

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NELLYA VOLOSTNYKH,
Appellant,
vs.
U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE, SUCCESSOR IN
INTEREST TO BANK OF AMERICA,
NATIONAL ASSOCIATION AS
TRUSTEE AS SUCCESSOR BY
MERGER TO LASALLE BANK,
NATIONAL ASSOCIATION AS
TRUSTEE FOR WAMU MORTGAGE
PASS-THROUGH CERTIFICATES
SERIES 2007-HY6TRUST,
Respondent.

No. 76493-COA

FILED

SEP 18 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Nellya Volostnykh appeals from a district court order denying a motion for sanctions and issuing a foreclosure mediation program certificate. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

After defaulting on her home loan, Volostnykh elected to participate in Nevada's Foreclosure Mediation Program (FMP). U.S. Bank appeared at the mediation, through counsel, and produced an assignment of the deed of trust that named Bank of America (BoA) as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-HY06 Trust (WaMu Trust). Additionally, U.S. Bank produced an affidavit stating that U.S. Bank had purchased BoA's trust administration business, acquiring the WaMu Trust, and that U.S. Bank had succeeded BoA as trustee for the WaMu Trust.

At the mediation, the mediator found that the property did not meet the eligibility threshold pursuant to the FMP rules because the record

19-38901

owner of the property was an LLC and not a person or trustee of a trust. The mediator also found that U.S. Bank failed to bring certified copies of each assignment of the deed of trust and that the affidavit it produced regarding a change in trustee was insufficient. Nonetheless, the record on appeal suggests that U.S. Bank was willing to negotiate with Volostnykh and that the FMP took place and continued until such time as Volostnykh ended the mediation because she was convinced U.S. Bank had produced insufficient documentation.

Ultimately, the mediator recommended that Volostnykh's petition be dismissed because the parties were unable to agree to a loan modification. Volostnykh then filed a motion for sanctions against U.S. Bank. At the hearing on the sanctions motion, the district court refused to review an unrecorded deed presented by Volostnykh, allegedly proving her ownership over the subject property. The district court denied Volostnykh's motion for sanctions and issued an FMP certificate on the grounds that the true ownership of the property was at issue and that Volostnykh was not the record titleholder; therefore, she was ineligible for a loan modification pursuant to the FMP.¹

On appeal, Volostnykh contends that the district court erred by denying her motion for sanctions and issuing the FMP certificate because she was eligible for the FMP. Volostnykh further argues that the district court should have sanctioned U.S. Bank for failing to produce the required assignments of the deed of trust at the mediation, primarily by not issuing the FMP certificate. Finally, Volostnykh argues that the mediator and the district court violated her right to due process by finding her ineligible for

¹We do not recount the facts except as necessary to our decision.

the FMP based on the unrecorded deed. U.S. Bank counters that the district court properly issued the FMP certificate because Volostnykh failed to produce a recorded deed to support her ownership of the property and, therefore, she was not entitled to participate in the FMP in the first place.²

We first address whether the district court abused its discretion in failing to impose sanctions on U.S. Bank for its lack of proper documentation. We “review a district court’s decision regarding the imposition of sanctions for a party’s participation in the Foreclosure Mediation Program under an abuse of discretion standard.” *Leyva v. Nat’l Default Servicing Corp.*, 127 Nev. 470, 475, 255 P.3d 1275, 1278 (2011) (internal quotation marks omitted).

Under Nevada law, the beneficiary under the deed of trust or the beneficiary’s representative must participate in the foreclosure mediation and must provide *each* assignment of the deed of trust. NRS 107.086(5); FMR 13(7). If the beneficiary under the deed of trust or the beneficiary’s representative fails to provide each assignment of the deed of trust, the court may issue sanctions against the beneficiary of the deed of trust, including denying an FMP certificate. NRS 107.086(6), (8). Here, U.S. Bank provided each required assignment of the deed of trust because although the trustee changed, the beneficiary of the deed of trust did not, and, therefore, no new assignment was required. *See Rheinschild Family Tr. v. Rankin*, No. 1:15-

²U.S. Bank further argues that Volostnykh’s motion for sanctions was untimely and, therefore, properly denied. We decline to address the timeliness issue because the district court not only heard the motion for sanctions, but also did not consider timeliness in its order denying Volostnykh’s motion. We would note that the mediator’s decision was electronically served on the parties, thereby giving Volostnykh three additional days to file her motion making it timely. *See* NRCP 6(e) (2005).

