

Court of Appeals, State of Michigan

ORDER

Federal Home Loan Mortgage Assn v Michael R. Kelley

Stephen L. Borrello
Presiding Judge

Docket No. 315082

Deborah A. Servitto

LC No. 12-000885-AV

Jane M. Beckering
Judges

The Court orders that the motion to file a late motion for amicus brief is GRANTED.

The Court orders that the motion for amicus curiae brief is GRANTED.

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued June 24, 2014 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 26 2014

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

FEDERAL HOME LOAN MORTGAGE ASSN,
Plaintiff-Appellant,

FOR PUBLICATION
August 26, 2014
9:00 a.m.

v

MICHAEL R. KELLEY, and KATHRYN
KELLEY,

No. 315082
Ingham Circuit Court
LC No. 12-000885-AV

Defendants-Appellees,

and

FEDERAL HOUSING FINANCE AGENCY,
Intervenor-Appellee.

ON RECONSIDERATION

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In this foreclosure-related litigation, plaintiff, Federal Home Loan Mortgage Association¹, (Freddie Mac), appeals by leave granted an Ingham Circuit Court opinion and order reversing the 55th District Court's July 31, 2012 order terminating defendants' possession of residential property located in East Lansing. For the reasons set forth in this opinion, we reverse and remand for reinstatement of the district court's order.

I. BACKGROUND

¹ In the lower court, plaintiff referred to itself as the Federal Home Loan Mortgage Corporation; however, on appeal, it now refers to itself as the Federal Home Loan Mortgage Association. For purposes of this opinion, we will refer to plaintiff as "Freddie Mac."

Underlying Mortgage Transaction

This dispute involves real property located at 2458 Barnsbury Road, in East Lansing, Michigan (the property). On March 21, 2003, First National Bank of America (First National) loaned defendants \$240,000 for the purchase of the property. Defendants executed a mortgage encumbering the property to First National. The mortgage was recorded on April 24, 2003. On March 26, 2003, First National assigned the mortgage to ABN-AMRO Mortgage Group, Inc. (ABN-AMRO). The assignment was recorded on November 25, 2003. On September 1, 2007, CitiMortgage, Inc. and ABN-AMRO merged and maintained the name CitiMortgage (hereinafter CMI).

Freddie Mac and the Federal Housing Finance Agency Conservatorship

Freddie Mac is a federally chartered corporation that was created as part of the Emergency Home Finance Act of 1970.² See PL 91-351, §§ 301-302; 84 Stat 451; 12 USC 1451 *et seq.*; *American Bankers Mortg Corp v Fed Home Loan Mortg Corp*, 75 F 3d 1401, 1404 (CA 9, 1996). Freddie Mac operates in the secondary mortgage market, purchasing and securitizing residential mortgages. *Cty of Sonoma v Fed Housing Finance Agency*, 710 F 3d 987, 989 (CA 9, 2013). Freddie Mac is governed by the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act), 12 USC 4501 *et seq. Id.*

In 2008, Congress amended the Safety and Soundness Act by enacting the Housing and Economic Recovery Act of 2008 (HERA). PL 110-289; 122 Stat 2645; as codified at 12 USC 4511 *et seq.* “HERA established the Federal Housing Finance Agency [FHFA], an independent agency charged with supervising [Fannie Mae and Freddie Mac] and the Federal Home Loan Banks.” *Cty of Sonoma*, 710 F 3d at 989. HERA empowered the FHFA to act, under certain circumstances, as a conservator or receiver of Freddie Mac or the Federal National Mortgage Association (Fannie Mae) for purposes of “reorganizing, rehabilitating, or winding up the affairs” of either entity. 12 USC 4617(a)(1) (2). It is undisputed that the FHFA placed Freddie Mac into conservatorship in September, 2008.³

Foreclosure of the Property

In June 2011, defendants defaulted on the mortgage and CMI foreclosed on the property under Michigan’s foreclosure by advertisement statute, MCL 600.3201, *et seq.* Freddie Mac purchased the property at an October 20, 2011 sheriff’s sale. Defendants failed to redeem the property within the six-month statutory redemption period and the property vested in Freddie Mac on April 20, 2012. See MCL 600.3236.

