IN THE SUPREME COURT OF NEVADA

NATIONSTAR MORTGAGE, LLC; AND THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE HOLDERS OF THE CERTIFICATES, FIRST HORIZON MORTGAGE PASSTHROUGH CERTIFICATES SERIES PHAMS 2005-AA5, BY FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK NATIONAL MASTER SERVICER, IN ITS CAPACITY AS AGENT FOR THE TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT,

Appellants.

vs.

CATHERINE RODRIGUEZ,

Respondent,

Electronically Filed
Aug 13 2015 10:08 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court No. 66761

District Court Case No. A685616

Appeal from the Eighth Judicial District Court, Clark County
The Honorable KATHLEEN DELANEY, District Judge
District Court Case No. A-13-685616-J

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), which must be disclosed. These representations are made in order that judges of this Court may evaluate possible disqualification or recusal. Respondent is an individual and is not using a pseudonym. Respondent, individually, has been represented by the partners and associates of the Legal Aid Center of Southern Nevada, Inc. and the Connaghan|Newberry Law Firm.

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RESPONDENT'S ANSWERING BRIEF

INTRODUCTION

This appeal seeks to enforce the Nevada Foreclosure Mediation Program ("FMP") requirements. These requirements are simple -- the owner of the loan and the beneficiary of the deed of trust must: (i) have the authority to attend the mediation, (ii) participate in good faith, and (iii) bring proper documents to ensure the financially unfortunate homeowner will have a fair mediation.

A Petition for Judicial Review was filed against Nationstar Mortgage LLC ("Nationstar"), and the Bank of New York Mellon f/k/a/ the Bank of New York as Trustee for the Holder of the Certificates, First Horizon Mortgage Passthrough Certificates Series PHAMS 2005-AA5, by First Horizon Home Loans, a Division of First Tennessee Bank National Master Servicer, in its Capacity as Agent for the Trustee Under the Pooling and Servicing Agreement ("BONY") (together referred to as the "Banks" or "Appellants") by Respondent, Catherine Rodriguez ("Rodriguez").

In this case, Rodriguez attended multiple mediations over the course of several years, and each time she faced a different lender and was shown different documentation. Each mediation ended without a certificate allowing foreclosure, because the Banks' documentation did not comply with the FMP rules.

Ultimately, BONY filed for judicial foreclosure, and during that litigation the original Note was produced. The original Note did not match the documentation presented at the mediations. It was a forged document. The Nevada Foreclosure Mediation program cannot permit a lender and/or servicer to provide fraudulent documentation at a mediation.

From the moment the original Note was produced, the Banks have tried to use the mediation program rules and statutes as both a sword and a shield. As sword, they claim that providing untrue documents is perfectly acceptable as long as the falseness of the document is not discovered immediately. As a shield, they claim false documents at mediations cannot be viewed in the aggregate because each mediation is a separate and unconnected event. The Banks are wrong on both counts.

The Banks' arguments are designed to distract this Court from the pattern and practice used against Rodriguez, and possibly others. Rodriguez has attempted to retain her home through a fair foreclosure mediation process. But, the Banks want to downplay or conceal their disdain for the basic requirements of the FMP program.

COUNTERSTATEMENT OF ISSUES ON APPEAL

Rodriguez characterizes the issues on appeal as follows:

1. Does the District Court have jurisdiction to rule upon a Petition for Judicial

Review of a foreclosure mediation filed more than thirty days after receiving the Mediator's Statement?

2. Did the District Court correctly consider evidence that false documentation was used at the October 6, 2011, foreclosure mediation for the purpose of obtaining a foreclosure certificate?

3. Did the District Court correctly determine that Banks' egregious conduct constituted a failure to mediate in good faith?

4. Did the District Court's imposition of sanctions for the Banks' bad faith participation in the foreclosure mediations comport with due process and the inherent discretion of that court?

STATEMENT OF FACTS

Respondent, Catherine Rodriguez, had a significant decrease in income and employment opportunities around 2007. (Appellants' Appendix ("App." [Volume]) 13 at 2779.) For months Rodriguez begged the servicer of her mortgage, First Horizon Home Loans ("First Horizon"), for assistance when she realized her service-industry employment was disappearing and not likely to return. (App. 13 at 2780.) First Horizon refused to help, telling Rodriguez that it would not review her file or consider her request because she was current on her payments. (App. 13 at 2780.) One of the First Horizon's employees advised Rodriguez to default on her loan in order to be considered for a loan modification, which was common advice

in 2009 and 2010. *Id.* After six months of waiting for help, Rodriguez became scared and tried to make her loan payments in 2009, but her payments were returned because she was in default. (App. 13 at 2781.) A notice of default was recorded by MERS on March 18, 2010. (App. 4 at 878-880.) The Assignment of the Deed of Trust to Bank of New York Mellon was recorded on June 16, 2010. (App. 6 at 1345-1346).

