IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PHH MORTGAGE CORPORATION,

Plaintiff-Appellee,

v.

COA Case No. 34,437
Santa Fe County
D-101-CV-2011-03524

LEIGH G. WEBB, AKA L. GEOFFREY WEBB, PATRICIA GAY WEBB AND CHARLES SCHWAB BANK, N.A.,

Defendants-Appellants.

APPELLANTS' REPLY BRIEF

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Defendants-Appellants Leigh G. Webb and Patricia Gay Webb (hereinafter "the Borrowers") submit this reply brief in accordance with Rule 12-213 NMRA.

I. *ROMERO* CLARIFIED EXISTING REQUIREMENTS TO ESTABLISH STANDING AND IS NOT NEW CASE LAW.

Appellee's Answer attempts to characterize *Romero* as new law and thus argues it should not be given retroactive effect. Answer at 31-38. This argument is without merit as it is widely accepted that *Romero* is not new case law but instead serves only to clarify the jurisdictional prerequisite of standing that must be established at the time a complaint is filed in a foreclosure action. No new rules have been adopted regarding standing and numerous opinions have been rendered since *Romero* was decided in which district courts have applied *Romero* to standing challenges in existing cases. *See e.g. Bank of America, N.A. v. Quintana*, 33,611 (N.M. 2014) 2014-NMSC¶ 15 (No. 33,611, February 27, 2014); *Deutsche Bank Nat. Trust Co. v. Beneficial New Mexico Inc.*, 335 P.3d 217, 219 (N.M. App. 2014) *cert. granted sub nom. Deutsche Bank v. Johnston*, 334 P.3d 425 (N.M. 2014); *Bank of New York Mellon v. Lopes*, 2014-NMCA-097, ¶ 7, 336 P.3d 443, 444-45.

Moreover, *Phoenix Funding, LLC v. Aurora Loan Services, LLC*, 2015 WL 5020997(N.M. Ct. App. Aug. 24, 2015) establishes that this argument is without merit. There the foreclosing bank acquired a default judgment against the borrowers in 2009, prior to the deciding of *Romero*. *Id.* at *1. *Phoenix Funding*

ultimately held that the original foreclosure judgment was void for lack of jurisdiction based on the bank's lack of standing. *Id.* at *13.

Finally, Appellee's arguments that it would incur a hardship by having to re-litigate its claim allegedly filed in compliance with law at the time of its initiation is also without merit. Appellee should be made to prove its standing in accordance with the clarifications made in *Romero*. If Appellee suffers a hardship it is hardly the fault of the Borrowers in that Appellee should have sufficiently proved its standing in its Complaint for Foreclosure or at any time after before the district court during the motion to set aside hearings.

II. *ROMERO* IS APPLICABLE TO THIS CASE.

Appellee's Answer attempts to argue that *Romero* is inapplicable in this case because *Romero* did not involve a default judgment or a motion to set aside. Answer at pp. 24-28. In support of this argument, Appellee relies primarily on two unpublished and non-precedential opinions, *BOKF, N.A. v. Lopez*, 2014 WL 7236489, at *1 (N.M. Ct. App. Nov. 3, 2014) *cert. denied sub nom. Bokf v. Lopez*, 344 P.3d 987 (N.M. 2014) and *Bank of New York Mellon v. Singh*, 2015 WL 667847, at *1 (N.M. Ct. App. Jan. 21, 2015) *cert. denied sub nom. Bank Of New York v. Singh*, 2015-NMCERT-003, 346 P.3d 1162. Answer at 26-28. However, Appellee's Answer all but ignores the Borrowers' argument in the BIC that *Phoenix Funding*, which is published, is precedential, and was decided after *Lopez*

and *Singh*, allowed a collateral attack of a foreclosure default judgment and found, under similar facts to the instant matter, that where a third party lender produced an unindorsed copy of note still made payable to original lender at the foreclosure proceeding leading to default judgment as well as a corporate assignment of mortgage assigning the mortgage to the third party lender, neither the unindorsed note, nor the assignment of mortgage was sufficient to establish the third party lender as the holder of the note. As such, Appellee's argument is without merit and the district Court erred in finding *Romero* was inapplicable in this case as Appellee failed to establish it had standing to foreclose at the time it filed its Complaint.

