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CHARTER WEST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLANT, V. WELLS FARGO BANK, N.A., APPELLEE.

802 N.W.2d 146

Filed August 23, 2011. No. A-10-727.

1. **Equity: Trusts: Agents.** Equity will not allow a trust to fail for want of a trustee.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Donald J. Pavelka, Jr., and Michelle D. Epstein, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee.

IRWIN and CASSEL, Judges, and HANNON, Judge, Retired.

IRWIN, Judge.

I. INTRODUCTION

Charter West National Bank (Charter West) appeals an order of the district court for Douglas County, Nebraska, granting summary judgment in favor of Wells Fargo Bank, N.A. (Wells Fargo), in this action for declaratory judgment concerning the validity and priority of a deed of trust executed to the benefit of Wells Fargo. Charter West asserts that the deed of trust's designated trustee's lack of consent to being named as a trustee rendered the Wells Fargo deed of trust void and without priority until a later date when a substitute trustee was named. We find that the deed of trust should not be rendered void for lack of an accepting trustee and should not lose its priority status from the date it was created, and that the district court's grant of summary judgment in favor of Wells Fargo should be affirmed.

II. BACKGROUND

There is no dispute between the parties about the essential factual background of this case. The case concerns the validity and priority of deeds of trust issued by Kevin D. Hebner

and Amanda J. Hebner for the benefit of Wells Fargo and Charter West.

On November 5, 2004, Wells Fargo loaned $333,700 to the Hebners. The loan was secured by a deed of trust for certain real property. The Wells Fargo deed of trust listed John S. Katelman as the trustee and Wells Fargo as the beneficiary. On May 14, 2008, Wells Fargo caused a "Substitution of Trustee" to be filed, naming another individual as the successor trustee.

On May 3, 2007, Charter West loaned $181,775.09 to Kevin Hebner. The loan was secured by a deed of trust for the same real property as the Wells Fargo deed of trust. The Charter West deed of trust named Charter West as the trustee and also as the beneficiary.

On November 13, 2008, the Hebners filed for chapter 11 bankruptcy protection. Charter West was granted relief from the automatic stay of the bankruptcy court and, on June 8, 2009, exercised its right under the Charter West deed of trust to conduct a trustee's sale of the Hebners' real property. Thereafter, Charter West purchased the property for $180,247.01.

On July 9, 2009, Charter West filed a complaint for declaratory judgment. In the complaint, Charter West alleged that the Wells Fargo deed of trust was not valid. Charter West alleged that the Wells Fargo deed of trust was not valid when first executed in 2004, because Katelman was "not a qualified Trustee . . . because he never consented, authorized, permitted, or ratified his agreement or designation to act as the Trustee for the Wells Fargo Deed of Trust." Charter West also alleged that the Wells Fargo deed of trust was not valid when the substitute of trustee was executed in 2008, because it lacked an affidavit attesting that a copy had been mailed to Katelman. Charter West thus sought a declaration that the Wells Fargo deed of trust was null and void and that Charter West's title to the property pursuant to the 2009 trustee's sale should not be encumbered by the Wells Fargo deed of trust.

On April 23, 2010, Charter West moved for summary judgment. On April 27, Wells Fargo also moved for summary judgment. On May 13, the district court held a hearing on the

cross-motions for summary judgment and the parties offered various affidavits, depositions, and exhibits in support of their respective motions.

In a deposition, Katelman testified that he had first begun doing legal work for Wells Fargo's predecessor in 1991, primarily concerning construction lending. He testified that he served as trustee for deeds of trust executed to the benefit of Wells Fargo. He testified that except with respect to construction loans, he was usually advised that he had been named trustee on a deed of trust when Wells Fargo requested a deed of reconveyance. He testified that he did not have any recollection of having particular discussions with Wells Fargo with respect to acting as trustee for residential home mortgage deeds of trust. A Wells Fargo loan administration manager testified by deposition that Wells Fargo's computer system automatically selects a trustee and places his or her name in a blank on deeds of trust Wells Fargo executes to its benefit. She was not aware of how the available trustees' names were placed in Wells Fargo's computer system. Katelman testified that he "got th[e] impression" his name was automatically being included on deeds of trust, but that he recalled no specific communications with Wells Fargo about it. He testified that he knew nothing about the Wells Fargo deed of trust concerning the Hebners' real property. Katelman also testified that he generally had not minded being named as trustee on Wells Fargo's deeds of trust until it became an irritation and that if Wells Fargo had contacted him requesting legal action regarding the deed of trust concerning the Hebners' real property, he "d[id]n't know why [he] wouldn't" have accepted the referral.