Rodriguez attended three separate mediations — July 19, 2010, December 10, 2010, and October 6, 2011. Each mediation was with the Appellants in this case or their agents, with the same law firm representing the Banks each time. (App. 5 at 915; App. 6 at 1383; App. 13 at 2782.) None of the mediations resulted in a foreclosure certificate being issued. *Id.* The Banks expected this outcome. (*E.g.*, Appellant's Opening Brief ("AOB") at p. 21; App. 12 at 2668-2669, 2703.)

Appellant, Nationstar, attended the mediation on October 6, 2011. It presented a Promissory Note, consisting of a copy of the Note with an endorsement to Nationstar. (App. 12 at 2701.) Nationstar held itself out to be the new owner of Rodriguez's loan at the mediation by presenting the Promissory Note, and stating during the mediation that it was both the servicer and owner of that loan. (App. 1 at 0001- 0005; App. 13 at 2783-2784.) Nationstar was merely the servicer and never held an ownership interest in the loan.

The Note presented at the October 6, 2011, mediation was a falsified

document created to appear that Nationstar was the owner of the loan. (App. 12 at 2685; App. 13 at 2793.) Appellant BONY filed a Verified Complaint for Judicial Foreclosure and Deficiency Judgment of Deed of Trust against Rodriguez on May 3, 2012, and attached as an exhibit a different version of the Note. (App. 8 at 1718-1735.) In response to Rodriguez's Motion to Cancel Lis Pendens and Dismiss the Complaint, BONY filed an Amended Complaint, with another version of Rodriguez's Note, which included a separate Note endorsement. (App. 8 at 1784-1797.) Finally, the *original* Promissory Note was provided at a hearing in June of 2013. (App. 10 at 2145-2157.) Appellant BONY filed for Summary Judgment against Rodriguez on April 29, 2013. (App. 9 at 1981-1987.)

Rodriguez filed her Petition for Judicial Review within 30 days after seeing the original Promissory Note and realizing the Note presented at the October 6, 2011, mediation was fraudulent. (App. 10 at 2158-2317; App. 11 at 2318-2433.) An Order to Show Cause was issued, and two days of evidentiary hearings were held. (App. 11 at 2455-2466; App. 13 at 2774-2805; App. 12 at 2681-2764; App. 13 at 2765-2773.)

SUMMARY OF THE ARGUMENT

The District Court's decisions to hear the Petition for Judicial Review ("PJR"), hold an evidentiary hearing, and order sanctions against the Appellants were supported in law and fact. The District Court's determinations were not an

abuse of discretion, and they must stand.

ARGUMENT

I. Rigidly applying a 30-day deadline for Petitions for Judicial Review contravenes the Legislature's intent in creating the foreclosure mediation program.

Interpreting 30-day period, in which PJRs "shall" be filed, as set forth in Foreclosure Mediation Rule 21(2) (the "Rule"), presents an issue of statutory construction. FMR 21(2).[1] "The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute [which] will prevail over the literal sense of the words." *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986) (internal citations omitted throughout unless noted) Thus, the term "shall is mandatory *unless* the statute demands a different construction to carry out the clear intent of the legislature." *Pasillas v. HSBC Bank USA*, 127 Nev. Adv. Op. 39, 255 P.3d 1281, 1287 (2011) (emphasis added).

Nevada's Foreclosure Mediation Program (the "FMP") was created "to provide for the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures. . . ." FMR 1(2). It accomplishes this goal in two ways. First, the FMP requires lenders to produce a certified promissory note and deed of

[1] Unless otherwise noted, all references to the foreclosure mediation rules refer to the rules in effect at the time of the October 6, 2011 mediation.

trust. *See* NRS 107.086(4); FMR 11(3)(a). This is the "elemental first step" in the process. Hearing on A.B. 149 Before the Joint Commerce and Labor Comm., 75th Leg. (February 11, 2009) (testimony of Assemblywoman Barbara Buckley). Notably, prior to the FMP being created, this step in the process was not being followed. *Id.* This requirement serves a practical function: "to ensure that the party seeking to enforce the homeowner's promissory note and to proceed with foreclosure is actually authorized to do so." *Wood v. Germann*, 130 Nev. Adv. Op. 58 n. 3, 331 P.3d 859, 861 n.3 (2014).

