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

APPELLEE'S ~~RESPONSE~~ ANSWER BRIEF

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A. Factual Background

Saipan Investment Group ("SIG") is the owner and holder of the matured promissory note, deed of trust, and assignment of leases and rents at issue in this case. [RP 35-46; 179, ¶ C].

On or about December 22, 2004, Morgan Stanley Mortgage Capital Inc., a New York corporation (the "Original Lender") loaned Gulfstream Lomas Ltd. ("Gulfstream") $8,600,000.00 (the "Loan"). As evidence of the Loan, Gulfstream executed and delivered a Promissory Note (the "Note") in the principle amount of $8,600,000.00, due and payable in full on or before January 1, 2015. [RP 2-3, 35-46].

As security for payment of the Note, Gulfstream executed and delivered a Leasehold Deed of Trust and Security Agreement dated December 22, 2004 (the "Deed of Trust") encumbering Gulfstream's right, title, interest, privileges, and options created by certain ground leases, together with Gulfstream's right, title, and interest in and to the leasehold and fee interest in the real property or properties (the "Land," together with the ground leases, the "Real Property"), structures, fixtures, personal property, improvements, leases, rents, easements, and other property (together with the Real Property, the "Collateral"). [RP 3, ¶ 7].

To further secure repayment of the Note, Gulfstream executed and delivered an Assignment of Leases and Rents dated December 22, 2004 (the "ALR"). [RP 3-4, ¶ 8]. Pursuant to the terms of the ALR, Gulfstream pledged to Original Lender all leases, rents, profits and other property (the "Rents") as collateral for the Loan. *Id.* Together, the Note, Deed of Trust, ALR, and all other documents executed in connection with the Note, along with all assignments thereof are referred to as the "Loan Documents."

The Original Lender assigned the Note to Wells Fargo Bank, National Association ("Wells Fargo"), as Trustee for the Registered Holders of Morgan Stanley Capital I Trust, Commercial Mortgage Pass-Through Certificates, Series 2005-HQ5 (the "Trust"). [RP 4, ¶ 11]. On or about April 26, 2005, the Original Lender assigned the Deed of Trust, ALR, and all other Loan Documents to Wells Fargo Bank as Trustee for the Trust, effective March 31, 2005. [RP 4-5, ¶ 12].

In 2006, CW Capital Asset Management, LLC ("CWCAM") became the Special Servicer for the Trust under the Pooling and Servicing Agreement dated as of March 1, 2005 (the "PSA"). [RP 84].[1] Section 8.3(a)(I) of the PSA empowers the Master Servicer (as defined in the PSA) to "exercise all powers and privileges

[1] In addition to the link to the PSA included in SIG's Reply in Support of Motion to Substitute [RP 84], excerpts of the PSA were also attached to documents filed during the pendency of the appeal. Although not included in the current version of the record before the Court of Appeals, these documents are part of the record proper pursuant to Rule 12-209(D) NMRA. Appellant refused to agree to include these documents in the Record Proper. On April 27, 2017, Appellee filed its opposed *Motion to Supplement the Record Proper*, in the Court of Appeals, which remains pending and undecided.

granted or provided to the holder of the Mortgage Notes...." [RP 84]. Section 9.4 of the PSA provides that the Special Servicer may "take any and all actions with respect to the Specially Serviced Mortgage Loans which the Master Servicer may perform as set forth in Section 8.3(a)..." [RP 84]. On January 28, 2015, Wells Fargo executed the limited power of attorney (the "Power of Attorney") further authorizing CWCAM to act on its behalf. [RP 89].

Section 9.36(a) of the PSA states, in part, that "the holder of the Certificates evidencing the greatest percentage interest in the Controlling Class, the Special Servicer and each Seller as to those Mortgage Loans sold to the Depositor by such Seller only (in such capacity, the "Option Holder") shall, in that order, have the right, at its option (the "Option") to purchase a Mortgage Loan...upon receipt from the Special Servicer of notice that such Mortgage Loan has become at least 60 days delinquent as to any monthly debt service payment..." [RP 84]. Section 9.36(c) of the PSA states, in part, that "any Option relating to a Mortgage Loan shall be assignable to a third party..." [RP 84].

By its terms, the Note the came due and payable in full on January 1, 2015. [RP 34, ¶(d)]. Gulfstream failed to repay the Note and failed to relinquish the collateral for the Note. [RP 26, ¶ 16]. Wells Fargo gave notice of default on January 12, 2015 [RP 6, ¶ 17, 26, ¶ 17], and thereafter filed the underlying action for foreclosure. [RP 1].

On November 3-5, 2015, Wells Fargo put up the Note for auction. [RP 30-31, 127, ¶ 16]. Kingfisher, LLC, a Gulfstream affiliate, made one bid at the auction, after which it was informed by Auction.com, the company conducting the auction for Wells Fargo, that it was barred from submitting any additional bids. [RP 102, ¶ 6, 110, ¶ 8]. Kingfisher filed a lawsuit against Wells Fargo (the "Kingfisher Case") on November 10, 2015 based on its exclusion from the auction. [RP 127, ¶ 17]. The Kingfisher Case is pending in the district court as Case No. D-202-CV-2015-08512. [RP 127, ¶ 17].

