ORIGINAL

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
MAR 01 2017

SAIPAN INVESTMENT GROUP, LLC,
a Northern Mariana Islands limited
liability company,

Plaintiff-Appellee,

v.

No. 35,573
(D-202-CV-2015-03781)

GULFSTREAM LOMAS, LTD.,
a Florida limited partnership,

Defendant-Appellant.

Appeal from the Second Judicial District Court
Bernalillo County
The Honorable Valerie A. Huling

APPELLANT'S BRIEF IN CHIEF

ORAL ARGUMENT IS REQUESTED

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This Brief in Chief is filed on behalf of Defendant/Appellant Gulfstream Lomas, Ltd.

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case.

Wells Fargo Bank National Association as Trustee for the Registered Holders of Morgan Stanley Capital I Trust, Commercial Mortgage Passthrough Certificates, Series 2005-HQ5 ("**Wells Fargo**") brought an action for unpaid debt and foreclosure against Gulfstream Lomas, Ltd. ("**Gulfstream**") concerning a commercial building located at 111 Lomas, Albuquerque, New Mexico.

B. Course of Proceedings.

Wells Fargo Bank did not proceed in its foreclosure action and instead sold the note at an auction. Thereafter, Saipan Investment Group, LLC ("**Saipan**") filed (1) a Motion for Order Substituting Saipan Investment, Group, LLC as Plaintiff, on December 23, 2015 [**RP 32**]; and (2) a Verified Application for Immediate Appointment of Receiver and Preliminary Injunction in Aid of Receiver, on January 22, 2016. [**RP 58**].

The district court ruled that it had no choice but to substitute Saipan as Plaintiff because it is the holder of the note. [**2-18-16 Tr. 43:22-25; *Id.* at 44:16-17**]. The court further ruled that regardless of whether there is a substitution of parties, there

is a right to appointment of a receiver. [***Id.* at 44:19-22**]. The court acknowledged that appointment of a receiver is a rarity, but, in the court's view, there was no choice but to appoint one. [***Id.* at 45:3-6; *see also id.* at 45:14**] ("I just don't think I have a choice.").

On March 23, 2016, the court entered an order substituting Saipan as Plaintiff. [**RP 175**]. The court amended the case caption to reflect the substitution of parties. [**RP 175-176**]. The court stated that Wells Fargo "is no longer a party to this action" and its counsel is deemed to have withdrawn. [**RP 176**]. The court stated that the provisions of Rule 1-089 NMRA – dealing with withdrawal and substitution of attorneys – are met. [**RP 176**].

The following day, the court entered an order appointing receiver. [**RP 178**]. The court found that Saipan is entitled to the appointment of a receiver under NMSA 1978, § 44-8-4(B) (1995). The order outlines the receiver's extensive powers and duties, including taking possession of the property, collecting rents, opening bank accounts, handling all aspects of management, and borrowing money to pay receivership expenses. [**RP 180-182**]. The receiver is also authorized to hire attorneys, enter into contracts, and retain real estate brokers to market the property for sale. [**RP 183, 186**]. Gulfstream was required to surrender immediately, among other things, all records, keys, service contracts, work orders, floorplans, surveys,

leases, insurance policies, tax bills, and funds related to the operation of the property. **[RP 183-185 ¶ 6(a) through (t)]**. Gulfstream was ordered to vacate the premises immediately. **[RP 185 ¶ 9]**.

Defendant timely filed a notice of appeal on April 18, 2016, well within thirty (30) days of entry of the order permitting substitution on March 23, 2016, and of the order appointing receiver on March 24, 2016. *See* Rule 12-201(A)(2) NMRA (notice of appeal must be filed within thirty (30) days after order appealed from is filed in district court clerk's office); NMSA 1978, § 39-3-2 (1979) (30 days to file appeal in civil action).

C. Summary of the Facts.

Gulfstream is a Florida limited partnership with its principal place of business in Albuquerque, New Mexico. Gulfstream executed and delivered to Morgan Stanley Mortgage Capital, Inc. a promissory note in the original principal amount of $8.6 million plus interest. As security for payment of the note, Gulfstream executed a Leasehold Deed of Trust and Security Agreement and delivered the same to LandAmerica Albuquerque Title. The Deed of Trust was duly recorded in the land records of the Bernalillo County Clerk. Gulfstream also executed and delivered an Assignment of Leases and Rents, which was also duly recorded. Gulfstream further

executed and delivered to Morgan Stanley a Ground Lease Reserve and Security Agreement. [**RP 2-4, ¶¶ 6-10; RP 25, ¶¶ 6-10**].

