

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL PHILLIPS,
Appellant,
vs.
BANK OF AMERICA, N.A.,
Respondent.

No. 57613

FILED

FEB 08 2012

ORDER OF AFFIRMANCE

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

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 Daniel Phillips filed a petition for judicial review in district court. Phillips contended that respondent Bank of America's 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 Phillips' 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

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

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, Phillips' only arguments that are properly raised on appeal relate to document production²—namely, that Bank of America failed to produce an assignment of the deed of trust, and that it failed to provide a satisfactory Broker's Price Opinion (BPO). We address each in turn.

²Phillips also argues that Bank of America (1) refused to offer a principal reduction, (2) refused to disclose the amount paid for the beneficial interest in Phillips' loan, and (3) refused to consider releasing Phillips from a potential deficiency judgment.

Because neither NRS 107.086 nor the Foreclosure Mediation Rules require these things from a lender, Phillips' arguments can only be construed as a contention that Bank of America mediated in bad faith. However, Phillips stressed to the district court at the status hearing that he was "not arguing bad faith." As such, these arguments are improperly raised on appeal. 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.").

It was not clearly erroneous for the district court to determine that an assignment was unnecessary

Phillips contends that Bank of America no longer owned his loan and that it therefore needed to produce an assignment demonstrating who owned it. We recognize that Bank of America's attorney was somewhat equivocal as to whether Bank of America still owned Phillips' loan or if, instead, it has been sold to Fannie Mae.³ Based on the record before us, however, we cannot conclude that the district court clearly erred in determining that Bank of America still owned Phillips' loan.

Specifically, Phillips did not include the note, the deed of trust, or a document certification in his appellate appendix. See FMR 11(3), (4) (requiring the beneficiary to produce these documents prior to mediation); NRAP 30(b)(3) (“[A]ppellant’s appendix to the opening brief shall include . . . portions of the record essential to determination of issues raised in appellant’s appeal.”). Nor has he made any arguments on appeal that Bank of America failed to produce these documents at the mediation.⁴ Consequently, we must assume that the district court reviewed these documents and found that they satisfactorily established Bank of America’s ownership of the loan. Lee v. Ball, 121 Nev. 391, 394 n.6, 116 P.3d 64, 66 n.6 (2005) (“[W]hen evidence on which a district court’s

³The deed of trust in Bank of America’s appellate appendix indicates that Bank of America was Phillips’ original lender—a point which Phillips does not appear to dispute.

⁴On appeal, Phillips requests that this court remand his case for an evidentiary hearing on the matter. Phillips never requested this from the district court, and we are unwilling to grant relief that was not previously requested.

judgment rests is not properly included in the record on appeal, it is assumed that the record supports the lower court's findings.” (quoting Stover v. Las Vegas Int'l Country Club, 95 Nev. 66, 68, 589 P.2d 671, 672 (1979))).

Left with this assumption, we conclude that it was not clearly erroneous for the district court to determine that Bank of America owned Phillips' loan and that an assignment was unnecessary.⁵

It was not clearly erroneous for the district court to determine that the BPO was substantially compliant

Phillips contends that the BPO provided by Bank of America was deficient in four respects: (1) it lacked a signature, (2) it lacked a license number, (3) it lacked a statement of purpose, and (4) it failed to disclose whether the licensee may have a conflict of interest. Cf. NRS 645.2515(3) (listing the requirements for a valid BPO). While Bank of America acknowledges these deficiencies, it contends that the district court properly determined that they had no impact on the mediation's outcome. We agree.

In Pasillas, we concluded that the note, deed of trust, and assignments of each must be provided under the FMP's rules. 127 Nev. at ___, 255 P.3d at 1285. And in Leyva, we held that these core or “essential


⁵Phillips also argues that a representative of the beneficiary did not participate in the mediation. We construe this argument to mean one of two things. If this argument is simply another way of contending that Bank of America no longer owned his loan, the argument fails for the reasons described above.


If the argument is contending that the ex parte telephone call at the mediation was improper, it has not been properly preserved for appeal. The appropriate time to call into question Bank of America's participation via telephone would have been at the status hearing. Phillips' failure to discuss this issue with the district court precludes our review of it on appeal. Old Aztec Mine, 97 Nev. at 52, 623 P.2d at 983.

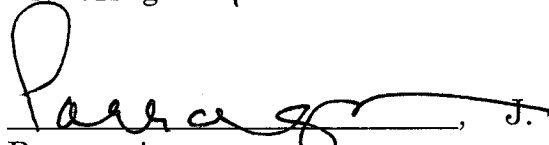
documents” must be in strict compliance. 127 Nev. at ___, 255 P.3d at 1276, 1279. We did not, however, establish strict compliance requirements for the individual contents of a BPO and other documents that are collateral to ensuring that the party foreclosing has authority to do so. See id. at ___, 255 P.3d at 1279 (discussing the intent behind the FMP in reaching the conclusion that strict compliance is required with respect to core documents).

Here, Bank of America produced a BPO that substantially complied with NRS 645.2515(3), as it provided Phillips with an accurate estimate of his home’s value. In spite of Phillips’ arguments to the contrary, we agree with the district court that the purpose of the mediation was not frustrated by the BPO’s alleged shortcomings. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Pickering


_____, J.
Parraguirre

cc: Hon. Patrick Flanagan, District Judge
Mark L. Mausert
Akerman Senterfitt/Las Vegas
Washoe District Court Clerk