intent, and that may be ascertained, not only by an examination of the express terms of the statute, but it may also be implied from the several provisions of the enactment. Of course, if a statute expressly declares that an agreement made in contravention of it is void, then the inquiry is at an end; but, in the absence of such a declaration, the court may take the statute by its four corners and carefully consider the terms of the statute, its object, the evil it was enacted to remedy, and the effect of

holding agreements in violation of it void, for the purpose of ascertaining whether it was the legislative intent to make such agreements void[.]"

Id. at 689-90, 193 P. 435. Thus, in the absence of an express statutory provision voiding the agreement of sale, as in this case, the question of the contract's enforceability is one of legislative intent. To determine whether the legislature intended agreements such as this one to be void, we apply the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611-12, 859 P.2d 1143 (1993), and look first to the text and context of the applicable statute. *Mayfly Group, Inc. v. *541 Ruiz*, 208 Or.App. 219, 222, 144 P.3d 1025 (2006). As we noted in *Wheeler v. Bucksteel Co.*, 73 Or.App. 495, 498, 698 P.2d 995, *rev. den.*, 299 Or. 583, 704 P.2d 513 (1985), *Uhlmann* and subsequent cases

"require an examination of the entire statutory scheme, rather than emphasizing the presence or absence of a particular provision, to determine whether the statutory prohibition goes to the substance of the challenged agreement or is collateral to it and the relation of the protective purpose of the legislation to the subject matter of the contract."

In *Wheeler*, we held that a contract for engineering services was unenforceable because it was made in violation of statutes prohibiting a person from practicing engineering in the absence of registration and a valid certificate to practice. 73 Or.App. at 500, 698 P.2d 995. Although the statutes did not expressly invalidate such noncomplying agreements, we concluded that, because the act was designed to protect the public from incompetent engineers, and the acts which the statute prohibited went "to the very heart" of the agreement in question, invalidation was required. *Id.*

In this case, defendant contends that the sale is void because the public policy embodied in the Oregon Trust Deed Act (Act), ORS 86.705 to 86.795, and implicit specifically in ORS 86.735, is to "prevent the wrongful loss of property by a borrower while also maintaining the efficient remedy of sale through the nonjudicial foreclosure process." According to defendant, permitting the sale of borrower's property after an agreement has been reached to postpone the sale would violate that policy.

Pointing to ORS 86.755(3),⁵ plaintiff counters that the public policy of the State of Oregon as expressed by the legislature "dictates that foreclosure sales should be binding upon the close of the auction" to support obtaining the highest possible price. Allowing lenders and trustees to "shirk their

responsibilities to convey title to properties purchased at a foreclosure sale" violates this policy and may have the effect of depressing the prices bid at foreclosure sales.

6 *542 On balance, we agree with defendant. The Act represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor. As discussed above, it confers upon a trustee the power to sell property securing an obligation under a trust deed in the event of default, without the necessity for judicial action. However, the trustee's power of sale is subject to strict statutory rules designed to protect the grantor, including provisions relating to notice and reinstatement.

For example, the trustee or beneficiary must record a notice of default in the county clerk's office and notify the grantor of a **158 foreclosure sale at least 120 days prior to the sale. See ORS 86.735(3); ORS 86.740; ORS 86.745. In addition, the Act provides a mechanism by which the grantor can, at any time prior to five days before the date set for sale, cure the default and dismiss the proceedings. In that case, the trust deed is reinstated and has the same force as if no acceleration had occurred. ORS 86.753.

Those provisions reflect the legislature's intent to protect the grantor against the unauthorized loss of its property and to give the grantor sufficient opportunity to cure the default. The ability of the grantor to postpone the sale by entering into, and complying with, a forbearance agreement with the beneficiary furthers that legislative intent. Enforcing a sale of the property at auction despite the existence of such an agreement would undermine that purpose of the Act.