² “Freddie Mac” was officially titled the “Federal Home Loan Mortgage Corporation.” See 12 USC 1451, 1452.

³ The FHFA also simultaneously placed Fannie Mae under conservatorship. See *Herron v Fannie Mae*, 857 F Supp 2d 87 (D DC, 2012).

On May 1, 2012, after expiration of the statutory redemption period, Freddie Mac initiated eviction proceedings in district court pursuant to MCL 600.5704. Defendants challenged the foreclosure, arguing in part that the foreclosure violated their Fifth Amendment due process rights. Defendants maintained that Freddie Mac was a federal actor by virtue of FHFA's conservatorship, and was subject to the due process requirements of the Fifth Amendment and therefore could not foreclose by advertisement. Defendants also argued that CMI's foreclosure was statutorily invalid under the recording act because there was no chain of title evidencing the transfer of the mortgage from ABN-AMRO to CMI. Therefore, according to defendants, CMI did not own the debt and the foreclosure notice failed to properly identify the foreclosing entity.

The district court granted Freddie Mac's motion for summary disposition under MCR 2.116(C)(9) (failure to state valid defense) and MCR 2.116(C)(10) (no genuine issue of material fact). The district court held in relevant part that Freddie Mac was not a governmental actor subject to Fifth Amendment claims and that the chain of title was proper under MCL 600.3204(3) because the merger between ABN-AMRO and CMI did not constitute an "assignment" of the mortgage that necessitated a recording.

Defendants appealed and the circuit court reversed. The circuit court held that Freddie Mac was a governmental entity subject to the Fifth Amendment's notice and hearing requirements. The circuit court reasoned that Freddie Mac "filed tax exemptions as the United States under MCL 207.526(h)(i) and 505(h)(i)," and reasoned that the federal government retained permanent control over all aspects of Freddie Mac. The circuit court stated, "FHFA controls every aspect of [Freddie Mac's] business and its Board of Directors is appointed by and answers to the Director of the FHFA." The court concluded that "the procedures and provisions in place in this case make the conservatorship, in all practicality, permanent." Regarding the chain-of-title, the circuit court held that the foreclosure was invalid because MCL 600.3204(3) requires assignments to be made whenever the foreclosing party is not the original mortgagee, such that assignments must be recorded when a mortgagee merges into another company. The court stated, "ABN-AMRO ceased to exist when it merged with CMI. Because of this, CMI is not synonymous with ABN-AMRO, but is an entirely different entity that is required to be assigned the mortgage under MCL 600.3204(3)."

The circuit court reversed the district court's order awarding possession to Freddie Mac and dismissed the complaint. Freddie Mac applied for leave to appeal and the FHFA moved to intervene. This Court granted both applications.⁴ On appeal, Freddie Mac argues that the circuit court erred in holding that it was a governmental entity for constitutional purposes, erred in concluding that the foreclosure failed to comply with MCL 600.3204(3), and, to the extent there was a defect in the chain of title, the court erred in concluding that the foreclosure was void *ab initio* as opposed to merely voidable.

II. STANDARD OF REVIEW

⁴ *Federal Home Loan Mortgage Assn v Kelley*, unpublished order of the Court of Appeals, issued October 11, 2013 (Docket No. 315082).

“We review de novo a trial court’s decision on a motion for summary disposition to determine whether the moving party is entitled to judgment as a matter of law.” *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). We review constitutional issues and issues of statutory construction under the same standard. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 425; 761 NW2d 371 (2008); *Cuddington*, 298 Mich App at 271.

III. ANALYSIS

A. DUE PROCESS

The Fifth Amendment “appl[ies] to and restrict[s] only the Federal Government and not private persons.” *Pub Utilities Comm v Pollak*, 343 US 451, 461; 72 S Ct 813; 96 L Ed 1068 (1952). Therefore, the threshold question in this case is whether Freddie Mac is a governmental entity subject to a Fifth Amendment claim.

