

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WELLS FARGO BANK, N.A., AS
SERVICER FOR U.S. BANK, N.A., AS
TRUSTEE FOR BANC OF AMERICA
FUNDING CORPORATION 2007-C,
Appellant,
vs.
CHRISTINE PAPPAS, AN
INDIVIDUAL; AND JOHN
KUCHARCZYK, AN INDIVIDUAL,
Respondents.

No. 70887

FILED

DEC 14 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Wells Fargo Bank, N.A., appeals from a district court order denying a petition for judicial review in a foreclosure mediation matter. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Wells Fargo participated in Nevada's Foreclosure Mediation Program (FMP) with respondents Christine Pappas and John Kucharczyk. During the mediation, Wells Fargo produced a copy of respondents' deed of trust, which it obtained from the county recorder's office. That document included a certification by a deputy recorder, indicating that it was a true and correct copy of the recorded deed of trust. The mediation later ended unsuccessfully, and the mediator found that the copy of the deed of trust that Wells Fargo produced at the mediation did not satisfy NRS 107.086(5)¹

¹NRS 107.086 was amended effective June 12, 2017, 2017 Nev. Stat., ch. 571, § 2, at 4091-96, but those amendments do not affect the disposition of this appeal, as they were enacted after the underlying mediation occurred.

or FMR 12(7)(a),² which both required it to produce an “original or a certified copy of the deed of trust.” As a result, the FMP administrator recommended that a foreclosure certificate not issue.

Wells Fargo then petitioned for judicial review, arguing that it satisfied the FMP’s document production requirements by producing the copy of the deed of trust that it obtained from the county recorder’s office. The district court disagreed, however, finding that Wells Fargo failed to certify that it was in possession of the original deed of trust in accordance with FMR 12(8)(a)(2) and that Wells Fargo therefore did not produce a certified copy of the deed of trust for purposes of NRS 107.086(5) and FMR 12(7)(a). And because Wells Fargo did not otherwise produce an original copy of the deed of trust, the district court denied its petition. This appeal followed.

Initially, to the extent Wells Fargo challenges the denial of its petition on the ground that NRS 107.086(5) did not require it to certify that it was in possession of the original deed of trust, its argument fails. In particular, while NRS 107.086(5) provides that, where the beneficiary does not produce the original deed of trust, it must produce a certified copy, the statute does not explain what a party must do to certify a copy of this document. But the supreme court adopted the FMRs to implement that statute. *See* NRS 2.120(2) (recognizing the supreme court’s inherent authority to adopt procedural rules); *see also* FMR 1(2) (explaining that the purpose of the FMRs “is to provide for the orderly, timely, and cost-effective

²The 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 April 1, 2014, and were the FMRs in effect at the time the underlying mediation occurred.

mediation of owner-occupied residential foreclosures”). And as relevant here, FMR 12(8)(a)(2) provides that, when the beneficiary produces certified copies to satisfy the FMP’s document production requirement, it must provide “[a] statement under oath signed before a notary public” attesting that the originals are in its possession.³ Thus, to demonstrate that reversal is warranted, Wells Fargo must establish that the district court erred in concluding that it failed to comply with FMR 12(8)(a)(2). See *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521-22, 286 P.3d 249, 260 (2012) (reviewing legal questions de novo).

In this regard, Wells Fargo asserts that, under *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012), it satisfied FMR 12(8)(a)(2), and, by extension, NRS 107.086(5), by producing a copy of the deed of trust from the county recorder’s office, which, according to Wells Fargo, was presumptively authentic. In *Einhorn*, the supreme court determined, as relevant here, that an assignment of the deed of trust from the county recorder’s office was sufficient to satisfy the FMP’s document production requirement because it carried presumptions of authenticity under NRS 52.085 (governing public records) and 52.165 (governing acknowledged documents). See *id.* at 697, 290 P.3d at 254. In reaching that

³Citing NRS 2.120(2), which recognizes that procedural rules adopted by the supreme court cannot “abridge, enlarge or modify any substantive right” or otherwise offend the Nevada constitution, Wells Fargo contends that the supreme court exceeded its rulemaking authority in adopting FMR 12(8)(a)(2) on the ground that the rule abridges or modifies its substantive right to foreclose. But Wells Fargo did not cite any case law explaining or applying the principles embodied by NRS 2.120, and, as a result, we decline to consider its argument in this regard. See *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that appellate courts need not consider issues that are not supported by relevant legal authority).

decision, the supreme court reasoned, as relevant here, that the beneficiary only needed to demonstrate the existence of the assignment because the purpose of that document was simply to establish the chain of title for the deed of trust. *See id.*


But regardless of whether the copy of the deed of trust here was presumptively authentic as Wells Fargo contends, *Einhorn* is distinguishable from the present case. In particular, this matter involves the deed of trust itself and, unlike with an assignment, it is not merely the existence of the deed of trust that is important, but also possession of the original.⁴ *See Edelstein*, 128 Nev. at 521-24, 286 P.3d at 260-62 (recognizing that only the holder of the note and the deed of trust has authority to foreclose); *see also* FMR 12(8)(a)(2) (requiring a sworn statement indicating that the person certifying documents for purposes of the FMP is in actual possession of the originals). And although Wells Fargo obtained a copy of the deed of trust from the county recorder's office and produced it at the mediation, neither that copy nor the county recorder's certification thereon demonstrated that Wells Fargo possessed the original document. *See* FMR 12(8)(a)(2); *see also Edelstein*, 128 Nev. at 521-24, 286 P.3d at 260-62. As a result, we conclude Wells Fargo failed to demonstrate that the district court abused its discretion in denying its petition for judicial review. *See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 480, 255 P.3d 1275, 1281

⁴Although Wells Fargo similarly argues that it was not required to demonstrate that it possessed the original deed of trust based on the rules governing recordation of deeds of trust, its argument fails for the same reason. Further, to the extent that Wells Fargo is concerned with the supreme court's prior application of *Edelstein* under circumstances similar to the present case, any such concerns should be addressed by seeking that court's review of this matter.

(2011) (reviewing a district court's decision with regard to a petition for judicial review in an FMP matter for an abuse of discretion). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Lynne K. Simons, District Judge
Tiffany & Bosco, P. A.
The Law Offices of J. Craig Demetras
Washoe District Court Clerk

⁵Insofar as the parties raise issues that are not specifically addressed herein, we have reviewed their arguments and conclude they do not warrant relief.