

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIEGO GALIETTI,
Appellant,
vs.
AMERICAN HOME MORTGAGE
SERVICING, INC.; AND FIDELITY
NATIONAL TITLE INSURANCE CO.,
Respondents.

No. 57709

FILED

FEB 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Anderson*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This proper person appeal from a district court order denying a petition for judicial review, Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge, arises out of a mediation conducted on October 28, 2010, under Nevada's Foreclosure Mediation Program (FMP). During the mediation, appellant Diego Galietti and respondent American Home Mortgage Servicing, Inc. (AHMSI) agreed to a loan modification. The mediator's statement, which the mediator handed to the parties as they left the mediation, reported their agreement. It made no findings as to the participants' document production, authority, or good faith.

Several weeks passed, and Galietti experienced buyer's remorse. On November 22, 2010, he filed a petition for judicial review. The petition asserted that the mediated loan modification agreement was oppressive and that, as a result, the court should find that AHMSI had not participated in the mediation in good faith. In addition, the petition alleged that AHMSI had failed to produce required documents and to participate via a representative who had authority to negotiate a loan

modification; that the substitution of trustees was suspect;¹ and that the involvement of Mortgage Electronic Registration Systems (MERS) and associated documentation suggested AHMSI was not the proper party to speak for the lender.

The district court summarily denied Galietti's petition. It found, as the mediator had reported, that the foreclosure had been averted by "an agreement [that] was drafted setting forth the essential terms." Its findings continue: "later the Homeowner/Petitioner decided against accepting the proposal and ultimately resolution was not had."² Finally, the court determined that AHMSI had not acted in bad faith, making sanctions inappropriate, and that, "absent a timely appeal, a Letter of Certification will issue." This appeal followed. Galietti has remained in his home, pending decision of this appeal.

This court reviews 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 sanctions, if any, in an FMP judicial review proceeding is committed to the sound discretion of the district

¹Documents evidencing a substitution of trustees are not among those NRS 107.086(4) or the FMP Rules require to be provided at an FMP mediation, so this is a non-issue in the context of this case.

²AHMSI appears to have accepted Galietti's decision to back out of the mediated loan modification agreement. It seeks not to enforce the settlement agreement but to proceed to foreclosure on the originally noticed default.

court. Pasillas v. HSBC Bank USA, 127 Nev. ___, ___, 255 P.3d 1281, 1287 (2011).

We affirm the district court's finding of no bad faith and its refusal to impose sanctions on AHMSI. Through AHMSI's participation, the mediation ended in a loan modification agreement—admittedly, one Galietti later renounced, but an agreement just the same. From the lender's side, AHMSI and its affiliates were prepared to proceed; they prepared and forwarded the final loan modification documents to Galietti as promised. The parties' reaching agreement derailed further proceedings as to the issues Galietti cited as a predicate for bad faith and sanctions. Under these circumstances, we find no abuse of discretion in the district court's refusal to impose sanctions or to find bad faith.

However, this does not end the matter. The district court also directed that an FMP certificate issue, so the originally noticed foreclosure could proceed. The district court entered this order before we decided Leyva v. National Default Servicing Corp., 127 Nev. ___, 255 P.3d 1275 (2011), and Pasillas v. HSBC Bank USA, 127 Nev. ___, 255 P.3d 1281 (2011). As these cases make clear, 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, 127 Nev. at ___, 255 P.3d at 1279. Thus, a district court may not direct an FMP certificate to issue unless it determines that all required documents have been provided. Pasillas, 127 Nev. at ___, 255 P.3d at 1286-87; see also Leyva, 127 Nev. at ___, 255 P.3d at 1278-79.

Here, the district court did not find all required documents were produced, and we cannot fairly infer this finding from the record. In


fact, there appears to be a gap in the documents. The original deed of trust named American Home Mortgage Acceptance, Inc. as the “Lender” and MERS as the beneficiary, “acting solely as a nominee for Lender and Lender’s successors and assigns.” An assignment is included, which makes CitiBank, N.A., as Trustee for American Home Mortgage Investment Trust 2004-3 Mortgage Backed Notes, Series 2004-3, the beneficiary. While the assignment tracks the deed of trust in that it lists the original beneficiary as “Mortgage Electronic Registration Systems, Inc. [MERS] as nominee for American Home Mortgage Acceptance, Inc.,” the named assignor is AHMSI “as successor-in-interest to Option One Mortgage Corporation,” and it is signed by a Korell Harp, who identifies him or herself as an AHMSI Vice President. The document that would authorize AHMSI to act as assignor for MERS “acting solely as a nominee for Lender [American Home Mortgage Acceptance, Inc.] and Lender’s successors and assigns,” is not included and the gap is not otherwise explained (although the names suggest AHMSI and American Home Mortgage Acceptance, Inc. are affiliates and the former is the latter’s servicer).

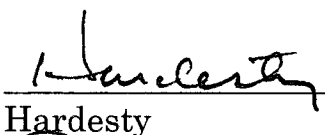
On this record, we cannot say that all assignments have been provided, see NRS 107.086(4), as Pasillas requires. 127 Nev. at ___, 255 P.3d at 1284 n.5. Thus, we conclude that the district court abused its discretion in directing the FMP certificate to issue without satisfying itself on the point. We therefore reverse the order directing the certificate to issue and remand for further proceedings on the completeness of the documents, unless the matter has been rendered moot by rescission and reissuance of the notice of default and election to sell. See Holt v. Regional Trustee Services Corp., 127 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 80, December 15, 2011).

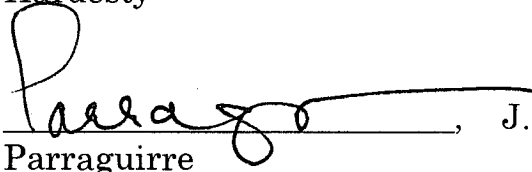
Another point will also merit attention if further proceedings are had on remand. Although the deadline was later changed from 15 to 30 days, see FMP Rule 21(2) (effective March 1, 2011), when Galietti filed his petition for judicial review, the FMP Rules stated that the petition “shall” be filed within 15 days of receiving the mediator’s statement. FMP Rule 6(2) (effective June 1, 2010 to March 1, 2011). Since the mediator delivered his statement to the parties on October 28, 2010, Galietti had 15 days from that date to file his petition for judicial review. His filing on November 22, 2010, thus was late. AHMSI’s response to Galietti’s petition challenged its timeliness, but the issue was not decided, since the district court proceeded to the merits, denying sanctions and directing issuance of the FMP certificate. Galietti’s excuse for the delay, and its sufficiency, are most appropriately determined in the first instance by the district court.

Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this order. The stay granted by this court is dissolved.

It is so ORDERED.

 _____, J.
Pickering

 _____, J.
Hardesty

 _____, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
Diego Galietti
Pite Duncan LLP, Las Vegas
Brooks Bauer LLP
Eighth District Court Clerk