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 SAIPAN INVESTMENT GROUP, LLC'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 Saipan Investment Group, LLC ("**SIG**") would state as follows:

The Statement of Facts used by SIG is erroneous in several areas. On page 2 of its Answer Brief, SIG claims that CWCapital Asset Management, LLC ("**CWCAM**"), became the special servicer for Wells Fargo as Trustee under a Pooling and Service Agreement ("**PSA**") dated as of March 1, 2005, and cites RP 84 as its basis. RP 84 refers to an Acknowledgment attached as Exhibit A to the Reply in Support of the Motion for Order Substituting SIG as Plaintiff. That Exhibit A actually refers to a PSA dated as of December 1, 2002, and not March 1, 2005. Thus, there is no acknowledgment upon which SIG may rely as authority of CWCAM to act as special servicer.

While Appellant disputes the version of the auction stated by SIG, it would also point out that it is alleged that Mountain Capital, LLC was the successful bidder at the auction and assigned its rights to SIG. No reference to the record is made other than a reference to paragraph 21 of Wells Fargo's opposition to Appellant's motion to amend answer and add counterclaims. Such paragraph merely makes a statement without documentary evidence to confirm such statement.

SIG also states as a fact that an allonge and assignment were executed by CWCAM pursuant to a section of the PSA and a Power of Attorney. The Power of

Attorney is not reflected as part of the allonge nor is any mention of the Power of Attorney made in the endorsement. [**RP 46**]. The assignment by CWCAM was presumably signed on behalf of Wells Fargo as special servicer only [**RP 49**] which, as shown, is improper because CWCAM was never the special servicer of a PSA dated as of March 1, 2005, but rather was special servicer of a PSA dated as of December 1, 2002.

As with Wells Fargo in its Answer Brief, SIG now asks this Honorable Court to improperly rely upon affidavits never considered by the District Court and filed almost one year after the District Court held its hearing that led to the two orders that are the subject of this appeal.

I. The Order of Substitution and the Order Appointing Receiver Are Final Orders So That the Court of Appeals Has Jurisdiction to Consider this Appeal.

A. Wells Fargo Is No Longer a Party to the Case So That the Order Permitting Substitution of Saipan Investment Group, LLC as Plaintiff, Is a Final Order.

SIG argues that there was no determination of all issues in the case with regard to the substitution of SIG for Wells Fargo. SIG's position ignores the clear language of the Order. 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, Appellee's counsel was required to seek a court order in order to withdraw from representation of Appellee. 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.

The cases cited by SIG are not applicable to the case before this Honorable Court. The cases of *In Re Estate of Duran*, 2007-NMCA-068, ¶ 10, 141 N.M. 793, 161 P.3d 290 (in probate case, final order is entered only when final administration of the estate is complete and personal representative discharged); *B.L. Goldberg & Associates, Inc., v. Uptown, Inc.*, 1985-NMSC-084, ¶ 5, 103 N.M. 277, 705 P.2d 683, (order dismissing counterclaim not appealable); *Principal Mutual Life Insurance Co. v. Straus*, 1993-NMSC-058, ¶ 7, 116 N.M. 612, 863 P.2d 447, (order determining liability, but not damages, not appealable when damages integral part of liability claim); and *Pena v. Trujillo*, 1994-NMCA-034, ¶ 3, 117 N.M. 371, 871 P.2d 1377, (order denying motion for default in garnishment proceeding not appealable), all have

in common the following: a final order of the district court in those cases had not occurred because there had not been a complete determination against a party.

In this case, the District Court dismissed Wells Fargo from the case. Wells Fargo itself states that ". . . the Trust is no longer a party to this lawsuit." [**RP 129 ¶ II**]. 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. This case therefore closely aligns with the practical finality reasoning of *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶¶ 9-10, 113 N.M. 231, 824 P.2d 1033, cited in Appellant's Brief in Chief at pages 8 through 9, 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.

SIG attempts to distinguish the decisions cited by Appellant in its Brief in Chief from courts outside of New Mexico with regard to whether an order of substitution is final order. As SIG correctly points out, such cases hold that if the effect of the order is to discharge another party or to eliminate issues so that there is nothing left to decide between some parties, then the order is a final appealable order.

SIG also cites two other cases. In *Mathews v. Saniway Distributors Serv.*, 155 Ga. App. 568, 271 S.E. 2d 701 (Ct. App. 1980), a garnishment action, the Court references a prior appeal in which the original judgment creditor alleged to be the real party in interest had died. Therefore a substitution of parties was required. The Court of Appeals held, citing to a prior decision in such case, that the order of substitution of the party plaintiff for a deceased party was not an appealable order.

