IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MT REAL ESTATE INVESTMENT, INC., A NEVADA CORPORATION, Appellant, vs. GOLDBERG, KERSHEN & ALTMANN, LLC, A DELAWARE LIMITED LIABILITY COMPANY, Respondent.	No. 87933-COA
MT REAL ESTATE INVESTMENT, INC., A NEVADA CORPORATION, Appellant, vs. GOLDBERG, KERSHEN & ALTMANN, LLC, A DELAWARE LIMITED LIABILITY COMPANY, Respondent.	No. 88577-COA

ORDER AFFIRMING (DOCKET NO 87933-COA) AND REVERSING AND REMANDING (DOCKET NO. 88577-COA)

MT Real Estate Investment, Inc. (MT), brings these consolidated appeals from a final judgment denying its ex parte petition to validate and enforce a lost promissory note, as well as a post-judgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

In 2005, John Barrier and John Harney obtained a home loan evidenced by a promissory note secured by a deed of trust. The note promised repayment to the lender, the Martin W. Keough Trust, where Martin Keough served as trustee. In 2009, Barrier and Harney defaulted on the loan, and during a bankruptcy proceeding brought by Harney, the property was surrendered to the Martin W. Keough Trust. However, it is unclear from the record whether the surrender resulted in a transfer of

ownership to the Martin W. Keough Trust, *see In re Failla*, 838 F.3d 1170, 1178 (11th Cir. 2016) (noting that a debtor who surrenders her property during bankruptcy proceedings "is representing to the [bankruptcy court] that she will make her property available to the Bank by refraining from taking any overt act that impedes the Bank's ability to foreclose its interest in the property" (cleaned up)), and no documentation reflecting a transfer of ownership was recorded with the Clark County Recorder, meaning that record title remained in Barrier's and Harney's names. Thereafter, Martin passed away, and his son, Kenneth Keough, was appointed successor trustee of the Martin W. Keough Trust. In March 2021, respondent Goldberg, Kershen & Altmann, LLC (Goldberg), filed a quiet title action against Barrier and Harney, claiming it had acquired title to the property through adverse possession. After Barrier and Harney failed to appear, the district court entered a default judgment against them, vesting title to the property in Goldberg.

Meanwhile, in 2022, Kenneth executed an assignment of the deed of trust to MT, stating he was also assigning the promissory note and all money due, or to become due, under the note to MT. The original promissory note had been lost at some point, prompting MT to initiate the underlying proceeding by filing an ex parte petition seeking a declaratory judgment confirming its right to enforce the note under NRS 104.3309, which allows a party to establish a lost instrument by demonstrating that it, or its predecessor in interest, had the right to enforce the instrument at the time it was lost. MT attached a photocopy of the note to the petition, along with a lost note affidavit from Kenneth, who attested that the photocopy "is an exact copy of the original, which is either lost or misplaced." The petition also included an affidavit from Michael Turner, president of

MT, providing details about the quiet title action, including the fact that "alleged adverse possessors" had been granted title through default judgment, although Goldberg was not mentioned by name. However, MT included the order from the quiet title action granting title to Goldberg as an exhibit to the petition. Goldberg was not served with the petition. Without notice to Goldberg, the court entered an ex parte order granting MT's petition and concluding that MT could enforce the photocopy of the note for all legal purposes. Subsequently, MT initiated a nonjudicial foreclosure proceeding by recording a notice of default and election to sell against the property, which was then served on Goldberg.[1]

Upon learning of the nonjudicial foreclosure proceeding, Goldberg intervened in the underlying proceeding, seeking to strike the district court's ex parte order granting MT's petition, arguing that it was the rightful owner of the property based on the court's default order in the separate quiet title action.[2] Goldberg argued that MT's decision to file the

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[1]MT initiated the nonjudicial foreclosure on March 30, 2022, just before the deed of trust was set to expire, as the entire unpaid principal balance and any accrued interest were due on April 1, 2012, meaning the deed of trust would be automatically extinguished by April 1, 2022, if payment was not made or the loan was not otherwise satisfied through foreclosure. *See* NRS 106.240 (providing that certain liens on real property are discharged by operation of law ten years after the related debt becomes "wholly due").

