IN THE SUPREME COURT OF THE STATE OF NEVADA

BEN M. MILLER,
Appellant,
vs.
AURORA LOAN SERVICES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 58532

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying 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), appellant Ben Miller filed a petition for judicial review in district court. Miller contended that respondent Aurora Loan Services' conduct was sanctionable because it failed to comply with the FMP's statutory requirements.[1] See NRS 107.086(4), (5). The district court denied Miller'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 (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

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

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 that a foreclosure certificate 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, Miller's only arguments that are properly presented on appeal relate to document production.[2] Specifically, Miller contends that

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[2]Miller's opening brief makes several observations in its "Statement of the Case" regarding alleged shortcomings at the mediation: (1) Deutsche Bank, and not Aurora, actually owns his loan; (2) Aurora failed to provide any of the required documents prior to the mediation; and (3) Aurora's document certification did not certify that Aurora was in possession of the original copy of the MERS assignment.

Because Miller's brief does not make clear whether these observations are meant as additional bases for reversing the district court's order, we decline to consider them as such. Specifically, if Miller's observations were intended as arguments in this regard, we would have expected Miller to discuss them in the "Argument" section of his brief and allude to them in his "Statement of Issues Presented for Review." See NRAP 28(a)(8) ("The appellant's brief shall . . . contain . . . a summary of

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the documents produced by Aurora were deficient in two respects: (1) the assignment produced by Aurora was not effective to assign the interest in his promissory note, and (2) his original lender did not endorse the note before transferring it to Aurora. We address each argument in turn.

The MERS assignment effectively assigned the interest in Miller's deed of trust and promissory note

At the mediation, Aurora provided a copy of Miller's deed of trust, his promissory note, and an assignment generated by MERS. In relevant part, the assignment stated:

> [S]aid Assignor hereby assigns unto the above-named Assignee, the said Deed of Trust, secured thereby, with all moneys now owing or that may hereafter become due or owing in respect thereof . . . .

(Emphasis added.)

We disagree with Miller's contention that this language was insufficient to transfer ownership of the note in addition to the beneficial interest in the deed of trust. To be sure, as Miller points out, most MERS assignments expressly assign "the said Deed of Trust together with the Note." And while such language makes clear what the assignment is purporting to do, it is not necessary for an assignment to expressly refer to "the Note" in order to transfer ownership of the note.

As for the assignment in this case, we conclude that the aforementioned underlined language purports to transfer ownership of the note. Because nothing is "owed" under a deed of trust, the only reasonable interpretation of this language is a reference to the underlying note.

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the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief . . . .").

Thus, the MERS assignment was sufficient to transfer both the beneficial interest in Miller's deed of trust and ownership of Miller's note from his original lender to Aurora.

The note did not need to be endorsed

This conclusion obviates the need for the note to have been endorsed. As we observed in Leyva, "[f]or a note in order form to be enforceable by a party other than to whom the note is originally payable, the note must be either negotiated or transferred." 127 Nev. at ___, 255 P.3d at 1280 (emphases added).

Leyva and Article 3 of Nevada's Uniform Commercial Code make clear that "negotiation" and "transfer" are two similar, but nevertheless distinct, concepts. When the holder of a note in order form endorses the note and gives possession of the note to a new entity, the note is thereby "negotiated," and the new entity becomes the holder. Id. at ___, 255 P.3d at 1280 (citing NRS 104.3201).

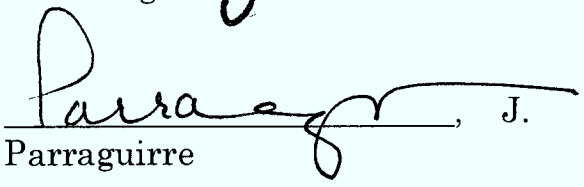
However, an endorsement is not necessary for a valid transfer. Id. at ___, 255 P.3d at 1281; cf. NRS 104.3203(2) ("Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument . . . ."). Because a transferred note is not endorsed, the party seeking to establish its right to enforce the note "'must account for possession of the unendorsed instrument by proving the transaction through which the transferee acquired it.'" Leyva, 127 Nev. at ___, 255 P.3d at 1281 (quoting U.C.C. § 3-203 cmt. 2, which explains the effect of § 3-203(b), codified in Nevada as NRS 104.3203(2)). In other words, because the party seeking to enforce the note cannot "prove" its right to enforce via a valid endorsement, the party must "prove" by some other means that it was given possession of the note for the purpose of enforcing it. Id.

As is customary in the secondary mortgage market, such "proof" generally comes in the form of a valid assignment of the deed of trust and corresponding promissory note—which, as explained previously, is what the MERS assignment in this case accomplished. Consequently, Aurora was entitled to enforce the note even though the note was not endorsed. We therefore

ORDER the judgment of the district court AFFIRMED.[3]

_____, J.
Gibbons

_____, J.
Pickering



_____, J.
Parraguirre

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[3]We conclude that Miller's bad-faith-mediation argument is without merit. Miller's argument is based almost exclusively on Aurora's alleged document-production shortcomings considered above. Miller also argues that Aurora mediated in bad faith by falsely representing that it had produced a "true and correct copy" of his note at the mediation. Specifically, because the note produced at the mediation did not contain a "pre-payment penalty addendum" that was purportedly attached to his original note, Miller contends that Aurora's representation was knowingly false and amounted to bad faith.

Foreclosure Mediation Rule 11.3 requires production of "the mortgage note" at the mediation—not the note and all attachments. Thus, Aurora complied with the Foreclosure Mediation Rules. Absent other evidence pertaining to Aurora's alleged mindset, we reject Miller's allegation that Aurora's representation in the document certification amounted to bad faith.

cc: Hon. Patrick Flanagan, District Judge
Robertson & Benevento/Reno
McCarthy & Holthus, LLP/Las Vegas
McCarthy & Holthus, LLP/Reno
Washoe District Court Clerk