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 BRIEF OF WELLS FARGO BANK, N.A. AS TRUSTEE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. Summary of Proceedings

Wells Fargo Bank, National Association, as Trustee ("**Wells Fargo**" or the "**Trustee**") for the Registered Holders of Morgan Stanley Capital I Trust, Commercial Mortgage Pass-Through Certificates, Series 2005-HQ5 (the "**Trust**") was previously the owner and holder of a Promissory Note dated December 22, 2004 executed by Gulfstream Lomas Ltd. (the "**Note**") in the original principal amount of $8,600,000 (the "**Loan**"). [RP 24-25]. The Note was secured by a Leasehold Deed of Trust and Security Agreement dated December 22, 2004 (the "**Deed of Trust**") granting a first priority lien on Gulfstream's interest in certain real property located in Bernalillo County, New Mexico, as more fully described in the Deed of Trust. [RP 17-21].

At all times relevant to this appeal, CWCapital Asset Management LLC ("**CWCAM**") was the special servicer for the Trust. [RP 87-88]. In furtherance of its duties as special servicer, the Trustee issued CWCAM a "Power of Attorney" giving it authority to execute virtually any document concerning the Loan on behalf of the Trustee, including all documents relating to "the satisfaction, cancellation, or partial or full release" of the Deed of Trust and "all other comparable documents". [RP 89].

Gulfstream failed to repay the Loan in full at maturity on December 31, 2014. [RP 26]. After a period of negotiation the Trustee, acting through its special servicer and attorney-in-fact CWCAM, commenced a foreclosure action by filing a "Complaint for Debt, Foreclosure and Receiver" on May 5, 2015. [RP 1-12]. Gulfstream's original "Answer", filed on June 11, 2015, does not contain any affirmative defenses or counterclaims and admits that the Loan has matured and remains unpaid. [RP 24-29].

In late 2015 the Trustee sold the Loan at auction to Appellee and current plaintiff Saipan Investment Group, LLC ("**Saipan**"). [RP 30, 32-34]. On December 23, 2015 Saipan filed a "Motion for Order Substituting Plaintiff" (the "**Substitution Motion**") pursuant to Rule 1-025(C) NMRA. [RP 32-34]. The District Court granted the Substitution Motion and entered an Order on March 23, 2016 substituting Saipan as plaintiff and removing the Trustee and the Trust from the case (the "**Substitution Order**"). [RP 175-176].

In its capacity as the new owner of the Loan and incoming plaintiff, Saipan filed a "Verified Emergency Application for Appointment of Receiver" on January 22, 2016 (the "**Receiver Motion**") asserting that the Loan was irrevocably in default, the Deed of Trust granted an absolute right to appointment of a receiver and that Gulfstream had refused to turn over rental income pledged as additional security for the Loan. [RP 58-62]. The District Court granted the Receiver Motion by Order entered on March 24, 2016 (the "**Receiver Order**"). [RP 178].

On February 16, 2016, eight months after filing its original Answer, Gulfstream filed a "Motion to Amend Answer and Add Counterclaims". [RP 101-118]. In its proposed Amended Answer and Counterclaims, Gulfstream alleges that (i) CWCAM did not have authority to commence the foreclosure action on behalf of the Trustee, and (ii) breached an obligation to permit the borrower to bid for the Loan. [RP 109-112]. The proposed counterclaims acknowledge that Gulfstream had for many months dealt with CWCAM as the authorized representative of the Trustee and never questioned its authority to transact business related to the Loan. [RP 109-112, 118]. By Order entered on May 12, 2016 the District Court granted Gulfstream leave to amend its answer but held that it did not have jurisdiction to rule on the addition of counterclaims because of this pending appeal.[1] [RP 236].

The official record in this matter was filed in Court of Appeals on June 30, 2016. [RP i]. Subsequent to the commencement of this appeal, Saipan filed a Motion for Partial Summary Judgment containing affidavits from CWCAM and the Trustee which attest to the chain of custody of the original Note. Further, the Trustee affidavit ratifies CWCAM's authority to sell the Loan and acknowledges Saipan as the new holder of the Note and Deed of Trust. *See* Affidavits of Wells Fargo and Kathleen Olin filed in the District Court on January

[1] The Amended Answer continues to admit that the Loan has matured and remains unpaid. [RP 106].

