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Summary of Bergenfield v. Bank of America, 129 Nev. Adv. Op. 40

Christopher J. Humphrey
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Bergenfield v. Bank of America, 129 Nev. Adv. Op. 40 (June 6, 2013)[1]

REAL ESTATE FINANCE – MEDIATION, NONJUDICIAL FORECLOSURE

Summary

This is an appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program matter.

Disposition/Outcome

In Nevada's Foreclosure Mediation Program, where a deed of trust and promissory note are held by different entities, the note holder's sole attendance at the mediation is insufficient to satisfy the statutory requirement that the deed of trust beneficiary also attend and participate in the mediation.

Facts and Procedural History

Marcia Bergenfield obtained a home loan from Countrywide Home Loans, Inc., and executed a promissory note in Countrywide's favor. The note was secured by a deed of trust that listed Mortgage Electronic Registration Systems (MERS) as the beneficiary. MERS subsequently assigned the deed of trust to HSBC Bank USA. Countrywide endorsed the promissory note in blank, giving the possessor of the note entitlement to payment. Bank of America then acquired Countrywide.

Bergenfield defaulted on the note and elected to participate in the Foreclosure Mediation Program (FMP). HSBC did not send a representative to the mediation, but BAC Home Loans Servicing appeared on behalf of Bank of America. The parties at mediation were unable to reach an agreement, and Bergenfield filed a petition for judicial review. The district court denied the petition on the basis that the statutory requirements were met—the parties had addressed the document production issues to the court's satisfaction, BAC had the authority to negotiate, and participated in good faith.

Discussion

Nevada law permits the severance and independent transfer of a deed of trust and promissory note without affecting the right to ultimately foreclose.[2] Thus it was permissible for Bank of America to hold the note, and for HSBC to remain beneficiary of the deed of trust. However, in a nonjudicial foreclosure, the party seeking to foreclose must be both the note holder, and the beneficiary of the deed of trust.[3] NRS 107.086(4) mandates that a deed of trust beneficiary must attend the mediation itself or through a representative either with authority to modify the loan, or with unfettered access to a person with such authority.[4] If the deed of trust

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[1] By Christopher J. Humphrey.
[2] Edelstein v. Bank of N.Y. Mellon, 128 Nev. ___, ___, 286 P.3d 249, 258-60 (2012).
[3] *Id.*
[4] Leyva v. Nat'l Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1278 (2011).

beneficiary fails to attend the mediation, the FMP certificate must not issue.[5] Bank of America was not the beneficiary of the deed of trust, and therefore failed to demonstrate authority to nonjudicially foreclose and participate in the FMP mediation.

Conclusion

The district court erred when it determined that Bank of America had the authority to mediate and when it denied Appellant's petition for judicial review. The Court reversed and remanded for further proceedings.

[5] Holt v. Reg'l Tr. Servs. Corp., 127 Nev. ___, ___, 266 P.3d 602, 606-07 (2011).