



*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

JULY TERM, 2022

New Penn Financial LLC v. Stephen W. Burke* et al.	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden, Civil Division
	}	CASE NO. 517-5-13 Cncv
	}	Trial Judge: Samuel Hoar, Jr.

In the above-entitled cause, the Clerk will enter:

Defendant appeals the civil division's order confirming the sale of the residential property that is the subject of this foreclosure action. We affirm.

The following facts are undisputed. In 2013, plaintiff filed a complaint to foreclose defendant's interest in a residential property in Underhill, Vermont. The trial court entered a judgment of foreclosure in 2016. Defendant subsequently filed for bankruptcy protection, halting the foreclosure proceeding. The case was reopened in 2018 after the bankruptcy proceeding concluded. A foreclosure sale took place in July 2018. However, the court declined to confirm the sale because the auctioneer incorrectly informed the bidders that there was a superior first mortgage. It ordered plaintiff to conduct another sale.

After several court-authorized extensions of time, plaintiff notified defendant in December 2019 by first-class and certified mail that a foreclosure sale would be conducted at the property in February 2020. Defendant attended the sale, at which plaintiff was the only bidder. Plaintiff subsequently moved to confirm the sale. Both the notice of sale and the motion to confirm were sent to defendant instead of to his counsel.

In April 2020, the court notified the parties of their right to a confirmation hearing. Defendant requested a hearing, arguing that the sale was void because plaintiff had sent the notice of sale and the motion to confirm the sale to him instead of to his attorney in violation of Vermont Rule of Civil Procedure 5. He also argued that plaintiff violated the ethical rule prohibiting an attorney from communicating directly with a represented party.

After a hearing, the court granted plaintiff's motion to confirm the sale. The court reasoned that the foreclosure statute permitted service of the notice of sale on either the party or their attorney of record. The court concluded that although plaintiff violated Rule 5(b) by failing to serve the motion for confirmation on defendant's counsel, defendant had not shown that he

was prejudiced by the violation because counsel had actual notice of the motion and timely filed a motion for a hearing.

On appeal, defendant claims that the trial court's order confirming the sale should be reversed because plaintiff sent the notice of sale directly to him instead of his attorney.<sup>1</sup> "Confirmation of a foreclosure sale is a discretionary judicial action, the purpose of which is to ensure fairness in the foreclosure process." HSBC Bank USA N.A. v. McAllister, 2018 VT 9, ¶ 7, 206 Vt. 445. We review the court's decision confirming the sale for abuse of discretion. Id.

The court acted within its discretion here because plaintiff complied with the notice provisions of the foreclosure statute and defendant has not shown that plaintiff's failure to follow Rule 5(b) undermined the integrity of the foreclosure process. Section 4952(c) of Title 12, which sets forth the procedure for judicial sales in foreclosure actions, specifically provides that "[a] copy of the notice of sale shall be mailed by first class mail, postage prepaid, to all parties who appeared in the foreclosure action or to their attorneys of record." The word "'or' is almost always disjunctive." Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1141 (2018) (quotation omitted). Its use here indicates that a notice of sale is legally sufficient if sent directly to the defendant. There is nothing in the statute to indicate a different intent. Cf. State v. Turner, 2021 VT 30, ¶ 10 (recognizing that disjunctive clause may be taken in conjunctive sense if it is obvious from statute as whole that this was Legislature's intent). As defendant concedes, the statute does not explicitly require service to be made upon a party's attorney if one has appeared in the case. "If the [L]egislature disagrees with our reading of its intent, it is free to amend the statute to clarify the issue." Burton v. Town of Salisbury, 173 Vt. 177, 182 (2001).

Defendant argues, however, that Vermont Rule of Civil Procedure 5 requires service of any document to a represented person to be made upon the attorney, and that plaintiff's failure to follow this rule rendered the sale void. See V.R.C.P. 5(b) ("Whenever under Rule 5(a) or 77(d) service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court."). The trial court concluded that plaintiff did not violate Rule 5(b) because the notice of sale was not a "notice" within the meaning of Rule 5(a). See V.R.C.P. 5(a) (stating "every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties"). We need not decide whether this ruling was correct because we agree with the court's alternative conclusion that defendant failed to demonstrate that he was prejudiced by the alleged violation. See Gilwee v. Town of Barre, 138 Vt. 109, 111 (1980) (stating error will not result in reversal if record contains any legal ground justifying result). Defendant conceded below that he had actual notice of the sale and attended it when it occurred. He does not claim that the notice of sale was deficient in its form or contents. He does not identify any objection that his attorney would have made to the sale if the attorney had been provided with the notice.<sup>2</sup> Indeed, defense

---

<sup>1</sup> On appeal, defendant does not pursue his arguments concerning the motion for confirmation. Because we conclude that defendant's appeal fails on its merits, we do not address plaintiff's secondary argument that this appeal is moot because title to the subject property has transferred to plaintiff as a result of plaintiff's recording the confirmation order in the town land records.

<sup>2</sup> At oral argument, defense counsel suggested, for the first time, that he could have filed a motion to reconsider if he had been given notice of the sale. This argument was not raised

counsel admitted at the hearing below that he was “not sure” what difference it would have made if he, as opposed to his client, had been provided with the notice of sale. Under these circumstances, the trial court did not abuse its discretion in concluding that plaintiff’s alleged violation of Rule 5(b) did not fatally undermine the fairness of the sale process. Cf. Union Sch. Dist. No. 45 v. Wright & Morrissey, Inc., 2007 VT 129, ¶ 10, 183 Vt. 555 (mem.) (declining to overturn judgment against construction company in contract action where plaintiff sent notice of claim to defendant’s and architect’s attorneys instead of to architect directly as required by contract, because defendant did not claim it was uninformed of claim or that it was prejudiced by service on attorneys).

Defendant also argues that the court abused its discretion in confirming the sale because plaintiff violated Vermont Rule of Professional Conduct 4.2 by sending the notice of sale directly to him when he was represented by counsel. This argument lacks merit. Rule 4.2 prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented “unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” As discussed above, § 4952(c) permits a notice to be sent directly to a party. We therefore see no reason to disturb the judgment below.<sup>3</sup>

Affirmed.

BY THE COURT:

---

Harold E. Eaton, Jr., Associate Justice

---

William D. Cohen, Associate Justice

---

Nancy J. Waples, Associate Justice

---

below and is not preserved for our review. Furthermore, defense counsel failed to demonstrate that the filing of such a motion would have made a difference to the outcome of this case.

<sup>3</sup> Although we affirm the court’s decision to confirm the sale, we note our concern with the court’s apparent impatience with defense counsel during the hearing. We emphasize that “[p]atience, dignity and common courtesy are essential parts of judging, whatever the personality of the judge.” In re O’Dea, 159 Vt. 590, 605 (1993) (per curiam); see also Vt. Code of Judicial Conduct, Rule 2.8(B).