IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN DAVIS,
Appellant,
vs.
BANK OF NEW YORK MELLON; AND OCWEN LOAN SERVICING,
Respondents.

No. 74155-COA

ORDER OF REVERSAL AND REMAND

Appellant Steven Davis appeals from a district court order dismissing his complaint in a real property, tort, and contract action. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

After defaulting on his home loan, which was secured by a deed of trust that was purportedly assigned to respondent Bank of New York Mellon (BNYM), Davis enrolled in Nevada's Foreclosure Mediation Program (FMP) twice. In each instance, BNYM's trustee rescinded the underlying notice of default, and, as a result, no mediation took place. But shortly after rescinding the first two notices of default, the trustee recorded a third notice of default. And when Davis failed to take any action with respect to that notice, the FMP issued a foreclosure certificate.

Davis then sued BNYM and its servicer, respondent Ocwen Loan Servicing, asserting various real property, tort, and contract claims based on, as relevant here, allegations that respondents used deceptive practices to pursue foreclosure and did not establish their authority to foreclose. Respondents moved for dismissal under NRCP 12(b)(5) and Davis opposed the motion. At the resulting hearing, the district court reasoned that it lacked jurisdiction to consider Davis' allegations because he

presented them in an independent action rather than a petition for judicial review of the FMP's decision to issue the foreclosure certificate. But in its dismissal order, the district court concluded that Davis' allegations concerned confidential matters since they related to the FMP and dismissed the case on that basis. This appeal followed.

On appeal, the parties dispute whether the district court properly dismissed Davis' complaint on the ground that it concerned confidential matters. In this regard, the district court was correct insofar as it recognized that the foreclosure certificate is confidential unless recorded and that all documents and discussions presented during the mediation are confidential except where raised in the context of a judicial foreclosure action, a petition for judicial review, or a subsequent appeal. *See* FMR 7(3)[1] (addressing the confidentiality of foreclosure certificates); FMR 21(1) (dealing with the confidentiality of documents and discussions presented during the mediation). But because nothing in the record indicates that a mediation took place and the parties do not assert otherwise, the record likewise fails to demonstrate that any of Davis' allegations relate to documents or discussions presented during a mediation. *See* FMR 21(1). And although the FMP ultimately issued a foreclosure certificate, that document was subsequently recorded. *See* FMR 7(3).

Moreover, insofar as the supreme court read FMR 21(1) to apply to documents produced outside of the mediation when it concluded that

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[1]The FMRs became effective on June 30, 2009, and have been amended and renumbered numerous times since. For clarity, the citations in this text are to the FMRs that went into effect on January 13, 2016, which were the FMRs that would have applied had a mediation occurred.

certain documents, including mediator assignments, were confidential in *Civil Rights for Seniors v. Admin. Office of the Courts*, 129 Nev. 752, 758, 313 P.3d 216, 219-20 (2013), that case is distinguishable from the present matter. Notably, *Civil Rights* involved a third-party public records request for documents pertaining to prior mediations whereas, in the present matter, the record does not demonstrate that a mediation even occurred. Thus, we conclude the district court erred by dismissing Davis' complaint on the ground that the allegations therein concerned confidential matters that the court could not consider. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (reviewing legal conclusions in a district court dismissal order de novo).

Nevertheless, respondents contend that dismissal was proper because Davis could only properly present his allegations in a petition for judicial review. But since Davis did not enroll in the FMP after BNYM's trustee recorded the third notice of default, a mediation did not occur. And under these circumstances, the FMRs do not support the conclusion that Davis could have brought a petition for judicial review to challenge the resulting issuance of the foreclosure certificate. *See* FMR 8(3)(d) (providing that, when the homeowner fails to timely submit an enrollment in mediation form after receiving a notice of default, the FMP administrator must issue a foreclosure certificate stating that no mediation is required); FMR 23(2) (authorizing "a party to the mediation" to petition for judicial review). Moreover, even if a mediation had occurred, the proper scope of a subsequent petition for judicial review would not have encompassed Davis' concerns regarding his prior efforts to participate in the FMP. *See* FMR 23(2) (setting forth the scope of a petition for judicial review). Instead,

Davis would have had to bring an independent action to address those issues.

Regardless, a petition for judicial review is not the only avenue for challenging foreclosure certificates. Indeed, NRS 107.080(5)(a)[2] implicitly authorizes homeowners to collaterally attack foreclosure certificates insofar as it requires the district court to declare foreclosure sales void upon determining that the beneficiary failed to comply with NRS 107.086, which is the foreclosure mediation statute. And although a foreclosure sale has yet to occur here, we see no reason why Davis cannot present his concerns regarding respondents' compliance with NRS 107.086 in a pre-foreclosure-sale independent action—particularly since the Nevada Supreme Court has long recognized that real property is unique, that a loss of real property generally results in irreparable harm, and that a party should not be permitted to benefit from a confusing situation of its own creation. *See Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) (recognizing the unique nature of real property and the irreparable harm caused by its loss); *see also Ross v. Giacomo*, 97 Nev. 550, 553-54, 635 P.2d 298, 300 (1981) (refusing to allow respondent to benefit from confusingly sending two separate notices of entry on different dates), *overruled on other grounds by Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 524, 134 P.3d 726, 731 (2006). Thus, we conclude that the district court erred insofar as it dismissed Davis' complaint for want of jurisdiction. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672; *see also Ogawa v. Ogawa*,

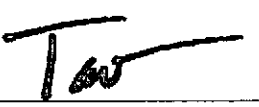
[2]Although NRS 107.080 was amended effective June 12, 2017, 2017 Nev. Stat., ch. 571, § 1.5, at 4085-91, we apply the version of that statute that went into effect on June 10, 2015, since it was the version in effect when the underlying case was commenced.

125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (providing that subject matter jurisdiction is a question of law subject to de novo review).

Lastly, the parties present limited argument regarding the sufficiency of Davis' allegations. But as respondents observe, because the district court did not reach this issue below, the court should have an opportunity to consider the issue in the first instance. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[3]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. William D. Kephart, District Judge
Crosby & Fox, LLC
Wright, Finlay & Zak, LLP/Las Vegas
Eighth District Court Clerk

[3]Having considered the parties' remaining arguments, we conclude that they either lack merit or need not be addressed given our disposition of this appeal.