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JUL 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

June 6, 2012

Via Facsimile (775) 684-1601

Tracie K. Lindeman
Clerk of the Court
201 South Carson Street,
Carson City Nevada 89701

ADKT 0435

Re: Response to Proposed Rule Changes to the Nevada Foreclosure Mediation Rules And Public Hearing scheduled for July 9, 2012 at 3:00 p.m.

Dear Ms. Lindeman:

As a long time citizen of the state of Nevada, I hereby request that this letter be provided to the Honorable Nevada Supreme Court Justices that are conducting the public hearing on July 9, 2012. It is my desire to share my perspective to the Court as a citizen of the state of Nevada and as an licensed Nevada attorney who has been representing lenders and foreclosing trustees since the enactment of AB 149. I personally represented beneficiaries as their counsel at Nevada Foreclosure Mediations as of the effective date of AB 148 and since then have participated in hundreds of foreclosure mediations as wells as represented lenders in Petitions for Judicial Review and in appeals before this Court related to AB 149 foreclosure mediation rules.

Moreover, I have been representing beneficiaries/lenders and foreclosing Trustees in the state of Nevada since 2009 in alleged wrongful foreclosure litigation actions, and now as the counsel for the beneficiary filing complaints for judicial foreclosures. What is of great significance is the divergence of legal the analysis for an alleged wrongful foreclosure claim asserted under N.R.S. 107.080, then the legal

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standard set forth by the proposed amended rules. Citizens are then left either misinformed or confused into believing that they maybe entitled to a free house and complete forgiveness of all the debt they had agreed to repay in their Note and Deed of Trust when a Lender fails to obtain a certificate from the Nevada Foreclosure Program Manager authorizing the lender/beneficiary to proceed with the non-judicial foreclosure process. I believe it is this misinformation and confusion as to the correct legal standards for a lender to proceed with a non-juridical foreclosure sale under NRS 107.080, and when applicable NRS 107.085 for a foreclosure mediation of their personal residence. I respectfully request that this Court consider the negative impact that some of these proposed rules will have on the ongoing economic crisis and housing market in the State of Nevada. Additionally, this court's legal analysis of which documents are to be produced need to be clearly defined as to alleviate the wide variety of determinations and mediator statement narratives by the mediator as to their own independent analysis as to whether the mediator believes that the lender did in fact strictly comply with the portion of documents upon which standard has been placed.

In particular, the proposed rule changes that will have a negative impact, and hinder the mediation process and therefore should not be adopted are:

- Proposed Rule 8(1).
- Proposed Rule 10(1)(a) – requiring negotiation of alternatives to foreclosure and producing the "assignment" of mortgage note
- Proposed Rule 11 – covering doc exchange, pre mediation conference, and deadlines
    - 11(1) – pre mediation conference
    - 11(2) – mediator approval for beneficiary doc request from borrower
    - 11(3) – borrower doc submission after initial request
    - 11(4) – beneficiary additional doc request
    - 11(5) – borrower additional doc submission and beneficiary request estoppels
    - 11(6) – beneficiary review of previously submitted docs
    - 11(7) – collateral packet doc exchange
        - 11(7)(c) – exchange of third party authority (e.g. servicing agreement)
        - 11(7)(f) – NRS 40.451 deficiency disclosure
    - 11(8) – HAMP calculations, NPV calculations
        - 11(8)(f) – short sale timelines, terms
    - 11(10) – certification guidelines
    - 11(12) – short sale negotiations
- Proposed Rule 13 – pre mediation conference scheduling
- Proposed Rule 21(1) – program notification of issuance or non-issuance to file PJR
- Proposed Rule 24 – description of what qualifies as failure to participate in good faith
- Proposed Rule 25 – mediator given authority to advise borrowers of eligibility for certain programs

1. **<u>The stated intent of AB 184 was to provide both the borrower and the lender to Arbitration vs. Mediation</u>**

The first grounds as to why the above stated proposed changes should be rejected is that the changes are outside of the stated purpose of AB 184, i.e. completely changing the roles and goals of the various parties to contested litigation, instead of providing a neutral forum, with a neutral mediator to

assist each side to come together to attempt to work out an amicable agreement. The above referenced proposed rule changes is a step back that will unnecessarily further the trend of turning the Foreclosure Mediation Program (FMP) into an adversarial and litigious binding Arbitration process. Black's Law Dictionary defines mediation as "the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute." Conversely, it defines arbitration as "the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons." The proposed rules changes deplete any and all the programs stated purpose of allowing the borrower to attempt to work out a settlement or agreement that is amicable to both parties. The rules should therefore focus on being a true mediation, i.e. a voluntary conflict resolution process in which a neutral third party mediator assists disputants to find a way to put aside their differences to attempt to reach a mutually satisfactory agreement. A unique feature of mediation which makes it different from litigation, an arbitration or counseling, is that the mediator does not render any decision or recommend any action. The parties come to their own agreement. The role of the mediator includes reducing the obstacles to communication, maximizing the exploration of alternatives, and addressing the needs of those involved and affected. Moving away from this goal into a litigation and adversarial process whereby the mediator is required to make a legal conclusion as to the completeness of documents, does not further the stated purpose of the Foreclosure Mediation Process.

The intent of the FMP has always been to explore options that may avoid foreclosure in a convivial, friendly atmosphere. However, due to many of the recent changes, the FMP has turned into a contentious, adversary proceeding for all parties involved. Whereas a third party in a mediation attempts to reconcile and urge the contending parties into settling a dispute, "mediators" in the FMP are tasked with ruling on vital issues that affect the outcome of the matter, much in the same way an arbitrator would.

Because of this dual role played by the mediator, it's understandable to see why borrowers and lenders share frustrations with the program, and may tend to without information's, even with the mediator. On one hand, the parties want to exchange applicable information that may result in avoiding foreclosure. On the other hand, participants are apprehensive because full disclosure may result (rightly or wrongly) in a mediator finding of bad faith or deficient documentation. Parties have to walk a fine line between appeasing the mediator or fulfilling the intent of the program.

2. **The proposed rules requiring a the Lender/Beneficiary to disclose or provide information as to how much was paid for their Assignment of the Note and Deed of Trust is based upon an incorrect interpretation of Nevada law, and therefore the rule change should be rejected.**

The committee that drafted the proposed rules changes were aware of Judge Flanagan's Order and Findings in the Second Judicial District Court hearing of borrowers' Petition for Judicial Review in Kuhl v. Carrington et al., case no. CV11-00235 (Mar 7, 2011). In Kuhl, the court found bad faith on part of the lender for the lender failing to disclose how much the lender had paid for its assigned interest. Kuhl's counsel argued that this information was necessary based upon his interpretation of the recently

amended NRS 40.451 regarding purported limitations on some deficiency judgment complaints. However, on February 24, 2012, the Nevada Supreme Court, en banc, issued the unpublished opinion in Volkes v. BAC Home Loans et al, case no. 57304 whereby the Court did a comprehensive and persuasive analysis that the amendments to NRS 40.0451does not apply to an assignee of the Note and Deed if Trust. (A copy of this unpublished opinion is attached hereto as Exhibit 1, not for precedent but as persuasive and well-reasoned opinion of the issue. The matter did in fact help persuade Judge Flanagan overrule his own Kuhl Order and instead he issued the attached Order following the well-reasoned analysis in Volkes in the denial of the Petitioners Petitions for Judicial Review in the consolidated action known as Gibb v BAC Home Loans, Second Judicial District Court Case No. CV10-03294 (attached hereto as **Exhibit 2**).

3. **The Proposed Rule Change to FMR 11(7)(f) is contrary to persuasive case law and comprehensive legal analysis of NRS 40.0451 that the amount paid for the assignment is irrelevant as to a potential deficiency balance remaining after the foreclose sale is complete.**

The proponents of Proposed Amendment FMP Rule 11(7)(f) rely highly on the Kuhl decision by Judge Flanagan of the Second Judicial District Court. However, they conveniently fail to mention the Gibb decision, also by Judge Flanagan, and the unpublished opinion in Volkes which greatly limits Kuhl, and in almost every case overrules Kuhl.

In Gibb, the court determines that the assignee may enforce the note and collect the amount of the principal obligation through a deficiency judgment, without regard to the amount paid for the assignment. The amount an assignee pays for an assignment does not change the outstanding principal obligation under the plan meaning of NRS 40.451. The amount an assignee pays for an assignment is irrelevant to the mediation proceedings. Such transactions involve the exercise of business judgment and complex risk calculations, none of which concern the borrower. The mediation program should only be concerned with the amount of the debt, not the amount of the debt assignments.

Furthermore, the court also determined that the beneficiary not providing the NRS 40.451 deficiency amount would rarely, if ever, adversely impact the mediation because the borrower can easily obtain the same information. Under NRS 40.451, the deficiency judgment amount a borrower may face is limited by the sum of six distinct debt categories: (1) the principal balance of the obligation; (2) interest; (3) costs; (4) fees; (5) all advances made during the foreclosure process; and (6) all other amounts secured by the mortgage or other lien. These amounts are readily available to borrowers, and exchange is needless. Requiring the exchange of information is appropriate in cases where the info being exchanged is unattainable by the party receiving the info, which is clearly not the case here.

4. **The Proposed Rules Objected to Herein Are Placing a Burden Above and Beyond What NRS 107.080 et al places on a Lender to Proceed With a Non-Judicial Foreclosure Process that some Lenders are Choosing to Judicially Foreclose and/or Have Stopped Lending in the State of Nevada hindering Nevada's Economic Recovery at a Rate Much Slower than Surrounding States**

The intent of AB 184 was to help the homeowners in the State of Nevada. However, as burdens and potentials for sanctions against a lender increase, the citizens of the state of Nevada have suffered the unintended consequence the slowing down Nevada's recovery verses surrounding states. Additionally, it continues to be difficult to find lenders that are willing to lend money in the state of Nevada since the default rates are so high, and the Lender has delays and extra expenses to attempt to obtain their collateral from defaulted borrowers.

