

No.

IN THE
Supreme Court of the United States

GUILLERMO LUNA; LOURDES DIANA LUNA, PETITIONERS

v.

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE, FOR
LSF9 MASTER PARTICIPATION TRUST

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Petitioners Guillermo Luna and Lourdes Diana Luna request this Petition for Writ of Certiorari be granted on the grounds that Petitioners did not receive notice of the foreclosure sale of their property pursuant to a nonjudicial foreclosure under the power of sale in the Deed of Trust that comported with Due Process under the Fourteenth Amendment of the Constitution of the United States as declared by this Supreme Court. Accordingly, Petitioners present the following questions:

WHETHER THE NOTICE OF THE FORECLOSURE
SALE OF THE PROPERTY OF THE PETITIONERS
UNDER THE POWER OF SALE IN THE DEED OF
TRUST IS SUBJECT TO NOTICE REQUIRED BY
DUE PROCESS UNDER THE FOURTEENTH
AMENDMENT OF THE UNITED STATES
CONSTITUTION AND AS DECLARED BY THE
SUPREME COURT

WHETHER THE NOTICE OF THE FORECLOSURE
SALE OF THE PROPERTY OF THE PETITIONERS
SENT TO THE PETITIONERS COMPORTED WITH
DUE PROCESS UNDER THE FOURTEENTH
AMENDMENT OF THE UNITED STATES
CONSTITUTION AS DECLARED BY THE SUPREME
COURT.

PARTIES TO THE PROCEEDING

No other parties than listed in the caption

STATEMENT OF RELATED CASES

None

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OPINIONS BELOW

This case is presented to this Honorable Court from an appeal from a decision of the United States Eight Circuit Court of Appeals, which decision is dated September 17, 2020. 1a

The Petitioners had filed an original appeal from a decision of the United States District Court for the Western District of Missouri-Kansas City, dated July 10, 2019, granting summary judgment to respondent on petitioners' complaint to set aside the foreclosure sale, 10a and a decision, dated September 24, 2019, denying petitioners motion for reconsideration. 4a

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S. C. § 1254. The Eight Circuit Court of Appeals' decision affirming the decision of the District Court was filed on September 17, 2020.

RELEVANT PROVISIONS INVOLVED**a) Fourteenth Amendment, United States Constitution**

The Due Process Clause of the Fourteenth Amendment provides that no State "shall....deprive any person of life, liberty, or property, without due process of law...."

b) Mo. Rev. Stat § 443.325.3

3. In the event of foreclosure under a power of sale, the foreclosing mortgagee or trustee shall,

not less than twenty days prior to the scheduled date of the sale, cause to be deposited in the United States mail an envelope certified or registered, and with postage prepaid, enclosing a notice containing the information required in the published notice of sale referred to in section [443.320](#), addressed

(1) To each person whose name and address is set forth in any such request recorded at least forty days prior to the scheduled date of sale; and

(2) To the person shown by the records in the office of the recorder of deeds to be the owner of the property as of forty days prior to the scheduled date of foreclosure sale at the foreclosing mortgagee's last known address for said record owner; and

(3) To the mortgagor or grantor named in the deed of trust or mortgage at the foreclosing mortgagee's last known address for said mortgagor or grantor.

(4) Actual receipt by the addressee of the envelope referred to above shall not be necessary to establish compliance with the notice requirements of subsection 3 hereof. Recording of receipt issued by the United States Post Office for certified or registered mail to evidence that said envelope has been delivered by the sender to the United States Post Office shall constitute proof of compliance with notice requirements of subsection 3 hereof.

STATEMENT

On May 7, 2007, the petitioners (Lunas) obtained a loan in the amount of \$89,500 from Bank of America to purchase the property located at 8810 Hiawatha Rd., Kansas City, Missouri 64114, and executed a note in the amount of \$89,500 payable to Bank of America. To secure the indebtedness under the note, the Lunas executed a deed of trust on the property to Bank of America.

The deed of trust on the property was subsequently assigned to respondent (US Bank) on October 5, 2015. The Lunas defaulted on the loan, and the Successor Trustee pursuant to the power of sale in the deed of trust held a sale of the property on October 5, 2017, sold and conveyed the property to US Bank pursuant to the Successor Trustee's Deed. The Successor Trustee provided notice of the sale to the Lunas, as owners of record of the property, pursuant to Mo. Rev. Stat § 443.325.3 by sending the notice of sale as stated in the published notice within 20 days prior to the sale by certified mail. Though the notice of sale was sent to the Lunas, the notice was not received by the Lunas or claimed by the Lunas at the post office. The notice was returned to the sender unclaimed.

