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Summary of Edelstein v. Bank of New York Mellon, 128 Nev. Adv. Op. 48

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Edelstein v. Bank of New York Mellon, 128 Nev. Adv. Op. 48 (September 27, 2012)[1]

NEVADA FORECLOSURE MEDIATION PROGRAM

Summary

Appeal examining the note-holder and beneficial-interest status of a party seeking to foreclose via the Nevada Foreclosure Mediation Program (Nevada FMP).

Disposition/Outcome

In order to participate in the Nevada FMP and obtain the necessary Nevada FMP certificate to proceed with the nonjudicial foreclosure of an owner-occupied residence, the party seeking foreclosure must show he is both the beneficiary of the deed of trust as well as the current holder of the promissory note.

If the Mortgage Electronic Registration System, Inc. (MERS) is designated as the initial beneficiary of the deed of trust, that designation does not irreversibly split the promissory note and the deed of trust so as to prevent foreclosure. If MERS is the designated beneficiary and a different entity holds the note, the note and the deed of trust are split, thereby making nonjudicial foreclosure by either entity improper. But, such a split is cured if the promissory note and deed of trust are reunified in one entity.

Facts/Procedural History

Appellant David Edelstein executed a promissory note (the note) in 2006 through lender and note-holder New American Funding, which provided Edelstein with a home loan. The note stated that the Lender may transfer the note, and that the Lender or anyone who takes the note by transfer and who is entitled to receive payments under this note is called the "Note Holder."

Edelstein and New American Funding also executed a deed of trust to secure the note, which named New American Funding as the lender, Chicago Title as the trustee, and MERS as the beneficiary. Specifically, the deed of trust described MERS as a separate corporation that was acting solely as a nominee for Lender and Lender's successors and assigns. It also described MERS as the beneficiary under this Security Instrument, and later described MERS as the beneficiary of this Security Instrument (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. The deed of trust also stated that "[b]orrower understands and agrees that MERS holds only legal title to the Interests granted by Borrower in this Security Instrument," but that "MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender . . . . "

Subsequently, both the note and the deed of trust were transferred several times. With the note, New American Funding created an allonge endorsing the note to the order of Countrywide

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Bank. Countrywide Bank then endorsed the note to the order of Countrywide Horne Loans, Inc., which in turn endorsed the note in blank, as follows: "Pay to the order of __ Without Recourse."

The deed of trust was also conveyed when MERS granted, assigned, and transferred "all beneficial interest" under the deed of trust to respondent Bank of New York Mellon (BNY Mellon); the conveyance language on the assignment stated that it was assigned and transferred together with the note . BNY Mellon designated ReconTrust Company as its new trustee, replacing Chicago Title. At the time of the mediation, ReconTrust physically possessed (1) the note, which was endorsed in blank, and (2) an assignment of the deed of trust, which named BNY Mellon as the beneficiary.

Edelstein stopped paying on the note and thus received a notice of default and election to sell. Edelstein elected to participate in the Nevada FMP. At the July 2010 foreclosure mediation, there was no resolution of the foreclosure issue. The mediator filed a report determining that "[t]he parties participated but were unable to agree to a loan modification or make other arrangements." The Court noted that the mediator did not report that the beneficiary or its representatives failed to attend the mediation, failed to participate in good faith, failed to bring required documents to the mediation, or failed to have authority to mediate.

On August 5, 2010, Edelstein filed a petition for judicial review with the district court, seeking a determination that BNY Mellon had participated in the mediation in bad faith. He argued that BNY Mellon failed to provide sufficient documents concerning the assignment of the mortgage note, deed of trust, and interest in the trust, and an appraisal or broker's price opinion. He further argued that BNY Mellon did not have the authority or access to a person with the authority to modify the loan as required by NRS 107.086 because the person representing BNY Mellon was not available to fully negotiate in good faith, and did not provide sufficient documentation that BNY Mellon held a legal claim to the beneficial proceeds of the deed. Finally, he argued that BNY Mellon failed to offer any modification offers. Bank of America (on behalf of BNY Mellon) objected to each of Edelstein's arguments and also argued that Edelstein's petition should not be considered because it was untimely. Edelstein argued that because the allonge was an invalid assignment, BNY Mellon was legally required to show that it owned those rights, or it had no legal authority to be attempting any foreclosure of the Edelstein home." He also contended that MERS' assignment of the deed of trust was invalid because MERS was a "sham" beneficiary. Lastly, Edelstein argued that his petition for judicial review was timely filed.

Before the district court, Edelstein emphasized that BNY Mellon had no standing in the matter because there was no chain of title that came from New American Funding to the acting party, BNY Mellon. The district court issued two separate orders. In the first order, the district court found that Edelstein timely filed his petition for judicial review and that BNY Mellon had properly appeared at the mediation. In its second order, the court found that BNY Mellon did not participate in bad faith, that the parties agreed to negotiate further, and that absent a timely appeal, a Letter of Certification would issue. Edelstein appealed.

