

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JONATHAN B. COHAN,  
Appellant,  
vs.  
WELLS FARGO BANK, N.A.; AND  
NATIONAL DEFAULT SERVICING  
CORP.,  
Respondents.

No. 65636

**FILED**

SEP 30 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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.<sup>1</sup> 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 this decision, appellant contends that respondent did not participate in the mediation in good faith and that respondent's asserted refusal to modify

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<sup>1</sup>In their answering brief, respondents assert that respondent National Default Servicing Corp. is not a proper party to this matter as it was dismissed from the underlying case on the parties' stipulation. Appellant does not dispute this assertion, and thus, we dismiss this appeal as to National Default Servicing Group.

based on investor requirements demonstrated it 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 argues a foreclosure mediation certificate should not have issued. Respondent, however, contends that, although no agreement was reached, it 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).

In regard to appellant's lack of good faith argument, the parties dispute what occurred at the mediation. Appellant argues that respondent stated there was an impasse at the beginning of the mediation, that only one modification option was offered, that respondent was not prepared to discuss non-retention options such as a short sale, and that respondent failed to take appellant's ability to pay into account when making its modification offer.<sup>2</sup> Respondent counters that no impasse was mentioned, that it was willing to discuss non-retention options in addition to the offered trial payments, that appellant declined to discuss a short sale, and that it made the best modification offer it could based on the financial information provided by appellant prior to the mediation. Respondent also argues that because it offered a trial modified payment plan and was ready to discuss non-retention options, it had more than one modification offer. Finally, respondent asserts that it was appellant who

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<sup>2</sup>Additionally, appellant briefly mentions that respondent failed to provide a broker's price opinion (BPO) as required by the Foreclosure Mediation Rules, but did not specifically state how the BPO that was provided was deficient or include a copy of it in the record. Because the BPO was not included in the record on appeal, we necessarily conclude that the missing record supports the decision below. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

did not want to discuss non-retention options.<sup>3</sup> Rather than resolve these factual disputes by conducting an evidentiary hearing pursuant to Foreclosure Mediation Rule (FMR) 22(2)<sup>4</sup> (giving district courts authority to conduct evidentiary hearings when deciding petitions for judicial review arising from the FMP), the district court simply issued an order denying judicial review based on the parties' arguments and briefing.

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 discrepancies noted above, we are unable to say that the district court's conclusion that respondent mediated in good faith is supported by substantial evidence. *See*


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<sup>3</sup>Respondent also asserts that appellant's counsel declined to discuss short sale options at the mediation, but then claimed in district court that respondent was unwilling or unable to discuss a possible short sale so that respondent would be found in violation of the foreclosure mediation rules. Appellant denies this. Without resolving this factual dispute, we remind the parties that the purpose of the FMP is for the homeowner and lender to attempt to reach an agreement that avoids foreclosure, not to search for rule violations. *See Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. \_\_\_, \_\_\_, 266 P.3d 602, 607 (2011).

<sup>4</sup>The 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, which were the FMRs in effect at the time the underlying mediation occurred.

*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 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 respondent participated in good faith.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

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