

DIRT Periodic Development for Thursday, October 9, 2014
Washington and Sandhill Owners Assoc. v. Bank of America

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SYNOPSIS: Foreclosure of HOA lien on home is ineffective against HUD.

Washington and Sandhill Owners Assoc. v. Bank of America
U.S. District Court (D. Nev. Sept. 25, 2014)

In 2008 the Renterias bought a house in Las Vegas with an FHA-insured loan. They subsequently defaulted both on the loan and on their assessments to the homeowners association.

The HOA filed a notice of lien and subsequently conducted a nonjudicial foreclosure of the lien, taking title by a trustee's deed on May 23, 2012.

However, at that stage it wasn't entirely clear whether the HOA lien (which by statute in Nevada had priority over the first mortgage for 9 months of assessments) was a "true" lien or only a right to be paid 9 months of assessments from the proceeds of a foreclosure of the first mortgage. This is no longer in doubt; on Sept. 18, 2014 the Supreme Court of Nevada resolved the question, holding that the HOA lien is a "true" lien, and that its foreclosure will cut off the rights of not only the homeowner but also the holder of a first mortgage on the property. See *SFR Investments Pool 1 v. U.S. Bank*, 2014 WL 4656471 (Nev. Sept. 18, 2014).

Meanwhile, Bank of America (BOA), which held the first deed of trust, was preparing to foreclose it. It first foreclosed on July 2, 2012, but for unexplained reasons rescinded that foreclosure. Its second foreclosure, pursuant to a notice of sale dated April 12, 2013, was held on May 3, 2013. Two weeks later BOA conveyed the house to HUD, pursuant to its claim on the FHA insurance contract.

While the HOA had acquired title to the property on May 23, 2012, it didn't initially act as if it owned the house. Instead, in September 2012 it sent BOA a notice of the delinquent lien, and it sent another such notice for additional delinquent assessments in October 2013. However, neither of these notices matured into a foreclosure sale against BOA.

Finally, in October 2013, the HOA (seemingly changing its mind and deciding that it did own the property after all), filed a suit to quiet its title as against HUD, and for damages for slander of title against HUD and BOA.

HOLDING: The court denied the HOA's claims on the basis of federal preemption. It quoted the following to support its position:

"State legislation must yield under the supremacy clause of the Constitution to the interests of the federal government when the legislation as applied interferes with the federal purpose or operates to impede or condition the implementation of federal policies and programs." *Rust v. Johnson*, 597 F.2d 174, 179 (9th Cir. 1979).

The court cited cases in which the federal courts had exempted mortgages held and foreclosed by the United States from such state law consumer protections as antideficiency statutes and post-sale redemption periods. It found that if the HOA's foreclosure were allowed to stand as against HUD's claim, it would "operate to impede or condition the implementation of federal policies and programs." Hence, under the principle of federal preemption, the court declared that (at least as against HUD) the HOA foreclosure was unconstitutional and void.

COMMENTS:

1. The court's conclusion makes no sense at all. It is one thing to say that, when the federal government is foreclosing, it is not bound by certain state law barriers to foreclosure, such as antideficiency statutes, one-action rules, or post sale redemption statutes. The federal courts have struggled with these issues, and their results are not uniform, but they do indeed present difficult and debatable issues. It is a very different, and much more questionable, conclusion, to say that the federal government is not bound by the standard methods of determining mortgage and lien priorities - and that is in effect what the court holds.
2. Note that the HOA's foreclosure had already been completed when BOA held its foreclosure sale. The HOA (whether it fully understood it or not) already owned the property, and BOA's first mortgage had already been wiped out. If the federal government's lien is junior to another party's, and the latter forecloses, it seems obvious that the government's lien is wiped out; that's the basic meaning of having a junior priority position.
3. Of course, in the Washington and Sandhill case, the holder of the mortgage wasn't (yet) the government; it was merely BOA. The court treats BOA as if it somehow represented the government, since BOA was planning to deed the property to HUD in pursuance of its FHA insurance claim. This is dubious reasoning enough, but even if the government had actually held the first mortgage, surely it would have to play by the state's priority rules; otherwise the entire system of property rights and expectations would be thrown into chaos whenever the federal government was a player.

4. Is there unfairness to BOA or the government in this system? Not in Nevada. A nonjudicial foreclosure in Nevada is commenced by the foreclosing party's issuance of a "Notice of Default and Election to Sell" under Nev. Rev. Stat. 107.080. This document is recorded in the real property records and also must be mailed by registered or certified mail to (1) the original grantor of the deed of trust; (2) the current owner of the property; (3) the holders of any subordinate encumbrances on the real property; (4) any person who has recorded a request for notice. The court concedes that the HOA issued that notice, and there's certainly no allegation that BOA didn't receive its copy. (Not all states with nonjudicial foreclosure provide for mailed notice to the holders of junior interests, but Nevada does.) So there's no surprise or unfairness to BOA. If it chooses to sit on its corporate hands rather than cure the HOA's delinquency or attend the sale and bid for the property, it has bought its plight on itself.

5. A proper understanding of the case would seem to be that BOA's lien was wiped out before it ever foreclosed, that its foreclosure was completely ineffective, and that it had no title to convey to HUD. Without the conveyance to HUD, BOA has no claim on the FHA mortgage insurance, but that is its own fault. Is there any risk or damage to the federal government's program of mortgage insurance in this result? Not the slightest.

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