

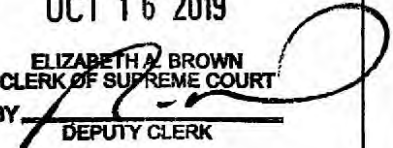
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIAN KANE,
Appellant,
vs.
U.S. BANK, N.A.,
Respondent.

No. 74642-COA

FILED

OCT 16 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Marian Kane appeals from a district court order denying a petition for judicial review in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Kane participated in Nevada's Foreclosure Mediation Program (FMP) with respondent U.S. Bank, N.A. The parties initially proceeded through a procedure defined by FMR 13(2)-(6),¹ which required Kane to produce documents necessary to establish her eligibility for a loan modification pursuant to a series of requests from U.S. Bank. The parties later appeared for the scheduled mediation, but agreed to continue it to afford U.S. Bank additional time to evaluate the documents that Kane had produced. U.S. Bank then requested that Kane produce more documents. Two weeks after Kane responded, the parties met for the continued mediation, which was unsuccessful. But because the mediator found that

¹The 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.

the beneficiary or a representative with authority to negotiate attended the mediation, brought the required documents, and negotiated in good faith as required by subsections five and six of NRS 107.086² and the analogous provisions in the FMRs, the FMP administrator recommended that a foreclosure certificate issue. *See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475-76, 255 P.3d 1275, 1278-79 (2011) (explaining that the above actions are a predicate to a foreclosure certificate issuing).

Kane petitioned for judicial review, arguing that U.S. Bank did not participate in the mediation in good faith because it failed to comply with the timeline for requesting documents set forth in FMR 13(2)-(6) and did not request additional documents to assess her eligibility for a loan modification between her final document production and the continued mediation. U.S. Bank disagreed, asserting that Kane was responsible for any delays and the outcome of the mediation because she incorrectly claimed to receive self-employment income when the documents that she gradually produced actually showed that she received money from a corporation that was possibly owned by her husband and that did not employ her.

At the resulting hearing, the district court concluded that, because the parties initially agreed to continue the mediation, Kane effectively waived her concerns over what transpired before that agreement. The district court next acknowledged that U.S. Bank possibly could have sought alternative documentation between Kane's final document production and the continued mediation to assess her eligibility for a loan

²NRS 107.086 was amended effective June 12, 2017, 2017 Nev. Stat., ch. 571, § 2, at 4091-96, but that amendment does not affect the disposition of this appeal, as it was enacted after the underlying mediation.

modification based on the money that she received from the corporation. But the district court rejected Kane's argument that U.S. Bank's failure to do so was indicative of a lack of good faith participation, emphasizing that Kane represented that she received self-employment income and that U.S. Bank proceeded accordingly throughout the mediation. Thereafter, the district court entered a written order denying Kane's petition, which summarily concluded that U.S. Bank participated in the mediation in good faith. This appeal followed.

On appeal, Kane initially challenges the district court's good faith determination, arguing that U.S. Bank failed to conduct a meaningful review of her eligibility for a loan modification prior to the initial date of the mediation because, before that time, it failed to comply with the timeframe for requesting documents set forth in FMR 13(2)-(6). But the transcript from the underlying show-cause hearing reflects that, in making its good faith determination, the district court treated Kane's agreement to continue the mediation as an effective waiver of her concerns with respect to what previously transpired. And because Kane did not object to that treatment below or address it on appeal, she waived any challenge thereto. *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."); *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived). Thus, Kane failed to demonstrate that relief is warranted in this regard.

Kane presents a similar argument, however, based on U.S. Bank's failure to request additional documents during the two weeks between her final document production and the continued mediation.

Initially, although FMR 13(2)-(6) sets forth a procedure for the beneficiary to request documents from the homeowner, that procedure also has a clear ending. Indeed, under those rules, the beneficiary is authorized to make an initial request for documents to which the homeowner is required to respond. FMRs 13(2)-(3). The beneficiary is then permitted to request additional or corrected documents, and when the homeowner provides the required response, the homeowner's documents are "deemed complete." FMR13(4)-(5). Then, within the next five days, the beneficiary is permitted to request clarification or to identify any inadequacies in the homeowner's documentation, and the homeowner is again required to respond. FMR 13(6). FMR 13(2)-(6) require nothing further. Thus, because Kane essentially argues that U.S. Bank should have requested additional documents even after the above steps were completed, FMR 13 does not control.³

Nevertheless, if after completing the procedure set forth in FMR 13(2)-(6), the beneficiary does not continue to work with the homeowner to obtain the documents necessary to assess the homeowner's eligibility for a loan modification, the beneficiary's conduct may be indicative of a lack of good faith participation in the mediation. But given that Kane incorrectly claimed to receive self-employment income and that


³Moreover, insofar as Kane cites FMR 13(4) for the proposition that "[i]f the beneficiary of the deed of trust fails to request additional and/or corrected documents from the homeowner, it will be estopped from claiming that the review of any option was not possible," her argument is unavailing. Indeed, as discussed above, this provision does not deal with the type of request at issue here, but instead, addresses the beneficiary's authority to request additional or corrected documents following the homeowner's initial document production. *See* FMR 13(4).

U.S. Bank proceeded accordingly through the above document production procedure and beyond, we cannot say that the district court improperly concluded that U.S. Bank participated in the mediation in good faith even though it did not seek alternative documentation from Kane during the two weeks preceding the continued mediation.⁴

Thus, given the foregoing and because Kane does not otherwise challenge the district court's order denying her petition for judicial review, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁴This is particularly the case since Kane did not provide the district court with any of U.S. Bank's document requests or the documents that she produced in response, which would have permitted the district court to fully evaluate whether U.S. Bank was stonewalling Kane by attempting to verify her claimed self-employment income rather than seeking proof that she qualified for a modification by some other means prior to the continued mediation. As a result, we note that the district court proceeded based on the largely undisputed timeline of events in the present case and the representations of the parties' mediation counsel at the show-cause hearing. And because Kane did not object to that approach below or otherwise challenge it on appeal, *see Old Aztec*, 97 Nev. at 52, 623 P.2d at 983; *Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3, we have followed suit.

cc: Hon. Kathleen E. Delaney, District Judge
Eleissa C. Lavelle, Settlement Judge
Peters & Associates, LLP
Justin T. Grim
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Eighth District Court Clerk