III. APPELLEE'S ANSWER FAILS TO ADDRESS APPELLANTS' MAIN ARGUMENT THAT STANDING IS JURISDICTIONAL AND MAY BE RAISED AT ANY TIME THUS THE MOTION TO SET ASIDE WAS TIMELY.

Appellee's Answer ignores the Borrowers' argument in the BIC that any delay in the filing of the Motion was reasonable under the circumstances of the case. Answer at pp. 9-10. As stated in the BIC, the Borrowers first brought their motion to set aside in their July 2, 2013, *pro se* pleading entitled "Request for Hearing and Case Review" which was only a little over one (1) month after the default judgment was entered. Also, the Borrowers filed their motion to set aside, the denial of which is the subject of this appeal on August 8, 2014, a little over one (1) year after the default judgment was entered and less than one (1) month after

the order approving sale was entered. Such timeframes could hardly be considered unreasonable under the circumstances of the case.

More importantly, as stated in their BIC (and ignored by Appellants' Answer) the Borrowers contend raised the issue of standing in the District Court as the main argument of their motion to set aside. [RP 288-298, TR 10/17/14, TR-1—TR-30] and standing is a jurisdictional prerequisite and "the lack of standing is potential jurisdictional defect which may not be waived and may be raised at any stage of the proceedings, even *sua sponte* by the appellate court." *Romero*, 2014-NMSC-007, ¶ 15 (internal citation and quotation omitted). As held in *Phoenix Funding*, the lack of standing to bring a foreclosure action against borrowers deprives a district court of subject matter jurisdiction, thus any judgment entered is void. Appellants won't reargue its BIC here as to how the Appellee failed to establish standing before the District Court but will instead reiterate that the lack of standing renders the District Court's default judgment against the Borrowers void and it thus erred in denying the motion to set aside.

IV. APPELLEE'S ANSWER FAILS TO ADDRESS APPELLANTS' ARGUMENT THAT THE DISTRICT COURT'S FINDING THAT THE BORROWERS HAD NOT PLED EXCEPTIONAL CIRCUMSTANCES WAS AN ABUSE OF DISCRETION AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE OF THE DISTRICT COURT'S FLAWED ANALYSIS OF *RODRIGUEZ*.

The crux of Appellee's Answer focuses on distinguishing the facts of the instant matter from *Rodriguez* and *Dyer* and analogizing it to the unpublished and non-precedential *Giles* which involved excusable neglect pursuant to Rule 1-060(B)(1) and not exceptional circumstances under Rule 1-060(B)(6). Answer at 10-10. However, Appellee's Answer fails to address let alone rebut Appellants' argument in their BIC the District Court's finding that the Borrowers had not pled any exceptional circumstances [TR 10/17/14, TR-12] was in error and not supported by substantial evidence, particularly where the record establishes the contrary thus such a finding that no exceptional circumstances were pled was an abuse of discretion and not supported by substantial evidence because the District Court's analysis of *Rodriguez* was flawed. As stated in their BIC, the District Court stated that *Rodriguez* found the plaintiff was playing fast and loose and the defendants were put in a position where they were going to waive or give up that Rule 1-060(B) right or that *Rodriguez* somehow differentiates between exceptional circumstances existing in situations where the plaintiff has no communication with the defendants after default was entered but somewhere such exceptional circumstances do not exist in situations where the plaintiff the Borrowers knew that default had been entered and attended copies post-judgment. [TR 10/17/14, TR-12—TR-13] The Borrowers again reiterate that nothing in *Rodriguez* could logically be interpreted to support a conclusion that exceptional circumstances

existed there because the court there found the plaintiff was playing fast and loose and the defendants were put in a position where they were going to waive or give up that Rule 1-060(B) and that *Rodriguez* instead stands for the proposition that exceptional circumstances may exist in situations where the plaintiff, who has communication with the defendant after the complaint is filed and has knowledge of the defendant's whereabouts at the time it seeks a default, moves for default without providing notice to the defendant. In fact, *Rodriguez* specifically states that "the failure of the party seeking to sustain a default judgment to give notice to opponents whose whereabouts were known may be a factor supporting the district court's decision to set aside that judgment" based on exceptional circumstances. *Id.* at ¶ 22. Here, the Borrowers argued that such facts existed in this matter. [RP 73-79, 248, 250-261, 288, TR 10/17/14, TR- 23].

