ORIGINAL

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

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

REPLY BRIEF TO WELLS FARGO BANK, N.A.'S ANSWER BRIEF

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COMES NOW, Defendant/Appellant Gulfstream Lomas, Ltd., by and through its counsel, Chappell Law Firm, P.A. and for its Reply to the Answer Brief filed by Wells Fargo Bank, N.A., ("**Wells Fargo**") would state as follows:

Wells Fargo's summary of the proceedings is inaccurate. Wells Fargo states that it executed a power of attorney in favor of its loan servicer, CWCapital Asset Management, LLC ("**CWCAM**") giving it authority "to execute virtually any document concerning the loan" on behalf of Wells Fargo. That is incorrect. The power of attorney [**RP 89**] specifically references a pooling and service agreement dated March 1, 2005, which is a different date than the acknowledgment in which CWCAM agreed to be a special servicer under a pooling and service agreement which is dated as of December 1, 2002, upon which this proceeding was filed by Wells Fargos's loan servicer. Additionally, as discussed herein, the power of attorney in limited by its own terms. Thus, there is no document upon which Wells Fargo may rely that gives the authority claimed by Wells Fargo.

Wells Fargo now wishes to rely upon documents that were never presented to the District Court prior to issuance of its two orders in this case. Wells Fargo offers no justification, nor is there, for now claiming it is entitled to rely upon documents that were never the basis for the two orders issued by the District Court. It is improper at this junction to seek to argue documents that were never considered by the District

Court in the first instance concerning factual matters. See *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154.

I. The Order Appointing Receiver and the Order Permitting Substitution of Saipan Investment Group, LLC, as Plaintiff, Are Final Orders So That this Honorable Court Has Jurisdiction to Hear this Appeal.

A. Cases Cited by Wells Fargo That the Orders under Review Are Interlocutory Orders Do Not Apply to this Case.

Wells Fargo has cited cases in which it claims that generally the orders under review are interlocutory in nature and therefore not subject to review by this Honorable Court. Such cases have no application to this appeal.

Wells Fargo has been dismissed from this case. The appropriate portion of the Order Permitting Substitution of Saipan Investment Group, LLC, as Plaintiff, states as follows:

> **Wells Fargo Bank, N.A. is no longer a party to this action** and its counsel, Modrall Sperling (Paul Fish and Spencer Edelman) and Venable, LLP (Brent Procida), are not counsel for the substituted plaintiff, and are hereby deemed to have withdrawn because Walker & Associates, P.C., is counsel for the substituted plaintiff. No further notice by counsel is required and the provisions of Rule 1-089 NMRA are deemed complied with.

(Emphasis added)

Under Rule 1-089(B) NMRA, Wells Fargo's counsel was required to seek a court order in order to withdraw from representation of Wells Fargo. Here, the

District Court counter-synced its final order of substitution, in which it specifically states that Wells Fargo is longer a party, by further stating that its counsel were no longer in the case.

Thus, the District Court determined there was no longer a case involving Wells Fargo upon which to proceed. There was nothing left for the District Court to decide concerning Wells Fargo.

Wells Fargo cites the case of *Principal Mutual Life Ins. Co. v. Strauss*, 1993-NMSC-058, ¶ 7, 116 N.M. 412, 863 P.2d 447. That case concerned the finality of an order in which attorney's fees were an integral part of the damages being sought. Such attorney's fees had not been adjudicated at the time of the appeal. The Supreme Court specifically distinguished *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, 113 N.M. 231, 824 P.2d 1033, cited in Appellant's Brief in Chief at pages 8 through 9, at ¶¶ 9-10, which held that seeking attorney's fees as a supplementary part of a judgment in which liability had been determined, did not defeat appeal of the order determining liability. As in *Kelly Inn*, there was nothing left to determine as to Wells Fargo so that such order is a final order.

Wells Fargo next cites *City of Sunland Park v. Paseo Del Note Ltd. P'ship*, 1999-NMCA-124, ¶ 8, 128 N.M. 163, 990 P.2d 1286. In that case, the District Court had ordered the condemnation of a property but had not yet determined the damages

to be assessed. The Court of Appeals held that such order was not a final order pending a determination as to damages. By its order effectively dismissing Wells Fargo from the case, the District Court was left with nothing to determine as to Wells Fargo.