Mountain Capital, LLC was the successful bidder at the auction, and assigned its rights to SIG. On or about December 10, 2015, CWCAM assigned to SIG its option to purchase the Note, SIG exercised the assigned option to purchase the Note, and the resulting sale closed on or about December 16, 2015. [RP 128, ¶ 21]. Effective December 16, 2015, Wells Fargo assigned to SIG all of its right, title, and interest in the Note, the Deed of Trust, the ALR, and all other Loan Documents. [RP 32-53]. As evidence of the assignment, Wells Fargo delivered to SIG the Note, an allonge to the Note, and an Assignment of Leasehold Deed of Trust and Security Agreement and Assignment of Assignment of Leases and Rents (the "Assignment") [RP 32-33, ¶ 2-3]. The allonge and Assignment were executed by CW Capital Asset Management, LLC ("CWCAM"), pursuant to Sections 8.3(a)(I) and 9.4 of the PSA and the Power of Attorney. [RP 84, 89].

B. Litigation History

The Note matured and came due and payable in full by its terms on January 1, 2015. [RP 34, ¶ (d)]. Gulfstream failed to repay the Note, and so on May 5, 2015, Wells Fargo filed its Complaint for Debt, Foreclosure, and Receiver (the "Complaint"), initiating the underlying district court case. [RP 1-14]. The Complaint seeks, *inter alia*, to enforce the "Note, to foreclose the Deed of Trust, to enforce the ALR, and to appoint a receiver. [RP 1-14]. On June 11, 2015, Defendant-Appellant Gulfstream Lomas Ltd. ("Gulfstream") filed its Answer to the Complaint (the "Answer"). [RP 24-29].

On December 23, 2015, SIG filed its Opposed Motion for Order Substituting Saipan Investment Group, LLC as Plaintiff (the "Motion to Substitute"). [RP 32-53]. Attached to the Motion to Substitute was a true and correct copy of the Note with attached allonge assigning the Note from Wells Fargo to SIG and a true and correct copy of the Assignment by which Wells Fargo assigned the Deed of Trust and ALR to SIG. [RP 34-51]. On January 20, 2016, Gulfstream filed its Response in Opposition to the Motion to Substitute [RP 54-57]. On February 8, 2016, SIG filed its Reply in Support of the Motion to Substitute, which included a link to the PSA, and attached a copy of the Power of Attorney [RP 83-89].

On January 22, 2016, SIG filed its Verified Application for Immediate Appointment of a Receiver and Preliminary Injunction in Aid of Receiver (the "Application for Receiver") [RP 58-77].

On February 16, 2016, Gulfstream filed its Motion to Amend Answer and Add Counterclaim (the "Gulfstream Motion to Amend"). [RP 101-118]. The Gulfstream Motion to Amend sought to add a counterclaim against Wells Fargo based on Wells Fargo's refusal to accept auction bids from Kingfisher, LLC for the sale of the Note. [RP 109-117].

On February 18, 2016, the district court held a hearing on the Motion to Substitute and the Application for Receiver. [2-18-16 TR 1-48]. On March 23, 2016, the district court entered the Order Permitting Substitution of Saipan Investment Group, LLC as Plaintiff (the "Substitution Order"). [RP 175-177]. On March 24, 2016, the district court entered the Order Appointing Receiver (the "Receiver Order"). [RP 178-187]. Gulfstream filed its Notice of Appeal on April 18, 2016. [RP 200-216].

On January 31, 2017, SIG filed its Motion for Partial Summary Judgment, the Affidavit of Jody Jordahl (the "Jordahl Affidavit"), and the Affidavit of Wells Fargo Bank, N.A. as Trustee (the "Wells Fargo Affidavit"). On February 1, 2017, SIG filed the Affidavit of Kathleen Olin in Support of Plaintiff's Motion for Summary Judgment (the "Olin Affidavit"). The Jordahl Affidavit, the Wells Fargo Affidavit,

and the Olin Affidavit provide additional information and documentation about the assignment to SIG of the Note, Deed of Trust, and other Loan Documents.[2]

II. ARGUMENT

Issue No. 1: The Appeal Should be Dismissed Because the Substitution Order and the Receiver Order are not Final, Appealable Orders and the Court of Appeals Lacks Jurisdiction.

"There is a strong policy in New Mexico of disfavoring piecemeal appeals, and of avoiding fragmentation in the adjudication of related legal or factual issues." *Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 12, 116 N.M. 412, 415. Consistent with this policy, the jurisdiction of appellate courts is generally "limited to appeals from final judgments, interlocutory orders which practically dispose of the merits of an action, and final orders after entry of judgment which affect substantial rights." *Thornton v. Gamble*, 1984-NMCA-093, ¶ 6, 101 N.M. 764, 766.

Under the New Mexico Rules of Civil Procedure, an order or judgment that does not adjudicate all of the claims of the parties is not a final judgment:

> When an action presents more than one claim for relief, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and

[2] Although not included in the current version of the record before the Court of Appeals, these affidavits are part of the record proper pursuant to Rule 12-209(D) NMRA, and are the subject of the *Motion to Supplement the Record Proper*.

