

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARY LAW,
Appellant,
vs.
FEDERAL NATIONAL MORTGAGE
ASSOCIATION; AND GREEN TREE
SERVICING, LLC,
Respondents.¹

No. 69469

FILED

DEC 28 2016

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a petition for judicial review in a foreclosure mediation matter. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Appellant Mary Law participated in Nevada's Foreclosure Mediation Program (FMP) with respondent Green Tree Servicing, LLC. At the end of the mediation, the mediator found that Green Tree failed to bring each assignment of the deed of trust and denied Green Tree a foreclosure certificate. Law then petitioned for judicial review, seeking additional sanctions against both Green Tree and respondent Federal National Mortgage Association (Fannie Mae) for their failure to comply with the FMP rules. Respondents opposed the petition. Ultimately, the district court found that Green Tree had brought an assignment to the

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

mediation and otherwise acted in good faith. As a result, the court denied the petition. This appeal followed.²

Fannie Mae

As a preliminary matter, Law argues that Fannie Mae failed to participate in the mediation. Respondents contend that Fannie Mae was not required to participate because Green Tree was the beneficiary of the deed of trust and appeared on behalf of Fannie Mae, the owner of the loan, as its loan servicer. If it is true that Green Tree is both the beneficiary of the deed of trust and the holder of the note, it is entitled to enforce the note and to appear at the mediation without Fannie Mae's participation. See NRS 107.086(5) (requiring "[t]he beneficiary of the deed of trust or a representative" to attend a mediation under the FMP); *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 514 & n.7, 286 P.3d 249, 255 & n.7 (2012) (explaining that "to have standing to foreclose, the current beneficiary of the deed of trust and the current holder of the promissory note must be the same" and noting that, in requiring the trust deed beneficiary to comply with the FMP requirements, "the Legislature considered the beneficiary of the deed of trust to be the same party as the note holder").

But, as discussed below, Green Tree did not establish at the mediation that it was the proper beneficiary of the deed of trust. And

²Although the district court denied the petition, because Green Tree rescinded its notice of default after the mediator denied the foreclosure certificate, if Green Tree wants to foreclose on the property, it will have to restart the proceedings by filing a new notice of default and proceeding through the steps that follow. Thus, the issues presented by this appeal only relate to whether the district court should have imposed additional sanctions against respondents for their actions in the mediation.

respondents' representations that Fannie Mae was the owner of the loan raise questions as to whether Green Tree was appearing as Fannie Mae's representative and, thus, whether it properly demonstrated that it had authority under Foreclosure Mediation Rule (FMR) 13(7)(d), which requires a third party appearing on behalf of a trust deed beneficiary to produce a copy of any agreement authorizing the third party to act as the beneficiary's representative.³ See *In re Montierth*, 131 Nev. ___, ___, 354 P.3d 648, 651 (2015) (recognizing that an agent may be entitled to enforce a loan only on behalf of, and at the direction of, its principal). Because determining Green Tree and Fannie Mae's respective authority, and thus, the extent to which each was permitted or required to participate in the mediation, involves the resolution of factual issues, we do not consider this dispute further on appeal. See *Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). On remand, the district court

³To the extent respondents rely on *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 667-68, 310 P.3d 569, 574 (2013), for the proposition that a loan servicer may appear on behalf of a trust deed beneficiary without complying with FMR 13(7)(d), that argument is tenuous, as the mediation in that case took place on December 28, 2010, two years before the predecessor to FMR 13(7)(d) was adopted into the Foreclosure Mediation Rules and *Markowitz* makes no mention of the rule. See *Markowitz*, 129 Nev. at 663, 310 P.3d at 570; see also ADKT 0435 (December 6, 2012, Order Amending Foreclosure Mediation Rules) (adopting a rule requiring a third party representing a trust deed beneficiary to produce any agreement demonstrating its authority to participate on behalf of the beneficiary, effective January 1, 2013). Regardless, because Green Tree failed to establish its precise relationship with Fannie Mae, we need not reach this issue in this appeal.

should consider this issue to the extent necessary to determine whether sanctions are appropriate against respondents.