[2]The district court in the quiet title action later set aside its order that had granted Goldberg title through a default judgment. *See* NRS 40.110(1) (stating that in a quiet title action, a court cannot enter a default judgment). We affirmed this decision in *Goldberg, Kershen & Altmann, LLC v. MT Real Estate Investments, Inc.*, No. 85260-COA, 2024 WL 4660834 (Nev. Ct. App. Oct. 31, 2024) (Order of Affirmance), and litigation concerning whether Goldberg acquired a vested interest in the property through adverse possession is ongoing in the quiet title action.

underlying case without notifying Goldberg constituted fraud upon the court. After a hearing, the court struck its order granting MT's petition and issued a preliminary injunction to halt the nonjudicial foreclosure proceedings because Goldberg had not received notice or an opportunity to respond. The district court scheduled the matter for a bench trial.

At trial, MT relied largely on testimony from Gregory Logan, an independent contractor who provided consulting and investigative services for MT, and Ty Kehoe, Martin's former attorney, who represented him throughout Harney's bankruptcy proceedings. Logan testified that he prepared the lost note affidavit for Kenneth after reviewing the deed of trust but admitted that he never actually "reached out personally" to Kenneth to discuss the note or deed of trust. Kehoe testified that, although he had seen a stamped copy of the promissory note, he had never seen the original, despite asking Martin about a dozen times to provide it, as he needed it to handle issues arising from Harney's bankruptcy proceeding. The court then heard testimony from Turner regarding the assignment of the deed of trust, but proceedings were paused midway through his testimony when it was revealed that David Crosby, MT's counsel, also served as the trustee for the deed of trust that secured the note on the subject property, creating a conflict of interest because he could potentially be called as a witness in this case. Crosby was disqualified, MT retained new counsel, and the trial resumed approximately one year later with testimony from Kenneth. When questioned about the lost note affidavit he signed, Kenneth testified he had never actually seen the original promissory note, despite representations in his affidavit that the photocopy was "an exact copy of the original."

Ultimately, the district court found that MT failed to meet the requirements to enforce a lost note under NRS 104.3309. The court found

there was no personal knowledge of the note's loss, and the timing of its loss was unclear, especially since Harney surrendered his interest in the subject property to the Martin W. Keough Trust during his bankruptcy proceeding. Additionally, the court determined that MT failed to prove "adequate protections exist to avoid the person who must pay the [n]ote from suffering from duplicate collections,"[3] and it could not establish that it acquired the note from a party entitled to enforce it. The court also ruled the original ex parte order was procured by fraud upon the court, as Goldberg was never properly served, and MT's former counsel, Crosby, failed to inform the court of the quiet title action when the lost note action was commenced. The court further found the petition was based on a false affidavit from Kenneth. As a result, the court denied MT's petition to validate and enforce the lost note. MT appealed from that order, which is before us in Docket No. 87933-COA.

Thereafter, Goldberg moved for attorney fees in the district court under NRS 18.010(2)(b), arguing that MT brought its claims without reasonable grounds or to harass. MT failed to timely oppose that motion, and although the district court conducted a hearing on the merits of the motion on February 8, 2024, only Goldberg appeared and presented argument. Following Goldberg's argument, the court orally granted its motion for attorney fees, staying enforcement until the court resolved a separate motion for reconsideration of the order denying MT's petition to validate and enforce the lost note brought by Crosby.

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[3]"The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument." NRS 104.3309(2).

Following the February 8 hearing, MT filed an untimely opposition to Goldberg's motion for attorney fees on March 20, 2024. In its opposition, MT effectively sought reconsideration of the district court's oral decision to award Goldberg attorney fees at the February 8 hearing, arguing that the February 8 hearing was improperly conducted without proper notice. After denying Crosby's motion for reconsideration, the court entered an order granting Goldberg attorney fees totaling $57,360 under NRS 18.010(2)(b), concluding that MT's claims were groundless and brought in bad faith for a variety of reasons, including MT's fraud on the court. MT then appealed from the award of attorney fees,[4] in Docket No. 88577-COA, and this appeal was subsequently consolidated with the appeal in Docket No. 87933-COA.[5]

The district court did not err by ruling that MT did not satisfy NRS 104.3309

MT argues that the statutory requirements of NRS 104.3309 to establish a lost note were met and that the district court wrongly reversed its initial ruling granting the petition. MT primarily argues NRS 104.3309 was satisfied through the lost note affidavit, Kehoe's testimony, and the production of a copy of the promissory note.