Gulfstream denied that Wells Fargo, acting through its alleged Special Servicer, CWCapital Asset Management, LLC ("**CWCAM**") had the right to enforce the provisions of the promissory note, the Deed of Trust, the Assignment of Leases and Rents, or the Ground Lease Reserve Agreement. **[RP 25, ¶¶ 6-8; 10]**. Gulfstream admitted it did not pay the note on the maturity date but otherwise denied that it was in default of the loan documents. [**RP 26-28 ¶¶ 16; 18; 23; 32; 37**].

Facts About Substitution of Plaintiff

Wells Fargo through CWCAM, had filed its complaint against Gulfstream on May 5, 2015. On December 23, 2015, Saipan filed a motion to be substituted as Plaintiff. **[RP 32]**. Saipan claimed that Wells Fargo had assigned to it all of its right, title, and interest in the loan documents. [**RP 32 ¶ 2**]. Saipan alleged it is now the holder of the note and the loan documents. [**RP 33 ¶ 3**]. In its bare-bones motion without any legal argument, Saipan claimed it is the proper party to pursue collection and foreclosure. [**RP 33 ¶ 4**]. The Allonge to Promissory Note is not signed by Wells Fargo, but rather by CWCAM. [**RP 46**].

Gulfstream responded that there is no proof that Wells Fargo actually assigned any interest to Saipan. [**RP 55 ¶ 3**]. Gulfstream also argued that it intended to file a

counterclaim against Wells Fargo.[**RP 55 ¶ 4**]. Gulfstream asked the court to deny the request to substitute Saipan as Plaintiff. [**RP 56 ¶ 5**].

In its reply, Saipan argued that Wells Fargo assigned the loan documents, and that Saipan is now the real party in interest. [**RP 83**]. Saipan argued that CWCAM executed the assignment documents. [**RP 84**]. Saipan claimed that CWCAM had authority to transfer the loan documents by virtue of a power of attorney executed by the Trustee on January 28, 2015. [**RP 84**]. Saipan argued that if it was not allowed to pursue the case in its own name, it would lead to confusion. [**RP 85**]. Finally, Saipan argued that Gulfstream cannot bring a counterclaim against Wells Fargo in the pending action. [**RP 85**].

At the hearing on the motion, Gulfstream reminded the district court that at that point in time, there was no proof that any party had to be substituted, in particular because there was evidence that the note and the security instruments were not properly assigned to Saipan. [**2-18-16 Tr. 24:24 to 25:5**]. Gulfstream pointed out that there was pending federal litigation[1] that will ultimately decide who is properly entitled to the note and the security instruments. [***Id.* at 28:14-20**]. Gulfstream argued

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[1]That Federal Litigation styled *Kingfisher, LLC v. Wells Fargo Bank, N.A.*, was remanded to the state court on July 26, 2016, and is pending as case no. D-202-CV-2015-08572.

that if Saipan is substituted in as a party, that is basically a premature acknowledgment that Saipan is a proper party, effectively circumventing the fact that the federal court has not yet decided the issue. [***Id.* at 29:3-4**].

Saipan argued at the hearing that Gulfstream's attorney had misrepresented what the pending federal action was about. [**2-18-16 Tr. 30:14-17**]. The district court disagreed that Gulfstream's attorney had misrepresented the circumstances of the federal lawsuit. [***Id.* at 30:21-23**]. The judge later reiterated: "I don't really feel that anybody is misrepresenting anything to me." [***Id.* at 40:18-19**].

Facts About Appointment of Receiver

In its complaint, Wells Fargo claimed it held a security interest and had the right to have the collateral sold at a foreclosure sale. [**RP 9 ¶ 41**]. In January 2016, while the motion for substitution of plaintiff was pending, Saipan applied for the appointment of a receiver, as well as a preliminary injunction to aid the receiver in the appointment of its duties. [**RP 58**]. Saipan argued that it was entitled to appointment of a receiver under the terms of the Deed of Trust and under the New Mexico Receivership Act, Section 44-8-4(A). [**RP 60 ¶ 10; RP 61 ¶ 14**]. Saipan argued in the alternative that if it was not entitled to appointment of a receiver as a matter of right, then it sought permissive appointment of a receiver. [**RP 61 ¶ 15**].

Saipan's proposed terms of the receivership were set forth in Exhibit B to the application. **[RP 62 ¶ 19; RP 66]**.

Gulfstream opposed the appointment of a receiver. Gulfstream argued that Saipan failed to provide documentation showing that it is the holder or owner of the loan documents. **[RP 95 ¶ 1]**. Gulfstream further argued that because the motion for substitution was still pending, there was no court order or other authority for Saipan to seek appointment of a receiver. **[RP 96 ¶ 3]**.

