

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ADRIENNE M. SONG; AND JAMES S.
SONG,
Appellants,
vs.
WELLS FARGO BANK, N.A. SBM TO
WELLS FARGO BANK MINNESOTA,
N.A. AS TRUSTEE FOR MERRILL
LYNCH MORTGAGE INVESTORS
TRUST, SERIES MLCC 2003-A; PHH
MORTGAGE CORPORATION; AND
MTC FINANCIAL, INC., D/B/A
TRUSTEE CORPS,
Respondents.

No. 78097-COA

FILED

MAY 11 2020

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

ORDER OF AFFIRMANCE

Adrienne M. Song and James S. Song (the Songs) appeal from a district court order denying a motion for NRCP 60(b) relief in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Linda Marie Bell, Chief Judge.

After defaulting on their home loan, the Songs elected to participate in Nevada's Foreclosure Mediation Program (FMP), and respondent Wells Fargo Bank, N.A., the beneficiary of the first deed of trust on the subject property, appeared at the mediation via counsel, as did its loan servicer, respondent PHH Mortgage Corporation (collectively respondents).¹ The parties did not come to an agreement on a loan

¹In respondents' answer to the Songs' petition for foreclosure mediation assistance, MTC Financial, Inc., d/b/a Trustee Corps, stated that its involvement in this matter was based purely upon its status as trustee

modification, and the mediator recommended that the district court dismiss the Songs' petition for foreclosure mediation assistance and direct the issuance of a foreclosure certificate. The Songs subsequently filed a request for appropriate relief under FMR 20(2) in the district court, arguing that respondents failed to comply with various FMP requirements and that the district court should therefore issue sanctions, including a loan modification. The district court summarily denied the request in a written order.²

Later, respondents filed a motion under NRCP 60(b)³ requesting that the district court amend its prior order on grounds that it mistakenly failed to dismiss the Songs' petition for foreclosure mediation assistance and order the issuance of a foreclosure certificate as required under FMR 20(3), and instead only denied the Songs' request for relief. The Songs opposed the motion, asserting various arguments and contending for the first time that new evidence (i.e., a report prepared for the Songs by a

under the deed of trust, and it therefore declared nonmonetary status pursuant to NRS 107.029. Trustee Corps did not participate any further in the underlying proceedings, and the Songs do not challenge its nonparticipation on appeal.

²The Honorable Elizabeth Goff Gonzalez, Judge, denied the Songs' request, and the case was subsequently reassigned to Chief Judge Bell, who presided over the remainder of the proceedings.

³The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Because the amendments do not affect our disposition, we cite the current version of the rules herein. Moreover, to the extent statutes cited herein have been recently amended, we cite the current versions for the same reason.

certified fraud examiner) demonstrated that the notice of default respondents had recorded against the subject property was void ab initio because respondents had failed to comply with certain statutory prerequisites to recording the notice as set forth in NRS 107.500 and 107.510. At the hearing on the motion, the district court explained to the Songs that their opposition went beyond the scope of respondents' motion, and if they wanted to seek further relief, they would need to file a motion of their own. The district court then granted respondents' motion and entered an amended order dismissing the Songs' petition and directing the issuance of a foreclosure certificate.

The Songs subsequently filed their own motion for NRCP 60(b) relief, again asserting that their new evidence showed that the notice of default was void and that respondents should be required to restart the foreclosure process with a new, statutorily compliant notice. They also argued that their new evidence rendered the entirety of the FMP proceeding void. Additionally, they requested injunctive relief to halt the foreclosure proceedings under NRS 107.560. At the hearing on the motion, the district court found that the Songs failed to demonstrate that they could not have previously discovered their supposedly new evidence, which was based on events and circumstances occurring long before the mediation. Accordingly, the district court entered a written order summarily denying the Songs' motion, and this appeal followed.