"After a bench trial, the district court's legal conclusions are reviewed de novo." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018). NRS 104.3309 establishes the procedure by which

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[4]MT does not challenge the district court's award of costs on appeal.

[5]This court granted Crosby leave to file an amicus curiae brief in support of the appeal in Docket No. 87933-COA, and Goldberg later filed a motion to strike that brief. The issues raised in Crosby's amicus curiae brief substantially mirror those presented by MT on appeal. As such, Crosby's brief will not assist this court, and we therefore grant Goldberg's motion to strike Crosby's amicus brief. *See* NRAP 29(a).

a party may enforce a note or other instrument when the original instrument is unavailable because it has been lost, destroyed, or stolen. *Jones v. U.S. Bank Nat'l Ass'n*, 136 Nev. 129, 131, 460 P.3d 958, 961 (2020). A party that does not have possession of a note may nevertheless enforce the instrument if the party establishes the following: (1) the party was entitled to enforce the instrument when possession was lost or it acquired ownership, whether directly or indirectly, from a prior owner that was entitled to enforce the instrument when it was lost; (2) "possession was not lost due to a transfer" by the party "or lawful seizure"; and (3) the party cannot reasonably obtain possession of the instrument because it was lost, destroyed, or stolen. NRS 104.3309(1); *Jones*, 136 Nev. at 131, 460 P.3d at 961.

The party seeking to enforce a note under such circumstances bears the burden of establishing, by a preponderance of the evidence, both the terms of the note and its right to enforce the instrument. NRS 104.3309(2); *Jones*, 136 Nev. at 131, 460 P.3d at 961. The district court may only permit a party to enforce a note pursuant to NRS 104.3309 if the court finds that the payor under the instrument is adequately protected from third-party claims. NRS 104.3309(2); *Jones*, 136 Nev. at 132, 460 P.3d at 961. The disposition in this case is controlled by the Nevada Supreme Court's holding in *Jones*, which concluded that an enforcing party can prove by a preponderance of the evidence its right to enforce a lost note under NRS 104.3309 using a lost note affidavit and other secondary evidence. *See Jones*, 136 Nev. at 130, 460 P.3d at 960.

In this case, MT's argument that it was entitled to enforce the note under NRS 104.3309 necessarily fails because it is unable to prove the terms of the original note. *See* NRS 104.3309(2) ("A person seeking

enforcement of an instrument . . . *must prove* the terms of the instrument and his or her right to enforce the instrument." (emphasis added)). MT relied on Kenneth's affidavit to attest that the photocopy of the note matched the original and to provide evidence that the note was lost. However, the district court found that Kenneth lacked personal knowledge to support the assertions in his affidavit, as he had neither seen the original note nor spoken to Martin about it, and this court must presume that finding to be correct because MT failed to provide this court with a copy of the trial transcript from August 23, 2023, which was the day that Kenneth testified. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (recognizing it is the appellant's duty to make an adequate record and that "[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"). No other witness at trial testified to having seen the original note, and since they did not, they could not confirm that the photocopy matched the original. As a result, MT failed to establish the terms of the instrument by a preponderance of the evidence.[6]

We therefore conclude that the requirements of NRS 104.3309 were not met. Accordingly, in Docket No. 87933-COA, we affirm the order denying MT's ex parte petition to validate and enforce the lost note. However, this court takes no position on the title to the property, either with respect to Goldberg or MT, as that issue is not before us in this appeal and should be resolved in the quiet title action.

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[6]Confusingly, MT did not name the debtors under the promissory note, Barrier and Harney, as defendants in the underlying proceeding, and it did not seek to have them testify.

The district court erred when awarding Goldberg attorney fees without hearing argument from MT

MT argues the attorney fees award must be set aside due to a due process violation, as the hearing was held without proper notice. Goldberg responds that the district court had the discretion to grant its motion for attorney fees as unopposed and that MT received proper notice of the hearing, as its counsel was copied on multiple emails regarding the scheduling of its motion for fees.

An award of attorney fees is reviewed for an abuse of discretion. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). However, this court reviews "constitutional challenges de novo, including a violation of due process rights challenge." *Eureka County v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018). "Procedural due process requires that parties receive notice and an opportunity to be heard." *Id.* (internal quotation marks omitted). "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (internal quotation marks omitted).

