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Gretchen Smith



IN THE
Supreme Court
OF THE
Commonwealth of the Northern Mariana Islands

NORTHERN MARIANAS HOUSING CORPORATION,
Petitioner,

v.

SUPERIOR COURT OF THE NORTHERN MARIANA ISLANDS,
Respondent,

and

LUCIA TECHUR AND JOHN WAYNE TECHUR,
Respondents-Real Parties in Interest.

Supreme Court No. 2020-SCC-0008-PET

ORDER DENYING WRIT OF MANDAMUS

Cite as: 2020 MP 18

Decided July 22, 2020

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLONA
ASSOCIATE JUSTICE PERRY B. INOS

Superior Court Civil Action No. 06-0505
Associate Judge Wesley M. Bogdan, Presiding

PER CURIAM:

¶ 1 Northern Marianas Housing Corporation (“NMHC”) petitions for a writ of mandamus to compel the trial court to order a foreclosure sale. Lucia and John Wayne Techur (the “Techurs”) defaulted on a mortgage loan and did not pay the judgment. Thirteen years later, NMHC moved ex parte for a foreclosure sale. The Superior Court denied the motion and instead ordered a status conference for NMHC and the Techurs to present evidence on the current state of the debt. The petition for the writ of mandamus is DENIED as it does not seek relief that would be unavailable on a direct appeal.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 The Techurs defaulted on a promissory note secured by a mortgage. In 2007, the court entered a default judgment for \$90,675.82. Thirteen years later, in 2020, NMHC moved ex parte for a foreclosure. The motion listed an outstanding principal of \$88,398.90 plus interest. It stated that the motion was made ex parte because NMHC was entitled to the procedural order requested under 2 CMC § 4537(e).¹ *Northern Marianas Hous. Corp. v. Lucia Techur and John Wayne Techur*, Civil Action No. 06-0505 (NMI Super. Ct. Jan. 28, 2020) (Motion at 1) (“Motion”). NMHC submitted a proposed order appointing NMHC’s counsel to sell the property.

¶ 3 The court denied the Motion because NMHC “fail[ed] to provide th[e] [c]ourt with the necessary information to properly consider its motion relating to a default judgment that has apparently sat inactive (and now totally unexplained) for a very long period of time.” *Northern Marianas Hous. Corp. v. Lucia Techur and John Wayne Techur*, Civil Action No. 06-0505 (NMI Super. Ct. June 17, 2020) (Order Denying Plaintiff’s *Ex Parte* Motion for Appointment of Person to Sell Mortgaged Property Pending Presentment of an Accounting of the Debt and Setting Status Conference at 2) (“Order”). The styling of the denial as an order “pending” accounting of the debt appeared to imply that it would grant a motion for a foreclosure sale once the figures were clarified. The court found the Motion lacked (1) authority for the proposition that the court lacked discretion to deny the Motion; (2) explanation for a different principal sum in the Motion than in the 2007 default judgment; and (3) the legal description of the property to be sold. Order at 2. The court ordered NMHC to provide an accounting of the debt and set a status conference, emphasizing that equity required giving notice to the Techurs.

¶ 4 NMHC argues that the court abused its discretion in denying the Motion. It further alleges that the trial court judge violated his duty to be impartial under

¹ This statute provides, in pertinent part:

When the mortgagor, after being directed to do so . . . fails to pay the principal, interest, costs, and attorney’s fees at the time directed in the order, the court shall order the property (or so much of it as may be necessary) to be sold . . .

Canon 3 of the Code of Judicial Conduct, though it does not seek his disqualification.

II. JURISDICTION

¶ 5 We have jurisdiction to issue writs of mandamus under Article IV, Section 3 of the NMI Constitution. *Tudela v. Superior Court*, 2007 MP 18 ¶ 4.

III. DISCUSSION

¶ 6 NMHC asserts that statutory language to the effect that “the court *shall* order the property . . . to be sold . . .” in 2 CMC § 4537(e) “absolutely and unqualifiedly entitled” it to a foreclosure sale. Pet. at 6. It concluded that “[t]o the extent that the Superior Court had any discretion at all in the matter, the Superior Court has abused that discretion.” Pet. at 8. It points out that “[o]ver the years, the judges of the Superior Court have, in hundreds of cases, issued orders substantially identical to the Order requested here . . .” *Id.* NMHC provides no other authority for the proposition that the court is *bound* to issue an order upon *ex parte* motion from the mortgagee and cannot deny such a motion as a matter of law.

A. Writ of Mandamus

¶ 7 “A Writ of Mandamus is an extraordinary writ, reserved for the most dire of instances when no other relief is available.” *Martens v. Superior Court*, 2007 MP 5 ¶ 16. We generally deny a petition for writ if “the petitioner has another adequate remedy at law.” *In re Babauta*, 2016 MP 6 ¶ 8 (citing *Tudela v. Superior Court*, 2006 MP 7 ¶¶ 12–13). NMHC fails to demonstrate that an extraordinary writ is warranted or to substantiate its allegation of judicial misconduct. It can later pursue the relief it seeks through an ordinary appeal without prejudice.