31 and February 2, 2017 in support of Saipan's Motion for Partial Summary Judgment.[2]

II. Argument.

A. Standard of Review

The issues on appeal are mixed questions of law and fact which require different standards of review. The District Court's application of the Receivership Act is an issue of statutory interpretation which is reviewed de novo. *Dydek v. Dydek*, 2012-NMCA-088, ¶ 55, 288 P.3d 872, *Cooper v. Chevron U.S.A., Inc.*, 2002–NMSC–020, ¶ 16, 132 N.M. 382, 49 P.3d 61. "The principal command of statutory construction is that the court should determine and effectuate the intent of the [L]egislature using the plain language of the statute as the primary indicator of legislative intent." *State v. Ogden*, 1994-NMSC-029, ¶ 24, 118 N.M. 234, 880 P.2d 845.

The Court's determination that Saipan is the holder of the Note is a finding of fact reviewed under the substantial evidence standard. *Bank of N.Y. v. Romero*, 2014-NMSC-007, 320 P.3d 1 ("Because the district court determined after a trial on the issue that the Bank of New York established standing as a factual matter, we review the district court's determination under a substantial evidence standard of review."). "Substantial evidence is such relevant evidence

2 Although not included in the current version of the record before the Court of Appeals, these documents are dispositive of several of the Appellant's arguments, are properly included in the record pursuant to Rule 12-209(D) NMRA, and are the subject of a pending motion to augment the existing record.

that a reasonable mind would find adequate to support a conclusion." *Salazar v. D.W.B.H.*, Inc., 2008–NMSC–054, ¶ 6, 144 N.M. 828, 192 P.3d 1205 (internal quotation marks and citation omitted). "[W]e will not reweigh the evidence nor substitute our judgment for that of the fact finder. The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997–NMCA–044, ¶ 12, 123 N.M. 329, 940 P.2d 177 (citations omitted).

The Court's substitution of Saipan as plaintiff is reviewed under an abuse of discretion standard. *Houde ex rel. Delisle v. Ferri*, No. 28,796, dec. at 1, (N.M. Ct.App. June 26, 2009) (non-precedential) (Reviewing substitution of parties based on assignment of mortgage under abuse of discretion standard.); *Daniels Ins., Inc. v. Daon Corp.*, 1987-NMCA-110, ¶ 15, 106 N.M. 328, 742 P.2d 540 (N.M. Ct.App. 1987) ("Substitution of a successor in interest under Rule 1-025(C) is within the sound discretion of the trial court."). "An abuse of discretion will be found when the trial court's decision is clearly untenable or contrary to logic and reason." *Newsome v. Farer*, 1985-NMSC-096, ¶ 22, 103 N.M. 415, 708 P.2d 327.

B. The Receiver Order and Substitution Order are Interlocutory.

The Court of Appeals does not have jurisdiction over this case because the Receiver Order and Substitution Order are interlocutory orders which do not "practically dispose of the merits of the action." *See* NMSA 1978, § 39-3-2 (1917, amended 1966). New Mexico has a long-standing policy against consideration of interlocutory appeals. "When appeals are permitted before the complete disposition of the issues before the trial court, the delay and inefficiency can be considerable." *City of Sunland Park v. Paseo Del Norte Ltd. P'ship*, 1999-NMCA-124, ¶ 8, 128 N.M. 163, 990 P.2d 1286; *citing Baca v. Atchison, Topeka, & Santa Fe Ry.*, 1996-NMCA-054, ¶ 8, 121 N.M. 734, 918 P.2d 13; *Sunwest Bank of Albuquerque, New Mexico v. Nelson*, 1998-NMSC-012, ¶ 5, 125 N.M. 170, 958 P.2d 740 (Stating that New Mexico appellate courts "disfavor piecemeal appeals.").

The rules limiting interlocutory appeals are jurisdictional and "subject to certain exceptions, this Court has no jurisdiction to review an order or decision that is not 'final' within the meaning of NMSA 1978, § 39–3–2." *Sunwest Bank*, 1998-NMSC-012, ¶ 5. Even where authorized by statute or rule, New Mexico appellate courts are urged to use "extreme caution" in exercising their discretion to hear an interlocutory appeal. *Ellis v. Cigna Prop. & Cas. Companies*, 2007-NMCA-123, ¶ 16, 142 N.M. 497, 167 P.3d 945.

In light of their inherently interlocutory nature, the Receiver Order and the Substitution Order are only subject to review by the Court of Appeals if (i) the District Court has certified in writing that the Orders involve "a controlling question of law at which there is substantial ground for difference of opinion" and that an immediate appeal would benefit the litigation; or (ii) the Orders "practically dispose of the merits of the action". NMSA 1978, § 39-3-4(A). Since the Orders do not contain any language certifying them for appeal, appellate jurisdiction can only exist if they practically disposed of the merits of the action. [RP 175-176, 178-188].

