In the Supreme Court of the State of Nevada

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MARC E. RADOW and KELLEY L. RADOW, Husband and Wife, Appellants, vs. U.S. BANK NATIONAL ASSOCIATION, as trustee, successor in interest to WACHOVIA BANK, NATIONAL ASSOCIATION, as trustee for WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR1, Respondent.	No.: 81021

APPELLANTS' REPLY BRIEF

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NRAP 26.1 Disclosures

The undersigned counsel of record certifies that the following persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock:

N/A

2. Name of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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Introduction

In its Answering Brief, Respondent, U.S. Bank National Association ("Respondent"), asserts new and different arguments than the arguments it presented to the district court:

- At the district court, Respondent successfully argued the Missing Assignment was invalid at the time it was created, but now Respondent claims the Missing Assignment was valid, and then became invalid by recording another assignment assigning the same interest.
- Respondent now argues that the later assignment was recorded to correct a mistake, but at the district court, Respondent claimed the second assignment transferred the interest, and not the first.
- At the district court, Respondent claimed that it should be excused from failing to file its motion for appropriate relief within the deadline in FMR 20(2). Now, Respondent claims that, in reality, there was no deadline because its request for relief was "intertwined" with its opposition to the Radows' Motion for Appropriate Relief.

Appellants Marc E. Radow and Kelly L. Radow ("the Radows") will respond to each point argued in Respondent's answering brief.

Argument

I. The Missing Assignment was not recorded to correct a mistake, and in spite of Respondent's latest explanation, remains valid. Therefore, Respondent was required to produce a certified copy of the Missing Assignment.

Relying only on 26A C.J.S. Deeds § 40 and foreign cases discussing it, Respondent now claims that the "Missing Assignment" was not invalid at the time it was executed, but later became invalid after Respondent recorded a second assignment purportedly assigning the same interest in the Deed of Trust. Therefore, according to Respondent, there was no need to produce a certified copy.

This new argument contradicts Respondent's argument below, and Respondent should not be allowed to raise it now. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Further, it is without merit, because it is clear that the second assignment was not recorded to correct a mistake.

A. To excuse its failure to supply the required documents, Respondent promotes a new theory – that the Missing Assignment was valid when it was executed but was rendered invalid after recording the second assignment.

Even though Respondent successfully relied on the Missing Assignment in Federal Court to lift the automatic bankruptcy stay, Respondent's argument at the district court was that the Missing Assignment was invalid at the time it was created, and therefore did not need to be presented at the foreclosure mediation. Respondent argued:

> This Invalid Assignment did not validly assign an interest in the Deed of Trust, however, and was not recorded – likely because there is a typographical error which was corrected in the valid version which was recorded.

AA, Vol. 2, 205:25-27. Respondent continued:

> As an initial matter, FMR 13 requires that a respondent produce a "copy of each assignment of the deed of trust." This necessarily must reflect **valid** assignments of the deed of trust, however, because void or rogue documents do not actually assign any interest in the deed of trust at issue. … The Invalid Assignment, then, was not an effective transfer and could not and did not assign any interest in the Deed of Trust and so was unnecessary to prove any chain of title, which is the core reason for the requirement to provide the documents under FMR 13.

AA, Vol. 2, 206:4-11. Respondent then claimed the Missing Assignment was "void:"

> The Invalid Assignment, consequently, was not necessary or required to be presented under the rules as it did not validly

> assign any interest since it was a void document that did not actually transfer any interest in the Deed of Trust …

AA, Vol. 2, 206:15-17.

The district court based its conclusion on Respondent's first argument: that the Missing Assignment was a void document:

> There is no requirement in the NFMRs that the beneficiary produce an invalid document that was not recorded and did not effectuate an assignment of the deed of trust.

AA Vol. 2, 283:18-20 (District court order denying the Radows' Motion for Appropriate Relief).

Now, Respondent changes its argument for the convenience of its position in this appeal. Respondent now claims that it never argued the Missing Assignment was void at execution, but rather became void when the second assignment was recorded. But the record below is clear, and Respondent's new argument is a tacit recognition that the argument it presented to the district court, and the district court's conclusion on this issue, are both wrong as a matter of law.

B. Even if the Court accepts Respondent's new argument that the Missing Assignment was initially valid, and was subsequently rendered invalid, the FMR's require production of the Missing Assignment.

Respondent argues that because the Missing Assignment was valid at some point, but then became invalid due to the recording of a new

assignment, that it did not have to produce the Missing Assignment as part of the foreclosure mediation. But, as demonstrated above, the district court based its conclusion on Respondent's first argument that the Missing Assignment was a void document, and therefore Respondent's new position removes the foundation upon which the district court based its reasoning.

Even if this Court accepts Respondent's new argument, Respondent is not excused from producing an authenticated copy of the Missing Assignment. Neither the FMR's nor NRS 107.086(5) contain any exceptions for superseded documents, whether they are simply duplicates or whether a subsequent assignment is recorded assigning the same interest that had already been assigned.