¶ 8 In *Tenorio v. Superior Court*, we laid out five factors bearing on whether to issue a writ of mandamus. 1 NMI 1, 9–10 (1989). These factors include 1) “the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired”; 2) “the petitioner will be damaged or prejudiced in a way not correctable on appeal”; 3) the lower court’s order is clearly erroneous as a matter of law”; 4) “the lower court’s order is an oft-repeated error, or manifests a persistent disregard of applicable rules”; and 5) “the lower court’s order raises new and important problems, or issues of law of first impression.” *Id.* “We balance these factors in determining whether to exercise our judicial discretion to grant the extraordinary relief.” *In re Babauta*, 2016 MP 6 ¶ 7 (citing *Tenorio*, 1 NMI at 10).

¶ 9 First and foremost, it is not the case that NMHC has no other avenue to obtain the desired relief. The court’s order for a status conference was not an abuse of discretion in view of the uncertainty concerning the state of the debt and the long delay in seeking foreclosure. When NMHC and the Techurs present accounting evidence and clarify the state of indebtedness at the status conference, the Superior Court can then issue an order authorizing a foreclosure sale. If it denies a foreclosure sale at that stage, NMHC can then bring the issue before this Court as a direct appeal.

¶ 10 NMHC’s argument that it will be damaged or prejudiced in a way not correctable on appeal if the petition for writ is denied is that the sale of the property and recovery of the judgment debt will be delayed. But there has already been a delay of thirteen years since the default judgment, and interest is running on the judgment. A few additional weeks for a status conference to clarify the situation, while interest is accumulating, does not irremediably damage NMHC.

¶ 11 NMHC relies most heavily on the argument that “[t]he Superior Court’s Order in question is clearly erroneous as a matter of law.” Pet. at 6. We have not previously ruled on whether the court has discretion to deny an *ex parte* motion to order a foreclosure sale, but we have interpreted 2 CMC § 4537(e) on previous occasions. We held that the court can issue an order confirming a foreclosure sale and that the purchaser acquires the right of possession upon confirmation. *Saipan Achugao Resort Members’ Ass’n v. Wan Jin Yoon*, 2011 MP 12 ¶¶ 30–37. To determine this, we relied on the common law to flesh out the law of judicial foreclosure sales where the statutory language is silent. We also denied a petition for writ of mandamus seeking to overturn the court’s scheduling of an upset price hearing. *In re Commonwealth Dev. Auth.*, 2016 MP 4 ¶ 15. An “upset price” is a minimum bid price set by the court at a judicial foreclosure sale. We found that the petitioner had not shown the upset price hearing to be contrary to the common law. The court’s supervisory powers over the judicial foreclosure sale process should be read broadly if they do not contradict the statutory language or the common law.

¶ 12 Here, too, the common law does not support constraining the court’s discretion. The Restatement, Third of Property states only that “[w]hen an obligation secured by a mortgage becomes due, the mortgagee may . . . foreclose the mortgage” RESTATEMENT, THIRD OF PROPERTY: MORTGAGES § 8.2 (1997). Comment a notes that about 40 percent of states permit only judicial foreclosure, while 60 percent permit non-judicial power of sale foreclosure as an option. The Commonwealth does not permit power of sale foreclosure. 2 CMC § 4531. At a judicial foreclosure, the “public sale is conducted by the sheriff or other court officer.” *Id.* The Restatement provides no support for the view that a court *must* order a sale and appoint counsel for the mortgagee as the designated official upon *ex parte* motion from the mortgagee. Indeed, judicial oversight is the key distinction between judicial foreclosure and power of sale. Judicial foreclosure “guarantees the integrity of the process” but “the process is costly and timely” whereas private sale is “quick and informal” since a trustee, often the mortgagee, is empowered to sell without a required appraisal. *Paulino v. Biscoe*, 2000 Guam 13 ¶ 9.

¶ 13 The drafters of the statute could easily have specified that the court must appoint mortgagee’s counsel as the officer of the court conducting the sale upon motion. 2 CMC § 4537(h) states that “the court, *upon motion*, shall give a decree against the defendant for any balance for which . . . the defendant may be personally liable to the plaintiff.” (emphasis added). 2 CMC § 4537(e), by contrast, specifies that “[a]ny sale of property under a judgment of foreclosure

shall be made by a person *appointed by the court* for that purpose . . .” (emphasis added). It does not state that this person must be counsel for the mortgagee, or that the court must grant any *ex parte* motion by the mortgagee. To the contrary, on its face it appears to give the court discretion to make this determination, much as the court designates the public place at which the sale will be held. In line with *Achugao* and *In re Commonwealth Development Authority*, we will not read the court’s scope of discretion in its oversight of the judicial foreclosure process more narrowly than the statutory language or the common law warrant.

