

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN HAFHEY,
Appellant,
vs.
WELLS FARGO BANK, N.A.; WORLD
SAVINGS BANK; AND NATIONAL
DEFAULT SERVICING
CORPORATION,
Respondents.

No. 66124

FILED

SEP 30 2015

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a petition for judicial review in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Following an unsuccessful mediation under Nevada's Foreclosure Mediation Program (FMP), appellant filed a petition for judicial review in the district court, which was denied. On appeal from that decision, appellant contends that respondents did not participate in the mediation in good faith and that respondents' asserted refusal to modify based on investor requirements demonstrated they lacked the authority to modify appellant's loan. Appellant also alleges on appeal that the district court erred in failing to conduct an evidentiary hearing. As a result, appellant alleges a foreclosure mediation certificate should not have issued. Respondents, however, contend that, although no agreement was reached, they met all the requirements to obtain a certificate and thus the district court properly denied the petition.

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 so long as they are supported by substantial

evidence. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 260 (2012). “Substantial evidence exists if a reasonable person could find the evidence adequate to support the [district court]’s conclusion” *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). 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 have access to such a person. NRS 107.086(5), (6); *Leyva v. Nat’l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is a necessary predicate to obtaining a foreclosure certificate).

Appellant bases his argument that a certificate should not have issued allowing the foreclosure of his home to proceed partly on his assertion that respondents erred in calculating his monthly income. Because his income was miscalculated, and thus, the offered modification was not based on his actual income, appellant argues that respondents mediated in bad faith. Respondents assert that they properly calculated appellant’s income based on documents appellant provided, and thus, they mediated in good faith. Rather than resolving this factual dispute by conducting an evidentiary hearing pursuant to Foreclosure Mediation Rule (FMR) 22(2)¹ (giving district courts the authority to conduct evidentiary hearings when deciding petitions for judicial review arising

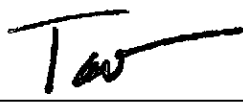
¹The FMRs became effective on June 30, 2009, and have been amended and renumbered numerous times since. For clarity, the citations in the text are to the FMRs that went into effect on January 1, 2013, and were the FMRs in effect at the time the underlying mediation occurred.

from the FMP), the district court simply issued an order adopting respondents' calculations, without even addressing appellant's argument.

Whether a party participated in good faith in a foreclosure mediation is a question of fact. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). Without the district court resolving the factual discrepancy noted above, we are unable to say that the district court's conclusion that respondents mediated in good faith is supported by substantial evidence. *See Edelstein*, 128 Nev. at ___, 286 P.3d at 260. Thus, we conclude that the district court abused its discretion in failing to conduct an evidentiary hearing regarding appellant's argument that his income was miscalculated and what transpired at the mediation. Accordingly, we reverse the district court's order and remand this matter to the district court. On remand, the district court shall conduct an evidentiary hearing to determine what occurred at the mediation and whether respondents accurately calculated appellant's income so that any offered modification was made in good faith and not based on erroneous calculations.²

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

²Because we conclude that the district court abused its discretion by failing to hold an evidentiary hearing to resolve the underlying factual disputes, we do not reach the additional arguments set forth by appellant in his opening brief.

cc: Hon. Kathleen E. Delaney, District Judge
Crosby & Fox, LLC
Tiffany & Bosco, P. A.
Eighth District Court Clerk