IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 11/26/2025 7:28 AM
Mark Reynolds

THE BANK OF NEW YORK MELLON,

Plaintiff-Appellee,

and

DEBORAH A. NESBITT,

Intervenor-Appellee,

v.

No. A-1-CA-41472

RUSSELL L. BARNES,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Kathleen McGarry Ellenwood, District Court Judge

Aldridge Pite, LLP
Janet M. Spears
Albuquerque, NM

Tiffany & Bosco, P.A.
Joshua T. Chappell
Albuquerque, NM

for Appellees

Russell L. Barnes
Santa Fe, NM

Pro Se Appellant

MEMORANDUM OPINION

MEDINA, Chief Judge.

{1} This is the second appeal to have been generated by this case, which was initiated when The Bank of New York Mellon (BNYM) brought a foreclosure action against Russell Barnes (Barnes). The district court entered default and summary judgment against Barnes in October 2018 and awarded BNYM attorney fees and costs. Barnes appealed, and this Court affirmed the summary judgment and order awarding attorney fees and costs. *The Bank of New York Mellon v. Barnes*, A-1-CA-38554, mem. op. ¶¶ 1, 40 (N.M. Ct. App. Feb. 1, 2022) (nonprecedential). Barnes then filed a motion to set aside "void judgments" for fraud upon the court due to BNYM's attorneys' conduct and a second Rule 1-060(B) NMRA motion to address a new, allegedly jurisdictional, issue. The district court denied both motions, and this appeal followed.

{2} The majority of the arguments made by Barnes in the present appeal have their roots in arguments that were previously made and addressed in the prior appeal. *See Barnes*, A-1-CA-38554, mem. op. ¶ 6. In this appeal, Barnes argues that opposing counsel misrepresented BNYM's status as a real party in interest with standing to bring the foreclosure action and did not disclose the involvement of another entity. For the reasons set forth below we affirm the order of the district court.

{3} In a motion filed with this Court on December 23, 2024, Barnes claimed that BNYM's attorneys should be sanctioned under Rule 1-011(A) NMRA for making false assertions and failing to provide relevant authority in BNYM's motion to strike Barnes's original reply brief. The motion was held in abeyance pending submission to a panel, as the arguments made were intertwined with the merits of the appeal. We have considered the motion and find it without merit. It is therefore denied.

BACKGROUND

{4} Because this nonprecedential memorandum opinion is issued solely for the benefit of the parties and we presume the parties to be familiar with the background and proceedings of this case, we provide only a brief overview of the facts. "In July 2006, Barnes executed and delivered a note . . . and mortgage . . . to Countrywide Home Loans, Inc. to secure the loan used to purchase his personal residence." *Barnes*, A-1-CA-38554, mem. op. ¶ 2. "The [m]ortgage was assigned to BNYM in 2011." *Id.* The parties do not appear to dispute that Bank of America (BOA) is the loan master servicer, and BNYM is the trustee for a group of investors. "Barnes defaulted on his mortgage loan in March 2008." *Id.* BOA hired attorneys to move toward foreclosure on the property on behalf of BNYM. A complaint for foreclosure was filed on behalf of BNYM against Barnes in 2013. The complaint does not mention BOA.

{5} In 2019, the district court granted default and summary judgment in favor of BNYM and ordered that the judgment for foreclosure proceed. *Id.* ¶ 3. The district court awarded attorney fees and costs to BNYM. *Id.* In 2022, this Court affirmed the grant of summary and default judgment as well as the award of attorney fees and costs. Barnes filed a motion for rehearing which was denied. Barnes then filed a petition for writ of certiorari to our Supreme Court, which was denied, and mandate issued. *See Barnes*, A-1-CA-38554, *cert. denied*, 2022-NMCERT-006, 547 P.3d 707.

{6} Following issuance of mandate, Barnes filed two motions in the district court seeking to void the judgments based on claims that BNYM's attorneys made false statements and concealed information, amounting to fraud upon the court and impacting the district court's jurisdiction. After extensive and lengthy briefing and a hearing before the district court, Barnes's motions were denied.

