2017

Bank of America, n.a., Plaintiff Appellant, v. Loraine Sundquist, Individually, and John Doe and Jane Doe Defendants Appellees.

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BANK OF AMERICA, N.A., Plaintiff Appellant, v. LORAINE SUNDQUIST, INDIVIDUALLY, and JOHN DOE AND JANE DOE Defendants Appellees.	Appellate Case No. 20170014-SC

On Appeal from the Third District Court, Salt Lake County
Case No. 110408730 EV (Judge Bruce C. Lubeck)

APPELLEE'S REPLY TO SUPPLEMENTAL BRIEF

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In the Supplemental Briefing Order dated September 17, 2017 regarding Supplemental Briefs, stated "such a brief should be submitted only if the posture before the Supreme Court creates a material difference in the argument presented (e.g., the argument already briefed relied on authority that would be binding on the Court of Appeals but not on the Supreme Court)."

Appellant properly addressed in Argument I., whether the law of the case is appropriate in this Supplemental Brief since the Court of Appeals would be bound by the law of the case, and now the case is before the Utah Supreme Court. However, arguing in Argument II., that overruling of *Sundquist* is warranted irrespective of the law of the case doctrine is not appropriate because it is making the same arguments that were contained by Bank of America's in its Opening Brief in the Court of Appeals and the Reply Brief submitted to the Supreme Court. Therefore, the Court should only consider Argument I of Appellant's Supplemental Brief.

I. UNDER THE LAW OF THE CASE DOCTRINE THE RULING IN FEDERAL NATIONAL MORTAGE ASSOCIATION (FNMA) V. SUNDQUIST SHOULD BE AFFIRMED.

This case is the same case that was on interlocutory appeal, *FNMA v Sundquist*, except the Plaintiff Appellant is Bank of America instead of FNMA. The law of the case should apply.

In the case of *IHC Health Services, Inc. v. D & K Management, Inc., 2008 UT 73, 196 P.3d 588 (2008)*, this Court stated,

" (*A. The Law of the Case Doctrine Dictates that Decisions Made on Issues During One Stage of a Case Are Binding on Successive Stages of the Same Case*

The law of the case doctrine encompasses several different principles related to the

binding effect of a decision on subsequent proceedings in the same case. Simply stated, under the law of the case doctrine, "a decision made on an issue during one stage of a case is binding in successive stages of the same litigation." Thus, the doctrine allows a court to decline to revisit issues within the same case once the court has ruled on them. In this way, the law of the case doctrine acts much like the doctrine of res judicata-furthering the goals of judicial economy and finality-but within a single case."

Here, the Court should decline to revisit the same issue that it addressed in the interlocutory appeal, *FNMA v Sundquist.* There are only three exceptions to when the law of the case is not applied.

"There are three exceptional circumstances in which the law of the case doctrine does not apply: " (1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *IHC Health Services, Inc. v. D & K Management, Inc., Supra.*

There has been no change of controlling authority. No new evidence has become available. The only exception that could apply would be if the Court is convinced that its prior decision was clearly erroneous and would work a manifest injustice. That is not the circumstances presently before this Court. Rather, the opposite is true. The Supreme Court's decision was correct when it held that Utah law applied to a non- judicial foreclosure conducted in the State of Utah. Those statutes, Utah Code §s 57-1-21 and 57-1-23, only permit a Utah licensed attorney in good standing or a title insurer physically located within the state to conduct foreclosure sales. This limitation gives the citizens of Utah access to directly meet with the foreclosing party such that any mistakes in fact and/or allow for resolution other than foreclosure. This is for the protection of the citizens of the state of Utah and to prevent a manifest injustice being done to these Utah citizens. Further, 12 U.SC.92a does not preempt the Utah Statutes as is urged by Appellant.

Foreclosure is not a fiduciary activity of a trustee. 12 U.SC.92a pertains to fiduciary duties. Additionally, using Texas law to foreclose on real property in Utah is not reasonable. The OCC regulation is an attempt to take away the states' rights to regulate debt collection and the real estate within its borders. Therefore, the Supreme Court in its decision did not err, and its decision should not be revisited. As a result, there is no exception to the law of the case rule that should be applied. Law of the Case does apply.

