

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS A. ROTONDI,
Appellant,
vs.
DHI MORTGAGE COMPANY, LTD.;
INDYMAC MORTGAGE SERVICES;
MERS; NDEX WEST, LLC; AND
ONEWEST BANK, FSB,
Respondents.

No. 58739

FILED

MAR 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ogawa
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order denying a petition for judicial review in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Following an unsuccessful mediation conducted under Nevada's Foreclosure Mediation Program (FMP), appellant filed a petition for judicial review in the district court. Appellant contends, among other things, that the mediator and district court both misapplied FMR 10(1)(d) and FMR 11.

This court reviews a district court's factual determinations deferentially, Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (stating 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 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) and (5); Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding strict compliance with these requirements is a necessary predicate to obtaining a foreclosure certificate).

After review of the record on appeal and considering the parties' arguments, we conclude that the district court abused its discretion when it denied appellant's petition for judicial review, based on the mediator's failure to conduct the mediation in accordance with the FMR. Under the FMR, a party may designate a representative through the execution of a valid power of attorney. FMR 10(1)(d). A representative empowered under a power of attorney need only meet the qualifications set forth in FMR 10(1)(a) and (b) if the representative is compensated; when a representative is uncompensated, the restrictions set forth in FMR 10(1)(a) and (b) do not apply. FMR 10(1)(d). Here, appellant gave power of attorney to his father to represent him in the mediation without compensation. This is consistent with and permitted by the foreclosure mediation rules, and thus, the father should have been permitted to act as appellant's representative. FMR 10(1)(d).

The mediator's statement specifically notes that the mediator explained his understanding of the rules concerning representation to the parties, permitted appellant's father to participate solely as "emotional support," and limited appellant's father on several occasions. Thus, the presiding mediator erroneously curtailed appellant's father's participation to that of emotional support, rather than permitting appellant's father to act as appellant's representative. FMR 10(1)(d). On its de novo review, the district court should have determined that appellant's father was permitted to represent appellant at the mediation, and we thus, conclude that the district court abused its discretion in ordering the issuance of a certificate.¹ FMR 10(1), 21(5); Pasillas, 127 Nev. at ___, 255 P.3d at 1287.

Because the mediator's misinterpretation of appellant's father's ability to represent appellant at the mediation adversely impacted the mediation session, we conclude that the parties are entitled to a new mediation session and should not be charged any additional fees. NRS

¹By contrast, the district court properly ruled that appellant's father could not represent appellant at the hearing on appellant's petition for judicial review. Representatives are not parties to the mediation, and thus are not covered by FMR 21(1). While a nonattorney may represent a homeowner at the mediation if qualified under FMR 10(1), that representative has no independent standing to file a petition for judicial review, and a nonattorney may not represent any other person before the district court. Guerin v. Guerin, 116 Nev. 210, 213-14, 993 P.2d 1256, 1258 (2000).


107.086(8)(e); FMR 5(1). Therefore, on remand, the district court shall order the parties to arrange a new mediation session before the same mediator, who shall not charge an additional fee for this second mediation.

Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.²


_____, J.
Gibbons


_____, J.
Pickering


_____, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
Douglas A. Rotondi
McDonald Carano Wilson LLP/Reno
McDonald Carano Wilson LLP/Las Vegas
Brooks Bauer LLP
Eighth District Court Clerk

²Because we conclude that appellant is entitled to a new mediation, which will entail new document production, and if unsuccessful, the opportunity for new judicial review, we do not reach the parties' other arguments. Further, we deny as moot respondent Mortgage Electronic Registration Systems, Inc.'s motion to be dismissed from the appeal.