C. The second assignment was not recorded to correct a mistake.

Respondent contends the second assignment is analogous to a "corrective" deed used to correct a mistake in the Missing Assignment. Answering Brief, p. 12. Therefore, the argument goes, that the "corrective" assignment that was ultimately recorded is the operative assignment. This argument ignores the facts.

While "corrective" deeds may be common to correct errors in recorded documents, the two assignments here are identical in their typed content. It is

highly unlikely that a company highly experienced in recording deeds of trust and subsequent assignments would simply print out the prior assignment, and then make a correction to one word in handwriting. It is more likely that if a mistake was identified, it would be corrected first, and then printed, signed, and sent to the County Recorder for recording with a notation on the "corrective" assignment that it was being recorded to correct a mistake. Nothing on the "corrective" assignment indicates its sole purpose was to correct a minor typographical error.

If this Court accepts Respondent's argument, the requirements in NRS 107.086 and the FMR's for production of original or certified documents is meaningless. If a lender cannot locate the required documents, the lender can simply create a new document, record it, and then claim the prior documents were invalid or superseded by the new document. This position is contrary to the purpose of the document production requirements.

II. Judicial estoppel should apply when, as here, a party successfully argues one position, and then changes its position to suit its current needs.

Respondent used the Missing Assignment to convince the Bankruptcy Court to lift the automatic stay in Marc Radow's bankruptcy case, and it is now using a different, subsequent assignment to justify its attempt to foreclose. As

shown above, the Missing Assignment was valid at the time it was executed, and it remains valid, as the minor misspelling does not affect its validity.

Below, Respondent argued the Missing Assignment was void and of no effect at the time it was executed. *See*, *e.g.*, AA Vol. 2, 205:25-27; AA Vol. 2, 206:4-11; AA Vol. 2, 206:15-17. That position was totally inconsistent with the position that Respondent took in the Bankruptcy Case. Respondent successfully used the Missing Assignment in the Bankruptcy Case to lift the automatic stay, and then, in this case at the district court, took the opposite position – that the Missing Assignment was void.

Here, Respondent again changes its position. Respondent now argues that the Missing Assignment was not void at the time it was executed, but rather became void upon the recording of the new assignment. Respondent's current position is different than its position at the district court, which is different than the position Respondent took at the Bankruptcy Court.

Respondent was successful in the Bankruptcy Court in lifting the automatic stay based on the Missing Assignment. Respondent then successfully changed its position and claimed the Missing Assignment was void and of no effect. These two positions cannot be reconciled, and Respondent should be barred from taking the subsequent position here.

III. *Einhorn* is inapplicable to this case.

Both the district court and Respondent rely on *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012) to excuse Respondent's failure to provide the Missing Assignment at the mediation, claiming the Radows' possession of it at the mediation complies with Respondent's document production burden. But the facts here are different than those in *Einhorn*, and therefore *Einhorn* has no applicability here.

In *Einhorn*, the borrower's attorney provided the assignment from the county recorder's office. Recorded documents are presumed to be authentic, as the county recorders require original signatures. Here, Appellants had an **unrecorded copy** of the assignment. While the Missing Assignment does contain a notarized signature, Neither the Radows nor Respondent possessed the original of that Missing Assignment. So, it is **the copy** that needs to be authenticated, and Respondent did not produce anything to authenticate that copy.

Further, this case presents a circular situation. At the mediation, Respondent's lawyers dubiously claimed to have no knowledge of the Missing Assignment after ten years, six mediations, and multiple court hearings each

addressing the Missing Assignment,[1] which contributed to the parties' inability to reach a resolution and exacerbated the depth of the current matter. In order to prove the existence of the Missing Assignment to the mediator (to show Respondent failed to bring all required documents), Appellants had to produce the unauthenticated copy. If the Radows had not produced the unauthenticated copy, then the mediator would not have known Respondent failed to produce it. Appellants had no choice but to bring it along and then to present it to the Mediator at the mediator's request.

The copy of the Missing Assignment provided by the Radows does not have the presumptions of authenticity that the document in *Einhorn* had. It is simply an unauthenticated copy that was never recorded. This unauthenticated copy represents the transfer of the real property on a specific date; a transfer that is different in time and different in the chain of title than the recorded assignment Respondent proffered.

[1] The fact Respondent could never produce the missing assignment has effectively prevented the Radows from achieving a resolution with Respondent. The Radows were unable to sell their home, make payments on the note, or pay off the note. During this time, interest accrued and Respondent added fees to the balance. The accrued interest and added fees made selling the home impossible, made paying off the loan impossible, and made refinancing impossible.

IV. Respondent waived its right to request a foreclosure certificate by failing to bring its motion for appropriate relief within the deadline provided in the FMR's.

