

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE M. FOUST AND BECKY H.  
FOUST, AS HUSBAND AND WIFE,  
Appellants,

vs.

WELLS FARGO, N.A., STATE OF  
INCORPORATION PRESENTLY  
UNKNOWN; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC.; AND AMERICAN  
HOME SERVICING MORTGAGES,  
INC., A DELAWARE CORPORATION,  
Respondents.

No. 55520

**FILED**

JUL 29 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Anderson*  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing a complaint as to respondents, certified as final under NRCP 54(b), in a foreclosure action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Appellants George and Becky Foust executed a deed of trust in February 2007 to secure a loan from Realty Mortgage Corporation in the amount of \$375,700, which they used to purchase a home located in Henderson, Nevada. The Fousts defaulted on their loan in November 2008. Prior to their default, the note and deed of trust were apparently assigned several times. Realty Mortgage apparently assigned the debt and the security interest to Option One Mortgage Corporation in October 2007. Option One Mortgage Corporation then appears to have assigned it

to American Home Mortgage Servicing, Inc.,<sup>1</sup> but neither party indicates in their briefs when or how this occurred, and there are no documents related to such an assignment in the record. The last of these assignments of the deed of trust, from American Home Mortgage Servicing, Inc., to Wells Fargo, is the subject of this appeal.

On January 30, 2009, Wells Fargo signed a document substituting AHMSI Default Services, Inc. (AHMSI Default), as a substitute trustee, but did not have this document acknowledged until February 2, 2009. Also on January 30, 2009, AHMSI Default, acting as a substitute trustee for Wells Fargo, signed and acknowledged a notice of default against the Fousts, and recorded the same on February 2, 2009. However, Wells Fargo's status as of January 30, 2009, is unclear. According to the record, American Home Mortgage Servicing, Inc., executed an assignment of the deed of trust to Wells Fargo on February 20, 2009, which was recorded on February 25, 2009. It included a provision stating "Misc. Comments: EFFECTIVE DATE OF ASSIGNMENTS: 01/02/2009." This effective date is prior to the date on which Wells Fargo substituted AHMSI Default as trustee.

In May 2009, the Fousts filed a complaint in district court, and subsequently filed a first amended complaint in July 2009. They alleged

---

<sup>1</sup>The caption erroneously refers to this party as "American Home Servicing Mortgages Inc.," and several instances in the record refer to it as "American Home Mortgage Services, Inc." However, the document wherein the deed of trust was assigned to Wells Fargo refers to the entity as "American Home Mortgage Servicing, Inc." Thus, we will refer to the party by this name.

ten causes of action against seven named defendants, including the parties who are now respondents on appeal.<sup>2</sup> One of the causes of action alleged that Wells Fargo “may not be in possession of the note and mortgage underlying the Transactions, and therefore, lack[ed] standing to foreclose on the note pursuant to NRS 104.3301.” The respondents subsequently filed a motion to dismiss, which the district court granted.

The Fousts then filed a “Motion for Reconsideration and/or Rule 54(b) Certification; Motion for Leave to Amend and Alternatively Motion for Rule 54(b) Certification.” The district court denied both the motion for reconsideration and the motion for leave to amend but granted the motion for NRCP 54(b) certification.<sup>3</sup> The Fousts then appealed.

On appeal, the Fousts contend that the district court erred in granting the defendants’ motion to dismiss their first amended complaint.<sup>4</sup>

---

<sup>2</sup>The respondents to this appeal are Wells Fargo, N.A., Mortgage Electronic Registration Systems, Inc., and American Home Servicing Mortgages, Inc.

<sup>3</sup>The Fousts requested NRCP 54(b) certification because one of the defendants, Realty Mortgage, was served with the complaint but never made an appearance in the case. The Fousts never entered default against Realty Mortgage, hence the dismissal of the complaint was not a final order from which the Fousts could appeal because it did not dismiss the complaint as to all parties. See NRAP 3A(b)(1); NRCP 54(b). By having the district court expressly certify the judgment as final, the Fousts were able to proceed with this appeal. NRCP 54(b).

<sup>4</sup>Technically, the Fousts designated the district court’s order denying their motion for reconsideration and for leave to amend and granting their alternative request for NRCP 54(b) certification in their notice of appeal. However, parties cannot appeal a motion for reconsideration, Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 345 (1995); see also Alvis v.

*continued on next page . . .*

The issues the Fousts raise on appeal are: (1) whether AHMSI Default wrongfully commenced a foreclosure against them because AHMSI Default was not a proper substitute trustee, as Wells Fargo was not entitled to enforce the note; and (2) whether Wells Fargo was assigned the deed of trust prior to the date on which AHMSI Default entered the notice of default. We conclude that the district court erred in granting the motion to dismiss because the Fousts presented a claim upon which relief could be granted. Thus, we reverse and remand this matter to the district court for further proceedings consistent with this order.

