NEVADA HOA FORECLOSURES CANNOT EXTINGUISH DEEDS OF TRUST HELD BY FANNIE MAE

Yesterday, the U.S. District Court for the District of Nevada issued an important ruling concerning the litigation over whether homeowners' association foreclosures under Nevada's super-priority lien statute (NRS 116.3116) can extinguish first deeds of trust when the underlying indebtedness is owned by a Government-Sponsored Enterprise (GSE) like Federal National Mortgage Association (Fannie Mae) or Federal Home Loan Mortgage Company (Freddie Mac).

In *Skylights LLC v. Byron*, Case No. 2:15-cv-00043-GMN-VCF, Chief Judge Gloria Navarro held that federal law prohibited a state-law HOA foreclosure from extinguishing a first deed of trust assigned to Fannie Mae. However, the Court's decision included language indicating that its holding could be limited to the rare scenario where Fannie Mae (or Freddie Mac) is record beneficiary of the deed of trust at the time of the HOA's foreclosure—a potential limitation that could greatly limit the extent of the Court's ruling.

As discussed several times before on this blog, lenders and mortgage servicers doing business in Nevada have found themselves enmeshed in litigation over whether they still have a valid security interest securing loans for many of properties in the State following the Nevada Supreme Court's opinion in September 2014 holding that a properly conducted HOA foreclosure under NRS 116.3116 would indeed extinguish all other security interests on the property—including purchase-money first deeds of trust recorded before the HOA even recorded its notice of default.

Following the Nevada Supreme Court's ruling, one of the arguments raised by lenders is that for loans where a GSE owns the underlying indebtedness (and therefore is the party entitled to enforce the deed of trust), the federal Housing and Economic Recovery Act (HERA) prohibits a state law such as NRS 116.3116 from eliminating a property interest held by the federal government through its conservatorship of Fannie Mae and Freddie Mac. The Federal Housing Finance Agency (FHFA) has intervened in several suits involving GSE loans to advance the argument.

Chief Judge Navarro's ruling from yesterday was the first significant decision on the issue. Chief Judge Navarro sided with the lenders and

FHFA, holding that the "plain meaning of [12 U.S.C. § 4617(j)] is that when FHFA is acting as a conservator, none of the property sought to be conserved by FHFA may be subject to a foreclosure without its consent." Op. at 9.

As noted above, there is a possibility that Chief Judge Navarro's ruling—as promising as it sounds—is limited in scope. *Skylights LLC* involved a unique set of facts: for reasons not explained in the opinion, CitiMortgage had assigned its deed of trust to Fannie Mae *before* the HOA foreclosed on the property, meaning the HOA had constructive notice that Fannie Mae had a property interest in the property at the time it conducted its foreclosure sale. Chief Judge Navarro's analysis is not expressly limited to the facts of the case; however, it is conceivable that it will be limited just so. The opinion makes mention of the fact that Fannie Mae was the record beneficiary of the deed of trust at the time of the HOA foreclosure. *See, e.g.*, Op. at 19 ("Based upon the recorded documents, it is undisputed that the Deed of Trust was assigned to Fannie Mae several months before the HOA conducted its foreclosure sale.").

> Indeed, the final "money line" of the order states: "Accordingly, *because FHFA held Deed of Trust as conservator for Fannie Mae prior to the foreclosure*, section 4617(j)(3) prevents the HOA's foreclosure on the Property from extinguishing the Deed of Trust." Op. at 21

The lending community will probably not have to wait long to find out the limits of Chief Judge Navarro's ruling. Two other similar cases that were argued along with *Skylights* just one week ago (*Williston Investment Group v. JPMorgan Chase Bank, N.A., et. al.*, No. 2:14-CV-02038-GMN-PAL;*Elmer v. JPMorgan Chase Bank, N.A., et. al.*, No. 2:14-cv-01999-GMN-NJK) are still awaiting Chief Judge Navarro's rulings. Each of those cases presents the more common fact scenario: at the time of the HOA foreclosure sales, the GSEs were not the *recorded* beneficiaries of the deeds of trust (though evidence in the record in both cases indicates the GSEs purchased the loans and acquired an interest in the deeds of trust prior to the HOA sales). Supplemental briefing in those two cases is due in early July. The lending community will simply have to wait and see whether that factual distinction makes all the difference.