We are not persuaded that voiding agreements made in violation of ORS 86.735(2), under the circumstances present here, would frustrate the legislature's objective to provide a quick and efficient remedy for creditors against defaulting buyers. First, there is nothing in the language of that section or, indeed, elsewhere in the Act, to indicate that the legislature intended the auction to be final *in the absence of legal authority to sell the property*. Moreover, although certainty is an important component of the nonjudicial foreclosure sale remedy, we do not agree with plaintiff's statement, based on ORS 86.755(3), that "[t]he Oregon statutory scheme * * * provide[s] that the auction is final with the close of that *543 auction [.]"⁶ Plaintiff correctly notes that ORS 86.755(3) provides that the trustee shall execute and deliver the trustee's deed within 10 days following payment of the price bid;

however, under ORS 86.780, the statutory presumption of finality does not arise until the trustee's deed is issued and recorded.⁷ We have not had occasion to squarely confront the question of the significance of the execution and recording of the trustee's deed on the finality of a nonjudicial foreclosure sale,⁸ and it is not necessary for us to do so here, except to note that, if the agreement to postpone the sale is discovered before the trustee's deed is executed, voiding the contract furthers the purpose of the Act to protect the grantor from unauthorized sales without unduly prejudicing the creditor's remedy envisioned by the Act.

The legislature, in enacting ORS 86.735(2), prohibited a trustee from foreclosing on a property unless a default existed. As in *Wheeler*, this prohibition goes to the substance of the challenged agreement. We see no basis for holding that a foreclosure sale entered into in violation of this statutory prohibition should be enforced. We conclude that, as a matter of law, although plaintiff was the high bidder at the foreclosure sale, the discovery of the agreement to postpone the sale before the execution of the trustee's deed renders the contract *544 void and plaintiff's remedy is limited to return of the purchase funds and, if applicable, interest. This result properly restores the parties to the positions they would have occupied had the wrongful sale not occurred.

In light of that conclusion, plaintiff's argument that even if Cal-Western did not have **159 statutory authority to sell the property, defendant is still liable under the contract of sale under the agency theory of apparent authority also must fail. As we have indicated, the attempted sale is void. That Cal-Western may have had apparent authority to sell the property under common law agency principles could not change that result. Cf. *Wiggins v. Barrett & Associates, Inc.*, 295 Or. 679, 683, 669 P.2d 1132 (1983) (municipality may be bound by the promise of its agent acting beyond the scope of its actual authority if, among other requirements, the promise is one which the municipality could lawfully make and perform).

For the reasons above, we conclude that defendant was entitled to prevail as a matter of law and that the trial court erred in granting plaintiff's motion for summary judgment and in denying defendant's motion for summary judgment on plaintiff's breach of contract claim.

As noted, on cross-appeal, plaintiff assigns error to the trial court's dismissal of its claim for breach of warranty of authority against Cal-Western. It appears that the court dismissed the claim because its decision in plaintiff's favor on its claim against defendant rendered the claim against

Cal-Western moot. Our reversal of the judgment in favor of plaintiff on defendant's breach of contract claim means that the claim against Cal-Western now is not moot. Although our decision in plaintiff's claim against defendant may foreclose any recovery by plaintiff on its breach of warranty of authority claim against Cal-Western, *see Schafer et al v. Fraser et ux*, 206 Or. 446, 466, 290 P.2d 190 (1955), *on reh'g*, 206 Or. 446, 294 P.2d 609 (1956); *see also Hermann v. Clark*, 108 Or. 457, 476, 219 P. 608 (1923), the parties have not had an opportunity to address the issue. Accordingly, we vacate the trial court's judgment of dismissal of plaintiff's claim

for breach of warranty of authority against Cal-Western and remand for further proceedings.

*545 Reversed and remanded with instructions to enter summary judgment for defendant Homecomings Financial Network; judgment of dismissal against defendant Cal-Western Reconveyance Corporation vacated and remanded.