"It is not difficult to envision how this purpose might be defeated if a homeowner were prohibited from challenging the veracity of a lender's documents." *Id.* The second way the Legislature sought to effectuate the FMP's purpose was by expressly requiring lenders to participate in the program in good faith. The Supreme Court was charged with adopting rules necessary to carry out the provisions of the statute by "[e]stablishing procedures to protect the mediation process from abuse and to ensure that each party to the mediation acts in good faith." NRS 107.086(8)(d).

These rules govern both practice (good faith participation) and procedure (document production and certification) in the program. They were designed to provide "orderly, timely, and cost-effective mediation . . ." and thus, are inextricably intertwined with the FMP's purpose. FMR 1(2). Accordingly, the

Legislature vested Nevada's District Courts with authority to sanction lenders for obstructing the FMP's goals, if lenders violated the rules. NRS 107.086(5);[2] *see also* FMR 21(1).

That is what brings this case before the Supreme Court — Rodriguez discovered the Banks were engaged in systematic fraud; and she filed a PJR to seek appropriate sanctions. The District Court agreed with Rodriguez. It found that it was Nationstar's ***practice*** to obtain foreclosure certificates by altering required certifications. (App. 13 at 2828 (emphasis added).)

Stated in a slightly different manner, the lenders and/or servicers intentionally participated in the FMP in bad faith, produced fraudulent documents, and therefore systematically obstructed the FMP's goals. The District Court found this conduct was egregious and warranted "substantial sanctions." (App. 13 at 2833.)

The Supreme Court reviews a District Court's factual determinations with deference, and those determinations will be upheld if not clearly erroneous, and if supported by substantial evidence. *See, e.g., Edelstein v. Bank of New York Mellon*, 128 Nev. Adv. Op. 48, 286 P.3d 249, 260 (2012); *see also Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound

[2] The current version can be found in NRS 107.086(6).

discretion of the district court. *Pasillas v. HSBC Bank USA*, 127 Nev. Adv. Op. 39, 255 P.3d 1281, 1287 (2011).

Nevertheless, the Banks ask this Court to rigidly apply the Rule's 30-day time period, and limit the District Court's authority to sanction lenders who systematically obstruct the FMP to thirty days. This effectively means that lenders only have to appear to be acting in good faith for thirty days — on day thirty-one, even the most egregious fraud by a lender or servicer would be beyond sanction. This limit would encourage fraud and deceit; and undercut and interfere with the Legislature's goal of providing "orderly, timely, and cost-effective mediation. . . . "

Conversely, interpreting the Rule's 30-day period as requiring a homeowner to file a PJR within 30 days ***after discovering*** fraud, bad faith, forged documents, or other egregious conduct would encourage lenders to produce genuine, authenticated documents and to participate in mediation in good faith.

Limitation periods for fraud claims typically begin to run at the time of discovery. *See* NRS 11.1903(d); *see also Hartford Accident and Indemnity Co. v. Rogers*, 96 Nev. 576, 613 P.2d 1025 (1980) (Nevada law clearly provides that the statute of limitations runs from the date of discovery of facts constituting the fraud). This interpretation would not be a particularly heavy burden or unfair imposition, and would further the purpose of the FMP by facilitating and encouraging "orderly, timely, and cost-effective mediation . . . " This interpretation

carries out the Legislature's intent, and is consistent with the FMP's mission statement — to provide a viable mediation process "under the guiding principles of respect, equity, accountability and sensitivity."[3]

A. Subject matter jurisdiction is not necessary to impose sanctions for violations in a FMP mediation.

Even assuming, arguendo that the Rule's 30-day limit is jurisdictional; the District Court does not need subject matter to impose sanctions against the offending lenders. *See, e.g., Chemiakin v. Yefimov*, 932 F.2d 124, 127 (2d Cir. 1991) (despite lacking subject matter jurisdiction, a district court may impose sanctions pursuant to Rule 11, and noting other courts uniformly agree). "A district court must possess the authority to impose sanctions irrespective of the existence of subject matter jurisdiction." *See, e.g., Willy v. Coastal Corp.*, 915 F.2d 965, 967 (5th Cir. 1990).

