

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES TENNIER; AND LOIS
TENNIER,
Appellants,
vs.
WELLS FARGO BANK, N.A.,
Respondent.

No. 65712

FILED

AUG 31 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

This is an appeal from a district court order denying a petition for judicial review in a foreclosure mediation matter. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Appellants James and Lois Tennier (the Tenniers) and respondent Wells Fargo Bank, N.A., have attended five total mediations under Nevada's Foreclosure Mediation Program (FMP). In the first four mediations, no certificate was issued allowing the foreclosure to proceed due to various errors on Wells Fargo's part. Following the fifth unsuccessful mediation, the Tenniers filed a petition for judicial review seeking an evidentiary hearing and sanctions against Wells Fargo. The Tenniers argued that Wells Fargo failed to demonstrate it was the proper entity to foreclose on the loan, failed to provide short sale information as

required by Foreclosure Mediation Rule (FMR) 11(10)¹, and failed to negotiate in good faith. See NRS 107.086(6). After supplemental briefing and a hearing on the petition, the district court denied the Tenniers' petition without an evidentiary hearing and ordered the FMP to issue a certificate to allow the foreclosure to proceed.

The Tenniers now appeal, raising the same arguments as in the district court, and also arguing that the district court erred in failing to hold an evidentiary hearing. For the reasons set forth below, we affirm in part, reverse in part, and remand the matter to the district court for further proceedings. Specifically, we take issue with the district court's lack of findings regarding the Tenniers' arguments that Wells Fargo failed to provide short sale information and that it mediated in bad faith.

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 a person. NRS 107.086(5), (6); *Leyva v. Nat'l Default*

¹The FMRs became effective on July 31, 2009, and have been amended and renumbered numerous times since. For clarity, the citations in the text are to the FMRs that went into effect on January 1, 2013, and were the FMRs in effect at the time the underlying mediation occurred.

Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is a necessary predicate to obtaining a foreclosure certificate).

We first turn to the Tenniers' argument that Wells Fargo failed to demonstrate that it had the right to foreclose on the Tenniers' home because it failed to provide assignments of the note and deed of trust demonstrating a transfer to Wells Fargo. *See* FMR 11(7). While it is true that Wells Fargo did not produce any assignments, the record demonstrates that Wells Fargo did not obtain the Tenniers' loan by assignment of the note and deed of trust, but rather, received them due to the merging of companies. The original note and deed of trust both named World Savings Bank, FSB as the lender/beneficiary. Thereafter, on November 19, 2007, World Savings Bank changed its name to Wachovia Mortgage, FSB. Then, on November 1, 2009, Wachovia Mortgage received approval to convert to Wells Fargo Southwest, National Association, and, on that same date, Wells Fargo Southwest merged with respondent in this case. The documents demonstrating these changes were accompanied by a duly-recorded affidavit of authority to exercise the power of sale, *see* NRS 107.080(1)(c), and declarations attesting to the documents' authenticity. With these documents, we cannot conclude that the district court clearly erred in finding that Wells Fargo demonstrated it had the authority to foreclose on the Tenniers' loan. *See Edelstein*, 128 Nev. at ___, 286 P.3d at 260. Therefore, we affirm the district court's order in that regard.

Next, we turn to the Tenniers' argument that Wells Fargo failed to provide all the required documentation because it did not provide a written statement setting forth conditions for a short sale option. FMR

11(10) states that the beneficiary of the deed of trust “shall prepare an estimate of the ‘short sale’ value of the residence that it may be willing to consider as part of the negotiation . . . and shall submit any conditions that must be met in order for a short sale to be approved.” The rule further provides a list of items that the beneficiary must be able to negotiate regarding the short sale of the home. See FMR 11(10)(i)-(v).

Wells Fargo argues that the Tenniers did not want to discuss any non-retention options at the mediation and had not listed the property for sale, that the rule does not require that the conditions be submitted in writing, and that only substantial compliance is required under *Markowitz v. Saxon Special Servicing*, 129 Nev. ___, ___, 310 P.3d 569, 573 (2013) (holding that an 83-day-old BPO substantially complied with the FMR requiring that a BPO be completed within 60 days before the mediation), but stops short of stating it complied, either strictly or substantially, with the short sale requirements.² The district court’s order merely stated that the Tenniers failed to demonstrate that Wells Fargo did not produce all the required documents and cited to *Markowitz* for its substantial compliance holding.

