

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH BERBERICH, AN
INDIVIDUAL IN HIS CAPACITY AS
TRUSTEE OF THE 7551 RINGTAIL
TRUST,
Appellant,
vs.
WILMINGTON TRUST, NATIONAL
ASSOCIATION, AS SUCCESSOR
TRUSTEE TO CITIBANK, N.A. AS
TRUSTEE OF STRUCTURED ASSET
MORTGAGE INVESTMENTS II, INC.,
BEAR STEARNS ARM TRUST,
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-1,
Respondent.

No. 81879-COA

FILED

OCT 26 2021

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

ORDER OF REVERSAL AND REMAND

Kenneth Berberich appeals from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Trevor L. Atkin, Judge.

The original owners of the subject property failed to make periodic payments to both of their homeowners' associations (HOAs). Both HOAs—through their collection agent, Alessi & Koenig (A&K)—initiated nonjudicial foreclosure proceedings to collect on the past due assessments and other fees pursuant to NRS Chapter 116 by mailing and recording two separate notices of delinquent assessment liens. On behalf of one of the HOAs (Nevada Trails), A&K proceeded to record a notice of default and

election to sell that incorrectly referred to the date and document number of the other HOA's recorded notice of delinquent assessment lien, but correctly identified Nevada Trails as the foreclosing party. A&K then recorded a second notice of default that again incorrectly referred to the date of the other HOA's recorded notice of delinquent assessment lien and also included a different—but still incorrect—document number, but nevertheless correctly identified Nevada Trails as the foreclosing party. Finally, A&K recorded a notice of sale that contained the same information from the second notice of default, and the property later reverted to Nevada Trails by a credit bid of \$4,754 at the ensuing sale. Nevada Trails later quitclaimed the property to the 7551 Ringtail Trust—for which Berberich is the trustee—in exchange for \$12,000.

Berberich then filed the underlying action seeking to quiet title against respondent Wilmington Trust, National Association (Wilmington), the current beneficiary of the first deed of trust on the property. The district court ultimately granted summary judgment in favor of Wilmington, concluding that the irregularities in the foreclosure notices amounted to fraud, unfairness, or oppression such that the foreclosure sale should be set aside in equity. The court alternatively concluded that the sale was void because the foreclosure notices failed to comply with NRS 116.31162(1)(b) (2005).¹ This appeal followed.

¹As this was the version of the statute in effect at all relevant times, we cite that version herein.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine disputes of fact. *Id.* at 731, 121 P.3d at 1030-31.

Berberich contends that this court must reverse the district court's order on grounds that Wilmington failed to present any evidence that the irregularities in the foreclosure notices actually affected the sale. He additionally contends that the district court erred in declaring the sale void because Nevada Trails/A&K substantially complied with statutory notice requirements, Wilmington's predecessor had actual notice of the sale, and Wilmington was therefore not prejudiced by the notice errors. We address each argument in turn, and we agree on both counts.

A party requesting that the district court set a foreclosure sale aside in equity "bears the burden to produce evidence showing that the sale was affected by fraud, unfairness, or oppression that would justify setting aside the sale." *Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 55, 437 P.3d 154, 160 (2019) (alteration and internal quotation marks omitted). This requires showing "that *the sale itself* was affected by 'fraud, unfairness, or oppression.'" *Id.*; see *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 741, 405 P.3d 641, 643 (2017) (noting

that “inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee’s sale absent additional proof of some element of fraud, unfairness, or oppression *as accounts for and brings about* the inadequacy of price” (emphasis added) (internal quotation marks omitted)).

Here, Wilmington speculates that bidding at the sale was chilled by the notice irregularities, but it fails to identify any evidence in the record in support of the notion that anyone was actually misled or otherwise dissuaded by the notices, which correctly identified the property and the fact of the original homeowners’ delinquency on their HOA dues. Moreover, as set forth below, we are not persuaded that the notice irregularities actually amounted to a statutory violation, but even if they did, Wilmington likewise fails to show that its predecessor was in any way prejudiced or misled by the notices. *See Shadow Canyon*, 133 Nev. at 752-53, 405 P.3d at 650 (reasoning that a technical statutory violation in a notice of sale did not warrant setting aside the sale in equity and noting that, “[s]ignificantly, there is no evidence in the record to suggest that [the beneficiary of the first deed of trust] ever tried to tender payment in any amount to the HOA, much less that [the beneficiary] was confused or otherwise prejudiced by the notice of sale”). Accordingly, the district court misapplied the “fraud, unfairness, or oppression” standard, and it therefore abused its discretion in setting the sale aside. *See Res. Grp.*, 135 Nev. at 55, 437 P.3d at 160 (“A district court’s decision to set aside a foreclosure sale on equitable grounds is subject to an abuse of discretion standard of review.”); *see also In re Guardianship of B.A.A.R.*, 136 Nev. 494, 496, 474 P.3d 838, 841 (Ct. App. 2020) (explaining that even when a district court is

exercising its discretion, it “must [nevertheless] apply the correct legal standard in reaching its decision”).

We turn now to the district court’s alternative conclusion that the sale was void because the notices supposedly violated a statute in NRS Chapter 116. Wilmington contends that the irregularities in the notices amounted to a violation of NRS 116.31162(1)(b), which requires in relevant part that “a notice of default and election to sell the unit to satisfy the lien . . . must contain the same information as the notice of delinquent assessment.” But Wilmington does not dispute that the relevant notices stated the amount of the delinquency, a description of the property, and the name of the property’s record owners, which is the information that an HOA is required to provide in a notice of delinquent assessment lien. *See* NRS 116.31162(1)(a). Instead, Wilmington points to the erroneous dates and document numbers referenced in the notices of default in connection with the recordation of the prior notice of delinquent assessment lien, which is information that is not even required to be included in such notices.² *See* NRS 116.31162(1)(a)-(b). Accordingly, we are not persuaded that the relevant notices violated NRS Chapter 116. And even if they did, Wilmington does not dispute that its predecessor had actual notice of the sale, and as noted above, it fails to show that it was in any way prejudiced by the notice irregularities. *See U.S. Bank, Nat’l Ass’n ND v. Res. Grp., LLC*, 135 Nev. 199, 205, 444 P.3d 442, 448 (2019) (providing that, following

²Notably, NRS 116.31162(1)(a) requires only that the HOA mail a notice of delinquent assessment lien to the property’s owner; it does not require the HOA to record that notice.

an HOA's foreclosure on the superpriority portion of its lien, a district court may declare the foreclosure sale void as to that portion if the HOA failed to provide the holder of the first deed of trust on the property with adequate statutory notice of the homeowner's default, the deed of trust holder did not receive timely notice by other means, and it suffered prejudice as a result).

Based on the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 8
Hong & Hong
ZBS Law, LLP
Eighth District Court Clerk