> may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.
>
> NMRA Rule 1-054(B) (emphasis supplied).

"An order or judgment is not considered final until 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, 236. *See also In re Estate of Duran*, 2007-NMCA-068, ¶ 10, 141 N.M. 793, 796 ("generally, a judgment is not final unless all issues of law and of fact necessary to be determined have been determined, and the case has been completely disposed of to the extent the court has power to dispose of it"); *B.L. Goldberg & Assocs., Inc. v. Uptown, Inc.*, 1985-NMSC-084, ¶ 5, 103 N.M. 277, 278 (holding that order dismissing counterclaim did not dispose of all of the claims in the case, and was therefore not a final, appealable order); *Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 7, 116 N.M. 412, 413 ("A judgment or order that reserves the issue of assessment of damages for future determination is not a final judgment for the purposes of appeal"); *Pena v. Trujillo*, 1994-NMCA-034, ¶ 3, 117 N.M. 371, 371–72 (finding that district court's denial of a motion for default judgment against a garnishee was not a final order, because all of the issues of fact and law in the garnishment proceeding had yet to be decided).

A. The Court of Appeals Lacks Jurisdiction Because the Substitution Order is Not a Final, Appealable Order

SIG is not aware of any reported New Mexico decisions regarding the finality of orders substituting parties. However, in other jurisdictions, substitution orders are considered to be non-final orders. In *Mathews v. Saniway Distributors Serv.*, 155 Ga. App. 568, 568, 271 S.E.2d 701, 701 (1980), the Georgia court of appeals held that an order that granting a motion for substitution of the party plaintiff was not a final, appealable order because it did not grant judgment to the plaintiff and dismissed the appeal as premature. *See also Labayog v. Labayog*, 83 Haw. 412, 420, 927 P.2d 420, 428 (Haw.App. 1996) (holding that an order allowing the substitution of a party was interlocutory and not appealable as of right).

The reasoning employed by the court in *Mathews v. Saniway Distributors* is identical to the reasoning articulated by New Mexico courts in cases discussing the finality of orders in general. New Mexico courts agree that "an order or judgment is not considered final unless all issues of fact and law have been determined and the case disposed of by the trial court to the fullest extent possible." *B.L. Goldberg & Assoc., Inc. v. Uptown, Inc.*, 1985-NMSC-084, ¶ 3, 103 N.M. 277, 278; *accord Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 13, 113 N.M. 231, 236; *Britt v. Phoenix Indem. Ins. Co.*, 1995-NMSC-075, ¶ 7, 120 N.M. 813, 815.

Here, the Substitution Order entered by the district court did not grant SIG judgment against Gulfstream or dispose of any of the substantive issues of fact or

law. [RP 175-177]. There was no determination of Gulfstream's liability under the Note, the Deed of Trust, or any of the other loan documents. *Id.* Instead, the Substitution Order merely recognized SIG as the real party in interest and that the Note and other loan documents had been assigned by Wells Fargo to SIG, and changed the caption accordingly. *Id.*

In its Brief in Chief (the "Gulfstream Brief"), Gulfstream argues that the Substitution Order is final because it removed Wells Fargo as a party to the case. *See* Gulfstream Brief, p. 14. In support of this argument, Gulfstream cites *Bruun v. Katz Drug Co.*, 211 S.W.2d 918 (Mo. 1948), *Agin-Feeley Servs., Inc. v. Indus. Comm'n*, 389 S.W.2d 416 (Mo. Ct. App. 1965), and *Ingram v. Superior Court*, 98 Cal.App.3d 483 (1979). None of these cases supports Gulfstream's argument. All three cases recognize that, under narrow circumstances, an order regarding the substitution of a *defendant* could be a final order if the order disposed of the claims against that defendant.

In *Bruun v. Katz Drug. Co.,* the Missouri supreme court stated that "if the order adding or denying the addition of parties does not have the effect of discharging some of the parties or the force of creating or enlarging liability, the order is not appealable." *Bruun v. Katz Drug. Co.,* 211 S.W.2d at 920. The *Agin-Feeley Servs., Inc. v. Indus. Comm'n* court, citing *Bruun*, stated that "an order adding or denying the addition of parties to a lawsuit does not constitute an appealable order

unless such order has the effect of discharging some of the parties to the litigation or the force of creating or enlarging liability." *Agin-Feeley Servs., Inc. v. Indus. Comm'n*, 389 S.W.2d at 418. Finally, the court in *Ingram v. Superior Court* stated that although an order denying substitution of parties is not an appealable order, when such an order has "the effect of eliminating issues between the plaintiff and defendant so nothing is left to be determined, the order is a final judgment and is appealable." *Ingram v. Superior Court*, 98 Cal.App.3d at 489.

Here, unlike the cases cited by Gulfstream, Wells Fargo was the original plaintiff, not a defendant. There were no claims asserted by any party against Wells Fargo [RP 24-31]. Further, none of Wells Fargo's claims against Gulfstream were determined or disposed of by the Substitution Order. [RP 175-177]. The Substitution Order merely determined that those claims now belong to SIG. Finally, none of the potential claims by Gulfstream against Wells Fargo raised in the Gulfstream Motion to Amend were disposed of. [RP 175-177]. Therefore, even under the cases cited by Gulfstream, the Substitution Order cannot be considered to be a final order.

