

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR IXIS
REAL ESTATE CAPITAL TRUST 2005-
HE3 MORTGAGE PASS THROUGH
CERTIFICATES, SERIES 2005-HE3,
Appellant,
vs.
EDWARD HURT,
Respondent.

No. 83863-COA

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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REAL ESTATE CAPITAL TRUST 2005-
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No. 84650-COA

*ORDER AFFIRMING (DOCKET NO. 83863-COA) AND VACATING
(DOCKET NO. 84650-COA)*

In these consolidated appeals, Deutsche Bank National Trust Company (Deutsche Bank) challenges district court orders granting a request for appropriate relief in a foreclosure mediation matter. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Respondent Edward Hurt filed a petition for foreclosure mediation assistance and ultimately attended a mediation conducted

pursuant to Nevada's Foreclosure Mediation Program (FMP). Deutsche Bank, the beneficiary of the deed of trust on Hurt's property, attended the mediation through its mortgage servicer, PHH Mortgage Corporation (PHH). Following the mediation, the mediator issued a statement recommending that the district court issue a foreclosure certificate. Hurt thereafter filed a petition for judicial review or alternatively for relief under Foreclosure Mediation Rule (FMR) 20 in the district court, in which he argued in relevant part that PHH lacked the requisite authority under NRS 107.086 and the FMRs to negotiate a loan modification, as the pooling and servicing agreement (PSA) between Deutsche Bank and its servicers prohibited PHH from permitting any loan modification that would "change the Mortgage Rate, reduce or increase the principal balance (except for reductions resulting from actual payments of principal) or change the final maturity date" of the loan. Based on the text of the PSA, as well as a power of attorney specifically limiting PHH's authority to that granted in the PSA, the district court concluded that PHH lacked authority to modify the material elements of the loan, including the mortgage rate, the principal balance, and the final maturity date. Accordingly, the district court concluded that PHH lacked the requisite authority to modify the loan, and it entered an order dismissing Hurt's petition for foreclosure mediation assistance and ordering that an FMP certificate shall not issue. These appeals followed.¹

¹Deutsche Bank initially appealed from a form order dismissing Hurt's petition for foreclosure mediation assistance and declining to issue

On appeal, Deutsche Bank contends that the district court misconstrued the relevant statute and rules and should have concluded that PHH had sufficient authority to modify the loan such that the district court should have issued a foreclosure certificate. In response, Hurt contends that Deutsche Bank lacked the requisite authority to modify and that the district court was therefore correct in not issuing a foreclosure certificate. We agree with Hurt.

In FMP matters, we defer to the district court's factual findings and review its decision regarding the imposition of sanctions for an abuse of discretion, but we review its legal conclusions de novo. *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 304, 300 P.3d 724, 727 (2013); *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 468, 255 P.3d 1281, 1286 (2011). Under

an FMP certificate. The district court thereafter filed a more detailed order explaining its rationale, and Deutsche Bank filed an amended notice of appeal from that order, which was docketed as a separate appeal. The supreme court thereafter entered an order consolidating the appeals. However, because Deutsche Bank timely appealed from the initial order, the district court was divested of jurisdiction over the issues pending on appeal, *see Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006), and thus it lacked jurisdiction to enter the order at issue in Docket No. 84650-COA. We therefore vacate the district court's order appealed from in Docket No. 84650-COA. Nevertheless, because the district court's minute order granting Hurt's request for relief—which is properly part of the record on appeal—details the court's rationale for ruling in the manner it did, and because the parties do not dispute that the minute order accurately reflects the district court's ruling, we review the court's decision appealed from in Docket No. 83863-COA on its merits. *Cf. Knox v. Dick*, 99 Nev. 514, 517, 665 P.2d 267, 269 (1983) (looking to district court minutes to interpret a summary judgment order in the absence of specific legal conclusions in the order).