The district court ordered BONY and Nationstar to each pay sanctions of $50,000 based on their egregious behavior. (App. 13 at 2834.) This Court reviews the imposition of sanctions for a party's participation in the FMP under an abuse of discretion standard. *Pasillas*, 127 Nev. Adv. Op. 39, 255 P.3d at 1286.. Based on Nationstar's ***practice*** of participating in bad faith, the District Court concluded that substantial sanctions were necessary. The District Court did not abuse its

[3] *See* http://foreclosure.nvcourts.gov/about/.

discretion.

B. FMR 21(2) is not a statute of repose.

"[A] statute of repose bars a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred. . . . ." *FDIC v. Rhodes*, 130 Nev. Adv. Op. 88, 336 P.3d 961, 965 (2014) (internal citations omitted). FMR 21(2) is not a statute of repose, in letter or spirit.

The language of statutes of repose is usually expressed in years — not days (especially not a mere 30 days as in FMR 21(2)). *See, e.g.*, NRS 104.4406(6) (one-year statute of repose); *see also*, NRS 11.202(1) (six-year statute of repose). Furthermore, the purpose of these statutes is *not* to protect a party from the consequences of its systematic fraud proven by its own documents. Rather, a statute of repose is intended "to give a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which ***the evidence vanished and memories faded***." *Rhodes*, 130 Nev. Adv. Op. 88, 336 P.3d at 965 (emphasis added; internal citations omitted).

Nationstar cannot credibly claim to be unfairly surprised having its own fraud revealed. Nor can it assert that some memory, now faded, or some evidence, now vanished, would controvert its fraud. Thus, construing the Rule as a statute of repose would not give a deserving party peace of mind. It would do the opposite:

unjustly absolve a guilty party, and unfairly deprive the aggrieved victim of a remedy. Therefore, the Rule cannot be construed as a statute of repose — its time is too short and the result too unjust.

The Banks are incorrect in their assertion that Rodriguez knew of the fraud, and yet sat on her rights for an additional seven months. (AOB at p. 18.) They maintain that Rodriguez knew, or should have known, of the fraud when BONY filed the Amended Verified Complaint for judicial foreclosure on December 14, 2012, with an attached Note containing an endorsement in blank, and not an endorsement to Nationstar. (App. 8 at 1784.)

The only fact Rodriguez knew at that time was that Nationstar and BONY presented two versions of the note, she did not know who fabricated the note or was complicit in the deceit. Only at the hearing on the motion for summary judgment, on June 18, 2013, where the original note was presented, did Rodriguez understand that there was a basis to file a PJR and against whom. (App. 11 at 2461.) It was at this hearing that Rodriguez had absolute proof that the Note presented at the October 6, 2011, mediation, which contained an endorsement to Nationstar, was forged. She filed her PJR on July 18, 2013, within 30 days after discovery of the fraud.

II. The District Court correctly considered evidence that false documentation was used at the foreclosure mediations for the purpose of obtaining a foreclosure certificate.

The Banks are wrong in claiming the District Court improperly relied on evidence outside the scope of the Petition for Judicial Review. (AOB at p. 18.) The Note is an "essential document" requiring strict compliance with the Foreclosure Mediation Rules. *Leyba v. Nat'l Default Servicing Corp.*, 127 Nev. Adv. Op. 40, 255 P.3d 1275 (2011). In October of 2011, Nationstar was unable to obtain a certificate allowing it to continue the foreclosure on Rodriguez's home due to deficiencies in the documents it presented. (App. 6 at 1384.) Not until the Summary Judgment hearing in June of 2013, at which time Rodriguez became aware that the documents presented at the mediation were not just deficient, they were ***forged***. (App. 6 at 1366.) The Note produced at the October 6, 2011, mediation was purportedly endorsed to Nationstar, and Rodriguez was told that Nationstar was both the owner of the loan and the servicer of the loan. (App. 1 at 0005 and App. 8 at 31 – 32.) These were lies; Nationstar had no interest in or ownership of Rodriguez's loan. (App. 13 at 2791.) The Note was purposefully altered in order to allow Nationstar to claim that it was the owner of the loan, when in fact it was only ***servicing*** the loan. (App. 12 at 2685.)

