

APPELLATE BRIEFS

By: Paul Georgeson, McDonald Carano Wilson

HOA SUPERPOWERS: EPISODE 34

In this week's episode of HOA Superpowers, our hero, Superpriority Lien Man, takes on his twin nemeses, the Due Process Clause and the Takings Clause. In the end, the Due Process Clause and the Takings Clause are simply not strong enough to overcome Superpriority Lien Man's superpowers.

Previously on HOA Superpowers: You will recall from previous episodes that the Nevada Legislature created Superpriority Lien Man in NRS 116.3116 - .31168 by endowing him with the powers of a superpriority lien to be used by Homeowners' Associations for certain unpaid HOA assessments. Superpriority Lien Man's chief superpower is the ability to foreclose upon properties subject to HOA liens and wipe out all other deeds and encumbrances on those properties. In Episode 16 (the famous "*SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014)" episode), Superpriority Lien Man survived a vicious attack by a jilted mortgage holder. In that episode, the Nevada Supreme Court held that: (1) Superpriority Lien Man's superpriority liens do, in fact, extinguish other deeds of trust (even first deeds), and; (2) Superpriority Lien Man can use nonjudicial foreclosure proceedings to foreclose on his superpriority liens. In this week's episode, Superpriority Lien Man faces a renewed onslaught, this time through the Nevada and United States Constitutions' Due Process and Takings Clauses.

This Episode: In this episode (known as *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev. Adv. Op. 5, --- P.3d --- (Jan. 20, 2017)), Wells Fargo, a lender whose deed was wiped out by an HOA superpriority lien foreclosure, sought redress for its injuries in the Nevada courts. Here, the Senholtzes (who do

not actually appear in the episode) borrowed \$81,370.00 from Wells Fargo to finance the purchase of their home in a Summerlin neighborhood governed by certain CC&R's. Unfortunately, the Senholtzes defaulted on both their HOA assessments and their Wells Fargo mortgage. In response, both the HOA and Wells Fargo recorded notices of default and elections to sell.

Pursuant to the applicable statutes and the Court's ruling in SFR (Episode 16), the HOA then conducted a nonjudicial foreclosure sale. Saticoy Bay bought the property at the sale for \$6,900.00. Saticoy Bay then filed a Complaint seeking to enjoin Wells Fargo from foreclosing on the property and a declaration that, as a result of the HOA superpriority lien foreclosure, it owned the property free and clear.

Wells Fargo filed a motion to dismiss Saticoy Bay's Complaint. Wells Fargo argued that the superpriority lien foreclosure statutes violate the Due Process and Takings Clauses of the United States and Nevada Constitutions. Wells Fargo also argued that the Supreme Court erred in the SFR decision and that Saticoy Bay's purchase of the property for a mere \$6,900.00 was commercially unreasonable. The district court granted Wells Fargo's Motion to Dismiss, finding that the superpriority lien statutes violated Wells Fargo's Due Process rights. The district court did not address Wells Fargo's other arguments. Saticoy Bay appealed to the Nevada Supreme Court. The case was heard by the full Court, absent Justice Pickering (who recused herself) and Justice Stiglich (who did not participate in the decision).

On appeal, Saticoy Bay argued that the superpriority foreclosure statutes do not violate other security holders' Due Process rights and do not constitute an unconstitutional Taking. In the appeal,

the Court decided to address Wells Fargo's Takings Clause arguments even though the district court did not rule on that issue.

With respect to the Due Process Clauses, Wells Fargo argued that the foreclosure proceedings violated its Due Process rights because they do not require the HOA to give actual notice of foreclosure to the other security holders, even though the foreclosure could extinguish their security interests. In response, Saticoy Bay argued that there could be no Constitutional Due Process claim because the nonjudicial foreclosure proceedings are not conducted by a state actor (which is a requirement of a Due Process violation). Saticoy Bay also argued that even though there are no specific notice requirements in the superpriority statutes, those statutes incorporate the notice requirements found in NRS 107.090.

In reviewing the Due Process claims, the Court utilized the U.S. Supreme Court's two-part test for determining whether a deprivation of property is the result of state action. First, the deprivation must be caused by "the exercise of some right or privilege created by the state." Second, the party charged with the deprivation must be someone "who may fairly be said to be a state actor." In evaluating the parties' arguments, the Court recognized that the HOA superpriority rights were created by the Nevada Legislature, which is clearly a state actor. Therefore, the Court found that the first prong of the Due Process test was satisfied, because the HOA, in foreclosing on the lien, exercised a right created by the state.

The Court then turned to the second element; whether the HOA, when it foreclosed on the lien, "may fairly be said to be a state actor." In

evaluating that issue, the Court noted that several other states have found that nonjudicial foreclosures do not constitute a “significant state action” so as to implicate Due Process. The Court ultimately agreed with that analysis, finding that an HOA, in conducting a nonjudicial foreclosure, is not fairly considered to be a state actor. Therefore, the Court held that the HOA superpriority liens, and nonjudicial foreclosures held thereunder, do not violate the Due Process Clauses of the Nevada or U.S. Constitutions.

The Court next turned to the Takings Clause arguments. The Takings Clauses of the Nevada and U.S. Constitutions prohibit the state from taking private property for public use without just compensation. That Taking may occur through direct government appropriation. However, it can also result from the enactment of a law that is so onerous that its effect is tantamount to a direct appropriation or ouster. Wells Fargo argued that the superpriority lien statutes effectuate an unconstitutional Taking because, in passing those statutes, the state authorized the HOA to destroy its property interest.

The Court noted, first, that the state did not directly appropriate Wells Fargo’s lien or the property at issue. Therefore,

it focused its discussion on the second prong: whether the enactment of the superpriority lien statutes resulted in a situation that was tantamount to a direct appropriation. In reviewing that issue, the Court ultimately concluded that the state’s creation of the superpriority lien statutes is not tantamount to government appropriation of Wells Fargo’s lien rights or property. Therefore, the Court rejected Wells Fargo’s Taking Clause arguments.

In the end, despite another sophisticated and brutal attack armed with not one, but two Constitutions, our superhero, HOA Superpriority Lien Man, survives to fight another day. Please tune in for our next episode, where we see if Superpriority Lien Man’s powers are strong enough to avoid a fine for leaving his garage door open too long.

Paul Georgeson is a partner at McDonald Carano Wilson and practices primarily in the areas of commercial litigation, construction law, and appellate law. He is a member of the firm’s Appellate Practice Group and regularly handles appeals and writ proceedings in state and federal courts.



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