Parallel Citations

149 P.3d 150

Footnotes

- 1 Defendant Cal-Western Reconveyance Corporation did not appeal the judgment. However, it is the cross-respondent in plaintiff's cross-appeal. We will refer to Homecomings Financial Network as defendant and Cal-Western Reconveyance Corporation as Cal-Western. Defendant Bankers Trust Company of California, N.A., is not a party to this appeal.
- 2 Plaintiff does not seek specific performance of the sale agreement.
- 3 Idaho Code section 45-1505(2) (1997) provided that "[t]he trustee may foreclose a trust deed by advertisement and sale under this act if * * * [t]here is a default by the grantor * * * owing an obligation the performance of which is secured by the trust deed or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision[.]"
- 4 In any event, the record discloses that defendant received Rainey's initial payment on or about December 21, 2001.
- 5 ORS 86.755(3) provides, "The purchaser shall pay at the time of sale the price bid, and, within 10 days following payment, the trustee shall execute and deliver the trustee's deed to the purchaser."
- 6 Plaintiff contends that our decision in *Bank of Myrtle Point v. Security Bank of Coos Co.*, 79 Or.App. 184, 718 P.2d 1373 (1986), supports that position. We disagree. Contrary to the case at bar, the issue in *Bank of Myrtle Point* was whether a *mistake* on the part of the *bidder* in bidding more than it intended justified the trustee setting aside the sale after the trustee's deed had been delivered and recorded. We held that it did not.
- 7 ORS 86.780 provides:
"When the trustee's deed is recorded in the deed records of the county or counties where the property described in the deed is situated, the recitals contained in the deed and in the affidavits required under ORS 86.750(3) shall be prima facie evidence in any court of the truth of the matters set forth therein, but the recitals shall be conclusive in favor of a purchaser for value in good faith relying upon them."
- 8 However, we have held, in the context of a forcible detainer action, that the high bidder at a trustee's sale was not a "purchaser" under ORS 86.755(5) (providing that the purchaser at a trustee's sale is entitled to possession of the property on the 10th day following sale) and thus was not entitled to possession of the property, because service of the notice of the trust deed foreclosure and sale was defective. *Option One Mortgage Corporation v. Wall*, 159 Or.App. 354, 361, 977 P.2d 408 (1999).

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59 P.3d 308
Supreme Court of Idaho,
Boise, November 2002 Term.

James L. TAYLOR, Plaintiff-
Respondent-Cross-Appellant,

v.

Charles C. JUST, in his capacity as Trustee;
Fairbanks Capital Corporation, a Utah
corporation; Ronald Dale Rush and
Terilyn Ann Rush, husband and wife,
Defendants-Appellants-Cross-Respondents.

No. 28105. Nov. 22, 2002.

Highest bidder at foreclosure sale brought declaratory judgment action against grantors of deed of trust, beneficiary, and trustee, seeking declaration that he was legal owner of the real property, and breach-of-contract action against trustee and beneficiary, seeking specific performance or damages. The District Court, Third Judicial District, Canyon County, Sergio A. Gutierrez, J., entered summary judgment for bidder on his declaratory judgment count, and ordered trustee to execute and deliver the trustee's deed to bidder. Grantors, beneficiary, and trustee appealed, and bidder cross-appealed. The Supreme Court, Eismann, J., held that: (1) modification of promissory note cured default, and thus foreclosure sale was void; (2) bidder did not acquire title, and thus was not a good faith purchaser for value; and (3) foreclosure sale was a commercial transaction, entitling trustee to attorney fees.

Reversed.

West Headnotes (15)

1 Appeal and Error

☞ Extent of Review Dependent on Nature of Decision Appealed from

In an appeal from an order of summary judgment, the Supreme Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment.

2 Judgment

☞ Presumptions and Burden of Proof

In ruling on a motion for summary judgment, all disputed facts are to be construed liberally in

favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.

3 Judgment

☞ Existence or Non-Existence of Fact Issue

Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

4 Appeal and Error

☞ Extent of Review Dependent on Nature of Decision Appealed from

On appeal from a summary judgment, if the evidence reveals no disputed issues of material fact, then only a question of law remains, over which the Supreme Court exercises free review.

5 Mortgages

☞ Right to Foreclose

Mortgages

☞ Grounds for Relief in General

Parties to promissory note secured by deed of trust cured default by modifying note, such that there were no longer any sums past due, and thus, foreclosure sale of property securing the note was void, even though grantors of deed of trust did not pay entire amount then due at time of modification and acknowledged that notice of default would remain filed until beneficiary withdrew it, where parties agreed to a new schedule of payments, and beneficiary agreed to forbear from proceeding with foreclosure sale unless there was a new default. I.C. § 45-1505(2).

