IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OCWEN LOAN SERVICING, LLC, SERVICER FOR WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP SECURITIZATION, SERIES 2014-2; AND ALTISOURCE RESIDENTIAL LP, Appellants, vs. PHILIP REDMON; AND PATRICIA REDMON, Respondents.	No. 79297-COA
OCWEN LOAN SERVICING, LLC, SERVICER FOR WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP SECURITIZATION TRUST, SERIES 2014-2; AND ALTISOURCE RESIDENTIAL LP, Appellants, vs. PHILIP REDMON; AND PATRICIA REDMON, Respondents.	No. 80131-COA

FILED

JAN 25 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ocwen Loan Servicing, LLC (Ocwen) and Altisource Residential LP (Altisource) (collectively referred to as the Foreclosing Parties) appeal from district court orders granting a petition for judicial review from the Foreclosure Mediation Program (FMP), issuing sanctions, and awarding attorney fees and costs. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Respondents Phillip and Patricia Redmon purchased a home in Reno in 2007, but they defaulted on their mortgage in 2009.[1] In 2015, Altisource purchased the Redmons' loan and Ocwen assumed servicing the loan on behalf of Altisource.[2] Ocwen sought foreclosure and the Redmons elected to participate in the FMP.[3]

Ocwen attended the March 2016 mediation on behalf of Altisource. Ocwen produced two assignments, but the mediator concluded that there was a missing assignment.[4] The mediator recommended sanctions

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[1]We recite the facts only as necessary for our disposition.

[2]In 2009, the Redmons were involved in a foreclosure mediation with the Bank of New York, Mellon (BONY) and HomEq Servicing Inc. regarding this home. That case resulted in an appeal and eventual sanctions against BONY and HomEq for FMP violations. *See Redmon v. HomEq Serv., Inc.*, Docket No. 56358 (Order Vacating Judgment and Remanding, July 7, 2011). Those proceedings are not relevant to the instant appeal, but provide necessary context for our disposition.

[3]The FMP requires beneficiaries of the deed of trust to attend the mediation, or send a representative that is authorized to negotiate a loan modification. Foreclosure Mediation Rules (FMR) 12(1)(a); FMR 13(7)(a); *see also* NRS 107.086(5). The FMP also requires that beneficiaries or their representatives produce several documents, including all assignments of the deed of trust, to establish that the beneficiary actually has authority to foreclose on the property. FMR (13)(7)(a); *see also* NRS 107.086(5); *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 691, 290 P.3d 249, 251 (2012).

The FMRs were originally adopted on June 30, 2009, and have been amended and renumbered numerous times since. For clarity, we apply the FMRs that went into effect on January 13, 2016, and which governed at the time the underlying mediation occurred.

[4]The first assignment indicated that in 2009, Mortgage Electronic Registration Systems, Inc. (MERS) assigned the Redmons' loan to BONY. The second assignment indicated that in 2015, MERS again assigned the Redmons' loan to Altisource. No documentation was produced to

based on this FMP violation and did not issue a foreclosure certificate. Shortly after the March 2016 mediation, the Redmons' loan servicing was transferred from Ocwen to another servicer, Caliber Home Loans. The Redmons filed a petition for judicial review, seeking sanctions and requesting that the district court modify their loan. The district court declined to modify the loan, but found that the Foreclosing Parties violated the FMRs based on the missing assignment. The district court also found that Ocwen did not have the authority to negotiate a loan modification on behalf of Altisource based on the Limited Power of Attorney (LPA) and Pooling and Servicing Agreement (PSA) that Ocwen provided. The district court ordered a $40,000 sanction and awarded the Redmons attorney fees and costs.

