

**BANK OF NY MELLON V. MOYA**

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**THE BANK OF NEW YORK MELLON  
f/k/a THE BANK OF NEW YORK,  
AS TRUSTEE FOR CERTIFICATE-  
HOLDERS OF ASSETS-BACKED  
CERTIFICATES, SERIES 2003-2,  
Plaintiff-Counterdefendant-Appellee,**

**v.**

**DIANE M. MOYA, WILLIAM L. MOYA,  
TAXATION AND REVENUE DEPARTMENT  
OF THE STATE OF NEW MEXICO, and  
UNIFUND CCR,**

**Defendants,**

**and**

**ANGEL GARCIA,**

**Defendant-Counterclaimant and Crossclaimant-Appellant,**

**v.**

**THE BANK OF NEW YORK MELLON  
f/k/a THE BANK OF NEW YORK,  
AS TRUSTEE FOR CERTIFICATE-  
HOLDERS OF ASSETS-BACKED  
CERTIFICATES, SERIES 2003-2,  
Plaintiff-Counterdefendant-Appellee,**

**and**

**DIANE M. MOYA and WILLIAM L. MOYA,  
Crossdefendants.**

No. 33,457

COURT OF APPEALS OF NEW MEXICO

July 29, 2014

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Shannon C.  
Bacon, District Judge

**COUNSEL**

Susan C. Little & Associates, P.A., Sandra A. Brown, Albuquerque, NM, for Appellee Bank of New York Mellon

The Law Office of Anita M. Kelley, Anita M. Kelley, Albuquerque, NM, for Appellant Angel Garcia

## JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, J. MILES HANISEE, Judge

**AUTHOR:** CYNTHIA A. FRY

## MEMORANDUM OPINION

### FRY, Judge.

{1} Appellant Angel Garcia (Garcia) appeals from the district court's summary judgment ruling that Appellee Bank of New York (Bank) has a valid first lien on the property described in Bank's mortgage and has priority for the amounts owed under the original note and the loan modifications identified in Bank's complaint. [RP 173] Our notice proposed to dismiss for lack of a final order, and Garcia filed a memorandum in opposition. We are not persuaded by Garcia's arguments in opposition to our notice, and therefore dismiss.

{2} While the district court's summary judgment ruling resolves Bank's claim against Garcia, yet to be addressed by the district court are Garcia's outstanding five counterclaims against Bank. [RP 78, 84-88] Because matters remain to be decided, we lack a final order for purposes of appeal. See generally *Watson v. Blakely*, 1987-NMCA-147, ¶ 14, 106 N.M. 687, 748 P.2d 984 (stating that "[a]n order disposing of the issues contained in the complaint but not the counterclaim is not a final judgment"), *overruled on other grounds by Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 25, 113 N.M. 231, 824 P.2d 1033; *Tarin's, Inc. v. Tinley*, 2000-NMCA-048, ¶ 2, 129 N.M. 185, 3 P.3d 680 (holding that a judgment containing no mention of a counterclaim was not a final, appealable order).

{3} Garcia acknowledges the counterclaims, but nonetheless urges this Court to view the proceedings as final, asserting her counterclaims "are based almost entirely on her claim that her lien is superior to the bank's modifications of the loan" [MIO 2] and that "these counterclaims are untenable based on the district court's ruling that the bank's loan modifications have priority." [MIO 3] Garcia thus advocates that her counterclaims are effectively implicitly denied by the district court's summary judgment ruling. Garcia however limits her argument to counts 1 through 4 of her counterclaims and qualifies her argument with regard to count 5 of her counterclaims. For this count, Garcia provides that "[a]rguably there is one counter-claim [count 5] that is somewhat independent" of the summary judgment issues, but contends this counterclaim should

not affect finality because it “affects . . . Garcia’s ability to cure and/or reinstate the mortgage.” [MIO 3] Despite her view that count 5 remains unresolved, Garcia argues that this Court should view the summary judgment ruling as final for purposes of appeal. [MIO 3] We decline to do so, because matters remain to be decided. Rather than make assumptions about counterclaims that need to be expressly ruled upon by the district court in the first instance, we instead dismiss for lack of a final order so that the district court may consider and expressly rule upon all of Garcia’s outstanding counterclaims.

**{4}** For the reasons discussed above and set forth in our notice, we dismiss for lack of a final order.

**{5} IT IS SO ORDERED.**

**CYNTHIA A. FRY, Judge**

**WE CONCUR:**

**MICHAEL D. BUSTAMANTE, Judge**

**J. MILES HANISEE, Judge**