B. The Court Lacks Jurisdiction Because the Receiver Order is Not a Final, Appealable Order

If an order "practically disposes of the merits of the action, the order is deemed final even though further proceedings remain necessary to carry the order into effect." *In re Estate of Harrington*, 2000-NMCA-058, ¶ 24, 129 N.M. 266, 272. While none of the New Mexico cases discussing the finality of orders appointing

receivers in commercial foreclosure actions, the case that is most applicable is *Eagle Mining & Improvement Co. v. Lund*, 1910-NMSC-064, 15 N.M. 696. In *Eagle Mining*, the trial court entered an order appointing a receiver to take possession of and inventory all of the property and assets of an insolvent corporation, and abide further order of the court. *Id.* at ¶ 3. The New Mexico Supreme Court found that the decree contained in the order appointing receiver was "in the usual form of such decrees appointing receivers to conserve property pending final disposition of the case in chief under orders from the court," and that no such final disposition of the case had been made *Id.* at ¶ 9. Therefore, the Supreme Court held that the order was interlocutory in nature. *Id.* at ¶ 12.

Here, like the receiver in *Eagle Mining,* the Receiver was appointed by the court to maintain and preserve the Collateral while the case is pending. The Receiver Order did not finally dispose of all of the claims contained in the Complaint.

The cases cited by Gulfstream in support of its contention that the Receiver Order is a final order are distinguishable from this case. *Cooper v. Otero*, 1934-NMSC-008, 38 N.M. 29 determined that an order appointing receivers to liquidate the assets of an insolvent bank was a final order. In *In re Estate of Harrington*, 2000-NMCA-058, 129 N.M. 266, 267, the Court of Appeals held that the probate court's order appointing receiver to liquidate business owned by decedent and her husband was a final order.

Here, unlike *Cooper v. Otero* and *Harrington*, where receivers were appointed to liquidate assets, the Receiver was appointed to maintain and protect SIG's Collateral pending resolution of the claims to enforce the Note and foreclose the Deed of Trust. [RP 180-187]. The district court did not grant the Receiver authority to sell the Property in the present case, but only to request such authority by further motion and after further order of the district court. [RP 186, ¶ 12]. The Receiver is not empowered to take any irreversible action.

Finally, Gulfstream's reliance on *Dydek v. Dydek*, 2012-NMCA-088, 288 P.3d 872 is misplaced. The *Dydek* court did not determine whether an order appointing a receiver in a divorce case was a final order – the court merely stated, in *dicta*, that NMSA 1978 § 44-8-10 (1995) implies that orders appointing receivers are final and appealable. *Id.* at ¶ 50. However, NMSA 1978 § 44-8-10 (1995) does not state that orders appointing receivers are final, it simply provides the bonding requirements for staying such an order pending appeal. As set forth in NMRA Rule 1-054(B), an order need not be final to be appealable, if the order contains an express determination "that there is no just reason for delay." NMRA Rule 1-054(B). *See also Blea v. Sandoval*, 1988-NMCA-036, ¶ 6, 107 N.M. 554, 556 (stating that when more than one claim for relief is presented, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay). Here, the Receiver Order does not contain an

express determination by the court that there was no just reason for delay. [RP 178-188]. Therefore, NMRA Rule 1-054 does not apply.

The majority of courts in other jurisdictions have held that orders appointing receivers are not appealable as final orders. *See, e.g. 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); *Beus v. Terrell*, 46 Idaho 635, 269 P. 593, 594 (1928) (holding that an order appointing the receiver was not an appealable order). *But see 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); *Jones v. Thorne*, 80 N.C. 72, 75 (1879).

Hartford Fed. Sav. & Loan Ass'n v. Tucker, 192 Conn. 1, 469 A.2d 778 (1984) is applicable to this case. In *Hartford*, the defendant borrower appealed the appointment of a rent receiver in a foreclosure action. *Id.* at 3, 780. The Connecticut Supreme Court stated that "standing by itself, an appointment of a receiver is an interlocutory order, not appealable until there has been a final judgment." *Id.* The court held that because the receivership order was ancillary to mortgage foreclosure proceedings, an appeal from the final judgment of foreclosure would provide the defendant with an adequate opportunity to litigate his constitutional claims arising from the receivership order. *Id.* at 4, 780-781. Applying the reasoning employed by

Hartford, the Receiver Order, which is ancillary to the claims to enforce the Note and foreclose the Deed of Trust, is clearly interlocutory.

C. The Orders are Not Subject to Interlocutory Appeal

Gulfstream implies that because some states have enacted statutes authorizing interlocutory appeals of orders appointing receivers, this Court should permit Gulfstream's interlocutory appeal of the Receiver Order. *See* Gulfstream Brief, p. 17. Gulfstream is correct that some states have enacted statutes permitting interlocutory appeals of orders appointing receivers. *See, e.g.* Tex. Civ. Prac. & Rem. Code Ann. § 51.014 (a)(1) (permitting the appeal of an interlocutory order that appoints a receiver or trustee); A.R.S. § 12–2101(A)(5)(b)(providing that an appeal may be taken from an order appointing a receiver).

