

IN THE SUPREME COURT OF THE STATE OF NEVADA

CYNTHIA DUFFY,
Appellant,
vs.
ONEWEST BANK, FSB,
Respondent.

No. 58922

FILED

MAY 10 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER DISMISSING APPEAL IN PART AND AFFIRMING IN PART

This is an appeal from a district court order granting a petition for judicial review in a foreclosure mediation program (FMP) action. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

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).

Following mediation, respondent filed a petition for judicial review, seeking a certificate to foreclose on the property. Appellant responded to the petition and asked for sanctions under NRCP 11, EDCR

7.60, attorney fees and costs under NRS 18.010 and 18.020, punitive damages, and asked for an order to show cause why respondent's representative should not be held in contempt. After a hearing, the district court entered an order in favor of respondent. This appeal followed.

During the pendency of this appeal, respondent rescinded the notice of default concerning the subject property. As no foreclosure could proceed, respondent contended that the matter was moot, and moved to dismiss the appeal. We agree that the appeal is moot in part. As to the issuance of the foreclosure certificate and issues concerning whether the foreclosure was properly initiated and maintained by the proper party, this appeal is moot. No foreclosure may occur based on the previously recorded notice of default. If respondent seeks foreclosure it must record a new notice of default, which will provide appellant with the opportunity for a new mediation. NRS 107.080; 107.086; Holt v. Regional Trustee Services Corp., 127 Nev. ___, 266 P.3d 602 (2011). Although, respondent contends that the entire appeal is moot because appellant has obtained the relief sought, namely to avoid a foreclosure,¹ appellant has also challenged the denial of her requests for relief and that issue is not moot.

¹In the motion to dismiss as moot, respondent cited to an unpublished order of this court in violation of SCR 123. Appellant moved to strike the references to that unpublished order. Although an unpublished order has no precedential value, the arguments accompanying respondent's citations are relevant to this appeal and are supported by enough valid authority to be considered. Accordingly, we deny the motion to strike but admonish respondent's counsel to avoid such citation in the future.

Appellant's response to the petition for judicial review did not contain a request for sanctions under NRS 107.086 or the Foreclosure Mediation Rules (FMR).² Rather, appellant requested the petition's dismissal, an order to show cause regarding contempt, attorney fees and costs under NRS 18.010 and 18.020, sanctions under NRCP 11 and EDCR 7.60, and punitive damages. When the district court issued its order granting respondent's petition for judicial review, it declined to grant any of appellant's requests for relief.³ Bd. of Gallery of History v. Datecs Corp., 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (noting that the district court's failure to rule on a request for attorney fees constitutes a denial of the request); Weiler v. Ross, 80 Nev. 380, 382, 395 P.2d 323, 324

²Appellant's response to the petition asserted that respondent acted in bad faith and alleged document deficiencies under FMR 11, but rather than ask for sanctions under NRS 107.086 and the FMR, appellant asked for litigation sanctions. Appellant's request "for any other relief [the district court] deems appropriate" did not adequately request sanctions under NRS 107.086 or the FMR, and appellant may not raise the issue of NRS Chapter 107 or FMR sanctions for the first time 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, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

³To the extent that appellant seeks to challenge the decision denying her motion for an order to show cause regarding contempt, we perceive no abuse of discretion and no reason to disturb the district court's decision. Matter of Water Rights of Humboldt River, 118 Nev. 901, 907, 59 P.3d 1226, 1229-30 (2002) (noting that the district court generally has particular knowledge of whether contemptible conduct occurred and thus its decisions regarding contempt are given deference).


(1964) (noting that the effect of a district court's refusal to rule upon a motion to amend the complaint was to deny the motion).

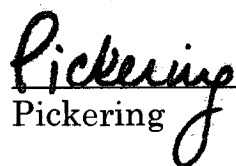
Having reviewed the record and considered the parties' arguments, we conclude that the district court did not abuse its discretion in declining to grant any of appellant's requested relief. Since appellant did not demonstrate that respondent's petition was brought for an improper purpose or to harass or cause needless delay or litigation costs, the district court properly denied appellant's requests for NRCP 11 and EDCR 7.60 sanctions. See NRCP 11; EDCR 7.60; Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, 130 P.3d 1280, 1288. (2006). Likewise, it was proper for the district court to deny appellant's request for attorney fees and costs under NRS 18.010 and 18.020.⁴ U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002) (holding that the decision whether to impose attorney fees or costs is within the district court's sound discretion). Finally, punitive damages were not available to appellant, as she was not a plaintiff who had filed a complaint alleging any damages. See NRS 42.005 (stating that a plaintiff may recover punitive damages in addition to compensatory damages in certain instances); Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 615, 5 P.3d 1043, 1054 (2000) (recognizing that punitive damages cannot be awarded unless compensatory damages are also awarded).

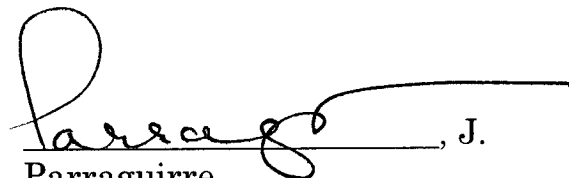
⁴Further, we note that appellant was not a prevailing party within the meaning of NRS 18.010 and 18.020.

Accordingly, we dismiss this appeal as to appellant's challenge to the portion of the district court order issuing a certificate, and affirm the judgment of the district court denying appellant's requests for relief.

It is so ORDERED.⁵


Gibbons, J.


Pickering, J.


Parraguirre, J.

cc: Hon. Donald M. Mosley, District Judge
Cody Law Firm, LLC
Brooks Bauer LLP
Eighth District Court Clerk

⁵We deny all other outstanding motions in this appeal. We have determined that this appeal should be submitted for decision on the briefs and appellate record without oral argument. See NRAP 34(f)(1).