The Lunas filed an equitable action against US Bank in the Circuit Court of Jackson County, Missouri to set aside the foreclosure sale of their property to US Bank on the grounds in part that the Lunas did not receive the notice of the sale. The action was subsequently removed to federal court on the grounds of diversity of citizenship in the current action before this Court.

US Bank filed a motion for summary judgment on the Lunas' claim arguing that under Missouri law notice to the Lunas of the foreclosure sale of their property was satisfied by mailing the notice of the foreclosure sale certified to the Lunas at their last known address of record, irrespective of whether the Lunas actually received the notice. The trustee mailed certified the notice of the foreclosure sale to the Lunas at their last known address and therefore the foreclosure sale of the property to US Bank was valid, notwithstanding that the Lunas never received the notice.

The Lunas in response to US Bank's motion for summary judgment argued that a notice of foreclosure sale of one's property sent to the property owners, but not received by the owners, does not comport with due process under the Fourteenth Amendment as declared by the U.S Supreme Court. And for that reason, the notice of the foreclosure sale to the Lunas was invalid and the subsequent sale to US Bank pursuant to that notice was invalid.

The District Court granted US Bank' motion for summary judgment ruling that private parties, such as US Bank, as opposed to governmental parties, are not subject to the requirements of due process with respect to a foreclosure action to repossess another's property. The Lunas filed a motion for reconsideration arguing that the District Court's ruling was contrary to a number of U.S. Supreme Court cases which held that private creditors acting under the authority of state statutes were subject to the requirements of due process with respect to the taking of the debtors' property. The District Court denied the Lunas' motion for reconsideration. It was the District Court's order granting U.S. Bank's motion for summary judgment

and denying the Lunas motion for reconsideration from which the Lunas appealed to Appellate Court.

The Appellate Court affirmed the judgment of the District Court in its decision included herein. 1a

REASONS FOR GRANTING THE PETITION

I. NOTICE OF THE FORECLOSURE
SALE OF PETITIONERS PROPERTY
PURSUANT TO THE POWER OF
SALE IN THE DEED OF TRUST
INVOLVED ACTION BY THE STATE
OF MISSOURI AND WAS
THEREFORE SUBJECT TO THE
REQUIREMENTS OF DUE PROCESS

The Appellate Court affirmed the District Court's judgment denying the Petitioner's request to set aside the foreclosure sale of their property ruling that the foreclosure sale was an extrajudicial foreclosure under the power of sale in the Deed of Trust and did not involve state action, The foreclosure sale therefore was not subject to the Due Process Clause of the Fourteenth Amendment. The Appellate Court held that the foreclosure sale of the Petitioner's property was a private contractual right derived from the power of sale provisions in the deed of trust and did not involve sufficient state action to implicate the due process clause.

Contrary to the Appellate Court's holding, the nonjudicial foreclosure of Petitioners' Property was not solely a matter of a contract between the mortgagee and mortgagor but is the subject of a state statute which has supplanted the power of sale provisions in the deed of trust to which the petitioners' property was

subject. The procedure for the trustee to exercise the power of sale in the deed of trust is prescribed in Mo. Rev. Stat § 443.325.3. The power of sale to be valid must be exercised in compliance with this statutory procedure. Specifically, this statute prescribes the content of the notice of the foreclosure sale, the method by which the notice is to be sent to the mortgagor and the period of time that the notice is to be sent to the mortgagor prior to the foreclosure sale. Most importantly, it is this statute that provides that notice of the foreclosure sale is satisfied by simply sending the notice to the last known address of the mortgagor, irrespective of whether the mortgagor actually received the notice. Thus, it was the state that caused Respondent to send the notice of the foreclosure sale that did not conform to due process as declared by the Supreme Court in *Jones v. Flowers*, 547 U.S. 220 (2006), discussed below.

The Appellate Court's decision is contrary to the long line of Supreme Court cases wherein the Court held that private parties who are empowered by state statute to take the property of others are subject to the requirements of Due Process under the Fourteenth Amendment which require prior notice and a meaningful opportunity to be heard regarding the taking. In. *Mullane v. Central Hanover Bank & Trust, Co.* 339 U.S. 306, 320(1950), the statutory notice by publication by a banking trustee was held to be constitutionally insufficient under due process to notify the known beneficiaries of a trust of the settlement of the accounts of the bank trustee which affected the beneficiaries' property subject to the trust. The Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972) held a statute which permitted prejudgment seizures of a debtor's property by creditors without prior notice and hearing

was unconstitutional as permitting a taking in violation of due process under the 14th Amendment. The holding in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) was that a prejudgment garnishment by a creditor pursuant to state statute which permitted prejudgment garnishments without prior notice and hearing violated the debtor's rights under due process to notice and a hearing. The Court in *Sniadach v. Family Finance Corp. Bay View*, 395 U.S. 337 (1969) held that a prejudgment garnishment by creditor of a debtor's wages pursuant to state statute without prior notice and hearing deprived the debtor of due process under the Fourteenth Amendment.

