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IN THE SUPREME COURT OF THE STATE OF IDAHO

JERRY LOSEE AND JOCAROL
LOSEE,

)

)

Docket No.

Plaintiffs/Appellants/

)

)

Bannock County Docket No. 2015-2863

vs.

)

)

NEW CENTURY MORTGAGE
CORPORATION,
DEUTSCHE BANK NATIONAL TRUST
COMPANY, et al

)

)

Supreme Court No. 45721

)

)

Defendants/Respondents/

)

)

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BRIEF OF APPELLANTS

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
FOR BANNOCK COUNTY HONORABLE STEPHEN S. DUNN, DISTRICT
JUDGE, PRESIDING

PLAINTIFFS/APPELLANTS *Pro Se*
JERRY & JOCAROL LOSEE
9253 FRANSEN RD.
LAVA HOT SPRINGS, ID 83246

WRIGHT FINLAY & ZAK
7785 W. SAHARA AVE. SUITE 200
LAS VEGAS, NV 89117
ATTORNEYS FOR RESPONDENTS/DEFENDANTS

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TABLE OF CASES AND AUTHORITIES

Cases:

FRAGNELLA v. PETROVICH, 281 P.3d 103 (2012)

I.R.C.P. Rule 56

I.R.E 801(c)

RHODEHOUSE v. STUTTS, 125 Idaho 208, 868 P.2d 1224 (1994)

SHERER v. POCA TELLO SCHOOL DIST. # 25, 148 P.3d 1232 (2006)

SILVER CREEK SEED v. SUNRAIN VARIETIES, 385 P.3d 448 (2016)

STATEMENT OF THE CASE

Nature of the Case

The Appellants appeal from the MEMORANDUM DECISION (R. 170 et seq.), Case number CV-2015-2863, August 25, 2017, and JUDGMENT entered November 22, 2017.

Statement of the Facts and Course of Proceedings

Appellants filed suit against the Appellees/Defendants for Breach of Contract, Slander of Title, and Wrongful Foreclosure on August 17, 2015. Appellees/Defendants filed a Motion for Summary Judgment on March 13, 2017. Appellants/Plaintiffs responded to the Motion, filing a response on March 31, 2017, and subsequently filing affidavits in support of their position. On April 11, 2017, the Plaintiffs/Appellants also filed a Notice of Filing for Judicial Review, which was a document (“Chain of Title Analysis”) containing the results of an investigation, and which had been previously referenced in an affidavit filed with the court; the Affidavit of Joseph R. Esquivel, Jr. (“Esquivel Affidavit”, attached as “Exhibit A”).

In its analysis of the issue of summary judgment, the District Court specifically referenced the Affidavit of Joseph R. Esquivel, Jr., and the document that is the report on this investigation. Then held that it would not consider the Chain of Title Analysis because it was not sworn to, and was, therefore, “hearsay” (R. 178).

Also, while the District Court, in its Memorandum Decision, dismissed the Appellants claims for breach of contract and for slander of title, it did not address the causes of action for wrongful foreclosure and for a declaratory judgment.

SUMMARY OF ARGUMENT

The District Court erred in failing to review and consider the Chain of Title Analysis, and mischaracterized and misstated the concept of “hearsay” as the grounds for excluding it.

ARGUMENT

I. THE DISTRICT COURT ERRED IN EXCLUDING FROM REVIEW THE CHAIN OF TITLE ANALYSIS AS “HEARSAY”.

In its Memorandum Decision Granting Defendant Deutsche Bank National Trust Company’s Motion for Summary Judgment, the District Court specifically references the Esquivel Affidavit as part of its analysis, but goes on to specifically exclude the Chain of Title Analysis as “hearsay” that is “inadmissible evidence”. The Chain of Title Analysis (R. 108, et seq.) contains the factual basis for the Plaintiffs/Appellants claim, and to exclude it from analysis is to effectively negate the claim.

The Esquivel Affidavit is sworn to, and was considered by the Court. Unfortunately, the Affidavit contains only a portion of the information that is in the Chain of Title Analysis. The Affidavit makes evident in plain terms that it was made in support of the Chain of Title Analysis. The Chain of Title Analysis contains the same Affidavit within in it, and the two are clearly meant to be part of the same material. The fact that the Plaintiffs/Appellants filed the Affidavit first and separately doesn’t change the nature of the documents or the information contained therein. The District Court’s reason for excluding the Chain of Title Analysis is erroneous. This Court has defined “hearsay” quoting the Rules of Evidence, as follows:

“Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E 801(c). The Idaho Rules of Evidence provide that hearsay is inadmissible unless it fits within a specific enumerated exception.” SILVER CREEK SEED v. SUNRAIN VARIETIES, 385 P.3d 448 (2016).

This is certainly not a controversial definition of hearsay. In fact, such a definition necessarily includes all affidavits that don’t fall within the exceptions to the hearsay rule, or are defined as not being hearsay. It would include the Esquivel Affidavit, along with all other affidavits filed in this case, which the District Court was willing to consider. They are all statements other than one made by the declarant while testifying at a trial or hearing, offered to prove the truth of the matter asserted.