In *Laboyag v. Laboyag*, 83 Haw. 412, 927 P.2d 420 (Ct. App. 1996), an order denying a motion to intervene in a probate case concerning the rights among a first wife and children of a decedent and a second wife and child claiming an interest in property of the estate was a final, appealable order. An order which allowed the substitution of a personal representative for a deceased person was not a final, appealable order. Accordingly, neither cases supports the position of SIG that the Order Permitting Substitution of Saipan Investment Group, LLC as Plaintiff is not a final order.

B. The Order Appointing Receiver Is a Final Order.

SIG cites no other New Mexico 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 Answer Brief at pages 15-17.

SIG states that the "majority of other jurisdictions have held that orders appointing receivers are not appealable as final orders" and cites three cases: *Meadow Valley Min. Co. v. Dodds,* 6 Nev. 261, 263 (1871) (holding that an order appointing a receiver was not reviewable, except upon an appeal from the final judgment); *Hartford Fed. Sav. & Loan Ass'n v. Tucker,* 192 Conn. 1, 3, 469 A.2d 778, 780 (1984) (order of civil contempt for disobeying order appointing rent receiver precludes a collateral attack on order appointing receiver which is not appealable until final judgment entered); and *Beus v. Terrell,* 46 Idaho 635, 269 P. 593, 594 (1928) (holding that an order appointing the receiver was not an appealable order). However, SIG also cites *Davenport* v. *Thompson,* 206 Iowa 746, 221 N.W. 347, 350 (1928) (holding that order of court appointing or refusing to appoint a receiver was appealable) and *Jones* v. *Thorne,* 80 N.C. 72, 75 (1879). (While no holding of *Jones* is stated, it stands for the proposition that an order appointing a receiver is appealable even if an interlocutory order).

SIG relies exclusively upon the *Hartford* decision from the Connecticut Supreme Court that an order appointing a receiver is not an appealable order. This case, along with other contrary cases, was previously disclosed in Appellant's Brief in Chief at 16-17. Appellant's position is that the Order Appointing Receiver is a final order. No further argument is needed in this regard.

SIG also argues that NMSA 1978 § 39-3-4 (1999) controls because the Order Appointing Receiver is an interlocutory order. Such statute does not mention, nor is it argued to the contrary by Appellant, the appeal of an order appointing a receiver. Section 39-3-4 is not applicable to the appeal of an order appointing receiver. The operative statute is Section 44-8-10.

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 *Little v. Jacobs*, 2014-NMCA-105, ¶ 7, 336 P.3d 398, statutory interpretation is an issue of law that is reviewed de novo, citing *Moongate Water Co., Inc. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405. "When construing statutes, 'our charge is to determine and give effect to the Legislature's intent.' *Id.* (internal quotation marks and citation omitted)."

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. SIG 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, SIG wishes to add language to the statute 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.

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.

The Order provides at paragraph 2G that the Receiver is required to pay SIG all property receipts after the expenses of the receivership have been paid. [**RP 181 ¶ G**] Under paragraph 2Q, 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. **[RP 182 ¶ Q]** More importantly perhaps, the Order at paragraph 9 required Appellant and its employees to vacate the premises and are not allowed to return to the premises without the specific approval of the Receiver. **[RP 185 ¶ 9]**. Thus, the effect of the Order Appointing Receiver is to eliminate the beneficial interest, both monetary and possessory, of the Appellant in the property. There can be no doubt that the practical effect of this order, as in *Kelly Inn*, makes it a final order. Thus, Section 44-8-10 envisions an appeal of such an order.

II. SIG Was Not Properly Substituted into the Case.

SIG argues in its Answer Brief that it has filings made almost a year after the District Court made its decision that moot the argument of the Appellant. SIG wishes to rely upon documents that were never presented to the District Court prior to issuance of its two orders in this case. SIG 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. See *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154.

Only two documents were presented to the 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 by Wells Fargo through foreclosure or otherwise; and (2) an "Acknowledgment" dated March 29, 2006, which refers to a PSA, dated as of December 1, 2002. It is undisputed that the PSA 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 or with regard to the actual transfer, other than the arguments of the parties.

Furthermore, SIG cannot rely upon affidavits never submitted to the District Court to now claim there were grounds to show a proper assignment, allow the substitution of SIG and allow the appointment of the receiver. 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.

SIG relies almost exclusively upon the case of *Deutsche Bank National Trust Co. v. MacLaurin*, 2015-NMCA-061, ¶¶ 8-9, 350 P.3d 1201, for the proposition that Appellant cannot challenge a violation of a PSA in order to contest whether the proper party is entitled to foreclose. Such case is not applicable to the facts in the present case.

