6-22-2018

Losee v. Deutsche Bank National Trust Company Respondent's Brief Dckt. 45721

IN THE SUPREME COURT OF THE STATE OF IDAHO

JERRY LOSEE AND JOCAROL LOSSEE, Appellants, v. NEW CENTURY MORTGAGE CORPORATION, DEUTSCHE BANK NATIONAL TRUST COMPANY, et al., Respondents.	Docket No. 45721 Bannock County Docket No. 2015-2863

BRIEF OF RESPONDENT

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

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A. Nature of the case and summary of argument

This case presents for judicial review a decision by the district court granting summary judgment in favor of Respondent, Deutsche Bank National Trust Company ("Deutsche Bank") against claims asserted by the Appellants, Plaintiff borrowers Jerry and JoCarol Losee (the "Losees") arising out of the enforcement of a Deed of Trust. The instant appeal alleges that the District Court abused its discretion by excluding a "Chain of Title Analysis" – a report generated by an entity claiming to be an expert in the field of real estate records - as being hearsay, arguing that the affidavit executed by Joseph Esquivel, Jr. (the "Esquivel Affidavit") made the Esquivel Affidavit and the Chain of Title Analysis "functionally inseparable." The District Court, however, correctly excluded the same as the Chain of Title Analysis is hearsay for which no exception applied. Ultimately, the District Court granted summary judgment in favor of Deutsche Bank.

In this matter, the District Court did not abuse its discretion when it correctly determined that the Chain of Title Analysis was inadmissible hearsay for which no exception applied. This was a legally correct finding and did not amount to an abuse of its discretion as the District Court recognized the matter was discretionary, acted within that scope of discretion and consistently, and made a reasoned decision to allow the Esquivel Affidavit but find the Chain of Title Analysis report, itself, to be inadmissible. This was the correct decision, but even if an error had

been made, the Losees suffered no harm as the District Court had considered the statements made in the Esquivel Affidavit as part of its analysis. As such, the contentions made by Mr. Esquivel – for which the Chain of Title Analysis supports – were evaluated when the District Court confirmed that no material issue of disputed fact existed. The District Court, therefore, correctly ruled and its order granting summary judgment should not be disturbed.

B. Legal standard

A District Court's evidentiary rulings are reviewed by this Court under an abuse of discretion standard. See e.g., *Herman ex rel. Herman v. Herman*, 136 Idaho 781, 784, 41 P.3d 209, 212 (Idaho 2002); *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 50–51, 995 P.2d 816, 820–21 (Idaho 2000). "Trial courts have 'broad discretion in the admission of evidence at trial, and [their] decision to admit such evidence will be reversed only when there has been a clear abuse of that discretion.'" *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 743, 992 P.2d 175, 192 (Idaho 1999)(quoting *Empire Lumber Co. v. Thermal–Dynamic Towers, Inc.*, 132 Idaho 295, 304, 971 P.2d 1119, 1128 (Idaho 1998)). As such, a trial court will not be found to have abused its discretion if it "correctly perceived the issue as discretionary" "act[s] within the boundaries of its discretion and consistently with applicable legal standards" and exercises reason in making its decision. *Id.*; *see also State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (Idaho 1989). Absent a harm which does not affect a substantial right, the Court must disregard any error made by the trial court. Idaho Civil Procedure Rule ("I.R.C.P.") 61.

C. The District Court appropriately excluded the Chain of Title Analysis in granting summary judgment in favor of Deutsche Bank on the slander of title claim.

The sole issue presented by the Losees is whether the Chain of Title Analysis was correctly excluded as inadmissible hearsay. The Opening Brief argues that the District Court erroneously excluded the Chain of Title Analysis presented by Joseph R. Esquivel, Jr. along with a supporting affidavit executed by Mr. Esquivel. *See,* Opening Brief, p. 5. The District Court, however, correctly found that the Chain of Title Analysis "is not an affidavit and the statements are not sworn to. Therefore the statements in the [Chain of Title Analysis] are hearsay and inadmissible evidence which the Court may not consider." R. Vol. 1, p. 179. Despite this, the Losees argue that the District Court abused its discretion "by applying a standard of 'hearsay' which would exclude virtually all affidavits from consideration on summary judgment" an action which exceeded the District Court's boundaries of discretion and which was inconsistent with legal standards, and resulted in an action which was not the result of reason. *See,* Opening Brief, p. 7. The District Court, however, properly exercised its discretion in excluding the Chain of Title Analysis and its ruling should not be set aside.