4 Cases that cite this headnote

6 Contracts

☞ Intention of Parties

A contract must be construed to give effect to the intention of the parties.

1 Cases that cite this headnote

7 Contracts

⚡ Construing Whole Contract Together

In order to ascertain the intention of the parties, a contract must be construed as a whole.

8 Contracts

⚡ Language of Contract

Contracts

⚡ Language of Instrument

Contracts

⚡ Ambiguity in General

If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law, and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words.

9 Mortgages

⚡ Right to Foreclose

Statutory provision giving the grantor of a deed of trust the right to cure a default by paying the sums due, including a reasonable trustee's fee and attorney fees, within 115 days after the recording of the notice of default simply grants a right to cure within 115 days after the recording of the notice of default and specifies how a grantor can exercise that right; it does not purport to limit the right of the grantor and beneficiary to come to their own agreement to cure a default. I.C. § 45-1506(12).

3 Cases that cite this headnote

10 Mortgages

⚡ Grounds for Relief in General

Mortgages

⚡ Effect of Defects or Irregularities in Proceedings

Statute providing that a failure to comply with the manner for foreclosing on a deed of trust would not affect validity of a sale to a good faith purchaser for value did not apply to foreclosure

sale that was void for lack of a default. I.C. §§ 45-1505(2), 45-1506, 45-1508.

2 Cases that cite this headnote

11 Mortgages

⚡ Bids

Highest bidder at foreclosure sale did not acquire title to the real property, and thus was not a "good faith purchaser for value," where the trustee refused to execute and deliver a deed. I.C. § 45-1508.

1 Cases that cite this headnote

12 Vendor and Purchaser

⚡ Nature and Grounds of Protection in General

The doctrine of good faith purchaser for value is available to protect title obtained, not to acquire title.

13 Vendor and Purchaser

⚡ Nature and Grounds of Protection in General

The doctrine of bona fide purchaser for value is peculiarly available for purposes of defense.

14 Vendor and Purchaser

⚡ Nature and Grounds of Protection in General

The defense of bona fide purchaser for value can be maintained only in favor of a title, though it may be defective, which a bona fide purchaser has, and it is not available for the purpose of creating a title.

15 Mortgages

⚡ Attorney Fees

Foreclosure sale was a commercial transaction, and thus, trustee that conducted sale and prevailed on appeal from judgment ordering trustee to deliver trustee's deed to highest bidder was entitled to reasonable attorney fees, where bidder bid at the foreclosure sale in order to obtain the real property for resale. I.C. § 12-120(3).

7 Cases that cite this headnote

Attorneys and Law Firms

****309 *138** Mark L. Clark, Nampa, for appellants.
White Peterson Morrow Gigray Rossman Nye & Rossman,
Nampa, for respondent. Kevin E. Dinius argued.

Opinion

EISMANN, Justice.

This is an appeal from a judgment ordering the trustee under a deed of trust to execute and deliver a trustee's deed to the highest bidder at the foreclosure sale. Prior to the sale, the grantor and beneficiary had entered into an agreement resolving the default. Therefore, we reverse the judgment of the district court because the sale was void and the trustee cannot be required to execute and deliver a trust deed.

I. FACTS AND PROCEDURAL HISTORY

In April 1998, Ronald and Terilyn Rush executed a deed of trust on their residence to secure payment of a promissory note in the sum of \$37,000. The defendant Fairbanks Capital Corporation (Fairbanks Capital) later ****310 *139** acquired the interest of the beneficiary under that deed of trust. The Rushes failed to make the monthly payments that came due under the promissory note for the months of November 2000 through February 2001. Fairbanks Capital retained the defendant Charles Just (the Trustee) to foreclose the deed of trust by nonjudicial sale, and he commenced foreclosure proceedings under Idaho Code § 45-1506, with the sale scheduled for July 19, 2001. The Trustee retained Pioneer Title Company (Pioneer Title) to conduct the sale.