Consistent with their policy against piecemeal review, New Mexico Courts have taken a strict view of what is necessary to "practically dispose of a case on the merits" holding that unresolved issues such as calculation of damages and affirmative defenses prevent appeal. *Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 7, 116 N.M. 412, 863 P.2d 447 ("A judgment or order that reserves the issue of assessment of damages for future determination is not a final judgment for purposes of appeal."); *City of Sunland Park*, 1999-NMCA-124, ¶ 6 ("Nor did the order 'practically dispose of the merits of the action,' because further proceedings (to award damages) are still necessary to resolve the dispute between the parties."); *Floyd v. Towndrow*, 1944-NMSC-052, ¶¶ 1-2, 48 N.M. 444, 152 P.2d 391 (1944) (Order not final because affirmative defenses not resolved); *Sys.*

Tech., Inc. v. Hall, 2004-NMCA-130, ¶ 11, 136 N.M. 548, 102 P.3d 107 (Arbitration order not final because court retained jurisdiction over question of priority of liens).

At the risk of stating the obvious, this is a foreclosure action. Orders directed to preserving the collateral and substituting parties are ancillary and have nothing to do with the foreclosure action itself. Every element of the case-in-chief and every affirmative defense still remain to be decided, including the right of the plaintiff to foreclose, the validity and priority of the lien, the existence of a default and the amount of the judgment.

i. The Receiver Order Does Not Resolve the Foreclosure Action.

The language of the Receiver Order confirms that few, if any, of the underlying issues among the parties have been resolved. [RP 178-188]. The text of the Order makes clear that the receiver is to "Protect, preserve and maintain the Property" and that he will serve until "disposition of the Property by foreclosure sale or otherwise". Further, the Receiver is prohibited from selling the Property absent further order of the Court. [RP 186]. Gulfstream fails to explain how appointment of a receiver to preserve the collateral could possibly resolve the merits of an underlying foreclosure action.

Instead, Gulfstream relies almost exclusively on Section 10 of the Receivership Act (NMSA 1978, §§ 44-8-1 through 10) titled "Appeal and stay of appointment of a receiver" and argues that since (i) the Act explicitly governs stay of a receivership pending appeal, therefore (ii) the legislature must have granted a blanket right of appeal for any order appointing a receiver. However, the language of the Act does not suggest Gulfstream's overbroad conclusion. The text of Section 44-8-10 is dedicated exclusively to the requirement of a supersedes bond to obtain a stay "***if an appeal is taken*** from a district court judgement or order appointing a receiver…". The statute does not address whether receivership orders are subject to appeal. While it is clear that the legislature believed some receivership orders to be subject to appeal, nothing in the Receivership Act grants a blanket right of appeal.

To adopt Gulfstream's position, this Court would need to conclude that in enacting Section 44-8-10 of the Receivership Act, the legislature abrogated NMSA 1978 39-3-2, 39-3-4, Rule 12-203 NMRA and more than a century of jurisprudence limiting appeals to final orders ***without ever mentioning its intention to do so***. It seems far more likely that if the legislature intended such a radical overhaul of appellate jurisdiction, it would have said so plainly. *Compare*, Colo. App. R. 1(A)(4) (4) (Expressly allowing direct appeal from "An order appointing or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver."). The more sensible way to interpret and harmonize the existing rules is to conclude that an order appointing a receiver is appealable if it practically disposes of the merits of a case or if the issuing court certifies it for appeal using the language provided in NMSA 1978 39-3-4(A), just like any other order.[3] In such cases, Section 10 of the Receiver Act governs obtaining a stay pending appeal. Absent certification or the requisite attributes of finality, a receiver order, like most every interlocutory order in New Mexico, is not subject to appeal.

The cases cited by Gulfstream demonstrate application of traditional appellate principals to receivership orders rather than establishment of a blanket right of appeal. In *Dydek v. Dydek*, the court appointed a receiver to prosecute a claim against an auto insurance company on behalf of an insured driver suffering from Alzheimer's Disease. The opinion states in dicta that the Receivership Act "implies" a right of appeal but also emphasizes that the issue was neither briefed by the parties nor decided by the court. 2012-NMCA-088, ¶ 50, 288 P.3d 872; *City of Sunderland Park*, 199-NMCA-124, ¶ 7 ("As we have said in the past, it would be a mistake to use an opinion as authority for a proposition not addressed in the opinion."). Moreover, as a practical matter the court treated the order in

[3] Section 8 of the Receivership Act provides that application for the appointment of a receiver may be made by motion in a pending action "or by separate petition or complaint." Presumably, an order appointing a receiver would "practically dispose of the merits" of a complaint filed solely to obtain the appointment.