II. STATE ACTION EXIST IN THE
FORECLOSURE SALE OF
PETITIONER'S PROPERTY
BECAUSE THE JUDICIARY WAS
CALLED UPON TO ENFORCE THE
MORTGAGEE'S CONTRACTUAL
RIGHT UNDER THE POWER OF
SALE PROVISION IN THE DEED OF
TRUST

The Appellate Court's decision is contrary to the decision of this Court in *Shelly v Kramer*, 334 U.S. 1 (1948). This Court held that the enforcement of restrictive covenants in a deed which excluded persons of designated races from use or occupancy of residential real estate by the state court constitutes state action which denies the petitioners' right of equal protection of the laws under the equal protection clause of the Fourteenth Amendment. *Id.* 21. This Court held that standing alone private agreements to exclude persons of a designated race or color from the use or occupancy

of real estate for residential purposes do not violate the Fourteenth Amendment; but it is violative of the equal protection clause of the Fourteenth Amendment for state courts to enforce them. The Court reasoned that state action was involved because the petitioners would have been able to acquire or occupy the properties that they sought as all other citizens in the community but for the intervention of the state courts to enforce the restrictive covenants. *Id.* 20

The *Shelly* decision stands for the proposition that state court enforcement of private agreements which deny constitutional rights is sufficient state action to invoke the protections under the Fourteenth Amendment. In this case, like in *Shelly*, petitioners were denied their right of due process when the federal court in this diversity action, applying state law, entered a judgment to enforce the power of sale provision in the petitioners' deed of trust that permitted respondent to appropriate and sell petitioners' property without notice that conforms to due process under the Fourteenth Amendment.

III. THE NOTICE OF THE FORECLOSURE SALE SENT TO THE PETITIONERS DID NOT CONFORM TO THE REQUIREMENTS OF DUE PROCESS

In *Jones v. Flowers*, 547 U.S. 220 (2006), this Court held that a notice sent to a person of a sale of his property at a tax sale for delinquent taxes where the notice was sent certified mail but not received and claimed by the affected person failed to comply with due process, notwithstanding a statute specifying this particular means of providing notice.

The notice required by due process is that which is reasonably calculated under the attending circumstances to apprise the affected party of a pending action against his property and afford him of an opportunity to contest the action. *Jones* at 226, citing *Mullane* at 314. The determination of whether notice is reasonably calculated to notify a party of a pending action against his property is not only determined by the circumstances at the time the notice is sent, but the circumstances after the notice is sent. Thus, when a sender of the notice learns that a certified letter containing the notice sent to the affected party was not delivered or claimed by the party, the sender is then obligated to take additional steps to notify the affected party, including but not limited to, sending the notice by regular mail or posting the notice on the affected property. The means employed to deliver a notice to a party of the taking of his property must be consistent with that of actually desirous of informing a party of the taking or action affecting his property. *Jones* at 229; *Mullane* at 315. It is not reasonable for a person who actually was desirous to inform another person of a taking of that person's property to do nothing when it is learned that the original notice sent by certified mail was returned unclaimed. *Id.*

The notice sent to the petitioners of the foreclosure sale of their property did not comport with due process as declared by the Supreme Court in *Jones*. The notice of the sale was sent by certified mail to the petitioners but not claimed or received and the respondent did not take any subsequent steps to notify the petitioners of the sale of their property. Therefore, the sale of the petitioners' property to respondent pursuant to this notice was unconstitutional as being a taking of their property without notice as required by

due process. The sale should accordingly be declared void and set aside.

CONCLUSION

For the foregoing reasons, Guillermo Luna and Lourdes Luna, the Petitioners, respectfully request that this Honorable Court to grant this Petition for Writ for Certiorari to determine whether a notice of a foreclosure sale of property pursuant to the power of sale provisions in the deed of trust is subject to the requirements of due process under the Fourteenth Amendment of the United States Constitution and whether the notice of the foreclosure sale of petitioners' property complied with the requirements of due process.

Respectfully submitted,

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21 Fed.Appx. 672 (Mem)

This case was not selected for publication in West's
Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1, generally
governing citation of judicial decisions issued on or
after Jan. 1, 2007. See also U.S.Ct. of App. 8th Cir. Rule
32.1A.

United States Court of Appeals, Eighth Circuit.

Guillermo LUNA; Lourdes Diana Luna Plaintiffs -
Appellants

v.