The circuit court concluded that Freddie Mac is a governmental entity subject to Fifth Amendment claims for two reasons: (1) Freddie Mac “filed tax exemptions as the United States under MCL 207.526(h)(i) and 505(h)(i)”; and (2) Freddie Mac is a governmental entity under *Lebron v Nat’l Railroad Passenger Corp*, 513 US 374, 377; 115 S Ct 961; 130 L Ed 2d 902 (1995). Both of these conclusions are erroneous.

With respect to Freddie Mac’s tax status, while MCL 207.505(h)(i) and MCL 207.526(h)(i), provide tax exemptions for certain instruments and transactions involving the United States, Freddie Mac is specifically authorized by federal statute, to be exempt from “all taxation now or hereafter imposed by any . . . State,” except for real property taxes. 12 USC 1452(e). Thus, Freddie Mac would have been exempt regardless of whether it sought an exemption “as the United States.” Moreover, the circuit court did not cite, and defendants do not provide, any authority supporting the position that seeking a tax exemption “as the United States” subjects federally created corporations to constitutional claims under the Fifth Amendment. As the United States Court of Appeals for the Ninth Circuit stated in *Hall v American Nat’l Red Cross*, 86 F3d 919, 922 (CA 9, 1996), “Government-created corporations are often held to be tax-immune government instrumentalities, but courts have also frequently found them not to be subject to constitutional treatment as government actors.”⁵ Thus, merely because Freddie Mac filed for tax exemptions as “the United States,” was not dispositive as to whether Freddie Mac is a governmental entity for constitutional purposes. Instead, *Lebron*, 513 US at 374, is controlling on this issue and under the *Lebron* framework, we conclude that Freddie Mac is not a governmental entity.

In *Lebron*, the United States Supreme Court addressed whether the National Railroad Passenger Corporation (commonly known as Amtrak) was a governmental entity for

⁵ “Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues.” *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 360 n5; 597 NW2d 250 (1999).

constitutional purposes. In that case, Amtrak refused to display the plaintiff's political advertisement on a large billboard at Penn Station commonly known as "the Spectacular." *Id.* at 377. The plaintiff sued, alleging violations of his First and Fifth Amendment rights. *Id.* at 377-378. At issue was whether Amtrak was a governmental entity subject to the plaintiff's constitutional claims. *Id.* at 378-379.

In resolving this issue, the Supreme Court held that, "where . . . [1] the Government creates a corporation by special law, [2] for the furtherance of governmental objectives and [3] retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for [constitutional purposes]." *Id.* at 400. Although Amtrak's authorizing statute expressly stated that Amtrak was not a federal entity, the *Lebron* Court concluded otherwise. The Court reasoned that Amtrak was created by special statute explicitly for the furtherance of governmental goals—i.e. the preservation of passenger trains in the United States. *Id.* at 383, 397-398. Furthermore, six of the eight Amtrak board members were directly appointed by the President of the United States. *Id.* Moreover, the Court reasoned, the government's control of Amtrak was permanent in nature, explaining:

Amtrak is not merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be); it is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission, which are run by Presidential appointees with fixed terms. [*Id.* at 398.]

In concluding that Amtrak was a federal entity, the *Lebron* Court distinguished *Regional Rail Reorganization Act Cases*, 419 US 102; 95 S Ct 335; 42 L Ed 2d 320 (1974), wherein the Supreme Court held that Conrail was not a federal instrumentality "despite the President's power to appoint . . . 8 of [Conrail's] 15 directors." *Lebron*, 513 US at 399. The *Lebron* Court noted that, in *Regional Rail*, the federal appointees were appointed to the Conrail board to protect federally-backed debt obligations. *Id.* at 399. Furthermore, the appointees were required to operate Conrail "at a profit for the benefit of its shareholders," and full control of the board would shift back to the shareholders once federally-backed debt obligations fell below 50-percent of total indebtedness. *Id.* (quotations and citations omitted). In contrast, "[t]he Government exerts its control [over Amtrak] not as a creditor but as a policy maker, and no provision exists that will automatically terminate control upon termination of a temporary financial interest." *Id.*

