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Holt v. Regional Trustee Services Corp., 127 Nev. Adv. Op. 80 (December 15, 2011)¹
PROPERTY – FORECLOSURE MEDIATION

Summary

The Court considered an appeal from a district court order refusing to enjoin a lender from instituting a second foreclosure action after being denied a Foreclosure Mediation Program certificate in a prior foreclosure action.

Disposition/Outcome

The Court affirmed the district court's refusal to enjoin the power of sale foreclosure, holding that a lender is not barred from reinstating new foreclosure proceedings after being denied a Foreclosure Mediation Program certificate.

Factual and Procedural History

Appellants Karl and Frances Holt ("Holt") defaulted on the note secured by a first deed of trust on their home. The trustee, Regional Trustee Services Corporation ("RTSC"), initiated non-judicial/power of sale foreclosure on July 16, 2009. The Holts elected to mediate under the Nevada Foreclosure Mediation Program ("FMP").² A representative from the lender, One West Bank, failed to appear at the mediation. Based on this failure to appear, the mediator declared RTSC in bad faith. The Holts then filed a petition for judicial review in district court requesting sanctions and a loan modification.

The district court declined to issue a loan modification and ordered as sanctions that RTSC be denied the FMP certificate necessary to conduct a valid power of sale foreclosure. The judge emphasized that the order only applied to the foreclosure proceedings at issue, and RTSC "can start all over again."³

On March 1, 2010, RTSC initiated a second power of sale foreclosure. The Holts subsequently filed a new action in district court to enjoin RTSC from foreclosing, arguing that the original denial of a FMP certificate permanently precluded RTSC from foreclosing. The district court denied injunctive relief and ordered an FMP mediation to take place on the second foreclosure. The Holts appealed.

Discussion

Justice Pickering wrote for the Court, sitting en banc. The Holts claimed that initial denial of an FMP certificate barred a second foreclosure due to the claim and issue preclusion doctrines. However, the Court noted that power of sale/non-judicial foreclosure is not a judicial action, but rather a process that occurs outside the scope of judicial authority.⁴ While claim and

¹ By Brandon C. Sendall.

² See NEV. REV. STAT. § 107.086 (2007).

³ *Holt v. Regional Trustee Services Corp.*, 127 Nev. Adv. Op. 80, 1 (December 15, 2011).

⁴ *Id.* (citing *Tom v. GMAC Mortgage, LLC*, 2011 WL 2133705, at 10. (D. Haw. May 25, 2011)).

issue preclusion can apply in an administrative context when an agency resolves disputed issues of fact, it only applies to claims and defenses that were both available in the prior action and actually decided.⁵

The Court determined that the denial of an FMP certificate, while denying the lender the right to foreclose on that particular action, does not reach the level of a total loss of the right to exercise a power of sale foreclosure. Claim preclusion did not apply because RTSC's power of sale foreclosure rights were neither defenses to the Holt's claims, nor the subject of compulsory counterclaims. Issue preclusion did not apply because the only issue "actually determined" was whether RTSC mediated in bad faith, not whether RTSC had the right to foreclose based on the Holts' continuing defaults.⁶ The district court judge neither abused her discretion nor committed error in denying an injunction on the second foreclosure proceeding, therefore the Court affirmed.

Additionally, even if claim and issue preclusion applied to this case, they do not apply when "the court in the first action expressly reserves the right to maintain a second action."⁷ The scope of the sanction order was established when Judge Mosley expressly stated that RTSC could reinstitute foreclosure proceedings.

Conclusion

A lender, denied an FMP certificate for failing to mediate in good faith, may subsequently restart the foreclosure process by giving a new notice of default and election to sell.

⁵ Id. (citing 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 131.21(5)(a)-(b), at 131-55 (3rd ed. 2011)).

⁶ Id. (citing *In re Sandoval*, 126 Nev. at , 232 P.3d 422, 424 (2010)).

⁷ Id. (citing 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4413, at 314 (2d ed. 2002)).