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Summary of *Leyva v. National Default Services Corp.*, 127 Nev. Adv. Op. No. 40

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Summary

An appeal from a district court order denying a petition for judicial review in a foreclosure mediation action.

Disposition/Outcome

The Supreme Court of Nevada reversed the district court's judgment, concluding that first that the Foreclosure Mediation Statute, NRS 107.086, and the Foreclosure Mediation Rules (FMRs) permit a homeowner, even if he or she is not the original or named mortgagor, to request mediation following a notice of default. Secondly, the Court concluded that strict compliance, not substantial compliance, is mandated by the document requirements contained in NRS 107.086(4) and (5). Failure to strictly comply with the document requirements enumerated in NRS 107.086 and the FMRs results in a sanctionable offense. Further, if a party does not provide the required documents during Foreclosure Mediation, a district court may not allow the foreclosure process to proceed.

Factual and Procedural History

In 2007, Appellant, Moises Leyva ("Leyva") received and recorded a quitclaim deed in exchange for taking over monthly mortgage payments on a residence in Las Vegas. Although Appellant did not expressly assume the mortgage note, which remained in the original mortgagor's name, he did make the mortgage payments to Wells Fargo for 25 months. After defaulting on the mortgage, Leyva chose to pursue mediation through the Foreclosure Mediation Program. Both Leyva and the original mortgagor signed the proper forms electing to mediate.

On September 23, 2009 the parties met to mediate. Wells Fargo did not submit copies of any assignments, and the parties failed to resolve the foreclosure. The mediator indicated that Wells Fargo failed to provide the statutorily required documents to the mediation.

Leyva filed a petition for judicial review and requested sanctions, stating Wells Fargo mediated in bad faith. Following a hearing, the district court concluded that because Wells Fargo provided all essential documents there was no showing of bad faith.

Discussion

Leyva was a proper party to the mediation

NRS 107.086(3) permits "[t]he grantor or the person who holds the title of record" to elect to mediate. Likewise, FMR 5(1) states that "any grantor or person who holds the title of record and is the owner-occupant of a residence" is eligible to participate in the Foreclosure Mediation Program." As Leyva recorded his ownership in

¹ By Marissa Pensabene.

the property in March 2007, he is clearly the title holder of record and authorized to participate in the Foreclosure Mediation Program. The mortgage note remaining in the original mortgagor's name did not preclude Appellant all foreclosure remedies. Rather, the division of title ownership and liability of the note limited the available foreclosure solution.

Wells Fargo failed to meet the mediation program's documentation requirements, compelling consideration of sanctions

“In Pasillas, we held that if a party fails to (1) provide the required documents . . . the district court is required to impose appropriate sanctions.”²

Substantial compliance with the NRS 107.086(4) and FMR(5) is not acceptable: rather strict compliance is required. The Court concluded that the use of “shall” in the statutory language mandates that parties strictly comply with requirements enumerated within the applicable rule and statute. Therefore, NRS 176.086 and the FMRs dictate strict compliance.

The deed of trust, with any assignments, identifies the person who is foreclosing

A deed of trust is an instrument that “secure[s] the performance of an obligation or the payment of any debt.”³ The Court previously held that a deed of trust “constitutes a conveyance of land as defined by NRS 111.010.”⁴ The statute of frauds requires that an assignment in land must include a deed or conveyance in writing subscribed by the party assigning.⁵ To prove that an original beneficiary properly assigned its interest in land via the deed of trust, the assignee of the original beneficiary wishing to foreclose must provide a signed writing from the original beneficiary demonstrating that transfer of interest. Here, as Wells Fargo was not the original beneficiary, but instead the assignee, Wells Fargo was required to provide a signed writing from the original beneficiary, MortgageIT, documenting the transfer of interest.

Mortgage note

A mortgage note is a negotiable instrument and thus Article 3 of the Uniform Commercial Code governs the proper method of transferring the right to payment. Therefore any negotiation of a mortgage note must be done in accordance with Article 3. “For a note in order form to be enforceable by a party other than to whom the note is originally payable, the note must be either negotiated or transferred. If a party cannot attain ‘holder’ status by showing a valid negotiation, the party may establish its right to enforce the note by showing that the note has been validly transferred.”⁶ If a transferred note is not endorsed, a party seeking to enforce the note “must account for possession of

² 127 Nev. Adv. Op. No. 40 (July 7, 2011) (citing Pasillas v. HSBC Bank USA, 127 Nev. Adv. Op. No. 39 (July 7, 2011)).

³ NEV. REV. STAT. § 107.020.

⁴ Ray v. Hawkins, 76 Nev. 164, 166, 350 P.2d 998, 999 (1960).

⁵ NEV. REV. STAT. § 111.205(1).

⁶ 127 Nev. Adv. Op. No. 40 (July 7, 2011).

the unendorsed instrument by proving the transaction through which the transferee acquired it.”⁷ However, the mere possession by the assignee the original beneficiary is not sufficient to enforce a negotiable instrument under Article 3.

A party seeking to enforce the note cannot prove its right to enforce simply through the use of a valid endorsement. Instead, the party must prove by some other means that it was given possession of the note for the purpose of enforcing it. Here, Wells Fargo must have possession of the properly endorsed note from MortgageIT. Unless Wells Fargo can prove that the note was properly endorsed or validly transferred, the mortgage note is payable to MortgageIT, thereby making MortgageIT the party entitled to enforce the note. Wells Fargo does not have demonstrated authority to mediate the note.

Conclusion

A homeowner, who is not the original or named mortgagor and did not assume the mortgage note in the purchase of a residence, may elect to mediate and participate in a Foreclosure Mediation program as the title holder of record. Pursuant to NRS 107.086 and FMRs, to demonstrate that there is an enforceable interest in property subject to mediation, the lender party must produce all required documents. To prove that an original beneficiary properly assigned its interest in land via the deed of trust, the assignee of the original beneficiary wishing to foreclose must provide a signed writing from the original beneficiary demonstrating that transfer of interest. Further, sanctions are warranted for violations of the requirements of § 107.086 under Pasillas v. HSBC Bank USA.⁸

⁷ 127 Nev. Adv. Op. No. 40 (July 7, 2011) (citing U.C.C. § 3-203 cmt. 2 (explaining the effect of § 3-203(b), codified in Nevada as NRS 104.3203(2)).

⁸ 127 Nev. Adv. Op. No. 39 (July 7, 2011).