

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KAILYNN O'MALLEY,  
Appellant,

vs.

GMAC MORTGAGE, LLC, SUCCESSOR  
BY MERGER TO GMAC MORTGAGE  
CORPORATION; AND OCWEN LOAN  
SERVICING, LLC, A DELAWARE  
LIMITED LIABILITY COMPANY,  
Respondents.

No. 65434

**FILED**

**SEP 30 2015**

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

*ORDER OF AFFIRMANCE*

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 conducted under Nevada's Foreclosure Mediation Program (FMP), at which respondents GMAC Mortgage, LLC, and Ocwen Loan Servicing, LLC, both purportedly appeared through a representative from respondent Ocwen, appellant filed a petition for judicial review in the district court, which was denied. As relevant here, the district court found that respondents offered appellant a trial modified payment plan at the mediation. Appellant alleges that she attempted to ask questions about the payment plan, such as what the interest rate attached to the modified plan was and how much of the payment would go towards principal, arrears, and interest, but respondents were unable to provide the requested information.

Ultimately, however, appellant rejected the payment plan, stating that her income would be decreasing in the near future, such that she would be unable to afford the offered payments. Because appellant did not have any paperwork to verify her change in income, respondents provided appellant the name and phone number of an employee who would be able to take appellant's new financial information and provide a new modified trial payment plan, if appellant qualified for one.<sup>1</sup>

On appeal from the denial of her petition for judicial review, appellant argues respondents failed to provide the requisite documentation, failed to have someone with authority to modify appellant's loan present at the mediation, and mediated in bad faith. Respondents contend that appellant misrepresented the facts of the mediation and that, although no agreement was reached, all the requirements to obtain a certificate of foreclosure were met and the district court did not err in denying 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 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

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<sup>1</sup>The district court found that appellant did submit updated financial information after the mediation, that respondents offered appellant a new payment plan based on the new information, and that appellant rejected that new offer. Appellant does not dispute these findings on appeal.

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). The documents that must be presented by the deed of trust beneficiary at the mediation are the original or a certified copy of the deed of trust, the mortgage note, and "each assignment of the deed of trust or mortgage note." NRS 107.086(5).

Here, appellant argues that respondents failed to provide all the required documentation insofar as respondent GMAC Mortgage had transferred its interest in appellant's mortgage to respondent Ocwen, but no assignment of the deed of trust from GMAC Mortgage to Ocwen was presented at the mediation. The record before this court, however, establishes that respondents presented an assignment of the deed of trust from the original beneficiary to GMAC Mortgage, demonstrating that GMAC Mortgage was the beneficiary of the deed of trust on appellant's home. *See Leyva*, 127 Nev. at 476-77, 255 P.3d at 1279 (requiring a written assignment of a deed of trust to satisfy the FMP's document production rules). Respondents also produced the mortgage note and its assignments, demonstrating that the note was ultimately endorsed in blank, giving the bearer of the note—in this case, GMAC Mortgage,

through its representative Ocwen—the ability to enforce it.<sup>2</sup> See NRS 104.3109(1)(b) (“A promise or order is payable to bearer if it . . . [d]oes not state a payee.”); see also *Edelstein*, 128 Nev. at \_\_\_, 286 P.3d at 261 (holding that in order to establish that it may enforce the mortgage note, a subsequent lender must show the note was endorsed in its favor or the favor of its servicer, which it can do by demonstrating that the note was made payable to bearer and that it has possession of the note); *Leyva*, 127 Nev. at 478-79, 255 P.3d at 1280 (discussing how a note can be transferred from one party to another by endorsement and transfer of possession from the original holder of the note to the new holder).

These documents demonstrate that appellant’s contention that an assignment to Ocwen was necessary to comply with the FMP rules is misguided: GMAC Mortgage remained the beneficiary of the deed of trust

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<sup>2</sup>To the extent that appellant’s contention that the note and deed of trust were split at the time of the mediation is premised on the idea that Ocwen’s actual possession of the mortgage note made Ocwen, rather than GMAC, the holder of the note, appellant has not set forth any argument on appeal or cited any authority to demonstrate that a note and deed of trust are impermissibly split when the note is endorsed in blank and is in the possession of the trust deed beneficiary’s representative, who possesses it only in its capacity as representative. As a result, we decline to consider this argument, and we therefore conclude that GMAC was entitled to enforce the note because Ocwen possessed the note only as GMAC’s agent. See *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that appellate courts need not consider claims that are not cogently argued on appeal); see also *Edelstein*, 128 Nev. at \_\_\_, 286 P.3d at 261 (declining to consider a similar issue because it had not been properly preserved for appellate review).

and the holder of the note. It merely gave Ocwen the power to enforce the rights associated with GMAC Mortgage's positions as a beneficiary and note holder. *See Edelstein*, 128 Nev. at \_\_\_ n.11, 286 P.3d at 260 n.11 (holding that a loan servicer may properly appear as a representative of the beneficiary of the deed of trust at an FMP mediation). Thus, the district court properly found that respondents produced the required documents.<sup>3</sup>

Appellant next contends that the district court should have found respondents failed to have someone present with authority to modify the loan and mediated in bad faith because they provided only one modification option and they told appellant to contact a person not at the mediation if she wished to discuss further modification options.<sup>4</sup> This misrepresents what occurred below, as the record shows that after rejecting the offered modification at the mediation, appellant stated her

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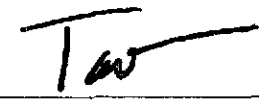
<sup>3</sup>Appellant also asserts that these alleged failings demonstrate bad faith. Because we conclude that respondents satisfied the FMP rules in those regards, we also conclude that they do not form the basis for a finding of bad faith. *See* NRS 107.086(6). Similarly, we reject appellant's argument that the notice of default was defective because GMAC Mortgage retained no interest in the mortgage.

<sup>4</sup>Appellant also asserts that respondents failed to have a person available with authority to modify her loan because the representative at the mediation could not answer her questions regarding the trial modified payment plan offered at the mediation. Because appellant never intended to accept the offered modification due to her soon-to-be-decreased income, appellant's questions regarding the modification were irrelevant. Thus, we decline to address this argument on appeal.

income had changed, but that she would not be able to provide paystubs to verify the change until after the mediation concluded. Only then did respondents provide an additional person for appellant to contact, as they could not review the documents and make a new modification offer on the spot. Based on these facts, we conclude that substantial evidence supports the district court's determination that respondents did not mediate in bad faith. *See id.* at \_\_\_, 286 P.3d at 260 (indicating that a district court's factual determinations will not be disturbed on appeal if they are supported by substantial evidence). Thus, we affirm the district court's denial of appellant's petition for judicial review.

It is so ORDERED.

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

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

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

cc: Hon. Kathleen E. Delaney, District Judge  
Naomi R. Arin  
Houser & Allison, APC  
Eighth District Court Clerk