U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE, FOR LSF9 MASTER PARTICIPATION

TRUST Defendant - Appellee

Ocwen Loan Servicing, LLC; Millsap & Singer, P.C.;
Substitute Trustee Corporation Defendants

No. 19-3309

Submitted: September 14, 2020 Filed: September 17,
2020

Appeal from United States District Court for the
Western District of Missouri - Kansas City

Attorneys and Law Firms

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Appellants

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City, MO, Hilary H. Sommer, Bryan & Cave, Saint
Louis, MO, for Defendant - Appellee

Before GRUENDER, WOLLMAN, and GRASZ,
Circuit Judges.

[Unpublished]
PER CURIAM.

Guillermo and Lourdes Luna appeal the district court's¹ adverse entry of summary judgment in their diversity action, which sought to set aside the foreclosure sale of their property for failure to comply with the Due Process Clause of the Fourteenth Amendment. Upon de novo review, see Smith v. Toyota Motor Corp., 964 F.3d 725, 728 (8th Cir. 2020) (standard of review), we affirm. We agree that the extrajudicial foreclosure sale did not involve state action and thus was not required to satisfy the Due Process Clause. See Mildfelt v. Cir. Ct. of Jackson Cty., 827 F.2d 343, 346 (8th Cir. 1987) (per curiam) (under Missouri law, there is no significant state involvement in conduct of trustee's sale, which is undertaken pursuant to contractual right, and thus no state action); Fed. Nat'l Mortg. Ass'n v. Howlett, 521 S.W.2d 428, 433, 439 (Mo. 1975) (en banc) (extrajudicial foreclosure process derives from contractual right of power of sale provision in deed of trust, and does not involve sufficient state action to implicate Due Process Clause). We also agree that the foreclosure sale notice sent to the Lunas complied with Missouri law. See Mo. Rev. Stat. § 443.325.3 (foreclosing trustee shall, not less than 20 days prior to sale date, deposit notice in certified mail addressed to mortgagor at his last known address; actual receipt by mortgagor shall not be necessary to establish compliance); Woolsey v. Bank of Versailles, 951 S.W.2d 662, 667 (Mo. Ct. App. 1997) (§ 443.325 requires only that notice be mailed to last address of mortgagor known to mortgagee; mortgagor's failure to receive foreclosure notice will not condemn foreclosure sale).

3a

The judgment is affirmed. See 8th Cir. R. 47B.

2019 WL 7593368

Only the Westlaw citation is currently available.
United States District Court, W.D. Missouri, Western
Division.

Guillermo LUNA and Lourdes Diana Luna, Plaintiffs,
v.

U.S. BANK, N.A., AS TRUSTEE FOR LSF9
MASTER PARTICIPATION TRUST, et al.,
Defendants.

Case No. 18-00473-CV-W-GAF
Signed 09/24/2019

Attorneys and Law Firms

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Leighton Paisner, LLP, Kansas City, MO, for
Defendants.

ORDER

GARY A. FENNER, UNITED STATES DISTRICT
JUDGE

Now before the Court is Guillermo Luna and Lourdes Diana Luna's ("Plaintiffs") Motion to Alter Judgment of an order granting U.S. Bank, N.A., as Trustee for LSF9 Master Participation Trust's ("Defendant") Motion for Summary Judgment. (Doc. # 100). Defendant opposes. (Doc. # 104). For the reasons set forth herein, Plaintiffs' Motion is DENIED.

DISCUSSION

I. BACKGROUND

Because neither party is alleging a misrepresentation of facts as previously recounted in the Court's July 10, 2019 Order granting summary judgment for Defendant, its recitation is reproduced here with minimal substitution. (Doc. 97, p. 1-3).

On or about May 11, 2007, Guillermo Luna obtained an \$89,500 loan from Bank of America, N.A. ("Loan"). (Doc. # 84-3). Mr. Luna signed a note ("Note") payable to Bank of America. (*Id.*). The Note is indorsed in blank. (*Id.*). The Note is secured by a deed of trust dated May 11, 2007 and executed by Plaintiffs on real property located at 8810 Hiawatha Road, Kansas City, Missouri ("Deed of Trust"). (Doc. # 84-4). The Deed of Trust was recorded on May 16, 2007, in the Office of the Recorder of Deeds of Jackson County, Missouri. (*Id.*). The Deed of Trust was assigned to Defendant on October 10, 2015. (Doc. # 84-8). Caliber Home Loans, Inc. began servicing the Loan on August 24, 2015. (Doc. # 84-5). After Caliber began servicing the loan, it was responsible for the collection of payments on the Loan, application and disbursements of payments, administering the escrow account, and complying with and enforcing the contractual obligations contained in the Note and Deed of Trust. (*Id.*). Mr. Luna did not make the required payments under the terms of the Loan, resulting in default under the terms of the Note and Deed of Trust. (Doc. # 84-9, p. 5). The Loan is due for the February 1, 2013 payment. (Doc. # 84-2, ¶ 15).