Standard of review

We review the district court's legal conclusions, including a determination that a plaintiff has failed to state any legitimate causes of action under NRCP 12(b)(5), de novo. See Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). In reviewing motions to dismiss pursuant to NRCP 12(b)(5), we accept all facts in the complaint as true, construe the pleadings liberally, and draw all possible

---

*... continued*

State, Gaming Control Bd., 99 Nev. 184, 660 P.2d 980 (1983), disapproved on other grounds by AA Primo Builders v. Washington, 126 Nev. \_\_\_, 245 P.3d 1190 (2010), and the Fousts were not aggrieved by the granting of their motion for NRCP 54(b) certification. However, the Fousts' briefs clearly indicate that they are appealing the order dismissing their complaint, which became final when the district court granted the motion for NRCP 54(b) certification. Therefore, we treat this appeal as a timely appeal from the order dismissing the Fousts' first amended complaint. Because we conclude that the order dismissing the complaint was improper, we do not reach the district court's denial of the motion for leave to amend the first amended complaint.

inferences in favor of the nonmoving party. Id.; Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). This standard of review is rigorous, and the plaintiff's "complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." Buzz Stew, 124 Nev. at 227-28, 181 P.3d at 672.

The Fousts stated a claim upon which relief can be granted

This appeal focuses on the Fousts' fifth cause of action, in which the Fousts alleged that Wells Fargo may not own the note and mortgage and, therefore, lacked standing to foreclose. Construing this allegation liberally and drawing all possible inferences in favor of the Fousts, the first amended complaint presents a claim upon which relief could be granted.

While deeds of trust and mortgage notes work together in the context of mortgage lending, they are distinct documents with separate functions. Leyva v. National Default Servicing Corp., 127 Nev. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_, \_\_\_ (Adv. Op. No. 40, July 7, 2011). We do not analyze those distinctions here, but possessing only the deed of trust does not create an entitlement to enforce the underlying note. See In re Veal, No. 09-14808, 2011 WL 2304200, at \*12 (B.A.P. 9th Cir. June 10, 2011). To enforce a debt secured by a deed of trust and mortgage note, a person must be entitled to enforce the note pursuant to Article 3 of the Uniform Commercial Code. Id. at \*7; see also Restatement (Third) of Property: Mortgages § 5.4(c) (1997) ("A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures."). "Article 3 is codified in NRS 104.3101-.3605." Leyva, 127 Nev. at \_\_\_ n.6, \_\_\_ P.3d at \_\_\_ n.6. If Wells Fargo was not entitled to enforce

the note, then the substitution of AHMSI Default as trustee and the subsequent foreclosure notice against the Fousts may have been in error. Therefore, the central inquiry on remand is whether Wells Fargo was entitled to enforce the note.<sup>5</sup>

Accordingly, we


ORDER the judgment of the district court REVERSED AND

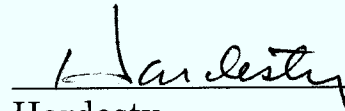
---

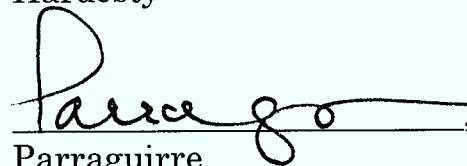
<sup>5</sup>As to the Fousts' argument regarding the validity of the substitution of AHMSI Default as trustee, that argument is without merit. In order for a substitution of trustee to be valid, it must be in the manner and form required by the provisions of the deed of trust, unless additional formalities are required by statute. 55 Am. Jur. 2d Mortgages § 934 (2009). Nevada has no applicable statute, although NRS 107.030(9) provides an optional covenant related to substitution of trustees that may be included in a deed of trust. Because the proposed covenant in NRS 107.030(9) is not required, and the deed of trust here did not include that covenant, we look to the Fousts' deed of trust for provisions regarding substitution of trustees. The deed of trust signed by the Fousts states in regard to substitution of a trustee: "Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder." There is no acknowledgement requirement, so if Wells Fargo was entitled to enforce the note, then it properly substituted AHMSI Default as trustee.

The Fousts' argument that Wells Fargo was not definitively able to enforce the note because the assignment to Wells Fargo did not record until February 25, 2009, is also without merit. Although a party may record a deed of trust, recordation is not necessary for the assignment to be effective and operates simply to give notice. NRS 106.210. We do not determine in this order whether the effective date listed in the assignment of January 2, 2009, is conclusive proof of the exact date on which the assignment became valid.

REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Timothy C. Williams, District Judge  
Thomas J. Tanksley, Settlement Judge  
Sullivan Brown  
Christopherson Law Offices  
Olson, Cannon, Gormley & Desruisseaux  
Wright, Finlay & Zak, LLP  
Eighth District Court Clerk