The Foreclosing Parties appealed. This court affirmed in part, reversed in part, remanded the petition for judicial review awarding sanctions, and vacated and remanded the order awarding attorney fees and costs.[5] We concluded that Ocwen did not prove that Altisource was the beneficiary of the Redmons' mortgage because Ocwen admittedly failed to produce each assignment to establish the chain of title. Because Ocwen did not establish that Altisource was the beneficiary, Ocwen failed to prove that the beneficiary or representative attended the mediation, and it was not necessary for the district court to evaluate the extent of Ocwen's authority

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demonstrate that the Redmons' mortgage had been assigned back to MERS before the second assignment to Altisource. In 2017, an Affidavit of Erroneous Assignment was recorded, declaring that the 2009 assignment to BONY was an administrative error and that BONY had never been granted, assigned, or transferred the Redmons' mortgage.

[5]*Ocwen Loan Servicing, LLC v. Redmon*, Docket Nos. 73488 & 74336 (Order Affirming in Part, Reversing in Part, and Remanding (Docket No. 73488-COA) and Vacating Post-Judgment Order and Remanding (Docket No. 74336-COA), Ct. App., December 14, 2018).

under the LPA and PSA. We affirmed the district court's determination that the Foreclosing Parties violated the FMRs and that sanctions may be considered, but reversed the order because the district court impermissibly considered the misconduct of the Foreclosing Parties' predecessors in interest when imposing sanctions. Therefore, we instructed the district court to "reconsider the extent to which additional sanctions beyond the denial of a foreclosure certificate are warranted" based on the Foreclosing Parties' conduct only.

On remand, the district court held an evidentiary hearing. Patricia Redmon testified about her efforts to obtain a loan modification from Ocwen. She testified that at the mediation, Ocwen would not accept the Redmons' updated financial statements indicating that the Redmons could afford to reduce their debt and qualify for a modification. Patricia also revealed that a few weeks prior to the evidentiary hearing, Caliber, the new loan servicer, offered the Redmons a loan modification (approximately three years after it assumed service of the loan) so the Redmons were no longer at risk of foreclosure. The Foreclosing Parties' evidence focused on whether Ocwen had authority negotiate a loan modification for Altisource under the LPA and PSA. The Foreclosing Parties admitted that they failed to establish the chain of title.

The district court then issued an order imposing a $10,000 sanction against each of the Foreclosing Parties for a total of $20,000, and later awarded an additional $13,323.85 in attorney fees and $183.30 in costs against each of the Foreclosing Parties for a total of $26,647.70 in attorney fees and $366.60 in costs.[6] The court ordered the sanction for (1) failing to

[6]The Redmons requested additional attorney fees, but the district court found that a portion of those requested fees was not related to the litigation

produce all the required documents at the mediation and (2) failing to prove that a proper beneficiary or representative attended the mediation. The district court determined that "[t]he failure to establish chain of title prevented Altisource from proving it was the beneficiary and prevented Ocwen from proving it was an authorized representative." The district court concluded that the Foreclosing Parties' violations significantly prejudiced the Redmons and warranted a hefty sanction.

On appeal, the Foreclosing Parties argue that the district court abused its discretion in issuing the sanction award.[7] We disagree.

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surrounding the second mediation. The Foreclosing Parties do not challenge the attorney fees and costs order except to argue that the sanctions, as a whole, are too severe.

[7]In addition, the Foreclosing Parties assert that our previous order limited the district court to assessing sanctions based on only the missing assignment and the district court violated the law of the case doctrine in considering other FMP violations. Under this doctrine, "[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal." *Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728 (2007) (alteration in original) (internal quotation marks omitted). Our December 2018 order did not restrict the district court to ordering sanctions based only on the missing assignment. Instead, we concluded that because Ocwen did not produce all assignments to prove that Altisource was the beneficiary, Ocwen also failed to prove it was the proper representative, and that the district court did not need to evaluate Ocwen's authority under the LPA and PSA. The district court's order after remand is consistent with our order. While the district court stated, in a footnote, that the PSA did not give Ocwen authority to modify the loan, the court's ruling was not based on that finding. Accordingly, the Foreclosing Parties' assertions are unpersuasive.

