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Summary of Pasillas v. HSBC Bank USA, et. al., 127 Nev. Adv. Op. No. 39

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CIVIL PROCEDURE & ADR—FORECLOSURE MEDIATION

Summary

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

Disposition/Outcome

The Supreme Court of Nevada reversed the district court's order and remanded the matter to determine sanctions because the foreclosing party failed to bring the required documents to the mediation and to have someone present with the authority to modify the loan, which were sanctionable offenses under the Foreclosure Mediation Program.

Factual and Procedural History

Emiliano and Yvette Pasillas (“the Pasillases”) purchased a home in 2006 with a loan from American Brokers Conduit. The note and deed of trust were assigned to HSBC Bank USA (“HSBC”). Near the end of 2009, Power Default Services became a substitute trustee, removing HSBC from that role. The servicer for the Pasillases’ loan was American Home Mortgage Servicing, Inc. (AHMSI). When the Pasillases defaulted on their mortgage and received a notice of election to sell, they elected to mediate pursuant to the Foreclosure Mediation Program provided for in NRS 107.086. Two mediations occurred, but neither resulted in a resolution. While a representative of AHMSI was available by phone at both mediations, it was unclear whether HSBC was present or represented by counsel.

After both mediations, the mediator decided not to recommend that the administrator issue a certificate authorizing further foreclosure proceedings because HSBC “failed to participate in [the] mediation in good faith as evidenced by its failure to produce required documents and information initially, or subsequently to cure its failures.”² The Pasillases subsequently filed a petition for judicial review in district court, requesting sanctions against HSBC, AHMSI, and Power Default Services (collectively “Respondents”), in the form of a modification of their mortgage and attorney fees.

The district court conducted a short hearing to address the parties’ failure to come to an agreement, but it did not address whether Respondents failed to provide the required documents at the mediation or whether Respondents lacked the requisite authority at the mediation to modify the loan. The court found that Respondents met the burden to show cause why sanctions

¹ By Meredith Still

² In an addendum to the mediator’s statement, the mediator indicated that two pages of the mortgage note were missing, that the assignment purportedly assigning the mortgage note and deed of trust to HSBC was incomplete, that instead of an appraisal HSBC provided a broker’s price opinion, and that respondents stated they would need additional investor approval before agreeing to a loan modification.

should not be imposed, and directed the Foreclosure Mediation Program administrator to issue a certification authorizing the foreclosure to proceed. The Pasillases appealed.

Discussion

The Foreclosure Mediation Program

The Nevada Legislature enacted the Foreclosure Mediation Program in 2009. The Foreclosure Mediation Program requires that a trustee seeking to foreclose on an owner-occupied residence provide an election-of-mediation form along with the notice of default and election to sell.³ If the homeowner elects to mediate, both the homeowner and the deed of trust beneficiary must attend, mediate in good faith, and provide certain enumerated documents. Moreover, if the beneficiary attends through a representative, the representative must have the authority to modify the loan or have “access at all times...to a person with such authority.”⁴

Upon the conclusion of the mediation, the mediator must file a mediator’s statement with the program administrator, indicating whether all parties complied with the statute and rules governing the program.⁵ If the beneficiary does not meet the requirements, the mediator is required to “submit...a petition and recommendation concerning the imposition of sanctions.”⁶ The homeowner may then file a petition for judicial review with the district court, and the court “may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate.”⁷ However, if the district court finds that the parties met the four program requirements, it will direct the program administrator to certify the mediation, allowing the foreclosure process to proceed.⁸

Respondents Failed to Meet the Mediation Program’s Statutory Requirements

The Pasillases argued that Respondents failed to meet the program’s document and loan modification authority requirements.⁹ The Supreme Court noted that NRS 107.086 and the FMRs use the word “shall” or “must” when listing the actions required of parties to foreclosure mediation. Use of the word “shall” in both the statutory language and the FMRs indicates a duty on the part of the beneficiary. Furthermore, the Court found that “shall” is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature. Therefore, NRS 107.086(4) and (5) and FMR 5(7)(a) clearly and unambiguously mandate that the beneficiary of the deed of trust or its representative: (1) attend the mediation, (2) mediate in good faith, (3) provide the required documents, and (4) have a person present with authority to modify the loan or access to such a person.

Standard of Review

The Court will review a district court’s decision regarding the imposition of sanctions for a party’s participation in the Foreclosure Mediation Program under an abuse of discretion

³ NEV. REV. STAT. 107.086(2)(a)(3) (2009).

⁴ NEV. REV. STAT. 107.086(4)-(5); F.M.R. 5(7)(a) (2009).

⁵ F.M.R. 12(2).

⁶ NEV. REV. STAT. 107.086(5).

⁷ See F.M.R. 5(7)(f).

⁸ See NEV. REV. STAT. 107.086(2)(c)(2)-(3), (6)-(7).

⁹ The Pasillases argued that the Respondents failed to bring a complete mortgage note, to provide assignments of the note and deed of trust, and to have someone present at the mediation with the authority to modify the loan.

standard. When determining whether the district court abused its discretion in such cases, the Court will not focus on whether the court committed manifest error. Rather, it will focus on whether the district court made any errors of law.

Failure to Satisfy Statutory Mandates is a Sanctionable Offense

The Court interpreted NRS 107.086(5) to mean that the violation of any one of the four statutory mandates prohibits the program administrator from certifying the foreclosure process to proceed and may also be sanctionable. In this case, the Court noted that the district court essentially ignored the fact that Respondents failed to bring “to the mediation each document required” and did “not have the authority or access to a person with the authority” to modify the loan. The Court determined that these failures constituted sanctionable offenses and remanded the case for the district court to consider the appropriate sanctions.

When determining the sanctions to be imposed in a case brought pursuant to NRS 107.086 and the FMRs, the Court directed district courts to consider the following non-exhaustive list of factors: (1) whether the violations were intentional, (2) the amount of prejudice to the non-violating party, and (3) the violating party’s willingness to mitigate any harm by continuing meaningful negotiation.

Conclusion

Because the Respondent’s failure to bring the required documents to the mediation and to have someone present at the mediation with the authority to modify the loan were sanctionable offenses under the Foreclosure Mediation Program, the Court held that the district court abused its discretion when it denied the Pasillases’ petition for judicial review and ordered the program administrator to enter a letter of certification authorizing the foreclosure process to proceed. Therefore, the Court reversed the district court’s order and remanded the matter with instructions to determine the appropriate sanctions for respondents’ violations of the statutory and rule-based requirements.