NRS 107.086, to avoid sanctions and obtain an FMP certificate allowing the beneficiary of the deed of trust to foreclose, the beneficiary must attend the foreclosure mediation, participate in good faith, bring certain documents, and, as most relevant to this appeal, if attending through a representative, the representative must have authority to negotiate a loan modification on the beneficiary's behalf or at all times have access to someone with such authority.² *Jacinto*, 129 Nev. at 304, 300 P.3d at 727 (citing NRS 107.086);³ see FMR 12(1)(a) (requiring that all beneficiaries of a deed of trust “be represented at all times during mediation by a person or persons who have the authority to negotiate and modify the loan secured by the deed of trust”); FMR 13(7)(d) (providing that a third-party representative “must produce a copy of the agreement, or relevant portion thereof, which authorizes the third party to represent the beneficiary at the mediation and authorizes the third party to negotiate a loan modification on behalf of the beneficiary of the deed of trust”). If the beneficiary fails to comply with any of these requirements, “the bare minimum sanction is that an FMP certificate must not issue.” *Jacinto*, 129 Nev. at 304, 300 P.3d at 727.

Deutsche Bank argues that the district court improperly created a requirement that a representative have authority to modify

²Deutsche Bank does not argue on appeal that PHH had access to anyone with greater authority than its own.

³Specifically, NRS 107.086(5) provides that a representative “must have authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust or have access at all times during the mediation to a person with such authority.”

material elements of a loan. While the scope of authority to modify has not been specifically delineated up to this point, there are some standards for foreclosure mediations that have been established relevant to the level of authority necessary. FMR 1(2) provides that the purpose of the FMP is, in part, to “encourage[] deed of trust beneficiaries (lenders) and homeowners (borrowers) to exchange information and proposals that *may avoid foreclosure.*” (Emphasis added.) NRS 107.086(6) requires that deed of trust beneficiaries mediate in good faith. Additionally, the Nevada Supreme Court has stated that “[t]he purpose of FMP mediation is to bring the parties together to participate in a *meaningful negotiation* to resolve the dispute.” *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 666, 310 P.3d 569, 572 (2013) (emphasis added) (internal quotation marks omitted).

To the extent Deutsche Bank argues that having authority to make any type of modification to the loan is sufficient to comply with the requirements, we reject this broad interpretation. Interpreting the relevant statute and rules to require only that the representative have authority to modify the loan in some way, no matter how small, yields an absurd result. Such an interpretation would permit deed of trust beneficiaries to purposely limit their representatives’ authority by only allowing them to make inconsequential modifications—e.g., reducing the principal owed by \$1 or extending the maturity date of the loan by a single day—and nevertheless somehow fulfill the FMP’s purpose of “bring[ing] the parties together to participate in a *meaningful* negotiation to resolve the dispute.” *Id.* (emphasis added). Thus, we believe such a result was clearly not intended by the Legislature or the Nevada Supreme Court.

Having rejected this interpretation, and in applying the general standards set out above to the scope of authority that Deutsche Bank provided to PHH through the PSA and the power of attorney, we conclude that we need not further delineate at this time a specific set of standards regarding the extent of authority a representative must possess because the limitations on PHH's authority in this matter would fail to meet any reasonable standards under the statutory and rule requirements that would be necessary to provide for a meaningful mediation.⁴ In order to mediate in good faith and have the mediation be meaningful, a representative's authority to modify a loan cannot be limited to prohibit all changes to the mortgage rate, principal balance, and final maturity date, as was the case here.

Based on our analysis herein, Deutsche Bank has failed to show any abuse of discretion on the part of the district court. While the district court relied on slightly different grounds in reaching its decision—i.e., that PHH lacked authority to modify the material elements of the loan—we nevertheless affirm the district court's decision to dismiss Hurt's petition for foreclosure mediation assistance and order that a foreclosure certificate


⁴We note that nothing in our disposition should be construed as requiring lenders or their representatives to actually offer or provide loan modifications in FMP proceedings. As argued by Deutsche Bank, and as essentially conceded by Hurt, nothing in NRS 107.086 or the FMRs expressly requires the beneficiary of a deed of trust to provide such relief; rather, consistent with the foregoing, the beneficiary or its representative must simply have the authority to do so, and they must negotiate with borrowers in FMP proceedings in good faith.

shall not issue. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (recognizing that the appellate courts will affirm the district court's order if it reached the correct result, even if it did so for a different reason).

It is so ORDERED.⁵


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 7
Kathleen M. Paustian, Settlement Judge
Wright, Finlay & Zak, LLP/Las Vegas
Nevada's Lawyers
Eighth District Court Clerk

⁵Insofar as the parties 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.