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Summary of Markowitz v. Saxon Special Servicing, 129 Nev. Adv. Op. 69

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NEVADA FORECLOSURE MEDIATION PROGRAM: AGE OF APPRAISAL, AUTHORITY
OF LOAN SERVICER

Summary

Appeal from a district court order denying judicial review in a Foreclosure Mediation Program (FMP) matter. The Court determined two issues: (1) whether the mediation rule requiring an appraisal or broker's price opinion (BPO) that is no more than sixty days old at the time of the mediation mandates strict or substantial compliance; and (2) whether the loan servicer had the proper authority to appear at FMP mediation.

Disposition

Foreclosure Mediation Program Rule (FMR) 8(3) provides that a beneficiary of a deed of trust must provide an appraisal or BPO that is "no more than 60 days" old at the commencement of mediation.² The age of this document is a matter of form and content, and the rule is therefore directory, rather than mandatory. Substantial compliance may satisfy the rule if the lack of strict compliance does not prejudice or injure the homeowner. An eighty-three-day-old BPO is substantially compliant with the sixty-day-old rule if there is no evidence that the homeowners were injured or prejudiced by the age of the BPO.

A beneficiary of deed of trust may participate in the FMP directly or through a representative with proper authority to negotiate a loan modification. A loan servicer is a valid representative of the trust-deed beneficiary. Additionally, a MERS assignment of a deed of trust validly transfers the note.

District court's denial of judicial review upheld.

Factual and Procedural History

Warren and Jacqueline Markowitz obtained a home loan from Fremont Investment & Loan. Fremont subsequently assigned the Markowitz's promissory note to Deutsche Bank National Trust Company. Saxon Special Services serviced the loan on Deutsche Bank's behalf. The Markowitzes later stopped making payments to Saxon, prompting a notice of default. The Markowitzes elected to mediate in under Nevada's FMP.

Saxon represented Deutsche Bank at the mediation and provided all of the required documents, including an eighty-three-day-old BPO. Despite statements by Saxon's counsel and a representative of Saxon that Saxon had the proper authority, the Markowitzes were not convinced that Saxon had the authority to implement a loan modification. The Markowitzes terminated the mediation. The mediator issued a statement that the Markowitzes failed to provide certain documents at mediation and that Saxon failed to bring a current BPO. The Markowitzes filed a petition for judicial review, which the district court denied, finding that the parties had negotiated in good faith with valid authority. This appeal followed.

¹ By Joseph Peacock.

² FMR 8 has been amended and renumbered to FMR 11. The amendments do not change the Court's analysis.

Discussion

The eighty-three-day-old BPO was substantially compliant with the rule requiring a maximum sixty-day-old appraisal or BPO.

A rule is generally considered mandatory, requiring strict compliance, when its language states a specific “time and manner” for performance, specifying when and how performance must take place.³ “Form and content” rules, which dictate who must perform and what information that party must provide, are considered directory, and can typically be satisfied with substantial compliance.⁴ For directory rules, literal noncompliance can be excused when a party complies with the “substance essential to every reasonable objective” of the rule.⁵ The determination of whether a rule is mandatory or directory is a matter of statutory interpretation and the Court’s objective is to determine and implement the rule’s purpose.⁶

The FMP rules include both a mandatory time provision and a directory content provision related to the appraisal or BPO used for negotiation purposes at mediation. FMR 8(1)⁷ requires that the trust-deed beneficiary must submit, among other documents, an appraisal or BPO at least 10 days prior to the mediation. This is a mandatory rule implicating notice and requiring strict compliance. FMR 8(3)⁸ states that the appraisal or BPO must be no more than sixty days old prior to the date of the mediation. This is a directory rule implicating the form and content of the required document and can therefore be satisfied with substantial compliance.

The policy behind the sixty-day requirement is to facilitate informed negotiation by ensuring that mediation participants have a fair appraisal of the home that represents its current market value. A slightly older appraisal or BPO may be just as accurate and serve the purpose of the requirement.⁹ A significantly older appraisal or BPO, such as one that is 200 days old, would likely reflect different market conditions and frustrate the purpose of the requirement.

The Markowitzes did not make any effort to demonstrate that the BPO in question reflected different market conditions than a strictly compliant document would have. Because the Markowitzes did not demonstrate any prejudice in their ability to negotiate a loan modification based on the BPO age, denying Saxon their contractual remedy of foreclosure based on the same would be an inequitably harsh consequence.

Saxon had the proper authority to participate in loan modification negotiations as Deutsche Bank’s representative.

The Court has previously held that a loan servicer is a valid representative of a trust-deed beneficiary for the purposes of loan modification negotiations in FMP.¹⁰ The record before the Court included documents demonstrating Deutsche Bank’s status as the beneficiary of the deed

³ Leven v. Frey, 123 Nev. 399, 407 n.27, 408, 168 P.3d 712, 717 n.27, 718 (2007).

⁴ Einhorn v. BAC Home Loans Servicing, LP, 128 Nev. ___, ___, 290 P.3d 249, 254 (2012).

⁵ Stasher v. Harger-Haldeman, 372 P.2d 649, 652 (Cal. 1962).

⁶ Village League to Save Incline Assets, Inc. v. State Bd. Of Equalization, 124 Nev. 1079, 1088, 194 P.3d 1254, 1260 (2008).

⁷ Renumbered FMR 11(7) (2013).

⁸ Renumbered FMR 11(7)(e) (2013).

⁹ See Leyva v. Nat’l Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011).

¹⁰ See Nev. Rev. Stat. § 107.086(5) (2012); Edelstein v. Bank of N.Y. Mellon, 128 Nev. ___, ___ n.11, 286 P.3d 249, 260 n.11 (2012).

of trust and Saxon's status as the loan servicer. Prior to their default, the Markowitzes made payments to Saxon, demonstrating their recognition of Saxon as the loan servicer, and entered into a stipulation specifically reciting that Saxon was the servicing agent for Deutsche Bank. Saxon therefore properly attended the mediation as Deutsche Bank's representative.

Additionally, the Court has previously held that a MERS assignment of a deed of trust is a valid transfer.¹¹ The Markowitzes contention that MERS cannot validly transfer a mortgage note because the system is incapable of acting as a beneficiary of the trust was therefore rejected.

Conclusion

Because the FMP rule requiring an appraisal or BPO relates to the form and content of the document, it is a directory rule that can be met by substantial compliance. "[A]n appraisal or BPO older than 60 days may . . . substantially comply with the FMR sufficient to avoid the imposition of sanctions when there is no evidence that the BPO is so old that it would impair the FMP's policy of facilitating good-faith negotiations or the BPO's content is inaccurate to the extent that the homeowners would be prejudiced." The eighty-three-day-old BPO was within a reasonable valuation window of the sixty day requirement and the homeowners did not display any injury or prejudice stemming from the noncompliant document. Equity dictates accepting the document under these circumstances, so as to not unduly deprive the trust-deed beneficiary of its contractual remedy of foreclosure.

The Court recognizes the validity of a MERS transfer of a mortgage note and the authority of a loan servicer to act on the beneficiary's behalf in loan modification negotiations. Deutsche Bank, therefore, properly held the Markowitzes' mortgage note and Saxon had the authority to participate in the FMP mediation.

¹¹ Edelstein, 286 P.3d at 260–61.