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## Summary of Einhorn v. BAC Home Loans Servicing, L.P., 128 Nev. Adv. Op. 61

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PROPERTY – FORECLOSURE MEDIATION PROGRAM

**Summary**

Appeal from a District Court order finding that BAC Home Loan Servicing, L.P (BAC) met its showing of lack of bad faith during foreclosure mediation and affirming the issuance of a Letter of Certification.

**Disposition/Outcome**

The Court affirmed the District Court decision. The Court held that strict compliance with N.R.S. 107.086(4)'s document production requirement was achieved even though some of the required documents were brought to the mediation by the homeowner rather than the trust-deed beneficiary.

**Factual and Procedural History**

Appellant-Homeowner Einhorn elected to participate in Nevada's Foreclosure Mediation Program (FMP) after receiving a Notice of Default on his residence. Although he did not find bad faith, and thus issued the required Letter of Certification, the mediator determined that respondent BAC failed to bring to the mediation each of the documents required by N.R.S. 107.084(4). Specifically, the mediator found that a gap existed in the loan assignments and that an early lost note certification was seemingly at odds with the trustee's certified claim to currently possess the original.

Einhorn filed a petition for judicial review in District Court alleging that BAC failed to comply with the FMP's document production and good faith requirements and requesting sanctions. The District Court ruled that the "Certification of Documents [establishes that] the original Deed of Trust, Promissory Note, and the missing Assignment of Promissory Note and/or Deed of Trust [are in BAC's] possession" and that there was "no irregularity as to the submitted documents."<sup>2</sup> Einhorn appealed.

**Discussion**

In Nevada, if a homeowner elects FMP mediation, a non-judicial foreclosure on an owner-occupied residence cannot proceed without a certificate issued by the mediator that the mediation has concluded or been waived.<sup>3</sup> The statute establishing the FMP obligates the trust deed beneficiary to "(1) attend the mediation; (2) mediate in good faith; (3) provide the required documents; [and] (4) if attending through a representative, have a person present with authority

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<sup>1</sup> By David H. Rigdon, Junior Staffer.

<sup>2</sup> 128 Nev. Adv. Op. 61, at 3.

<sup>3</sup> *Holt v. Regional Trustee Services Corp.*, 127 Nev. \_\_\_\_, \_\_\_\_, 266 P.3d 602, 603 (2011).

to modify the loan or access to such a person.”<sup>4</sup> This appeal focuses on item 3 of the list, the document production requirement.

N.R.S. 107.086(4) states: “The beneficiary of the deed of trust shall bring to the mediation the original or certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note.” The purpose of the requirement is to allow the mediator and the homeowner to satisfy themselves “that whoever is foreclosing actually owns the note and has authority to modify the loan.”<sup>5</sup> Strict compliance with N.R.S. 107.086(4) is required.<sup>6</sup>

In this case, the homeowner rather than the beneficiary brought to the mediation the missing assignment needed to make the chain of transfers complete. Thus all required documents were available at the mediation. Einhorn argued, however, that strict compliance with the statute requires the beneficiary of the deed of trust to provide the documents and, since he produced the documents rather than BAC, it was improper for the mediator to issue the Letter of Certification.

The Court rejected Einhorn’s argument and held that a “court’s requirement for strict or substantial compliance may vary depending on the circumstances.”<sup>7</sup> In general, “‘time and manner’ requirements are strictly construed, whereas substantial compliance may be sufficient for ‘form and content’ requirements.”<sup>8</sup> Furthermore, “strict compliance does not mean absurd compliance.”<sup>9</sup> Only if a specified document is missing does it matter who had the burden of producing it. Since all documents needed to determine BAC’s entitlement to enforce the note were authenticated and present, strict compliance with N.R.S. 107.086(4) was achieved and the District Court did not abuse its discretion in denying sanctions and allowing the FMP certificate to issue.

## **Conclusion**

While the FMP statute requires strict compliance with a deed of trust beneficiary’s obligation to produce all required documents at mediation, if all documents are present at the mediation it does not matter who produced them. Since the homeowner brought the missing assignments to the mediation, the Letter of Certification was properly issued and the District Court did not abuse its discretion in denying sanctions.

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<sup>4</sup> *Pasillas v. HSBC Bank USA*, 127 Nev. \_\_\_, \_\_\_, 255 P.3d 1281, 1284 (2011).

<sup>5</sup> *Leyva v. National Default Servicing Corp.*, 127 Nev. \_\_\_, \_\_\_, 255 P.3d 1275, 1279 (2011).

<sup>6</sup> *Id.*

<sup>7</sup> *Leven v. Frey*, 123 Nev. 399, 407, 168 P.3d 712, 717 (2007).

<sup>8</sup> *Leven*, 123 Nev. at 408, 168 P.3d at 718.

<sup>9</sup> *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528 (2001).