Faye Janati, the litigation resolution specialist from Nationstar, stated in her testimony on November 1, 2013:

> The stamp of Nationstar Mortgage is incorrect and it should not be on this document. This is a copy of the note and nobody should have stamped a copy of the note with Nationstar Mortgage.

(App. 13 at 2793.) On December 13, 2013, Ms. Janati testified:

> It appears that unfortunately somebody that I don't know who, printed a copy and stamped Nationstar Mortgage on the copy of the [n]ote and it went to the foreclosure attorney. I do not know who did it . . . It was wrong.

(App. 12 at 2685.) Ms. Janati further testified that Rodriguez's original Note stayed with the custodian and did note move around. (App. 13 at 2792, App. 12 at 55, and App. 13 at 2731.)

The Foreclosure Mediation Rules require the ***original or a certified copy*** of the Note "to ensure that whoever is foreclosing 'actually owns the note' and has authority to modify the loan." *Leyba v. Nat'l Default Servicing Corp.*, 127 Nev. Adv. Op. 40, 255 P.3d 1275, 1379 (2011). "[T]he party seeking to obtain an FMP certificate through the FMP must show that is the proper entity, under the nonjudicial foreclosure statutes, to proceed against the property." *Edelstein v. Bank of New York Mellon*, 128 Nev. Adv. Op. 48, 286 P.3rd 249, 255 (2012). These are the fundamental requirements of the Foreclosure Mediation program and are codified in statute. NRS 107.086(5).

It was only because the Banks could not obtain the FMP certificate in the repeated, failed mediations, that they filed a judicial foreclosure. That was the first time the ***original*** Note was viewed by Rodriguez. The Banks claim that the Amended Verified Complaint gave Rodriguez notice of the deceit. (App. at pp. 17-

18.) But, without the multiple mediations and the judicial foreclosure action, the falsified Note used in the October 6, 2011, would never have been discovered. The Banks repeatedly avoided using the ***original*** Note or a true certified copy. Only when the original is produced does the Banks' history of fraud become clear. It is the history that proves the ***practice*** of fraud.

After the original Note was produced, the Banks attempted to use the Foreclosure Mediation Rules as a shield to avoid responsibility and accountability. They would have this Court accept the idea that providing falsified documents is acceptable, as long as the falseness of those documents is not discovered within thirty days of receiving the Mediator's Statement. Furthermore, they want this Court to believe that each mediation is a separate and unconnected event; and that a pattern of false documentation cannot be viewed in the aggregate to prove the fraud. The Banks would have it be an abuse of the District Court's discretion to review the foreclosure history of a single home and borrower when evidence of forgery is presented. The law should not condone or ignore fraud.

The Nevada Foreclosure Mediation program must not allow, or possibly encourage, lenders and/or servicers to provide fraudulent documentation at mediation by ignoring a pattern of attempts to pass off false essential documents. In this case, the District Court heard evidence to obtain "the full picture of this loan and the circumstances surrounding this loan. So the Court will ultimately weigh all

of the evidence that is in this case as far as what's relative . . ." (App. 12 at 2717.) The District Court did not abuse its discretion, nor did it improperly rely on "outside" evidence.

Appellants claim that Nationstar did not attend the previous mediations or the Judicial Foreclosure, and therefore, any documentation showing a pattern and practice from those events should not have been included in the District Court's determinations. (AOB at pp. 18-19.) However, Nationstar is sub-servicer for BONY, as was MetLife. (App. 13 at 2791.) Faye Janati testified that the servicers act on behalf of the investors. (App. 13 at 2791.) In fact, Appellants' counsel stated, "Nationstar is an agent of the owner of the note, BONY . . . " (App. 13 at 2731.)

"An agency relationship results when one person possesses the contractual right to control another's manner of performing the duties for which he or she was hired." *Hamm v. Arrowcreek Homeowners' Association*, 124 Nev. 290, 300, 183 P.3d 895 (2008). "To bind a principal, an agent must have actual authority . . . or apparent authority." *Simmons Self-Storage v. Rib Roof, Inc.*, 331 P.3d 850 (2014) (*quoting Dixon v. Thatcher*, 103 Nev., 414, 417, 742 P.2d 1029, 1031 (1987)). "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with

the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency § 2.01 (2006).

Nationstar was acting as the agent for BONY, and BONY has been the trustee since the time Rodriguez's loan was securitized in 2005. (App. 12 at 2730.) Both Nationstar and BONY were properly sanctioned by the district court.

