IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GARY LEE NEMRAVA,
Appellant,
vs.
NICOLE COVACEVICH,
Respondent.

No. 69619

ORDER OF REVERSAL AND REMAND

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

Appellant, an individual, loaned respondent, the homeowner, $100,000 in 2005 secured by a mortgage note and second deed of trust on respondent's home. The loan was structured such that respondent made interest-only payments for five years, and then was required to make a balloon payment for the full amount of the principal in 2010. While respondent made the interest-only payments, she failed to make any significant payments on the principal over the next four years, and appellant initiated foreclosure proceedings against the home in 2014.[1]

The parties then proceeded to mediation pursuant to Nevada's Foreclosure Mediation Program (FMP). At the mediation, appellant offered to reduce the amount respondent owed so that respondent would be able to satisfy the loan with a lump sum payment of $153,000, which

[1]Respondent is current on her first mortgage.

represented a forgiveness of approximately $470,000 in late fees and interest. Respondent refused this offer, and countered with an offer to pay the loan off over 40 years,[2] at 4 percent interest, with payments beginning at $350 for the first year and increasing up to $600 by the fourth year, and a balloon payment in the fortieth year of any outstanding amounts owed.[3] Each side rejected the other party's offer and the mediator concluded that appellant acted in good faith at the mediation.

Respondent then filed a petition for judicial review in the district court arguing that appellant did not mediate in good faith. At the hearing on the petition, both appellant, who was put under oath, and his attorney confirmed to the district court that they did not offer any retention options and did not negotiate or counter the loan modification proposed by respondent. Instead, they asserted that the $153,000 offer represented a lump sum payment based on what appellant believed respondent would be able to obtain through a short sale of the property.

In light of the petition briefing and the testimony given to the district court, the district court concluded that appellant did not mediate in good faith. *See* NRS 107.086(6) (requiring lenders to participate in foreclosure mediations in good faith). As a result, the district court refused to issue a certificate allowing the foreclosure to proceed and

---

[2]We note that appellant was in his sixties at the time of the mediation.

[3]While the mediator calculated the balloon payment under respondent's option to be $1,347,000, respondent calculates the total cost of the loan over the 40 years to be only $200,610.

sanctioned appellant approximately $5,000, representing about half of the attorney fees respondent incurred below. This appeal followed.

Based on our review of the documents before us on appeal, it is apparent that the fact that appellant did not offer any retention options, such as a loan modification, during the mediation process, was a significant factor in the district court's determination that appellant failed to mediate in good faith. While the district court's order is more circumspect, the transcript from the hearing on respondent's petition for judicial review makes clear that the district court was troubled by the statement from appellant's counsel indicating that the $153,000 lump-sum offer was not a retention offer and that no such options had been mediated or negotiated.

Our review of the Foreclosure Mediation Rules (FMR), however, reveals nothing that expressly requires a lender to offer a modification or other retention option in order to satisfy the good faith mandate of NRS 107.086(6). *See generally* FMR 1(2) (providing that the program is intended to encourage lenders and homeowners "to exchange information and proposals that *may avoid foreclosure*" without any specific requirement that a modification be offered at every mediation (emphasis added)); NRS 107.086(6) (describing what actions require the recommendation of sanctions and not listing the failure to offer a modification as one of those actions). Indeed, within the FMP, lenders may not be able to modify every loan due to economic considerations. In such cases, the refusal to offer a modification or other retention option may constitute a proper business decision based on sound economic

considerations, rather than a demonstration of the failure to participate in the mediation in good faith.

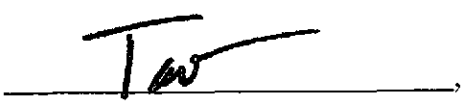
Here, there is nothing in the record to demonstrate that the district court gave any consideration to whether appellant's failure to offer a retention option constituted an appropriate business decision under the circumstances presented. And, perhaps due to the district court's mistaken belief that a retention offer was necessary for appellant to have participated in good faith, the district court likewise seemingly gave no consideration to whether the $153,000 lump-sum offer was, in and of itself, an appropriate offer under the circumstances of this case. While we recognize that the district court made findings, based on appellant's testimony and the statements of his counsel, that appellant entered into the mediation with no real intent to negotiate, it is not clear to what extent these determinations may have been informed by the court's erroneous conclusion that a retention offer was necessary for good faith participation and/or its failure to evaluate whether appellant's offers were based on appropriate considerations.

In light of the district court's erroneous legal conclusion that, under the FMRs, good faith participation in the mediation requires that a retention offer be made, *see Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006) (reviewing the interpretation of statutes and court rules de novo), we cannot determine whether the district court abused its discretion in granting the petition and sanctioning appellant by denying a certificate and awarding attorney fees to respondent. *See Jacinto v. PennyMac Corp.*, 129 Nev. 300, 304, 300 P.3d 724, 727 (2013) (reviewing a decision regarding the imposition of

sanctions for an abuse of discretion). Accordingly, we reverse and remand this case to the district court for it to reassess its finding that appellant did not mediate in good faith in light of this order. We also necessarily reverse and remand the district court's award of sanctions as that award was premised upon the finding of a lack of good faith. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 522, 286 P.3d 249, 260 (2012) (recognizing that appellate courts do not defer to the district court's award of sanctions if the award is based on factual or legal error).

It is so ORDERED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge
Persi J. Mishel, Settlement Judge
Law Offices of Michael F. Bohn, Ltd.
Canon Law Services, LLC
Eighth District Court Clerk