Finally, *Giles* is inapplicable in this case as it was decided prior to *Romero* and also prior to *Phoenix Funding*, which as discussed above, held that a default judgment is void if the district court lacked jurisdiction to render such judgment based on a lack of standing. Also, *Giles* was not a case that turned on the issue of standing but instead discussed whether excusable neglect was present where the borrower delayed in responding to a complaint due to settlement negotiations. *Giles*, 2012 WL 3193592, at *5. Here, Borrowers' are not appealing the District Court's finding that exceptional circumstances did not exist and not whether

excusable neglect justified setting aside the judgment, rather they are hanging their hat on the fact that the judgment is void. Thus, *Giles* is nothing more than a strawman and Appellee's reliance on it is misplaced and without merit.

V. APPELLEE'S ANSWER FAILS TO ADDRESS APPELLANTS' ARGUMENT THAT MERITORIOUS DEFENSES WERE PLEAD.

As stated in the BIC, the finding of a meritorious defense is addressed to the sound discretion of the trial court and in making that determination the court should be liberal. The object of establishing a meritorious defense is to ascertain whether there is some possibility that the outcome of the suit after trial will be different from the result achieved by the setting aside judgment. The Borrowers asserted meritorious defenses in their motion to set aside as the averred facts in the motion supported that the Bank would liable to the Borrowers for violations of common law as well as federal and state consumer laws. [RP 288-298] Thus, any amounts alleged owed in the default judgment would be off-set by these violations. Therefore, if the Borrowers were to prove the averred facts to support their defenses and potential counterclaims, there is clearly a possibility that the outcome of this suit after trial would be different from the result achieved by the default, which is a judgment against them. Finally, the District Court did not address whether the Borrowers established meritorious defenses. [TR 10/17/14, TR-1—TR-30, RP 342-344]

VI. Conclusion

One maxim of New Mexico law is that default judgments are not favored and that a case should be decided upon its merits. *See Adams v. Para-Chem Southern, Inc.,* 1998-NMCA-161, ¶ 20, 126 N.M. 189, 967 P.2d 864. The record does not establish substantial evidence to support the District Court's finding that the Appellee proved it had standing. The District Court abused its discretion in relying upon inadmissible affidavit testimony and erroneous conclusions of fact that *any* admissions as to standing were made. The District Court also abused its discretion based on its erroneous conclusions of law that admissions could be used by a plaintiff to establish standing against an entirely different party. Finally, the District Court abused its discretion in relying upon erroneous conclusions of fact that the Borrowers did not plead the existence of exceptional circumstance to warrant setting aside the default judgment entered against them pursuant to Rule 1-060(B)(6) NMRA and it abused its discretion by relying upon erroneous conclusions of law that exceptional circumstances did not exist and that the motion to set aside was untimely. Thus, this Court should reverse the District Court's denial of the Borrowers' motion to set aside default judgment and order approving sale because said denial was based on an abuse of discretion and its findings were not supported by substantial evidence.

Respectfully Submitted,

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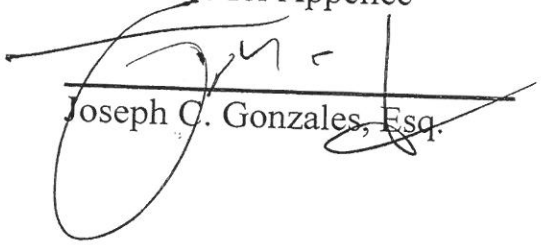

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-213(F) NMRA, I hereby certify that the foregoing Brief complies with Rule 12-305 NMRA and also the applicable type-volume limitation set forth in Rule 12-213(F)(3) in that the body of the Brief uses a proportionally-spaced type style or typeface, specifically, Times New Roman and does not exceed eleven thousand (11,000) words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Office Word 2013.

Joseph C. Gonzales, Esq.

AFFIDAVIT OF SERVICE FOR BRIEF IN CHIEF IN A CIVIL APPEAL

Joseph C. Gonzales, Esq., being duly sworn upon his oath or affirmation, hereby declares under penalty of perjury that he mailed the foregoing brief in chief to the following people or entities at the addresses indicated on this day of this 11th day of January, 2016.