Instead of making the burden greater, and require the Lender to produce documents that often time are not needed nor required to foreclose under NRS 107.080. As the real estate market crashed and the mediation program was put in place, litigation also increased regarding alleged clams of wrongful foreclosure, where the borrower does not deny being in default under the Note and Deed of Trust, but instead the claims are based upon allegations that the borrower does not believe the lender has presented enough proof of standing to foreclose. Case law continues to develop under NRS 107.080, but not in the direction that requires the lender to produce more proof. Instead, the recent "unpublished" cases regarding the standing to foreclose under NRS 107.080 have been issued providing guidance as to the burden that the lender has to demonstrate the standing to foreclose (See, Davis v US Bank, case no 56303 entered February 24, 2012 attached hereto as **Exhibit 3** [MERS Assignments are generally acceptable and do not invalidate the lender standing to foreclose]; Bangston v Greater Nevada Mortage et al, Case No. 57302 attached hereto as Exhibitb4 [Under the Foreclosure Mediaiton Rules, the BPO does not have the same strict compliance standard in order to obtain a certificate to foreclose].; Surgeoner v Credit Suisse First Boston et al. case No. 57699 attached hereto as Exhibit 5 [holding that under NRS 104.3204 the Note does not have to have all endorsements for the lender to have standing to foreclose and again upholding a MERS Assignment and therefore the court did not error in granting the lender a certificate from the foreclosure mediation program to proceed with the non-judicial foreclosure]; Miller v Aurora Loan Services, LLC, et al, Case No. 58532 attached hereto as Exhibit 6[the State Court did not err in granting a certificate for the lender to proceed with the non-judicial foreclosure as the vague Assignment still served the purpose of assigning both the Note and Deed of Trust, and the MERS Assignment language satisfied Nevada's laws to validly transfer the beneficiary interest along with the Note]; and Ray v Deutsche Bank National Trust, et al. case no. 54626 attached hereto as Exhibit 7 [the state court order dismiss the wrongful foreclosure case was upheld under NRCP 12(b)(5) for failure to state a valid

claim for relief as Nevada has not requirement that the Lender produce the Original Note in order to establish standing to foreclose, as the ~show me the note" allegations are baseless].

In conclusion, the proposed rules objected to herein should be rejected.

Sincerely,

WRIGHT, FINLAY & ZAK, LLP

Donna M. Osborn, Esq.
Managing Attorney of the Nevada Branch

DMO/
Enclosures

Exhibit 1

Exhibit 1

Exhibit 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT VOLKES; AND AMBER VOLKES,
Appellants,
vs.
BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING, LP,
Respondent.

No. 57304

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a foreclosure mediation action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Following an unsuccessful mediation conducted under Nevada's Foreclosure Mediation Program (FMP), appellants Robert and Amber Volkes filed a petition for judicial review in district court. Appellants contended that respondent BAC Home Loans' conduct was sanctionable because it failed to comply with the FMP's statutory requirements.[1] See NRS 107.086(4), (5). The district court denied

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition. We recognize that appellants have recently filed a supplemental appendix. In large part, appellants' supplemental appendix contains information that was previously filed as part of their docketing statement. The only new information consists of a computer printout indicating that respondent is merely the servicer of appellants' loan. Appellants have failed to provide an explanation of how this new information relates to any previously raised arguments. As such, we decline to consider this information and dismiss as moot respondent's motion to strike. Estate of LoMastro v. American Family Ins., 124 Nev. 1060, 1079 n.55, 195 P.3d 339, 352 n.55 (2008).

appellants' petition and ordered that a foreclosure certificate be issued. We affirm.

Standard of review

We review a district court's factual determinations deferentially, Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (a "district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence"), and its legal determinations de novo, Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound discretion of the district court. Pasillas v. HSBC Bank USA, 127 Nev. ___, ___, 255 P.3d 1281, 1287 (2011).

The district court did not abuse its discretion in ordering a foreclosure certificate to be issued

To obtain a foreclosure certificate, a deed of trust beneficiary must strictly comply with four requirements: (1) attend the mediation, (2) participate in good faith, (3) bring the required documents, and (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person. NRS 107.086(4), (5); Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is necessary).

Appellants argue on appeal that: (1) respondent failed to produce a valid assignment of the deed of trust,[2] (2) respondent failed to

[2]Appellants also argue that a representative of the beneficiary did not attend the mediation. Explanation of this argument is confined to one sentence in which appellants contend that "[t]he real party in interest was concealed." From this, we construe appellants' argument to mean that they do not believe respondent actually owns their loan. Because this

timely provide appellants with an appraisal, and (3) respondent mediated in bad faith by failing to disclose how much it paid appellants' original lender for their loan. We address each in turn.

It was not clearly erroneous for the district court to determine that the MERS assignment was valid

Appellants' overarching argument in their briefs is that the assignment in this case was invalid solely by virtue of the fact that it was generated by MERS. In other words, because appellants believe that MERS as an entity is a sham or a fraud, they contend that the assignment itself was necessarily invalid.

Courts in Nevada and across the nation have repeatedly recognized that MERS serves at least some legitimate business purpose.[3] See, e.g., Weingartner v. Chase Home Finance, LLC, 702 F. Supp. 2d 1276, 1280, 1282 (D. Nev. 2010); Gomes v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 3d 819, 821 (Ct. App. 2011); BAC Home Loans Servicing, L.P. v.

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argument is essentially the same as appellants' argument regarding the MERS assignment's validity, we treat them as such.

[3]Several have even confirmed MERS' legitimacy with respect to the precise issue presented here: whether MERS, acting as a lender's nominee, can assign the lender's ownership of a note to another entity. See, e.g., Smith v. Community Lending, Inc., 773 F. Supp. 2d 941, 944 (D. Nev. 2011) (concluding that a provision in a deed of trust "indicates an intent to give MERS the broadest possible agency" on behalf of the lender and that "[s]uch agency would include the ability to sell the interest in the debt"); Crum v. LaSalle Bank, N.A., 55 So. 3d 266, 269 (Ala. Civ. App. 2009) (concluding that an identical provision indicated that "MERS was authorized to perform any act on the lender's behalf as to the property, including selling the note"); Taylor v. Deutsche Bank Nat. Trust Co., 44 So. 3d 618, 623 (Fla. Dist. Ct. App. 2010) ("The transfer . . . was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note . . . because MERS was . . . given explicit and agreed upon authority to make just such an assignment.").

White, 256 P.3d 1014, 1017 (Okla. Civ. App. 2010); Jackson v. Mortgage Electronic, 770 N.W.2d 487, 490-91 (Minn. 2009); In re Wilhelm, 407 B.R. 392, 404-05 (Bankr. D. Idaho 2009); MERS v. Nebraska Dept. of Banking, 704 N.W.2d 784, 787-88 (Neb. 2005). Consequently, we reject appellants' contention that the assignment was invalid solely by virtue of its connection to MERS.

Having done so, however, we are left with nothing else to consider in terms of an appropriately raised argument. The one arguably meritorious contention we can decipher from appellants' briefs is that Jessica Ulary, the MERS Certifying Officer, lacked the authority to execute the assignment. However, assuming appellants intended to raise this argument, it has not been properly preserved for appeal.[4] Namely, although appellants' petition for judicial review references this argument, counsel expressly informed the district court at the status hearing, "I'm not going to readdress the MERS issues. I've already talked about those."

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[4]It is not this court's responsibility to decipher the arguments that an appellant is intending to make. Rather, an appellant's brief must provide "a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief and which must not merely repeat the argument headings." NRAP 28(a)(7).

Here, appellants' summary simply reiterates NRS 107.086(4)'s requirements and in no way alludes to an intent to make an argument regarding Jessica Ulary's authority. Moreover, the passing references to this argument are interspersed throughout different sections of appellants' briefs.

Upon reviewing numerous briefs submitted by appellants' counsel in different FMP cases, it is evident that counsel has been recycling the same brief with little regard for the actual facts underlying each individual client's case. We strongly caution counsel to discontinue this practice. RPC 1.1, 1.3.

"This court is not a fact-finding tribunal," Zugel v. Miller, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983), and it is an appellant's responsibility to create an appellate record with these facts in place. NRAP 30(b)(3), (g)(2). In the context of the FMP, this starts with cogently presenting discrete arguments in a petition for judicial review, and it continues with discussing these arguments with the district court at that case's status hearing. At very least, this enables the district court to exercise its discretion in considering the relevant arguments before issuing an order. Pasillas, 127 Nev. at ___, 255 P.3d at 1286.

Based on the record before us, nothing suggests that the district court clearly erred in concluding that the MERS assignment was valid.

It was not clearly erroneous for the district court to determine that the appraisal was timely produced

Appellants contend that respondent failed to comply with the FMP's document production requirements because respondent provided appellants with an appraisal seven days prior to the mediation, rather than the required ten days. FMR 11(1), (3). In response, respondent contends that it mailed the appraisal to appellants and to the FMP administrator eleven days prior to the mediation.[5]

On this record, the district court did not clearly err in determining that the appraisal was timely produced. Furthermore, although we have previously concluded that the note, deed of trust, and each assignment must be provided under the Foreclosure Mediation Rules,

[5]At the status hearing, appellants did little to clarify their argument regarding the appraisal's untimeliness. In fact, they contradicted their stance in the petition for judicial review by stating that they did not receive the appraisal at all prior to the mediation.

Pasillas, 127 Nev. at ___, 255 P.3d at 1285, and have imposed a strict compliance standard for these core or "essential documents," Leyva, 127 Nev. at ___, 255 P.3d at 1277-79; see also NRS 107.086(4), (5) (requiring production of the note, deed of trust, and each assignment), this strict-compliance requirement does not extend to the rule-imposed requirement that an appraisal or BPO be produced ten days before the mediation. As we stated in Leyva, the purpose of the document production requirements is to ensure that the foreclosing party actually owns the note and has the authority to negotiate. 127 Nev. at ___, 255 P.3d at 1279. An appraisal mailed eleven days before the mediation, and acknowledged to have been received seven days before the mediation, does not affect this authority. We find no clear error or abuse of discretion in the district court's ruling as to the appraisal.

Appellants' bad-faith argument was improperly preserved for appeal

Appellants contend that respondent participated in bad faith, which was evidenced by its failure to disclose how much it paid appellants' original lender for their loan. According to appellants, this figure was necessary to determine their potential exposure to a deficiency judgment.

As an initial matter, this argument was not made in their petition for judicial review, and it is therefore improperly raised on appeal.[6] Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

[6]We recognize that this argument was made at the status hearing. However, the status hearing is meant as a forum for discussing those arguments previously raised in the petition for judicial review.

