IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW DAVIS AND LAURETTA DAVIS,
Appellants,
vs.
US BANK, NATIONAL ASSOCIATION AS TRUSTEE,
Respondent.

No. 56306

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a petition for judicial review in a foreclosure mediation action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Following an unsuccessful mediation conducted under Nevada's Foreclosure Mediation Program (FMP), respondent US Bank filed a petition for judicial review in district court. Respondent contended that it had complied with the FMP's statutory requirements and that it should therefore be issued a foreclosure certificate. See NRS 107.086(4), (5). Appellants Andrew and Lauretta Davis opposed the petition, contending that respondent failed to produce a valid assignment to demonstrate that ownership of their loan had been transferred from their original lender to respondent.[1]

The district court granted respondent's petition and ordered that a foreclosure certificate be issued. We affirm.

Standard of review

We review a district court's factual determinations deferentially, Ogawa v. Ogawa, 125 Nev. 660, 668, 221 P.3d 699, 704

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

(2009) (a "district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence"), and its legal determinations de novo, Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound discretion of the district court. Pasillas v. HSBC Bank USA, 127 Nev. ___, ___, 255 P.3d 1281, 1287 (2011).

The district court did not abuse its discretion in ordering a foreclosure certificate to be issued

To obtain a foreclosure certificate, a deed of trust beneficiary must strictly comply with four requirements: (1) attend the mediation, (2) participate in good faith, (3) bring the required documents, and (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person. NRS 107.086(4), (5); Leyva v. National Default Servicing Corp., 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is necessary).

Here appellants' sole argument on appeal is one of document production.[2] Specifically, they contend that a MERS-generated assignment was insufficient to establish respondent's ownership of their loan. Due to the manner in which this argument was presented to the district court and now on appeal, we are compelled to affirm.

The overarching argument that can be gleaned from appellants' briefs is that the assignment in this case was invalid solely by

[2]We reject appellants' vague allegations that respondent's representative at the mediation lacked authority to modify their loan and that respondent participated in bad faith. The record undisputedly demonstrates that the representative offered appellants a loan modification at the mediation. In light of this offer, we see no basis for appellants' bad-faith argument.

virtue of the fact that it was generated by MERS. In other words, because appellants believe that MERS as an entity is a sham or a fraud, they contend that the assignment itself was necessarily invalid.

Courts in Nevada and across the nation have repeatedly recognized that MERS serves at least some legitimate business purpose.[3] See, e.g., Weingartner v. Chase Home Finance, LLC, 702 F. Supp. 2d 1276, 1280, 1282 (D. Nev. 2010); Gomes v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 3d 819, 821 (Ct. App. 2011); BAC Home Loans Servicing, L.P. v. White, 256 P.3d 1014, 1017 (Okla. Civ. App. 2010); Jackson v. Mortgage Electronic, 770 N.W.2d 487, 490-91 (Minn. 2009); In re Wilhelm, 407 B.R. 392, 404-05 (Bankr. D. Idaho 2009); MERS v. Nebraska Dept. of Banking, 704 N.W.2d 784, 787-88 (Neb. 2005). Consequently, we reject appellants' contention that the assignment was invalid solely by virtue of its connection to MERS.

Having done so, however, we are left with little else to consider in terms of an appropriately raised argument. Although appellants raised

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[3]Several have even confirmed MERS' legitimacy with respect to the precise issue presented here: whether MERS, acting as a lender's nominee, can assign the lender's ownership of a note to another entity. See, e.g., Smith v. Community Lending, Inc., 773 F. Supp. 2d 941, 944 (D. Nev. 2011) (concluding that a provision in a deed of trust "indicates an intent to give MERS the broadest possible agency" on behalf of the lender and that "[s]uch agency would include the ability to sell the interest in the debt"); Crum v. LaSalle Bank, N.A., 55 So. 3d 266, 269 (Ala. Civ. App. 2009) (concluding that an identical provision indicated that "MERS was authorized to perform any act on the lender's behalf as to the property, including selling the note"); Taylor v. Deutsche Bank Nat. Trust Co., 44 So. 3d 618, 623 (Fla. Dist. Ct. App. 2010) ("The transfer . . . was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note . . . because MERS was . . . given explicit and agreed upon authority to make just such an assignment.").

several issues having arguable merit during oral argument, these issues were either raised for the first time at oral argument[4] or raised in cursory fashion in their briefs.[5]

Based upon the record before us, we are unable to give adequate consideration to these issues. "This court is not a fact-finding tribunal," Zugel v. Miller, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983), and it is an appellant's responsibility to create an appellate record with these facts in place. NRAP 30(b)(3), (g)(2).