Gulfstream argued that Saipan relied on facts that were misstatements of actual events. **[RP 96 ¶ 4]**. Gulfstream pointed out that Wells Fargo assigned nothing to Saipan. Instead, the assignment was by a "special servicer" (i.e. CWCAM), who had no authority to file a foreclosure action. **[RP 96 ¶¶ 4, 6]**. Therefore, Saipan was not the owner of the loan documents. ***[Id.]***

Gulfstream argued that the court must first determine whether the loan documents and the cause of action were validly transferred, and, in addition, whether the case should proceed in the name of Wells Fargo. **[RP 96 ¶ 5]**. Gulfstream argued that there is a substantial dispute about the alleged assignment of the security instruments and the owner of those instruments. **[RP 96 ¶ 6]**.

Under the Act, only the mortgagee or secured party may seek the appointment of a receiver, and Saipan is neither. *See* Section 44-8-4(A). **[RP 97 ¶ 7]**. Furthermore,

under the Deed of Trust, only the lender or its valid assignee is entitled to seek appointment of a receiver, and Saipan is neither. [*Id.*]. Gulfstream argued that Saipan is, therefore, not entitled to appointment of a receiver as a matter of right, either under the statute or the Deed of Trust.

Gulfstream next argued that Saipan is not entitled to permissive appointment of a receiver under Section 44-8-4(B)(2) because, other than its disputed allegations, it has not demonstrated any interest in the property, much less an ownership interest. **[RP 97 ¶ 8]**. Nor, Gulfstream argued, was Saipan entitled to permissive appointment of a receiver under Section 44-8-4(B)(3) because it is not entitled to foreclose on the property. **[RP 97 ¶ 8]**. Gulfstream pointed out that pending federal litigation (now state court litigation as provided in footnote 1) will determine who has the rightful interest in the note and related security documents. [*Id.*]

Gulfstream next argued that Saipan is not entitled to permissive appointment of a receiver under Section 44-8-4(B)(5). **[RP 98 ¶ 10]**. There is no showing of irreparable harm, and the building continues to be operational. There are no facts to support Saipan's bald assertion that it will be irreparably harmed. Finally, Gulfstream argued that under the circumstances, if the court does appoint a receiver, the court should not waive the requirement of posting a bond. **[RP 98 ¶ 11]**.

At the hearing on the motion for appointment of a receiver, Gulfstream explained the circumstances demonstrating that CWCAM actually had nothing to assign. [**2-18-16 Tr. 17:21 to 20:6**]. Accordingly, Saipan has no authority to ask for the appointment of a receiver. [***Id.* at 20:1-3**]. Gulfstream referred to Saipan as an "interloper" who is not entitled to seek appointment of a receiver but nevertheless is trying to gain control of the property. [***Id.* at 22:8-12**].

Gulfstream suggested that instead of appointing a receiver, the district court should require Gulfstream to provide cash basis accounting documents to the court, to Saipan, and to Wells Fargo, on a monthly basis, to give everyone the information that they need and to obviate the need to incur $7,000 per month in expenses on a receiver. [**2-18-16 Tr. 25:7 to 26:13**].

Facts About Gulfstream's Motion to Amend

Gulfstream had filed its answer in June 2015, and by February 2016, circumstances had changed. In particular, Wells Fargo decided to sell the note via public auction, rather than negotiating with Gulfstream. Gulfstream was given approval to bid at the auction, but it was required to form a separate entity to register for the auction and place a bid. The members of Gulfstream formed Kingfisher, LLC, a New Mexico limited liability company ("**Kingfisher**"). Kingfisher wired the $25,000 bid deposit and was prepared to bid up to $3,000,000. After receiving

Kingfisher's first bid, however, an agent of Wells Fargo informed Kingfisher that it was disqualified from further bidding. Wells Fargo sold the note for $2,400,000. [**RP 101-102; RP 109-116**]; [**02-18-16 Tr. 14-20**].

Gulfstream accordingly filed a motion to amend its answer to add affirmative defenses, as well as compulsory counterclaims against Wells Fargo pursuant to Rule 1-013. Gulfstream sought to assert claims against Wells Fargo for prima facie tort, breach of contract, breach of implied covenant of good faith and fair dealing, equitable estoppel, promissory estoppel, fraud/intentional misrepresentation, and constructive trust. Gulfstream argued that leave to amend pleadings is favored and should be allowed when justice so requires. [**RP 102 ¶ 9**].

Wells Fargo opposed the motion, arguing that Kingfisher, not Gulfstream, is the entity that has a claim against it. [**RP 124, 130**]. Wells Fargo asserted that there was already pending federal litigation by Kingfisher against Wells Fargo for substantially similar allegations, so under the doctrine of "priority jurisdiction," the counterclaims are barred. [**RP 127-128; 131-132**]. Wells Fargo further argued that since it was no longer a Plaintiff, the claims against it would have to be third-party claims, as opposed to counterclaims. [**RP 129**]. On the merits, Wells Fargo also argued that the seller had the right to reject any bid for any reason. [**RP 126-127; 131**].

