IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL RUTHERFORD; AND JILL RUTHERFORD,
Appellants,
vs.
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CITIGROUP MORTGAGE LOAN TRUST, INC., MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-6,
Respondent.[1]

No. 73038-COA

FILED

DEC 04 2018

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

ORDER OF AFFIRMANCE

Michael and Jill Rutherford appeal from a district court order granting a petition for judicial review in a foreclosure mediation matter. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

The Rutherfords participated in Nevada's Foreclosure Mediation Program (FMP) with respondent U.S. Bank, N.A., as trustee for CitiGroup Mortgage Loan Trust, Inc., Mortgage Pass-Through Certificates, Series 2007-6, but the mediation ended unsuccessfully. And because the mediator found that U.S. Bank failed to produce a certification of each endorsement of the note as required by NRS 107.086(5)[2] and FMR 13(7),[3]

[1]We direct the clerk of the court to amend the caption for this case to conform to the caption on this order.

[2]NRS 107.085 was amended effective June 12, 2017, 2017 Nev. Stat., ch. 571, § 2, at 4091-96, but that amendment does not affect the disposition of this appeal, as it was enacted after the underlying mediation.

[3]The FMRs became effective on June 30, 2009, and have been amended and renumbered numerous times since. For clarity, the citations

the FMP administrator recommended that a foreclosure certificate not issue. *See Pasillas v. HSBC Bank USA*, 127 Nev. 462, 469, 255 P.3d 1281, 1286 (2011) (listing the FMP's document production requirements as prerequisites for a foreclosure certificate to issue).

U.S. Bank petitioned for judicial review, arguing that it produced certifications for all of the endorsements of the note and that a foreclosure certificate should therefore issue. The Rutherfords disagreed, asserting that U.S. Bank failed to comply with the FMP's requirements for myriad other reasons, and requested that the district court impose additional sanctions against U.S. Bank beyond the denial of a foreclosure certificate. But the district court concluded that it could not consider the Rutherfords' request for sanctions or any of the new issues that they raised in their response since they did not file a cross-petition or otherwise respond to U.S. Bank's petition within the period for seeking judicial review. And because the district court also found that U.S. Bank produced a certification for each endorsement of the note, the court granted U.S. Bank's petition for judicial review. This appeal followed.

On appeal, the Rutherfords do not dispute that U.S. Bank brought a certification for each endorsement of the note to the mediation. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived). Instead, the Rutherfords assert that, based on the scope of a petition for judicial review of an FMP matter and the de novo standard of review that the district court must apply in evaluating such petitions, *see* FMR 23(2), (6) (setting forth the scope of, and standard for reviewing, a

---

in the text are to the FMRs that went into effect on January 13, 2016, and were the FMRs in effect at the time the underlying mediation occurred.

petition for judicial review in an FMP matter), the court should have considered the new issues that they raised in their response to U.S. Bank's petition along with their request for additional sanctions beyond the denial of a foreclosure certificate. But whether the district court could consider these matters in the absence of a timely cross-petition is a jurisdictional question, *see Nationstar Mortg., LLC v. Rodriguez*, 132 Nev. 559, 561-63, 375 P.3d 1027, 1028-29 (2016) (concluding that the period for filing a petition for judicial review is jurisdictional), and the rules governing the scope of a petition for judicial review and the standard for reviewing such a petition have no bearing on that question. Moreover, insofar as the Rutherfords requested that the district court impose additional sanctions against U.S. Bank beyond the denial of a foreclosure certificate, they were required to present their request for additional substantive relief in a cross-petition.

Nevertheless U.S. Bank concedes that, although the Rutherfords' failure to cross-petition for judicial review within their time for doing so precluded the district court from considering their request for sanctions, the court should have considered the new issues that they raised in their response to the underlying petition to the extent that those issues were presented in support of the FMP administrator's recommendation that a foreclosure certificate not issue. *See Gubber v. Indep. Mining Co.*, 112 Nev. 190, 192, 911 P.2d 1191, 1192 (1996) (holding that a party's failure to file a cross-petition before the district court did not prevent the party from raising an argument on appeal in support of an appeals officer's decision); *cf. Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) (concluding, in the context of an appeal, that a party "who seeks to alter the rights of the parties under a judgment must file a notice of cross-

appeal," but recognizing that a party "may . . . without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument"). But U.S. Bank also contends that the Rutherfords' arguments with regard to these issues lacked merit and that the district court's error in failing to consider them was harmless. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521-22, 286 P.3d 249, 260 (2012) (reviewing legal questions in an FMP matter de novo); *see also* NRCP 61 (requiring the court, at every stage of a proceeding, to disregard errors that do not affect a party's substantial rights).

For their part, the Rutherfords did not address these issues on the merits in their opening brief, which only argued that the district court should have considered them, and the Rutherfords did not file a reply brief to challenge U.S. Bank's contention that the district court's failure to consider these issues was harmless. Consequently, the Rutherfords waived any such challenge. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position"). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Elliott A. Sattler, District Judge
T M Pankopf PLLC
Ballard Spahr LLP/Las Vegas
Ballard Spahr LLP/Washington DC
Washoe District Court Clerk