Furthermore, appellant does not adequately develop the argument, citing as authority only an unpublished district court order in an unrelated case, which we find inapposite. Nonetheless, we take this opportunity to consider the statute upon which counsel's argument relies: NRS 40.451. In its entirety, NRS 40.451 provides as follows:

> As used in [this subchapter,] "indebtedness" means the principal balance of the obligation secured by a mortgage or other lien on real property, together with all interest accrued and unpaid prior to the time of foreclosure sale, all costs and fees of such a sale, all advances made with respect to the property by the beneficiary, and all other amounts secured by the mortgage or other lien on the real property in favor of the person seeking the deficiency judgment. Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder.

(Emphasis added).

We construe counsel's argument to mean the following: if respondent hypothetically paid appellants' original lender $100,000 to obtain ownership of appellants' $304,000 note, NRS 40.451 prohibits respondent from collecting more than $100,000 on the note.

With respect to this argument, we question counsel's attempt to equate "lien" with "debt." Regardless of what NRS 40.451 says about the lienholder's "lien," the statute does not affect the amount of "debt" the lienholder is entitled to collect.[7]

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[7]NRS 40.451's lack of attention by the Legislature also contradicts the meaning that counsel ascribes to the statute. Enacted in 1969 in substantially its current form, NRS 40.451 has been amended only once in 1989. See 1969 Nev. Stat. ch. 327, § 3, at 572-73; 1989 Nev. Stat. ch. 750, § 8, at 1769.

This lack of attention is particularly noteworthy considering the Legislature's substantial amendment to NRS 40.455 in 2009. Namely, in conjunction with enacting the FMP, the Legislature amended NRS 40.455 to provide a limited and prospective prohibition on a deed of trust

Because appellants' promissory note is a negotiable instrument, its transfer is governed by Article 3 of Nevada's UCC. Leyva, 127 Nev. at ___, 255 P.3d at 1279-81. Under Article 3, "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument." NRS 104.3203(2). Counsel's proffered application of NRS 40.451 appears to contradict not only Article 3, but also well-founded principles of contract law. See, e.g., 29 Richard A. Lord, Williston on Contracts § 74:10 (4th ed. 2003) ("Generally, all contract rights may be assigned . . . ."); Restatement (Second) of Contracts § 317(2) (1979) (same); 9 John E. Murray, Jr., Corbin on Contracts § 48.1 (rev. ed. 2007) ("It is no defense to an obligor that the assignee gave no consideration.").

In sum, because appellants' bad-faith-mediation argument was not made in their petition for judicial review, it is not properly raised on appeal. Without ruling decisively on NRS 40.451's application as it relates to this argument, we question counsel's logic.

Having determined that the district court did not abuse its discretion in ordering a foreclosure certificate to be issued, we

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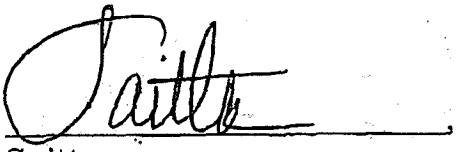
beneficiary's right to pursue a deficiency judgment. See 2009 Nev. Stat., ch. 310, §§ 2-3, at 1330-31.

In light of its 2009 actions, it is highly unlikely that the Legislature would completely ignore NRS 40.451's potential effect if the statute were intended to apply in a manner consistent with counsel's argument.

ORDER the judgment of the district court AFFIRMED.



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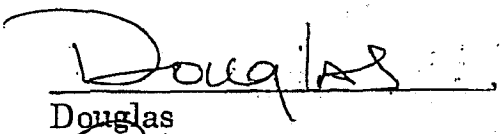
Saitta



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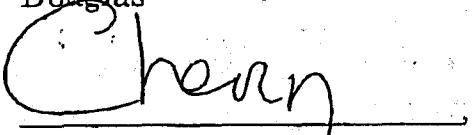

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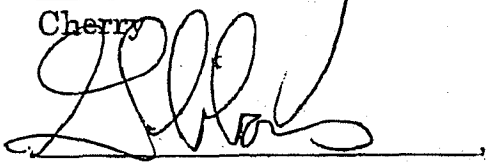

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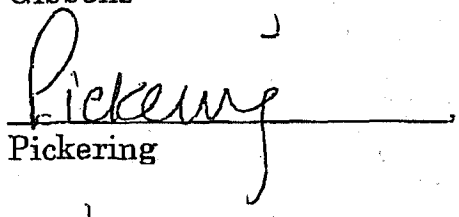
Gibbons



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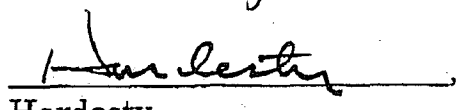
Pickering



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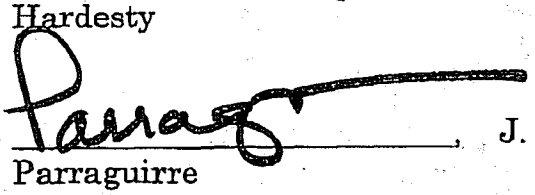
Hardesty



_____, J.
Parraguirre

cc: Hon. Patrick Flanagan, District Judge
Mark L. Mausert
McCarthy & Holthus, LLP/Las Vegas
Washoe District Court Clerk

EXHIBIT 2

EXHIBIT 2

EXHIBIT 2

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN GIBB and SHERRY GIBB et al.,

Petitioners,

vs.

BAC HOME LOANS SERVICING, LP et al.,

Respondents.

Case No.: CV10-03294

Dept. No.: 7

AND RELATED CASES

ORDER

INTRODUCTION

Currently before this Court is a consolidated case containing eighteen separate cases, including Petitioners JOHN and SHERRY GIBB's ("the Gibbs") case. The following cases were initially consolidated with the Gibbs' case: CV11-01374 (Cragg); CV11-01030 (Gonzalez); CV11-01692 (Henschell); CV11-01470 (Livingston-Glossen); CV10-03742 (Lorsen); CV11-00738 (Rose); CV11-00747 (Stuart-Christie); CV11-00698 (Thomas); CV10-01971 (Woods); and CV10-03294 (Jackson).[1] These cases have been consolidated to address certain issues related to deficiency judgments, particularly the meaning of NRS 40.451 and its application within the context of Nevada's Foreclosure Mediation Program ("the FMP"), where issues

[1] Six additional cases were added to this consolidation at a later date. See Section Consolidation, *infra*.

relating to deficiency judgments. As of today, however, the Supreme Court has yet to issue any opinion or order to

relating to deficiency judgments pervade many, if not all, of the cases.[2] This Court requested additional briefing on these issues and heard oral arguments on March 27, 2012. This Order now follows.

In this consolidated case, this Court considers the amount of liability or exposure a homeowner may face under Nevada law after a foreclosure or trustee's sale of residential real estate.[3] Additionally, this Court reconsiders a related issue particular to the FMP, within which this case arises. Many homeowners participating in the FMP, including several involved in this consolidated case, argue it is bad faith under NRS 107.086 ("the FMP statute") and the Foreclosure Mediation Program Rules ("FMRs") for a bank to refuse a homeowner's request to produce at the mediation the homeowner's potential deficiency in the event of a foreclosure or trustee's sale.

Conversely, the banks argue neither the FMP statute nor the FMRs require disclosure of such information and further, homeowners may calculate the potential deficiency themselves without the banks' assistance simply by ascertaining the difference between the principal obligation and any payments made towards that principal amount. Thus, in addition to this Court's determination of how Nevada law calculates the deficiency exposure a homeowner may face *after* a foreclosure or trustee's sale, this Court also will evaluate whether a bank's refusal to disclose at the mediation the potential deficiency judgment is aligned with the spirit of the FMP and the FMRs and the related purpose of exchanging information in good faith.[4]

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[2] Although the Gibbs did not raise the deficiency judgment issue in their *Petition for Judicial Review*, the parties stipulated to this Court's use of their case as a vehicle to consolidate and decide the other cases in which the deficiency judgment issues were raised. See Global Stipulation, CV10-03294 (Nov. 1, 2011), discussed *infra*.

[3] The Supreme Court of Nevada has heard oral argument on these issues and has released several unpublished orders relating to deficiency judgments. As of today, however, the Supreme Court has yet to issue any opinion or order to which this Court is bound.

[4] This Court previously addressed this issue in Kuhl v. Carrington Mortgage Servs., CV11-00325 (Mar. 7, 2011).

PROCEDURAL HISTORY

The Gibbs' Case

On October 14, 2010, the Gibbs and Respondent BAC HOME LOANS SERVICING, LP ("BAC")[5] attended a mediation under the auspices of the FMP. According to the Mediator's Statement, the parties participated but were unable to agree to a loan modification or make other arrangements. The Gibbs filed a *Petition for Judicial Review* on November 1, 2010. This Court entered its *Order for Judicial Review* on November 2, 2010. BAC filed its *Response to Petition for Judicial Review* on November 24, 2010. The Gibbs filed a *Reply Points and Authorities in Support of Petition for Judicial Review* on December 7, 2010. Hearings were held on January 28, 2011 and March 14, 2011. Although an Evidentiary Hearing was scheduled for July 2011, it was vacated and the case was reset.

Consolidation

At some point after the Gibbs' Evidentiary Hearing was vacated, counsel involved on both sides of the litigation within the FMP—including counsel for the Gibbs and BAC—decided to combine the aforementioned cases. Counsel did so in order to streamline the determination of the common issues surrounding deficiency judgments and to reduce confusion that could result from independent and potentially inconsistent rulings. As a result, the parties entered into a global stipulation memorialized in BAC's *Global Stipulation and Order to Extend Time for Respondent to File Response to Deficiency Judgment Issues as Raised in the Petition for Judicial Review* ("Global Stipulation") filed on November 1, 2011.

BAC filed a *Consolidated Response to Deficiency Judgment Issues as Raised in Petitioners' Petitions for Judicial Review* on February 7, 2012. Respondent JP MORGAN CHASE BANK, N.A., BY ITSELF AND AS SUCCESSOR BY MERGER WITH CHASE HOME FINANCE, LLC ("Chase") entered into the *Global Stipulation* by filing a *Joinder with Supplemental Points and Authorities to Consolidated Response* February 15, 2012. With this

[5] On July 1, 2011, BAC merged into Bank of America, N.A. and is now known as "Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP." See Resp'ts Notice of Merger and Name Change, CV10-03294 (Aug. 23, 2011). For the sake of consistency, this Court will continue to refer to Respondent as BAC.