The Deed of Trust requires notice specifying default; action required to cure default; a date not less than 30 days from the date notice is given by which default must be cured; and a statement that failure to

cure default may result in acceleration. (Doc. # 84-4, p. 14). The Deed of Trust states “Any notice to Borrower in connection with this Security Interest shall be deemed to have been given to borrower when mailed by first class mail” (*Id.* at p. 12). Caliber sent Plaintiffs a notice of default via first class mail dated July 7, 2017. (Doc. # 84-6). The notice of default was sent to both the Property listed in the Deed of Trust and to 11734 Garnett Street, Overland Park, Kansas, Plaintiffs' mailing address. (*Id.*; Doc. # 84-10, p. 6). Caliber also sent Plaintiffs' then-counsel a notice of default. (Docs. ## 84-2, ¶ 20; 84-7). The notice of default provides:

This letter is formal notice by Caliber Home Loans, Inc., the Servicer of the above-referenced loan, on behalf of LSF9 MASTER PARTICIPATION TRUST, that you are in default under the terms of the documents creating and securing your Loan described above, including the Note and Deed of Trust/Mortgage/Security Deed (“Security Instrument”), for failure to pay amounts due.

You have a right to cure your default. To cure the default, you must pay the full amount of the default on this loan by 08/11/2017 (of if said date falls on a Saturday, Sunday, or legal holiday, then on the first business day thereafter). Failure to cure the default on or before this date may result in acceleration of the sums secured by the Security Instrument, foreclosure by judicial proceeding where applicable, and sale of the property.

(Doc. # 84-6). The notice also stated the total amount required to cure the default was \$53,923.60. (*Id.*).

A foreclosure sale was held on October 5, 2017. (Doc. # 84-2, ¶ 23). Defendant was the successful bidder at the foreclosure sale. (Doc. # 84-8). Defendant is the current owner of the Property pursuant to the

Trustee's Deed dated October 10, 2017. (*Id.*). The Trustee's Deed was recorded on October 10, 2017, in the Office of the Recorder of Deeds in Jackson County, Missouri. (*Id.*). The Trustee's Deed confirms notice of the foreclosure sale and was sent to Plaintiffs at both the Property and Residential addresses. (*Id.* at pp. 2-3). The attachments to the Trustee's Deed were published in the Daily Record, Kansas City starting on September 15, 2017, and ending on October 5, 2017. (Docs. ## 84-2, ¶ 28; 84-8, p. 6).

On March 7, 2018, Plaintiffs filed suit against Defendant, Ocwen Loan Servicing, LLC, Millsap & Singer, P.C., and Substitute Trustee Corporation in the Circuit Court of Jackson County, Missouri. (Doc. # 1-1). On June 19, 2018, Ocwen removed the case to this Court. (Doc. # 1). Plaintiffs subsequently dismissed their claims against Millsap & Singer and Substitute Trustee Corporation. (Doc. # 45). On March 27, 2019, the Court granted summary judgment in favor of Ocwen and dismissed Plaintiffs' claim against it. (Doc. # 81). On July 10, 2019, the Court granted summary judgment in favor of the remaining Defendant. (Doc. # 97). Plaintiffs' Motion to Alter Judgment followed.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) permits an aggrieved party to file a motion to alter or amend a judgment. Although the language of the rule is broad, it is well-settled that "Rule 59(e) motions serve the limited function of correcting 'manifest errors of law or fact or to present newly discovered evidence.' " *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (quoting *Innovative Home Health Care v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998)). "Such motions cannot be used to

introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.” *Id.*; *see also Williams v. Decker*, 767 F.3d 734, 741 n.2 (8th Cir. 2014).

III. ANALYSIS

Plaintiffs argue that the Court erred in failing to consider the holding in *Schlereth v. Hardy*, 280 S.W.3d 47 (Mo. 2009), prior to issuing its July 10, 2019 order (“Order”) granting summary judgment to Defendant. (Doc # 100, p. 1-2). Specifically, Plaintiffs assert that had the Court reviewed *Schlereth* in rendering its decision, it would have found an issue of fact exists as to whether Defendant provided Plaintiffs with sufficient notice of the foreclosure sale to satisfy Plaintiffs' due process rights under the 14th Amendment. *Id.* Plaintiffs previously raised the issue of the alleged defective notice pursuant to *Schlereth* in their Response to Defendant's Motion for Summary Judgment (“Response”). (Doc. # 87, p. 3-5). The Court reviewed the briefing submitted by both parties before issuing its Order and does not find a second reading of *Schlereth* changes Defendant's entitlement to summary judgment. However, the Court allows further explanation is warranted in coming to this conclusion in view of *Schlereth*.

