

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ZENT; AND DEBORAH ZENT,
Appellants,
vs.
BAC HOME LOAN SERVICING, LP;
BANK OF NEW YORK MELLON F/K/A
THE BANK OF NEW YORK, AS
TRUSTEE FOR THE CERTIFICATE
HOLDERS OF CWALT, INC.
ALTERNATIVE LOAN TRUST 2006-HY
13; AND RECONTRUST COMPANY,
Respondents.

No. 62137

FILED

DEC 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program (FMP) matter. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

In an appeal from a district court order granting or denying judicial review in an FMP matter, this court defers to the district court's factual determinations and reviews de novo the district court's legal determinations. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 260 (2012). To obtain an FMP certificate, a deed of trust beneficiary must: (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 person. NRS 107.086(4) and (5) (2011); *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. ___, ___, 255 P.3d 1275, 1278-79 (2011).

Appellants contend that respondents failed to establish that Bank of New York Mellon (BNYM) is a holder in due course and that,

consequently, BNYM is not entitled to enforce appellants' promissory note. There is a difference between being a note "holder" and a "holder in due course," and this court has never held that a deed of trust beneficiary seeking to foreclose must be a holder in due course. See NRS 104.3302 (requiring a note holder to satisfy various criteria in order to be a holder in due course); *Leyva*, 127 Nev. at ___, 255 P.3d at 1280-81 (recognizing that a note holder is entitled to enforce the note). Accordingly, the district court properly rejected the argument that respondents needed to establish BNYM's status as a holder in due course before BNYM was entitled to enforce appellants' note. *Edelstein*, 128 Nev. at ___, 286 P.3d at 260 (reviewing the district court's legal conclusions de novo).

Appellants next contend that respondents mediated in bad faith by failing to disclose the amount that BNYM paid to obtain ownership of appellants' loan while still asserting BNYM's right to seek a deficiency judgment. Nothing in the FMP statute or rules requires disclosure of this information, and the district court did not clearly err in finding a lack of bad faith in this regard. *Edelstein*, 128 Nev. at ___, 286 P.3d at 260 (indicating that, absent clear error, a district court's factual determinations will not be disturbed).

Appellants also contend that (1) a deed of trust assignment was void for failure to comply with NRS 111.210, and (2) the appraisal provided by respondents was "deceptive and unreliable" because it did not disclose that the company performing the appraisal was a wholly owned subsidiary of Bank of America. Because these arguments were not raised

in district court, we need not address them on appeal.¹ See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Nonetheless, we have considered them and conclude that they lack merit.² Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Patrick Flanagan, District Judge
Mark L. Mausert
Akerman LLP/Las Vegas
Silvestri Gidvani, P.C.
Washoe District Court Clerk

¹We recognize that appellants alluded to these arguments in their district court reply. Cf. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. ___, ___ n.7, 262 P.3d 705, 715 n.7 (2011) (“[A]rguments raised for the first time in [a] reply brief need not be considered.”).

²In so doing, we note that the FMP rules in place at the time of this mediation did not require an appraisal to be performed by an independent appraiser. See former FMR 11(6) (effective March 1, 2011, amended and renumbered as FMR 11(10), effective January 1, 2013)).