Joinder, Chase added the following six cases to the consolidated case: CV11-03655 (Aragon); CV11-03495 (Espinoza); CV11-03363 (Ramos); CV11-03131 (Eduave); CV11-02683 (Cornelius); and CV11-0248 (Pyne). The Gibbs and the other Petitioners (collectively "Petitioners") filed a *Reply Points and Authorities in Support of Petition for Judicial Review/Reply to Consolidated Response to Deficiency Judgment Issues* on March 6, 2012.

DISCUSSION

Issues Presented

Whether the term "indebtedness" as defined in NRS 40.451 is limited to the amount paid for an assignment of the deed of trust[6] when determining the amount of a deficiency judgment? In addition, whether a beneficial interest holder's refusal to disclose at the mediation the potential deficiency judgment a homeowner may face in the event of a foreclosure or trustee's sale amounts to bad faith under the FMP statute and the FMRs?

Indebtedness and Deficiency Judgments

Legal Standards

Relevant Statutory Provisions Related to Deficiency Judgments

NRS 40.451 reads, in its entirety:

> As used in NRS 40.451 to 40.463, inclusive, "indebtedness" means the principal balance of the obligation secured by a mortgage or other lien on real property, together with all interest accrued and unpaid prior to the time of foreclosure sale, all costs and fees of such a sale, all advances made with respect to the property by the beneficiary, and all other amounts secured by the mortgage or other lien on the real property in favor of the person seeking the deficiency judgment. Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder.

NRS 40.459 uses this definition of "indebtedness" to limit the amount of a deficiency recovery. This statute provides, in relevant part:

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[6] Petitioners frame the issue in terms of the assignment of the deed of trust. On the other hand, Respondents note that consideration paid for the *note* and accompanying mortgage is the relevant inquiry here because this transaction, as opposed to consideration paid for an assignment of the deed of trust, "actually occurs" in the mortgage industry and "constitutes paying for a beneficial interest in a loan." (Resp. at p. 4.) This Court finds the parties are referring to the same idea, namely the assignment of the *loan* to a new creditor. Thus, this Court will construe Petitioners' position and therefore frame the issue presented in this case as if "deed of trust" is a proxy for the note or the loan.

> The court shall not render judgment for more than:
>
> 1. The amount by which the amount of the indebtedness which was secured exceeds the fair market value of the property sold at the time of the sale, with interest from the date of the sale; or
>
> 2. The amount which is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured, with interest from the date of sale,
>
> whichever is the lesser amount.

NEV. REV. STAT. § 40.459.[7]

Statutory Interpretation

Because resolution of the *Global Stipulation* depends upon the interpretation of NRS 40.451, this Court relies on the well-established rules, procedures and precepts of statutory interpretation in resolving this case. When a statute is clear on its face this Court will not look beyond the statute's plain language. See Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004); We the People Nevada v. Secretary of State, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008) (per curiam). If, however, a statute is unclear or ambiguous, this Court attempts to give effect to the meaning the legislature intended to provide. Beazer Homes, 120 Nev. at 580, 97 P.3d at 1135 (citation omitted). A statute is ambiguous when it is susceptible to more than one reasonable interpretation. D.R. Horton, Inc. v. Eighth Judicial Dist. Court, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009). In determining legislative intent, this Court considers reason, public policy, and legislative history, and also assumes that the Legislature is aware of related statutes. See id. (citing Cable v. EICON, 122 Nev. 120, 125, 127 P.3d 528, 531 (2006)); City of N. Las Vegas v. Eighth Judicial Dist. Court, 122 Nev. 1197, 1205, 147 P.3d 1109, 1115 (2006). As a general matter, Nevada courts "read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation" whereby "no part [of the statute at issue] shall be rendered meaningless."

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[7] Assembly Bill 273 recently passed in 2011 amended NRS 40.459. See Ch. 311 (A.B. 273), 2011 Leg., 76th Sess. (Nev. 2011). This amendment is inapplicable to the *Global Stipulation* because it was not in place at the time any of the individual cases commenced. Further, this amendment is also irrelevant to this case because the relevant portions of NRS 40.459 that concern this Court here were unmodified by the amendment.

Stockmeier v. Psychological Review Panel, 122 Nev. 534, 541 n. 8, 135 P.3d 807, 810 n. 8 (2006) (internal quotations and citations omitted).

Legal Analysis

As an initial matter, this Court notes at oral argument the parties agreed on one fundamental point: that NRS 40.451 was plain on its face. Of course, the parties reached different results from this shared premise. Petitioners averred the last sentence of the statute plainly limits indebtedness to the amount the lienholder paid for the deed of trust. Conversely, Respondents averred the statute plainly establishes a debtor's principal balance under the note as the basis for calculating indebtedness, and the limiting language at end of the statute provides no basis for disregarding the amount of a debtor's principal balance when calculating indebtedness.

Of course, if a statute is plain its meaning is clear and singular. Here, this Court is presented with opposing plain meanings. Simultaneously, or in the alternative, therefore, Petitioners and Respondents analyzed NRS 40.451's legislative history to provide further support for their opposing positions. This Court will begin with a determination about whether, as a matter of law, NRS 40.451 is plain on its face and, if so, what precisely that plain meaning actually is.

NRS 40.451 is Plain and Unambiguous

This Court agrees with the parties and finds NRS 40.451 is plain on its face. As a result, this Court will not venture into the legislative history of the statute or conduct other similar analyses attendant to judicial interpretation of ambiguous legislation. Before this Court states precisely what this plain meaning is, however, this Court will summarize the parties' positions.

Respondents contend the plain language of NRS 40.451 can be interpreted in only one way—in a way that leaves unchanged the primary amount used to calculate the debtor's total indebtedness, namely the amount of the debtor's principal obligation. Specifically, Respondents focus on the last sentence of the statute, which reads, "[s]uch amount constituting a lien is limited to the amount of consideration paid by the lienholder." NEV. REV. STAT. § 40.451. Respondents aver this sentence is "intended to apply in the case of non-statutory liens . . ." and "provides no basis for disregarding the amount of a debtor's principal balance on the obligation

when calculating indebtedness." (Resp. at p. 4.) Respondents argue to read this sentence any other way would render meaningless another critical part of the statute, namely the primary definition of indebtedness as "the principal balance of the obligation secured by the mortgage or other lien on real property . . . ." NEV. REV. STAT. § 40.451. In short, Respondents aver the limiting language contained in the last sentence of the statute limits certain liens, but not the debtor's principal obligation under the mortgage note.

Petitioners, on the other hand, begin by correctly asserting a deed of trust is encompassed within the definition of "mortgage or other lien" under NRS 40.433. See NEV. REV. STAT. § 40.433 ("As used in NRS 40.430 to 40.459, inclusive, unless the context otherwise requires, a 'mortgage or other lien' includes a deed of trust . . . ."). Based on NRS 40.433, Petitioners contend the last sentence of NRS 40.451—"[s]uch amount constituting a lien is limited to the amount of consideration paid by the lienholder"—plainly limits the principal obligor's total *indebtedness* secured by the lien, i.e. the deed of trust. Underlying Petitioners' contention is the assumption that the lienholder cannot equitably recover through a deficiency judgment more than what it paid to obtain the right to pursue that deficiency judgment. In other words, the lienholder cannot recover an amount that exceeds its "position" or "interest" in the security. Petitioners aver this assumption—and the plain meaning of the NRS 40.451 arising therefrom—is supported by the original "anti-deficiency" character of the statute, which reflected the Legislature's intent to prevent "double recovery" by lienholders.

According to Petitioners, to ignore this plain meaning would permit double recoveries through deficiency judgments to abound in the following manner. First, the lienholder pays a certain amount for the residential mortgage loan through an assignment of the deed of trust. Then, when the borrower defaults, the lienholder enforces the deed of trust, forecloses, and collects the security, the value of which likely exceeds what the lienholder paid for the assignment of the security instrument. This is the first "recovery." Next, sometime later (up to six years), the lienholder is permitted to sue and collect the deficiency, i.e. the remaining principal obligation plus interest, costs, fees, etc. According to Petitioner, this is the second "recovery." (Reply at p. 3.) This Court disagrees with Petitioners' analysis.

This Court finds Petitioners' argument is inexact, in large part because it double-counts the recovery. When the lienholder forecloses on a residence, the value of the security it obtains is neither liquidated nor enjoyed by the lienholder. The lienholder, usually a financial institution, is not going to move into the house, quite the contrary. The lienholder simply owns the house and likely will resell the house, *e.g.*, at a trustee's sale, at its current market value. At this point, the security is liquidated and the lienholder receives *some* value.

However, it is, at best, imprecise and at worst, misleading, to call this transaction a "recovery." Again, Petitioners argue that the lienholder's interest or position in the debt is limited to what the lienholder paid for it on the secondary or tertiary market and, therefore, the proceeds reaped from the post-foreclosure sale of the security should be construed as a profit. (Reply at p. 4.) This argument misses the mark in two ways.

First, in cases where the debt was acquired at face value, the lienholder sees no profit. In such cases, the proceeds reaped from the post-foreclosure sale of the security likely are *offset* against, *inter alia,* the amount of the debtor's outstanding principal obligation. In today's residential housing market, particularly in Nevada, the amount of the outstanding debt always exceeds the value of the security due to the precipitous decline of residential home values in the wake of the financial crisis. Thus, when the lienholder decides to pursue a deficiency judgment, that judgment is the lienholder's first and only actual "recovery," but no profit is gained because it is utilized, ostensibly, to satisfy the remaining outstanding debt.

While this analysis obtains in a situation where the amount the lienholder paid for the assignment equals the amount of the original loan, this Court recognizes such an analysis is unresponsive to Petitioners' argument, which assumes just the opposite. Specifically, Petitioners frequently assert the amount the lienholder paid for the loan through an assignment likely is a *fraction* of the original loan amount, due to complex bundling and securitization practices. In other words, instead of the debtor's outstanding principal obligation exceeding the value of the security, the *lienholder's interest* in the loan, i.e. the amount the lienholder paid for the right to collect the security upon default, is *less than* the value of the security. In such a case, Petitioners aver NRS 40.451 adjusts downward the debtor's indebtedness to reflect that fractional value and

prevent "foreclosure profiteering." (Reply at p. 7, 13.) This leads to this Court's second, and more important, point.