In the context of the FMP, this starts with cogently presenting discrete arguments in a petition for judicial review or a response to such a petition, and it continues with discussing these arguments with the district court at the status hearing. At very least, this enables the district court to exercise its discretion in considering the relevant arguments before issuing an order.[6] Pasillas, 127 Nev. at ___, 255 P.3d at 1286. Then, in the event that this order is appealed, the appellant's briefs must cogently and discretely argue why the district court erred and must direct this court to

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[4]For example, at oral argument, appellants questioned whether NRS 111.210 requires a deed of trust assignment to recite the consideration paid. Appellants also questioned how their original lender could sell their loan to respondent years after the lender ceased doing business. These questions were not raised in their briefs, let alone in district court.

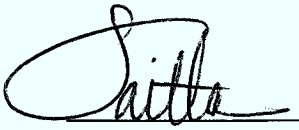
[5]Appellants further questioned at oral argument the authority of Marti Noriega to execute the assignment. Again, however, appellants never discussed this matter with the district court at the status hearing and make only passing references to it in their briefs.

[6]If a genuine factual dispute exists regarding a particular argument, it is then the parties' obligation to request an evidentiary hearing on the matter. We note that although appellants did request an evidentiary hearing in this case, their request pertained to a different issue than those raised on appeal.

where in the appellate record this error occurred.[7] NRAP 28(a)(8)(A), (e)(1).

In sum, the assignment produced by respondent at the mediation was not invalid simply by virtue of the fact that it was generated by MERS. Although appellants have raised some other arguably meritorious questions with regard to the assignment, they were not properly preserved for appeal. We therefore

ORDER the judgment of the district court AFFIRMED.



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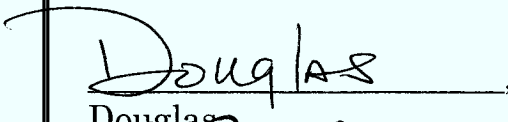

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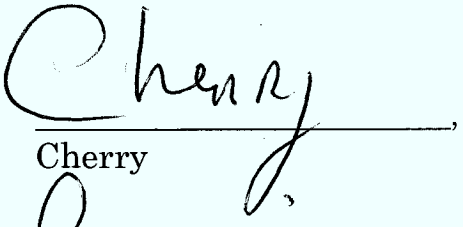
Douglas



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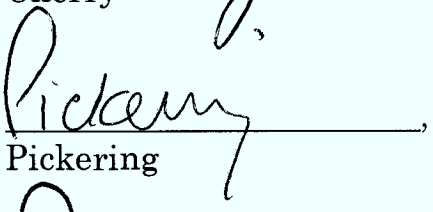

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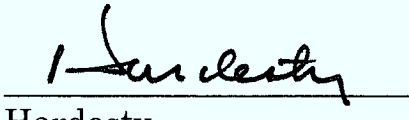

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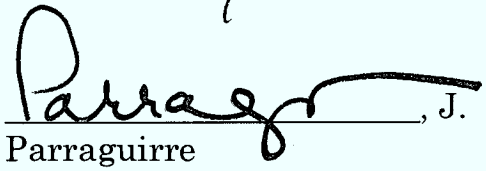

_____, J.
Parraguirre

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[7]The implications of not citing to the record were apparent in this case. Perhaps appellants' most persuasive argument on appeal was that respondent "admit[ted]" that it did not produce the promissory note at the mediation. However, without citation to the record or respondent's brief regarding where this alleged admission occurred, we were unable to determine whether the mediation was thus flawed. Not until oral argument were we able to confirm that appellants' contention was actually false. We strongly caution appellants' counsel to use care in the future. RPC 3.3(a)(1).

cc: Hon. Patrick Flanagan, District Judge
Mark L. Mausert
Hager & Hearne
McCarthy & Holthus, LLP/Las Vegas
Washoe District Court Clerk