IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY WAYNE LATHAM,
Appellant,
vs.
AURORA LOAN SERVICES, LLC,
Respondent.

No. 60353

FILED
JAN 24 2014
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order granting a petition for judicial review in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

In this appeal, we consider whether the district court erred in concluding that Aurora Loan Services complied with the Foreclosure Mediation Program's (FMP) document production requirements. Consistent with our recent holding in *Markowitz v. Saxon Special Servicing*, 129 Nev. ___, ___, 310 P.3d 569, 573 (2013), we affirm the district court's determination that the Broker's Price Opinion (BPO) was in substantial compliance with NRS 645.2515(3), but we reverse the district court's determination that the remaining documents were in compliance as substantial evidence does not appear to support the district court's conclusion.

Standard of review

We review a district court's factual determinations deferentially, and a "district court's factual findings . . . 'will be upheld if not clearly erroneous and if supported by substantial evidence.'" *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. ___, ___, 290 P.3d 249, 251

(2012) (quoting *Edelstein v. Bank of New York Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 260 (2012)). Absent factual or legal error, the choice of sanctions 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).

On appeal, Latham argues that the district court abused its discretion by ordering a foreclosure certificate to be issued because Aurora did not comply with the FMP document production requirements. Latham also argues that the district court erred by failing to hold an evidentiary hearing.

The district court erred by 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(5), (6); *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. ___, ___, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with these requirements is necessary).

In asserting that Aurora failed to comply with the FMP document production requirements, Latham makes three arguments: (1) the BPO did not comply with NRS 645.2515(3), (2) the evaluative methodology and proposal were deficient, and (3) the assignment of the promissory note was not certified. We address each in turn.

Substantial evidence supports the district court's conclusion that the BPO was in substantial compliance with NRS 645.2515(3)

Latham points out a number of defects in the BPO and argues that the district court erred in concluding that Aurora complied with the FMP document production requirements.

At least ten days prior to the mediation, the beneficiary or its representative must submit to the mediator and the homeowner an appraisal or BPO that complies with NRS 645.2515.[1] FMR 11(1), (3)(b).[2] This court recently held that the content requirements for a BPO can be satisfied by substantial compliance. *Markowitz*, 129 Nev. at ___, 310 P.3d at 573. Substantial compliance excuses a party's literal noncompliance with a rule so long as "the party complies with 'respect to the substance essential to every reasonable objective' of the rule." *Id.* at ___, 310 P.3d at 572 (quoting *Stasher v. Harger–Haldeman*, 372 P.2d 649, 652 (Cal. 1962)). Thus, technical defects do not constitute noncompliance where a party complies with the substantive requirements of a rule. *Id.*

Here, substantial evidence supports the district court's determination that the BPO was in substantial compliance with the FMP

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[1]NRS 645.2515(3) requires a BPO to include (a) a statement of intended purpose; (b) a brief description of the property and the interest in the property for which the BPO is being prepared; (c) the basis used to determine the BPO; (d) assumptions or limiting conditions used; (e) the date of issuance; (f) disclosure of an existing or contemplated interest of the licensee preparing the BPO; (g) the license number, name, and signature of the licensee; (h) the broker association of the licensee; and (i) a disclaimer in fourteen-point font that the BPO is not an appraisal.

[2]All citations to the FMRs in this order refer to the rules in place from March 1, 2011 to December 31, 2012, during which the subject mediation occurred.

document production requirements. Latham argues that the BPO failed to comply with NRS 645.2515(3)(b), (d), (f), and (i). Specifically, Latham argues that the property description was insufficient, the BPO did not state the interest for which it was being prepared, did not state the broker's assumptions in preparing the BPO, did not disclose whether the broker had an interest in listing the property, and the disclaimer was not written in fourteen-point font. With the exception of the fourteen-point font requirement, none of Latham's contentions are borne out upon examination of the BPO. For example, the correct address is listed on the BPO and there is a section setting forth the assumptions and limiting conditions. To the extent that Latham argues that these portions are insufficient, substantial evidence supports the district court's conclusion otherwise. In regard to the disclaimer being written in the wrong font size, the disclaimer is written in bold and a larger font than the rest of the document. Latham does not adequately explain how the technical deficiency in precise font size upsets the reasonable objective of NRS 645.2515(3). *See Markowitz*, 129 Nev. at ___, 310 P.3d at 572.

Accordingly, we conclude that substantial evidence supports the district court's conclusion that the BPO was in substantial compliance with NRS 645.2515(3).

Substantial evidence does not support the district court's conclusion that the evaluative methodology and proposal were acceptable

Latham next argues that the district court improperly allowed the certificate to issue where Aurora did not provide an evaluative methodology for its "net present value" assessment. We agree.

The FMP document production requirements require a lender to bring its evaluative methodology to the mediation. FMR 11(3)(c). FMR 11(8) expands on this requirement:

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> The beneficiary of the deed of trust shall, under confidential cover, provide to the mediator the evaluative methodology used in determining the eligibility or noneligibility of the grantor or the person who holds the title of record for a loan modification.

