



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40119

BOKF, N.A.,

Plaintiff,

v.

**THE UNKNOWN HEIRS AND DEVISEES
AND LEGATEES OF LINORA P. PACHECO,
Deceased, JOSE PACHECO, SANTA FE
COMMUNITY HOUSING TRUST, NEW
MEXICO MORTGAGE FINANCE
AUTHORITY, and OCCUPANTS OF THE
PROPERTY**

Defendants,

and

ASHOK KAUSHAL,

Appellant-Petitioner/Cross-Respondent,

v.

SANTA FE COMMUNITY HOUSING TRUST,

Appellee-Respondent/Cross Petitioner.

BRIEF IN CHIEF

By: Santa Fe Community Housing Trust

Respectfully Submitted,

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RELATED APPEALS:

Appeal 1:

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Appeal II:

Kaushal v. Santa Fe Community Housing Trust
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SUMMARY OF PROCEEDINGS

Nature of the Case

This case involves a foreclosure action followed by the efforts of Appellant-Petitioner/Cross-Respondent Kaushal (“Kaushal”) and the Appellee-Respondent/Cross-Petitioner the Santa Fe Community Housing Trust (the “Trust”) to enforce their separate rights of redemption. The appeals and these certiorari proceedings involve these redemption efforts.

COURSE OF PROCEEDINGS

This matter has come before this Court upon the Trust’s petition for writ of certiorari to the New Mexico Court of Appeals in Court of Appeal number A-1-CA-39814 (“Appeal II”) filed by the Trust and the cross-petition for writ of certiorari filed by Kaushal.

Linora Pacheco (“Linora”) was the Defendant in the mortgage foreclosure case filed by the Plaintiff National Banking Association d/b/a Bank of Oklahoma (the “Bank”) in the district court case upon which the appeals and this writ are based (RP 1). The Trust held a second mortgage which was also in default and filed a counterclaim and cross-claim for foreclosure in these proceedings. (RP 54, 170).

During these proceedings, Linora died. A stipulated default judgment was entered foreclosing the Bank’s mortgage and the Trust’s second mortgage. (RP 280, 301).

Kushal obtained assignments of redemption rights from two of Linora's four heirs. (RP 307). The Trust and Kaushal filed competing petitions for redemption and conflicts developed between the Trust and Kaushal over the exercise of their respective redemption rights, resulting in additional proceedings before the District Court. (RP 307, 317, 336, 349). Kaushal claimed priority redemption rights through his assignments from two of Linora's heirs. The Trust claimed to hold priority rights as a second mortgage holder. (*Id.*).

The Trust filed a motion for summary judgment. (RP 420). District Court granted the summary judgment motion and ruled that Kaushal, who had only secured redemption rights from two of Linora's four heirs, had not perfected a right of redemption and the Trust, as a second mortgage holder, was now the sole redeemer of the foreclosed property. (RP 573, 577).

Kaushal appealed (RP 582), and the Court of Appeals in a published opinion reversed in part the District Court. (Court of Appeals number (A-1-CA-37609, the "Opinion" and "Appeal 1") and held that Kaushal redeemed a 50% undivided interest in the property as represented by his redemption rights obtained from 50% of Linora's heirs. The Trust redeemed the balance of the property, resulting in both Kaushal and the Trust holding 50% tenancy in common interests in the foreclosed property. (the Appeal I Opinion). No further motions were filed, and the Opinion became final.

After the time for post opinion motions passed (Rule 12-402, NMRA 2016 and Rule 12-404, NMRA 2022), the Court of Appeals issued its Mandate. (RP 633). The Trust presented to the District Court a form of judgment on the mandate which reflected the holdings of the Court of Appeal Opinion. (RP 660). Kaushal opposed the form of Judgment and essentially argued that the Court of Appeals Opinion should be modified to hold that Kaushal redeemed the entire interest in the property. (RP 692). The Trust responded and argued that the time for reconsideration of the Opinion had long passed. (RP 696). The District Court agreed that the Trust's form of judgment on the Mandate reflected the holdings in the Opinion and entered the Trust's form of judgment. (RP 708).

Kaushal appealed the Judgment on the Mandate (RP 713) and in his appeal continued to argue the merits of the case, contending that Kaushal should be held to have redeemed the entire property. (See Brief in Chief and Reply Brief in Appeal II).

