

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRACY LEE CASTL,  
Appellant,  
vs.  
PENNYMAC HOLDINGS, LLC,  
Respondent.

No. 71082

TRACY LEE CASTL,  
Appellant,  
vs.  
PENNYMAC HOLDINGS, LLC,  
Respondent.

No. 71990

FILED

MAY 09 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE (DOCKET NO. 71082) AND AFFIRMING IN PART, REVERSING IN PART AND REMANDING (DOCKET NO. 71990)*

Tracy Lee Castl appeals from district court orders denying her petition for judicial review in a foreclosure mediation matter and dismissing her complaint in a real property and torts action. These appeals are consolidated. Eighth Judicial District Court, Clark County; Kathleen E. Delaney and Michelle Leavitt, Judges.

When she purchased her home, Castl executed a deed of trust naming Washington Mutual Bank, F.A. (WaMu), as the beneficiary. Castl eventually defaulted on her loan and elected to participate in Nevada's Foreclosure Mediation Program (FMP). PennyMac Holdings, LLC, appeared at the mediation and, to establish that it was the beneficiary, produced an assignment of the deed of trust from the Federal Deposit Insurance Corporation (FDIC), as receiver for WaMu, to JPMorgan Chase

Bank, N.A. (Chase), and another assignment from Chase to PennyMac. After the mediation ended unsuccessfully, the mediator found that PennyMac complied with the FMP's requirements, and the FMP administrator recommended that a foreclosure certificate issue.

Castl then petitioned for judicial review, arguing, among other things, that PennyMac failed to produce a necessary assignment of the deed of trust and that PennyMac produced a note on which her signature was forged. PennyMac opposed Castl's petition on both grounds. After the resulting hearing, the district court summarily found that PennyMac satisfied all of the FMP's requirements and, as a result, it denied Castl's petition. That decision is the subject of the appeal in Docket No. 71082.

Castl later brought an independent action against PennyMac, asserting claims for trespass, quiet title, and declaratory and injunctive relief. For support, Castl alleged that PennyMac unlawfully entered her property, that it presented the forged note referenced above at the mediation, and that the statute of limitations barred it from foreclosing on her property. PennyMac moved to dismiss Castl's complaint under NRCP 12(b)(5), asserting that she failed to state a claim for relief for assorted reasons, and Castl opposed that motion. Following a hearing on the matter, the district court entered a written order summarily dismissing Castl's complaint. That decision gave rise to the appeal in Docket No. 71990.

*Docket No. 71082*

On appeal, Castl argues that an assignment from WaMu to the FDIC was missing, *see* NRS 107.086(5)<sup>1</sup> (requiring the beneficiary to produce each assignment at the mediation); FMR 12(7)(a)<sup>2</sup> (mandating the same at least 10 days before the mediation), while PennyMac counters that no such assignment was needed because the FDIC was the receiver for WaMu. Castl does not dispute that the FDIC was appointed as WaMu's receiver. And under federal law, when the FDIC became WaMu's receiver, it acquired "all rights, titles, powers, and privileges" with respect to WaMu's assets along with the power to transfer them "without any approval, assignment, or consent." 12 U.S.C. 1821(d)(2)(A), (G)(i). Thus, no written assignment was necessary for the FDIC to effect a transfer of WaMu's beneficial interest in the deed of trust to Chase notwithstanding state law.<sup>3</sup> *See Demelo v. U.S. Bank Nat'l Ass'n*, 727 F.3d 117, 125 (1st Cir. 2013)

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<sup>1</sup>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.

<sup>2</sup>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 April 1, 2014, and were the FMRs in effect at the time the underlying mediation occurred.

<sup>3</sup>Insofar as Castl asserts that WaMu may have assigned her deed of trust to a third-party before the FDIC became its receiver, we discern no basis for relief, as Castl has not identified any documentation to indicate that such an assignment occurred. To the contrary, Castl produced a report from the Clark County Recorder's office, which reflects that WaMu was the beneficiary when it went into receivership with the FDIC.

(applying 12 U.S.C. § 1821(d)(2)(G)(i) and reasoning that “a transfer of a mortgage, authorized by federal law, obviates the need for the specific written assignment that state law would otherwise require”).

Castl next argues that, in denying her petition, the district court improperly failed to address whether her signature was forged on the note that PennyMac produced at the mediation.<sup>4</sup> Initially, the district court’s written order is unclear as to how it handled the forgery issue, but a review of the transcript from the hearing on Castl’s petition reflects that the court determined that the matter was outside the scope of a petition for judicial review. *See Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 110 (1970) (explaining that “even in the absence of express findings, if the record is clear and will support the judgment, findings may be implied”). The propriety of that decision is called into question by *Wood v. Germann*, 130 Nev. 553, 555 n.3, 331 P.3d 859, 860 n.3 (2014), where the supreme court explained that certain unspecified challenges to the veracity of a lender’s loan documents can fall within the scope of a petition for judicial review since those challenges can implicate the lender’s authority to foreclose.

But PennyMac argues that the district court’s decision was proper under the more recent case of *Nationstar Mortg., LLC v. Rodriguez*,

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<sup>4</sup>Castl also asserts that PennyMac failed to produce an original or certified copy of the note at the mediation. But the mediator and district court both found that PennyMac complied with the FMP’s document production requirements and, consistent with those findings, our review of the record reveals a copy of the note along with the necessary information to certify that document as a copy of the original. *See* NRS 107.086(5); FMR 12(7)(a); *see also* FMR 12(8) (setting forth the requirements to certify a document as a copy of an original for purposes of the FMRs).

