N THE COURT OF APPEALS OF THE STATE OF NEVADA

EVAN S. WISHENGRAD; AND BETH WISHENGRAD,
Appellants,
vs.
JP MORGAN CHASE BANK NATIONAL ASSOCIATION,
Respondent.

No. 67045

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, the appellant homeowners filed a petition for judicial review arguing that respondent failed to satisfy the requirements of the Foreclosure Mediation Program (FMP) and, thus, a certificate should not issue allowing the foreclosure to proceed. Respondent opposed the petition and the district court ultimately denied it. This appeal followed.

On appeal, appellants' first argument is that respondent did not strictly comply with the Foreclosure Mediation Rules (FMRs) because it did not timely send appellants the election of mediation form. And, because respondent violated an FMR, appellants contend that respondent participated in the mediation in bad faith. Respondent asserts that the petition for judicial review process only allows the district court to review what occurred at the mediation, and because what appellants complain of occurred before the mediation, it is outside the scope of the petition for judicial review. Alternatively, respondent maintains that it substantially complied with the rule. Under either circumstance, respondent contends

that the district court properly denied appellants' petition on this basis.[1] 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).

As an initial matter, to the extent respondent asserts that appellants' timing based election of mediation form argument is outside the scope of a petition for judicial review, that argument lacks merit. FMR 22(2) (2014)[2] provides that a district court may hold a hearing on a petition for judicial review to determine, among other things, if a party complied with the FMRs. And since the requirement that the election of mediation form be provided within 10 days is established by the FMRs, specifically FMR 8(1) (2013), appellant's argument that respondent failed to strictly comply with this requirement is properly within the scope of a petition for judicial review. Thus, we now turn to address the merits of this timing argument.

Parties to an FMP mediation must participate in the mediation process in good faith. *See Jacinto v. PennyMac Corp.*, 129 Nev.

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[1]Respondent also argues that this strict compliance argument was not raised below and, therefore, we should decline to consider it. But, contrary to respondent's position, this argument was raised at the hearing on the petition for judicial review, and thus it is properly before us.

[2]After respondent filed the notice of default, the FMRs were amended. Thus, the 2014 version of the FMRs applies to the mediation and petition for judicial review, but the filing of the notice of default and the provision of the election of mediation form were done under the 2013 version of the FMRs. We note, however, that neither FMR 8(1) nor FMR 22(2) was substantially changed by these amendments.

300, 304, 300 P.3d 724, 727 (2013). And pursuant to FMR 8(1) (2013), the party presenting the notice of default and election to sell for recording "shall, not later than 10 days" after presenting the notice for recording, send an election of mediation form, amongst other required documents, to the homeowner. Because this rule "governs the time and manner for the deed of trust beneficiary to perform one of its duties," it requires strict compliance. *Markowitz*, 129 Nev. at ___, 310 P.3d at 573 (concluding that a ten-day production rule 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 "shall" in relation to respondent's duty to provide the election form within ten days of presenting the notice of default and election to sell for recording, 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) (recognizing that the use of "shall" in the FMRs denotes mandatory action).

In this case, respondent failed to strictly comply with the rule requiring that the election of mediation form be mailed to the homeowner within ten days of presenting the notice of default for recording. And despite the lack of any apparent prejudice resulting from this late provision of the election of mediation form, we are constrained by *Markowitz*'s determination that strict compliance is required with foreclosure mediation rules like FMR 8(1) (2013), which "govern[ ] the time and manner for the deed of trust beneficiary to perform one of its duties." 129 Nev. at ___, 310 P.3d at 573. Here, the district court concluded that respondent participated in the mediation in good faith, but in making this determination, it failed to address respondent's failure to strictly comply with the timing requirement for providing the election of

mediation form and whether this failure demonstrated a failure to participate in the mediation in good faith. As a result, the district court's finding of good faith participation constituted clear error. *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). Accordingly, we must reverse and remand this matter for the district court to consider whether this rule violation alters its conclusion that respondent participated in the mediation in good faith and, if so, what sanctions are warranted for the failure to participate in good faith. *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).

As to appellants' arguments that respondent failed to produce the required documents, failed to demonstrate its authority to initiate the foreclosure, and failed to have someone present at the mediation with authority to modify the loan, we conclude that those arguments lack merit as the district court's determinations that all essential documents were produced, that respondent demonstrated its authority to foreclosure, and that respondent had someone with authority present at the mediation are supported by substantial evidence in the record. *See Einhorn*, 128 Nev. at 692, 290 P.3d at 251. Thus, the district court did not abuse its discretion in determining that those arguments failed and did not warrant the imposition of sanctions. *See Jacinto*, 129 Nev. at 304, 300 P.3d at 727 (providing that, "[i]n the absence of factual or legal error," a district court's

decision regarding the imposition of sanctions is within the court's discretion).

Nonetheless, a reversal and remand of the denial of judicial review is necessary because the district court clearly erred in determining respondent participated in the mediation in good faith without addressing respondent's failure to strictly comply with the timing requirement for providing the election of mediation form and whether this failure demonstrated a failure to participate in good faith. Accordingly, we reverse and remand the district court's denial of appellants' petition for judicial review for the district court to address whether respondent's failure to comply with FMR 8(1) (2013) warranted the imposition of sanctions for not participating in the mediation process in good faith.[3]

It is so ORDERED.[4]

_____, C.J.
Gibbons

_____, J.
Tao

[3]We decline to address appellants' remaining arguments that the note and deed of trust were irreparably split and that a certain assignment of the deed of trust was not provided as the former argument was not raised in the district court and the latter argument was not raised until appellants' reply brief. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (providing that a point not raised in the district court is waived on appeal); *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that arguments not raised in an opening brief are deemed waived).

[4]The Honorable Abbi Silver, Judge, did not participate in the decision in this matter.

cc: Hon. Kathleen E. Delaney, District Judge
Robert F. Saint-Aubin, Settlement Judge
Prestige Law Group
Smith Larsen & Wixom
Eighth District Court Clerk