

ORS 86.737
ORS 86.745
ORS 86.770
Non-judicial foreclosure
Trust deed
Notice of trustee's sale

Names et al. v. Freeman et al., Adversary No. 10-6244
Carl Ann Names, Case No. 10-65697

5/13/2011 elp

Plaintiffs purchased debtor's residence at a trustee's sale, after debtor had defaulted on a validly executed and recorded trust deed. After the trustee's deed had been delivered and recorded, debtor complained that she had not received the notice that ORS 86.745(9) requires to be given to residential tenants in advance of a trustee's sale. Despite the fact that there was no tenant occupying the property, debtor argued that the notice of sale was void for non-compliance with ORS 86.745(9), and therefore the sale was ineffective.

Plaintiffs sued seeking a declaration quieting title, or in the alternative, damages from the beneficiaries of the trust deed. Debtor asserted a counterclaim to quiet title in her.

The bankruptcy court found that, even assuming that notice to tenants is required under ORS 86.745(9) regardless of whether there is a tenant, debtor had suffered no infringement of her rights under Oregon's non-judicial foreclosure statutes.

Below is an Opinion of the Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26


ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	
CAROL ANN NAMES,)	Bankruptcy Case No.
)	10-65697-elp13
Debtor.)	
_____)	
NATHAN FREEMAN, OLEN NATIONS and)	Adversary No. 10-6244
MARY NATIONS,)	
Plaintiffs,)	
v.)	MEMORANDUM OPINION
CAROL ANN NAMES and GERALD NORMAN)	
AND JANET NORMAN, as Trustees of)	
the Norman Trust,)	
Defendants.)	

This is a dispute arising out of a non-judicial foreclosure sale to plaintiffs Nathan Freeman, Olen Nations, and Mary Nations ("plaintiffs") of debtor Carol Names's ("debtor") home. Defendants Gerald and Janet Norman ("the Normans") held a trust deed on debtor's property. When debtor defaulted on the payments, the Normans foreclosed non-judicially,

1 selling the property to plaintiffs. Debtor claims that the sale is void
2 because the notice of sale, which was timely given to her, omitted a
3 notice to residential tenants that she argues was required under ORS
4 86.745(9). Plaintiffs and the Normans move for summary judgment, arguing
5 that the sale was properly conducted and foreclosed any right debtor had
6 in the property.

7 FACTS

8 The facts are not in dispute. In 2009, debtor executed a note that
9 was secured by a trust deed in favor of the Normans. Debtor defaulted on
10 her payments to the Normans, and they commenced non-judicial foreclosure
11 proceedings. The successor trustee filed a notice of default, which was
12 recorded in Josephine County. On March 4, 2010, he mailed to debtor a
13 Trustee's Notice of Sale, advising debtor that the property was to be
14 sold on July 29, 2010. The notice was personally served on debtor on
15 March 5. The trustee recorded the notice of sale on March 11, 2010. The
16 notice was also published in the local newspaper. The notice of sale
17 contained all of the information required by ORS 86.745 to be included in
18 a notice of sale that related to debtor, including the fact of the
19 default; the date, time, and place of the foreclosure sale; and her right
20 to cure. The notice did not include the language provided for in ORS
21 86.745(9), which is a notice to residential tenants. There was no
22 residential tenant living in the property at the time of the notice.

23 On July 19, 2010, the trustee received a telephone call from counsel
24 for debtor, who asked for a payoff amount to cure the default. The
25 trustee sent debtor's counsel payoff information, and agreed to postpone
26 the foreclosure sale until August 31, 2010, to allow debtor time to

1 refinance. Debtor's counsel sent a confirming email indicating that
2 debtor was attempting to obtain financing to pay off the loan. On August
3 18, 2010, the trustee inquired of debtor's counsel whether debtor was
4 going to cure the default or do anything else. When the trustee did not
5 hear back from debtor's counsel, he conducted the sale on August 31,
6 2010. Plaintiffs were the successful bidders at the sale. The trustee
7 recorded his Affidavit of Compliance on August 3, 2010, and the Trustee's
8 Deed was recorded with the county on September 1, 2010.

9 Debtor filed her chapter 13 petition on September 21, 2010. She
10 claims that the sale was invalid, and therefore she still holds an
11 interest in the property. Although she does not dispute that she was in
12 default on the loan and was served with the notice of sale, she argues
13 that the sale was void because the notice failed to comply with Oregon
14 law by omitting the notice of sale to residential tenants, and therefore
15 the trustee lacked authority to sell the property.