Petitioners focus on one side of the equation and completely ignore the other. That is, Petitioners focus on the amount the lienholder paid for the loan and ignore the amount of the debtor's principal obligation, i.e. the original loan amount. Petitioners should be unconcerned with the amount the lienholder paid for the loan on the secondary or tertiary market, or what the lienholder does with the proceeds from the post-foreclosure sale. As an assignee, the lienholder has the same rights as the assignor. See 4 Corbin on Contracts § 861 (1951) (stating the general rule of assignments is that the transferee (or assignee) has the same rights as the transferor (or assignor)). This general principle is often stated as an assignment places the assignee "in the shoes" of the assignor. See Interim Capital, LLC v. The Herr Law Group, Ltd., No. 2:09-CR-01606-KJD-LRL, 2011 WL 7047062, at *6 (D. Nev. Oct. 21, 2011) (citing Ill. Farmers Ins. Co., Glass Serv. Co., 683 N.W.2d 792, 803 (Minn. Ct. App. 2004)). This principle has been recognized and followed by the Nevada Supreme Court. See Wood v. Chicago Title Agency, 109 Nev. 70, 72, 847 P.2d 738, 739-40 ("'After notice of [an] assignment has been given to the obligor . . . the assignor has no remaining power of release. The obligor must pay the assignee.'" 4 Corbin on Contracts § 890 (1951)). This principle is also codified in Nevada's version of the Uniform Commercial Code. See NEV. REV. STAT. § 104.3203 ("Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument.") Under these principles, by standing in the shoes of the assignor the assignee—here, the lienholder—may enforce the note and collect the amount of the principal obligation through a deficiency judgment.

Further, this Court notes such transactions involve the exercise of business judgment and complex risk calculations. The question of why, or the fact that, a secondary-market participant would purchase a residential mortgage loan—or several million loans—for less than the principal amount is irrelevant under NRS 40.451, which is concerned with amounts of debt, not amounts of debt assignments. These transactions are not talismanic. Indeed, these transactions have

nothing to do with Petitioners' outstanding principal obligation under the plain meaning of NRS 40.451. That amount remains unchanged.

NRS 40.451 defines "indebtedness" by listing six categories or amounts: (1) the principal balance of the obligation; (2) interest; (3) costs; (4) fees; (5) all advances made during the foreclosure process; and (6) all *other* amounts secured by the mortgage or other lien. Under the plain meaning of NRS 40.451, the last sentence of that statute limits only the last clause of the preceding sentence, which identifies the final catchall category of debt included in the calculation of indebtedness. The clause reads, "and all *other* amounts secured by the mortgage or other lien on the real property in favor of the person seeking the deficiency judgment." NEV. REV. STAT. § 40.451 (emphasis added). This Court finds the word "other" denotes amounts *in addition* to the amounts previously listed in the statute. This plain meaning is further supported by the use of "together with," which follows the principal obligation category and precedes the other remaining categories. See id.

Furthermore, as the court stated in Interim Capital, *supra*, NRS 40.451 is definitional. Interim Capital, 2011 WL 7047062 at *7. The title of NRS 40.451 is "Indebtedness defined." Accordingly, the statute goes on to define "indebtedness" as a collection of amounts through a list of categories identifying types of obligations. "Such amount" in the last sentence, therefore, cannot reasonably be read to refer to indebtedness because—grammatically—indebtedness is a list of categories or collection of amounts, not an "amount." Id. at *8. As the Interim Capital court stated: "if the last sentence [of NRS 40.451] was meant to limit the total amount of indebtedness, the statute would say so, likely by stating that '*Indebtedness* is limited to the amount of consideration paid by the mortgagee" or even '*Such indebtedness* . . .' The statute says no such thing." Id. at *7 (emphasis added). Thus, this Court finds NRS 40.451 provides for no meaning *other than* one that applies the last sentence only to the sixth and final category of indebtedness previously listed in the statute.

Pursuant to this plain meaning, therefore, this Court concludes indebtedness as used in NRS 40.451 to 40.463, inclusive, cannot be reduced by an assignment of the deed of trust. This Court finds the only amounts limited by the last sentence of NRS 40.451 are "other amounts"

like, *e.g.*, non-statutory liens or miscellaneous actual out-of-pocket expenses, but not the mortgage or deed of trust securing the debtor's principal obligation.

Failure to Provide Deficiency Judgment Information at Mediation

Under the above-explained plain meaning of NRS 40.451, calculating indebtedness under that statute, and by extension the potential deficiency judgment under NRS 40.459, is rather uncomplicated. To calculate indebtedness, one simply adds the amounts from the six distinct categories listed in the statute. As this Court previously explained, for category (6), these other amounts are limited to the amount of the consideration paid by the lienholder. See NEV. REV. STAT. § 40.451.

Thus, in order to calculate the potential deficiency judgment, the debtor uses the previously-calculated indebtedness amount and applies NRS 40.459, depending on her particular situation. It is against this background of the unsophisticated and fairly straightforward nature of the deficiency judgment calculation that this Court reconsiders whether the refusal to disclose the potential deficiency amount constitutes bad faith under the FMP statute and the FMRs.

Legal Standards

The scope of judicial review by the district court in FMP cases is limited to enforcing agreements made between the parties and determining bad faith and appropriate sanctions. FMR 21(1).[8] Upon a petition for judicial review, the district court conducts proceedings *de novo*. FMR 21(5).

If a homeowner elects to mediate under the FMP, the homeowner and the trustee or deed of trust beneficiary (or its representative) must attend and mediate in good faith. NEV. REV. STAT. § 107.086(5); FMR 10.1. The beneficiary must bring to the mediation the original or certified copy of the deed of trust, the mortgage note, and every assignment of each.[9] NEV. REV. STAT. § 107.086(4); FMR 11.3, 10.1(a). The purpose of these document requirements is to "ensure that whoever is foreclosing 'actually owns the note' and has authority to modify the

[8] Including Amendments through March 1, 2011, *available at* http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf.

[9] The beneficiary also must produce an appraisal or a broker's price opinion. FMR 11.3.

loan." Leyva v. Nat'l Default Servicing Corp., 127 Nev. Adv. Op. 40, 255 P.3d 1275, 1279 (July 7, 2011) (en banc) (citing Hearing on A.B. 149 Before the J. Comm. on Commerce & Labor, 2009 Leg., 75th Sess. (Nev. 2009) (statement of Assem. Barbara Buckley)). Finally, if the beneficiary attends through a representative, that person must have loan modification authority or have "access at all times during the mediation to a person with such authority." NEV. REV. STAT. § 107.086(4); FMR 10.1(a). If the beneficiary fails to satisfy any of the aforementioned statutory mandates, the district court may issue sanctions "as the court determines appropriate." NEV. REV. STAT. § 107.086(5); Pasillas v. HSBC Bank USA, 127 Nev. Adv. Op. 39, 255 P.3d 1281, 1286 (July 7, 2011) (en banc); see Leyva, 255 P.3d at 1276-77 (failure to strictly comply with FMP's statutory and rule-based mandates is a sanctionable offense).

Legal Analysis

Neither the FMP statute nor the FMRs expressly require the disclosure of deficiency judgment information. As this Court explained in Kuhl, *supra*, however, "[t]he determination of whether failure to provide certain information falls below the threshold of 'good faith' is well within the purview of this Court sitting in review." Kuhl, CV11-00325 at p. 3. Good faith determinations are fact-based and contextual. In Kuhl, this Court ultimately held that information regarding the maximum deficiency judgment a homeowner may face is relevant—and therefore required to be disclosed at the mediation to satisfy good faith—"in very narrow circumstances." Kuhl, at p. 4. These circumstances include those where lack of disclosure adversely impacts the mediation, particularly the homeowner's ability to make an informed decision when considering exit strategies, or a specific offer. Id. at 5. For example, this Court found that "withholding [deficiency judgment] information without good reason, while also refusing to release liability, falls below the threshold of 'good faith' negotiation," id. at 6, especially when a homeowner is considering a short sale or deed-in-lieu, which requires the homeowner to waive the six-month statutory period and accept a six-year period in which they may face deficiency liability. Id. at 5.

This Court continues to follow Kuhl in the following respect: when a beneficial interest holder's failure to provide certain information at the mediation *adversely impacts* the mediation,

that failure constitutes a failure to meet the good faith requirement of the FMP statute. However, these instances will decrease in number in light of this Court's explication of NRS 40.451's plain meaning and the resultant relative ease with which a homeowner may calculate the potential deficiency judgment she may face. In other words, this Order further narrows the circumstances discussed in Kuhl.

The "cap" or "ceiling" deficiency judgment amount a homeowner may face will never exceed the sum total of the amounts from the six distinct debt categories listed in the first sentence of NRS 40.451. Thus, a beneficial interest holder's failure to provide this information will rarely, if ever, adversely impact the mediation because the homeowner—with some effort—may obtain the same information. Accordingly, such a failure (or refusal) will rarely, if ever, fall below the FMP statute's good faith requirement.

This Court reminds Respondents and others similarly situated, however, of the purpose and spirit of Nevada's FMP. The FMP was designed to provide homeowners a *meaningful* opportunity to keep their homes and, to that end, to facilitate the exchange of pertinent information with the owner of their mortgage loan. Inevitably, an opportunity to keep a home will nearly always entail a loan modification of some kind. Unfortunately, loan modifications are not always reached. In such cases, the parties must discuss exit strategies like, *e.g.*, foreclosure, a short sale, or a deed-in-lieu. These discussions are particularly difficult for homeowners who are likely losing not only their most important financial asset—their house—but they are also severing an emotional connection and losing a place of belonging, a place of comfort and memories—their *home*. Therefore, this Court *strongly* encourages the banks and other financial institutions mediating with homeowners in Nevada's FMP to provide *all* of the information necessary for a homeowner to meaningfully negotiate or, if necessary, exit the process with dignity. This encouragement is *in addition* to the FMP statute's good faith requirement, which provides grounds for this Court to sanction banks or financial institutions for insincere or dishonest conduct, including failure to disclose pertinent information.

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CONCLUSION

Accordingly, this Court concludes, as a matter of law: (1) "indebtedness," as used in NRS 40.451 to 40.463, inclusive, is not reduced to the amount of consideration paid for an assignment of the deed of trust; and (2) failure to disclose the maximum deficiency judgment a homeowner may face does not fall below the FMP statute's good faith requirement—unless such a failure adversely impacts the mediation in such a way that the homeowner is not afforded a reasonable opportunity to negotiate—because the homeowner can obtain the same information.

