IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR.; AND VICENTA LINCICOME,
Appellants,
vs.
SABLES, LLC, A NEVADA LIMITED LIABILITY COMPANY, AS TRUSTEE OF THE DEED OF TRUST GIVEN BY VICENTA LINCICOME AND DATED 5/23/2007; FAY SERVICING, LLC, A DELAWARE LIMITED LIABILITY COMPANY AND SUBSIDIARY OF FAY FINANCIAL, LLC; PROF-2013-M4 LEGAL TITLE TRUST BY U.S. BANK, N.A., AS LEGAL TITLE TRUSTEE; BANK OF AMERICA, N.A.; NEWREZ, LLC, D/B/A SHELLPOINT MORTGAGE SERVICING, LLC; 1900 CAPITAL TRUST II, BY U.S. BANK TRUST NATIONAL ASSOCIATION; AND MCM-2018-NPL2,
Respondents.

No. 83261



*ORDER OF AFFIRMANCE*

This is an appeal from a district court order granting summary judgment in an action for breach of contract and wrongful foreclosure. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

This case concerns a long-running home foreclosure dispute between appellants Vicenta Lincicome and Albert Ellis Lincicome, Jr. (collectively, the Lincicomes), and respondent banks, mortgage servicer, and trustee. The Lincicomes accepted a loan modification agreement (LMA) from respondent Bank of America (BANA) in 2009 after falling into default on a 2007 loan secured by a deed of trust. However, when the Lincicomes

attempted to make the reduced payment due under the LMA, BANA objected, stating that it had no record of the modification. BANA accepted the Lincicomes' first LMA payment in September of 2009, but rejected their second LMA payment in October of 2009. BANA told the Lincicomes that it would try to locate the lost LMA, but that in the meantime they needed to make the larger monthly payments due under the original note. After BANA rejected their October 2009 payment, the Lincicomes stopped making payments on the note or the LMA and filed for bankruptcy in 2010.

Unknown to the Lincicomes, BANA signed and recorded the LMA in 2011. But, after a bankruptcy stay on foreclosure was lifted in 2014, BANA and its successors in interest demanded payment under the original loan. The Lincicomes failed to pay, and Sables, LLC (Sables), the trustee for BANA and its successors, filed a notice of default in 2017. The Lincicomes petitioned for foreclosure mediation against all parties except BANA. At the mediation, the parties agreed to resolve their disputes by the Lincicomes agreeing to provide, and Sables agreeing to accept, a deed in lieu of foreclosure by July 5, 2018. When the Lincicomes failed to timely provide the deed, Sables recorded a Notice of Trustee's Sale.

The Lincicomes filed the underlying action in November 2018 against BANA, US Bank (BANA's successor mortgagee), Sables, and loan servicer Fay Servicing (Fay), seeking declaratory and injunctive relief against foreclosure and damages. The district court granted a preliminary injunction against foreclosure on the condition that the Lincicomes post bond. When the Lincicomes failed to do so, the property went to foreclosure sale. The Lincicomes then amended their complaint to add claims for wrongful foreclosure. The parties filed competing motions for summary judgment, and the district court granted summary judgment in favor of

respondents and denied the Lincicomes' cross-motion for summary judgment. The Lincicomes timely appealed.

Summary judgment is appropriate when the pleadings and other evidence demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Applying the de novo review appropriate to appeals from orders granting summary judgment, *see id.*, we affirm. The Lincicomes' contract-based damages against BANA accrued in 2009, when BANA repudiated the LMA, and the six-year statute of limitations provided by NRS 11.190 for such claims expired before the Lincicomes filed suit in 2017. Further, US Bank, Fay, and Sables (the foreclosing respondents) were not liable for wrongful foreclosure because of the foreclosure mediation agreement, which the Lincicomes then breached.

