

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES D. FISHER; AND DEBORAH
FISHER,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
JAMES M. BIXLER, DISTRICT JUDGE,
Respondents,
and
LASALLE BANK, NA., SUCCESSOR IN
INTEREST TO WMC MORTGAGE
CORP.,
Real Party in Interest.

No. 57552

FILED

SEP 20 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER DENYING PETITION
FOR WRIT OF PROHIBITION

This is an original petition for a writ of prohibition challenging a district court order granting in part and denying in part cross-motions for summary judgment in a real property action. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Petitioners James and Deborah Fisher purchased a home in Las Vegas, Nevada and, subsequently, refinanced it with WMC Mortgage Corporation. On the loan application for the refinance, the Fishers represented that the home would be their primary residence and that they earned \$14,000 per month. In fact, the Fishers purchased the residence for their son and did not have the income stated on the loan application.

The deed of trust securing the note designated Mortgage Electronic Registration Systems, Inc. (MERS) as both the nominee and the beneficiary. After the loan closed, WMC sold the note and deed of trust to

the real party in interest, LaSalle Bank. MERS, as nominee for WMC, ostensibly assigned both the note and deed of trust to LaSalle Bank. The Fishers defaulted on the note and LaSalle Bank conducted a trustee's sale where LaSalle Bank placed the only bid and acquired the property for \$397,845. At the time of auction, the Fishers owed a total unpaid debt of \$528,670.40, leaving a deficiency of \$130,825.40, plus interest.

LaSalle Bank sued for the deficiency and, in addition, included a claim that the Fishers committed mortgage fraud by falsely inflating their income and representing that the home would be their primary residence. The bank sought summary judgment on both the deficiency and mortgage fraud claims. The Fishers filed a counterclaim and moved for summary judgment on both claims, arguing that: 1) MERS did not have the power to assign the beneficial interest in the note to LaSalle Bank, and 2) the Fishers could not have made any misrepresentations to LaSalle Bank because they submitted the loan application to WMC, not LaSalle Bank.

The district court granted summary judgment to LaSalle Bank on the deficiency claim but refused to grant summary judgment to either party on the mortgage fraud issue. This petition for an interlocutory writ of prohibition followed.

A writ of prohibition is an extraordinary remedy, and its grant or denial is discretionary. Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Normally, writ relief will not lie as to a partial summary judgment order unless the law clearly required the district court to grant summary judgment or there is an important legal problem, clearly framed, that demands immediate resolution. D.R. Horton v. Dist. Ct., 125 Nev. 449, 453, 215 P.3d 697, 700 (2009). These limits on writ


review are consistent with NRCP 54(b) which, unlike Fed. R. Civ. P. 54(b), does not provide for interlocutory review of orders granting partial summary judgment with respect to claims, as opposed to parties, even when certified. NRAP 3A(b); NRCP 56(d); Lee v. GNLV Corp., 116 Nev. 424, 428 n.4, 996 P.2d 416, 418 n.4 (2000). In addition, denial of summary judgment cannot be appealed. GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001) (citing NRAP 3A(b)).

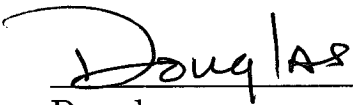
In support of their writ petition, the Fishers argue that they have no plain, speedy, and adequate remedy at law because the ability of MERS, as nominee under a deed of trust, to transfer beneficial interest in the note and/or deed of trust has not been addressed by this court. However, entertaining this on a writ petition challenging a partial summary judgment would circumvent this court's process for summary judgment appeals, essentially allowing interlocutory appeals that would not normally be considered by this court.

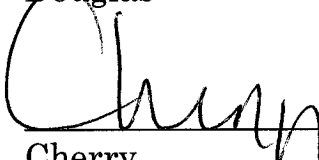
Moreover, the Fishers did not contest the non-judicial foreclosure. They raised the issue only in resisting the deficiency judgment. Nevada law has different requirements for foreclosure sales and deficiency judgments, compare NRS 40.455 with NRS 107.080, but those distinctions and the impact of the completed foreclosure on the deficiency claim were not developed below which, together with the unresolved mortgage fraud claims, make this a poor candidate for resolution by extraordinary writ in this court before final resolution of the case and claims by the district court.

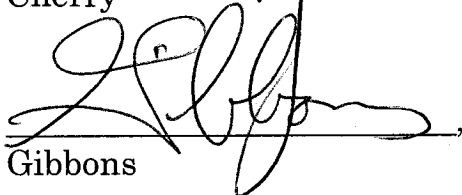
For these reasons, we deny the petition for extraordinary writ relief.

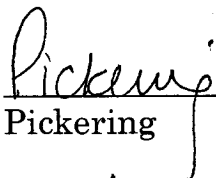
It is so ORDERED.

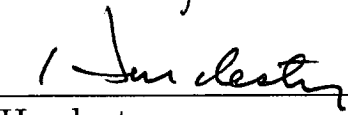

_____, C.J.
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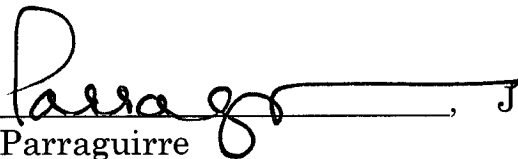

_____, J.
Douglas


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. James M. Bixler, District Judge
Feldman Graf
Cooper Castle Law Firm, LLC
Eighth District Court Clerk