

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAY GIBSON; AND LEEANN GIBSON,
Appellants,
vs.
EVERHOME MORTGAGE CO.
SERVICES, INC.,
Respondent.

No. 60434

FILED

DEC 17 2013

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program (FMP) matter. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

In an appeal from a district court order granting or denying judicial review in an FMP matter, this court defers to the district court's factual determinations and reviews de novo the district court's legal determinations. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 260 (2012). 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 person. NRS 107.086(4) and (5) (2011); *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. ___, ___, 255 P.3d 1275, 1278-79 (2011).

Appellants first contend that respondent mediated in bad faith by refusing to disclose the amount it paid to acquire ownership of appellants' loan. Nothing in the FMP statute or rules requires disclosure of this information, and the district court did not clearly err in finding a lack of bad faith in this regard. *Edelstein*, 128 Nev. at ___, 286 P.3d at 260

(indicating that, absent clear error, a district court's factual determinations will not be disturbed).

Appellants next contend that the assignment produced by respondent was "void" because it did not recite the amount of consideration that respondent paid for the assignment. According to appellants, this failure to recite the consideration paid violates NRS 111.210. We disagree. NRS 111.210, part of Nevada's statute of frauds, applies to "contract[s] . . . for the sale of . . . an[] interest in lands." NRS 111.210(1). A written assignment of a deed of trust, however, is not a contract, but is an instrument that sets forth the chain of title. A written assignment is therefore akin to a receipt, providing a written record of who is entitled to foreclose on secured property as a means of satisfying a borrower's obligation under a promissory note. *Cf. Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. ___, ___, 290 P.3d 249, 254 (2012) (indicating that an assignment's purpose is to complete the chain of title of the person seeking to enforce the note and to proceed with foreclosure). Thus, while a signed writing is required to transfer the beneficial interest in a deed of trust, *see* NRS 111.205, this writing does not need to recite consideration to accomplish its purpose. *See Leyva*, 127 Nev. at ___, 255 P.3d at 1279 (discussing the applicability of NRS 111.205 without reference to NRS 111.210). Accordingly, the district court properly determined that the deed of trust assignment produced by respondent was not "void" for failure to comply with NRS 111.210(1).¹ *Edelstein*, 128 Nev. at ___, 286 P.3d at 260.

¹We note that the record on appeal contains a second assignment from respondent to respondent's successor company. Setting aside
continued on next page...

Appellants next contend that respondent failed to produce necessary assignments. Specifically, because appellants' promissory note contained endorsements to and from GMAC, appellants contend that assignments should have been produced to demonstrate that beneficial interest in appellants' deed of trust was assigned to and from GMAC. We disagree. In *Edelstein* 128 Nev. at ___, 286 P.3d at 259, we recognized that when a homeowner's deed of trust contains language appointing Mortgage Electronic Registration Systems, Inc. (MERS), as the beneficiary, this constitutes an agreement to separate the note from the deed of trust. We concluded, however, that such separation is "not irreparable or fatal" so long as both documents "are ultimately held by the same party" at the time that party seeks to foreclose. *Id.* at ___, 286 P.3d at 260.

Such was the case here. In 2004, appellants signed a deed of trust and a promissory note in which Mortgage Investors Corporation was identified as the lender and MERS was identified as the deed of trust beneficiary. As for the deed of trust, MERS assigned beneficial interest to respondent via the August 2010 assignment. As for the promissory note, Mortgage Investors endorsed the note to the order of GMAC Bank, who in turn endorsed the note to the order of GMAC Mortgage Corporation, who in turn endorsed the note in blank, meaning that the entity in possession of the note was entitled to enforce the note. *Id.* at ___, 286 P.3d at 261 (citing *Leyva*, 127 Nev. at ___, 255 P.3d at 1280). Thus, by demonstrating possession of appellants' original promissory note, deed of trust, and the

...continued

whether this assignment was even necessary, to the extent that appellants also contend that this assignment was void, the same analysis applies.

August 2010 assignment, respondent established that it was the entity entitled to enforce appellants' note and to proceed with foreclosure. Accordingly, the district court correctly determined that there were not missing assignments that respondent had failed to produce.²

Appellants finally contend that the Broker's Price Opinion (BPO) produced at the mediation by respondent was deficient because it was not signed by the preparer and because it did not contain the preparer's license number. This court has recently recognized, however, that substantial compliance with the FMP's directory rules may be sufficient. *Markowitz v. Saxon Special Servicing*, 129 Nev. ___, ___, 310 P.3d 569, 572 (2013). Because the record demonstrates that the district court considered appellants' contention regarding the BPO's deficiencies, and because appellants have not established that these deficiencies hindered the mediation, this contention does not warrant reversal of the district court's order. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

²Because there were no missing assignments, respondent necessarily did not need to produce document certifications attesting to possession of these assignments. Appellants' related argument regarding respondent's failure to certify possession of the original endorsements was not made in district court, and we decline to consider it on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

cc: Hon. Patrick Flanagan, District Judge
Mark L. Mausert
Robinson Tait, P.S.
Washoe District Court Clerk