

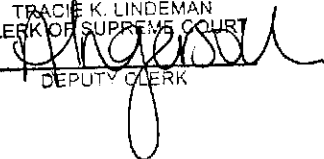
IN THE SUPREME COURT OF THE STATE OF NEVADA

NHU THI TRAN, AN INDIVIDUAL;
TRAN ENTERPRISES, LLC, A NEVADA
LIMITED LIABILITY COMPANY; AND
NT REVOCABLE LIVING TRUST
DATED 10-15-2009, NHU THI TRAN,
TRUSTEE,
Appellants,
vs.
TOWN & COUNTRY BANK,
Respondent.

No. 60948

FILED

FEB 28 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment following trial in a deficiency action. Eighth Judicial District Court, Clark County; Susan Scann, Judge.

I.

Appellant Nhu Thi Tran failed to timely repay a loan to respondent Town & Country Bank (T&C). The loan was secured by six properties located in southwest Las Vegas. T&C nonjudicially foreclosed on the properties, made a credit bid on them at the foreclosure sale, and then sued Tran for the deficiency. When T&C moved for a deficiency hearing, Tran, in her response to that motion, requested that the district court appoint an appraiser. The district court denied Tran's request, stating that Tran could obtain her own appraiser, and exigent circumstances did not exist to support a court-appointed appraiser.

At the deficiency hearing, T&C's appraiser presented evidence of the properties' liquidation value. T&C also presented evidence of the

properties' market prices. Tran's appraiser presented additional market value evidence. At the close of the hearing, the district court granted Tran's request to withdraw T&C's president's affidavit, which Tran had presented during the hearing. However, the district court readmitted the affidavit when it became apparent the affidavit was necessary to establish the debt.

Ultimately, the district court found Tran's fair market value evidence flawed and relied on T&C's evidence to set the properties' fair market value and determine the deficiency amount. After a bench trial, the district court entered judgment against Tran as suggested by the order from the deficiency hearing, plus interest and costs. Tran now appeals entry of that judgment and asserts that the district court committed three errors.

II.

First, Tran argues that under NRS 40.457(2) the district court was required to appoint an appraiser because Tran requested it do so. NRS 40.457(2) provides that "[u]pon application of any party made at least 10 days before the date set for the hearing the court shall . . . appoint an appraiser to appraise the property sold as of the date of foreclosure sale or trustee's sale." The word "shall" generally imposes a duty to act. NRS 0.025(1)(d). Therefore, when a party properly applies for an appraiser, the district court has a mandatory duty to appoint an appraiser. This court has not determined whether a simple request for appointment of an appraiser, contained in an opposition to a motion, is sufficient to trigger this mandatory duty.

However, even assuming that Tran's request triggered the district court's mandatory duty, the district court's failure to appoint an appraiser here was harmless. *See Wyeth v. Rowatt*, 126 Nev., ___, ___, 244

P.3d 765, 778 (2010) (noting that this court will not reverse for a harmless error). Tran ultimately obtained her own appraiser who prepared a report and testified at the deficiency hearing. Thus, Tran had the opportunity to and did present evidence that supported her valuation of the properties. The district court weighed the evidence and found T&C's expert reliable and credible and disregarded Tran's expert as unreliable, which is within the district court's purview in a bench trial. *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. ___, ___, 283 P.3d 250, 254 (2012). Tran has presented no evidence, only speculation, to show that the district court would have valued the properties differently if it would have obtained a third, court-ordered appraisal. *See Wyeth*, 126 Nev. at ___, 244 P.3d at 778 (noting that to warrant reversal, the moving party must show that "the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"). Therefore, we find the district court's failure to appoint an appraiser harmless.

III.

Tran next contends that the district court erroneously used T&C's liquidation value evidence to determine the properties' fair market value. A district court's deficiency determination receives deferential review, and will not be disturbed on appeal if supported by substantial evidence. *Bldg. Energetix Corp. v. EHE, LP*, 129 Nev. ___, ___, 294 P.3d 1228, 1231 (2013); *Halton v. Title Ins. & Trust Co.*, 97 Nev. 421, 423-24, 634 P.2d 660, 661 (1981).