16 Plaintiffs filed this complaint seeking a declaration that they are
17 the owners of the property free and clear of any claim by debtor. In the
18 alternative, if the court determines that debtor still has an interest in
19 the property, they seek damages from the Normans, consisting of the
20 equity they would have had but for debtor's claim. Debtor filed a
21 counterclaim to quiet title in her.

22 Both plaintiffs and the Normans have filed motions for summary
23 judgment. Both motions seek a determination that the sale was valid and
24 that plaintiffs are the owners of the property, free of any interest of
25
26

1 debtor.¹ Debtor opposes both motions based on her view that the
2 undisputed facts show that the sale was void.

3 DISCUSSION

4 The court shall grant summary judgment if there are no genuine
5 disputes as to any material facts and the moving party is entitled to
6 judgment as a matter of law. Fed. R. Bankr. P. 7056; Fed. R. Civ. P.
7 56(a). Because in this case there is no dispute about any of the
8 material facts, the only question is whether plaintiffs and the Normans
9 are entitled to judgment as a matter of law.

10 1. Oregon non-judicial foreclosure provisions

11 Under Oregon law, the trustee of a deed of trust can foreclose by
12 advertisement and sale if, among other things, the trust deed has been
13 recorded, there has been a default by the grantor, and no other action
14 has been instituted to recover the debt. ORS 86.735. Before the trustee
15 can sell the property, the trustee must follow certain procedures set out
16 in Oregon's Trust Deed Act, ORS 86.705 to 86.795. The trustee must, for
17 example, file with the county clerk's office a notice of default that
18 contains the information required by ORS 86.745 and the trustee's
19 election to sell the property to satisfy the obligation. ORS 86.735(3).
20 At least 120 days before the date of the trustee's sale, a notice of sale
21 must be served on the grantor and on any occupant of the property. ORS

22
23 ¹ In the alternative, plaintiffs seek a determination that they
24 are the lawful owners of the property because they are bona fide
25 purchasers who took title to the property after paying good faith
26 consideration, without actual or constructive notice of any adverse
claims by debtor, and relying on the recitals in the trustee's deed.
Because I conclude that the sale was valid, I need not address the
alternative bona fide purchaser argument.

1 86.740(1)(a); ORS 86.750. If the property being foreclosed is
2 residential property, the sender of the notice of sale must also serve on
3 the grantor and, if the sender knows that the grantor is not occupying
4 the real property, on the occupant of the property a notice advising the
5 grantor and occupant that they are in danger of losing their property if
6 action is not taken immediately. ORS 86.737.

7 The notice of sale "shall" provide certain specific information,
8 including, among other things, the names of the grantor, trustee, and
9 beneficiary in the trust deed; a description of the property; the default
10 for which foreclosure is being made; the sum owing on the obligation;
11 that the property will be sold; and the date, time, and place of sale.
12 ORS 86.745(1) - (8). The notice "shall" also include, if the property
13 contains one or more dwelling units, "a notice addressed clearly to any
14 person who occupies the property and who is or might be a residential
15 tenant." ORS 86.745(9).² The notice provided for in ORS 86.745(9) must
16 contain certain information, including contact information about how to
17 obtain legal counsel, information about the right to notice under ORS

18
19
20 ² This provision was amended during the 2010 special session of
21 the legislature. The phrase "If the property includes one or more
22 dwelling units, as defined in ORS 90.100," was added to the beginning of
23 ORS 86.745(9), and the word "residential" added before the word "tenant."
24 Or. Laws 2010, c. 28 (1st Sp. Sess.) § 1. This change applies to notices
25 given on or after the effective date of the Act, which was March 4, 2010.
26 Id. at § 6(1). Therefore, the changes apply to this notice, which was
given on March 4.

The same bill also changed the requirements for the contents of the
notice. Or. Laws 2010 (1st Sp. Sess.) c. 28 § 2. That change, however,
was not operative until June 30, 2010, after this notice of sale was
given. Id. at § 7(1).

1 86.755(5)(c),³ and the fact that the person may have additional rights
2 under federal law. ORS 86.745(9)(a), (b). This information must "[b]e
3 set apart from other text in the notice of sale[,]" and must "[b]e in
4 substantially" the form set out in the statute. ORS 86.745(9)(c), (d).