1. The Chain of Title Analysis was hearsay.

Idaho Rule of Evidence (I.R.E.) 801 defines hearsay as 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. Evidence which is hearsay is generally inadmissible. I.R.E. 802. The Chain of Title Analysis here is an out of court statement made by Mr. Esquivel which the Losees are

using to prove their contention that Deutsche Bank could not enforce the Loan Documents. The Chain of Title Analysis, then, falls squarely within the definition of hearsay. The Losees suggest that by filing the Notice of Filing of Judicial Review, that the Chain of Title Analysis and Affidavit became one and the same. This however, conflates the expert opinion – if indeed Mr. Esquivel were determined to be an expert, an issue not before this Court – with the expert's basis for that opinion.

While an expert's opinion may be admissible under I.R.E. 702 and 703, the report itself is hearsay for which the Losees do not claim any exception exists. The Losees attempt to conflate the two, but both the courts and the rules of evidence themselves confirm the two are separate and must be separately admitted to be considered. While the expert's opinion may be based upon evidence which may be inadmissible, under I.R.E. 703, that does not allow the inadmissible evidence to be considered as substantive evidence for the allegations contained in the report. Indeed, as this Court has pointed out, I.R.E. 703 "serves to prevent an expert witness from serving as a conduit for the introduction of otherwise inadmissible evidence." *State v. Watkins*, 148 Idaho 418, 427, 224 P.3d 485, 494 (Idaho 2009). The Ninth Circuit Court of Appeals, in analyzing the corresponding Federal Rules of Evidence have recognized the same, concluding that an expert's written report is hearsay. *See e.g., Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984).

Here, even if Esquivel was considered to be an expert, his opinion could be – and was – considered; the report, however, must have a separate basis for admission in order to be considered. No such exception exists, and none has been claimed by the Losees. The Losees

simply argue that Esquivel Affidavit references the Chain of Title Analysis and so because the affidavit was sworn to, the Chain of Title Analysis should be considered on the same basis. *See,* Opening Brief, p. 5. Indeed, even though they were filed roughly a year an half apart, the Losees argue the Esquivel Affidavit and the Chain of Title Analysis "are clearly meant to be part of the same material." *Id.; see also* R. Vol. 1, p. 106 (Notice of Filing for Judicial Review filed April 11, 2017); R. Vol. 1, p. 24 (Esquivel Affidavit filed as Exhibit A to Plaintiff's Amended Complaint on September 14, 2015). By claiming that the Esquivel Affidavit supported the Chain of Title Analysis, and not the other way around, the Losees confirm the District Court's decision was correct. If the Esquivel Affidavit was not meant as an expert opinion, but was meant to be included as part of the Chain of Title Analysis, the entirety of the affidavit should also have been found to be inadmissible hearsay. Ultimately, under either scenario, the Chain of Title Analysis was hearsay, and while Mr. Esquivel could consider the same in forming his opinion, such an action would not serve as a conduit to allow the Chain of Title Analysis to be converted into admissible evidence. As a result, the District Court correctly ruled that the Chain of Title Analysis was not separately inadmissible, even if Mr. Esquivel's affidvait would be considered.

Finally, an expert report exceeds the scope of facts which could be judicially noticeable under I.R.E. 201. The Losees filed the "Notice of Filing for Judicial Review" in which it attached the Chain of Title Analysis in support of the Esquivel Affidavit. R. Vol. 1, p. 106. To the extent that this was a request that the District Court take judicial notice of the same, the District Court was correct in refusing the same. I.R.E. 201 provides that the court may only take judicial notice of facts which are "not subject to reasonable dispute" because that fact is generally known or

could be easily and accurately determined by using well established sources. The Chaint of Title Analysis does not fall within this narrow category of noticeable facts, and, to the extent the Losees's Notice is construed as the same, the District Court was correct in not admitting the same.

2. **The District Court did not abuse its discretion.**

A trial court will not be found to have abused its discretion if it "correctly perceived the issue as discretionary" "act[s] within the boundaries of its discretion and consistently with applicable legal standards" and exercises reason in making its decision. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (Idaho 1989). The District Court, here, did not abuse its discretion and its decision should not be disturbed.