*The Lincicomes' claims against BANA are time-barred*

The district court found that the Lincicomes became aware of any alleged breach of the LMA in October 2009, when BANA repudiated the LMA and informed them that it would not accept payments under the LMA and that they needed to continue to make payments under the original note. Based upon this finding, the district court concluded that any breach of contract claim by the Lincicomes against BANA was barred by the six-year statute of limitations in NRS 11.190, because the Lincicomes did not bring suit until November 2018. The Lincicomes argue that they reasonably relied on BANA's representations that it had lost the LMA and was trying to locate it. Therefore, the Lincicomes contend that the statute of limitations began to run on November 3, 2017—the date Sables recorded the default notice—under the doctrine of equitable tolling and the discovery rule.

Failure by the promisor to perform at the time indicated for performance in the contract establishes an immediate breach. *Franconia Assocs. v. United States*, 536 U.S. 129, 142-43 (2002) ("When performance of a duty under a contract is due, any non-performance is a breach." (quoting Restatement (Second) of Contracts § 235(2) (1979)). A breach gives rise to a claim for damages or other appropriate relief by the injured party. *See* Restatement (Second) of Contracts § 236 cmt. a (Am. Law Inst. 1979). Here, BANA failed to perform under the LMA by refusing to accept the Lincicomes' second modified payment, as well as subsequent modified payments, at the time that these payments were due under the agreement. We therefore find that BANA breached the LMA and that the Lincicomes were entitled to claim damages.[1]

NRS 11.190 requires "[a]n action upon a contract, obligation or liability" to be brought within six years. The period for calculating the date an action for breach of contract accrues is specified in NRS 11.200, which states that the statute of limitations begins to run from the date of the last transaction. The discovery rule may delay the beginning of the statute of limitations period until the time that "the plaintiff knows or should know of facts constituting a breach." *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025,

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[1]We disagree with the district court's suggestion that the LMA may not have been valid until its recording in 2011. The LMA stated that "[i]n order for the modification to be valid, [its] enclosed documents need[ed] to be signed [in the presence of a notary] and returned." The Lincicomes complied with these requirements. Vicenta Lincicome signed the LMA in the presence of a notary on July 31, 2009, and mailed the agreement to BANA. Therefore, viewed in the light most favorable to the non-moving party, the record makes clear that the Lincicomes validly accepted BANA's modification offer, and that the LMA became valid upon mailing in July 2009.

967 P.2d 437, 440 (1998). Equitable tolling excuses delay if a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002), or when the defendant's wrongful conduct or extraordinary circumstances prevent a plaintiff from asserting a claim on time, *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999).

Under NRS 11.200, the last transaction between the Lincicomes and BANA with respect to the LMA occurred in October 2009, when BANA refused to accept payment in accordance with the LMA. Therefore, under NRS 11.190, the six-year statute of limitations required the Lincicomes to bring suit to enforce their asserted rights under the LMA no later than October 2015. Instead of suing to enforce the LMA, tendering payments under it as they accrued, or performing under the original note, the Lincicomes did not perform any of the above.

The Lincicomes' arguments for tolling the statute of limitations under the discovery rule or equitable tolling are unpersuasive. The Lincicomes posit that BANA's breach was not apparent to them because the bank repeatedly informed them that it was investigating the allegedly lost LMA's status. But this argument is flawed; when BANA refused to accept payment in October 2009, the Lincicomes knew or should have known that BANA was not going to perform in accordance with the LMA. And, even accepting the Lincicomes' argument that the LMA took effect when they signed and returned it, paragraphs 4 and 12 of the LMA made clear that it did not wholly release them from their liability under the note and deed of trust; equitable tolling thus did not excuse them from either suing or continuing to tender payments, neither of which they timely did. Under these facts, a reasonable plaintiff would have been aware of a possible claim

for breach before the limitations period expired in October 2015. Further, the Lincicomes failed to demonstrate extraordinary circumstances or wrongful conduct on BANA's part that prevented the Lincicomes from asserting a claim on time. *Stoll*, 165 F.3d 1238, 1242 (9th Cir. 1999). Thus, the district court properly granted summary judgment to the Lincicomes on their breach of contract claims against BANA, concluding their claims were time-barred.