132 Nev. \_\_\_, \_\_\_ n.2, 375 P.3d 1027, 1029 n.2 (2016), where the supreme court, in addressing a fraud allegation, explained that “[a] petition for judicial review is not meant as an avenue to bring original claims.” And while Castl argued in her reply brief that PennyMac had an affirmative duty to establish its authority to negotiate a loan under *Leyva v. Nat’l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275 (2011), she failed to address PennyMac’s assertion with regard to *Nationstar* and thereby waived any challenge to the applicability of that case. *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”).

Given the foregoing, Castl failed to demonstrate that the district court abused its discretion in refusing to hold an evidentiary hearing on the issues discussed above and in denying her petition for judicial review. *See FMR 22(2)* (providing the district court with discretion to determine the extent to which an evidentiary hearing is warranted); *see also Leyva*, 127 Nev. at 480, 255 P.3d at 1281 (reviewing the denial of a petition for judicial review in an FMP matter for an abuse of discretion). Accordingly, we affirm the district court’s decision in Docket No. 71082.

*Docket No. 71990*

Turning to the appeal in Docket No. 71990, Castl asserts that the district court dismissed her complaint, under the issue-preclusion doctrine, based on the order denying her petition in the FMP matter. Although the district court’s written order did not include findings in

support of dismissal, the associated transcript strongly suggests that the court dismissed the case on issue-preclusion grounds, and PennyMac effectively conceded as much by failing to dispute Castl's characterization of the court's decision. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (concluding that respondents confessed error by failing to respond to appellant's argument). Accordingly, we proceed to consider the propriety of the district court's application of the issue preclusion doctrine.

As to that matter, Castl asserts that the district court erred in relying on issue preclusion to dismiss each of her claims on the ground that the statute of limitations, trespass, and forgery issues were not actually and necessarily litigated in the FMP matter. *See Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) (reviewing a district court's dismissal of a complaint on issue-preclusion grounds de novo); *see also Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (explaining that an issue must be actually and necessarily litigated in the first proceeding to be barred by the issue-preclusion doctrine in the second proceeding). Initially, because PennyMac does not dispute that the statute of limitations and trespass issues were not actually and necessarily litigated in the FMP matter, it effectively conceded that the district court erred in dismissing Castl's associated claims on issue preclusion grounds. *See Bates*, 100 Nev. at 682, 691 P.2d at 870.

With regard to forgery, however, PennyMac argues that the district court in the present matter properly applied the issue-preclusion doctrine on the ground that the district court in the FMP matter found that Castl signed the note even though it also concluded that her forgery allegation was beyond the scope of a petition for judicial review. But

nothing in the record from the FMP matter indicates that the district court there found that Castl signed the subject note despite concluding that it could not consider her allegations that she did not do so. Accordingly, we conclude that the district court in the present matter erred in relying on the issue-preclusion doctrine to dismiss Castl's forgery-based claims.

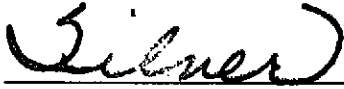
Lastly, PennyMac effectively turns to the harmless-error doctrine, *see* NRCP 61 (requiring the court, at every stage of a proceeding, to disregard errors that do not affect a party's substantial rights), arguing that dismissal was necessary as to the trespass and statute of limitations based claims on the merits. Turning first to trespass, while PennyMac asserts that dismissal was required because Castl authorized it to make certain reasonable entries, resolution of that issue requires factual findings as to reasonableness, which this court is "not particularly well-suited to make . . . in the first instance." *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012).


As to the statute of limitations issue, PennyMac argues that dismissal of Castl's associated claims was proper because they were based on her assertion that foreclosure was barred by the limitations period set forth in NRS 11.190(1)(b), which PennyMac maintains does not apply to nonjudicial foreclosures. In this regard, despite Castl's appellate contentions to the contrary, NRS 11.190(1)(b)'s limitations period does not prevent PennyMac from pursuing a nonjudicial foreclosure, even if that statute otherwise prevents PennyMac from asserting a breach of contract claim based on the note. *See Facklam v. HSBC Bank USA*, 133 Nev. \_\_\_, \_\_\_, 401 P.3d 1068, 1071 (2017) (holding that "a lender may recover on a deed of trust even after the statute of limitations for contractual remedies

on the note has passed"). Accordingly, we conclude that, although the district court erred in dismissing Castl's statute of limitations based claims on preclusion grounds, that error was harmless. See NRCP 61.

Thus, in Docket No. 71990, we affirm the dismissal of Castl's statute of limitations based claims, but reverse and remand the dismissal of her trespass and forgery-based claims.<sup>5</sup>

It is so ORDERED.<sup>6</sup>

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge  
Hon. Michelle Leavitt, District Judge  
Tracy Lee Castl  
Hafter Law  
Akerman LLP/Las Vegas  
Eighth District Court Clerk

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<sup>5</sup>Given our disposition of this matter, we need not address the parties' remaining arguments.

<sup>6</sup>We note that Castl's attorney of record, Jacob Hafter, was suspended in 2017 and later passed away. Consequently, we direct counsel for PennyMac to ascertain, to the best of their ability, an appropriate address for service of documents on Castl and to serve her with a copy of this order within 10 days of its entry. Counsel for PennyMac shall then file proof of service of the order with this court within 10 days of the date of service. If counsel for PennyMac cannot ascertain an appropriate service address for Castl, counsel shall notify this court within that same period.