Dydek as interlocutory since it addressed the propriety of the receivership even though the appeal was filed several years after entry of the order. Had the order been final, the deadline to appeal would have long since expired. *Id.*

In the case of *In re Estate of Harrington*, the court permitted immediate appeal of an order appointing a receiver to liquidate a business, observing that the order "dictated the fate of the business" and could not be compared to an order appointing a receiver to conserve the assets of a corporation. 2000-NMCA-058, ¶ 32, 129 N.M. 266, 5 P.3d 1070; *see also Eagle Mining & Improvement Co. v. Lund*, 1910-NMSC-064, ¶ 11, 115 N.M. 696, 113 P. 840 (Order appointing receiver to conserve assets interlocutory); *Cooper v. Otero*, 1934-NMSC-008, ¶ 19, 38 N.M. 164 (Order appointing receiver to liquate bank final and appealable). In reaching its decision the Court specifically contrasted *Eagle Mining* with *Cooper*, citing *Eagle* as an example of a receivership created merely to preserve assets and the *Cooper* as an example of a liquidating receivership subject to immediate appeal.

The resulting rule from these cases is simple. An order appointing a receiver to preserve property is interlocutory, just as an injunction preserving the status quo and/or granting temporary possession is unquestionably interlocutory. *See City of Sunland Park*, 1999-NMCA-124, ¶¶ 6-20. (Holding that an order granting immediate possession of real property to a condemning municipality to be interlocutory.). An order appointing a receiver to liquidate a business or perform some other irreversible act is final and subject to appeal. *In re Estate of Harrington*, 2000-NMCA-058, ¶ 32.

Application of the rule to this case is equally simple. Here, the receivership is in the nature of an injunction and not subject to appeal as a final order because the receiver was appointed to "protect, preserve and maintain the Property" and cannot sell the Property without further order of the District Court. [RP 178, 186]. If Gulfstream wanted an immediate appeal, it could have requested inclusion of the appropriate certification in the Receivership Order. Absent this language, the Court of Appeals has no jurisdiction to consider the appeal.

ii. The Substitution Order Does Not Resolve the Foreclosure Action.

As with the Receiver Order, the Substitution Order contains none of the language required to certify an interlocutory order for immediate appeal and is therefore only appealable if it "practically dispose[s] of the merits of the action.". Rule 1-025(C) NMRA is entirely permissive and the Substitution Order did little more that decide the form of caption to use in the case. Wright, Miller and Kane states of the analogous Federal Rule "An order allowing substitution under Rule 25 is interlocutory and not appealable of right. Nor will the courts use the extraordinary writs to review an order of this kind. ***The propriety of the***

substitution can be raised on appeal from a final judgment." 7C Fed. Prac. & Proc. Civ., Appellate Procedure, § 1962 (3d ed.).

Nevertheless, Gulfstream argues that the Substitution Order constitutes a finding that the Loan was properly transferred and denies Gulfstream the ability to file claims against the Trustee. These arguments are legally and logically senseless. The Order did not (i) address any of the elements of the underlying foreclosure action; (ii) rule on any affirmative defense; or (iii) prevent Gulfstream from asserting any defense or claim.

Any defense resulting from a flaw in the chain of title for the Loan or a failure to properly initiate foreclosure would apply equally to Saipan and the Trustee.[4] *Deutsche Bank Nat. Trust Co. v. Johnston*, 2016-NMSC-013, ¶ 16, 369 P.3d 1046. Gulfstream argues that "Effectively, the district court eliminated Gulfstream's counterclaim against Wells Fargo by allowing the substitution", but there is nothing preventing Gulfstream from filing these alleged causes of action as third-party claims in this case or in a new case. *See generally*, Rule 1-007(A) NMRA. Even if Gulfstream could identify an issue of law or fact that has been decided in the Substitution Motion, there is no rational argument that it practically decided the merits of the foreclosure case.

C. The Court had Ample Cause to Appoint a Receiver.

[4] If anything, a flawed transfer to Saipan would provide Gulfstream with an additional defense.

The Receivership Act states that upon application "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). Here, there is no dispute that the Deed of Trust provides for the appointment of a receiver upon default and that the Loan has matured and remains unpaid. [RP 26, 60-61]. The current mortgagee, Saipan, filed an application in conformity with the Receiver Act, Gulfstream filed opposition, the District Court held a hearing and at its conclusion appointed a receiver as directed by the statute. [RP 178-188].