*The foreclosure mediation agreement, which the Lincicomes breached, entitled the non-BANA respondents to proceed with foreclosure*

When no facts are in dispute, this court reviews contractual interpretation issues de novo, "looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011)

Here, the district court held that, under *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 274 P.3d 762 (2012), the 2018 mediation agreement, wherein the Lincicomes agreed to provide Sables a deed in lieu of foreclosure, was enforceable. The district court found that the mediation agreement "settled all claims regarding the mortgage." Because the Lincicomes breached the foreclosure mediation agreement by not providing a deed in lieu of foreclosure as promised, the respondents were entitled to proceed with foreclosure.

The Lincicomes argue that no provision of the mediation agreement requires surrender of the property, supplants or replaces the LMA, or settles all claims under the mortgage—including their claim for wrongful foreclosure under NRS Chapter 107.

The mediation occurred on April 3, 2018, and was documented by a form mediator's statement, attested to by the mediator and signed by the parties and their lawyers, that "the parties resolved this matter." The

agreement section of the document states that the parties agreed "to relinquish the home" by way of a "deed in lieu of foreclosure" and incorporated by attachment and reference the deed-in-lieu program requirements. Based upon the manner in which the parties filled out the form, we agree with the district court that the Lincicomes not only agreed to surrender possession of the property, but to relinquish all rights to the home. *See Redrock*, 127 Nev. at 460, 254 P.3d at 647-48.

The parties indicated that the certificate date for the deed in lieu of foreclosure would be July 5, 2018. The agreement further stated that the deed would issue "[p]ursuant to DIL requirements on p.6 of TTP dated 3/6/2018—attached hereto." "TTP" refers to the Trial Period Plan[2] that Fay had offered the Lincicomes on March 6, 2018. The Trial Period Plan presented the Lincicomes with the option of either pursuing a new modified payment plan or surrendering the home through a deed in lieu of foreclosure. Page six of the Trial Period Plan outlined the deed in lieu of foreclosure program requirements in a section titled "Attachment B." As one of these requirements, the Lincicomes had to complete a deed in lieu of foreclosure by July 4, 2018. If the Lincicomes did not execute the deed by that date, then "any pending foreclosure action or proceedings may continue and a foreclosure sale may occur." Thus, because the mediation agreement incorporated the requirements listed under Attachment B, the parties clearly agreed that the Lincicomes would relinquish the home via a deed in lieu of foreclosure, and that if they failed to do so by July 4, 2018, the noticed foreclosure would proceed. The Lincicomes' argument that the agreement did not require them to surrender the property is without merit.

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[2]We assume that "TTP" is simply a typo, and that the parties meant to write "TPP" to refer to the Trial Period Plan.

This court held in *Jones* that "when an agreement is reached as a result of an [Foreclosure Mediation Program] mediation, the parties sign the agreement, and it otherwise comports with contract law principles, the agreement is enforceable under District Court Rule 16." 128 Nev. at 189, 274 P.3d at 763. Here, the Lincicomes' mediation was a foreclosure mediation program (FMP) mediation. The Lincicomes and Fay signed the agreement. There is no evidence that the agreement runs afoul of contract law principles and the Lincicomes make no argument to that effect. Thus, the terms of the mediation agreement are enforceable under *Jones*.

The Lincicomes additionally argue that Fay repudiated the mediation agreement in a May 2018 letter. This letter informed the Lincicomes that they were no longer eligible for Fay's deed in lieu of foreclosure program because they had failed to indicate their intent to participate in the program.