III. The Banks' egregious conduct constituted a failure to mediate in good faith.

For failure to participate in the mediation in good faith, the "court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court." NRS 107.086(6). The nature of the sanctions imposed on the beneficiary or its representative is within the discretion of the district court. *Pasillas v. HSBC Bank, USA*, 127 Nev. Adv. Op. 39, 255 P.3d 1281, 1287 (2011) The Banks argue that only bad faith that occurs "while the parties are 'in the mediation' can be sanctioned." (AOB at p. 21.) FMR 11(1) in effect at the time of the mediation, states that parties to the mediation shall exchange documents 10 days prior to the mediation. Accepting the Banks' argument — that the documents exchanged in compliance with the Rule would put both the Bank's documents and the homeowner's documents outside the mediation — is an absurd interpretation of the FMP Rules.

It is undisputed that the Banks failed to comply with FMR 11(4) at the October 6, 2011, mediation because they failed to provide an original or a certified copy of the Promissory Note. (App. 6 at 1384.) But, they argue that since the false documents presented at the mediation were not accepted, the conduct "in the mediation" was not bad faith. (AOB at p. 21.) Essentially what the Banks seem to say is that since the documents they did bring were not acceptable, it does not matter that the document was forged.

The Banks wish to cast themselves in a better light by arguing that they told Rodriguez prior to the mediation that they did not have all of the essential documents. (AOB at p. 21.) One must ask: "why show up with forged documents instead of no documents at all?" If the Banks knew they were not able to meet the Foreclosure Mediation requirements for the documents, why download false documents and present them at the mediation? There is no other purpose for attending a mediation with falsified documents except to take the chance that the homeowner and the Mediator fail to notice the documents are improper; and get a FMP foreclosure certificate issued.

The Banks also claim Rodriguez strategically defaulted on her loan, and thereby put her good faith in question. (AOB at p. 22.) Rodriguez, a victim of working in a service industry when the recession hit, not only continued to make her mortgage payments, she begged First Horizon for assistance. (App. 13 at

2780.) A First Horizon employee told Rodriguez she would not get help unless she defaulted on her mortgage, which was a common advice in 2009 and 2010. *Id.* After six months of waiting for help, Rodriguez became scared and tried to make payments, but her payments were returned because she was in default. (App. 13 at 2781.) Rodriguez participated in the FMP mediation in good faith.

A determination of bad faith is the discretion of the District Court; and the Appellants have failed to provide any valid argument, or point to any evidence in the record, that they were not guilty of failing to mediate in good faith.

IV. The District Court Awarded Reasonable Sanctions for the Banks' Fraud and Bad Faith.

A. The District Court has the Inherent Authority and Discretion to Determine the Amount of a Sanction

1. The Banks' Violations of the FMP Warranted Severe Sanctions

At an FMP mediation a lender and/or servicer bank must: "(1) attend the mediation; (2) mediate in good faith; (3) provide the required documents; or (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(5), *see also* FMR 5(7)(f). The FMP statute gives little latitude to a beneficiary of the deed of trust or its representative with regard to compliance with NRS 107.086(4) and (5) and FMR 5(7)(a).

The words "shall" and "must" in NRS 107.086 and the FMRs, "clearly and

unambiguously" mandate that the beneficiary of the deed of trust or its representative must comply with all four enumerated requirements under NRS 107.086(5). *Pasillas v. HSBC Bank, USA*, 127 Nev. Adv. Op. 39, 255 P.3d 1281, 1287 (2011). "[C]ommission of any one of these four statutory violations prohibits the program administrator from certifying the foreclosure process to proceed ***and may also be sanctionable***." *Pasillas*, 255 P.3d at 1286 (emphasis added) (citing *Tarango v. SIIS*, 117 Nev. 444, 451 n. 20, 25 P.3d 175, 180 n. 20 (2001). A violation of any one of the factors listed in NRS 107.086(5), requires the mediator to "submit . . . a petition and recommendation concerning the imposition of sanctions."