The Court of Appeals accepted Kaushal's invitation to revisit its Opinion and reversed its prior Opinion, ruling that the Trust failed to redeem any interest in the property. However, it further ruled that Kaushal was apparently now a tenant in common with the remaining heirs of Linora who did not assign their redemption rights to Kaushal, a result that neither party had expected. (See Memorandum of Opinion in the Appeal II "Memorandum").

Both parties filed motions for reconsideration in Appeal II, both of which were

denied. (See Appeal II denials).

The Trust then filed a Petition for Writ of Certiorari to the Court of Appeals in these present proceedings and presented as questions for review the following:

1. Does the Judgment on the Mandate reflect the holdings in the Court of Appeal's Opinion in this matter?

2. May the Court of Appeals modify a final Opinion with an unpublished Memorandum Opinion issued after the Court of Appeals has lost all jurisdiction and during a process where the only task is to enter a judgment on the mandate?

STATEMENT OF FACTS

Linora Pacheco had four children. Kaushal obtained the rights of redemption held by two of the children. Following the foreclosure sale, both the Trust and Kaushal proceeded to enforce their respective redemption rights. The Trust's redemption rights were based upon its second mortgage holder status, (Opinion ¶¶ 2,3)

Kaushal claimed that since he had assignments of the redemption rights of two of the heirs, he had priority redemption rights for the entire property under Section 39-5-18 NMSA 1978. (Opinion ¶¶4,9) The Trust argued that Kaushal needed assignments of all of the Pacheco children's redemption rights to redeem the property. Otherwise, we would be back to the race to the courthouse which the 2007 amendment to the statute apparently intended to eliminate. (Appeal I, Answer Brief

pps. 9-13).

On December 10, 2020, the Court of Appeals issued its Opinion. On February 22, 2021, the Court of Appeals issued its mandate to the District Court instructing it to proceed in accordance with the attached Opinion. (RP 633). On June 11, 2021, the Judgment on the Mandate was entered. (RP 708). On June 14, 2021, Kaushal filed a notice of appeal of the Judgment on the Mandate. (RP 713). On May 18, 2023, the Court of Appeals filed its Memorandum. On May 25, 2023, the Trust filed an Amended Motion for Rehearing and Reconsideration along with a brief in support thereof. (Appeal II, Trust Motion). Kaushal also filed a motion for reconsideration. (Appeal II, Kaushal Motion). On August 28, 2023, the Court of Appeals denied both motions for reconsideration.

THE APPEAL OPINION

The Appeal I Opinion clearly articulated its holding: “However, we need not resolve that issue [the Trust’s receipt of one heir’s redemption rights] given our conclusion that Kaushal’s interest is limited to the fifty percent (50%) he was assigned, which did not include the interest purportedly assigned by Urioste to the Trust.” (Appeal Opinion p. 4, footnote 1). On the same page at ¶7, the Opinion restates its holding that Kaushal only redeemed a fifty percent interest in the property: “Kaushal’s interest, however, is limited to those interests possessed by the assignees - two of Pacheco’s four surviving sons – at the time of the assignment.”

The Opinion also concluded that the "...Trust substantially complied with the statutory requirements applicable to its own right of action." *Id.* Unless the Trust had redeemed something i.e.: the remaining 50% interest in the property, there would have been no need to address this issue. See the Opinion footnote number 1, p.4 and *Santa Fe S. Ry. v. Baucis Ltd. Liab. Co.*, 1998-NMCA-002, ¶ 24, 124 N.M. 430, 952 P.2d 31 ("We will not issue an advisory opinion in the absence of a justiciable issue.")

The Opinion notes that Section 39-5-18(D) NMSA 1978 provides that mortgagees and their heirs have priority redemption rights. ¶10. The Opinion then states: "However, the statute is silent on whether a prioritized redeeming former defendant owner must possess a unified interest-i.e., one hundred percent (100%) of the redemption right." *Id.*

The Opinion then concludes that Section 39-5-18(D) did not require a unity of interest held by the mortgagee's heirs in order for redemption rights to be exercised on their behalf. *Id.* ¶14. "However, he [Kaushal] holds only a 50% redemption interest in the property." *Id.* ¶17.

At ¶¶15-17, the Opinion disposes of the argument that securing the redemption rights of one of several heirs allows for a redemption of the entire property interest. Instead, since tenancy in common interests are separately alienable, Kaushal only had a right to redeem 50% of the fee title to the property.