In reply, Gulfstream argued that Wells Fargo's position on the merits of the counterclaims and the affirmative defenses is irrelevant when a court is determining whether to grant leave to amend a pleading. [**RP 170-172**]. Gulfstream also argued that the court had not yet determined that Wells Fargo would be dismissed from the case. [**RP 172**]. Gulfstream further argued that the doctrine of "priority jurisdiction" supports amendment of the pleadings because Wells Fargo filed the first action. [**RP 173**].

Saipan also opposed Gulfstream's motion for leave to amend the answer. Saipan argued that leave to amend should not be granted because the amendment would be futile. [**RP 167**]. In its view, amendment would be futile because none of the proposed counterclaims are against Saipan. [***Id.***] Saipan also argued that the subject of the counterclaims is different than the subject of the pending foreclosure action. [**RP 168**].

In reply, Gulfstream argued that amendment of the answer is proper because the facts and circumstances of Wells Fargo's transfer of the loan documents to Saipan occurred after the original answer was filed. [**RP 189**]. Gulfstream further argued that amendment would not be futile because Saipan would be a necessary party to the counterclaims based on having obtained the instruments from Wells Fargo. [**RP 190**].

In other words, Saipan's interest in the note and the leasehold deed of trust is subject to termination. [*Id.*].

The district court set a hearing on Gulfstream's motion for leave to amend its answer. The hearing was set for May 11, 2016; however, the court vacated the hearing. The following day, the district court entered an order permitting Gulfstream to amend its answer to add affirmative defenses. **[RP 236]**. However, the court believed that due to the pending appeal, it lacked jurisdiction to rule on Gulfstream's request to add counterclaims against Wells Fargo. [**RP 237**]. Paradoxically, the court had already ruled that Wells Fargo is no longer a party to the case. [**RP 176**].

II. ARGUMENT

Issue No. 1: The Order Permitting Substitution of Saipan Investment Group, LLC, as Plaintiff, and the Order Appointing Receiver are Final Orders.

The general rule in New Mexico for determining the finality of an order or judgment is that an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible. *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 14, 113 N.M. 231. In determining whether a judgment is final, courts are to look at the substance and effect of the order rather than to its form. *Kelly Inn*; *State v. Ahasteen*,

1998-NMCA-158, ¶ 10, 126 N.M. 238. That is, "the term 'finality' is to be given a practical, rather than a technical, construction." *Kelly Inn*, 1992-NMSC-005, ¶ 15.

Additionally, as provided in *Kelly Inn*, 1992-NMSC-005, ¶ 21, a judgment that declares the rights and liabilities of the parties to an underlying controversy is a final judgment, notwithstanding there remain a question to be determined if that question will not alter the judgment or moot or revise decisions embodied therein. See also *San Juan 1990-A v. El Paso Production Co.*, 2002-NMCA-041, ¶¶ 16-17, 132 N.M. 73, citing *Kelly Inn*, and stating at ¶ 17 that it ". . . is the practical effect of the orders in question . . . that determines whether an order is final for purposes of appeal." As stated in *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 12, 139 N.M. 625, Rule 1-054(B)(2) NMRA provides that in cases involving multiple parties, a judgment determining all issues as to one party is final unless the Court otherwise provides.

A. <u>Finality of Order Permitting Substitution.</u>

There does not appear to be a case in New Mexico addressing whether an order permitting substitution of parties is a final appealable order. In other jurisdictions, it appears that ordinarily, an order permitting substitution of parties is held to be a non-final order. See, e.g., *Popescu v. J.P. Morgan Chase Bank, NA*, 162 So.3d 10, 11 (Fla. 4th Dist. App. 2014) (dismissing appeal from order granting substitution of parties);

see also *Randall v. Beber*, 225 P.2d 291, 292 (Cal. App. 1st Dist. 1950) (noting that order substituting parties is not appealable).

However, where an order permitting substitution of parties finally disposes of the cause as to one or more parties, it becomes appealable. See, e.g., *Bruun v. Katz Drug Co.*, 211 S.W.2d 918, 920 (Mo. 1948); see also *Agin-Feeley Services, Inc. v. Indus. Commn.*, 389 S.W.2d 416 (Mo. App. 1965) (order substituting parties not appealable "unless such order has the effect of discharging some of the parties to the litigation") and *Ingram v. Superior Court,* 98 Cal.App.3d 483, 489 (1979)(order denying substitution of parties is appealable as a final judgment when order has the effect of eliminating issues between a plaintiff and a defendant so that nothing is left to be determined between those parties, and distinguishing *Randall v. Beber* above).