The homeowner then can file a Petition for Judicial Review with the district court. The district court has the authority and power to "issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative ***as the court determines appropriate***." *See Pasillas*, 255 P.3d at 1285-1286. Whether to impose sanctions, and the amount of the sanction, clearly are within the discretion of the district court. *Id. T*he applicable abuse of discretion standard of review for imposing sanctions in FMP cases was articulated in *Pasillas* "we do not focus on whether the court committed manifest error, but rather we focus on whether the district court made any ***errors of law***." *Id.* at 1286 (emphasis added) (*citing Arnold v. Kip*, 123 Nev. 410, 414, 168 P.3d 1050, 1052 (2007); *Banks v.*

Sunrise Hospital, 120 Nev. 822, 830, 102 P.3d 52, 58 (2004)).

In *Pasillas* the beneficiary failed to participate in good faith, and failed to bring to the mediation each document required. *Id.* at 1283. Failing to bring documents to the foreclosure mediation was "an offense subject to sanctions by the district court." *Id.* at 1282. Here, the Appellants admit they knew they were not complying with the requirements, and argue that they should be absolved of any wrongdoing because they were not in compliance. (AOB at p. 21.) In *Pasillas*, the district court's failure to consider sanctions for not bringing the required documents was an abuse of discretion, because the beneficiary clearly violated NRS 107.086 and the FMRs. *Id*. at 1286-1287.

We have a much more serious situation than was presented in *Pasillas*. The Banks committed overt and obvious fraud, and did not just a fail to bring documents to the mediation. Judge Delaney determined that the Banks' conduct was egregious and severe. (FFCL pg. 12 paragraph 8.) The record, as well as the Findings of Fact and Conclusions of Law, substantiate the District Court's determination that substantial sanctions were warranted. The District Court found that "[t]he conduct exhibited in relation to Petitioner's loan and the mediation at issue was egregious and in the consideration of imposition of sanctions, this Court finds that under NRS.107.080, FMR, and the case law of this state, that substantial sanctions are appropriate" (FFCL pg. 12 paragraph 8.) But, the Banks want this

Court to forgive their fraud and find that the District Court abused its discretion in imposing sanctions against them.

2. The District Court's Reference to Analogous Nevada Case Law was Appropriate

The Banks were sanctioned for their conduct, and the financial conditions of the Banks were presented as judicially noticed public records. The Banks' characterization of a sanction being tantamount to a punitive damages is a misapplication of law. The District Court carefully considered the appropriateness of the amount of sanctions and aligned its rationale with guidance from Nevada's Supreme Court in the *Pasillas* case. The District Court did not err in using analogous case law to fashion the amount of the sanction imposed on the Banks.

Sanctions imposed by a court are punitive by definition. "In the original sense of the word, a 'sanction' is a penalty or punishment provided as a means of enforcing obedience to a law." Black's Law Dictionary, 6th ed., p. 1341. Therefore, due to the deterrent purpose, sanctions can be considered analogous to punitive damages. Judge Delaney made reference to a punitive damages case because this Court has used the same cases when it reached its decision in *Pasillas v. HSBC Bank, USA*, 127 Nev. Adv. Op. 39, 255 P.3d 1281, 1287 (2011)

B. The Sanction Amount Imposed by the District Court was Reasonable

1. The District Court Properly Considered Relevant Factors to Support Its Decision

The District Court wanted to ensure that its sanctions would not exceed due process. "The nature of the sanctions imposed on the beneficiary or its representative is within the discretion of the district court. We have previously listed factors to aid district courts when considering sanctions as punishment for litigation abuses." *Pasillas* (*citing Young v. Johnny Ribeiro Building,* 106 Nev. 88, 93, 787 P.2d 777, 780 (1990);[4] *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. ___, ___, 235 P.3d 592, 598-99 (2010); *Arnold*, 123 Nev. at 415-16, 168 P.3d at 1053.

Based on this Court's direction in *Pasillas*, the District Court considered the *Young* and *Bahena* factors in determining the appropriateness of the sanctions it imposed. The District Court did not award punitive damages, and thus the Banks' analysis regarding the punitive damages is irrelevant. The court imposed sanctions and utilized the cases that this Court referenced in other Foreclosure Mediation Program sanction cases to assist it in making its' ultimate determination. Judge Delaney's 14-page recitation of findings of fact and conclusions of law exemplifies

[4] The factors in *Young* applied to discovery abuses, and were enumerated as: (i) the degree of willfulness of the offending party, (ii) the extent to which the non-offending party would be prejudiced by a lesser sanction, (iii) the severity of the sanction of dismissal relative to the severity of the discovery abuse, (iv) whether any evidence has been irreparably lost, (v) the feasibility and fairness of alternative, less severe sanctions, (vi) the policy favoring adjudication on the merits, (vii) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and (viii) the need to deter both the parties and future litigants from similar abuses. *Young*, 787 P.2d at 780.

the careful approach she took before imposing sanctions against the Banks. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).