The Court then instructed the District Court “to allow for the exercise of Kaushal’s, *along with the Trust’s*, rights to redemption consistent with this Opinion.” *Id.* ¶ 28 (emphasis added).

The only plausible interpretation of this mandated directive is that both parties had redemption rights which were properly exercised and which redeemed something – 50% interests in the property.

THE MANDATE

There being no post Opinion motions for reconsideration or petitions for writs of certiorari filed, on February 22, 2001, the Court of Appeals issued its Mandate to the District Court with the Opinion attached and ordered the District Court to conduct such further “... proceedings consistent with said decision/order.” (RP 633). Following the Court of Appeal’s Mandate, the District Court issued its Judgment on the Mandate and, complying with the Opinion, confirmed that the parties had each successfully redeemed a 50% interest in the property. (RP 708).

KAUSHAL APPEAL

Kaushal then appealed the Judgment on the Mandate. However, instead of limiting his arguments to whether the Judgment on the Mandate followed the Opinion, reargued the merits of the Opinion. Despite having no jurisdiction to modify the Opinion, the Court of Appeals acquiesced to Kaushal’s efforts to reopen the appellate case and issued its unpublished Memorandum Opinion reversing the

holdings in the Opinion. Under the Memorandum, Kaushal now redeemed a one-hundred percent (100%) interest in the property, but the redemption was on behalf of himself and other non-assigning heirs of Linora. The Trust redeemed nothing. (Memorandum ¶¶ 10-12). This left an irreconcilable conflict between a published Opinion and the unpublished, non-precedential Memorandum and a title company nightmare.

THE MEMORANDUM OPINION

Even a casual read of the Memorandum reveals that it is announcing holdings totally foreign to anything found in the Opinion. For example, the Opinion found that the Trust had successfully exercised its redemption rights. (Opinion ¶¶10, 15-17, 28). Had this not have been the holding, there would have been no need for the extensive discussion about the Trust’s successful enforcement of redemption rights. (Opinion ¶¶ 23-27). Also, the Memorandum declares that Kaushal redeemed one-hundred percent (100%) of the property, but the redemption was also on behalf of the other heirs of Linora who retained their tenancy in common interests. (Memorandum ¶ 8-9) Kaushal succeeded in opening up the Opinion, but with a result he never expected. Now, if he wanted clean title, he needed to clear out the 50% title interests held by the other Linora heirs. None of this is found in the Opinion.

STANDARD OF REVIEW

In the case before this Court, the issue is whether the Court of Appeal’s

Memorandum of Opinion is an improper attempt to amend its own Opinion after all jurisdiction was lost, and whether the Judgment on the Mandate properly reflects the holdings of the published Opinion. There are no factual disputes, and this Court can rule on these issues *de novo* and as a matter of law. *See, Losinski v. Drs. Corcoran, Barkoff & Stagnone, P. A.*, 1981-NMCA-127, ¶ 4, 97 N.M. 79, 80, 636 P.2d 898, 899; *Cadle Co. v. Seavall*, 2019-NMCA-062, ¶ 6, 450 P.3d 471, 473 (holding that a *de novo* review is appropriate for a statutory interpretation matter) and *State v. Esparza*, 2003-NMCA-075, ¶ 13, 133 N.M. 772, 70 P.3d 762 (stating that an appellate court reviews legal issues *de novo* where facts are not in dispute.).

ARGUMENT

Section 39-5-18, *supra*, was extensively amended in 2007, apparently to add stability to the mortgage foreclosure process by establishing redemption priorities and hopefully avoiding the too frequent chaotic race to the courthouse with competing redemption rights. The Memorandum now creates a new source for chaos. The Opinion, which holds that one only redeems that percentage ownership interest in the foreclosed property represented by the assigned redemption interests, is now published authority and precedence. The Opinion is now part of New Mexico's *stare decisis*. The Court of Appeals mandate was later issued, and, following the Court of Appeals' mandate, the District Court entered judgment in accordance with the Opinion, a limited ministerial process. An unpublished

memorandum provides no precedential authority. However, in the case at bar, apparently, under the guise of an interpretation or clarification, the Memorandum upends the holding of the Opinion, leaving the legal community in a quandary as to whether it advises that the Opinion is to be followed or whether the subsequent non-precedential Memorandum is to be followed.

