

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDALL J. PANE; AND MICHELE A.  
PANE,  
Appellants,  
vs.  
BANK OF AMERICA, N.A.;  
CITIMORTGAGE, INC.; NATIONAL  
DEFAULT SERVICING COMPANY;  
AND POKER BROWN, LLC,  
Respondents.

No. 76059-COA

**FILED**

APR 23 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Randall and Michele Pane challenge two district court orders, one denying their motion for a preliminary injunction, and the other granting Poker Brown, LLC's motion for writ of possession. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

In 2005, the Panes built a home at 14272 Quail Springs Court in Reno and mortgaged it pursuant to a promissory note, secured by a deed of trust, for \$650,000 to Colonial Bank, and the promissory note and deed of trust were later assumed by Bank of America, N.A. The mortgage servicer was CitiMortgage, Inc. After the Panes defaulted on their mortgage in November 2014, Bank of America recorded a notice of default, as well as two notices of a trustee sale. After the second notice of trustee sale was recorded, the foreclosure sale was postponed three times. The foreclosure sale was held by National Default Servicing Corporation (NDSC) on November 2, 2017, and Poker Brown, LLC, purchased the home for \$775,100 and recorded the deed on November 17. At the time of the sale, the unpaid balance on the mortgage was \$694,070.

On December 6, 2017, the Panes filed a petition for declaratory and injunctive relief and for monetary damages in district court, arguing that (1) NRS 107.080 requires a new notice of trustee sale if postponement has occurred three times, and (2) that if a homeowner files an application for foreclosure prevention alternatives pursuant to NRS 107.420, the servicer and trustee may not proceed with the foreclosure until a final determination has been made and appellate rights have been exhausted. The Panes averred that Bank of America, Citi, and NDSC knowingly violated NRS 107.530 by issuing the notices of trustee sale, and permitting the recordation of the trustee's deed of sale. They also averred that Poker Brown had constructive notice of these purported violations, and therefore, was not a bona fide purchaser.

In December 2017, the Panes recorded a notice of lis pendens. Poker Brown then moved to expunge the notice of lis pendens, and later moved to dismiss the complaint. In February 2018, Poker Brown moved for a writ of possession. A month later, the Panes moved for a preliminary injunction, despite the fact that the foreclosure sale had occurred in November 2017.

In June 2018, the district court issued four orders. First, the district court denied the Panes' motion for a preliminary injunction, concluding that the Panes were not entitled to injunctive relief because they were not seeking to enjoin the foreclosure sale. The district court also concluded that the Panes' motion for a preliminary injunction was more properly characterized as a response to Poker Brown's motion for a writ of possession. Second, the district court issued an order granting Poker Brown's motion for a writ of possession. The district court concluded that, under NRS 40.255(1)(b), the Panes should no longer have possession of the

home because Poker Brown had purchased the home at the foreclosure sale. In this order, the district court also referenced the order granting Poker Brown's motion to expunge the lis pendens, as well as the order granting in part Poker Brown's motion to dismiss. The district court concluded that the Panes would be limited to recovery of their actual economic damages for any potential violation that occurred during the foreclosure sale.

Third, the district court granted Poker Brown's motion to expunge the lis pendens. The district court concluded that the lis pendens should be expunged—pursuant to NRS 14.015(2)(a)-(b)—because, even if the Panes prevailed on their claims, they would be limited to recovery of their actual economic damages pursuant to NRS 107.560(2). Fourth, the district court entered an order granting in part and denying in part Poker Brown's motion to dismiss the action. The district court dismissed the Panes' claims against Poker Brown as to NRS 107.530 because it concluded that the sole remedy available to the Panes, with respect to Poker Brown, was money damages. The Panes appealed all orders.

The Nevada Supreme Court dismissed the Panes' appeal as to the order granting Poker Brown's motion to expunge the lis pendens, as well as the order granting in part Poker Brown's motion to dismiss because it lacked jurisdiction over the challenges to these orders. *See Pane v. Bank of Am., N.A.*, Docket No. 76059, at \*1-2 (Order Partially Dismissing Appeal, June 3, 2019). The Panes then filed a petition for a writ of mandamus or prohibition to challenge the district court's orders expunging the lis pendens, as well as the order granting Poker Brown's motion to dismiss. The supreme court denied the petition, as the district court had stayed the writ of possession. *Pane v. Second Judicial Dist. Court*, Docket No. 79423 at \*1-2 (Order Denying Petition for Writ of Mandamus or Prohibition,

October 24, 2019) (holding that extraordinary writ relief was not appropriate because this current case (i.e., Docket No. 76059-COA) was pending). Thus, this appeal concerns only the district court's order granting Poker Brown's motion for a writ of possession, as well the order denying the Panes' motion for a preliminary injunction.

On appeal, the Panes argue that (1) writ relief is the only means of redress available to them, (2) Poker Brown's status as a non-bona fide purchaser is not hypothetical (i.e., the Panes argue that Bank of America and Citi violated statutory notice requirements by postponing the foreclosure sale, and that Poker Brown had constructive notice of these defects and was not a bona fide purchaser, which would void the foreclosure sale), and (3) NRS 107.080 voided the foreclosure sale, and the district court erred by concluding that NRS 107.080 does not apply. We disagree.