With these common legal issues resolved, the individual parties in the *Global Stipulation* may or may not desire a hearing to compel application of these legal conclusions to their particular cases. If the parties desire such a hearing, they may contact the Judicial Assistant in Department Seven to schedule the hearing.

IT IS SO ORDERED.

DATED this 16 day of April, 2012.

Patrick E Flanagan

PATRICK FLANAGAN
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 16 day of April, 2012, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Mark Mausert, Esq. for the Gibbs and other Petitioners;

Ariel Stern, Esq. for BAC; and

Jordan Butler, Esq. for Chase.

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Judicial Assistant

FILED
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04-18-2012:04:29:47 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 2898171

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN GIBB and SHERRY GIBB et al.,

Petitioners,

vs.

BAC HOME LOANS SERVICING, LP et al.,

Respondents.

/

AND RELATED CASES

/

Case No.: CV10-03294

Dept. No.: 7

ERRATUM

On April 16, 2012, this Court entered an *Order* resolving the *Global Stipulation* in the above-entitled matter. That *Order* contained an inaccurate list of cases included in the *Global Stipulation*. Accordingly, this Court issues the instant *Erratum*, or correction, to rectify those inaccuracies. The following thirteen cases were consolidated with Petitioners JOHN and SHERRY GIBB's case: CV11-00530 (Jackson); CV11-00698 (Thomas); CV11-00738 (Rose); CV11-00747 (Stuart-Christie); CV11-01692 (Henschel); CV11-01971 (Woods); CV11-01610 (Kievit); CV11-02151 (Sandusky); CV11-02548 (Pyne); CV11-02683 (Cornelius); CV11-03131 (Eduave); CV11-03495 (Espinoza); and CV11-03655 (Aragon). This list excludes closed cases.

IT IS SO ORDERED.

DATED this 18 day of April, 2012.

PATRICK FLANAGAN
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 18 day of April, 2012, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Mark Mausert, Esq. for the Gibbs and other Petitioners;

Ariel Stern, Esq. for BAC; and

Jordan Butler, Esq. for Chase.

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Judicial Assistant

Exhibit 3

Exhibit 3

Exhibit 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW DAVIS AND LAURETTA DAVIS,
Appellants,
vs.
US BANK, NATIONAL ASSOCIATION AS TRUSTEE,
Respondent.

No. 56306

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a petition for judicial review in a foreclosure mediation action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Following an unsuccessful mediation conducted under Nevada's Foreclosure Mediation Program (FMP), respondent US Bank filed a petition for judicial review in district court. Respondent contended that it had complied with the FMP's statutory requirements and that it should therefore be issued a foreclosure certificate. See NRS 107.086(4), (5). Appellants Andrew and Lauretta Davis opposed the petition, contending that respondent failed to produce a valid assignment to demonstrate that ownership of their loan had been transferred from their original lender to respondent.[1]

The district court granted respondent's petition and ordered that a foreclosure certificate be issued. We affirm.

Standard of review

We review a district court's factual determinations deferentially, Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

(2009) (a "district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence"), and its legal determinations de novo, Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound discretion of the district court. Pasillas v. HSBC Bank USA, 127 Nev. ___, ___, 255 P.3d 1281, 1287 (2011).

The district court did not abuse its discretion in ordering a foreclosure certificate to be issued

To obtain a foreclosure certificate, a deed of trust beneficiary must strictly comply with four requirements: (1) attend the mediation, (2) participate in good faith, (3) bring the required documents, and (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person. NRS 107.086(4), (5); Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is necessary).

Here appellants' sole argument on appeal is one of document production.[2] Specifically, they contend that a MERS-generated assignment was insufficient to establish respondent's ownership of their loan. Due to the manner in which this argument was presented to the district court and now on appeal, we are compelled to affirm.

The overarching argument that can be gleaned from appellants' briefs is that the assignment in this case was invalid solely by

[2]We reject appellants' vague allegations that respondent's representative at the mediation lacked authority to modify their loan and that respondent participated in bad faith. The record undisputedly demonstrates that the representative offered appellants a loan modification at the mediation. In light of this offer, we see no basis for appellants' bad-faith argument.

virtue of the fact that it was generated by MERS. In other words, because appellants believe that MERS as an entity is a sham or a fraud, they contend that the assignment itself was necessarily invalid.

Courts in Nevada and across the nation have repeatedly recognized that MERS serves at least some legitimate business purpose.[3] See, e.g., Weingartner v. Chase Home Finance, LLC, 702 F. Supp. 2d 1276, 1280, 1282 (D. Nev. 2010); Gomes v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 3d 819, 821 (Ct. App. 2011); BAC Home Loans Servicing, L.P. v. White, 256 P.3d 1014, 1017 (Okla. Civ. App. 2010); Jackson v. Mortgage Electronic, 770 N.W.2d 487, 490-91 (Minn. 2009); In re Wilhelm, 407 B.R. 392, 404-05 (Bankr. D. Idaho 2009); MERS v. Nebraska Dept. of Banking, 704 N.W.2d 784, 787-88 (Neb. 2005). Consequently, we reject appellants' contention that the assignment was invalid solely by virtue of its connection to MERS.

Having done so, however, we are left with little else to consider in terms of an appropriately raised argument. Although appellants raised

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[3]Several have even confirmed MERS' legitimacy with respect to the precise issue presented here: whether MERS, acting as a lender's nominee, can assign the lender's ownership of a note to another entity. See, e.g., Smith v. Community Lending, Inc., 773 F. Supp. 2d 941, 944 (D. Nev. 2011) (concluding that a provision in a deed of trust "indicates an intent to give MERS the broadest possible agency" on behalf of the lender and that "[s]uch agency would include the ability to sell the interest in the debt"); Crum v. LaSalle Bank, N.A., 55 So. 3d 266, 269 (Ala. Civ. App. 2009) (concluding that an identical provision indicated that "MERS was authorized to perform any act on the lender's behalf as to the property, including selling the note"); Taylor v. Deutsche Bank Nat. Trust Co., 44 So. 3d 618, 623 (Fla. Dist. Ct. App. 2010) ("The transfer . . . was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note . . . because MERS was . . . given explicit and agreed upon authority to make just such an assignment.").

several issues having arguable merit during oral argument, these issues were either raised for the first time at oral argument[4] or raised in cursory fashion in their briefs.[5]

Based upon the record before us, we are unable to give adequate consideration to these issues. "This court is not a fact-finding tribunal," Zugel v. Miller, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983), and it is an appellant's responsibility to create an appellate record with these facts in place. NRAP 30(b)(3), (g)(2).

In the context of the FMP, this starts with cogently presenting discrete arguments in a petition for judicial review or a response to such a petition, and it continues with discussing these arguments with the district court at the status hearing. At very least, this enables the district court to exercise its discretion in considering the relevant arguments before issuing an order.[6] Pasillas, 127 Nev. at ___, 255 P.3d at 1286. Then, in the event that this order is appealed, the appellant's briefs must cogently and discretely argue why the district court erred and must direct this court to

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[4]For example, at oral argument, appellants questioned whether NRS 111.210 requires a deed of trust assignment to recite the consideration paid. Appellants also questioned how their original lender could sell their loan to respondent years after the lender ceased doing business. These questions were not raised in their briefs, let alone in district court.

[5]Appellants further questioned at oral argument the authority of Marti Noriega to execute the assignment. Again, however, appellants never discussed this matter with the district court at the status hearing and make only passing references to it in their briefs.

[6]If a genuine factual dispute exists regarding a particular argument, it is then the parties' obligation to request an evidentiary hearing on the matter. We note that although appellants did request an evidentiary hearing in this case, their request pertained to a different issue than those raised on appeal.

where in the appellate record this error occurred.[7] NRAP 28(a)(8)(A), (e)(1).

In sum, the assignment produced by respondent at the mediation was not invalid simply by virtue of the fact that it was generated by MERS. Although appellants have raised some other arguably meritorious questions with regard to the assignment, they were not properly preserved for appeal. We therefore

ORDER the judgment of the district court AFFIRMED.

Saitta, C.J.

Douglas, J.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

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[7]The implications of not citing to the record were apparent in this case. Perhaps appellants' most persuasive argument on appeal was that respondent "admit[ted]" that it did not produce the promissory note at the mediation. However, without citation to the record or respondent's brief regarding where this alleged admission occurred, we were unable to determine whether the mediation was thus flawed. Not until oral argument were we able to confirm that appellants' contention was actually false. We strongly caution appellants' counsel to use care in the future. RPC 3.3(a)(1).

cc: Hon. Patrick Flanagan, District Judge
Mark L. Mausert
Hager & Hearne
McCarthy & Holthus, LLP/Las Vegas
Washoe District Court Clerk

EXHIBIT 4

EXHIBIT 4

EXHIBIT 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERALD A. BANGSTON,
Appellant,
vs.
GREATER NEVADA MORTGAGE SERVICES; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
Respondents.

No. 57302

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a foreclosure mediation action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Following an unsuccessful mediation conducted under Nevada's Foreclosure Mediation Program (FMP), appellant Jerald Bangston filed a petition for judicial review in district court, asserting that respondent Greater Nevada Mortgage Services (GNMS) had negotiated in bad faith and failed to comply with the FMP's statutory requirements.[1] See NRS 107.086(4), (5). After a hearing on these matters, the district

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition. We recognize that Bangston has recently filed a supplemental appendix. In large part, Bangston's supplemental appendix contains information that was previously filed as part of his docketing statement. The only new information consists of two computer printouts indicating that GNMS is merely the servicer of his loan. Bangston has failed to provide an explanation of how this new information relates to any previously raised arguments. As such, we decline to consider this information and dismiss as moot GNMS's motion to strike. Estate of LoMastro v. American Family Ins., 124 Nev. 1060, 1079 n.55, 195 P.3d 339, 352 n.55 (2008).

court denied Bangston's petition and ordered that a foreclosure certificate be issued.

Standard of review

We review a district court's factual determinations deferentially, Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (a "district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence"), and its legal determinations de novo, Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound discretion of the district court. Pasillas v. HSBC Bank USA, 127 Nev. ___, ___, 255 P.3d 1281, 1287 (2011).

The district court did not abuse its discretion in ordering a foreclosure certificate to be issued

To obtain a foreclosure certificate, a deed of trust beneficiary must strictly comply with four requirements: (1) attend the mediation, (2) participate in good faith, (3) bring the required documents, and (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person. NRS 107.086(4), (5); Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is necessary).