NMSA 1978 § 39-3-4 (1999) sets out the circumstances under which an appeal from an interlocutory order may be taken. New Mexico law provides that when the district court enters an order or decision, and the district court determines that "the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, he shall so state in writing in the order or decision." NMSA 1978 § 39-3-4(A) (1999) (emphasis supplied). Under this standard, the Orders are not appealable.

The district court did not so state, and further, the Orders don't come close to meeting that standard.

The New Mexico legislature could have included an exception in Section 39-3-4(A) for orders appointing receivers, but it did not. The district court did not state that the Receivership Order involved a controlling question of law as to which there is substantial ground for difference of opinion, or that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation. [RP 178-188]. In fact, the opposite is true. The appointment of a receiver in a commercial foreclosure action, particularly on a matured note, is routine and generally uncontroversial. *See* Robert M. Abrahams and Julian M. Wise, *Business and Commercial Litigation in Federal Courts*, § 127:25 (4th ed.) ("Receivers often are appointed in conjunction with a judicial foreclosure, in order to protect the assets during resolution of the parties' respective rights and to oversee the foreclosure."). Gulfstream's appeal does not meet the requirements for an interlocutory appeal.

Neither the Substitution Order nor the Receiver Order are final orders, the appeal does not meet any of the requirements for an interlocutory appeal, and the Court should therefore dismiss the appeal for lack of jurisdiction.

Issue No. 2: **The Trial Court Properly Substituted Saipan Investment Group, LLC as Plaintiff**

A. Standard of Review

Orders substituting parties are reviewed under the abuse of discretion standard. *Daniels Ins., Inc. v. Daon Corp.*, 1987-NMCA-110, ¶ 15, 106 N.M. 328, 331, *citing Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322 (10th Cir.1978) ("Substitution of a successor in interest under Rule 1–025(C) is within the sound discretion of the trial court.").

B. The Trial Court Properly Exercised its Discretion by Substituting SIG as the Plaintiff

NMRA Rule 1-025(C) provides that "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." NMRA Rule 1-025(C) (emphasis supplied). "[W]hen the interest of an original party has been transferred during the pendency of the proceeding...our rules permit the action to be continued by the party who has acquired the interest." *Crown Life Ins. Co. v. Candlewood, Ltd.*, 1991-NMSC-090, ¶ 14, 112 N.M. 633, amended (Oct. 28, 1991).

"An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 633. *See also Zamora v. CDK Contracting*

Co., 1987-NMCA-093, ¶ 28, 106 N.M. 309, 314 ("An abuse of discretion is an erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn from such facts and circumstances."). The district court's conclusion that SIG should be substituted as the plaintiff was supported by the substantial evidence presented and the applicable law.

1. The District Court's Substitution of SIG as Plaintiff Was Based on Substantial Evidence

As set forth above, SIG acquired all of Wells Fargo's right, title, and interest in the Note, the Deed of Trust, the ALR, and all other Loan Documents on December 16, 2015. [RP 32-53]. A copy of the Note with the allonge from Wells Fargo to SIG and a copy of the Assignment were attached to the Motion to Substitute. *Id.* When Gulfstream argued that CWCAM did not have the authority to execute the assignment documents [RP 55, ¶ 3], SIG provided the evidence of CWCAM's authority to execute the documents in its Reply in Support of the Motion to Substitute. [RP 83-89], including a link to the PSA and a copy of the Power of Attorney.[3]

[3] The exhibit attached to the Reply in Support of Motion to Substitute contained a typographical error. It referred to the PSA as being formed on December 1, 2002 [RP 84, 87]. However, the link contained in the Reply directs users to the correct PSA. [RP 84, footnote 1].

CWCAM is the Special Servicer for the Trust under the PSA. [RP 89]. Section 8.3(a)(I) of the PSA empowers the Master Servicer (as defined in the PSA) to "exercise all powers and privileges granted or provided to the holder of the Mortgage Notes..." [RP 84]. Section 9.4 of the PSA provides that the Special Servicer may "take any and all actions with respect to the Specially Serviced Mortgage Loans which the Master Servicer may perform as set forth in Section 8.3(a)..." [RP 84]. The PSA clearly gives CWCAM the authority to exercise the rights of the holder of the Note, including the authority to execute assignments of the Note and related Loan Documents.

When considering the Motion to Substitute, the district court had before it copies of the Note and allonge and the Assignment showing that the Note, the Deed of Trust, the ALR, and other Loan Documents had been assigned to SIG. [RP 32-53]. The district court also had a link to the PSA, which confirmed CWCAM's authority to execute the allonge and Assignment. [RP 84]. In addition, at the hearing held on February 18, 2016, the attorney for Wells Fargo confirmed that the Note and other Loan Documents had been assigned to SIG, and that Wells Fargo was no longer the holder of the Note or the owner of the other Loan Documents. [2-18-16 Tr. 14:5-8]. Conversely, Gulfstream provided no evidence that the Note had not been assigned to SIG, or that SIG was not the holder of the Note.