The district court ordered that "Wells Fargo Bank, N.A. is no longer a party to this action," and it ordered that the case caption be amended accordingly. [**RP 176**]. Even before the district court ordered substitution, Wells Fargo referred to itself as a "former plaintiff and current non-party" when it filed a response to Gulfstream's motion to amend. [**RP 124**].

Likewise, at the presentment hearing, Wells Fargo asserted that it is no longer a party Plaintiff and holds no part of Saipan's claim against Gulfstream. [**3-21-16 Tr. 5:3-6; *Id.* at 5:12-14**]. Under the doctrine of practical finality, the Court has appellate

jurisdiction to address the order substituting Saipan as the Plaintiff because the order entirely removed Wells Fargo from the case.

B. Finality of Order Appointing Receiver

While the Receivership Act does not expressly address the finality of an order appointing a receiver, the Court has noted that the statute implies that such orders are final and appealable. See *Dydek v. Dydek*, 2012-NMCA-088, ¶ 50, 288 P.3d 872. According to the Act, "[i]f an appeal is taken from a district court from a judgment or an order appointing a receiver, perfecting of an appeal from such judgment or order shall not stay enforcement of the judgment or order . . . ." NMSA 1978, § 44-8-10 (1995). The very fact that the Act states "if an appeal is taken" demonstrates the New Mexico Legislature's intent to allow an appeal from an order appointing a receiver.

Prior to *Dydek*, the Court held that when a district court exercised its authority to appoint a receiver to liquidate a business, the order appointing the receiver was final and appealable. See *In re Estate of Harrington*, 2000-NMCA-058, ¶ 28, 129 N.M. 266; but see *Eagle Mining & Improvement Co. v. Lund*, 1910-NMSC-064, ¶¶ 11-12, 15 N.M. 696 (decree appointing receiver to conserve assets of insolvent corporation is not a final order). In fact, *Harrington,* 2000-NMCA-058, ¶ 29 provides that a party must file its notice of appeal within thirty days after the order appointing

the receiver is entered to in order to perfect the right to appeal under Rule 12-201(A)(2).

The Court should not follow *Eagle Mining* for several reasons. First of all, there was no such thing as the Receivership Act back in 1910 when the Territorial Supreme Court decided *Eagle Mining*. Second, *Eagle Mining* conflicts with a subsequent decision of the Supreme Court. In 1934, the Supreme Court stated that an order appointing a receiver for a bank amounted to a final decree and was, therefore, appealable. *See Cooper v. Otero*, 1934-NMSC-008, ¶ 19, 38 N.M. 164.

Eagle Mining has thus lost its vitality since enactment of Section 44-8-10 and since the Supreme Court decided *Cooper*. As the *Dydek* Court noted, the statute implies a right to immediate appeal. *Cooper* indicates the same, even before the statute's enactment.

If the Court decides to look outside of New Mexico's borders to address the finality issue, it will find a split in authority. Some jurisdictions hold that an order appointing a receiver is a final appealable order. See, e.g., *Collins v. Collins*, 2007-Ohio-283 (Ohio App.); *Wax v. Monks*, 96 N.E.2d 704, 705-06 (Mass. 1951). Other jurisdictions hold that an order appointing a receiver is an interlocutory order, not appealable until final judgment is entered. See, e.g., *Hartford Fed. Sav. & Loan Ass'n*

v. Tucker, 469 A.2d 778, 780 (Conn. 1984); *Lloyds of Tex. v. Bobbitt*, 55 S.W.2d 803, 805 (Tex. Civ. App. 1932).

Some states have statutes expressly granting the right to take an interlocutory appeal from an order appointing a receiver. See, e.g. *AEA Fed. Cred. Union v. Yuma Funding, Inc.*, 346 P.3d 991, 995 (Ariz. App. Div. 1 2015); *App. of NW Mut. Life Ins. Co.*, 703 P.2d 1314, 1317 (Colo. App. 1985). At least one state has held that an order appointing a receiver is immediately appealable under the collateral order doctrine. See *Fleet Bank of Maine v. Zimelman*, 575 A.2d 731, 733 (Me. 1990).

The Court should follow the lead of *Dydek*, *Harrington*, and *Cooper* – as well as the states that allow an immediate appeal from an order appointing a receiver – and should find that it has appellate jurisdiction from a timely appeal of an order appointing a receiver. Such an order affects substantial rights. Waiting until judgment is entered in the foreclosure action is not workable and would leave Gulfstream without a meaningful remedy for the district court's error.

Issue No. 2: The Substitution of Saipan Investment Group, LLC, as Plaintiff and Dismissal of Wells Fargo from the Case Was Error.

Standard of Review

The standard of review for an order substituting a party is whether there has been an abuse of discretion by the district court.

