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Saticoy Bay, LLC. v. Wells Fargo Home Mortgage, 133 Nev., Adv. Op. 5 (Jan. 26, 2017)

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CONSTITUTIONAL LAW: THE DUE PROCESS CLAUSE AND TAKINGS CLAUSE

Summary

The Court determined that (1) Nevada's superiority lien statutes in NRS 116.3116-.31168 do not implicate due process when an homeowners' association (HOA) conducts a nonjudicial foreclosure sale; and (2) that extinguishing a subordinate deed of trust through the same foreclosure sale is not a government taking, thus the statute does not violate the Takings Clauses of both the United States and Nevada Constitutions.

Background

In order to refinance their home the Senholtz's, nonparties to the appeal, took out an \$81,370 loan from the respondent, Wells Fargo Home Mortgage, secured by a deed of trust on the property in 2003. An HOA's covenants, conditions, and restrictions (CC&Rs) also governed the home beginning in 1994. After securing the loan, the Senholtz's could not pay their mortgage or HOA dues. Both Wells Fargo and the HOA then recorded notices of default and election to sell. The HOA proceeded with the nonjudicial foreclosure sale, selling the home to the appellant, Saticoy Bay, LLC., for \$6,900.

After the sale, to prevent Wells Fargo from foreclosing on the home, Saticoy Bay filed an injunction and a declaration the Saticoy Bay was the lawful owner of the property, which was free from any liens or encumbrances. Wells Fargo subsequently filed a motion to dismiss. It argued that NRS 116.3116 violated the Due Process Clause and the Takings Clause of both the United States and Nevada Constitutions.² The District Court granted the motion, holding that the statutes violated Wells Fargo's due process rights. Saticoy Bay appealed.

Discussion

Nevada's superiority lien statutes do not violate a first security interest holder's due process rights

Both the United States and Nevada Constitutions' Due Process Clauses "protect individuals from state actions that deprive them of life, liberty, or property without due process of law."³ The United States Supreme Court in *Lugar v. Edmondson Oil Co.*, set out a two-part test to determine whether state action is depriving a person of a property interest.⁴ First, a court determines if "the deprivation [was] caused by the exercise of some right or privilege created by

¹ By Julia Barker.

² Wells Fargo made two additional arguments that were not addressed by the district court and not considered in this opinion.

³ U.S. CONST. amend, XIV, § 1; NEV. CONST. art. 1, § 8(5).

⁴ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

the State.”⁵ Then, the court determines if “the party charged with the deprivation [is] a person who may be fairly said to be a state actor.”⁶

Here, the Court determined that the facts satisfied the first part of the *Lugar* test, but not the second. The first part of the test was satisfied for two reasons. First, Nevada law created the superiority lien in question and the HOA’s right to conduct a nonjudicial foreclosure upon default.⁷ Second, the HOA’s exercise of its statutory right to nonjudicial foreclosure extinguished Wells Fargo’s security interest in the home. Thus, Nevada created the privilege the HOA exercised in selling the home to Saticoy Bay through the nonjudicial foreclosure.

However, the second part of the test was not met because the HOA was not a state actor when it conducted the sale. A private party acting with the authority of the state is not enough to make that party a state actor. Further, comparing the facts of this case to the United States Supreme Court case, *Flagg Bros., Inc. v. Brooks*,⁸ the Court concluded that the procedures allowed by Nevada law did not involve some form of State action because the law did not compel the nonjudicial foreclosure sale and the state took no involvement in the sale. In sum, because NRS 116.3116 did not compel the HOA to foreclose on the home or conduct a nonjudicial foreclosure sale, an HOA’s nonjudicial foreclosure sale does not implicate due process.

The extinguishment of a subordinate deed of trust through an HOA’s nonjudicial foreclosure does not constitute a government taking

Both the United States and Nevada Constitutions Takings Clauses “prohibit the state from taking private property for public use without just compensation.”⁹ A state may effectuate a taking in two ways: (1) by “direct government appropriation or physical invasion of private property”; or (2) by a regulation that is “so onerous that its effect is tantamount to a direct appropriation or ouster.”¹⁰ To be a regulatory taking worthy of compensation, the Court considered three factors: “(1) the regulation’s economic impact on the property owner, (2) the regulation’s interference with investment-back expectations, and (3) the character of the government action.”¹¹

Here, the Court concluded that there was no direct government taking because the state did not directly appropriate Wells Fargo’s lien or the property subject to the lien, and the intangible property interest held by Wells Fargo was not “subject to actual physical invasion.”

The Court then considered if foreclosure statutes constituted a regulatory taking. The Court further concluded that there was no regulatory taking for three reasons. First, the statute did not have an impact on first security interest holders because the statute did not require an HOA to conduct a foreclosure sale in the event of a default; and when an HOA does conduct a sale, the proceeds may fully satisfy the amount owed to the first security holder. Second, Wells Fargo’s security interest was acquired after the HOA’s declaration of CC&Rs which means that Wells

⁵ *Id.*

⁶ *Id.*

⁷ NEV. REV. STAT. ANN. § 116.3116 (2015).

⁸ *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

⁹ U.S. CONST. amend, V, § 1; NEV. CONST. art. 1, § 8(6).

¹⁰ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *see also* *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1121-22 (2006).

¹¹ *Sisolak*, 137 P.3d at 1121-22.

Fargo was on notice that the HOA had a superior lien taking priority of a first deed of trust that was recorded later. Finally, because the state did not participate in the HOA's nonjudicial foreclosure sale, it did not physically invade any property interest.

Conclusion

An HOA's nonjudicial foreclosure action upon a superiority lien, does not implicate the Due Process Clauses of the United States and Nevada Constitutions. Further, extinguishing a subordinate deed of trust through a nonjudicial foreclosure sale does not violate the Takings Clauses of the United States and Nevada Constitutions.

The Court reversed the district court's decision and remanded the matter back to the district court to consider Wells Fargo's additional arguments this opinion did not address.