Respondent moved the district court, through a "Countermotion for Appropriate Relief" filed as part of Respondent's Opposition to the Radows' Motion for Appropriate Relief. The Countermotion was filed after the deadline contained in FMR 20(2).

Respondent excuses its failure by claiming its request was "intertwined" with Respondent's opposition to the Radows' motion. This is a new argument not presented at the district court, because, below, Respondent simply argued that the ten-day deadline to move for appropriate relief should not apply, as the NRCP was amended in 2019 to eliminate the use of "court" days to calculate deadlines, and instead using calendar days. Respondent then claimed the failure was "excusable neglect and would serve as just cause under NRCP 6(b) to extend the time for Respondents to file their own request for relief …" AA Vol. 2, 269:19-21.[2]

Now Respondent makes a new argument not presented to the district court – that there was no reason to move for affirmative relief, and that styling

[2] At the district court, Respondent claimed it was only one day late in filing its countermotion. Respondent later filed an Errata acknowledging the fact the countermotion was two days late. *See* AA Vol. 2, 274-275.

the request as a "countermotion" was simply a form v. substance issue. This argument was not raised below, and therefore should not be considered. *Dolores v. Emp. Sec. Div.*, 134 Nev. 258, 261, 416 P.3d 259, 262 (2018) ("Issues not argued below are deemed to have been waived and will not be considered on appeal.") (internal quotation marks and citation omitted).

Even if the Court considers the new argument, it should not accept it. If neither party had moved for relief, the petition would have been dismissed without a foreclosure certificate being issued. Because Respondent argued against the mediator's findings, it was required to move the district court for affirmative relief, and it was late in doing so.

Respondent contends that the Radows should be precluded from arguing that the 10-day deadline is jurisdictional, as, according to Respondent, the Radows did not raise that issue at the district court. But Respondent is being overly technical. While the Radows did not use the word "jurisdictional" at the district court, the Radows did raise the issue of Respondent's failure to file its motion timely. The "jurisdictional" argument is simply an extension of the Radows' position in the district court. And, even if the Radows had not raised the argument, jurisdictional issues are never waived. *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). Either

way, the point remains – Respondent failed to request relief within the ten-day deadline.

Conclusion

More than ten years ago, the Radows sought assistance from Nevada's Foreclosure Mediation Program. The Radows spent years trying to negotiate with the lender, but at each turn they were met with Respondent's failure to follow the rules. Even after the Great Recession, the Radows could not simply restart making payments because Respondent increased the sum of the debt by adding fees and compounding interest, all to the benefit of Respondent.

Further, there were issues surrounding the missing documents, raising questions as to whether Respondent was the actual beneficiary under the Deed of Trust. This locked the Radows out of any chance to refinance the debt and forced them into more than ten years of mediations with Respondent.

The Radows worked to reach an agreement with Respondent. The Radows proposed direct pay-off and accepted the terms the Respondent offered at the first and second mediations. But Respondent failed to negotiate in good faith, failed to provide proof of its authority to enforce the debt, failed to present an individual with authority to represent the Respondent, and, in

one case, simply failed to show up to a hearing. Respondent's failure to participate in good faith in the FMP, over the course of time, exacerbated the fees and compounding interest, further hampering the Radows' ability to save their family home.

The Radows could not simply restart payments to 'anyone,' and they could not appropriately manage the risk of the debt with Respondent unwilling to deviate from a punitive floating interest rate that could have increased their interest rate payments three-fold, raising the specter of another subsequent default.

At each mediation, and at each stage of these proceedings, the Radows have played by the rules. They want to keep their home. Respondent failed to participate in good faith in six mediations, all of which resulted in the mediators recommending sanctions against Respondent. [3]

Respondent should not be rewarded by the Court allowing it to foreclose and earn interest and collect fees on a loan Respondent has actively

[3] Radows did not request sanctions in any of their first five of six mediations. At each time they sought to extend an olive branch and attempt to negotiate reasonable terms to restructure, refinance, or payoff the note. At one mediation (the 2nd mediation), the mediator recommended sanctions in the amount of $50,000 due Respondent's repeated failures. Respondent refused all attempts to further negotiate, seemingly bent on compounding time, interest, and fees. Here in the 6th mediation, the mediator again recommended sanctions.

prevented the Radows from satisfying. The Radows respectfully request the Court reverse the decision of the district court for the reasons herein.

Dated this 15th day of October, 2021

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NRAP 28.2 Attorneys' Certificate

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRSAP 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 for Mac in Cambria 14 point.

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 NRAP32(a)(7)(C), it is either:

[X] Proportionally spaced, has a typeface of 14 points or more, and contains less than 6,000 words.

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 15th day of October, 2021

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Certificate of Service

I hereby certify that I am an employee of Hoy Chrissinger Vallas, and that on this date the foregoing Answering Brief of Respondents was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the service list.

Dated this 15th day of October, 2021

Shondel Seth