5 If the trustee sells the property covered by a trust deed, "the
6 trustee's sale forecloses and terminates the interest in the property
7 that belongs to a person that received notice of the sale under ORS
8 86.740 and 86.750" ORS 86.770(1). "A failure to give notice to
9 a person entitled to notice does not affect the validity of the sale as
10 to persons who were notified." Id.

11 There is no dispute that the deed of trust at issue in this case was
12 recorded; that debtor, the grantor of the trust deed, was in default of
13 her obligations under the trust deed; and that no other action had been
14 commenced to collect the debt. Further, there is no dispute that the
15 notice of default containing the trustee's election to sell was recorded.

16 There is also no dispute that debtor was served with a notice of
17 sale within the time provided by statute. The notice of sale that was
18 served on debtor did not, however, include the notice to residential
19 tenants required by ORS 86.745(9).

20 2. Debtor's argument

21 Debtor argues that the sale was void because of one defect in the
22 form of the notice: the notice of sale she received did not contain the
23 information set out in ORS 86.745(9), regarding the rights of residential
24 tenants when the property they occupy is in foreclosure. Because the

25
26 ³ ORS 87.755(5)(c) deals with how the purchaser at a trustee's
sale can obtain possession of the property from a residential tenant.

1 statute requires that information to be included in the notice of sale
2 and it was not, debtor argues, she never got the notice to which she was
3 entitled under the statute, and therefore the trustee lacked authority to
4 sell the property and the sale was void.

5 It is not clear whether ORS 86.745 requires the notice to
6 residential tenants be included in every notice of sale, regardless of
7 whether there is an occupant of the property who is or might be a
8 residential tenant. For purposes of this opinion, I will assume without
9 deciding that the notice of sale was defective because it omitted the
10 notice required by ORS 86.745(9), even though there was no occupant of
11 the property who was or might have been a residential tenant.⁴

12 A. Authority to sell the property

13 Debtor argues that the defect in the form of the notice deprived the
14 trustee of the authority to sell the property. She cites Staffordshire
15 Investments, Inc. v. Cal-Western Reconveyance Corp., 209 Or. App. 528
16 (2006), for the proposition that the trustee's failure to comply with the
17 requirements of the non-judicial foreclosure statutes deprives the
18 trustee of the authority to sell the property and voids any sale. In
19 Staffordshire Investments, the court held that a default in payment is a
20 precondition to the exercise of the trustee's authority to sell the
21 _____

22 ⁴ The Affidavit of Service of Trustee's Notice of Sale in this
23 case shows that the Notice of Sale was served on debtor as well as on a
24 person named Mike Hardin, who is referred to in the Affidavit as "(co-
25 tenant)" [sic]. At the hearing on these motions for summary judgment, I
26 asked the parties whether Mr. Hardin was a tenant at the time the notice
of sale was served. Counsel for debtor responded that he was not arguing
that there was a tenant or renter in the property at the time the notice
was given. Therefore, I conclude that the fact is undisputed that there
was no tenant in the property when the notice of sale was given.

1 property in a non-judicial foreclosure sale. The requirement that there
2 be a default "goes to the substance of the challenged agreement." Id. at
3 543. In that case, there was no default, and so no statutory authority
4 to sell. At least when challenged before the trustee's deed was
5 recorded, the court said, the sale was void. Id.

6 ORS 86.735 grants authority to a trustee to foreclose a trust deed
7 by advertisement and sale. The statute sets out four preconditions for
8 that authority: the trust deed is recorded in the mortgage records of the
9 county, there is a default by the grantor, the trustee has filed a notice
10 of default and election to sell in the county clerk's office, and no
11 action has been instituted to recover the debt secured by the trust deed.
12 ORS 86.735(1)-(4). Default is a precondition for the authority to sell
13 and thus for a valid sale. Without a default, there is no authority to
14 sell.

15 This case is different. Here, all of the preconditions for the
16 trustee's authority to sell were met. The only defect was in the form of
17 the notice of sale. Therefore, the trustee had the authority to sell.

18 B. Effect of defect in form of notice of sale

19 The question then is whether the defect in the form of the notice of
20 sale, where debtor got timely notice of all of the information pertinent
21 to her and did not raise the alleged defect until the sale was completed
22 and the trustee's deed was recorded, is fatal to the validity of the
23 sale. I conclude that, under the facts of this case, debtor's objection
24 to the form of the notice comes too late.