Further, Gulfstream's arguments about CWCAM's authority to assign the Note and other Loan Documents have been rendered moot by filings made during the pendency of the appeal, all of which should be part of the Record Proper.[4] The Jordahl Affidavit, the Wells Fargo Affidavit, and the Olin Affidavit provide additional information and documentation about the transfer of the Note and other Loan Documents to SIG, that, while not necessary for the district court to enter the Substitution Order, prove undeniably that CWCAM had the authority to execute the assignment documents.

2. The Substitution Order is Consistent with Applicable Law

Courts "may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Clark v. Sims*, 2009-NMCA-118, ¶ 20, 147 N.M. 252, 257. Gulfstream argues that the district court did not properly apply the law when it determined that SIG was the proper party in interest. *See* Gulfstream Brief, p. 20. Gulfstream's argument is unsupported and fails.

Under the New Mexico Uniform Commercial Code, there are three classes of persons entitled to enforce a negotiable instrument: "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the

[4] "Copies of all documents filed in the district court during the pendency of the appeal shall be transmitted to the appellate court for inclusion in the record proper, unless otherwise ordered by the appellate court." NMRA Rule 12-209(D).

instrument pursuant to Section 55-3-309 or 55-3-418(d) NMSA 1978." NMSA 1978 § 55-3-301 (1992).

As shown above, the district court was presented with abundant evidence that SIG was the holder of the Note on the date the Motion to Substitute was filed. Therefore, the district court's decision to permit SIG to substitute as the plaintiff was not based on a "misapprehension of law."

Further, Gulfstream does not have authority to challenge the effectiveness of the allonge to the Note and the Assignment based on the fact that the documents were signed by CWCAM. *Deutsche Bank Nat. Trust Co. v. Maclaurin*, 2015-NMCA-061, ¶¶ 8-9, 350 P.3d 1201, 1204 (holding that a defendant in a foreclosure action cannot challenge alleged violations of a pooling and servicing agreement in order to establish that a transferee is not a valid holder of the loan documents and thus is not the proper party to foreclose). Therefore, the district court did not even have to consider the issue of CWCAM's authority in order to find that SIG should be substituted as the plaintiff.

Gulfstream's reliance on *Bank of New York v. Romero*, 2014-NMSC-007, 320 P.3d 1 and *Deutsche Bank Nat. Trust Co. v. Johnston*, 2016-NMSC-013, 369 P.3d 1046 is misplaced.

In *Bank of New York v. Romero*, Bank of New York filed a complaint for foreclosure claiming to be the holder of a note that had been executed in favor of

Equity One. *Bank of New York v. Romero*, 2014-NMSC-007 at ¶ 5. Attached to the complaint was a copy of an unendorsed note. *Id.* at ¶ 10. At trial, Bank of New York produced the original note, which contained two undated endorsements by Equity One: a blank endorsement, and a special endorsement to JP Morgan Chase. *Id.* The court held that Bank of New York's physical possession of a note that was specially endorsed to JP Morgan Chase was not sufficient to establish Bank of New York as the holder of the note, stating that "[p]ossession of an unendorsed note made payable to a third party does not establish the right of enforcement, just as finding a lost check made payable to a particular party does not allow the finder to cash it." *Id.* at ¶ 23. The court further stated that because the note was specially endorsed to JP Morgan Chase by Equity One, the blank endorsement by Equity One could not be used to prove that Bank of New York was the proper holder of the note, concluding that "the Bank of New York's possession of the twice-endorsed note restricting payment to JP Morgan Chase does not establish the Bank of New York as a holder with the right of enforcement." *Id.* at ¶ 28.

Bank of New York v. Romero is factually distinguishable from this case. Unlike *Bank of New York v. Romero*, where the plaintiff was attempting to enforce a note endorsed to a third party, here, the Note was transferred to SIG via special endorsement. [RP 46]. There is no confusion about the identity of the holder of the Note; it cannot be disputed that SIG is the holder of the Note.

In *Deutsche Bank Nat. Trust Co. v. Johnston,* the court found that Deutsche Bank did not establish that it had standing to bring an action to enforce a note and foreclose a mortgage because Deutsche Bank could not show that it had possession of the note and had the right to enforce the note at the time the complaint was filed. *Deutsche Bank Nat. Trust Co. v. Johnston,* 2016-NMSC-013, ¶ 31.

Here, unlike *Deutsche Bank*, SIG attached copies of the assignment documents to the Motion to Substitute. [RP 32-53], and produced evidence of CWCAM's authority to assign the Note and other Loan Documents. [RP 83-88]. There is no question that SIG was the holder of the Note on the date the Motion to Substitute was filed.[5] Additionally, the policy concerns articulated by the *Deutsche Bank* court are inapplicable to the issue of substitution. The *Deutsche Bank* court was concerned with preventing non-holders from exercising final remedies against homeowners, thereby exposing homeowners to the possibility of double liability "when the wrong party sells the home and the note holder later appears seeking full payment on the note." *Id.* at ¶ 22. Here, the Substitution Order did not grant SIG a final judgment against Gulfstream, and because the Note was specially endorsed to SIG [RP 34-46], there is no possibility of a third party coming forward to attempt to enforce the Note again.