In their Response, Plaintiffs relied heavily on another case, *Jones v. Flowers*, 547 U.S. 220 (2006), to bolster their argument that it was incumbent upon the named Defendant to undertake further notice attempts beyond those specified in the Deed of Trust to alert Plaintiffs of the foreclosure sale. (Doc. # 87, p. 3-4). The Court found this argument inapplicable to the current cause since *Jones* involved a tax foreclosure sale by a

state actor (a tax collector) rather than a private actor. (Doc. # 97, p. 5). Plaintiffs correctly point out that, unlike *Jones*, *Schlereth*, imposes additional notice requirements on a *private* tax sale purchaser. (Doc. # 100, p. 3) (emphasis added). The problem with Plaintiffs' argument is that it fails to acknowledge that the private actor in *Schlereth* stands in the shoes of the government, thereby adopting the more stringent notice requirements of the tax collector. *Schlereth*, 280 S.W.3d at 51. The court noted that “[i]n this case, there is no question that Schlereth, proceeding under section 140.405, takes on the governmental obligation to give notice that satisfies due process.” *Id.*

Here, Defendant is a private party who purchased the Property at a deed foreclosure sale, not a tax foreclosure sale. Defendant was not stepping into the shoes of the collector or any other government official as was the case in *Schlereth*. Further, none of the cases cited in Plaintiffs' Motion to Alter Judgment demonstrate an application of *Schlereth* or its predecessors to Mo. Rev. Stat. § 443.325 or any deed foreclosure case. The Court previously found that Defendant had more than satisfied the notice requirements under the Deed of Trust and § 443.325, and Plaintiffs have not presented any new arguments that alter this analysis. (Doc. # 97, p. 6).

CONCLUSION

A second reading of *Schlereth* does not give rise to an issue of disputed fact, nor does it present any novel arguments that have not previously been considered by the Court. For these reasons and the reasons outlined above, Plaintiffs' Motion for Reconsideration is DENIED.

United States District Court, W.D. Missouri, Western
Division.

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v.
U.S. BANK, N.A., AS TRUSTEE FOR LSF9
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Defendants.

Case No. 18-00473-CV-W-GAF
Signed 07/10/2019

Attorneys and Law Firms

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Kansas City, MO, Hilary H. Sommer, Bryan Cave
Leighton Paisner, LLP, St. Louis, MO, for Defendants.

ORDER

GARY A. FENNER, UNITED STATES DISTRICT
JUDGE

Presently before the Court is Defendant U.S. Bank, N.A., as Trustee for LSF9 Master Participation Trust's ("Defendant") Motion for Summary Judgment. (Doc. # 84). Plaintiffs Guillermo Luna and Lourdes Diana Luna (collectively "Plaintiffs") oppose. (Doc. # 87). For the reasons provided below, Defendant's Motion is GRANTED.

DISCUSSION

I. FACTS

On or about May 11, 2007, Guillermo Luna obtained an \$89,500 loan from Bank of America, N.A. (“Loan”). (Doc. # 84-3). Mr. Luna signed a note (“Note”) payable to Bank of America. (*Id.*). The Note is indorsed in blank. (*Id.*). The Note is secured by a deed of trust dated May 11, 2007 and executed by Plaintiffs on real property located at 8810 Hiawatha Road, Kansas City, Missouri (“Deed of Trust”). (Doc. # 84-4). The Deed of Trust was recorded on May 16, 2007, in the Office of the Recorder of Deeds of Jackson County, Missouri. (*Id.*). The Deed of Trust was assigned to Defendant on October 10, 2015. (Doc. # 84-8). Caliber Home Loans, Inc. began servicing the Loan on August 24, 2015. (Doc. # 84-5). After Caliber began servicing the loan, it was responsible for the collection of payments on the Loan, application and disbursements of payments, administering the escrow account, and complying with and enforcing the contractual obligations contained in the Note and Deed of Trust. (*Id.*). Mr. Luna did not make the required payments under the terms of the Loan, resulting in default under the terms of the Note and Deed of Trust. (Doc. # 84-9, p. 5). The Loan is due for the February 1, 2013 payment. (Doc. # 84-2, ¶ 15).