On July 17, 2001, the Rushes and Fairbanks Capital executed a contract entitled "Forbearance Agreement" (Agreement) which addressed the Rushes' default. The Agreement altered the terms of the promissory note by modifying the payments due. As modified by the Agreement, the Rushes were to pay \$2,000 on July 17, 2001; \$575 by the seventeenth days of August, September, and October 2001; and \$4,984 by November 17, 2001. The Agreement provided that if the Rushes made the payments as modified, Fairbanks Capital would not proceed with the foreclosure. The Rushes timely paid the \$2,000, and Fairbanks Capital sent the Trustee an

e-mail instructing him to stop the foreclosure proceedings. Because of a problem with the Trustee's Internet provider, however, he did not receive the e-mail until July 20, 2001, the day after the sale.

Pioneer Title held the foreclosure sale as scheduled on July 19, 2001. The plaintiff James Taylor (Taylor) was the highest bidder, and on the same day he tendered to Pioneer Title a certified check for the full amount of his bid. On July 20, 2001, the Trustee received the e-mail message from Fairbanks Capital. On July 23, 2001, the Trustee informed Taylor about the Agreement and told him he would not be receiving a trustee's deed. Taylor's check was returned to him.

On August 22, 2001, Taylor commenced this action. In count one of his complaint he requested a declaratory judgment that he is the legal owner of the real property. In count two, he alleged that the Trustee and Fairbanks Capital had breached a contract to convey the real property to him, and he sought either specific performance of that contract or damages for its breach. He alleged that the damages recoverable were \$47,215, the difference between the price he bid and the fair market value of the real property.

The parties filed cross motions for summary judgment, which were heard on December 14, 2001. The district court ruled that the Agreement did not cure the default, it was simply a promise to cure the default, and that as a result the sale was valid. The district court therefore ruled that the sale was valid and that the Trustee was required to execute and deliver the trustee's deed to Taylor. The court granted summary judgment in favor of Taylor on count one of his complaint. With respect to count two, the district court stated that a breach of contract cause of action would not lie under the facts of this case. It also denied respondents' motion for summary judgment. The district court entered a judgment ordering the Trustee to execute and deliver the trustee's deed to Taylor. The respondents then appealed, and Taylor cross-appealed.

II. ISSUES ON APPEAL

A. Was the foreclosure sale void?

B. Is Taylor a good faith purchaser under Idaho Code § 45-1508?

C. Did the district court err in not granting Taylor summary judgment on his claim for breach of contract?

D. Did the district court err in awarding Taylor attorney fees?

E. Is either the Trustee or Taylor entitled to attorney fees on appeal?

III. ANALYSIS

1 2 3 4 In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id.* Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review. *Id.*

A. Was the Foreclosure Sale Void?

5 Idaho Code § 45-1505(2) (1997) grants authority to foreclose a deed of trust by nonjudicial sale. It provides, "The trustee may foreclose a trust deed by advertisement and sale under this act if ... [t]here is a default by the grantor ... owing an obligation the performance of which is secured by the trust deed." The statute requires that the default exist at the time of the sale. It states that the trustee may foreclose a trust deed if there "is" a default by the grantor, not if there "has been" a default by the grantor. Both parties agree that if the promissory note was not in default on July 19, 2001, the foreclosure sale was void. The issue in this case is whether there was still a default after the Rushes and Fairbanks Capital had entered into the Agreement. The district court held that the Agreement "amounts to a promise to cure a default and ... it does not cure the default." In so holding, the district court erred.

6 7 8 A contract must be construed to give effect to the intention of the parties. *Wing v. Martin*, 107 Idaho 267, 688 P.2d 1172 (1984). In order to ascertain that intent, the contract must be construed as a whole. *Id.* If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law, and the meaning of the contract and intent

of the parties must be determined from the plain meaning of the contract's own words. *Taylor v. Browning*, 129 Idaho 483, 927 P.2d 873 (1996).

