

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARLEE YBARRA, AN INDIVIDUAL,
Appellant,
vs.
WELLS FARGO BANK, N.A.,
Respondent.

No. 68496

FILED

OCT 06 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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.

After an unsuccessful foreclosure mediation, appellant filed a petition for judicial review arguing that the broker's price opinion (BPO) was required by rule to be given to her ten days before the mediation, but that respondent only provided the BPO five days before the mediation. Based on that argument, appellant asked that a certificate of foreclosure not be issued. The district court found that respondent substantially complied with the applicable rule, that the purpose of Nevada's foreclosure mediation program (FMP) was met, and that appellant suffered no prejudice. Based on these findings, the district court ruled that strict compliance with the ten-day disclosure rule was not required and, therefore, denied appellant's petition for judicial review. This appeal followed.

On appeal, appellant argues that strict compliance is required with the ten-day disclosure rule and, because the BPO was not produced ten days before the mediation, a certificate should not have issued allowing the foreclosure to proceed. Respondent argues that substantial

compliance is all that is required so long as the goals of the FMP are met. We review a district court order interpreting a statute or rule de novo. *Markowitz v. Saxon Special Servicing*, 129 Nev. ___, ___, 310 P.3d 569, 572 (2013) (recognizing that whether a rule is mandatory, and thus requires strict compliance, or directory, such that its requirements can be satisfied through substantial compliance, is a question of statutory interpretation reviewed de novo on appeal).

Parties to an FMP mediation must, among other requirements, participate in the mediation process in good faith. See *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 304, 300 P.3d 724, 727 (2013). And pursuant to the FMP rules, the beneficiary of a deed of trust “must prepare and submit” a BPO “at least 10 days prior to the mediation.” Foreclosure Mediation Rule (FMR) 13(7)(f).¹ Because this rule “governs the time and manner for the deed of trust beneficiary to perform one of its duties to negotiate in good faith,” it requires strict compliance. *Markowitz*, 129 Nev. at ___, 310 P.3d at 573 (concluding that the ten-day production rule for the BPO was a time and manner rule, which generally requires strict compliance). The rule also lacks any “built-in grace period or safety valve provision,” as it uses the mandatory word “must” in relation to respondent’s duty to provide the BPO ten days in advance of the mediation, leaving “little room for judicial construction or ‘substantial compliance’ analysis.” *Leven v. Frey*, 123 Nev. 399, 407, 168 P.3d 712, 718 (2007); see also *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (providing that “must,” as used in the FMRs’ document

¹Although the parties mediated under a prior version of the FMRs, the requirement to submit a BPO ten days before the mediation has not been substantively amended.

production rule, is a synonym of “shall” and, therefore, denotes mandatory action). And a failure to strictly comply with this mandatory rule necessarily means that a party did not participate in the mediation in good faith. *See Markowitz*, 129 Nev. at ___, 310 P.3d at 572-73 (concluding that the BPO “is a necessary document for the mediation and good-faith negotiations therein”).

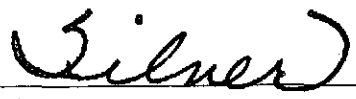
In this case, respondent failed to strictly comply with the ten-day production rule by providing the BPO only five days before the mediation. And, despite the lack of any apparent prejudice resulting from this late disclosure, we are constrained by *Markowitz’s* determination that strict compliance with the rule setting forth the time in which the BPO must be produced is required. 129 Nev. at ___, 310 P.3d at 573. Thus, the district court clearly erred in concluding that respondent participated in the mediation in good faith. *See Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 692, 290 P.3d 249, 251 (2012) (reviewing factual determinations for clear error); *Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (providing that good faith is a question of fact). Because respondent did not participate in the mediation in good faith, the district court should have granted appellant’s petition for judicial review and determined a proper sanction for respondent. *See Jacinto*, 129 Nev. at 304, 300 P.3d at 727 (holding that if a party fails to mediate in good faith, the district court must, at “the bare minimum,” sanction the offending party by not allowing an FMP certificate to issue); *Pasillas*, 127 Nev. at 470, 255 P.3d at 1287 (providing factors for the district court to consider when sanctioning a party to an FMP mediation).

Accordingly, we reverse the district court's order and remand this matter with instructions to determine the appropriate sanctions for respondent's violation of the FMRs.

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Kathleen E. Delaney, District Judge
Eleissa C. Lavelle, Settlement Judge
Peters and Associates, LLP
Malcolm Cisneros
Eighth District Court Clerk