The Deed of Trust requires notice specifying default; action required to cure default; a date not less than 30 days from the date notice is given by which default must be cured; and a statement that failure to cure default may result in acceleration. (Doc. # 84-4, p. 14). The Deed of Trust states “Any notice to Borrower in connection with this Security Interest shall be deemed to have been given to borrower when mailed by first class mail” (*Id.* at p. 12). Caliber sent Plaintiffs a notice of default via first class mail dated July 7, 2017. (Doc. # 84-6). The notice of default was sent to both the Property listed in the Deed of Trust and to 11734

Garnett Street, Overland Park, Kansas, Plaintiffs' mailing address. (*Id.*; Doc. # 84-10, p. 6). Caliber also sent Plaintiffs' then-counsel a notice of default. (Docs. ## 84-2, ¶ 20; 84-7). The notice of default provides:

This letter is formal notice by Caliber Home Loans, Inc., the Servicer of the above-referenced loan, on behalf of LSF9 MASTER PARTICIPATION TRUST, that you are in default under the terms of the documents creating and securing your Loan described above, including the Note and Deed of Trust/Mortgage/Security Deed ("Security Instrument"), for failure to pay amounts due.

You have a right to cure your default. To cure the default, you must pay the full amount of the default on this loan by 08/11/2017 (or if said date falls on a Saturday, Sunday, or legal holiday, then on the first business day thereafter). Failure to cure the default on or before this date may result in acceleration of the sums secured by the Security Instrument, foreclosure by judicial proceeding where applicable, and sale of the property.

(Doc. # 84-6). The notice also stated the total amount required to cure the default was \$53,923.60. (*Id.*).

A foreclosure sale was held on October 5, 2017. (Doc. # 84-2, ¶ 23). Defendant was the successful bidder at the foreclosure sale. (Doc. # 84-8). Defendant is the current owner of the Property pursuant to the Trustee's Deed dated October 10, 2017. (*Id.*). The Trustee's Deed was recorded on October 10, 2017, in the Office of the Recorder of Deeds in Jackson County

Missouri. (*Id.*). The Trustee's Deed confirms notice of the foreclosure sale and was sent to Plaintiffs at both the Property and Residential addresses. (*Id.* at pp. 2-3). The attachments to the Trustee's Deed were published in the Daily Record, Kansas City starting on September 15, 2017, and ending on October 5, 2017. (Docs. ## 84-2, ¶ 28; 84-8, p. 6).

On March 7, 2018, Plaintiffs filed suit against Defendant, Ocwen Loan Servicing, LLC, Millsap & Singer, P.C., and Substitute Trustee Corporation in the Circuit Court of Jackson County, Missouri. (Doc. # 1-1). On June 19, 2018, Ocwen removed the case to this Court. (Doc. # 1). Plaintiffs subsequently dismissed their claims against Millsap & Singer and Substitute Trustee Corporation. (Doc. # 45). On March 27, 2019, the Court granted summary judgment in favor of Ocwen and dismissed Plaintiffs' claim against it. (Doc. # 81). As such, only Plaintiff's claim to set aside the foreclosure sale against Defendant remains.

II. LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "Summary judgment is appropriate if the evidence, viewed in the light most favorable to the [nonmovant] and giving [the nonmovant] the benefit of all reasonable inferences, shows there are no genuine issues of material fact and [the movant] is entitled to judgment as a matter of law." *Price v. N. States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011). "Once the moving party has made and supported their motion, the nonmoving party must proffer admissible evidence demonstrating

a genuine dispute as to a material fact.” *Holden v. Hirner*, 663 F.3d 336, 340 (8th Cir. 2011). Essentially, parties resisting a motion for summary judgment must support their allegations with “ ‘sufficient probative evidence [that] would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.’ ” *Moody v. St. Charles Cty.*, 23 F.3d 1410, 1412 (8th Cir. 1994) (first alteration in original) (quoting *Gregory v. Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992)). “A mere scintilla of evidence is insufficient to avoid a summary judgment.” *Id.* Summary judgment should not be granted if a reasonable jury could find for the nonmoving party. *Woodsmith Publ'g Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. ANALYSIS

“A tort action for damages for wrongful foreclosure lies against a mortgagee only when the mortgagee had no right to foreclose at the time foreclosure proceedings were commenced.” *Dobson v. Mortg. Elec. Registration Sys., Inc./GMAC Mortg. Corp.*, 259 S.W.3d 19, 22 (Mo. Ct. App. 2008). “If the mortgagee did have the right to foreclose, but the sale was otherwise void or voidable, then the remedy is a suit in equity to set the sale aside.” *Id.* Plaintiffs do not dispute that they were in default on the terms of the Deed of Trust. (Docs. ## 84-1, ¶¶ 9-10; 87, p. 1). Rather, Plaintiffs seek to set aside the foreclosure sale and the Trustee's Deed to Defendant based on the arguments that the notice of sale was not delivered to them and notice of default was not provided to them. (Doc. # 1-1, ¶¶ 1-10). “Failure to provide notice of a foreclosure sale

to owners of the foreclosed property is a substantial defect sufficient to render the sale void and prevent the transfer of title in the property.” *Williams v. Kimes*, 996 S.W.2d 43, 45 (Mo. 1999) (en banc). Defendant asserts that it complied with the applicable notice requirements. The Court agrees with Defendant.