[5] Additionally, Wells Fargo was the holder of the Note on the date the foreclosure case was filed. *See* Wells Fargo Affidavit, Olin Affidavit.

Finally, Gulfstream's argument that SIG cannot be substituted as the plaintiff because it is not a holder in due course is nonsensical. A party does not need to be a holder in due course in order to enforce a negotiable instrument. *See* NMSA 1978 § 55-3-301 (1992). Further, there is no defense to enforcement of the Note. In the Answer, Gulfstream admits that the Note matured and was payable on January 1, 2015, and that it has not paid the Note. [RP 26, ¶ 16]. The Answer asserts no affirmative defenses to enforcement of the Note or foreclosure of the Deed of Trust. [RP 24-29]. Therefore, SIG's lack of holder in due course status does not affect its ability to enforce the Note or other Loan Documents.

3. The Substitution Order Did Not Unfairly Prejudice Gulfstream

Gulfstream argues that the district court abused its discretion by entering the Substitution Order because SIG's substitution as plaintiff prevented Gulfstream from filing a counterclaim against Wells Fargo. *See* Gulfstream Brief, pp. 20-21.

First, no New Mexico courts have recognized "unfair prejudice to the defendant" as a basis for a finding of abuse of discretion by a district court. Second, Gulfstream was not prejudiced by the substitution of SIG as plaintiff. Gulfstream's claims against Wells Fargo (to the extent that the claims belong to Gulfstream) do not need to be asserted in the foreclosure action as counterclaims because: (1) the claims arose after the Complaint was served, and (2) the claims did not arise out of the same transactions or occurrences that are the subject of the Complaint. *See*

NMRA Rule 1-013(A) ("A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim..."). Wells Fargo's foreclosure action, in which SIG was substituted as plaintiff, was filed on May 5, 2015. [RP 1-14]. The note auction, about which Gulfstream and Kingfisher complain, was conducted six months later, on November 3-5, 2015. [RP 125, ¶¶ 6-7]. Gulfstream has several options available to assert a claim against Wells Fargo relating to the auction procedures: (1) intervene in the Kingfisher Case; (2) file a separate action against Wells Fargo; or (3) file a motion to add Wells Fargo to the foreclosure case as a third-party defendant. All of these options are still available to Gulfstream. It has suffered no prejudice as a result of the Substitution Order.

The Substitution Order is supported by sufficient evidence that SIG is the real party in interest with the right to enforce the Loan Documents, and is consistent with the provisions of both NMRA 1-025 and the New Mexico Uniform Commercial Code. To the extent that this Court holds that prejudice to Gulfstream is a factor in determining whether the district court abused its discretion, Gulfstream has suffered no prejudice. Therefore, this Court should affirm the entry of the Substitution Order.

Issue No. 3: **The Trial Court's Appointment of a Receiver Was Proper**

A. Standard of Review

While there is no New Mexico case law discussing the standard of review of orders appointing receivers, in other jurisdictions, orders appointing receivers are reviewed under the abuse of discretion standard. *See, e.g. Moyer v. Moyer*, 183 S.W.3d 48, 51 (Tex. App. 2005) (orders appointing receivers are reviewed for abuse of discretion); *2115-2121 Ontario Bldg., L.L.C. v. Anter*, 2013-Ohio-2995, ¶ 14 ("The decision to appoint a receiver is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion."); *H.A. Sand Springs, LLC v. Lakeside Care Ctr., LLC*, 2012 OK CIV APP 21, ¶ 10, 273 P.3d 73, 75 ("The abuse of discretion appellate standard of review applies to a trial court's decision to appoint a receiver.").

The district court appointed the receiver under NMSA 1978 § 44-8-4(B) (1995) [RP 179, ¶ F], which states, in pertinent part, that "[u]pon application to a district court, the district court may appoint a receiver..." (emphasis supplied). This language supports the application of the abuse of discretion standard.

Gulfstream's argument that this Court should review the appointment of the Receiver *de novo* is incorrect. In its brief, Gulfstream does not state or even imply that the district court misconstrued the language contained in NMSA 1978 §§ 44-8-3 or 44-8-4 (1995). Instead, Gulfstream argues that the district court's findings of

fact (specifically, that SIG was the holder of the Note) were incorrect. *See* SIG Brief, p. 25. Findings of fact are reviewed under the abuse of discretion standard:

> Findings of fact made by the district court will not be disturbed if they are supported by substantial evidence. "Substantial evidence" means relevant evidence that a reasonable mind could accept as adequate to support a conclusion. This Court will resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings. Moreover, in reviewing a challenge to a finding, it is the evidence supportive of the finding, not that which is adverse, that usually decides the issue. We will order a reversal only if the trial court has clearly abused its discretion.

Sims v. Sims, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 633 (emphasis supplied).

Therefore, when considering the Receiver Order and the findings of fact it contains, the proper standard of review is abuse of discretion.