The District Court correctly confirmed that the decision to exclude the Chain of Title Analysis was discretionary where it considered the Esquivel Affidavit but not the Chain of Title Analysis. It recognized, then, that the two may be considered independently. Indeed, the Court in noting that the Chain of Title Analysis was hearsay indicates that it "***may*** not consider" the evidence. R. Vol. 1, p. 179. (emphasis added). The District Court did not say that it "must not" or "shall not" consider the Chain of Title Analysis, confirming that the District Court recognized its decision was a matter of discretion.

The District Court also appropriately acted within its scope of discretion and consistently. As noted above, the District Court correctly determined that the Chain of Title Analysis was inadmissible hearsay, a matter which was squarely within its discretion to do so. *See e.g., Basic*

Am., Inc. v. Shatila, 133 Idaho at 743, 992 P.2d at 192. Moreover, the Losees do not point to any inconsistent application. Instead, they suggest that the other affidavits presented should have been excluded. *See,* Opening Brief, p. 7. This, however, ignores the fact that the District Court did consider the Esquivel Affidavit – it expressly referred to five allegations contained in the Esquivel Affidavit in its order. R. Vol. 1, p. 178-179. The District Court only found the Chain of Title Analysis – the report itself – inadmissible. *Id.* This is not an inconsistent application, then, as the affidavit was considered by the District Court.

Finally, the District Court exercised reason in determining to exclude the Chain of Title Analysis. The District Court specifically addressed the admissibility of the Chain of Title Analysis, noting that:

> Although the Notice states that it supports the "Affidavit of Joseph Esquivel, Jr., the Chain of Title Analysis," the Report is not an affidavit and the statements are not sworn to. Therefore, the statements in the Report are hearsay and inadmissible evidence which the Court may not consider.

The District Court, as a result, considered the admissibility of the document and found that because it was not an affidavit and was not sworn to, that it was not admissible – in essence it found that the Chain of Title Analysis was not appropriately included in the affidavit. Not only was this a correct determination, but the District Court correctly determined the admissibility of the Esquivel Affidavit separately from the Chain of Title Analysis, allowing the former even though the latter was inadmissible. As a result, the District Court properly and reasonably evaluated the same. Consequently, the District Court's actions do not constitute an abuse of its discretion, and its decision should not be disturbed.

3. **Even if the Court committed an error in not considering the Chain of Title Analysis, the error was harmless where the Esquivel Affidavit itself was considered.**

Significantly, as noted above, the District Court did consider the Esquivel Affidavit in making its decision; it only found the Chain of Title Analysis to be inadmissible, as it was not a sworn statement. *See,* R. Vol. 1, p. 178-179 (providing a list of five statements asserted in the Esquivel Affidavit). As a result, even if the District Court erred in excluding the Chain of Title Report the Losees did not suffer any harm to a substantial right. The Court considered the allegations contained in the Esquivel Affidavit and found that neither the Esquivel Affidavit, nor any other evidence provided by the Losees, created any genuine issue of a material dispute of fact. *See e.g.,* R. Vol. 1, p. 180 (finding that the Losees failed show title was clouded, that Deutsche had published a slanderous statement through the sale of the Loan or that any defect with the assignment would cause a harm to the Losees). Even after considering the Esquivel Affidavit, the District Court found that the Losees failed to present any evidence which created an issue of material fact. As such, the District Court considered the allegations made by Esquivel and correctly found that no material dispute existed. The Losees, then, did not suffer any harm as a result of the failure to consider the Chain of Title Analysis report, as the factual allegations contained in the Chain of Title Analysis were evaluated as part of the District Court's decision. Consequently, even if the District Court did error, the error was harmless and the Judgment must not be set aside.

CONCLUSION

Based on the foregoing, the District Court did not abuse its discretion in finding that the Chain of Title Analysis was inadmissible hearsay, and considering the Esquivel Affidavit separately. As a result, the District Court's decision should be affirmed, and the decision allowed to stand.

DATED this 21st day of June, 2018.

WRIGHT, FINLAY & ZAK, LLP

Ace C. Van Patten, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP and that I served on the ~~26th~~ 22nd day of June, 2018, the foregoing **BRIEF OF RESPONDENT** to all parties and counsel as identified below:

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