The current state of this appeal is further problematic. The Court of Appeals has turned the formality of entering a judgment on the mandate into an opportunity to resurrect jurisdiction which includes revising the very opinion that the district court has been ordered to follow. In essence, the Court of Appeals is now pioneering a process where, after it loses jurisdiction, it can still provide ad hoc commentary as to what its previously issued opinions were intended to mean,

Instead, the Opinion should stand and the Judgment on the Mandate should stand. If the Court of Appeals is poised to reverse one of its opinions, it must do so when appropriate litigation comes within the scope of its jurisdiction.

ENTERING JUDGMENTS ON THE MANDATE

The only matter left in this litigation is to enter a judgment on the mandate based upon the rulings and holdings of the Opinion attached to the mandate from the Court of Appeals. There is no opportunity to change or fine-tune an Opinion that has become final. The following cases confirm this process:

- *State ex rel. King v. UU Bar Ranch Ltd. Partnership*, 2009-NMSC-010, ¶22, 145 N.M. 769 (“The Court of Appeals 1 opinion and mandate set forth the full extent of the jurisdiction of the district court on remand.”)
- *Matter of Miller*, 1976-NMSC-039, ¶4, 89 N.M. 547 (“Since mandate was issued on November 21 the Court of Appeals lost jurisdiction over the case on December 1”)
- *B & H Co. Inc. v. Moss*, 1976 -NMSC- 057, ¶1, 89 N.M. 549 (“The cost bill was not submitted until after the mandate had been issued and therefore the Court of Appeals lost jurisdiction over the case.”)
- *Hughes v. Hughes*, 1984-NMSC-035, ¶4, 101 N.M. 74: (“Our mandate and opinion in the prior appeal set forth the full extent of the jurisdiction of the district court on remand.”)
- *Vinton Eppsco Inc. of Albuquerque v. Showe Homes, Inc.*, 1981-NMSC-114, ¶4, 97 N.M. 225 (“It is well settled that the duty of a lower court on remand is to comply with the mandate of the appellate court, and to obey the directions therein without variation, even though the mandate may be erroneous.”)
- *Kaushal v. Santa Fe Community Housing Trust*, Opinion in Ct. App. No. A-1-CA-39814. ¶28 (“For the foregoing reasons, we reverse the District Court order granting the Trust’s redemption petition and summary judgment for the Trust and remand to the District Court to **allow for the exercise of Kaushal’s**,

along with the Trust's, rights to redemption consistent with this opinion."

(emphasis added).

- *Bank of N.Y. v Romero*, 2016-NMCA-091, ¶9, 382 P.3d 991 (“When there ‘is any doubt or ambiguity regarding the [appellate] mandate, the *meaning* of the [appellate] opinion governs”)
- *Wilson v. Emp. Sec. Comm'n*, 1966-NMSC-147, ¶ 5, 76 N.M. 652, 655, 417 P.2d 455, 457 (Upon remand, the district court must look to the opinion of the supreme court, not to the mandate, and, if there is any conflict in the supreme court's opinion and the mandate, the mandate must give way to the court's opinion as the law of the case.”)
- *Albuquerque Broad. Co. v. Bureau of Revenue*, 1950-NMSC-011, ¶ 5, 54 N.M. 133, 135, 215 P.2d 819, 820 (“... in case there is any conflict between this Court's opinion and its mandate, the mandate must give way to the opinion.”)

In the present case, the District Court did as instructed by the Mandate and the Opinion. On appeal of the Judgment on the Mandate, the Court of Appeals was restricted to the same extent as the District Court and could only determine whether the Judgment on the Mandate followed the Opinion.

The irony is that both Kaushal and the Trust contend that the Memorandum conflicts with the Opinion. However, the parties then diverge, with Kaushal

continuing to address the merits of the holdings in both the Opinion and the Memorandum and the Trust trying to put the train back on the tracks.

CONCLUSION

The only issue before this Court over which there is any jurisdiction is a determination of whether the Judgment on the Mandate issued by the District Court follows the Opinion. The Trust contends that the Judgment on the Mandate does follow the Opinion. In fact, Kaushal does not appear to contend otherwise. The Court of Appeals Memorandum should be expressly overruled or stricken as being issued without supporting jurisdiction.

Respectfully submitted,

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/s/ Ronald J. VanAmberg

RONALD J. VanAMBERG

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document to the following counsel of record electronically through the Odyssey System on December 27, 2023.

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