Equally unpersuasive is the Foreclosing Parties' argument that we should find, as a matter of law, that Ocwen had the requisite authority to negotiate a loan modification on behalf of Altisource. This argument is barred by the law of the case doctrine. *See id.* Our December 2018 order

The Foreclosing Parties contend that the district court abused its discretion when it imposed a $20,000 sanction and awarded over $26,000 in attorney fees and costs. They argue that the award was excessive because the district court considered factors other than the missing assignment, which violated the law of the case doctrine.[8] The Foreclosing Parties also assert that the district court erred in not considering other examples of an appropriate sanction for comparable misconduct and that the sanction issued here was disproportionate to the misconduct.

We review a district court's decision regarding sanctions based on the FMP for an abuse of discretion. *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 468, 255 P.3d 1281, 1286 (2011). The district court may order sanctions if the beneficiary of the deed of trust or its representative (1) fails to attend the mediation, (2) fails to participate in the mediation in good faith, (3) does not produce the required documents,[9] or (4) does not have authority to negotiate a loan modification or have access to a person with the authority. NRS 107.086(6); *Pasillas*, 127 Nev. at 466, 255 P.3d at 1284. If the district court finds noncompliance with any of these requirements, "the bare minimum sanction is that an FMP certificate must not issue." *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 304, 300 P.3d 724, 727 (2013). "In the

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already determined that the Foreclosing Parties could not prove that a beneficiary or representative attended the mediation because they could not prove that Altisource was the beneficiary due to the missing assignment. The facts have not changed and it remains unnecessary to evaluate the extent of Ocwen's alleged authority under the LPA and PSA.

[8]As discussed *supra*, the district court did not violate the law of the case doctrine.

[9]The Nevada Supreme Court mandates strict compliance with the document production requirements. *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011).

absence of factual or legal error, the choice of any further sanctions in addition to withholding the FMP certificate is committed to the district court's sound discretion." *Id.*

Sanctions are meant to "command obedience to the judiciary and to deter and punish those who abuse the judicial process." *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 678, 263 P.3d 224, 228 (2011) (internal quotations omitted). While district courts have broad discretion to impose sanctions, any sanctions must be "reasonably proportionate to the litigant's misconduct." *Id.* at 681, 263 P.3d at 230 (internal quotation marks omitted). The Nevada Supreme Court has stated that "[p]roportionate sanctions are those which are roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability." *Id.* (internal quotation marks omitted). But, "the fact that no other court has imposed like sanctions for such behavior does not mandate a conclusion that the trial court has abused its discretion" and "[s]uch comparisons will seldom be determinative, given the infinite variety of misconduct and of aggravating and mitigating factors." *Id.* (alteration in original) (internal quotation marks omitted).

Nevada has not established bright-line rules for determining an appropriate sanction for an FMP violation and has not defined an "excessive sanction." However, in *Pasillas v. HSBC Bank USA*, the supreme court identified nonexhaustive factors for district courts to consider when awarding sanctions beyond denying issuance of the foreclosure certificate, including "[(1)] whether the violations were intentional, [(2)] the amount of prejudice to the nonviolating party, and [(3)] the violating party's willingness to mitigate any harm by continuing meaningful negotiation." 127 Nev. at 470, 255 P.3d at 1287.

Here, the district court analyzed all of the *Pasillas* factors and determined that a hefty monetary sanction and an additional sanction of

attorney fees and costs was warranted. The court stated that, while the Foreclosing Parties' violation may have been unintentional, the Foreclosing Parties were on notice of the FMP requirements but failed to produce the assignment documents and have a proper beneficiary or representative attend the mediation. The court observed that the onus is on the Foreclosing Parties to adhere to these requirements, so their lack of diligence is not excusable. The court found that the Redmons were significantly prejudiced because they were left negotiating with a party without authority to modify the mortgage.[10] This necessarily led to the Redmons incurring substantial legal fees. Further, the district court concluded that the Redmons likely had the financial resources to reduce their debt and qualify for a loan modification, but Ocwen would not consider all the information presented during the mediation. Had the Foreclosing Parties followed all of the FMRs, the court determined, a modification could have been negotiated. The district court further concluded that the Foreclosing Parties' violations made any meaningful negotiation impossible.