Assignments

Law also argues the district court clearly erred in finding that Green Tree brought the only necessary assignment to the mediation. Her argument in this regard has two components. First, she contends that Green Tree failed to bring an assignment demonstrating that the deed of trust had been assigned to Green Tree to the mediation. And second, she asserts that the deed of trust had previously been assigned to Bank of America (BOA), and Green Tree failed to bring any assignments to or from BOA to the mediation, thus failing to demonstrate a clear chain of title for the deed of trust.⁴

Under NRS 107.086(5), which requires strict compliance, the beneficiary must bring each assignment of a deed of trust to the mediation. *See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011) (concluding that NRS 107.086(5) necessitates strict compliance). We review a district court's factual findings for clear error and substantial evidentiary support. *See Edelstein*, 128 Nev. at 521-22, 286 P.3d at 260 (recognizing that the appellate court defers to the district court's factual findings so long as they are not clearly erroneous and are supported by substantial evidence).

⁴Respondents assert that Law failed to raise before the district court, and thereby waived, any argument that an assignment from BOA to MERS was required before MERS could assign the deed of trust to Green Tree, but our review of the record reveals that Law raised this argument during the hearing on her petition for judicial review and the related evidentiary hearing.

Green Tree

In denying Law's petition for review, the district court found that Green Tree brought an assignment from the Mortgage Electronic Registration Systems, Inc. (MERS) to Green Tree to the mediation, demonstrating that it was the current beneficiary of the deed of trust.⁵ This finding was clearly erroneous, however, as the mediator found that Green Tree did not bring the assignment and respondents conceded during an evidentiary hearing that they did not bring the assignment to the mediation. Because Green Tree failed to bring the assignment to the mediation, the certificate was properly denied and the district court was required to consider whether additional sanctions were warranted based on this failure. *See Pasillas v. HSBC Bank USA*, 127 Nev. 462, 469-70, 255 P.3d 1281, 1286-87 (2011) (providing that an FMP certificate must not issue when a party violates NRS 107.086(5), that additional sanctions may be appropriate, and that the district court must consider a nonexhaustive list of factors in evaluating whether sanctions are warranted).

BOA

As to the second part of Law's argument, the district court did not address the purportedly missing BOA assignments. In this regard, respondents have not disputed that MERS previously assigned the deed of trust to BOA, instead asserting that Law failed to demonstrate that any missing assignments negatively impacted Green Tree's ability to foreclose.

⁵The district court appears to have misunderstood Law's petition to be arguing that an assignment from MERS is not a valid assignment. The question of whether MERS is a legitimate beneficiary that may assign its interest in a deed of trust was resolved by *Edelstein*, and Law has not raised that question, either in the underlying matter or on appeal.

If MERS previously assigned the deed of trust to BOA, then BOA had to assign the deed of trust back to MERS before MERS could effectively assign any interest in that instrument to Green Tree.⁶ 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”). Thus, to the extent respondents do not dispute that an assignment to BOA previously occurred, they must produce all assignments to and from BOA in order to comply with the FMP requirements and demonstrate their authority to pursue foreclosure proceedings. See NRS 107.086(5) (requiring a beneficiary to bring “each assignment of the deed of trust” to the mediation); *Leyva*, 127 Nev. at 477, 255 P.3d at 1279 (explaining that “[a]bsent a proper assignment” one “lacks standing to pursue foreclosure proceedings”).


Under these circumstances, the district court’s conclusion that Green Tree brought all necessary assignments to the mediation was not supported by substantial evidence. See *Edelstein*, 128 Nev. at 521-22, 286 P.3d at 260 (recognizing that the appellate court defers to the district court’s factual findings so long as they are not clearly erroneous and are

⁶To the extent respondents’ contentions could be construed as arguments that *Edelstein* permits MERS to assign the same interest more than once, without an intervening assignment back to MERS, nothing in *Edelstein* permits MERS to assign an interest in a deed of trust that it has previously assigned to another entity. See generally *Edelstein*, 128 Nev. 505, 286 P.3d 249.

supported by substantial evidence). And the district court's refusal to consider whether additional sanctions were warranted therefore constituted an abused its discretion. *See Pasillas*, 127 Nev. at 469-70, 255 P.3d at 1286-87.

In light of the above, we reverse the district court's order denying judicial review and remand this matter to the district court to consider whether Fannie Mae's failure to participate in the mediation or Green Tree's failure to bring each assignment of the deed of trust to the mediation warrants sanctions beyond the denial of the FMP certificate.

It is so ORDERED.⁷


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

⁷We have considered Law's remaining arguments and conclude that they do not provide a basis for reversal. We also deny respondents' request to strike Geoffrey Giles' declaration from the record on appeal because they failed to object when Law introduced that document below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

cc: Hon. David A. Hardy, District Judge
Debbie Leonard, Settlement Judge
Keith J. Tierney
Wolfe & Wyman LLP
Washoe District Court Clerk