The decision whether to substitute a successor in interest is within the discretion of the trial court. See *Daniels Ins. v. Daon Corp.*, 1987-NMCA-110, ¶ 15, 106 N.M. 328. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *In re Rescue EcoVersity Petition*, 2013-NMSC-039, ¶ 19, 308 P.3d 125. When a discretionary decision is premised on a misapprehension of the law, the Court will find an abuse of discretion. See *Clark v. Sims*, 2009-NMCA-118, ¶ 20, 147 N.M. 252.

Preservation

The parties briefed the issue of substitution of parties, and they argued their respective positions at a motion hearing on February 18, 2016, and at a presentment hearing on March 21, 2016.

Rule 1-025(C) NMRA, states in appropriate part as follows: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

As provided in *Crown Life Ins. Co. v. Candlewood, Ltd.*, 1991-NMSC-090, ¶ 14, 112 N.M. 633, a court is not required to substitute a successor in interest asa party under Rule 1-025(C); the action may be continued the by original party and judgment will be binding on successor in interest, even though it is not a named party.

In other words, the district court was not required to substitute parties in this case and as provided herein, abused its discretion by allowing the substitution of Saipan for Wells Fargo. Effectively the district court eliminated Gulfstream's counterclaim against Wells Fargo by allowing the substitution.

The district court erred when it failed to make a determination whether there had been a proper transfer of interest from Wells Fargo to Saipan. Instead the Court limited its inquiry to the "holder" of the note. A look at the note shows that the note was not endorsed by Wells Fargo but rather by CWCAM, an alleged special servicer of Wells Fargo. The power of attorney used to justify the transfer of the note did not in fact give the special servicer the right to transfer a note unless there had been a completed foreclosure. [**RP 89**]. The letter relied upon by Wells Fargo and its special servicer dated March 29, 2006 [**RP 87**], shows that the special servicer was authorized to act on behalf of a pooling and service agreement dated December 1, 2002, not for a certificate series for which Wells Fargo was acting as trustee and which was dated as of March 1, 2005. In fact, the undated endorsed note was not even filed with the original complaint in this case.

The district court, in summary, failed to do what it was required to do under *Bank of New York v. Romero*, 2014-NMSC-007, ¶¶ 14-38, 320 P.3d 1. Wells Fargo, not the special servicer, was required to demonstrate that it had standing as a

prerequisite to filing suit. In this case the special servicer, a third party, filed suit. Simply possessing a note is insufficient to establish a third party as the holder with the right of enforcement. Additionally, any party seeking to enforce a negotiable instrument must adequately demonstrate how it obtained the rights to do so. *Romero*, 2014-NMSC-007, ¶ 14-38. See also *Deutsche Bank National Trust Co. v. Johnston*, 2016-NMSC-013, ¶¶ 22-27, 369 P.3d 1046.

The district court also did not determine that Saipan was a holder in due course, but merely a holder with rights to proceed on the note. Under NMSA 1978, § 55-3-305(a)(2) (2009), a holder cannot be a holder in due course on an overdue note. The complaint clearly shows that the note was past its maturity date when suit was filed. **[RP 1-12]**. See also *Ballengee v. N.M. Fed. Sav. & Loan Ass'n*, 1990-NMSC-008, ¶¶ 9-10, 109 N.M. 423 (holder not entitled to payment on note when transfer of note lacked a proper indorsement and therefore was not properly negotiated).

The substitution of Saipan was also an abuse of discretion by the district court because it prejudiced the rights of Gulfstream. See *Mortgage Elec. Reg. Sys. Inc. v. Saunders*, 2 A.3d 289, 298-99 (Me. 2010) (substitution of plaintiff in foreclosure action is proper if it does not unfairly prejudice defendant). Clearly the Defendant was prejudiced since it lost the right to a counterclaim against Wells Fargo that if proven would prevent the enforcement of the note and foreclosure of the mortgage.

Well known treatises concerning Fed. R. Civ. P. 25(C) also show that substitution of Saipan for Wells Fargo was error.

For example, Wright, Miller & Kane, *7C Federal Practice and Procedure: Civil 3d* § 1958 (2007), states that "The most significant feature of Rule 25(C)[2] is that it does not require that anything be done after an interest has been transferred. The action may be continued by . . . the original party, and the judgment will be binding on the successor in interest even though the successor is not named."

Such treatise also states that a court "is free, if it wishes, to retain the transferor as a party and to order that the transferee be made an additional party."

Another well known treatise provides for a similar result. *6 Moore's Federal Practice* § 25.31[2] (3d ed. 2016) states that the question of whether a party is a successor in interest, such that Rule 25 applies, is a matter of governing substantive law.

6 Moore's Federal Practice § 25.34[1] (3d ed. 2016), further states that "the question whether an entity is a transferee of interest so as to trigger th[e] discretion [to order substitution or joinder] is a matter of applying the applicable substantive law to the facts."