With regard to affidavits filed in support of motions, the Rules of Civil Procedure state in Rule 56 as follows:

(4) *Affidavits.* An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit must be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

When the Appellants filed their Notice of Filing for Judicial Review, it included the Chain of Title Analysis, which itself includes the Esquivel Affidavit. As such, the Chain of Title Analysis was part of the Affidavit, and vice versa.

The District Court has discretion when deciding what evidence to consider when adjudicating a case on summary judgment. RHODEHOUSE v. STUTTS, 125 Idaho 208, 868

P.2d 1224 (1994). In this case the District Court abused that discretion when it refused to consider the Chain of Title Analysis, stating it was inadmissible hearsay; a standard that the District Court did not apply to other materials that are clearly within the definition of hearsay under the Rules of Evidence. This Court has defined abuse of discretion as follows:

"A district court's evidentiary rulings will not be disturbed by this Court unless there has been a clear abuse of discretion." *Navo v. Bingham Mem'l Hosp.*, 160 Idaho 363, 370-71, 373 P.3d 681, 688-89 (2016) (quoting *Mattox v. Life Care Ctrs. of America, Inc.*, 157 Idaho 468, 473, 337 P.3d 627, 632 (2014)). The abuse of discretion standard requires a three-part inquiry: "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistent with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *SILVER CREEK SEED v. SUNRAIN VARIETIES*, 385 P.3d 448 (2016).

Under this standard, the District Court abused its discretion in refusing to consider the Chain of Title Analysis. Specifically, by applying a standard of "hearsay" which would exclude virtually all affidavits from consideration on summary judgment, the District Court did not act within the boundaries of its discretion nor consistently with legal standards, and did not reach its decision by and exercise of reason. The same standard of hearsay was not applied to all affidavits in the case, yet all fall within the definition of hearsay, as defined under Idaho law.

While the District Court correctly stated the standard for Summary Judgment, the evidence in the case was not properly evaluated. The standard before this Court is stated as:

"In an appeal from a grant of summary judgment, this Court's standard of review is the same as the district court's standard in ruling upon the motion. *Hei v. Holzer*, 73 P.3d 94, 97-98 (2003). Summary judgment is proper 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." I.R.C.P. 56(c)." *SHERER v. POCATELLO SCHOOL DIST. # 25*, 148 P.3d 1232 (2006).

There is a genuine issue of material fact as to whether the Defendant is a holder in due course of the note that is at issue in the Appellants' cause of action. That question lies at the heart of the Plaintiffs/Appellants' causes of action. If the Defendant were not properly in possession of the rights granted in the transaction between the parties, then they did not have the right to foreclose or otherwise enforce the provisions of the mortgage documents. The Esquivel Affidavit, along with the Chain of Title Analysis, the two of which are functionally inseparable, constitute a proffer of evidence in the form of testimony of an expert witness who has testified as such on numerous occasions (Joseph Esquivel, Jr.) that would likely be admissible at trial. As this Court has put it, "... to create a genuine issue, there must be evidence upon which a jury may rely." FRAGNELLA v. PETROVICH, 281 P.3d 103 (2012). That evidence is what Mr. Esquivel produced in the Chain of Title Analysis, and reflected in his Affidavit.

The District Court also entered a final judgment on November 22, 2017, and amended the judgment on February 12, 2018 (see R. 207, Appellant believes that the document is mis-dated as 2017 instead of 2018, as the file stamp reflects 2018) in this case without dealing with the remaining causes of action. Said judgment dismissed the Complaint. The Memorandum Decision is silent as to the causes of action for wrongful foreclosure and the request for a declaratory judgment. They were simply not adjudicated.

CONCLUSION

The District Court erred when it refused to consider the Chain of Title Analysis. That court applied a standard of hearsay to the Chain of Title Analysis that would also exclude all affidavits that the court did consider. Hence, the court applied an improper standard.

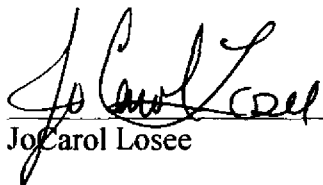
Furthermore, the Chain of Title Analysis contains the Esquivel Affidavit, and the Affidavit reference the Chain of Title Analysis. The two documents are clearly two parts of the same proffer of evidence, and the District Court used its “hearsay” analysis to exclude the Chain of Title Analysis, splitting them in two.

The District Court also erred in dismissing the Complaint in its entirety when said court had not adjudicated two of the causes of action.

For these and foregoing reasons, the Court must reverse the decision of the District Court, and remand this matter to said court for further proceedings.

RESPECTFULLY SUBMITTED,


Jerry L. Losee

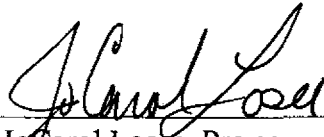

Jo Carol Losee

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY, that two true copies of this pleading have been sent by US
Mail to the following parties: WRIGHT FINLAY & ZAK., Ace C. Van Patten, 7785 W. Sahara
Ave., Las Vegas, NV 89117; on this 21 day of May, 2018.



Jerry Losee, Pro se
9253 Frandsen Road
Lava Hot Springs, Idaho 83246
Ph: (208) 251-6968
Email: jj68mobile@gmail.com



Jo Carol Losee, Pro se
9253 Frandsen Road
Lava Hot Springs, Idaho 83246
Ph: (208) 251-6968
Email: jj68mobile@gmail.com