Unlike a breach by non-performance, discussed previously with respect to BANA's conduct, a repudiation is "the promisor's renunciation of a 'contractual duty *before* the time fixed in the contract for . . . performance.'" *Franconia*, 536 U.S. at 143 (alteration in original) (quoting 4 A. Corbin, Contracts § 959, p. 855 (1951)). A repudiation "ripens into a breach prior to the time for performance only if the promisee 'elects to treat it as such.'" *Id.* (quoting *Roehm v. Horst*, 178 U.S. 1, 13 (1900)). "A contractual anticipatory repudiation must be clear, positive, and unequivocal." *Covington Bros. v. Valley Plastering, Inc.*, 93 Nev. 355, 360, 566 P.2d 814, 817 (1977). "Whether specific conduct or language is sufficiently clear to constitute an anticipatory repudiation [of a contract] must be decided in light of the total factual context of the individual case." *Id.*

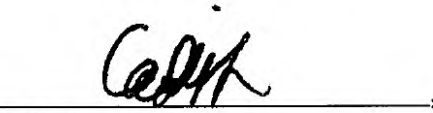
We disagree that Fay renounced its contractual duties under the mediation agreement in the May 2018 letter. First, the letter was not clearly a repudiation of the agreement. While perhaps confusing to the Lincicomes, the May 2018 letter appears to correspond to Fay's March 6, 2018, offer to the Lincicomes to participate in the deed in lieu program pursuant to Attachment B of the Trial Period Plan. Attachment B required the Lincicomes to contact Fay, if interested in pursuing the program, by March 20, 2018. Fay explained all of this to the Lincicomes in a June 20, 2018, letter. The March 6 offer thus appears separate from the mediation agreement, except for the fact that the mediation agreement adopted the deed in lieu terms contained in Attachment B. And critically, the parties signed the FMP mediation agreement on April 4, 2018, contractually binding themselves to the deed in lieu of foreclosure terms. The May 2018 letter does not refer to the April 2018 mediation agreement but rather to the March letter outlining options. Accordingly, we find no clear, positive, and unequivocal repudiation of the mediation agreement by Fay in the May 2018 letter.

Second, the Lincicomes did not treat the alleged repudiation as a breach. The Lincicomes sent Fay a separate letter of their own on May 21, 2018, in which the Lincicomes alleged they had been "steered . . . into a deed in lieu agreement that [they] never wanted to sign" and requested "to be considered for a modification with an affordable monthly payment that addresses the arrearages either through forgiveness of a portion of the delinquency or forbearance or deferred payment on said portion of the arrearages." Thus, despite receiving Fay's May 2018 letter, the Lincicomes seem to have believed that they were still bound to the deed in lieu of foreclosure agreed to at mediation, and sought a new loan modification as a

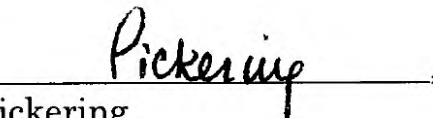
way to retain their home. There is no language from the Lincicomes' reply letter that refers to Fay's May 2018 letter or evidences an intent to treat it as a breach. In sum, Fay did not repudiate the mediation agreement before its performance became due in July 2018.

The district court did not err in finding that the agreement settled all claims regarding the mortgage. The agreement is enforceable, and by its plain terms, the Lincicomes agreed to surrender the property via a deed in lieu of foreclosure, for the reciprocal benefits the deed in lieu procedure afforded them. The Lincicomes breached the mediation agreement by failing to prepare and deliver a deed in lieu of foreclosure by the July 4, 2018, deadline. Because of the Lincicomes' breach, the agreement permitted the foreclosing respondents to proceed with foreclosure of the property. This defeats the Lincicomes' wrongful foreclosure claim. The district court properly granted summary judgment based on the statute of limitations as to BANA and as to the remaining defendants based on the deed-in-lieu mediation agreement. We therefore

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cadish



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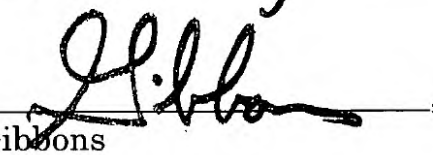
Pickering



_____, Sr. J.[3]
Gibbons

[3]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

cc: Hon. Leon Aberasturi, District Judge
Lansford W. Levitt, Settlement Judge
Clouser Hempen Wasick Law Group, Ltd.
Millward Law, Ltd.
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