Wells Fargo also cites *Floyd v. Towndrow*, 1944-NMSC-052, ¶¶ 1-2, 48 N.M. 444, 152 P.2d 391. That case involved the personal representative of a state filing an action to collect on a promissory note. The District Court entered an order dismissing an amended counterclaim filed by the defendant but made no determination on the merits of the collection action. Again, such facts are not applicable to the present case in which Wells Fargo is completely dismissed and no issues remain to be determined, nor can further action be taken, as to Wells Fargo.

Finally, Wells Fargo cites *Systems Technology, Inc. v. Hall*, 2004-NMCA-130, ¶ 11, 136 N.M. 548, 102 P. 3d 107. That case stand for the proposition that when a district court sends part of a case to arbitration and determines another portion of the case will be resolved by the district court, such order is not a final order because of the possibility of an appeal from an arbitration order as well as an appeal from order of the issue remaining with the district court. Here there is no reservation of any part of the case as to Wells Fargo.

B. The Order Appointing Receiver Is a Final Order That Can Be Immediately Appealed.

Interestingly, Wells Fargo, which is out of the case by virtue of the Order of Substitution, argues that the Order Appointing Receiver is not a final order that can be appealed. Because it is out of the case, Wells Fargo has no remaining interest in the case and has no reason for its arguments on the Order Appointing Receiver. Wells Fargo itself stated "We are no longer the real party in interest. I don't think we have standing to ask for a receiver. We don't have an interest in this anymore." **[2-18-16 1 Tr. 14:6-8]**.

Nevertheless, Wells Fargo cites no other cases other than those cited by Appellant in its Brief in Chief concerning the finality of an order appointing a receiver. Appellant has fully explained its position as to the holdings of those cases as well as the interplay of NMSA 1978 § 44-8-10 (1995), in its Brief at pages 15-17.

Appellant does take issue with how Wells Fargo views the Order Appointing Receiver as merely preserving the property (Wells Fargo Answer Brief, page 11) so that it is not a final order. The Order Appointing Receiver is not just preserving property. It has effectively taken the property of the Appellant from Appellant and given it to the substituted plaintiff, Saipan Investment Group, LLC ("**SIG**").

The Order provides at paragraph 2G [**RP 181**] that the Receiver is required to pay SIG all property receipts after the expenses of the receivership have been paid. Under paragraph 2Q [**RP 182**], the Receiver has the right to borrow money from SIG which adds to the balance of the promissory note at issue in this case without the consent of the Appellant. More importantly perhaps, the Order at paragraph 9 required Appellant and its employees to vacate the premises and not return to the premises without the specific approval of the Receiver. [**RP 185**] Thus, the effect of the Order Appointing Receiver is to eliminate the beneficial interest of the Appellant in the property as well as the funds that are generated by the property. There can be no doubt that the practical effect of this order, as in *Kelly Inn*, makes it a final order.

Appellant also respectfully disagrees with Wells Fargo's position on Section 44-8-10 that such statute does not allow an appeal of an order appointing a receiver because it is interlocutory in nature. As the Court stated in *Dydek v. Dydek*, 2012-NMCA-088, ¶ 58, 288 P.3d 872, citing *State v. Gurule*, 2011-NMCA-042, ¶ 12, 149 N.M. 599, 252 P.3d 823, "[A]s a rule of statutory construction, we read all provisions of a statute and all statutes in pari materia together in order to ascertain the legislative intent."

As provided in NMSA 1978, Section 44-8-2 (1995), "The purpose of the Receivership Act [44-8-1 NMSA 1978] is to provide a framework for the creation and

administration of receiverships." Section 44-8-10 must be read in conjunction with the rest of the statute. It states as follows:

> If 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 unless a bond, in a sum fixed by the district court, is given and posted on condition that if the judgment or order is affirmed on the appeal, or if the appeal is withdrawn or dismissed, the appellant will pay all costs and damages that the respondent may sustain by reason of the stay in the enforcement of the judgment or order.

Here, that section of the statute clearly envisions the appeal of an order appointing receiver because there would be no reason to discuss the stay of such an order as well as the bond requirements if an immediate appeal was not allowed. Wells Fargo wishes this Honorable Court to ignore the first part of the language of that section of the statute which clearly states that there can be an appeal of an order appointing a receiver. Additionally, Wells Fargo wishes to add language to Section 44-8-10 to state the words "a final" before the word "order" in the first line of the statute. The legislature did not insert such language nor should this Honorable Court interpret the statute as such.

It does not matter that the foreclosure action remains to be completed. Wells Fargo wishes this Honorable Court to ignore the effect of the Order Appointing Receiver on Appellant. As discussed above, the practical effect of the order at issue

in this case is to divest the Appellant of its interest, both monetary and possessory, in the property. Thus, Section 44-8-10 envisions an appeal of such an order.

