

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREA BRICCA, AN INDIVIDUAL;  
AND MICHAEL HAUGEN, JR., AN  
INDIVIDUAL,  
Appellants,  
vs.  
FIRST HORIZON HOME LOAN  
CORPORATION,  
Respondent.

No. 58196

**FILED**

DEC 12 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 granting a petition for judicial review in a Foreclosure Mediation Program (FMP) matter. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On August 9, 2005, appellant Michael Haugen, Jr. purchased a home, financed with a home loan obtained from First Horizon Home Loan Corporation, secured by a deed of trust naming Mortgage Electronic Registration Systems, Inc. (MERS), as the beneficiary. On September 16, 2005, Haugen executed a grant, bargain and sale deed to himself and appellant Andrea Bricca, as joint tenants. The loan went into default, and respondent initiated nonjudicial foreclosure proceedings. A first mediation between appellants and respondent was held in 2009, resulting in a short sale agreement. No short sale was reached. Respondent's trustee rescinded the notice of default and recorded a new notice of default. Appellant Bricca elected to mediate. Bricca and respondent attended a second mediation, but no agreement was reached. The mediator's statement noted that respondent failed to bring an assignment of the deed of trust. Respondent filed a petition for judicial review, seeking a court

ordered FMP certificate. The district court concluded that the bank's document production had only minor deficiencies, and that Bricca had authority to appeal and mediate, but that appellants' failure to provide updated financial information from Haugen precluded consideration of a modification. The district court ordered an FMP certificate to issue. This appeal followed.

This court reviews a district court's factual determinations deferentially, Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (explaining that 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).

To obtain an FMP certificate, a deed of trust beneficiary must: (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). The purpose of FMP mediation and its attendant requirements is to bring the deed of trust beneficiary and the homeowner together for meaningful negotiation. Holt v Regional Trustee Services Corp., 127 Nev. at \_\_\_, \_\_\_, 266 P.3d 602, 607 (2011).

On appeal, appellants first argue that the district court erred by concluding that (1) Bricca was not qualified to participate in the FMP as an owner-occupier and title holder of record; (2) Bricca failed to provide all required documents necessary to negotiate a loan modification; and (3) Bricca lacked standing to negotiate, other than as a representative for Haugen.

Although Bricca was not the original borrower or trustor of the deed of trust, she nevertheless qualified as an owner-occupier and was eligible to participate in the FMP because she had received an interest in the title to the property by way of deed from Haugen. See Leyva, 127 Nev. at \_\_\_, 255 P.3d at 1278 (holding that a grantor or holder of title of record who is an owner-occupier is eligible to participate). Additionally, as the district court properly concluded, Bricca possessed power of attorney to negotiate on behalf of Haugen. But, as recognized in Leyva, although an owner-occupier who is not the borrower may participate in the mediation, there may be limits on the ability of the lender to offer certain options to a nonborrower. Id. Having considered the parties' arguments and reviewed the record on appeal, we conclude that the district court properly concluded that respondent had sufficient authority to negotiate in good faith and exercised sound business judgment to decline a loan modification with a nonborrower.

Next, appellants argue that respondent lacked authority to participate in the FMP, contending that MERS is incapable of acting as a beneficiary of the deed of trust and cannot transfer the mortgage note, and thus respondent had not received a valid interest in the property. This court rejected this argument in Edelstein v. Bank of New York Mellon, 128 Nev. \_\_\_, 286 P.3d 249 (2012). Here, MERS, as the original beneficiary of

the deed of trust, properly executed an assignment of the deed of trust carrying with it the note, to First Horizon Home Loans, a division of First Tennessee Bank, N.A.<sup>1</sup> Id. at \_\_\_, 286 P.3d at 260-61 (holding that a MERS assignment of the deed of trust validly transfers the note); Leyva, 127 Nev. at \_\_\_, 255 P.3d at 1281 (holding that a party may demonstrate its status as holder of the note by showing valid transfer of the note). Thus, we conclude the MERS assignment demonstrated that First Horizon Home Loans, a division of First Tennessee Bank, N.A., was the proper party to mediate.

Finally, appellants argue that the district court erred by allowing an FMP certificate to issue because respondent's representative failed to bring the MERS assignment to the mediation, although Bricca herself had the assignment in her possession at the mediation.<sup>2</sup> This court recently concluded that when all assignments are in a homeowner's possession at the mediation, strict compliance with NRS 107.086(4)'s document production requirements is achieved. Einhorn v. BAC Home

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<sup>1</sup>Appellants also argue that the MERS assignment is invalid because it was executed in December 2009, but not notarized until March 2010. Appellant does not cite to any Nevada authority that requires an assignment of a deed of trust to be acknowledged in front of a notary when it is executed. See Einhorn v. BAC Home Loans Servicing, 128 Nev. \_\_\_, \_\_\_ n.4, \_\_\_ P.3d \_\_\_, \_\_\_ n.4 (Adv. Op. No. 61, December 6, 2012).

<sup>2</sup>Appellants argue for the first time on appeal that respondent failed to provide a note at the mediation, arguing that no note appears in the record. Respondent contends that it provided a certified copy at the mediation, and the mediator's statement does not indicate that the note was missing. As appellants failed to raise this argument before the district court, they may not raise it on appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Loans Servicing, 128 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 61, December 6, 2012). Here, all assignments were present at the mediation. Thus, although the mediator appropriately noted that the beneficiary did not bring all of the documents, no sanctions were mandated as Bricca had each assignment of the deed of trust at the mediation satisfying NRS 107.086(4). Einhorn, 128 Nev. at \_\_\_, \_\_\_ P.3d at \_\_\_.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

Pickering, J.  
Pickering

Gibbons J.  
Gibbons

Hardesty, J.  
Hardesty

cc: Eighth Judicial District Court, Department 14  
Law Office of Jacob L. Hafter & Associates  
McCarthy & Holthus, LLP/Las Vegas  
Eighth District Court Clerk

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<sup>3</sup>We submit this appeal for decision without oral argument. NRAP 34(f)(1).