II. UNDER THE LAW OF THE CASE DOCTRINE THE RULING IN FEDERAL NATIONAL MORTAGE ASSOCIATION (FNMA) V. SUNDQUIST SHOULD BE AFFIRMED.

This argument is only being presented because Appellant in its Supplemental Brief Argument II., violated the basis of the Supplement Brief and presented argument already briefed in its Opening Brief and Reply Brief. *See* Supplemental Briefing Order dated September 13, 2017.

The question whether to overrule the Court's prior decision, notwithstanding the principles of stare decisis, requires evaluation of two factors. "(1) the persuasiveness of the authority and reasoning on which the precedent was originally based, and (2) how firmly the precedent has become established in the law since it was handed down." *Eldridge v Johndrow*, 2015 UT 21, 22. In the interlocutory appeal decision, the Supreme Court was very persuasive in its application of Utah state law, because that law is very clear and unambiguous. In

reasoning that the law should be applied the Court stated,

" ***Utah Code sections 57-1-21*** *and 57-1-23 are not preempted by federal law. A national bank seeking to foreclose real property in Utah must comply with Utah law."*

To argue that this Court erred and should not apply Utah law in non-judicial foreclosures is nonsensical. Non judicial foreclosure is a creation of the legislature of state of Utah. Its purpose is to eliminate use of the court to foreclose. This reduces the burden on the banks. In non-judicial foreclosure, these statutes were needed for the protection of Utah citizens.

To claim that these statutes are preempted by 12 U.S.C. 92a, is wrong. As pointed out in our Reply Brief, "a non-judicial foreclosure is nothing more than debt collection activity. Regulation of debt collection is historically governed by state laws not federal law. Bank of America's interpretation of 12 U.S.C. §92a essentially relies on conflating the term "trustee" under a deed of trust with a "trustee" of a fiduciary trust; the only type of trust governed by §92a. This is a traditional trust where there is a fiduciary duty; not non-fiduciary foreclosures for debt collection." Further, the parties, i.e., predecessor of FNMA (Bank of America) and Sundquist, agreed in the deed of trust that the laws of Utah would apply to the deed of trust. Finally, even if §92a was applicable, Bank of America cannot show that it was the clear and manifest intent of Congress in §92a to override state laws governing debt collection or property law. Something Bank of

America is incapable of performing. Preemption is not available to prevent the enforcement of these Utah statutes. This Court in the interlocutory appeal stated,

" In four cases, however, the federal district courts have reached the contrary result and held that Utah law is not preempted. Bell v. Countrywide Bank, N.A., ***860 F.Supp.2d 1290****(D. Utah 2012) (holding that a national bank is subject to Utah law); Loomis v. Meridias Capital, Inc., No. 2:11-cv-363-PMW, 2011 WL 5844304 (D. Utah Nov. 18, 2011) (same); Coleman v. ReconTrust Co., N.A., No. 2:10-cv-1099-DB, 2011 U.S. Dist. LEXIS 138519 (D. Utah Oct. 4, 2011) (same); Cox v. ReconTrust Co., N.A., No. 2:10-CV-492 CW, 2011 WL 835893, at *6 (D. Utah Mar. 3, 2011) (stating that " [u]nder a straight forward reading of § 92a(b), this court must look to Utah law in its analysis of whether ReconTrust's activities in Utah exceed ReconTrust's trustee powers"). We find Judge Jenkins's analysis in Bell to be particularly persuasive, and follow much of this same analysis here. Like Judge Jenkins, we conclude that ReconTrust is subject to the laws of Utah when exercising the power to sell property located in Utah." Federal Nat. Mortg. Ass'n v. Sundquist, 2013 UT 45, 311 P.3d 1004 (2013.*

CONCLUSION

Sundquist should not be overruled. This Court was correct in its application of Utah law. Its statutes cannot be preempted by any convoluted and misinterpretation of 12 U.S.C. 92a. To overrule Sundquist would be a manifest injustice.

Dated: November 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this _____ day of November, 2017, a true and correct copy of the foregoing REPLY TO SUPPLEMENTAL BRIEF was mailed to the following:

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