While the Young factors provide a good template, other factors, specific to the sanctions imposed in a case brought pursuant to NRS 107.086 and the FMRs, have been applied. This Court stated:

> The nature of the sanctions imposed on the beneficiary or its representative is within the discretion of the district court. We have previously listed factors to aid district courts when considering sanctions as punishment for litigation abuses. *See Young v. Johnny Ribeiro Building*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990); *see also Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. ___, ___, 235 P.3d 592, 598-99 (2010); *Arnold*, 123 Nev. at 415-16, 168 P.3d at 1053. However, we conclude that other factors, more specific to the foreclosure mediation context, apply when a district court is considering sanctions in such a case. When determining the sanctions to be imposed in a case brought pursuant to NRS 107.086 and the FMRs, district courts should consider the following ***nonexhaustive*** list of factors: whether the violations were intentional, the amount of prejudice to the nonviolating party, and the violating party's willingness to mitigate any harm by continuing meaningful negotiation.

Pasillas, 255 P.3d at 1287 (emphasis added). The nonexhaustive factors, include whether: (i) the violations were intentional, (ii) the amount of prejudice to the nonviolating party, and (iii) the violating party's willingness to mitigate any harm by continuing meaningful negotiation." *Pasillas*, 255 P.3d at 1287

Fraud is a willful and intentional act, deserving of the strongest sanctions. Rodriguez was prejudiced by not having the opportunity to participate in a fair,

respectful, and equitable mediation. The sanctions imposed by the District Court did not unfairly penalize the Banks for their egregious misconduct. There is a distinct need to deter lenders and/or servicers participating in the FMP to scrupulously avoid similar abuses. Finally, the Banks' ***unwillingness*** "to mitigate any harm by continuing meaningful negotiation" was shown when the judicial foreclosure action was filed, regardless of whether it made any offer in the October 6, 2011, mediation. Each of these factors supports the District Court's sanctions.

2. The Banks' Net Worth Justifies the Sanction Amount

There is no provision in the rules or case law that states a district court cannot consider the financial condition of a party when making the determination of sanctions. In fact, this Court ruled in *Young* and *Bahena* that financial conditions were appropriate considerations. An offender's ability to pay may be considered, "not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney and litigant misconduct." *White v. General Motors Corp., Inc.*, 908 F. 2d 675, 685 (10th Cir. 1990).

Evidence of the Banks net worth was not presented until the District Court made its determination that substantial sanctions were appropriate. The Banks provided SEC filings during the NRCP Rule 16.1 disclosure and exchange, and those same documents were submitted via a Request for Judicial Notice.[5] The

[5] Both Nationstar and BONY were required to file financial statements with the SEC as publically traded entities, such filings were judicially noticed and admitted

Banks did not make any objection to the use of the SEC filings, and conceded at hearing that the documents were public records and appropriate for judicial notice. They never objected or contested the validity of the information contained in the SEC filings. The Banks cannot raise this issue for the first time on appeal. B*uzz Stew, LLC v. City of N. Las Vegas*, 341 P.3d 646 (2015), n.6 (citing *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 981 (2008).

The Banks have the ability to pay what the District Court regarded as an appropriate sanction. Even though the District Court sanctioned each Bank $50,000 for the participation in the fraud and bad faith conduct at mediation; this sanction amount on publically traded companies, with net income as reported in each company's annual report in 2011 as $205 million and $2.5 billion respectively, is about like a parking ticket for the average Nevada resident.

CONCLUSION

Accordingly and for all the foregoing reasons, this Court should: (i) affirm the district court's Findings of Fact, Conclusions of Law and Order; and (ii) Dismiss Appellant's appeal.

(continued)
into evidence.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 7227 words (not more than the allowable 14,000 words); or

[ ] Does not exceed 10 pages.

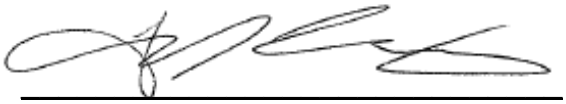
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of August, 2015.

Respectfully Submitted by Respondent Counsel:

CONNAGHAN NEWBERRY LAW FIRM



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