The sanction in this case is supported by the district court's reasoning and the record. *See generally MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 242, 416 P.3d 249, 256 (2018) (holding that case-concluding sanctions typically must be supported by an express written explanation of the court's analysis of the pertinent factors

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[10]The Foreclosing Parties argue that the Redmons were not prejudiced because their loan was assumed by Caliber after the mediation, which, in 2019, agreed to modify their loan. But this argument is logically inconsistent with the Foreclosing Parties' arguments below that when determining sanctions, the court should only consider the Foreclosing Parties' conduct, and no other party. Additionally, the modified loan was not obtained until three years after the mediation at issue in this appeal and, thus, did not obviate the prejudice the Redmons had already incurred.

that guided the decision). Further, "[e]ven if we would not have imposed such sanctions in the first instance, we will not substitute our judgment for that of the district court." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). We note that the district court dealt with the parties first hand and was in the best position to determine an appropriate sanction under the unique facts of this case. Therefore, this court will not second guess the district court's sanctions order absent a clear showing that the award was not proportional to the misconduct at issue, as we next discuss.[11]

The Foreclosing Parties argue that the sanction is not proportional to the misconduct. In the proceedings below, the Foreclosing Parties asserted that the sanction should be less than $4,000 and pointed to several district court decisions in which sanctions had been awarded for FMP violations. At the evidentiary hearing, the district court determined that citation to those decisions was inappropriate under NRAP 36. We conclude that while the district court could have considered those decisions, it was not

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[11]This conclusion is consistent with the purposes of sanctions—to deter and punish misconduct—matters which are necessarily committed to the district court's broad discretion. *See Emerson*, 127 Nev. at 678, 263 P.3d at 228. The district court deals firsthand with parties and is in the best position to determine what facts may aggravate or mitigate the misconduct. *See Sparks v. Bare*, 132 Nev. 426, 433, 373 P.3d 864, 866 (2016) (stating a "primary aspect of [the district court's] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process" (internal quotation marks omitted)). Furthermore, because sanctions are designed to deter and punish misconduct, there are a vast number of factors a district court could conceivably consider, such as multiple rule violations and what type of sanction will serve as a deterrent for an individual party or others similarly situated. *See Emerson*, 127 Nev. at 681, 263 P.3d at 230 (noting the "infinite variety of misconduct and of aggravating and mitigating factors" (internal quotation marks omitted)).

bound to follow them. *See Emerson*, 127 Nev. at 681, 263 P.2d at 230 (stating that proportional sanctions are those that are of similar amounts for similar misconduct, but also stating that such comparisons are not determinative because of various aggravating and mitigating factors).

We further conclude that even if the district court had considered those decisions, the Foreclosing Parties have not shown that the result would have been different or that the sanction issued in this case was so disproportionate as to warrant reversal. Indeed, many of the other available decisions regarding sanctions for FMP violations contain limited facts, making it difficult to compare them to the instant case. Of the decisions this court was able to review that included sanctions for FMP violations, the sanctions ranged from $2,500 to $30,000.[12] Based on the foregoing and our deferential standard of review, we conclude that the district court did not abuse its discretion in sanctioning the Foreclosing Parties. Accordingly, we

ORDER the judgments of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Scott N. Freeman, Chief Judge, Second Judicial District
Department 10, Second Judicial District
Wright, Finlay & Zak, LLP/Las Vegas
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[12]*See, e.g., Jacinto v. PennyMac Corp.*, 129 Nev. 300, 300 P.3d 724 (2013); *Wells Fargo Bank v. Renslow*, Docket No. 58283 (Order Affirming in Part and Reversing in Part, May 21, 2015).