In this case, there is no dispute that the government created Freddie Mac by special statute for the purpose of furthering governmental objectives.⁶ Defendants do not argue, nor can

⁶ See e.g. 12 USC 4501; *American Bankers Mortgage Corp v Fed Home Loan Mortgage Corp*, 75 F3d 1401, 1406-1407 (CA 9, 1996), ("The congressional purposes for Freddie Mac are clearly designed to serve the public interest by increasing the availability of mortgages on

they prove that, pre-conservatorship, Freddie Mac was a governmental entity. See *American Bankers Mortgage Corp v Fed Home Loan Mortgage Corp*, 75 F3d 1401, 1406-1409 (CA 9, 1996) (holding that pre-conservatorship Freddie Mac lacked sufficient government control under *Lebron* because 13 of its 18 directors were elected annually by common shareholders and its 60 million shares of common stock were publically traded on the New York Stock Exchange).

Instead, defendants argue that the FHFA's 2008 conservatorship served to transform Freddie Mac into a governmental entity. This argument is not novel and has been repeatedly rejected by federal courts including the United States Court of Appeals for the Sixth Circuit, which recently held that “[u]nder the *Lebron* framework, Freddie Mac is not a government actor who can be held liable for violations of the Fifth Amendment’s Due Process Clause.” *Mik v Fed Home Loan Mortg Corp*, 743 F 3d 149, 168 (CA 6, 2014). This holding aligned with numerous decisions by federal courts across the country, which have soundly rejected the same argument.⁷ For the following reasons, we now similarly hold that Freddie Mac, under the conservatorship of the FHFA, is not a governmental entity for constitutional purposes.

As conservator, the FHFA succeeded to “all” of Freddie Mac’s “rights, titles, powers, and privileges,” with authority to operate all of its business “with all the powers of the shareholders, the directors, and the officers. . . .” 12 USC 4617(b)(2)(A)-(B). Although these powers are sweeping, importantly, Congress did not appoint FHFA as *permanent* conservator over Freddie Mac. Instead, the purpose of the conservatorship is to reorganize, rehabilitate or wind-up Freddie Mac’s affairs. 12 USC 4617(a)(2). These terms connote a temporary period of control and defendants point to no statutory language showing that the government intended to effectuate a permanent takeover of Freddie Mac.

The circuit court concluded that although “conservatorship is described as a temporary status of a company, the procedures in place in this case make the conservatorship, in all practicality, permanent,” noting that “there is no determined end date in which [Freddie Mac] will become a private entity, nor is there an automatic provision that will revert [Freddie Mac] to a private entity.” Similarly, defendants point out that in *Regional Rail*, 419 US at 102, the Court held that Conrail was not a federal instrumentality in part because the government’s full voting control would *automatically* shift back to Conrail’s shareholders once the corporation’s federal debt obligations fell below 50-percent of its indebtedness. *Lebron*, 513 US at 399, citing *Regional Rail*, 419 US at 152. Defendants argue that, unlike Conrail, in this case, there is no triggering mechanism that terminates the conservatorship. These arguments are unpersuasive.

housing for low—and moderate—income families and by promoting nationwide access to mortgages.”)

⁷ See e.g. *Narra v Fannie Mae*, No. 2:13-cv-12282 (ED Mich, 2014); *Fed Home Loan Mortg Corp v Shamoon*, 922 F Supp 2d 641 (ED Mich, 2013); *Lopez v Bank of America, N.A.*, 920 F Supp 2d 798 (WD Mich, 2013); *Dias v Fed Nat’l Mortg Assoc*, No. 12-00394 (D Hawaii, 2013); *Matveychuk v One West Bank*, No. 1:13-CV-3464-AT (ND Ga, 2013); *May v Wells Fargo Bank*, No. 4:11-3516 (SD Tex, 2013); *Bernard v Fannie Mae*, No. 12-14680 (ED Mich, 2013); *In re Kapla*, 485 BR 136 (Bankr ED Mich, 2012); *Syriani v Freddie Mac Multiclass Certificates*, No. 12-3035-JFW (CD Cal, 2012); *Herron v Fannie Mae*, 857 F Supp 2d 87, 95-96 (D DC, 2012).