*The district court did not abuse its discretion by denying the Panes' motion for a preliminary injunction*

The Panes do not directly argue that the district court abused its discretion by denying their motion for a preliminary injunction, nor do they provide a standard of review.<sup>1</sup> Instead, they seem to argue that Poker Brown had constructive notice of alleged defects in the foreclosure sale, which would void the foreclosure. We note that these same arguments were asserted by the Panes in opposition to the motion to dismiss below, which has been dismissed on appeal. Poker Brown contends that the Panes did not set forth a standard of review for a preliminary injunction, nor a discussion of the standard of review.

The district court's decision to grant or deny a preliminary injunction will not be disturbed unless it constitutes an abuse of discretion

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<sup>1</sup>See NRAP 28(a)(10)(A)-(B).

or is based on an erroneous legal standard. *Sarfo v. Bd. of Med. Exam'rs*, 134 Nev. 709, 711, 429 P.3d 650, 652 (2018). “As a general rule, we will not overturn the district court’s ruling on a preliminary injunction.” *Dixon v. Thatcher*, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987). “A district court may issue a preliminary injunction if the plaintiff can show ‘(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party’s conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy.’” *Sarfo*, 134 Nev. at 711, 429 P.3d at 652 (quoting *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004)).

NRS 107.560(1) provides, “[i]f a trustee’s deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of NRS 107.400 to 107.560, inclusive.” NRS 107.560(2) further states, “[a]fter a trustee’s deed upon sale has been recorded . . . a borrower may bring a civil action . . . to recover his or her actual economic damages.” (Emphasis added.) The Nevada Supreme Court has not interpreted these statutes, but a federal court has. *See Kitchen v. Select Portfolio Serv., Inc.*, No. 2:15-cv-02297-RCJ-PAL, 2016 WL 4521679, at \*2 (D. Nev. August 29, 2016) (explaining that NRS 107.560(1) allows for an injunction of foreclosure sale where there is a material violation of NRS 107.400 to 107.560).

We conclude that the district court’s order denying the Panes’ motion for a preliminary injunction should be affirmed for several reasons. First, NRS 107.560(2) states that—after a trustee’s deed upon sale has been recorded—a borrower may only recover economic damages. Here, the undisputed facts show that Poker Brown recorded the trustee’s deed of sale in November 2017, and that the Panes did not move for a preliminary

injunction until March 2018. Thus, NRS 107.560(2) dictates that the Panes would only be entitled to economic damages, as they moved for the injunction after the foreclosure sale already occurred.

Next, the Panes have not provided legal authority to show that the district court abused its discretion in denying the preliminary injunction. *See* NRAP 28(a)(10)(A)-(B); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that an appellate court need not consider claims that are not cogently argued with citations to relevant authority).

Finally, the Panes have not directly challenged the legal bases the district court applied in denying the Panes' motion for a preliminary injunction. The district court concluded that the Panes could not receive an injunction after the foreclosure sale had already occurred, and the Panes instead argue, for instance, that the foreclosure sale should be voided. Thus, because the Panes did not challenge the bases of the district court's denial of the preliminary injunction motion, the Panes have waived it on appeal, which provides an additional basis to affirm the district court's decision. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived).

For these separate reasons, we affirm the district court's order denying the Panes' motion for a preliminary injunction.

*The district court did not abuse its discretion by granting Poker Brown's motion for a writ of possession*

The Panes provide no direct argument to show that the district court abused its discretion by granting Poker Brown's motion for a writ of possession, nor do they provide a standard of review. Poker Brown contends that the Panes did not set forth a standard of review for a writ of possession,

nor a discussion of the standard of review. The Panes loosely contend that NRS 107.080 would void the foreclosure sale, which would seemingly make the grant of the writ of possession improper.

The district court's decision to grant or deny writ relief is reviewed for an abuse of discretion. *See Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010) (recognizing that the district court's denial of a writ petition is reviewed for an abuse of discretion). NRS 40.255(1)(b) provides that, "a person who holds over and continues in possession of real property . . . after a 3-day written notice to surrender has been served upon the person may be removed . . . [w]here the property . . . has been sold upon foreclosure of a mortgage . . . and the title under the sale has been perfected."

Here, the district court concluded that Poker Brown had purchased the home at the foreclosure sale and that the Panes had already received notice because of Poker Brown's motion for the writ of possession. The Panes did not challenge these findings, nor any other findings the district court made with respect to the writ of possession, and therefore, they have waived these arguments on appeal. *Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3 (providing that arguments not raised on appeal are deemed waived).

Further, the district court concluded that the writ of possession should be granted because the Panes were limited to economic damages, and referenced its findings in both the order granting the motion to expunge *lis pendens*, as well as the order granting in part Poker Brown's motion to

dismiss.<sup>2</sup> As noted above, the appeals of these orders were dismissed. *See Pane*, Docket No. 76059 (Order Partially Dismissing Appeal, June 3, 2019). As such, the Panes have not shown that the district court abused its discretion.<sup>3</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Lynne K. Simons, District Judge  
Wayne M. Pressel  
Akerman LLP/Las Vegas  
Walsh, Baker & Rosevear, P.C.  
Tiffany & Bosco, P. A.  
Aldridge Pite, LLP  
Washoe District Court Clerk

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<sup>2</sup>We note that our affirmance of the writ of possession does not reach the merits of the arguments the Panes asserted in opposition to Poker Brown's motion to dismiss and motion to expunge lis pendens, as the supreme court dismissed the appeals of those orders for lack of jurisdiction.

<sup>3</sup>Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude they either do not present a basis for relief, or need not be reached given the disposition of this appeal nor should this disposition be construed to affirm the district court's dismissal of the Panes' arguments that are not before us.