In April 2005, Katelman contacted Wells Fargo and asked that Wells Fargo discontinue naming him as trustee for deeds of trust. In August 2006, he provided Wells Fargo with a form to use for requesting deeds of reconveyance on deeds of trust on which he had been named trustee.

On June 30, 2010, the district court entered an order granting summary judgment in favor of Wells Fargo. The district court noted that the primary argument present in the dispute was whether a trustee designated on a deed of trust must agree and consent to taking that position before the deed of trust

could be considered valid. The district court noted that the parties agreed that the question was not explicitly addressed in the Nebraska Trust Deeds Act (NTDA), see Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 2009 & Cum. Supp. 2010). The court concluded that the NTDA's silence concerning issues of formation and administration evidenced a legislative intent to defer to the Nebraska Uniform Trust Code, see Neb. Rev. Stat. § 30-3801 et seq. (Reissue 2008 & Cum. Supp. 2010). The court thus concluded that the Nebraska Uniform Trust Code and common law governed the fundamental operations of the trust.

The district court assumed that Katelman did not consent to being the trustee, through either words or actions, rather than resolving the issue of whether Katelman actually did agree to serve as the trustee. The court concluded that a designated trustee must consent to serve as a trustee, but that the failure of a designated trustee to accept the position did not invalidate the trust. The court held that equity would not allow a trust to fail for want of a trustee and that, instead, the trustee position lays fallow until filled. The court noted that the NTDA provides a specific mechanism for appointing a successor trustee to fill vacancies, that Wells Fargo successfully did so, and that the substitute of trustee was valid. The court thus held that the Wells Fargo deed of trust was valid, even assuming Katelman did not consent to act as the trustee, and that it maintained its priority lien position over the Charter West deed of trust.

Charter West brought this appeal. On March 14, 2011, Wells Fargo filed a suggestion of mootness and sought dismissal of Charter West's appeal. Wells Fargo alleged that Charter West had sold the real property listed in the deeds of trust to purchasers who are not parties to the appeal, that Charter West no longer has an interest in the property or the resolution of the appeal, and that the appeal was therefore rendered moot.

III. ASSIGNMENT OF ERROR

Charter West assigns as error that the district court erred in finding the Wells Fargo deed of trust valid and effective prior to the naming of the successor trustee.

IV. ANALYSIS

1. Validity of Wells Fargo Deed of Trust

Charter West asserts on appeal that the consent of the designated trustee to serve as a trustee is an essential element to the effective creation of a deed of trust. Charter West asserts that Katelman, the designated trustee in the Wells Fargo deed of trust, never consented to serve as trustee and that as a result, the Wells Fargo deed of trust was invalid at its creation. We decline to adopt Charter West's reasoning.

Section 76-1001 contains definitions of terms relevant to the NTDA. That section defines beneficiary, trustor, and trustee as those terms are used in the NTDA, but does not include any indication that the consent of a designated trustee is a prerequisite to the validity of a deed of trust. Similarly, § 76-1003 sets forth the qualifications necessary to serve as a trustee for a deed of trust, but also does not include any indication that the consent of a designated trustee is a prerequisite to the validity of a deed of trust. Indeed, Charter West does not direct the court to any provision in the NTDA which indicates that the consent of a designated trustee is a prerequisite to the validity of a deed of trust. The NTDA does not include any provision that specifies the necessary prerequisites for creation of a valid deed of trust.

Although we generally agree with Charter West's assertions that the NTDA includes provisions which impose significant responsibilities and duties upon trustees, we do not accept Charter West's assertion that these responsibilities somehow dictate that a designated trustee's consent is a prerequisite to validity. As the district court recognized, it is certainly possible that administration of the trust might be delayed or hampered by the designated trustee's failure to consent to act as trustee, but such should not preclude the effective creation of a trust or equitable matters such as priority of lien based on the trust's creation date.

[1] The district court pointed to the Restatement (Third) of Trusts § 31 (2003) as support for the notion that equity will not allow a trust to fail for want of a trustee. We note that the Nebraska Supreme Court has looked to the Restatement in

numerous prior cases, either to specifically adopt its provisions or to cite to it as additional authority in support of particular principles. See, *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010) (citing provisions of Restatement); *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009) (citing several sections of Restatement and recognizing that portions of Nebraska Uniform Trust Code are patterned after Restatement); *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009) (citing provisions of Restatement); *Chebatoris v. Moyer*, 276 Neb. 733, 757 N.W.2d 212 (2008) (citing provisions of Restatement); *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007) (adopting Restatement (Third), *supra*, § 50 (2003), and citing other provisions of Restatement).