On appeal, the Songs again assert that they were entitled to relief from the district court's order dismissing their petition and directing issuance of a foreclosure certificate, and also that the entirety of the FMP proceeding was void, on grounds that respondents' notice of default was void ab initio. We review a district court order denying NRCP 60(b) relief for an

abuse of discretion. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656, 428 P.3d 255, 257 (2018) (noting that a “district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)” and that such a decision will not be reversed “absent an abuse of discretion” (internal quotation marks omitted)). Under NRCP 60(b)(2), a district court may relieve a party from a final judgment or order on grounds of “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).” And under NRCP 60(b)(4), a district court may grant the same relief on grounds that “the judgment is void.”

Assuming, without deciding, that NRCP 60(b)(2) applies in the context of a foreclosure mediation matter, we discern no abuse of discretion in the district court’s finding that the Songs could have reasonably discovered evidence of respondents’ supposed noncompliance with NRS 107.500 and 107.510 by the time of the mediation in this case. *See* NRCP 60(b)(2); *Rodriguez*, 134 Nev. at 656, 428 P.3d at 257. Although the Songs received the report from the certified fraud examiner after the mediation, they failed to show that the information discussed therein could not have been discovered previously, or even that the report itself could not have been generated by the time of the mediation.

Turning to NRCP 60(b)(4), which the district court did not address, we note that the Songs have failed to show—and we have not located any legal authority demonstrating—that noncompliance with NRS 107.500 or 107.510 renders a notice of default or any subsequent proceedings stemming therefrom void, as opposed to merely voidable or otherwise subject to some form of collateral challenge. Indeed, the statute under which the Songs sought injunctive relief below—NRS 107.560—does

not provide that such violations render any part of the foreclosure proceedings void, but instead sets forth a borrower's civil remedies for violations of NRS 107.400-.560, which include "bring[ing] an action for injunctive relief to enjoin a material violation of [those provisions]" prior to the impending foreclosure sale,⁴ as well as "bring[ing] a civil action . . . to recover his or her actual economic damages resulting from a material violation of [those provisions]" after the property has already been sold. NRS 107.560(1)-(2). It further provides that "[a] violation of [the relevant provisions] does not affect the validity of a sale to a bona fide purchaser for value and any of its encumbrancers for value without notice," NRS 107.560(4), thereby indicating that such violations do not render related foreclosure proceedings void. *Cf. Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018) ("A party's status as a [bona fide purchaser] is irrelevant when a defect in the foreclosure proceeding renders the sale void.").

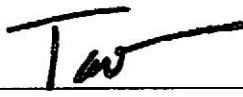
Even assuming the Songs may be entitled to some form of relief, we are not persuaded that respondents' supposed noncompliance with NRS 107.500 and 107.510 is something that would be redressable in the context of an FMP proceeding, as none of the FMRs provide for such relief, nor does the governing statute. *See* NRS 107.086; FMR 1-24. And NRS 107.560—the remedial statute discussed above—indicates that such relief is not available in the FMP context, as it expressly contemplates the filing of a

⁴The statute further provides that such an injunction may be dissolved upon a showing that the relevant violation has been corrected and remedied, NRS 107.560(1), thereby indicating that such violations do not render a notice of default void.

separate action for injunctive relief or damages, which is initiated by filing a complaint, not a petition for foreclosure mediation assistance of the kind at issue here.⁵ See NRS 107.560(1)-(2); NRCP 3 (“A civil action is commenced by filing a complaint with the court.”). Accordingly, the Songs have not shown that the district court abused its discretion in denying their motion for NRCP 60(b) relief, and we therefore

ORDER the judgment of the district court AFFIRMED.⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁵The record on appeal demonstrates that, before attempting to have the notice of default declared void in this matter, the Songs filed a separate action in the Eighth Judicial District Court against respondents stemming from the underlying foreclosure proceedings (which was later removed to federal court), in which they sought in part to enjoin the foreclosure. That action was the proper case in which to seek the relief the Songs requested below and in this appeal. See NRS 107.560(1)-(2); *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) (holding that a party is prohibited from splitting causes of action and maintaining separate actions on the same claims).

⁶Insofar as the Songs raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Linda Marie Bell, Chief Judge
Adrienne M. Song
James S. Song
Ballard Spahr LLP/Las Vegas
Eighth District Court Clerk