In this case, the district court awarded attorney fees under NRS 18.010(2)(b). This statute permits a district court to award attorney fees to a prevailing party "when the court finds that the claim . . . of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." In awarding attorney fees under NRS 18.010(2)(b) "[i]t is the intent of the Legislature that the court award attorney fees pursuant to this paragraph . . . to punish for and deter frivolous or vexatious claims and defenses." Thus, attorney fees awarded under NRS 18.010(2)(b) are intended to be a sanction. *See Lamont's Wild W. Buffalo,*

LLC v. Terry, 140 Nev., Adv. Op. 11, 544 P.3d 248, 253 (2024) (reasoning that NRS 18.010(2)(b) and NRCP 11 are each "a distinct mechanism for sanctions").

Under the local rules, when the nonmoving party fails to timely oppose a motion, the district court has discretion to construe that failure "as an admission that the motion . . . is meritorious and a consent to granting the same." EDCR 2.20(e); *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 277-78, 182 P.3d 764, 768 (2008). Under such circumstances, the district court may also consider the motion on its merits and grant or deny it with or without oral argument. EDCR 2.23(c). However, the local rules also provide that sanctions, including attorney fees, may be imposed after "notice and the opportunity to be heard." EDCR 7.60.

In the present case, although MT failed to timely oppose Goldberg's motion for attorney fees in advance of the February 8 hearing, the district court did not simply grant it as being unopposed. Instead, less than two hours before the scheduled time for the hearing on the motion, the district court filed and served a notice to the parties, indicating that the motion for attorney fees, along with other pending motions, had been rescheduled from February 8 to March 28. Goldberg's counsel emailed the court's judicial executive assistant (JEA) shortly after the rescheduling notice was filed and served on the parties to clarify whether the district court intended to continue all the motions set to be heard on February 8. The JEA responded via email that all the motions would be continued. Goldberg's counsel then sent another email questioning whether the district court intended to reschedule the hearing on Goldberg's motion for attorney fees and costs, as it was unopposed. In a responsive email sent

approximately 90 minutes before the originally scheduled hearing time, the district court's law clerk indicated that the hearing on Goldberg's motion for attorney fees would proceed on February 8 at the originally scheduled time. Although MT's counsel was copied on all communications, MT did not appear at the hearing. MT later argued in its untimely opposition to Goldberg's motion for attorney fees that it had not received proper notice or confirmation that the attorney fees motion would proceed on February 8 given the court's prior notice of rescheduling the hearing. At the hearing, the district court heard argument from Goldberg's counsel concerning the substantive merits of Goldberg's motion for attorney fees, and the court subsequently granted the motion on the merits, and not merely because it had been unopposed by MT.

Because the district court intended to conduct a hearing on Goldberg's motion for attorney fees on the merits, MT was entitled to meaningful notice and opportunity to be heard, including an opportunity to address any arguments presented by Goldberg at the hearing. *See Clark Cnty. Sports Enters., Inc., v. Kaighn*, 93 Nev. 395, 397, 566 P.2d 411, 412 (1977) (holding that once a party has appeared in proceedings, it is entitled to notice of all subsequent matters that are not "a mere matter of course"); *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (recognizing that procedural due process requires meaningful notice and an opportunity to be heard); EDCR 7.60. Although there may be circumstances where the district court may grant a motion on the merits or as being unopposed, in this case where the court scheduled oral argument on Goldberg's motion for attorney fees sought under NRS 18.010(2)(b) as a sanction, then rescheduled it on the day of the hearing, and then placed it back on calendar for a hearing that same day with less than two hours' notice, we conclude

that the district court abused its discretion by proceeding with the hearing on the merits and granting Goldberg's motion for attorney fees without MT's counsel's presence.

Indeed, the rescheduling notice that the court filed and served was an authoritative directive regarding the scheduling of the hearing on Goldberg's motion for attorney fees, and the court's decision to rescind that notice via email correspondence less than two hours before proceeding with the hearing at its originally scheduled time did not afford MT meaningful notice. *Cf. Fullbrook v. Allstate Ins. Co.*, 131 Nev. 276, 278, 350 P.3d 88, 89 (2015) ("[E]-mail notifications are a courtesy, and the official notification of a document filed in this court is the notification within the electronic filing system."). As a result, MT was also denied a meaningful opportunity to be heard on the motion for attorney fees, especially since a motion for reconsideration of the order denying MT's ex parte petition to validate and enforce the lost note was still pending, which if granted, would have rendered the motion for attorney fees moot at that point.[7] *See Nicoladze v. First Nat'l Bank of Nev.*, 94 Nev. 377, 378, 580 P.2d 1391, 1391 (1978) (holding that procedural due process guarantees the opportunity to present every available defense).

