IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARC E. RADOW AND KELLEY L. RADOW, HUSBAND AND WIFE,
Appellants,
vs.
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO WACHOVIA BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR1,
Respondent.

No. 81021-COA

FILED

FEB 11 2022

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

ORDER OF AFFIRMANCE

Marc E. Radow and Kelley L. Radow appeal from a district court order denying a request for appropriate relief in a foreclosure mediation matter. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

After the Radows defaulted on their home loan, the beneficiary of the first deed of trust on the property—respondent U.S. Bank National Association—initiated nonjudicial foreclosure proceedings, and the Radows elected to participate in Nevada's Foreclosure Mediation Program (FMP). After five failed mediations, none of which resulted in the issuance of a foreclosure certificate, the Radows and U.S. Bank participated in the underlying sixth mediation. Following the mediation, the mediator concluded that U.S. Bank had failed to comply with its obligation under the

Foreclosure Mediation Rules (FMRs) to provide originals or copies of each assignment of the deed of trust, as it failed to provide an unrecorded March 2011 assignment from Wells Fargo Bank, N.A., to U.S. Bank, and instead provided only a later recorded July 2011 assignment between those same entities. The mediator therefore recommended sanctions against U.S. Bank, including that it pay the Radows' costs in connection with the mediation and that a foreclosure certificate not issue.

The Radows then filed a request for appropriate relief under FMR 20(2) in the district court, requesting that the court sanction U.S. Bank in accordance with the mediator's recommendations. U.S Bank opposed the request in a submission styled as both an "opposition" and a "countermotion for appropriate relief," arguing that it was not required to provide the March 2011 assignment and, even if it was, the Radows themselves produced a copy of the assignment at the mediation such that U.S. Bank's failure to do so was excused under our supreme court's holding in *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012). The district court agreed with U.S. Bank in a written order denying the Radows' request and directing the issuance of a foreclosure certificate. This appeal followed.

In an FMP matter, we give deference to the district court's factual determinations, but we review legal issues de novo. *Pascua v. Bayview Loan Servicing, LLC*, 135 Nev. 29, 31, 434 P.3d 287, 289 (2019).

On appeal, the Radows repeat their argument that U.S. Bank was required to produce the March 2011 assignment but failed to do so. *See* NRS 107.086(5) ("The beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of . . . each assignment of the deed

of trust . . . ."). U.S. Bank counters that the July 2011 assignment was duplicative of the prior assignment in all material respects such that it superseded that assignment and became the operative legal transfer, and only that document was required to be produced. But we need not decide this issue, as U.S. Bank is correct that the Radows provided the March 2011 assignment to the mediator such that its failure to produce the document did not result in any prejudice.[1] *See Einhorn*, 128 Nev. at 697, 290 P.3d at 254 (concluding that the district court did not abuse its discretion in allowing a foreclosure certificate to issue when the homeowner provided one of the assignments the beneficiary was supposed to produce).

The Radows attempt to distinguish the underlying circumstances from *Einhorn* by pointing out that the copy of the assignment they provided was not recorded like the document at issue in that case was. But the supreme court in *Einhorn* did not hold that the assignment has to

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[1]In light of our disposition, we need not address the Radows' argument that the district court should have applied judicial estoppel to bar U.S. Bank from arguing that the earlier assignment was invalid. Further, we reject the Radows' argument that U.S. Bank's countermotion for appropriate relief was untimely and that the district court therefore lacked authority to direct the issuance of a foreclosure certificate. As argued by U.S. Bank, the relief it requested was intertwined with its timely opposition to the Radows' request for appropriate relief such that it was unnecessary for U.S. Bank to move for affirmative relief. And contrary to the Radows' assertions on appeal, the district court would not have been required to adopt the mediator's recommendations in the absence of a timely request for relief from U.S. Bank. *See* FMR 20(3) (providing that, "[u]pon receipt of the mediator's statement and any request for relief, the District Court shall enter an order . . . detailing decisions regarding the imposition of sanctions *as the District Court determines is appropriate*" (emphasis added)).

be recorded;[2] instead, it simply noted the document at issue in that case was recorded and was therefore sufficiently authenticated under NRS 52.085, in addition to the fact that the document contained a self-authenticating acknowledgment before a notary public, *id.* (citing NRS 52.165 ("Documents accompanied by a certificate of acknowledgment of a notary public . . . are presumed to be authentic.")), as does the relevant assignment in this case. And although the Radows contend that the copy of the assignment they provided was not certified in accordance with the FMRs, the supreme court rejected that same argument in *Einhorn*, concluding that strictly enforcing such a requirement when the document is otherwise sufficiently authenticated under conventional rules of evidence "exalts literalism for no practical purpose." *Id.* at 696-97, 290 P.3d at 254.

Accordingly, because the documents produced at the underlying mediation adequately demonstrated U.S. Bank's authority to negotiate,[3] *see*

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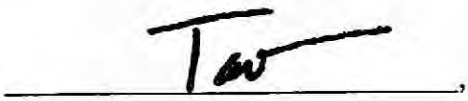
[2]We note that the March 2011 assignment was not required to be recorded in order to be effective under the law in effect at that time. *See* 2011 Nev. Stat., ch. 81, § 1, at 327 (providing that, effective July 1, 2011, any assignment of the beneficial interest in a deed of trust must be recorded in order to be enforced).

[3]The Radows point out what they believe is a problematic circularity in *Einhorn*'s holding; namely, that they could not prove that U.S. Bank failed to produce all of the necessary documents without producing the missing assignment themselves. But this argument only proves further that the Radows were not prejudiced by U.S. Bank's failure to produce the assignment, as the documents U.S. Bank produced depicted a complete chain of ownership with respect to the deed of trust, whereas in *Einhorn*, the documents the beneficiary produced did not show how the beneficiary's predecessor obtained its interest. *See* 128 Nev. at 692-93, 290 P.3d at 251-52.

id. at 691, 290 P.3d at 251 (providing that the FMP's document-production requirement "allows the mediator and the homeowner to satisfy themselves that whoever is foreclosing actually owns the note and has authority to modify the loan" (internal quotation marks omitted)), we discern no abuse of discretion in the district court's decision to allow a foreclosure certificate to issue, *see id.* at 697, 290 P.3d at 254, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge
Hoy Chrissinger Vallas, PC
Tiffany & Bosco, P.A./Las Vegas
Snell & Wilmer, LLP/Las Vegas
Washoe District Court Clerk