B. The Court Properly Exercised its Discretion by Appointing a Receiver

As discussed in greater detail above, a court abuses its discretion when it enters a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case. *Sims v. Sims*, 1996-NMSC-078 at ¶ 65. The district court's decision to appointment of a receiver was logical in light of the facts and circumstances in the case.

NMSA 1978 § 44-8-4(B) (1995) provides that, upon application to a district court, the district court may appoint a receiver:

> (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;
(4) when a receiver has been appointed for a business entity or other person by a court of competent jurisdiction in another state, and that receiver seeks to collect, take possession or manage assets of the receivership estate located in New Mexico; 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.

NMSA 1978 § 44-8-4(B) (1995) (emphasis supplied).

The evidence presented to the district court established that SIG is entitled to a receiver under paragraphs (1), (2), (3), and (5) of § 44-8-4(B). Gulfstream claims that "no evidence was taken by the district court" on the issue of the appointment of a receiver. Gulfstream Brief, p. 27. This is false. The Application for Receiver was verified, under oath, by SIG's manager, Jody Jordahl. [RP 58-77].

1. The Statutory Provisions Authorize the Appointment of a Receiver

NMSA 1978 § 44-8-4(A) (1995) states:

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.

NMSA 1978 § 44-8-4(A) (1995) (emphasis supplied).

SIG provided substantial evidence that it was the holder of the Note and the secured party under the Deed of Trust and ALR. [RP 32-53, 83-89]. The Deed of Trust provides for the appointment of a receiver after an event of default. [RP 60,

¶ 10]. Therefore, there existed grounds under NMSA 1978 § 44-8-4(B)(1) (1995) for the appointment of a receiver.

2. The Foreclosure Case is an Action Between Entities Claiming an Interest in the Receivership Estate

SIG claims an interest in the Collateral pursuant to the Deed of Trust, ALR, and other Loan Documents. SIG provided the district court with substantial evidence that it was the holder and owner of the Loan Documents. [RP 32-53, 83-89]. Further, even if the district court had not made a determination that SIG was the holder of the Note, SIG claimed an interest in the receivership estate based on the assignment of the Loan Documents. Therefore, grounds existed under NMSA 1978 § 44-8-4(B)(2) (1995) for the appointment of a receiver.

3. Receivers are Customarily Appointed in Foreclosure Cases

Receivers are commonly appointed in foreclosure cases. *See,* e.g. *First Interstate Bank of Lea Cty. v. Heritage Square, Ltd.*, 1992-NMSC-037, ¶ 8, 113 N.M. 763, 766 (receiver appointed to take charge of the mortgaged premises and to hold possession of the same until the foreclosure sale); *Bank of New Mexico v. Freedom Homes, Inc.*, 1980-NMCA-064, ¶ 2, 94 N.M. 532, 533 (receiver appointed in action to collect promissory note and foreclose mortgage). *See also* NMSA 1978 § 44-8-4(A) (1995) (expressly authorizing the appointment of a receiver in an action by a mortgagee or secured party). Therefore, there existed grounds under NMSA 1978 § 44-8-4(B)(2) (1995) for the appointment of a receiver.

4. Just Cause and the Risk of Irreparable Harm Existed

Pursuant to the terms of the ALR, Gulfstream absolutely and unconditionally assigned its rights and interests in all the Rents to the lender. [RP 60, ¶ 11]. SIG established is the owner of the ALR. [RP 32-53, 83-89]. The ALR provides that upon an event of default, "Lender shall be immediately entitled to possession of all Rents and sums due under any Lease Guaranties." [RP 61, ¶ 12]. It cannot be overemphasized that Gulfstream did not pay the Note when it matured on January 1, 2015. [RP 5-6, ¶¶ 16-19, 26, ¶ 16, 34, ¶ (d)]. Although Gulfstream had no right to possession of the Property or the Rents. [RP 60-61], Gulfstream continued to collect the Rents and refused to relinquish the Rents upon demand. [RP 61, ¶ 12]. A receiver was necessary to prevent further misapplication of the Rents.

The district court's entry of the Receiver Order was supported by evidence that SIG is the holder of the Note and the owner of the Deed of Trust and the ALR; that the Note had matured and is in default; that upon default, Gulfstream is obligated, under the ALR, to turn over the Rents; and that Gulfstream had refused to do so. The district court's appointment of a receiver was consistent with the evidence presented to the court and the New Mexico Receivership Act, NMSA 1978 § 44-8-1, *et seq.* (1995). Therefore, the Receiver Order should be upheld by this Court.

III. CONCLUSION

The Substitution Order and the Receiver Order are both interlocutory orders. Neither the Substitution Order nor the Receiver Order contain the language required by NMSA 1978 § 39-3-4(A) (1999) for the immediate appeal from an interlocutory appeal. Therefore, this Court lacks jurisdiction to consider the appeal.

The district court properly exercised its discretion by substituting SIG as the plaintiff in the foreclosure case and appointing a receiver. If this Court holds that it has jurisdiction to consider the appeal, the Substitution Order and Receiver Order must be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on May 15, 2017, a true and correct copy of Saipan Investment Group, LLC's Response Brief was served via first class U.S. Mail, postage prepaid on:

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