We note that the Restatement (Third), *supra*, § 5 (2003), specifically indicates that deeds of trust and other security arrangements are not considered "trusts" for purposes of the provisions of the Restatement. The comments to § 5 indicate that the provisions of the Restatement are not generally applicable to deeds of trust, but also recognize that the law governing deeds of trust may borrow from this Restatement. We conclude that the provision of the Restatement (Third), *supra*, § 31, that equity will not allow a trust to fail for want of a trustee, is a provision that is appropriately borrowed in the context of deeds of trust.

Just as the Restatement (Third), *supra*, § 35 (2003), recognizes that a designated trustee in a standard trust relationship may accept or decline to serve as trustee, a designated trustee for a deed of trust is free to accept or decline to serve. The NTDA specifically includes provisions that provide for the appointment of a substitute trustee. See § 76-1004. It is axiomatic that if the NTDA specifically allows for the appointment of a substitute trustee, there will quite likely be situations where a designated trustee who has consented to serve as trustee withdraws from such service, is unable to render service, or is removed from service, and a substitute trustee must be appointed. In such situations, Charter West's logic would seem to suggest that any gap in the time period between the withdrawal of the designated trustee and the appointment and consent to serve of the substitute trustee would result in the

deed of trust no longer being valid and the appointment of a substitute trustee effectively resulting in the creation of an entirely new deed of trust, without any priority status enjoyed by the initial deed of trust. Charter West has cited us to no authority that would support such a conclusion, and we conclude that equity would not allow such a result.

A similar issue was addressed and resolved by the Arizona Supreme Court in *In re Bisbee*, 157 Ariz. 31, 754 P.2d 1135 (1988), a case in which a man executed and recorded a deed of trust naming a beneficiary but failing to designate any trustee. The man later filed for bankruptcy protection and sought to invalidate the security interest of the named beneficiary by arguing that the failure of the deed of trust to include a designated trustee rendered it and the security interest created by it invalid. The court held that the determinative issue in the case was whether the failure to designate a trustee precluded the named beneficiary's successor in interest from enforcing the deed of trust against later claimholders.

In *In re Bisbee, supra*, the court noted that Arizona statutes specifically provide that if a deed of trust designates a trustee who fails to qualify or is unwilling or unable to serve, the deed of trust is not invalidated. The court noted that the only effect of the absence of a valid trustee is that no action required to be taken by a trustee may be taken until a successor trustee is appointed. The court concluded that there was no logical distinction between a failure to designate a trustee and a failure to designate a legally qualified trustee, and the court perceived no policy reason to treat the two situations differently. In addition to the specific statutory guidance, however, the court also referenced traditional trust law as being helpful, while not directly controlling, and noted that under prevailing traditional trust law, a valid trust is created notwithstanding the failure to designate a trustee. Finally, the court also noted that the deed of trust, despite its failure to designate a trustee, was properly recorded and indexed and provided notice to subsequent claimholders of the lien created by the deed of trust.

As the Arizona Supreme Court did in *In re Bisbee, supra*, we conclude that in the instant case, the deed of trust was valid and created a priority interest despite the designated

trustee's failure to consent to serve, and that such is consistent with prevailing law. Charter West has provided no authority which would indicate that the consent of a designated trustee is a prerequisite to the validity of a deed of trust. Although the trustee's consent is certainly necessary to allow the trustee to act, we agree with the district court that the deed of trust remains valid despite the designated trustee's failure to consent to act as trustee. If the designated trustee does not consent to act as trustee, a substitute trustee may be appointed, as provided in the NTDA. In the present case, a substitute trustee was effectively appointed, and we conclude that the district court correctly found that the Wells Fargo deed of trust, created in 2004, has priority over the Charter West deed of trust, created in 2007. We affirm the district court's grant of summary judgment in favor of Wells Fargo.

2. Mootness

We find no merit to Wells Fargo's assertion that this appeal should be dismissed for mootness. Although Charter West acknowledges that it has, in fact, sold its interest in the real property listed in the deeds of trust at issue in this case, we conclude that the appeal was not rendered moot as a result. The determination of the validity of Wells Fargo's deed of trust and its priority status remains an important legal right that could impact the interest Charter West transferred. Additionally, inasmuch as Charter West's successors were not capable of participating at trial, a finding that the appeal is moot would seem to render the district court's summary judgment a final order which could not later be challenged by Charter West's successors, causing the issue to evade review. As such, we overrule Wells Fargo's suggestion of mootness.

V. CONCLUSION

We find that Wells Fargo's deed of trust was valid, even assuming Katelman did not consent to serve as trustee as designated. The deed of trust will not fail for want of a trustee. We reject Charter West's challenge to the validity of the deed of trust, and we affirm the district court's summary judgment.

Affirmed.