Discussion

Justice Hardesty wrote the unanimous opinion of the Court sitting en banc. The primary issue before the Court was whether BNY Mellon could properly participate in the Nevada FMP and obtain a Nevada FMP certificate to proceed with foreclosure proceedings against Edelstein.[2] To answer that question, the Court addressed (1) the party-status requirements to pursue nonjudicial foreclosure in Nevada and (2) whether BNY Mellon met those requirements in the context of NRS 107.086.

I. Requirements to pursue nonjudicial foreclosure in Nevada

Edelstein argued that Nevada FMP "requires the beneficiary of a deed of trust to prove to the homeowner that the beneficiary has a right to foreclose on the property."

The Court agreed with Edelstein's argument. The Court noted that because the deed of trust does not convey title so as to allow the beneficiary to obtain the property without foreclosure and sale[3], in order to pursue nonjudicial foreclosure and sale, "[t]he deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment."[4]

The Court also noted that Nevada FMP requires the trustee to obtain and record a Nevada FMP certificate before proceeding with the foreclosure.[5] In order for the FMP certificate to issue, the trustee must (1) attend the mediation; (2) mediate in good faith; (3) provide the required documents; or (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person. The requirements for Nevada FMP mediation provide that the requisite documents actually enable a determination both of whether a person with the required authority over the note is available and of whether the party seeking to foreclose is in fact the beneficiary of the deed of trust or a representative.[6] The Court stated this means the party seeking to obtain a Nevada FMP certificate must show that it is the proper entity, under the nonjudicial foreclosure statutes, to proceed against the property.[7]

II. BNY Mellon met the requirements to pursue nonjudicial foreclosure.

Edelstein argued that though BNY Mellon produced the necessary documents at the Nevada FMP mediation, the production was not enough to prove it was the proper entity to

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[2] There were two further arguments made that the Court did not address: (1) BNY Mellon argued that Edelstein's petition was untimely filed, but the Court dismissed this argument due to the date Edelstein actually received the foreclosure statement; (2) The parties disputed the standard of review and strict vs. substantial compliance with Nevada FMP, but the Court stated the decisions in *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. __, 255 P.3d 1275 (2011) and *Pasillas v. HSBC Bank USA*, 127 Nev. __, 255 P.3d 1281 (2011) resolved those issues.

[3] *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298-99, 183 P.3d 895, 901-02 (2008); *Orr v. Ulyatt*, 23 Nev. 134, 140, 43 P. 916, 917-18 (1896).

[4] *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011).

[5] *See* NEV. REV. STAT. 107.086 (2007).

[6] NEV. REV. STAT. 107.086(4) (2007); *see Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. __, 255 P.3d 1275 (2011).

[7] *Id.*

pursue foreclosure. He claimed that the documents were insufficient to prove a clear chain of the deed of trust and the note from New American Funding to BNY Mellon. He asserted this was because MERS was only a nominee and therefore did not have authority to assign an interest in the deed of trust, so the note and the deed of trust were permanently split. Therefore, BNY Mellon did not have the capacity to foreclose.

The Court looked at how MERS works, noting that MERS was designed to avoid the need to record multiple transfers of the deed.[8] The Court stated that nothing in Nevada law prohibited MERS' actions and therefore rejected Edelstein's argument that MERS did not have authority to assign an interest in the deed of trust.

The Court examined the two most common approaches to situations involving MERS: the traditional approach, and the Restatement approach. Under the traditional approach, splitting the note and the deed of trust is impossible, because the holder of the note always has both the note and the deed.[9] Under the traditional approach, the assignment of the deed alone is a nullity. Therefore, MERS' assignment of the deed of trust separate from the note would have no force.[10] However, the Court stated that following this approach would be inconsistent with its prior ruling in *Leyva*, in which the Court explained that "[t]ransfers of deeds of trust and mortgage notes are distinctly separate."[11] Therefore, the Court declined to follow the traditional approach, and looked instead to the Restatement route.

Under the Restatement approach, a promissory note and a deed of trust are automatically transferred together unless the parties agree otherwise.[12] This allows for parties to agree to separate the promissory note and the deed of trust.

In this case, New American Funding was the initial holder of the note, and MERS was characterized in the deed of trust as a separate corporation that was acting solely as a nominee for Lender and Lender's successors and assigns. The Court then examined the effect of designating MERS both as a nominee for New American Funding and its successors and assigns, and as a beneficiary of the deed of trust.

