IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OCWEN LOAN SERVICING, LLC, SERVICER FOR WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP SECURITIZATION TRUST, SERIES 2014-2; AND ALTISOURCE RESIDENTIAL, LP, Appellants, vs. PHILIP REDMON; AND PATRICIA REDMON, Respondents.	No. 73488-COA FILED DEC 14 2018 ELIZABETH A. BROWN CLERK OF SUPREME COURT BY S. Young DEPUTY CLERK
OCWEN LOAN SERVICING, LLC, SERVICER FOR WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP SECURITIZATION TRUST, SERIES 2014-2; AND ALTISOURCE RESIDENTIAL, LP, Appellants, vs. PHILIP REDMON; AND PATRICIA REDMON, Respondents.	No. 74336-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING (DOCKET NO. 73488-COA) AND VACATING POST-JUDGMENT ORDER AND REMANDING (DOCKET NO. 74336-COA)

Ocwen Loan Servicing, LLC, and Altisource Residential, LP, present consolidated appeals from a district court order granting a petition for judicial review and a post-judgment order directing payment of attorney fees and costs in a foreclosure mediation matter. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

18-908648

When purchasing their home, respondents Philip and Patricia Redmon executed a deed of trust, which designated Mortgage Electronic Registration Systems, Inc. (MERS), as the beneficiary, acting as nominee for their lender. The Redmons later defaulted and elected to participate in Nevada's Foreclosure Mediation Program (FMP). Ocwen appeared at the mediation and produced two assignments of the deed of trust to establish that it had been transferred from MERS to Altisource. Ocwen also produced a pooling and servicing agreement and a power of attorney to demonstrate that it was authorized to negotiate a loan modification for Altisource. But the mediation ended unsuccessfully and, because the mediator found that Ocwen failed to produce each assignment of the note and deed of trust, the FMP administrator recommended that a foreclosure certificate not issue.

The Redmons petitioned for judicial review, seeking additional sanctions against Ocwen and Altisource (sometimes referred to collectively as the Foreclosing Parties) on the ground that Ocwen failed to comply with the FMP's document production and good faith requirements. Over the Foreclosing Parties' opposition, the district court found that the pooling and servicing agreement and the power of attorney that Ocwen produced at the mediation were insufficient to establish its authority to negotiate a loan modification for Altisource. Based on that lack of authority to negotiate, as well as Ocwen's failure to offer the Redmons a loan modification option that would allow them to retain their home, the district court further found that Ocwen participated in the mediation in bad faith. And because the district court reasoned that Ocwen had continued the bad faith conduct of the Foreclosing Parties' predecessors in interest, the court held that punitive sanctions were warranted. Thus, the district court granted the Redmons' petition and directed the Foreclosing Parties to pay them $40,000 and to

reimburse them for certain of their attorney fees and costs. That decision is the subject of the appeal in Docket No. 73488.

Based on its order granting the Redmons' petition for judicial review, the district court later entered an order directing the Foreclosing Parties to pay the Redmons $17,118.37 in attorney fees and costs. That decision is the subject of the appeal in Docket No. 74336.

On appeal, the parties dispute whether the pooling and servicing agreement and power of attorney established Ocwen's authority to negotiate a loan modification for Altisource. As a preliminary matter, when a homeowner elects to participate in the FMP, the beneficiary must appear at the mediation, either personally or through a representative. *See* NRS 107.086(5)[1] (setting forth the FMP's attendance requirements); FMR 12(1)(a).[2] And if a representative appears at the mediation for the beneficiary, the representative must produce all of the documentation necessary to establish its authority to negotiate on the beneficiary's behalf. *See* NRS 107.086(5) (providing that, when a representative appears at the mediation for the beneficiary, the representative must have authority to negotiate for the beneficiary); FMR 13(7)(d) (requiring a representative who appears for the beneficiary to produce the agreement that authorizes it to negotiate for the beneficiary). Hence, because Ocwen asserted below, and continues to argue on appeal, that it appeared at the mediation for

---

[1]NRS 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.

[2]The 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 January 13, 2016, and were the FMRs in effect at the time the underlying mediation occurred.

Altisource, a crucial question before this court, despite Ocwen's bald assertion to the contrary, is whether Ocwen demonstrated that Altisource was the beneficiary. Indeed, without such a showing, the extent of Ocwen's authority to act for Altisource, as set forth in the pooling and servicing agreement and power of attorney, is meaningless for purposes of the FMP.