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[2]FED. R. CIV. P. 25(C) is substantially similar to Rule 1-025(C) NMRA.

Finally, as provided in *6 Moore's Federal Practice* § 25.34[3] (3d ed. 2016) "The court, after a transfer in interest, may direct the transferee to be either substituted in the action or joined with the original party. Thus, the court must make a determination, based on the respective rights and liabilities among the parties and the transferee under the substantive law governing the case, whether it would best facilitate the conduct of the case to have the transferor remain in the case, substitute the transferee, or join the transferee and continue with both as parties." The district court should either have continued the case with the original parties or name Saipan as an additional party. The district court erroneously did neither.

In this case, there is a substantial dispute as to how Saipan became the holder of the note and whether such transfer was proper. As provided in *Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 72, 75 (3rd Cir. 1993), where facts are in dispute, the court should hold an evidentiary hearing to determine whether an entity is in fact the transferee of an actual interest for purposes of deciding substitution or joinder. The district court erroneously did not conduct an evidentiary hearing.

Issue No. 3: The District Court Erred in Appointing a Receiver.

Standard of Review

Whether the district court erred in appointing a receiver involves a question of statutory construction, which the Court reviews de novo. See *City of Las Cruces v. Rogers*, 2009-NMSC-042, ¶ 5, 146 N.M. 790.

Preservation

The parties briefed the issue of appointment of a receiver, and they argued their respective positions at a motion hearing on February 18, 2016, and at a presentment hearing on March 21, 2016.

The district court relied upon statutory law in appointing the receiver in this case. An interested person may seek the appointment of a receiver. Section 44-8-3(C) provides that " 'interested person' means any secured or unsecured creditor, a shareholder of a corporation, a general or limited partner of a partnership or a person jointly owning or interested in a receivership estate."

Additionally, a receiver may also be appointed if a mortgage or security instrument provides for the appointment of a receiver. Section 44-8-4(A) provides that "Upon application to a district court, the district court shall appoint a receiver in an action by a mortgagee or secured party or in any other action based upon a contract

or other written agreement, where such mortgage, security agreement, contract or other written agreement provides for the appointment of a receiver."

The district court also has discretionary authority to appoint a receiver. Section 44-8-4(B) provides that "Grounds for permissive appointment of a receiver are: (1) when specific statutory provisions authorize the appointment of a receiver; (2) in an action between or among persons owning or claiming an interest in the receivership estate; (3) in actions where receivers have customarily been appointed by courts of law or equity; . . .; or (5) in any other case where, in the discretion of the district court, just cause exists and irreparable harm may result from failure to appoint a receiver."

A bond may be required in appropriate cases when a receiver is appointed. NMSA 1978, § 44-8-6(D) (1995) provides "[U]pon request and a showing of good cause by an interested party, the district court may require the receiver to post a bond unless the mortgage, security agreement, contract or other written agreement dispenses with the posting of bond. The amount of the bond shall be as ordered by the court."

The problem with the appointment of the receiver is that it was requested by Saipan and not by CWCAM which claimed the authority to file suit, nor Wells Fargo itself. As provided above, Saipan was improperly substituted into the case. Until

such time as it was shown it was a proper party, it could not be an interested party because it simply had not proven any interest in the note and mortgage. While the word "interest" is interpreted broadly, *Dydek*, 2012-NMCA-088, ¶¶ 56-59, it cannot include one who has not shown that it has an interest to protect. The district court erred by granting Saipan's motion for the appointment of a receiver which acted to deprive Gulfstream of its ability to control its own property when it had a legitimate counterclaim against Wells Fargo concerning the misconduct that occurred during the auction of the note.

Because of the dispute as to whether Saipan was a property party, the district court should have ordered a bond to be posted to protect Gulfstream's rights in the collateral.

Section 44-8-4 provides two grounds under which a receiver may be appointed. Under paragraph A, where a mortgagee or secured party brings an action or any other action based upon a contract, a receiver shall be appointed. However, as provided above, there was no showing that Saipan was either a mortgagee or the secured party since there were issues of fact concerning how Saipan became the holder of the note and whether the rights of Gulfstream had been ignored or violated.

Under paragraph B, a discretionary appointment of a receiver may be made under 5 separate categories, three of which have no application. No statutory

reference is made in the Order Appointing Receiver so that subparagraph (1) is eliminated. Subparagraph (4) concerns the appointment of a receiver in another state which is not an issue in this case. No finding of the court was made that irreparable harm would result if a receiver was not appointed so that subparagraph (5) is also eliminated.