The Court noted that other jurisdictions have held that MERS designation as nominee is more than sufficient to create an agency relationship between MERS and the Lender and its successors.[13] The Court agreed with this and held that, in this case, MERS holds an agency relationship with New American Funding and its successors and assigns with regard to the note. Pursuant to the express language of the deed of trust, "MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender . . . ." Therefore, the Court concluded MERS, as an agent for New American Funding and its successors and assigns, had authority to transfer the note on behalf of New American

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[8] *Cervantes*, 656 F.3d at 1039.
[9] *In re Vargas*, 396 B.R. 511, 516 (Bankr. C.D. Cal. 2008) (quoting *Carpenter v. Longan*, 83 U.S. 271, 274 (1872)).
[10] *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. Ct. App. 2009).
[11] 127 Nev. __, __, 255 P.3d 1275, 1279 (2011).
[12] Restatement (Third) of Prop.: Mortgages § 5.4(a) (1997).
[13] *In re Tucker*, 441 B.R. 638, 645 (Bankr. W.D. Mo. 2010); *In re Martinez*, 444 B.R. 192, 205-06 (Bankr. D. Ran. 2011); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir. 2011).

Funding and its successors and assigns.[14] The Court also noted that the deed of trust also expressly designated MERS as the beneficiary.

The Court concluded that although MERS was the proper beneficiary pursuant to the deed of trust, that designation did not make MERS the holder of the note. The Court agreed with Edelstein's contention that designating MERS as the beneficiary "split" the note and the deed of trust at inception because, as the parties agreed, an entity separate from the original note holder (New American Funding) was listed as the beneficiary (MERS).[15] But, the Court found that this split was not permanent; rather, it simply prevented enforcement of the deed of trust through foreclosure unless and until the two documents were ultimately held by the same party.[16] The Court concluded that MERS, as a valid beneficiary, may assign its beneficial interest in the deed of trust to the holder of the note, at which time the documents are reunified.

Here, BNY Mellon claims that it can enforce the deed of trust because MERS assigned its beneficial interest in the deed of trust to BNY Mellon. Certified copies of the deed of trust and the subsequent assignment were produced at the mediation; thus, the Court held BNY Mellon is entitled to enforce the deed of trust. With respect to the note, MERS also assigned its beneficial interest in the deed of trust together with the note to BNY Mellon. The Court stated that because MERS, as agent (nominee) for New American Funding's successors and assigns, could transfer the note on behalf of the successors and assigns, this action also transferred the note to BNY Mellon.

Plus, even independently of MERS' assignment, BNY Mellon was entitled to enforce the note.[17] The Court stated that "a note initially made payable 'to order' can become a bearer instrument, if it is endorsed in blank" under Article 3 of the Uniform Commercial Code. [18] Here, New American Funding, the original lender, endorsed the note to Countrywide Bank, N.A., who then endorsed the note to Countrywide Home Loans, Inc. Countrywide Home Loans endorsed the note, in blank, as follows: "Pay to the order of Recourse." Thus, the note was bearer paper, and if the note is payable to bearer, that "indicates that the person in possession of the promise or order is entitled to payment."[19] The Court held this to mean that to be entitled to enforce the note, BNY Mellon would merely have to possess the note.

The Court concluded that because ReconTrust, BNY Mellon's trustee, physically possessed the note, BNY Mellon, the beneficiary, was entitled to enforce it.[20] Because BNY Mellon was entitled to enforce both the note and the deed of trust, which were reunified, BNY Mellon demonstrated authority over the note and to foreclose.

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[14] *See generally Leyva*, 127 Nev. at __, 255 P.3d at 1279-80.
[15] *See generally In re Agard*, 444 B.R. 231, 247 (Bankr. E.D.N.Y. 2011).
[16] *Cervantes*, 656 F.3d at 1039.
[17] The Uniform Commercial Code, Article 3, governs transfers of negotiable instruments, like the note. *Leyva*, 127 Nev. at __, 255 P.3d at 1279.
[18] *Bank of New York v. Raftogianis*, 13 A.3d 435, 439 (N.J. Super. Ct. Ch. Div. 2010); *see also* U.C.C. § 3-205 cmt. 2 (2004).
[19] *Leyva*, 127 Nev. at __, 255 P.3d at 1280 (quoting NEV. REV. STAT. 104.3109(1)(a)) (2007); *see also* NEV. REV. STAT. 104.3205(2) (2007).
[20] The Court noted that it not consider Edelstein's argument that ReconTrust, rather than BNY Mellon, was "the holder and person entitled to enforce" because Edelstein did not raise that argument at the district court level.

Conclusion

The Court affirmed the district court's denial of petition for judicial review under the Nevada FMP. Because the party seeking foreclosure (BNY Mellon) became both the holder of the promissory note and the beneficiary of the deed of trust, the Court found it had standing to proceed through the Nevada FMP.