BANK OF NEW YORK V. KEERAN

BANK OF NEW YORK, as Trustee for the Benefit of the Certificateholders, CWALT, Alternative Loan Trust 2007-14T2 Mortgage Pass-Through Certificates, Series 2007-14T2,
Plaintiffs-Appellees,
v.
JENNIFER J. KEERAN,
Defendant-Appellant,
and
JOHN DOE and JANE DOE (true names unknown), tenants,
Defendants.

No. 33,901

COURT OF APPEALS OF NEW MEXICO

December 3, 2014

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Nan G. Nash, District Judge

COUNSEL

Little, Bradley & Nesbitt, P.A., Sandra A. Brown, Albuquerque, NM, for Appellees

Foster, Rieder & Jackson P.C., J. Douglas Foster, Albuquerque, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: RODERICK T. KENNEDY, Chief Judge, MICHAEL E. VIGIL, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Defendant appeals from the district court's order approving the foreclosure sale and special master's report. We issued a notice of proposed summary disposition, proposing summary affirmance. Defendant has responded to our notice with a memorandum in opposition, containing a motion to amend the docketing statement. Plaintiff filed a response to the memorandum in opposition and motion to amend the docketing statement. After due consideration, we are not persuaded by Defendant's opposition to our notice and motion to amend, and we are persuaded by Plaintiff's response. Thus, we deny the motion to amend the docketing statement and affirm the district court's order approving the foreclosure sale and special master's report.

{2} On appeal, Defendant has argued that (1) the district court erred by reopening the foreclosure case that Plaintiffs (the Bank) initiated, but was dismissed due to inaction [DS 2]; and (2) the district court erred by approving the foreclosure sale that the Bank conducted while the case was inactive. [DS 3] Our notice proposed to affirm on the grounds that (1) the Bank had a right to sell the property under the foreclosure decree, which was a final judgment that was not appealed, and there are no alleged improprieties in the terms of the sale; (2) there is no indication that notice of the sale was inadequate or that Defendant could have exercised the right of redemption or wants to exercise it now; and therefore (3) we saw no harm to Defendant nor any relief to which she is entitled.

{3} In response to our notice, Defendant filed a motion to amend the docketing statement, arguing for the first time in this case that the Bank lacked standing to file the foreclosure complaint. [MIO 1-2] Defendant contends that the Bank's lack of standing establishes that she is harmed by the district court's order approving the sale of the property and the special master's report. [Id.] Defendant further states that the statute of limitations on the foreclosure claim has now lapsed, and therefore, the Bank could not file a new foreclosure complaint to cure the standing problem, and she would be entitled to the property. [MIO 1-2, 9] For the reasons stated in this Opinion, we are not persuaded that this argument is viable and therefore deny the motion to amend the docketing statement to add this standing issue.

{4} In cases assigned to the summary calendar, this Court will grant a motion to amend the docketing statement to include additional issues if the motion (1) is timely, (2) states all facts material to a consideration of the new issues sought to be raised, (3) explains how the issues were properly preserved or why they may be raised for the first time on appeal, (4) demonstrates just cause by explaining why the issues were not originally raised in the docketing statement, and (5) complies in other respects with the appellate rules. *See State v. Rael*, 1983-NMCA-081, ¶¶ 7-8, 10-11, 14-17, 100 N.M. 193, 668 P.2d 309. This Court will deny motions to amend that raise issues that are not viable, even if they allege fundamental or jurisdictional error. *See State v. Moore*, 1989-

NMCA-073, ¶¶ 36-51, 109 N.M. 119, 782 P.2d 91, *superseded by rule on other grounds as recognized in State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730.

{5} Defendant contends that she may raise her standing challenge at this time because standing is a jurisdictional matter that may be raised at any time, even for the first time on appeal and even sua sponte by the appellate court. *See, e.g.*, *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 15, 320 P.3d 1 ("We have recognized that the lack of standing is a potential jurisdictional defect which 'may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." (alteration, internal quotation marks, and citation omitted)). While we agree that standing may be a jurisdictional defect, it is a challenge that nevertheless must be raised properly.