On appeal, Bangston argues that the district court improperly ordered that the foreclosure certificate issue because GNMS failed to

produce a Broker's Price Opinion (BPO) that was created within 60 days of mediation pursuant to Foreclosure Mediation Rule (FMR) 11(3)(b).[2]

While the record on appeal does not include the BPO at issue, Bangston seemingly concedes that the BPO was created 61 days prior to mediation. As NRCP 6(a) provides that "the day of the act . . . shall not be included" in the computation of time, this entire argument is steeped in an apparent miscalculation.

In any event, although we have previously concluded that the note, deed of trust, and each assignment must be provided under the Foreclosure Mediation Rules, Pasillas, 127 Nev. at ___, 255 P.3d at 1285, and have imposed a strict compliance standard for these core or "essential documents," Levya, 127 Nev. at ___, 255 P.3d at 1277-79; see also NRS 107.086(4), (5) (requiring production of the note, deed of trust, and each assignment), this strict-compliance requirement does not extend to the individual contents of a BPO and other collateral documents. As we stated

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[2]The Foreclosure Mediation Rules were amended effective March 1, 2011. The analogous prior rules, which were in effect when Bangston's petition was considered in the district court, were FMR 8(3), (4).

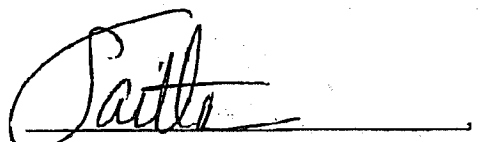
Bangston raises two additional arguments. First, he argues that GNMS was not the real party in interest to attend the mediation. However, Bangston does not dispute that he obtained the original loan from GNMS and that a representative from GNMS appeared at the mediation with the original note, offering to reduce Bangston's monthly payment by 50 percent. Thus, the district court did not abuse its discretion in concluding that GNMS is a real party in interest.

Second, Bangston argues that GNMS negotiated in bad faith by refusing to disclose the amount of consideration paid to MERS for the assignment. We find it unnecessary to reach the merits of this argument, as the record does not support that an assignment actually occurred. Instead, MERS was simply transferring back to GNMS any authority it retained to act on GNMS's behalf.

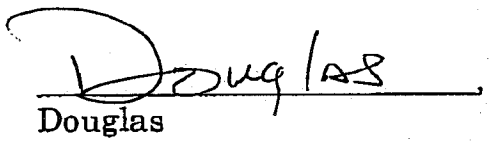
in Leyva, the purpose of the document production requirements is to ensure that the foreclosing party actually owns the note and has the authority to negotiate. 127 Nev. at ___, 255 P.3d at 1279. The contents of a BPO do not establish or affect this authority. We conclude that GNMS complied with FMR 11(3)(b).

Therefore, the district court did not abuse its discretion in declining to sanction GNMS for failing to produce a required document and ordering the foreclosure certificate. Accordingly, we

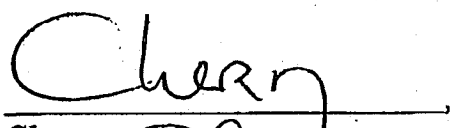
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Saitta



_____, J.
Douglas



_____, J.
Cherry

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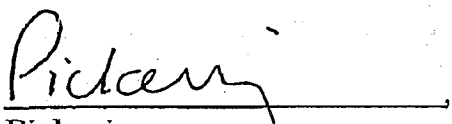
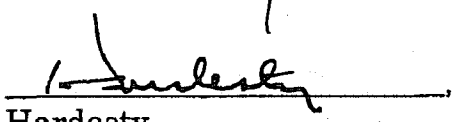
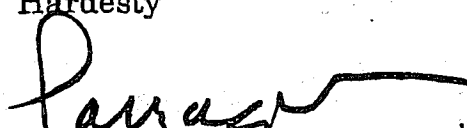
Gibbons



_____, J.
Pickering



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Patrick Flanagan, District Judge
Mark L. Mausert
McCarthy & Holthus, LLP/Las Vegas
Washoe District Court Clerk

Exhibit 5

Exhibit 5

Exhibit 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSANNAH J. SURGEONER,
Appellant,
vs.
CREDIT SUISSE FIRST BOSTON; FLOREZ CONSULTING D/B/A MERIDIAS CAPITAL; AMERICA'S SERVICING COMPANY/WELLS FARGO HOME MORTGAGE; QUALITY LOAN SERVICING CORP.; U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MORTGAGE BACKED SECURITY ADJUSTABLE RATE MORTGAGE TRUST 2005-2; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (MERS),
Respondents.

No. 57699

FILED

MAY 16 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program (FMP) matter. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Following an unsuccessful FMP mediation, appellant filed a petition for judicial review in district court. Appellant contended that respondents did not establish that they were entitled to enforce the note, to foreclose, or to mediate. The district court denied the petition without

12-15563

an evidentiary hearing and ordered that a foreclosure certificate be issued. This appeal followed.

This court reviews a district court's factual determinations deferentially, Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (explaining that a "district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence"), and its legal determinations de novo. Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound discretion of the district court. Pasillas v. HSBC Bank USA, 127 Nev. ___, ___, 255 P.3d 1281, 1287 (2011).

To obtain a foreclosure certificate, a deed of trust beneficiary must strictly comply with four requirements: (1) attend the mediation; (2) participate in good faith; (3) bring the required documents; and (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person. NRS 107.086(4) and (5); Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is necessary).

After review of the appellate record and considering the parties' arguments, we conclude that the district court did not abuse its discretion in ordering a foreclosure certificate to issue. First, the deed of trust named Mortgage Electronic Registration Systems, Inc. (MERS), the "nominee for Lender and Lender's successors and assigns," as "the beneficiary of this Security Instrument" and recites that, "Borrower

understands and agrees that," as such, MERS has "the right to foreclose and sell the Property." Both the note and the deed of trust named "Florez Consulting, Inc. dba Meridas Capital" as the lender. While appellant points to several unsigned form endorsements-in-blank to argue that, at the time of the notice of default and election to sell, the note had been transferred but the deed of trust not assigned, the unsigned endorsements were ineffective for any purpose, and thus, raise no question warranting an evidentiary hearing as to who holds the note. NRS 104.3204 (stating that "[e]ndorsement means a signature . . . made on an instrument for the purpose of negotiating the instrument").

Nor does the post-notice of default/pre-mediation assignment from MERS, as nominee for respondent Florez Consulting, Inc., to respondent U.S. Bank affect the notice of default and election to sell. See Leyva, 127 Nev. at ___, 255 P.3d at 1281; see also Restatement (Third) of Prop.: Mortgages § 5.4 (1997). According to the sworn certificate provided for the mediation, at the time of mediation, U.S. Bank had physical possession of the note, could demonstrate valid transfer based on the assignment from MERS, and had received an assignment of the deed of trust, U.S. Bank possessed authority to mediate. NRS 104.3203; Leyva, 127 Nev. at ___, 255 P.3d at 1280-81. An attorney for Wells Fargo Home Mortgage, as servicer for U.S. Bank, qualifies as a representative for purposes of satisfying the attendance requirements at mediation. NRS 107.086(4).

For these reasons, we reject appellant's assignments of error and we

ORDER the judgment of the district court AFFIRMED.[1]

Pickering, J.
Pickering

Gibbons, J.
Gibbons

Parraguirre, J.
Parraguirre

cc: Hon. Robert W. Lane, District Judge
Susannah J. Surgeoner
Romeo Cerutti
Sharon Horstkamp
McCarthy & Holthus, LLP/Las Vegas
Peter Schancupp
Nye County Clerk

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[1]Because we affirm on these bases, we decline to address the other arguments raised by respondents. We have considered appellant's remaining arguments and conclude that they present no basis for reversal.

To the extent that appellant submitted documents that are not part of the record, those documents were not considered in resolving this appeal. Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

Exhibit 6

Exhibit 6

Exhibit 6

IN THE SUPREME COURT OF THE STATE OF NEVADA

BEN M. MILLER,
Appellant,
vs.
AURORA LOAN SERVICES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 58532

FILED

MAR 30 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a foreclosure mediation action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Following an unsuccessful mediation conducted under Nevada's Foreclosure Mediation Program (FMP), appellant Ben Miller filed a petition for judicial review in district court. Miller contended that respondent Aurora Loan Services' conduct was sanctionable because it failed to comply with the FMP's statutory requirements.[1] See NRS 107.086(4), (5). The district court denied Miller's petition and ordered that a foreclosure certificate be issued. We affirm.

Standard of review

We review a district court's factual determinations deferentially, Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (a "district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence"), and its legal determinations de novo, Clark County v. Sun

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound discretion of the district court. Pasillas v. HSBC Bank USA, 127 Nev. ___, ___, 255 P.3d 1281, 1287 (2011).

The district court did not abuse its discretion in ordering that a foreclosure certificate be issued

To obtain a foreclosure certificate, a deed of trust beneficiary must strictly comply with four requirements: (1) attend the mediation, (2) participate in good faith, (3) bring the required documents, and (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person. NRS 107.086(4), (5); Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is necessary).

Here, Miller's only arguments that are properly presented on appeal relate to document production.[2] Specifically, Miller contends that

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[2]Miller's opening brief makes several observations in its "Statement of the Case" regarding alleged shortcomings at the mediation: (1) Deutsche Bank, and not Aurora, actually owns his loan; (2) Aurora failed to provide any of the required documents prior to the mediation; and (3) Aurora's document certification did not certify that Aurora was in possession of the original copy of the MERS assignment.

Because Miller's brief does not make clear whether these observations are meant as additional bases for reversing the district court's order, we decline to consider them as such. Specifically, if Miller's observations were intended as arguments in this regard, we would have expected Miller to discuss them in the "Argument" section of his brief and allude to them in his "Statement of Issues Presented for Review." See NRAP 28(a)(8) ("The appellant's brief shall . . . contain . . . a summary of

continued on next page...

the documents produced by Aurora were deficient in two respects: (1) the assignment produced by Aurora was not effective to assign the interest in his promissory note, and (2) his original lender did not endorse the note before transferring it to Aurora. We address each argument in turn.