The Agreement expressly modified the payments due under the promissory note. It recited, "Whereas Borrower(s) and Lender are willing to modify the note as set forth below in order to permit Borrower(s) to continue to own and use the property." The parties agreed that the amounts due under the note, including various fees and costs relating to the foreclosure proceedings, totaled \$6,984.38. They then agreed as follows:

2. **Forbearance.** From and after the date of execution of this agreement, during the term hereof, so long as Borrower(s) does not default in any performance required by this Agreement and does not default in any performance required by the Note (except as modified by this Agreement) and Mortgage lender agrees to forbear from scheduling a sheriff's sale, and to forbear from proceeding with the filing of a Foreclosure.

3. **Duties of Borrower(s).** Borrower(s) shall make the following payments at the following times:

A) On or before the earlier of July 17, 2001 or the date of execution of this agreement, Borrower(s) shall pay \$2000.00 to Lender.

B) Thereafter Borrower(s) shall make monthly payments to Lender in the amount of \$575.00 for the months of August 2001 through and including October 2001 provided that payments shall be received by Lender no later than the 17th day of each of these months. A final balloon payment to reinstate loan is due on or before November 17, 2001 in amount of \$4984.28.

4. **Effect of Default.** Should Borrower(s) fail to make any payment required by this Agreement or perform any other act required by this Agreement or should any representation or warranty given by Borrower(s) be untrue or shall be breached, Lender shall have the right to pursue all remedies available to it under the Note, Mortgage and/or Final Judgment. In executing this agreement, Borrower(s) specifically acknowledges that the Notice of Default shall not be rescinded and shall be an instrument of record until withdrawn by Lender.

The Agreement also provided, "Except as specifically modified by this Agreement, all other terms of the Note shall remain unchanged from the original terms and no part of the

Mortgage is modified by this Agreement.” **312 *141 .” The Rushes paid the \$2,000 due upon execution of the Agreement.

The Agreement clearly provided: (1) that the terms of the promissory note were modified so that there were no longer any sums that were past due; (2) that Fairbanks Capital could not proceed with foreclosing the deed of trust unless there was a new default in the Agreement or in the promissory note; and (3) that if there was a future default then Fairbanks Capital could pursue all remedies available to it. Thus, the Agreement by its terms cured the default because under the Agreement, there were no longer any sums past due. Under its terms, it would require a new default by the Rushes for Fairbanks Capital to be able to foreclose the deed of trust.

Idaho Code § 45-1506 (1997) provides that the trustee can postpone the sale at the request of the beneficiary. Thus, the beneficiary could agree to postpone the sale to give the grantor additional time to cure the default. That is not what happened here, however. The Agreement did not merely provide that the sale would be postponed. It eliminated the default by altering the terms of the promissory note so that there were no longer any sums past due.

Taylor points to one sentence in the Agreement which he contends shows that the default was not cured. That sentence states, “In executing this agreement, Borrower(s) specifically acknowledges that the Notice of Default shall not be rescinded and shall be an instrument of record until withdrawn by Lender.” This sentence does not provide that the default is not cured. It simply provides that the notice of default will remain filed. Fairbanks Capital may have included this provision in the Agreement under the belief that if there were a future default, Fairbanks Capital could short-circuit the foreclosure process by relying upon the prior notice of default. Whatever the reason behind this provision, its terms do not contradict the fact that upon the execution of the Agreement, there were no longer any sums past due under the promissory note as it had been modified by the Agreement. Thus, because at the time of the sale on July 19, 2001, there was no default in the performance of any obligations secured by the deed of trust, the foreclosure sale was void.

9 Taylor also argues that the default could not be cured without actual payment of the entire amount then due under the terms of the deed of trust and promissory note, including a reasonable trustee's fee and attorney fees. Taylor relies upon Idaho Code § 45-1506(12) in making this argument. That code section gives the grantor the right to cure a default by

paying those sums within 115 days after the recording of the notice of default. The statute simply grants a right to cure within 115 days after the recording of the notice of default and specifies how a grantor can exercise that right. It does not purport to limit the right of the grantor and beneficiary to come to their own agreement to cure a default.

B. Is Taylor a Good Faith Purchaser Under Idaho Code § 45-1508?

Taylor argues that he is entitled to a deed to the real property because he is a good faith purchaser under Idaho Code § 45-1508 (1997), which provides:

A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. The failure to give notice to any of such persons by mailing, personal service, posting or publication in accordance with section 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified nor as to any such persons having actual knowledge of the sale. Furthermore, any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof.