{6} Under the circumstances, Defendant's challenge to standing is not raised properly in an appeal from the sale. *See, e.g.*, *Speckner v. Riebold*, 1974-NMSC-029, ¶ 9, 86 N.M. 275, 523 P.2d 10 ("A judgment of foreclosure is always final in part and interlocutory in part; final as to determining the rights of the plaintiff under the mortgage; interlocutory with respect to the sale; final as to the amounts to be paid to the mortgagor; interlocutory with respect to the legality of the proceedings upon the sale, the proper distribution of the proceeds thereof and as to any rights in the distribution of any surplus." (internal quotation marks and citation omitted)). As we stated in our notice, the foreclosure decree was a final declaration of the rights of the parties in the property and was immediately appealable. *See, e.g.*, *Grygorwicz v. Trujillo*, 2009-NMSC-009, ¶ 8, 145 N.M. 650, 203 P.3d 865; *see also Speckner*, 1974-NMSC-029, ¶ 8 ("As we view it, there are two separate adjudications in a suit to foreclose a mortgage. The initial judgment operates to foreclose the mortgage. It declares the rights of the parties in the mortgaged premises. If no appeal is taken from that portion of the judgment, it becomes final unless modified [within the thirty-day period of time during which trial courts have control over their judgments]."). Defendant did not appeal from the foreclosure, which was entered by summaryjudgment. [RP 75-81] We also note that Defendant has never filed a motion for relief from the judgment of foreclosure in district court, asking the district court to reopen its final, unappealed judgment. *See, e.g.*, Rule 1-060(B) NMRA. We can review a timely appeal from the denial of that relief, but it is improper to ask this Court to reopen the district court's foreclosure judgment, so long after the time for challenging that judgment has expired. *See* Rule 12-201(A)(2) NMRA (stating that the notice of appeal shall be filed within thirty days of the district court's judgment being challenged on appeal).

{7} For these reasons, we determine that Defendant's motion to amend the docketing statement to add her challenge to the Bank's standing to bring the foreclosure complaint is not a viable issue. Thus, we deny the motion to amend.

{8} Because we hold that Defendant cannot challenge the foreclosure of her property in this appeal from the district court's order reopening the case and approving the sale, we consider whether Defendant's response to our notice established that she was harmed by the district court's actions, without considering Defendant's standing challenge. Without considering any challenge to the Bank's standing to foreclose on the

property, we are left with a record showing the Bank with a valid, enforceable right to sell the property under the foreclosure decree. Defendant does not allege any impropriety in the terms of the sale or notice of the sale, and Defendant does not argue that she could have exercised the right of redemption or wants to exercise it now. In the absence of any alleged harm in the sale of the property, we fail to see how Defendant was harmed by the manner in which the district court reopened the case to permit approval of the Bank's sale of the property. *See, e.g.*, *Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 30, 135 N.M. 423, 89 P.3d 672 (stating that "[i]n the absence of prejudice, there is no reversible error" (internal quotation marks and citation omitted)); *In Re Byrnes*, 2002-NMCA-102, ¶ 36, 132 N.M. 718, 54 P.3d 996 (noting that matters of administration for the court that do not cause actual harm to a party do not present errors that we will remedy).

{9} To the extent Defendant argues that she was harmed by the district court's reopening of the case rather than requiring the Bank to file a new foreclosure complaint—because the statute of limitations for foreclosure would have lapsed for the Bank to seek a new foreclosure decree—we are aware of no authority that would require the Bank to file another foreclosure action after having obtained a judgment of foreclosure.

{10} Based on the foregoing reasons, we affirm the district court's order approving the foreclosure sale and special master's report.

{11} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

MICHAEL E. VIGIL, Judge