Fair market value is "the price which a purchaser, willing but not obliged to buy, would pay an owner willing but not obliged to sell, taking into consideration all the uses to which the property is adapted and might in reason be applied." *Unruh v. Streight*, 96 Nev. 684, 686, 615 P.2d 247, 249 (1980). The district court has wide discretion as to what evidence

to consider in determining fair market value. *Tahoe Highlander v. Westside Fed. Sav. & Loan Ass'n*, 95 Nev. 8, 11, 588 P.2d 1022, 1024 (1979). But the district court must take evidence from both parties concerning the property's fair market value at the time of the foreclosure sale. NRS 40.457(1).

Here, the district court took evidence from both Tran and T&C as to the properties' fair market value. In addition to T&C's and Tran's experts' appraisals, the valuation evidence included the pre-foreclosure-sale appraisal, the amount of T&C's bid at the foreclosure sale, the subsequent, lower bids offered on the properties, and T&C's difficulties selling the properties. T&C's president also testified that in his opinion the amount T&C bid at the foreclosure sale was much higher than the properties' actual fair market value. Furthermore, T&C's expert testified that the overall property market in Las Vegas was in rapid decline, and that she had not seen a decline such as this in her 18 years as an appraiser. Thus, the district court's ultimate determination that the fair market value was the liquidation value offered by T&C's expert was supported by substantial evidence. We therefore affirm the district court's fair market value and deficiency judgment determinations.

IV.

Finally, Tran asserts that the district court erroneously admitted T&C's president's affidavit. This court reviews decisions regarding the admissibility of evidence for abuse of discretion, and will not overturn a district court's decision absent palpable abuse. *Quinlan v. Camden USA, Inc.*, 126 Nev. ___, ___, 236 P.3d 613, 616 (2010); *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008).


Here, the affidavit may have constituted inadmissible hearsay. NRS 51.035; *Caye v. Caye*, 66 Nev. 78, 91-92, 211 P.2d 252, 256 (1949). But Tran did not object to its initial admission, as she was the party who first sought the affidavit's admission. Tran thus failed to preserve this issue for appeal. NRS 47.040(1)(a); *In re Parental Rights as to J.D.N.*, 128 Nev. ___, ___, 283 P.3d 842, 846 (2012).

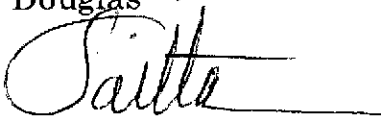
Moreover, even if Tran's objection in her closing brief, submitted after the hearing, preserved this issue for appeal, the district court did not abuse its discretion by leaving the affidavit in evidence. Although the district court originally granted Tran's request to remove the affidavit from evidence, it readmitted the affidavit after determining that the affidavit contained relevant information about the indebtedness. Parties generally do not have a right to withdraw relevant evidence once admitted. *Eaton v. Sontag*, 387 A.2d 33, 40 (Me. 1978). Rather, the district court has discretion as to whether to withdraw relevant admitted evidence. *Id.* Furthermore, Tran had the opportunity to and did cross-examine the affiant about the affidavit. *See Caye*, 66 Nev. at 92, 211 P.2d at 256 (stating that the purpose behind requiring testimony is to provide the opposing party the opportunity to cross-examine the witness). Thus, given that Tran introduced the relevant affidavit and was able to cross-examine the affiant, the district court did not commit a palpable abuse of discretion in keeping the affidavit in evidence.

We therefore

ORDER the judgment of the district court AFFIRMED.


_____, C. J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Susan Scann, District Judge
M. Nelson Segel, Settlement Judge
Law Offices of P. Sterling Kerr
Holland & Hart LLP/Las Vegas
Eighth District Court Clerk