CV-00194-EJL, 2016 WL 1170945, at *10-11 (D. Idaho March 24, 2016) (providing that a mortgage-backed security is the beneficiary under a deed of trust when that deed of trust is assigned to a trustee of the mortgage-backed security); *cf. Torres v. Christiana Tr. of ARLP Securitization Tr.* 2015-1, Docket No. 71359-COA, *2 (Order of Reversal and Remand, Ct. App., March 29, 2018).

To illustrate, here, the assignment of the deed of trust listed BoA as the trustee for the WaMu Trust. Consequently, the WaMu Trust was the beneficiary under the deed of trust, not BoA. As such, U.S. Bank's affidavit was evidence of its status as the new trustee for the WaMu Trust, not as the new beneficiary under the deed of trust. Therefore, the WaMu trust remained the beneficiary under the deed of trust, and no new assignment was required. Accordingly, we conclude that U.S. Bank provided sufficient documentation to participate in the mediation and, therefore, the district court did not abuse its discretion by refraining from imposing sanctions against U.S. Bank.

We next agree with Volostnykh that she was eligible for the FMP. Questions of statutory interpretation are reviewed *de novo*. *Bldg. Energetix Corp. v. EHE, LP*, 129 Nev. 78, 82, 294 P.3d 1228, 1231 (2013). And, we do not look beyond an unambiguous statute's plain language. *Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015). "[T]he grantor *or* the person who holds the title of record may petition the district court to participate in mediation" NRS 107.086(2)(a)(4) (emphasis added); *see also Leyva*, 127 Nev. at 474, 255 P.3d at 1278. "Generally, courts presume that 'or' is used in a statute disjunctively" 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7th ed. 2009). A grantor is also

known as the borrower who executes the deed of trust. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 512, 286 P.3d 249, 254 (2012).


Here, Volostnykh executed the deed of trust and is therefore the grantor. As the grantor and owner-occupier³, she was eligible to participate in the FMP. The record demonstrates that evidence proving Volostnykh's status as the grantor (the deed of trust) was distributed to the pertinent parties prior to the mediation. *See* FMR 13(7). The unrecorded deed should not have factored into the mediator's or the district court's determination in this case because it was not dispositive of Volostnykh's eligibility for the FMP. Therefore, the district court erred in finding Volostnykh was not eligible for the FMP because of the unrecorded deed.

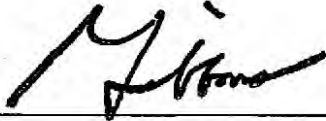
Nevertheless, we affirm the district court's decision to issue the FMP certificate because the parties were unable to reach a loan modification, and there is no evidence in the record to support that U.S. Bank negotiated in bad faith warranting the denial of the FMP certificate. *See* NRS 107.086(6), (8); *see also Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason."). The record does not support the conclusion that Volostnykh was deprived of her right to participate in the FMP because of her eligibility status. Instead, the record demonstrates that Volostnykh was given the opportunity to negotiate her loan at the mediation and that she did so until she chose to discontinue negotiations. Thus, while the mediator noted, and the district court found, that Volostnykh was not eligible for the FMP, nothing in the record demonstrates that this impeded the mediation process.


³There is no dispute on appeal that Volostnykh occupied the property as her home. *See* FMR 7(1)-(2).

Indeed, U.S. Bank expressed its willingness to continue negotiating in spite of its objection regarding her eligibility. Therefore, we conclude that the district court properly issued the FMP certificate, albeit for the wrong reason.⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Kern Law, Ltd.
Smith Larsen & Wixom
Eighth District Court Clerk

⁴Because Volostnykh raised her due process argument for the first time on appeal, we need not review it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of the court, is deemed to have been waived and will not be considered on appeal.”). However, we reiterate that Volostnykh had the opportunity to negotiate a loan modification but chose to end the mediation herself. Moreover, we are unpersuaded that Volostnykh had no recourse available to her in raising her due process concerns prior to this appeal. Volostnykh could have requested a continuance of the mediation to allow her to clarify her eligibility to participate in the FMP as a grantor-homeowner, or although unnecessary, to file her unrecorded deed and present it at the continued mediation. Again, it is unclear if this would have changed the mediation’s outcome since Volostnykh chose to discontinue the negotiations.