ORIGINAL

IN THE SUPREME COURT OF OHIO

FEDERAL DEPOSIT INSURANCE CORPORATION,	:	**Case No. 2008-1056**
Appellee,	:	**On Certified Conflict from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 06 AP-1189**
v.	:	
JACK K. BEATLEY,	:	
Appellant.	:	

APPELLEE FEDERAL DEPOSIT INSURANCE CORPORATION'S EMERGENCY MOTION FOR CONTINUANCE OF ORAL ARGUMENT TO ALLOW SUBSTITUTION OF JPMORGAN CHASE BANK N.A. AS APPELLEE

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FILED
MAY 18 2009
CLERK OF COURT
SUPREME COURT OF OHIO

I. Introduction

This is a certified conflict case in which this Court is poised to hear oral argument on May 19, 2009, and decide the following certified question: "When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?"

The certified question arose from a judgment of the Tenth District Court of Appeals, which denied the motion of Appellant Jack Beatley ("Appellant")(the appellee in the court of appeals) to dismiss the appeal of Washington Mutual Bank ("WaMu"). Appellant argued that WaMu lacked capacity to appeal the trial court's judgment dismissing WaMu's foreclosure action with prejudice. The court of appeals held that WaMu's ability to appeal was sufficiently established by virtue of the fact that it had "a present interest in the subject matter of this litigation" that was "prejudiced by the trial court's dismissal of its complaint for foreclosure." *Washington Mutual Bank v. Beatley* (Apr. 8, 2008), 10th Dist. App. No. 06AP-1189, 2008-Ohio-1679, at ¶ 7. The Tenth District certified its judgment, however, as being in conflict with a decision from another court of appeals on the same issue.

Following this Court's exercise of its certified-conflict jurisdiction over this case, the Office of Thrift Supervision of the United States Department of Treasury declared WaMu to be insolvent and the Federal Deposit Insurance Corporation ("FDIC") was appointed as Receiver of WaMu. Subsequently, JPMorgan Chase Bank, N.A. ("JPMorgan") and the FDIC reached an agreement whereby JPMorgan acquired certain deposits, assets, and liabilities of WaMu's banking operations, including the servicing rights related to its mortgage portfolio. The FDIC, however, retained certain liabilities, including certain litigation involving WaMu.

On November 14, 2008, the FDIC moved to substitute into the case as the Receiver of WaMu. (Motion To Substitute the Federal Deposition Insurance Corporation, Nov. 14, 2008.) The motion to this Court noted that the Office of Thrift Supervision had declared WaMu insolvent, that the FDIC had been appointed as Receiver, and that the FDIC had accepted the appointment as Receiver pursuant to 12 U.S.C. § 1821(c)(6)(B). This Court granted the motion and substituted FDIC in place of WaMu as the appellee in this appeal.

On the same day as the motion to substitute was filed, the FDIC requested a 90 day stay pursuant to 12 U.S.C. § 1821(d)(12), which this Court granted. When the 90-day stay expired, the FDIC sought a further discretionary 180-day stay of proceedings in this Court. Beatley opposed the further stay, and this Court denied the FDIC's request for this further stay. Shortly thereafter, the FDIC briefed this case on the merits. The case is set for oral argument on May 19, 2009.

Before and during the 90-day stay, JPMorgan and the FDIC jointly embarked on an extensive undertaking to inventory all of WaMu's litigation and determine which matters belonged to FDIC and which belonged to JPMorgan. This process is still ongoing.

II. A Brief Continuance is Warranted to Allow JPMorgan the Opportunity to Substitute as Appellee.

Though the certified conflict question before this Court reads simply, the underlying circumstances of the case are complex. The collapse and insolvency of WaMu has required a great deal of painstaking work to disentangle claims retained by the FDIC and claims transferred to JP Morgan.

When the FDIC substituted for WaMu as Appellee in this case, it did so in its capacity as the Receiver of WaMu, and pursuant to the authority granted to it by federal law. It only recently became apparent, however, that JP Morgan is the real party in interest in this case, when

in opposition to the FDIC's motion for discretionary stay, Appellant Beatley disavowed any claim for damages against WAMU or the FDIC as Receiver in the present procedural posture of this case. (Memorandum in Opposition, pp.3-4)

While JPMorgan purchased certain assets and liabilities of WaMu, it was reasonable for the FDIC to substitute into this matter initially. The FDIC was the appointed Receiver of WaMu following the Office of Thrift Supervision's determination of the bank's insolvency. Further, notwithstanding JPMorgan's acquisition of WaMu assets, JPMorgan did *not* assume liabilities associated with cases involving payment of, or liability to, any borrower for monetary relief. The FDIC does not hold the note or mortgage and has no connection or interest in Appellant Beatley's loan. As the present holder of the note and mortgage, JPMorgan is the proper party plaintiff in the foreclosure action and accordingly the proper party to be the Appellee in this case as to the property at issue. See, e.g., *Everhome Mortg. Co. v. Rowland* (Mar. 20, 2008), 10th Dist. App. No. 07AP-615, 2008-Ohio-1282, at ¶ 12.

As a result, the FDIC respectfully requests a continuance of the oral argument in this case in order to allow JPMorgan to substitute into this case in place of the FDIC as the Appellee. To do so, JPMorgan will need to retain other counsel because a conflict of interest is present with respect to the FDIC's counsel of record. More specifically, Taft Stettinius & Hollister LLP ("Taft") has a conflict that prevents it from similarly representing JPMorgan in this case (and participating in the oral argument on behalf of JPMorgan). Taft currently represents a party that is directly adverse to JPMorgan in a separate lawsuit pending in Columbus, Ohio. As a result of its ownership in the mortgage, this Court's decision will affect JPMorgan's interest in the property, and thus, JPMorgan should properly be before this Court.

SCt. R. XIV, Section 4 provides that the Court "may act upon a motion before the deadline for filing a memorandum opposing the motion if the motion . . . requests emergency relief and the interests of justice warrant immediate consideration by the" Court. The FDIC respectfully realizes that this motion is unusual. However, the collapse of WaMu and the national credit crises in general are unusual events and have created a number of complex issues that are being dealt with on an unprecedented scale. Because it is now clear that the party in interest to the underlying loan and mortgage is JPMorgan,, the interests of justice warrants the granting of a brief continuance to allow JPMorgan to substitute as Appellee.

III. Conclusion.

Based upon the foregoing, the FDIC respectfully requests that the Court grant a short continuance of the oral argument to allow JPMorgan to request substitution as the Appellee.

Respectfully Submitted,

Charles A. Bowers / Richard A. Byers per authority 5/18/09

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CERTIFICATE OF SERVICE

This is to certify that on May 18, 2009, a copy of the foregoing *Appellee Federal Deposit Insurance Corporation's Motion for Continuance of Oral Argument to Allow Intervention, or in the Alternative, Substitution of JPMorgan as Appellee* was served via HAND DELIVERY upon the following:

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