First, that case, decided upon summary judgment, did not involve a new party, SIG, being substituted into a case and thereafter foreclosing on a mortgage. Rather, Deutsche Bank, as the holder of a note secured by a mortgage, initiated the action. The order of substitution, as SIG repeatedly argues, does not constitute a final adjudication on the note.

Second, as pointed out in such case, the alleged violation of the PSA was based upon the opinion of an expert and the PSA was not part of the record, which is contrary to SIG's position that it placed a "link" to the PSA in one of its pleadings. Third, the trust that assigned the note to Deutsche Bank closed in 2006 but did not receive the note until 2010. In this case no evidence was submitted to the District Court that the trust did not exist. The two documents presented to the District Court showed that CWCAM did not have a right to act on behalf of Wells Fargo as trustee.

Lastly, and perhaps most importantly, Appellant and an affiliate claimed a right to purchase the note at an auction that was improperly conducted by Wells Fargo through CWCAM and for which the District Court took no evidence. It is Appellant's position, as it tried to assert in a counterclaim against Wells Fargo, which the District Court would not rule upon by stating it lacked jurisdiction while this appeal was pending [**RP 237**], that the transfer was contrary to an agreement to allow Appellant or its related entities to bid on the note at an auction where the note was presumably

sold, among other claims made [**RP 101-118**]. The note was sold at a price less than what a related entity to Appellant could, and was prepared to, bid. Instead, the District Court allowed the improper substitution thereby removing Wells Fargo from the case, and improperly prejudicing the Appellant, without conducting an evidentiary hearing. [**BIC 9-12; 20-22**]. Accordingly, the *Deutsche Bank v. MacLaurin* case simply has no bearing on this case. The District Court erred in entering its order allowing SIG to substitute for Wells Fargo and dismissing Wells Fargo from the case.

III. The Order Appointing Receiver Was Entered in Error.

SIG's argument that it was entitled to the appointment of a receiver is based upon the faulty premise that the District Court was not required to conduct an evidentiary hearing concerning how SIG obtained the note at issue. In its Motion to Appoint Receiver, SIG even argues it was entitled to proceed without substituting for Wells Fargo [**RP 59 ¶ 5**].

The District Court did not conduct an evidentiary hearing on the conflicting claims as provided above. SIG claims that the motion verified by a representative of SIG is sufficient evidence for the appointment of a receiver. As pointed out by Appellant in its Brief in Chief, which was not disputed by SIG, none of the documents listed at paragraph D of the Order Appointing Receiver were introduced into evidence at the hearing [**BIC 27**]. It is therefore an abuse of discretion to appoint

a receiver when the very documents upon which the moving party relied were not presented to the District Court. (The assigned note referenced at the hearing and assignment of certain documents are attached to the motion of SIG requesting substitution.)

SIG argues that there was sufficient evidence presented to the District Court for the appointment of a receiver. However, in summary, the only information presented was the allegation contained in SIG's Motion for Appointment of a Receiver. There was no evidence otherwise presented of anything contained in the motion. Rather, the District Court based its decision almost entirely on argument of SIG when the District Court knew there was a substantial dispute as to whether SIG was a proper party. The District Court appointed a receiver as a matter of discretion under NMSA 1978, § 44-8-4 (1995). It essentially made no findings of fact (other than SIG was the holder of the note, the assignment being disputed by Appellant), outside of reference to documents consisting of the note and mortgage and other security instruments that were not introduced into evidence nor presented to the District Court. The District Court's only other finding stated that the Application was well taken and should be entered. [**RP 179 ¶ H**]. SIG does not dispute the applicable loan documents, other than a copy of the promissory note along with the disputed

assignment of the note and assignment of security instruments, were not submitted or reviewed by the District Court.

SIG additionally argues that there was just cause and irreparable harm existed **[AB 30]**. However, other than the verified motion, which merely states what may be contained in loan documents but never presented to the District Court, there was no evidence presented. In fact, the Order Appointing Receiver makes no finding that irreparable harm existed. As stated previously, the Order Appointing Receiver effectively deprives Appellant of any beneficial interest in, or use of, the property without an evidentiary hearing being conducted as to whether SIG was even a proper party or whether Appellant or its affiliates were deprived of an opportunity to purchase the note at issue.

IV. 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 and the case remanded to the District Court to conduct an appropriate evidentiary hearing.

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 **Reply Brief to Saipan Investment Group, LLC's Answer Brief** to:

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on this the 30th day of June 2017.

_____
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