Saipan merely summarized Section 44-8-4(B) in its Verified Application for Immediate Appointment of Receiver **[RP 61 ¶ 16]** which contained nothing other than the verification of a member of Saipan. Saipan presented no testimony nor produced any evidence in which to justify the discretionary equitable power of the district court to appoint a receiver. Additionally, the district court made no findings of fact to support any subparagraph of Section 44-8-4(B), but merely stated that Saipan was entitled to the appointment of a receiver in paragraph F of its Order Appointing Receiver.

Since the district court only made a finding that Saipan was the holder of a promissory note **[RP 179 ¶ C]**, would not rule on the counterclaim of Gulfstream against Wells Fargo, and made no finding of the interest of Gulfstream in the property, the district court could not have utilized subparagraph (2) concerning persons owning or claiming an interest in the receivership property. Thus, only subparagraph (3), in actions where receivers have customarily been appointed by

court of law or equity, could have been used by the district court. However, no foreclosure judgment has been entered against Gulfstream. Neither the Verified Application for the Immediate Appointment of Receiver nor the Order Appointing Receiver states anything other than the promissory note was not paid, thereby triggering a default. None of the documents listed at paragraph D **[RP 179 ¶ D]** of the order were introduced into evidence and in fact are not even part of the complaint that was filed. No evidence was taken by the district court on any issue.

The treatise entitled Fletcher *Cyclopedia of the Law of Corporations* at volume 16 (2015) cautions against the unfounded appointment of a receiver at various sections:

A. Section 7696.5 ("The appointment of a receiver impairs the credit of the corporation, interferes with its management, and imposes on the court the onerous duty of corporate management, which it is not qualified to perform and which it should not undertake except as a last resort.").

B. Section 7697 ("The appointment of a receiver is an extraordinary remedy.").

C. Section 7697 ("Appointment [of a receiver] is a drastic remedy, and the power of appointment should be exercised with great caution and circumspection, particularly if there is an alternative remedy.").

D. Section 7697 ("Before a receiver is appointed, it should further appear that the plaintiff is clearly entitled to the interest the plaintiff claims in the property for which a receiver is asked, or the facts alleged and the affidavits offered in support should tend strongly to establish the right of receivership.").

E. Section 7769 (2015-16 Cum. Supp. pocket part) ("The burden is always on the applicant to show the necessity for the appointment of a receiver for a corporation. Courts are reluctant to resort to the summary remedy of a receivership unless the proof clearly warrants such a procedure. The offered proof must be clear and convincing.").

The Order Appointing Receiver was made on statutory grounds, a remedy at law, and not on equitable grounds. The district court failed to take any evidence nor make a single finding of which of the discretionary subparagraphs it utilized. Gulfstream not only lost control of its property with no evidence being taken, it was summarily removed from the property. It was error for the district court to enter its Order Appointing Receiver.

The reason why Saipan immediately sought the appointment of a receiver is found in the case of *McCloskey v. Shortle*, 1937-NMSC-005, 41 N.M. 107 which states at paragraph 23 as follows:

> 'The object of obtaining the appointment of a receiver is generally to gain a priority of lien on the rents and profits of the premises, so that the court will have the power of directing their application to the payment of the plaintiff's claim; a receiver cannot properly be appointed where the court does not have such power. The immediate and actual cause for the appointment of a receiver in a foreclosure, is to secure the rents and profits of the mortgaged premises in advance of the final judgment, in order that they may be applied towards any deficiency that may exist between the amount of the incumbrances and the amount for which the property may sell under the foreclosure.' Wiltsie on Mortgage Foreclosures, p. 1115, § 760.

As can be seen from the appointment order itself, this is exactly what happened. The rights of Gulfstream in the premises were effectively terminated and Saipan became the recipient of the rents from the operation of the building. Additionally, the monthly receiver fees became an additional expense effectively paid by Gulfstream since it decreases the amount available to pay debt.

All of this assumes of course that Saipan was actually entitled to be substituted into the case for Wells Fargo or, more accurately, CWCAM. As provided in this Brief, the district court's error in allowing the substitution of Saipan and the dismissal of Wells Fargo/CWCAM carried over into the district court's erroneous order granting the request of Saipan for the appointment of a receiver in this case without a determination of whether Saipan in fact had a legitimate interest in the property of its collateral.

III. CONCLUSION

This Court has jurisdiction to consider this appeal because the orders that are the subject of this appeal are final orders. The district court erred in substituting Saipan for Wells Fargo and dismissing Wells Fargo from the case. Similarly, because Saipan had no right to seek the appointment of a receiver, it was error for the district court to appoint a receiver. The aforementioned orders should be reversed.

IV. REQUEST FOR ORAL ARGUMENT

Because this appears to be a case of first impression in New Mexico for several reasons, oral argument may assist this Honorable Court in formulating its decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that I caused to be mailed a true and correct copy of the **BRIEF IN CHIEF** to:

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