Since the district court granted Goldberg's motion for attorney fees without affording MT due process notwithstanding that an award of

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[7]We recognize that the district court eventually denied the motion for reconsideration. But by the time the motion for reconsideration was heard at the March 28 hearing, MT had filed an opposition to Goldberg's motion for attorney fees on March 20, which the district court had discretion to consider despite its untimeliness. *See King v. Cartridge*, 121 Nev. 926, 927-28, 124 P.3d 1161, 1162-63 (2005) (reviewing the district court's decision to grant a motion for summary judgment as unopposed, even after an untimely opposition was filed, for an abuse of discretion).

fees under NRS 18.010(2)(b) acts as a sanction, we reverse the attorney fees award in favor of Goldberg in Docket No. 88577-COA and remand for further consideration. On remand, based on these circumstances, the district court must conduct a hearing where both parties have an opportunity to present argument concerning whether MT brought or maintained the underlying proceeding, including defense of its efforts to nonjudicially foreclose, without reasonable grounds for the purpose of awarding fees pursuant to NRS 18.010(2)(b).[8] And the district court must

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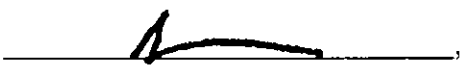
[8]Although the due process violation, by itself, warrants reversal, for the sake of judicial efficiency, we note that to the extent the district court awarded Goldberg attorney fees under NRS 18.010(2)(b) on grounds that MT committed fraud on the court by failing to notify the court of the quiet title action and to serve Goldberg with a copy of its ex parte petition to validate and enforce the lost note, MT's conduct in this respect did not rise to the level of fraud upon the court. Indeed, although MT did not expressly reference the quiet title action in its petition, it attached sufficient documentation to the petition to inform the district court of that action, including the default judgment entered in the quiet title action, which quieted title in Goldberg's favor before that decision was reversed in Docket No. 85260-COA. *See NC-DSH, Inc. v. Garner*, 125 Nev. 647, 654, 218 P.3d 853, 858 (2009) (describing fraud on the court as conduct that "subvert[s] the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases" (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1994)). Moreover, while MT did not serve Goldberg with the petition to validate and enforce the lost note, its rights were not implicated in the present case, given that it was not a party to the promissory note, until MT commenced a nonjudicial foreclosure proceeding, at which point MT provided Goldberg with notice of the foreclosure, prompting it to intervene in the present case. Thus, any purported failure to serve Goldberg when MT's petition was initially filed should have been treated as a potential jurisdictional defect, rather than an attempt to subvert the integrity of the court. *See Monroe, Ltd. v. Cent. Tel. Co.*, 91 Nev. 450, 454, 538 P.2d 152, 155 (1975) (holding that ex parte orders affecting the rights of another party are improper absent notice and an opportunity

make findings to support its award of fees under NRS 18.010(2)(b) based on whether MT brought or maintained a frivolous or vexatious claim. *See Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 294 (Ct. App. 2023) (stating that an award of attorney fees under NRS 18.010(2)(b) is unsupportable when a district court fails to make findings that a party's "claims or defenses were either unreasonable or meant to harass"). The district court may consider consolidating or coordinating the resolution of Goldberg's request for attorney fees with the quiet title action in order to avoid possible duplicative fee awards. *Cf. Laughon v. Silver State Shopping Ctr.*, 109 Nev. 820, 822-23, 858 P.2d 44, 45-46 (1993); EDCR 2.50.

It is so ORDERED.[9]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Bulla


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Gibbons


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Westbrook

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to be heard, requiring vacating when entered without proper procedure). And in fact, the district court essentially treated the failure to involve Goldberg as a jurisdictional defect when it set aside its original order granting the ex parte motion. We express no opinion as to whether the district court's remaining rationale for awarding attorney fees was sufficient to support an award under NRS 18.010(2)(b) since MT has not yet been permitted to address the merits of Goldberg's request for fees.

[9]Insofar as MT raises arguments that are not specifically addressed in this order, we have considered the same and conclude they do not present a basis for further relief.

cc: Hon. Jessica K. Peterson, District Judge
Christopherson Law Offices
Origins Legal Group, LLC
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Eighth District Court Clerk