¶ 14 To the extent NMHC can claim a right to have its *ex parte* motion granted, it is pursuant to the 2007 order in conjunction with the statute, rather than straightforwardly under the statute itself. As envisioned in 2 CMC § 4537(d), the court ordered the Techurs to pay the balance of the judgment within three months of the order, and failing that, stipulated that the property “may be sold by Plaintiff in accordance with law.” *Northern Marianas Hous. Corp. v. Lucia Techur and John Wayne Techur*, Civil Action No. 06-0505 (NMI Super. Ct. Apr. 25, 2007) (Default Judgment at 2). The statute does not foresee the “thirteen years of unexplained inaction” in the present case, Order at 3, and does not provide a clear procedure for this situation. Under the circumstances, ordering a status conference to clarify the debt before proceeding with foreclosure was not unreasonable.

¶ 15 As to the last two *Tenorio* factors—“oft-repeated error” and “issue of first impression”—it is far from clear from the statutory analysis that the court erred in denying the *ex parte* motion. If the trial court has never before denied a motion from a mortgagee, this is indeed an issue of first impression. While that might bear on the “new and important problem” factor, it cuts against being an oft-repeated error; these two factors are “usually opposite sides of the same coin and are rarely if ever present together.” *Xiao Ru Liu v. Commonwealth*, 2006 MP 5 ¶ 15. In any event, these considerations do not weigh in favor of granting a writ of mandamus.

¶ 16 “There are dangers to an unprincipled use of peremptory writs” including “the possibility that its use would be an impermissible alternative to the normal appellate process” or “undermine the mutual respect generally existing between trial a[nd] appellate courts.” *Tenorio*, 1 NMI 1, 8. The United States Supreme Court has emphasized that “it is clear that only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.” *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)). A petition for writ should be denied if the petitioner could attain the same relief in a conventional appeal. NMHC can seek an equivalent remedy on direct appeal and the Superior Court may well order a foreclosure sale after the status conference clarifies the state of the debt. Under the *Tenorio* factors, NMHC has not made a showing that issuing the extraordinary remedy of a writ of mandamus is warranted.

B. Allegation of Judicial Misconduct

¶ 17 NMHC also alleges that the trial judge violated Canon 3 of the Code of Judicial Conduct for the Commonwealth Judiciary, which states that “A Judge Should Perform the Duties of His Office Impartially and Diligently,” by “raising defenses . . . that Techurs have not raised.” Pet. at 8. Although NMHC cites *In re Lizama*, 2008 MP 20 ¶ 21, a case in which we sanctioned a trial court judge for ex parte communications and public comment on pending proceedings, NMHC does not allege that any specific action by the judge violated any of Canon 3’s subsections. Rather, it accuses him of general lack of impartiality and “tilting the playing field” against NMHC.

¶ 18 Canon 3(C) provides for disqualification of judges pursuant to 1 CMC § 3308 in a proceeding in which the judge’s “impartiality might reasonably be questioned” or he “has a personal bias or prejudice concerning a party.” NMHC does not request that the judge disqualify himself under Canon 3(C) and 1 CMC § 3308, though that would seem to be the implication of the Petition’s allegation that he violated Canon 3 by lacking impartiality and exhibiting bias against a party.

¶ 19 We find no violation of the Code of Judicial Conduct. The Order is very clear in its reasoning for issuing a status conference. In declining to endorse without question an ex parte motion to enforce a thirteen-year-old judgment, the court did not exhibit bias. 1 CMC § 3309(b) provides that a “party may move for disqualification” of a judge, “stating specifically the grounds for such disqualification.” Alleging judicial misconduct without clear foundation or seeking the appropriate remedy risks kindling animosity to no good end. We also stress that *even the appearance* of lack of impartiality must be avoided.² As the Petition notes, “the ability of mortgage creditors . . . to proceed in mortgage foreclosure cases” requires that the court promptly issue appropriate orders to vindicate the mortgagee’s remedies in the event of default. Pet. at 7. When the state of the debt is clarified, issuing a foreclosure order may be called for.

V. CONCLUSION

¶ 20 Under the *Tenorio* factors, NMHC fails to make a showing that it is entitled to relief that would be unavailable on direct appeal. The petition for writ of mandamus is DENIED.

² A comment on the procedural history of this matter and the apparent discord between the judge and NMHC’s counsel is in order. The court scheduled a status conference for months after the Motion was filed, unnecessarily protracting the resolution of this dispute. The information desired from NMHC could have been obtained in short order. The court should be mindful of the need to resolve the parties’ dispute expeditiously.

SO ORDERED this 22nd day of July, 2020.

/s/

ALEXANDRO C. CASTRO
Chief Justice

/s/

JOHN A. MANGLONA
Associate Justice

/s/

PERRY B. INOS
Associate Justice

COUNSEL

Michael A. White, Saipan, MP, for Petitioner.

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