That statute has no application in this case for two reasons.

**313 *142 10 First, by its terms it only applies to sales challenged because of a failure to comply with the provisions of Idaho Code § 45-1506. In this case, the Rushes have not contended that the foreclosure sale was void for failure to comply with Idaho Code § 45-1506. They have contended, and we have found, that the foreclosure sale was void for failure to comply with Idaho Code § 45-1505(2), which requires that there be a default in order to sell the real property secured by a deed of trust.

11 12 13 14 Second, Taylor is not a good faith purchaser for value because he did not acquire title to the real property. The trustee refused to execute and deliver a deed. The doctrine of good faith purchaser for value is available to protect title obtained, not to acquire title. As this Court explained in *Ewald v. Hufston*, 31 Idaho 373, 380, 173 P. 247, 247-48 (1918):

The doctrine of *bona fide* purchaser is peculiarly available for purposes of defense. (See the discussion in 2 Pomeroy,

Equity Jurisdiction, § 735, et seq.) This defense can be maintained only in favor of a title, though it may be defective, which a *bona fide* purchaser has, and it is not available for the purpose of creating a title. This view is well expressed by Mr. Justice Bean in the case of *Allen v. Ayer*, 26 Or. 589, 39 Pac. 1 [(1895)], as follows:

“Where the title to land passes, though obtained by fraud, and the deed is therefore voidable, one who purchases from the grantee in good faith, and without notice, will be protected, because he had a title which he could and did convey, but when the deed was never in fact delivered, the grantee can convey no title for the protection of which the plea of a *bona fide* purchaser can be invoked.”

Thus, Taylor is not entitled to obtain a deed to the real property based upon his contention that he is a good faith purchaser for value.

C. Did the District Court Err in Not Granting Taylor Summary Judgment on His Claim for Breach of Contract?

Taylor contends that even if the foreclosure sale is void, the facts in this case gave rise to a contract between him and either Fairbanks Capital or the Trustee, and he is entitled either to enforce that contract either by requiring the Trustee to execute and deliver a deed to the real property or by recovering damages. Because the foreclosure sale is void, the alleged contract is likewise void. The alleged contract would circumvent the statutory requirement, discussed above, that a deed of trust can be foreclosed only if there is a default in an obligation the performance of which is secured by the deed of trust. A void contract cannot be enforced. *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997).

D. Did the District Court Err in Awarding Taylor Attorney Fees?

The district court awarded Taylor attorney fees in the sum of \$8,842.50 against the Trustee. The district court found that the gravamen of this case involved a commercial transaction, and

so the prevailing party was entitled to an award of attorney fees under Idaho Code § 12-120(3). Because we reverse the judgment of the district court, we also reverse the attorney fee award to Taylor.

E. Is Either the Trustee or Taylor Entitled to Attorney Fees on Appeal?

15 The Trustee and Taylor both seek an award of attorney fees on appeal pursuant to Idaho Code § 12-120(3). That statute provides, “In any civil action to recover ... in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.” The statute defines the term “commercial transaction” to mean “all transactions except transactions for personal or household purposes.” IDAHO CODE § 12-120(3) (1998). Both Taylor and the Trustee agree that Taylor's action against the Trustee was to recover in a commercial transaction. Taylor bid at the foreclosure sale in order to obtain the real property for resale. As the prevailing party on the appeal, the Trustee is entitled to an award of a reasonable attorney fee under Idaho Code § 12-120(3). *Hoffer v. Callister*, 137 Idaho 291, 47 P.3d 1261 (2002). The Trustee is ****314 *143** likewise entitled to an award of a reasonable attorney fee in the district court.

IV. CONCLUSION

We reverse the judgment of the district court and remand this case with instructions to enter a judgment dismissing the complaint with prejudice and to award the Trustee a reasonable attorney fee. We also award costs and attorney fees on appeal to the Trustee.

Chief Justice TROUT, and Justices SCHROEDER, WALTERS, and KIDWELL concur.

Parallel Citations

59 P.3d 308

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