The *Lebron* Court noted that with respect to Conrail, the government was merely acting as its creditor and exerted control over Conrail for the purpose of ensuring a profit for Conrail's shareholders. *Lebron*, 513 US at 399. Notably, the *Lebron* Court did not state that government control is deemed permanent unless the government provides that its involvement will terminate on a specified date or upon the satisfaction of a specified condition. To the contrary, the *Lebron* Court recognized that the indefinite government control over Conrail, pending the satisfaction of certain conditions, did not equate to permanent government control. *Id.* With respect to permanence, the conservatorship of Freddie Mac is analogous to the government's control of Conrail, as it is similarly of indefinite duration pending the satisfaction of certain conditions. See 12 USC 4617(a)(2). Thus, Congress' failure to specify a termination date does not render the FHFA's control permanent under the *Lebron* framework. This is especially true considering the government's control of Freddie Mac was imposed for the inherently temporary purpose of "reorganizing, rehabilitating, or winding up" its affairs. 12 USC 4617(a)(2).

In sum, Freddie Mac was created by special law for governmental purposes; however, although the federal government, through the FHFA, exercises control over Freddie Mac, that control is not permanent in nature. Accordingly, under the *Lebron* framework, Freddie Mac is not a federal entity for constitutional purposes and defendants' due process claim failed as a matter of law.⁸ See *Nat'l Airport Corp v Wayne Bank*, 73 Mich App 572, 574; 252 NW2d 519 (1977) ("It is unquestioned that state action is required in order to assert a denial of due process under both the Michigan and United States Constitutions.")

B. VALIDITY OF FORECLOSURE UNDER MCL 600.3204(3)

Freddie Mac argues that the circuit court erred in holding that the foreclosure was void *ab initio* because the foreclosure did not comply with MCL 600.3204(3).

MCL 600.3204(3) provides as follows:

(3) *If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.* [Emphasis added.]

In this case, it is undisputed that the foreclosing party was not the original mortgagee. First National assigned the mortgage to ABN-AMRO, and that assignment was duly recorded. Subsequently, ABN-AMRO merged with CMI, the foreclosing entity. Freddie Mac argues that CMI was not required to record its interest in defendants' mortgage under MCL 600.3204(3) because it acquired that interest pursuant to a merger. Defendants argue that the circuit court correctly concluded that CMI failed to comply with MCL 600.3204(3). We need not address the substance of this issue, however, because our Supreme Court in *Kim v JP Morgan Chase Bank*,

⁸ Because we conclude that Freddie Mac is not a governmental entity for constitutional purposes, we need not address Freddie Mac's argument that Michigan's foreclosure by advertisement does not violate the Due Process Clause.

NA, 493 Mich 98, 115-116; 825 NW2d 329 (2012), stated “to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant’s failure to comply with MCL 600.3204. To demonstrate such prejudice, they must show they would have been in a better position to preserve their interest in the property absent defendant’s noncompliance with the statute.” Here, defendants cannot make such a showing. Rather, their claim is based on their contention that plaintiffs violated their due process rights. Having held that defendants’ due process rights were not violated, defendants are left without a claim relative to this issue. Therefore, under *Kim* 493 Mich at 115-116, they have failed to allege prejudice necessary for this Court to engage in a resolution of this issue.

IV. CONCLUSION

In summary, we conclude that Freddie Mac is not a governmental entity for constitutional purposes and defendants’ due process claim therefore failed as a matter of law. Further, whether CMI properly complied with MCL 600.3204(3) is not necessary for this Court to decide given defendants’ failure to allege prejudice. As such, defendants were not entitled to any relief and the district court properly entered an order terminating defendants’ possession of the property. *Kim*, 493 Mich at 15-116. Accordingly, we reverse the circuit court’s order and remand for reinstatement of the district court’s order terminating defendants’ possession of the property.

Reversed and remanded for proceedings consistent with this opinion. No costs are awarded in this matter. MCR 7.219 (A). We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Deborah A. Servitto

/s/ Jane M. Beckering