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In re Montierth, 131 Nev. Adv. Op. 55

Walter Fick
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In re Montierth, 131 Nev. Adv. Op. 55 (Jul. 30, 2015)[1]

BANKRUPTCY: FORECLOSURE & MINISTERIAL ACTS

Summary

The Court held that the separation of a promissory note, held by a principal, and the deed of trust, held by an agent of the principal, does not render either instrument "void," or require the reunification of the note and the deed of trust in order to foreclose. The Court further held that, under Nevada law and in the case of a contractual principal-agent relationship, the recordation of an assignment of a deed of trust is a "ministerial act."

Background

The United States Bankruptcy Court for the District of Nevada certified two questions of law concerning the separation of a promissory note and a deed of trust at the time of foreclosure. Specifically the bankruptcy court asked: "what occurs when the promissory note and the deed of trust remain split at the time of foreclosure" and "whether recordation of an assignment of a deed of trust is a purely ministerial act that would not violate the automatic stay."[2] The Nevada Supreme Court reframed both questions, concluding that reunification of the note and deed of trust is not necessary because of a principal-agent relationship, and that the contractual principal-agent relationship makes recordation of an assignment a ministerial act under Nevada law.

The promissory note, in this case, was originally signed in favor of 1st National Lending Services and subsequently transferred to Deutsche Bank. It was secured by a deed of trust on the property. Mortgage Electronic Registration Systems, Inc., (MERS) was the beneficiary of the deed of trust, "solely as nominee for Lender and Lender's successors and assigns."[3] The deed of trust further provided that MERS would "take any action required of Lender.[4]"

After Deutsche Bank filed a notice of default, the Montierths filed for bankruptcy. At the time, the note was still held by Deutsche Bank and MERS was the beneficiary of the deed of trust. Later, during the bankruptcy, MERS assigned interest in the deed of trust to Deutsche Bank, but before the assignment was recorded, Deutsche Bank filed a proof of claim, claiming that it was a secured creditor. When Deutsche Bank filed a motion for relief from the automatic stay in order to foreclose on the property, the Montierths objected on the grounds that Deutsche Bank was not a secured creditor because the note and deed of trust were separated at the time the bankruptcy petition was filed, and the automatic stay prevented their reunification.

Discussion

The Montierths argued that, under the Restatement (Third) of Property, a promissory note is unsecured until it is reunited with the deed of trust. The Nevada Supreme Court had previously said in *Edelstein v. Bank of New York Mellon*, however, that "[s]eparation of the note and security deed creates a question of what entity would have authority to foreclose, but does

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[1] By Walter Fick.
[2] *In re Montierth* at 2 (internal quotations and editing marks omitted).
[3] *Id.* at 3.
[4] *Id.*

not render either instrument void."[5] Further, according to the Restatement (Third) of Property, although the promissory note and the mortgage generally need to be held together to foreclose, there are several exceptions. Specifically, foreclosure is not impossible where there is a principal-agent relationship between the promissory note holder and the mortgage holder.[6] Adopting this standard, the Court found that the deed of trust "designated MERS as nominee, or agent, for the note holder," and because the security interest was attached and perfected before the bankruptcy, the "separation of the note from the deed of trust did not alter the interests of the parties."[7] Thus, because of the principal-agent relationship with MERS, Deutsche Bank was a secured creditor at the time of the bankruptcy filing, and it was not necessary to reunify the promissory note and the deed of trust in order to foreclose.

The Court also addressed whether "the state law effect of the recordation of an assignment of a beneficial interest in a deed of trust by an agent of the note holder [is] a ministerial act under Nevada law."[8] The "ministerial act" exception to the automatic stay was put forth by the United States Court of Appeals for the Ninth Circuit in *In re Pettit*.[9] It applies to "automatic occurrences that entail no deliberation, discretion or judicial involvement."[10] In Nevada, the Court has previously "defined a discretionary act as that which requires the exercise of personal deliberation, decision and judgment. A ministerial act is an act performed by an individual in a prescribed legal manner in accordance with the law, without regard to, or the exercise of, the judgment of the individual."[11]

Here, the Court extended recognition of ministerial acts, from those based on statutory requirements, such as a court clerk's duties, to contractual obligations to record an assignment based on a principal-agent relationship. Per the terms of the deed of trust, MERS had no legal choice other than to comply with Deutsche Bank's demand for an assignment, and was bound by obedience to Deutsche Bank's instructions, thus MERS' recordation of its assignment was a ministerial act.

Conclusion

Reunification of a promissory note and the deed of trust is not necessary to foreclose when the beneficiary of the deed of trust is an agent for the principal note holder. Further, in this case, the recordation of an assignment was a ministerial act, because it was performed by an agent fulfilling its contractual, nondiscretionary, obligations.

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[5] 128 Nev. Adv. Op. 48, 286 P.3d 249, 259 (2012) (internal quotations omitted).
[6] Restatement (Third) of Prop.: Mortgages § 5.4 cmts. C, e (1997).
[7] *In re Montierth* at 7.
[8] *Id.* at 9.
[9] 217 F.3d 1072, 1080 (9th Cir. 2000).
[10] *Id.*
[11] Pittman v. Lower Court Counseling, 110 Nev. 359, 364, 871 P.2d 953, 956 (1994) (internal quotations and editing marks omitted).