25 Debtor does not dispute that the notice of sale she received was
26 timely, contained all of the information required by ORS 86.745 that was

1 pertinent to her, and provided her the information that she needed to
2 protect her rights: the names of the parties; the description of the
3 property; the default; the sum owing on the obligation; that the property
4 would be sold to satisfy the obligation; the date, time, and place of
5 sale; and the right to cure the default. Debtor does not contend that
6 there was a residential tenant living in the property at the time the
7 notice was given.

8 Debtor retained counsel, who failed to raise any objection based on
9 any defect in the form of the notice when he contacted the trustee to
10 request a postponement of the sale to allow debtor time to obtain
11 financing to pay off the debt. The trustee allowed the postponement,
12 debtor did not refinance, and she remained silent while the sale
13 proceeded and the trustee's deed was recorded.

14 Debtor had timely notice of everything pertinent to her and her
15 ability to protect her rights in the property. There was no residential
16 tenant in the property to whom the notice required by ORS 86.745(9) would
17 relate. The defect in the form of the notice had no impact on debtor's
18 substantive rights. Her failure to bring the defect in the form of the
19 notice, which related to information that was not relevant to protection
20 of her interest, to the attention of the trustee before he conducted the
21 sale and recorded the trustee's deed precludes her from now arguing that
22 the defect in the form of the notice makes the sale void.⁵

24 ⁵ At its core, debtor's argument is that receiving a defective
25 notice, no matter what the defect is, is akin to receiving no notice at
26 Option One Mortg. Corp. v. Wall, 159 Or. App. 354 (1999). In that case,
(continued...)

1 Unlike in Staffordshire Investments, in this case the foreclosure
2 sale has been completed and the trustee's deed recorded. The Oregon
3 legislature expressly provided in ORS 86.770(1) that failure to give
4 required notice to one person does not affect the validity of the sale
5 "as to persons that were notified." Despite debtor's argument to the
6 contrary, she did receive notice, albeit a notice that was defective in a
7 way that did not relate in any way to her substantive rights.

8 Because I conclude that debtor is precluded from claiming that the
9 sale was void due to the defect in the form of the notice of sale,
10

11 ⁵(...continued)

12 the issue was whether service of the notice of sale was properly made
13 pursuant to ORS 86.750(1), which requires service by specific methods.
14 The court noted that the methods set out in the statute do not include
15 the reasonable notice standard set out in Oregon Rule of Civil Procedure
16 7D(1). Because the notice of sale had not been served by a method
17 required by the statute, the court held that the purchasers were not
18 entitled to possession of the property after the sale.

19 Option One Mortg. Corp. was a forcible entry and detainer action
20 brought by the purchaser at a non-judicial foreclosure sale against the
21 grantor of the trust deed who resided in the property. Although the
22 court said that the notice of the sale was inadequate and the purchasers
23 were not entitled to possession, it also noted that, although the FED
24 court had considered title issues in determining whether the purchaser
25 was entitled to possession, the FED court's "judgment may not determine
26 how those issues affect title." Id. at 358.

This case is distinguishable from Option One Mortg. Corp. The
grantor in that case did not get the full 120-day notice to which she was
entitled, which could have affected her ability to protect her rights. I
read Option One Mortg. Corp. to stand for the proposition that, even
after the sale, a grantor may challenge the validity of a non-judicial
foreclosure if the defect in the process relates to the grantor's rights.
Here, debtor timely received the required notice of everything relating
to the sale that affected her ability to protect her rights. The defect
in process in this case relates to the rights of a non-existent third-
party residential tenant, not debtor.

1 plaintiffs are entitled to summary judgment on their first claim for
2 relief declaring that they are the owners of the property free and clear
3 of any claims of debtor. I understand the Normans to essentially join in
4 plaintiffs' motion, seeking a determination that plaintiffs are the
5 rightful owners of the property.

6 CONCLUSION

7 The non-judicial foreclosure sale was valid and foreclosed any
8 rights debtor had in the real property. Plaintiffs and the Normans are
9 entitled to summary judgment on the claim for a declaration that
10 plaintiffs are the owners of the property free and clear of any claim by
11 debtor. Mr. Radmacher should submit an order granting the motions for
12 summary judgment, as well as a judgment quieting title in plaintiffs and
13 dismissing defendant-debtor's counterclaim.

14 ###

15 cc: Jonathan M. Radmacher
16 Erik J. Glatte
Keith D. Karnes