Here, the evaluative methodology that Aurora brought to the mediation was not presented to the district court until the actual hearing, and the minutes from the hearing suggest that the district court did not examine the document to any degree, but instead made its findings based on the parties' representations alone. Thus, substantial evidence does not support the district court's finding that the evaluative methodology complied with FMR 11(8). *Einhorn*, 128 Nev. at ___, 290 P.3d at 251.

Substantial evidence does not support the district court's conclusion that the assignment of the promissory note was acceptable

Latham argues that the district court erred by finding that Aurora satisfied the document production requirement where the promissory note was certified, but the endorsement transferring the note to Aurora did not have a separate certification.

FMR 11(3) provides:

> The trustee or beneficiary of the deed of trust must prepare and submit the following documents to the mediator:
>
> (a) The original or a certified copy of the deed of trust, the mortgage note, and each assignment of the deed of trust and *each endorsement of the mortgage note.*

(Emphasis added.)

Despite the possibility that a promissory note could comply with FMR 11(3)(a) under the circumstances that Aurora describes,[3] Aurora did not include the certification of the promissory note or the promissory note itself as an attachment to its petition for judicial review. Nor do the hearing minutes indicate that the certification or note was brought before the district court during the hearing. The note and the certification were also not provided in the record on appeal.

Thus, similar to the missing evaluative methodology, this court cannot find that sufficient evidence supported the district court's decision where the document in question was never before the district court. *Einhorn*, 128 Nev. at ___, 290 P.3d at 251.

Latham has not preserved the issue of whether the district court was required to hold an evidentiary hearing

Latham argues that the district court erred by reversing the mediator's decision without holding an evidentiary hearing. While a district court's factual findings are subject to clear-error review, *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009), such deferential review may be inappropriate where the parties to the proceeding were not given an opportunity to be heard. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 ("This court has recognized that procedural due

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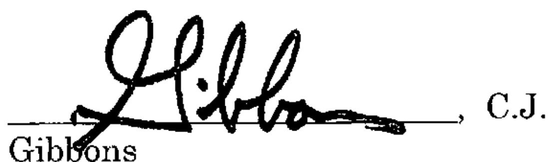
[3]According to Aurora, the note was not assigned but was endorsed to Aurora, with the endorsement on the note itself. Thus, Aurora argues, they have complied with FMR 11(3)(a)'s document production requirement because the endorsement is affixed to the note itself and the note is certified. Requiring a separate certification of the same document appears to be an absurd reading of the FMRs. *See Einhorn*, 128 Nev. at ___, 290 P.3d at 254 (noting that even where strict compliance is required, "strict compliance does not mean absurd compliance").

process 'requires notice and an opportunity to be heard.'" (quoting *Maiola v. State*, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004))).

Nevertheless, the record does not indicate that Latham sought an evidentiary hearing. *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, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *Diversified Capital Corp. v. City of N. Las Vegas*, 95 Nev. 15, 21, 590 P.2d 146, 149 (1979) (finding that the appellant's failure to request an evidentiary hearing militated against finding a violation of his right to procedural due process). Although the district court's decision to overturn the mediator's factual findings without an evidentiary hearing could arguably raise a procedural due process issue, and constitutional issues may be considered when raised for the first time on appeal, *Levingston v. Washoe Cnty.*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996), Latham only discusses the issue in general terms without citing any legal authority, constitutional or otherwise. Accordingly, we reject Latham's argument without going into a searching analysis of the procedural due process implications of the lack of an evidentiary hearing. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider allegations of error not cogently argued or supported by any pertinent legal authority).

Having concluded that the BPO was in substantial compliance with NRS 645.2515, but that substantial evidence did not support the district court's conclusion that the evaluative methodology and assignment of the promissory note were acceptable, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.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Pickering

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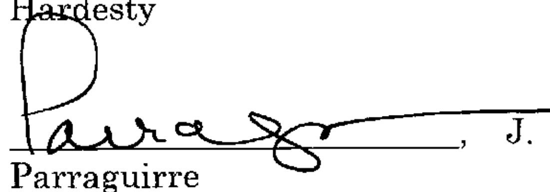
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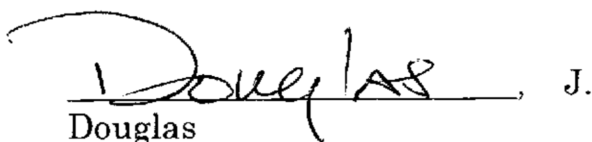
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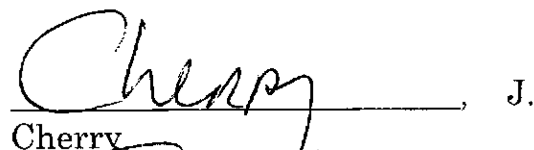
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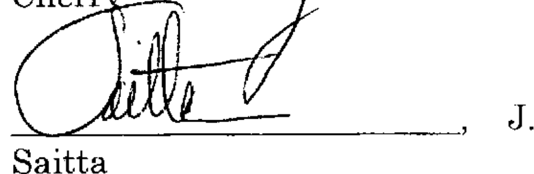
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Saitta

cc: Eighth Judicial District Court Dept. 14
William F. Buchanan, Settlement Judge
Tara D. Newberry
Akerman LLP/Las Vegas
Reisman Sorokac
Eighth District Court Clerk