Gulfstream's primary argument, that the District Court failed to make a finding of fact that Saipan is the current mortgagee, contradicts the plain language of Receivership Act, the Receiver Order and New Mexico law. The Act does not require indisputable proof of an applicant's interest in the property, only a verified statement describing the interest and the grounds for appointment of a receiver. Had the legislature intended to require additional proof, such as recorded copies of the deed of trust or verification of every transfer in the chain of title, it would have said so. Moreover, since the District Court found Saipan to be the holder of the Note and the Note to be secured by the Deed of Trust, as a matter of law the Court also found Saipan to be the "mortgagee". [RP 179]; *Bank of N.Y. v.*

Romero, 2014-NMSC-007, ¶ 35, 320 P.3d 1, *citing,* 55 Am.Jur.2d *Mortgages* § 584 ("A mortgage securing the repayment of a promissory note follows the note, and thus, only the rightful owner of the note has the right to enforce the mortgage.").[5]

D. The District Court properly substituted Saipan as Plaintiff.

Substitution of a plaintiff after commencement of an action is governed by Rule 1–025(C) NMRA. *Daniels Ins., Inc. v. Daon Corp.*, 1987-NMCA-110, 106 N.M. 328, 742 P.2d 540. The decision to add or substitute a party pursuant to Rule 1–025(C) is committed to the sound discretion of the Court. *Id.* The rule does not demand any specific standard of proof and no evidentiary hearing is required prior to substitution. 7C Fed. Prac. & Proc. Civ., Transfer of Interest in Action, § 1958 (3d ed.); *Sullivan v. Running Waters Irrigation, Inc.*, 739 F.3d 354 (7th Cir. 2014). If the propriety of the substitution is in doubt, it can be challenged on appeal from a final judgment. 7C Fed. Prac. & Proc. Civ., Appellate Review, § 1962 (3d ed.)

Here, Saipan provided evidence of the assignment of the Loan and both the original and substituted plaintiffs agree that Saipan is the correct party to continue this action. Olin Affidavit at ¶¶ 17 – 21; Wells Fargo Affidavit ¶¶ 8-11. The trustee has, by affidavit, acknowledged Saipan as the owner of the Loan and

5 Gulfstream's claim that the mandatory appointment language of NMSA 44-8-4(A) applies only to applications by mortgagees or secured parties also ignores the plain language of the statute, which goes on to state "or in any other action based upon a contract or other written agreement…".

confirmed CWCAM's authority to transfer the Loan Documents. Wells Fargo Affidavit at 8-11. Given these facts, the District Court was squarely within its discretion when it ordered Saipan to be substituted as plaintiff and it is difficult to see what Gulfstream hopes to achieve by this appeal other than wasting time.

Gulfstream argues that the District Court abused its discretion substituting Saipan as Plaintiff because the (i) Note was not properly transferred to Saipan; and (ii) the Defendant "lost the right to a counterclaim against Wells Fargo that if proven would prevent the enforcement of the note and the foreclosure of the mortgage."[6] However, Rule 1-025(C) is entirely permissive regardless of any findings of fact and Gulfstream retains the right to assert defenses based on a faulty transfer of the Note at any time prior to judgment. *Deutsche Bank Nat. Trust Co. v. Johnston*, 2016-NMSC-013, ¶ 18, 369 P.3d 1046 ("Arguments based on a lack of prudential standing are analogous to asserting that a litigant has failed to state a legal cause of action."). Further, Gulfstream remains free to file an action against the Trustee at any time, so no prejudice exists.[7]

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6 Gulfstream's assertion that Saipan is not a holder in due course is irrelevant. The UCC makes clear that a party need not be a holder in due course (or even a holder) in order to enforce a note. NMSA 1978 55-3-301(i)-(iii).

7 Gulfstream never articulates what counterclaim it thinks it has against Wells Fargo or why it would be a defense to foreclosure.

Conclusion

The Court lacks jurisdiction to consider this appeal because the Orders are interlocutory, have not been certified for appeal by the District Court and do not practically dispose of the merits of the foreclosure action. Even if the Court had jurisdiction, the record demonstrates that the District Court properly exercised its discretion in substituting Saipan as plaintiff and appointing a receiver.

Dated: May 15, 2017

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CERTIFICATE OF SERVICE

It is hereby certified that I caused to be mailed a true and correct copy of the APPELLEE BRIEF OF WELLS FARGO BANK N.A. AS TRUSTEE to:

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