To demonstrate that Altisource was the beneficiary, Ocwen was required to produce each assignment of the deed of trust necessary to establish the chain-of-title from the original beneficiary, MERS, to Altisource. *See* NRS 107.086(5) (requiring a representative who appears for the beneficiary to produce each assignment of the deed of trust); FMR 13(7)(a); *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011) ("The legislative intent behind requiring a party to produce the assignments of the deed of trust and mortgage note is to ensure that whoever is foreclosing actually owns the note and has authority to modify the loan." (internal quotation marks omitted)). In this regard, the record reflects that Ocwen produced an assignment of the deed of trust from MERS to Bank of New York Mellon Trust Company (BNYM) and a subsequent assignment from MERS to Altisource. But while the Nevada Supreme Court has recognized that MERS is a legitimate beneficiary that may assign its interest in a deed of trust, *see Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521, 286 P.3d 249, 260 (2012), MERS could not assign an interest in the subject deed of trust to Altisource once it assigned its interest in that instrument to BNYM, absent an intermediate assignment from BNYM back to MERS. *See Zakarian v. Option One Mortg. Corp.*, 642 F. Supp. 2d 1206, 1213 (D. Haw. 2009) ("Once a valid and unqualified assignment is made, all interests and rights of the assignor are transferred to the assignee[, and] the assignor loses all control over the thing

assigned . . . ."); *cf. Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 740, 917 P.2d 447, 448 (1996) (providing that "when a tort action is assigned, the assignor loses the right to pursue the action"). And Ocwen did not produce any such intermediate assignment at the mediation.

Thus, based on the record before us, we conclude that Ocwen failed to produce each assignment of the deed of trust necessary to demonstrate that Altisource was the beneficiary and that, as a result, Ocwen also failed to establish that the beneficiary or a representative attended the mediation. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (2009) (explaining that the appellate court reviews mixed questions of law and fact de novo when legal issues predominate). Consequently, it was unnecessary for the district court to evaluate the extent of Ocwen's authority to negotiate for Altisource, and we therefore do not address the parties' arguments as to that issue.[3]

Given the foregoing, although our reasoning is slightly different than the district court's, we affirm its order granting the Redmons' petition

---

[3]Ocwen also contends that the district court erroneously determined that it negotiated in bad faith because it did not offer the Redmons a retention option. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521-22, 286 P.3d 249, 260 (2012) (reviewing the district court's legal conclusions de novo). Although we agree with Ocwen, *see* FMR 1(2) (providing that the FMP 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), we discern no basis for relief. Indeed, the district court also based its bad faith finding on its conclusion that Ocwen lacked authority to negotiate for Altisource, which, as discussed above, is correct insofar as Ocwen failed to show that Altisource was the beneficiary.

insofar as the court held that Ocwen violated the FMP's requirements and that it was therefore necessary for the court to consider whether to impose sanctions beyond the denial of a foreclosure certificate. *See Jacinto v. PennyMac Corp.*, 129 Nev. 300, 304, 300 P.3d 724, 727 (2013) (providing that the denial of a foreclosure certificate is the bare minimum sanction for noncompliance with NRS 107.086(5)'s requirements and that the district court has discretion to determine what additional sanctions are warranted); *see also Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 460 n.22, 168 P.3d 1055, 1062 n.22 (2007) (recognizing that the appellate court may affirm the district court's decision, if correct, for different reasons than relied upon below).

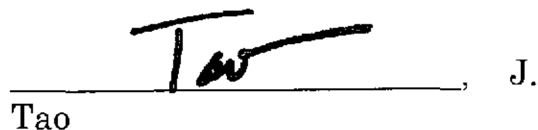
This does not end our examination of the issues presented here, however, as the parties dispute whether the district court, in imposing sanctions against the Foreclosing Parties beyond the denial of a foreclosure certificate, considered the conduct of their predecessors in interest and thereby abused its discretion. *See Jacinto*, 129 Nev. at 304, 300 P.3d at 727. Here, although the district court acknowledged in its order granting the Redmons' petition that the conduct of the Foreclosing Parties' predecessors in interest was outside the scope of the underlying judicial review, *see* FMR 23(2) (setting forth the scope of a petition for judicial review), the court nevertheless penalized those parties for the conduct of their predecessors. Indeed, the district court found that the Foreclosing Parties continued the bad faith conduct of their predecessors in interest and imposed sanctions against them that were "more punitive in nature" than those that the court apparently would have imposed absent the unidentified similarities between the various entities' conduct. And because the district court therefore relied, at least in part, on an improper basis for imposing

sanctions on the Foreclosing Parties beyond the denial of a foreclosure certificate, its decision in this regard was an abuse of discretion.

Thus, in Docket No. 73488, while we affirm the district court's order granting the Redmons' petition insofar as the court determined that it must consider whether additional sanctions were warranted based on Ocwen's violations of the FMP's requirements, we reverse the portion of that order imposing sanctions and remand this matter for the district court to reconsider the extent to which additional sanctions beyond the denial of a foreclosure certificate are warranted under *Pasillas* based on Ocwen's conduct, as opposed to the conduct of the Foreclosing Parties' predecessors in interest. And given that disposition, we also vacate the order directing Ocwen to pay the Redmons $17,118.37 in attorney fees and costs, which is the subject of the appeal in Docket No. 74336, as that order was based on the district court's prior decision to impose sanctions.

It is so ORDERED.[4]

_______________, C.J.
Silver



_______________, J.
Tao

_______________, J.
Gibbons

---

[4]Given our disposition of these appeals, we need not address the parties' remaining arguments.

cc: Hon. Elliott A. Sattler, District Judge
Jill I. Greiner, Settlement Judge
Wright, Finlay & Zak, LLP/Las Vegas
Geoffrey Lynn Giles
Washoe District Court Clerk