C. The Substitution Order is a Final Order.

Wells Fargo erroneously refers to the Order Permitting Substitution of Saipan Investment Group, LLC, as an interlocutory order not subject to appeal. Wells Fargo wishes this Court to view the dismissal of the Wells Fargo from this case as something that cannot be appealed but instead such appeal is required to be delayed until some indefinite time in the future. Wells Fargo in this regard ignores the clear language of the order.

Wells Fargo does not attempt to distinguish or disagree with any case cited by Appellant concerning the finality of an order substituting a party when such order effectively terminates any further action against such party. It also does not argue the doctrine of practical finality as announced in the case of *Kelly Inn*, cited in Appellant's Brief in Chief at pages 8 through 9. In fact, Wells Fargo admits ". . . the Trust is not longer a party to this lawsuit." **[RP 129, II]**

The result of the substitution order is clear: Wells Fargo is dismissed from the case ("Wells Fargo Bank, N.A., is no longer a party to this action . . .") **[RP 176]** Again, however, Wells Fargo argues that this Honorable Court can consider the affidavits that were filed almost a year after the decision by the District Court to

determine that there was a proper substitution. Wells Fargo cites no cases in support of its position that is contrary to or distinguishes *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154.

II. There Were Insufficient Grounds for Substitution of Saipan Investment Group, LLC and the Appointment of a Receiver.

Only two documents were presented to the District Court at the time the hearings were held concerning the authority of CWCAM allegedly acting on behalf of Wells Fargo: (1) a limited power of attorney which by its very terms is limited to executing such documents as are appropriate to effect any sale, transfer, or disposition of property acquired through foreclosure or otherwise; and (2) an "Acknowledgment" dated March 29, 2006, which refers to a Pooling and Servicing Agreement, dated as of December 1, 2002. It is undisputed that the Pooling and Service Agreement in this case is dated March 1, 2005. Neither the limitations in the Power of Attorney nor the error in the Acknowledgment were mentioned in any fashion by the District Court nor was any evidence taken in this regard. Furthermore, Wells Fargo cannot rely upon affidavits never submitted to the Court to now claim there were grounds to show a proper assignment, allow the substitution of SIG and allow the appointment of the receiver.

As Wells Fargo correctly points out, SIG was found only to be the holder of the note at issue. There was no determination nor evidence taken whether there had been a proper assignment of the note to SIG. Wells Fargo cites *Sullivan v. Running Waters Irrigation, Inc.*, 739 F.3d 354 (7th Cir. 2014), in support of its argument that no evidence is required to be taken to effectuate a substitution of a party under Fed. R. Civ. P. 1-025(c). The case, which involved successor ERISA liability, at 357-358 actually states that Rule 25(c) allows the substitution of parties if an "interest" is transferred, but relies on other substantive law to define "interest." In *Sullivan*, depositions, tax returns and credit card statements were used by the trial court to make its determination. This was in accordance with prior decisions that substantial continuity of one business by another requires a "fact-centered" analysis. This of course is completely different from what the District Court did in this case. The District Court took no additional evidence other than SIG was a holder of the note at issue and made no determination concerning whether there had been a proper assignment of the note that allowed the receivership motion to move forward.

Similarly, Wells Fargo never went forward in the many months the case was pending to have a receiver appointed. Despite the apparent availability of the persons executing the affidavits, the affidavits were never presented to the District Court when it conducted the hearings on February 18, 2016. Rather, it was the erroneous

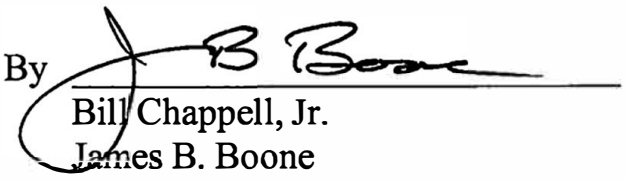
transfer of the note and substitution of SIG that led to the hearing on the receivership. The District Court took no evidence, appointed a receiver, and effectively removed the Appellant from its beneficial interest in the property. This was error by the District Court.

III. CONCLUSION

The District Court erred in allowing a substitution of parties and further erred by allowing the substituted party to have a receiver appointed. The orders should be quashed or vacated, or, in the alternative, the case should be remanded to the District Court to conduct an appropriate evidentiary hearing.

Respectfully submitted,

CHAPPELL LAW FIRM, P.A.

By 

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CERTIFICATE OF SERVICE

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