The MERS assignment effectively assigned the interest in Miller's deed of trust and promissory note

At the mediation, Aurora provided a copy of Miller's deed of trust, his promissory note, and an assignment generated by MERS. In relevant part, the assignment stated:

> [S]aid Assignor hereby assigns unto the above-named Assignee, the said Deed of Trust, secured thereby, with all moneys now owing or that may hereafter become due or owing in respect thereof . . . .

(Emphasis added.)

We disagree with Miller's contention that this language was insufficient to transfer ownership of the note in addition to the beneficial interest in the deed of trust. To be sure, as Miller points out, most MERS assignments expressly assign "the said Deed of Trust together with the Note." And while such language makes clear what the assignment is purporting to do, it is not necessary for an assignment to expressly refer to "the Note" in order to transfer ownership of the note.

As for the assignment in this case, we conclude that the aforementioned underlined language purports to transfer ownership of the note. Because nothing is "owed" under a deed of trust, the only reasonable interpretation of this language is a reference to the underlying note.

...continued
the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief . . . .").

Thus, the MERS assignment was sufficient to transfer both the beneficial interest in Miller's deed of trust and ownership of Miller's note from his original lender to Aurora.

The note did not need to be endorsed

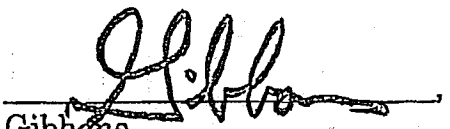
This conclusion obviates the need for the note to have been endorsed. As we observed in Leyva, "[f]or a note in order form to be enforceable by a party other than to whom the note is originally payable, the note must be either negotiated or transferred." 127 Nev. at ___, 255 P.3d at 1280 (emphases added).

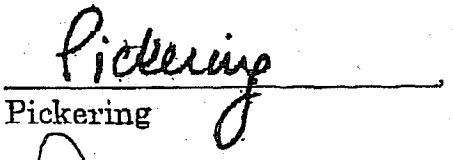
Leyva and Article 3 of Nevada's Uniform Commercial Code make clear that "negotiation" and "transfer" are two similar, but nevertheless distinct, concepts. When the holder of a note in order form endorses the note and gives possession of the note to a new entity, the note is thereby "negotiated," and the new entity becomes the holder. Id. at ___, 255 P.3d at 1280 (citing NRS 104.3201).

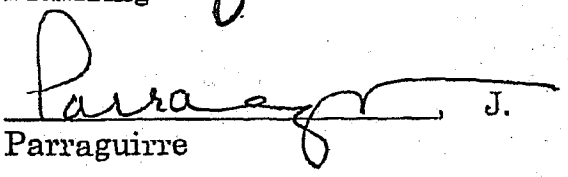
However, an endorsement is not necessary for a valid transfer. Id. at ___, 255 P.3d at 1281; cf. NRS 104.3203(2) ("Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument . . . ."). Because a transferred note is not endorsed, the party seeking to establish its right to enforce the note "'must account for possession of the unendorsed instrument by proving the transaction through which the transferee acquired it.'" Leyva, 127 Nev. at ___, 255 P.3d at 1281 (quoting U.C.C. § 3-203 cmt. 2, which explains the effect of § 3-203(b), codified in Nevada as NRS 104.3203(2)). In other words, because the party seeking to enforce the note cannot "prove" its right to enforce via a valid endorsement, the party must "prove" by some other means that it was given possession of the note for the purpose of enforcing it. Id.

As is customary in the secondary mortgage market, such "proof" generally comes in the form of a valid assignment of the deed of trust and corresponding promissory note—which, as explained previously, is what the MERS assignment in this case accomplished. Consequently, Aurora was entitled to enforce the note even though the note was not endorsed. We therefore

ORDER the judgment of the district court AFFIRMED.[3]


Gibbons, J.


Pickering, J.


Parraguirre, J.

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[3]We conclude that Miller's bad-faith-mediation argument is without merit. Miller's argument is based almost exclusively on Aurora's alleged document-production shortcomings considered above. Miller also argues that Aurora mediated in bad faith by falsely representing that it had produced a "true and correct copy" of his note at the mediation. Specifically, because the note produced at the mediation did not contain a "pre-payment penalty addendum" that was purportedly attached to his original note, Miller contends that Aurora's representation was knowingly false and amounted to bad faith.

Foreclosure Mediation Rule 11.3 requires production of "the mortgage note" at the mediation—not the note and all attachments. Thus, Aurora complied with the Foreclosure Mediation Rules. Absent other evidence pertaining to Aurora's alleged mindset, we reject Miller's allegation that Aurora's representation in the document certification amounted to bad faith.

cc: Hon. Patrick Flanagan, District Judge
Robertson & Benevento/Reno
McCarthy & Holthus, LLP/Las Vegas
McCarthy & Holthus, LLP/Reno
Washoe District Court Clerk

Exhibit 7

Exhibit 7

Exhibit 7

IN THE SUPREME COURT OF THE STATE OF NEVADA

KATHLEEN L. RAY,
Appellant,
vs.
DEUTSCHE BANK NATIONAL TRUST; FIRST FRANKLIN LOAN SERVICES; AND CAL-WESTERN RECONVEYANCE CORPORATION,
Respondents.

No. 54626

FILED

FEB 15 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY K. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order granting an NRCP 12(b)(5) motion to dismiss an action asserting breach of contract and related claims. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Kathleen Ray obtained two mortgages from respondent First Franklin Loan Services. The mortgages were secured by two deeds of trust on her property, which were subsequently assigned to respondent Deutsche Bank National Trust. After Ray defaulted on both mortgages, the trustee on the deeds of trust, respondent Cal-Western Reconveyance Corporation, filed notices of default and elections to sell, and then a notice of trustee's sale, with respect to Ray's property.

In response, Ray sent respondents letters disputing her default and essentially requesting that they demonstrate entitlement to foreclose on her property by, among other things, producing the original loan documents. When respondents did not respond to her requests, Ray instituted a district court action against them, including causes of action for breach of the covenant of good faith and fair dealing, breach of contract, breach of fiduciary duty, and fraud, primarily based on their failure to provide her with the original loan documents. Ray mailed the

summons and complaint to respondents, and when they did not respond within the 20-day time period set forth in NRCP 12(a)(1), she filed a motion for a default judgment. Respondents ultimately filed a motion to dismiss Ray's complaint under NRCP 12(b)(5) for failure to state a claim. The district court granted the motion and dismissed the action. This appeal followed.

The district court's order granting respondents' motion to dismiss under NRCP 12(b)(5) "'is subject to a rigorous standard of review on appeal.'" See Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (quoting Seput v. Lacayo, 122 Nev. 499, 501, 134 P.3d 733, 734 (2006)). Accordingly, this court will treat all factual allegations in Ray's complaint as true and draw all inferences in her favor. Id. at 228, 181 P.3d at 672. Ray's complaint was properly dismissed only if it appears beyond a doubt that she could prove no set of facts that would entitle her to relief. Id. "We review the district court's legal conclusions de novo." Id.

On appeal, Ray contends that the district court erred when it granted respondents' motion to dismiss. She argues mainly that, to proceed with foreclosure, respondents were required to demonstrate that they held the original note, which they failed to do. Although Ray does not cite to any specific legal authority to support that argument, it appears that she is basing it on NRS 104.3501(2)(b) and the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692g(b) (2006). Additionally, Ray contends that the district court erred when it did not grant her motion for a default judgment.

Having considered Ray's civil proper person appeal statement, First Franklin and Deutsche Bank's response, Cal-Western's joinder thereto, and the record, we conclude that the district court did not err

when it granted respondents' motion to dismiss. The nonjudicial foreclosure in this case predates the 2011 amendments to NRS Chapter 107 and does not grow out of Nevada's foreclosure mediation program (FMP). No authority indicates that NRS 104.3501(2)(b), dealing with the enforceability of negotiable instruments, applies to a nonjudicial foreclosure proceeding conducted outside the FMP and under the pre-2011 version of NRS Chapter 107, and Ray does not provide any. See Oraha v. Metrocities Mortgage, LLC, 2012 WL 70834 (D. Ariz., January 10, 2012); Diessner v. Mortgage Electronic Registration, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009) (recognizing that district courts "'have routinely held that [the] "show me the note" argument lacks merit'" (quoting Mansour v. Cal-Western Reconveyance Corp., 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009))); Hafiz v. Greenpoint Mortg. Funding, Inc., 652 F. Supp. 2d 1039 (N.D. Cal. 2009) (stating that, in California, which has a statute analogous to NRS 104.3501(2)(b), a deed of trust trustee need not produce the original note to initiate nonjudicial foreclosure proceedings). Second, the FDCPA likewise does not apply to these foreclosure proceedings. See Diessner, 618 F. Supp. 2d at 1188-89 (concluding that nonjudicial foreclosure proceedings do not fall within the FDCPA's scope); Hulse v. Ocwen Federal Bank, FSB, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) ("Foreclosing on a trust deed is distinct from the collection of the obligation to pay money. The FDCPA is intended to curtail objectionable acts occurring in the process of collecting funds from a debtor.").

We also reject Ray's argument that, because respondents did not respond to her complaint within NRCP 12(a)(1)'s 20-day time period, the district court erred when it did not grant her motion for a default judgment. Ray failed to properly serve her summons and complaint; as a result, the 20-day time period never commenced. It appears that Ray

mailed her summons and complaint to respondents, but as foreign corporations, she was required to personally serve respondents' respective designated Nevada agents. See NRCP 4(d)(2). Therefore, the district court did not err when it refused to enter a default judgment.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[1]

Pickering, J.

Pickering

Hardesty, J.

Hardesty

Parraguirre, J.

Parraguirre

cc: Hon. Valerie Adair, District Judge
Kathleen L. Ray
Brooks Bauer LLP
Wolfe & Wyman LLP
Eighth District Court Clerk

[1]Having considered all of the issues raised by Ray, we conclude that her other contentions lack merit and thus do not warrant reversal of the district court's judgment.

In light of this order, we deny as moot First Franklin and Deutsche Bank's July 26, 2010, motion for clarification.

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To:	Tracie K. Lindeman	From:	Donna M. Osborn, Esq.
Fax:	(775) 684-1601	Date:	7/6/2012 7:08:55 PM
Phone:		Re:	Written Response to Proposed Rule Changes to th

Comments

Written Response to Proposed Rule Changes to the Nevada Foreclosure Mediation Rules And Public Hearing scheduled for July 9, 2012 at 3:00 p.m.

facsimile