Mo. Rev. Stat. § 443.325.3, the statute that creates notice requirements prior to a foreclosure sale, provides:

3. In the event of foreclosure under a power of sale, the foreclosing mortgagee or trustee shall, not less than twenty days prior to the scheduled date of the sale, cause to be deposited in the United States mail an envelope certified or registered, and with postage prepaid, enclosing a notice containing the information required in the published notice of sale referred to in section 443.320 addressed:

- (1) To each person whose name and address is set forth in any such request recorded at least forty days prior to the scheduled date of sale; and
- (2) To the person shown by the records in the office of the recorder of deeds to be the owner of the property as of forty days prior to the scheduled date of foreclosure sale at the foreclosing mortgagee's last known address for said record owner; and
- (3) To the mortgagor or grantor named in the deed of trust or mortgage at the foreclosing mortgagee's last known address for said mortgagor or grantor.

(4) Actual receipt by the addressee of the envelope referred to above shall not be necessary to establish compliance with the notice requirements of subsection 3 hereof. Recording of receipt issued by the United States Post Office for certified or registered mail to evidence that said envelope has been delivered by the sender to the United States Post Office shall constitute proof of compliance with notice requirements of subsection 3 hereof.

This statute requires that notice be mailed to the last address of the mortgagor known to the mortgagee. *Woolsey v. Bank of Versailles*, 951 S.W.2d 662, 667 (Mo. Ct. App. 1997). “Failure to receive the foreclosure notice will not in and of itself condemn the foreclosure sale.” *Id.*

Plaintiffs assert that they never received the notice of default or the notice of the foreclosure sale. (*See* Doc. # 87). However, whether Plaintiffs actually received notice is not the dispositive issue. Plaintiffs cite *Jones v. Flowers*, 547 U.S. 220 (2006), to support their claim that failure to receive notice voids the foreclosure sale. (Doc. # 87, pp. 3-4). However, *Jones* is inapplicable as it was a case involving a due process claim against a state that conducted a property sale due to delinquent tax payments. *Jones*, 547 U.S. at 223. Plaintiffs cannot rely on *Jones*, a suit brought against a state, to support their claims against Defendant, a private actor. *See Jones*, 547 U.S. at 226 (“[W]e have stated that due process requires the *government* to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity

to present their objections.”) (emphasis added). As such, the adequacy of the notice provided to Plaintiffs will be determined by reference to state law and the terms of the Deed of Trust.

The uncontested material facts show that Defendant mailed both the notice of default and the notice of the foreclosure sale to Plaintiffs' last known address, the Property address, and to their then-counsel. These acts satisfy both the statutory requirements and the requirements set out in the Deed of Trust. By mailing notice to Plaintiffs' last known address, Defendant satisfied the statutory notice requirement. Additionally, the Deed of Trust provides that any notice given to Plaintiffs in connection with the mortgage “shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means.” The uncontested material facts show that notice of default was mailed by first class mail to the Property address. Additionally, the uncontested material facts show that notice of the foreclosure sale was provided in compliance with [Mo. Rev. Stat. § 443.325.3](#). The Trustee's Deed clearly established that notice of the foreclosure sale was sent to Plaintiffs at the Property address and mailing address as identified in the Deed of Trust as well as to their then-counsel. As the Deed of Trust provides that notice is validly given if it complies with state law, the notice of the foreclosure sale comported with the Deed of Trust requirements. Because the notice of default and notice of foreclosure sale were properly delivered as defined by Missouri law and the terms of the Deed of Trust, Plaintiffs' wrongful foreclosure claim fails as a matter of fact and law. Therefore, summary judgment in favor of Defendant is appropriate.

CONCLUSION

There is not a dispute of material fact that precludes summary judgment. Plaintiffs' cannot succeed on their wrongful foreclosure claim because the undisputed material facts establish that the notice of default and the notice of the foreclosure sale complied with Missouri law and the Deed of Trust. Accordingly, for these reasons and the reasons provided above, Defendant's Motion for Summary Judgment is GRANTED and Count I is DISMISSED with prejudice.

IT IS SO ORDERED.