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 R. 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,

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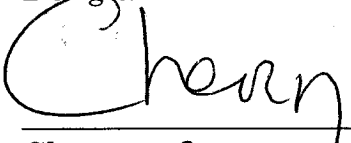
beneficiary's right to pursue a deficiency judgment. See 2009 Nev. Stat., ch. 310, §§ 2-3, at 1330-31.

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.

_____, C.J.
Saitta

_____, J.
Douglas



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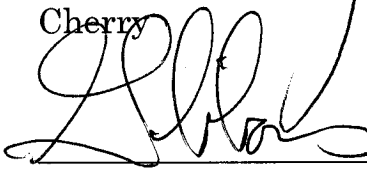

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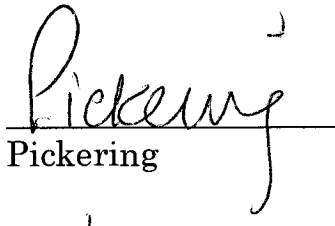

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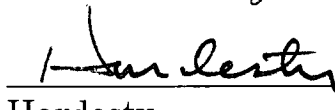

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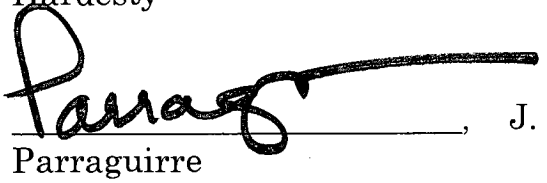
Hardesty



_____, J.
Parraguirre

cc: Hon. Patrick Flanagan, District Judge
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Washoe District Court Clerk