The record lacks clarity as to what occurred at the mediation and whether Wells Fargo satisfactorily complied with the short sale rule. The only evidence provided is that the mediator noted in the mediator statement that the lender offered, but the Tenniers did not want to

²We do not, by this order, reach the issue of whether the short sale rule requires strict or substantial compliance.

discuss, non-retention options.³ Other than that, the record is devoid of any information regarding Wells Fargo's preparedness to discuss short sale options, aside from the arguments of counsel, which cannot be considered as evidence. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. ___, ___, 338 P.3d 1250, 1255-56 (2014) (noting that statements of counsel are not evidence).

An additional factual discrepancy exists regarding the Tenniers' bad faith argument. At the fifth mediation, Wells Fargo informed the Tenniers that they did not qualify for any modification options.⁴ The Tenniers allege that the only reason they did not qualify is because Wells Fargo acted in bad faith and did not follow the FMRs in the four prior mediations, causing the Tenniers' loan to continue to accrue arrears and fees to such an extent that they were no longer eligible for modification. The failure to qualify for a modification is therefore, according to the Tenniers, a direct result of the culmination of Wells

³It does not appear, however, that the district court relied on this statement in its order.

⁴The Tenniers also argue that, by not offering any modification options, Wells Fargo failed to have someone with authority to negotiate a loan modification present at the mediation in violation of FMR 10(1)(a) (allowing a beneficiary to be represented by another party at the mediation so long as the representative has "the authority to negotiate and modify the loan secured by the deed of trust sought to be foreclosed"). Because the record demonstrates that the Wells Fargo representative could negotiate a loan modification, but that Wells Fargo had concluded that the Tenniers did not qualify for a loan modification, this appears to be more properly couched as a bad faith argument, and we therefore treat it as such.


Fargo's previous mediation errors. Wells Fargo argued below that evidence of what occurred at prior mediations is not relevant to the instant petition for judicial review based on the language of the FMRs. The district court did not make specific findings on this issue, except to find that Wells Fargo mediated in good faith, and the record is also devoid of evidence regarding whether Wells Fargo's conduct contributed to the Tenniers' inability to qualify for a modification, such that Wells Fargo could be found to have mediated in bad faith in the most recent mediation.


Thus, we conclude the district court abused its discretion in failing to conduct an evidentiary hearing regarding the above factual disputes. See FMR 21(2) (providing the district court with discretion to hold an evidentiary hearing on an FMP petition for judicial review). Accordingly, we reverse the district court's order as to Wells Fargo's compliance with the short sale rule and its good faith, and we remand this matter to the district court. On remand, the district court shall conduct an evidentiary hearing to determine whether Wells Fargo complied with the short sale rule and whether Wells Fargo's actions contributed to the Tenniers' inability to qualify for a loan modification, and, if so, whether that contribution amounts to bad faith under the FMRs.⁵ If the district court finds any rule violations or bad faith negotiation, it will then need to determine the appropriate sanctions. See *Pasillas v. HSBC Bank USA*,

⁵In addressing the Tenniers' bad faith argument, the district court will also need to consider Wells Fargo's assertion that its actions in the first four mediations are outside the purview of the instant petition for judicial review.

127 P.3d ___, ___, 255 P.3d 1281, 1286-87 (2011) (explaining that the district court must consider appropriate sanctions when a party is found to have violated the FMRs).

It is so ORDERED.⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Elliott A. Sattler, District Judge
Jill I. Greiner, Settlement Judge
Luke A. Busby
Tiffany & Bosco, P. A.
Washoe District Court Clerk

⁶In light of our conclusion that the district court abused its discretion in failing to hold an evidentiary hearing, we need not consider the Tenniers' argument that such a failure amounts to a deprivation of due process. *See Dir., Nev. Dep't of Prisons v. Arndt*, 98 Nev. 84, 86, 640 P.2d 1318, 1320 (1982) ("It is well settled that [an appellate] court will not address constitutional issues unless [they] are requisite to the disposition of a case.").