DISCUSSION

I. Arguments Addressed Summarily

{7} We summarily address arguments made by Barnes in this appeal that were previously decided or are not properly before this Court.

{8} Orders arising out of a court's inherent authority and those based on Rule 1-060(B) NMRA are reviewed under an abuse of discretion standard. *Deutsche Bank Nat'l Tr. Co. v. Valerio*, 2021-NMCA-035, ¶ 19, 493 P.3d 493; *Moya v. Catholic*

Archdiocese of N.M., 1988-NMSC-048, ¶ 7, 107 N.M. 245, 755 P.2d 583 (noting that "the inherent power of a court to grant equitable relief from a judgment procured by fraud upon the court is beyond question"); *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 28, 329 P.3d 658 ("The application of equitable doctrines and the granting of equitable relief rests in the sound discretion of the district court." (internal quotation marks and citation omitted)). Relief under Rule 1-060(B) requires a showing of "exceptional circumstances." *Chavez v. Cnty. of Valencia*, 1974-NMSC-035, ¶ 16, 86 N.M. 205, 521 P.2d 1154 (internal quotation marks and citation omitted).

{9} In the motions filed by Barnes, he continues his attempts to demonstrate that BNYM did not have standing and was not the real party in interest to bring the foreclosure action. Barnes also advances arguments concerning the Flow Subservicing Agreement (FSA) between loan master servicer BOA and Subservicer Bayview Loan Servicing, LLC.

{10} For example, Barnes claims that BNYM "was not an actual plaintiff represented by counsel" because, despite evidence to the contrary, there was no showing of an agency between BOA and BNYM. The basis for Barnes's claim that BNYM's attorneys engaged in fraud is his contention that BNYM's attorneys took action to conceal the true identity of the real party in interest in this case, the party that had standing to bring the lawsuit. In other words, Barnes's arguments regarding fraud, agency, the FSA, etc., although couched in different terms, all constitute claims that BNYM does not have standing and is not a real party in interest in this foreclosure case. In our previous opinion, this Court rejected Barnes's claims concerning standing and real party in interest, after reviewing the affidavits and other evidence relied on by Barnes. *Barnes*, A-1-CA-38554, mem. op. ¶¶ 11, 19.

{11} The basis for the holding in our previous opinion that BNYM had standing was in part that the affidavits established that BNYM was the holder of the note. *Id.* ¶¶ 12-18. Barnes argues that the affidavits were false because the attorneys did not represent BNYM and were holding the note for BOA. Barnes made these arguments all along in the district court and they were rejected. We do not revisit our holding that BNYM has standing—except to consider whether that holding and the ruling of the district court was based on misrepresentations of the attorneys that were discovered after the judgment. Barnes cites the following post-appeal evidence to establish that the attorneys misled the court (1) the FSA, and (2) admissions made by the attorneys in response to Barnes's post-appeal motions. Barnes maintains that this evidence establishes that BOA retained the attorneys and prosecuted the foreclosure, not BNYM, and therefore the attorneys misled the district court into ruling that BNYM had standing when it did not.

{12} We disagree with Barnes that provisions of the FSA "clearly require[ed]" the attorneys to "represent and possess the note" for BOA as the loan master servicer, or that a different provision establishes that BOA was the real party in interest. The FSA, as a contract between the loan master servicer, BOA, and the subservicer, Bayview, is intended to establish the terms as between those parties. The terms highlighted by Barnes address which of those parties is responsible to establish ownership of the note, to establish policies for foreclosures and foreclosure firms, and to establish "[p]rocesses to review and approve standardized affidavits for each jurisdiction in which the [b]ank/[s]ervicer files foreclosure actions to ensure compliance with applicable laws, rules and court procedures." Nothing in these provisions prevents the servicer from establishing that another entity—in this case, a trustee—owns the note and has the right to enforcement or prohibits the servicer from hiring counsel to represent that owner. Nor is the servicer required to file for foreclosure—but if it does, it must have processes to ensure legal compliance. Nor does the FSA establish that the servicer is the real party in interest. The FSA explains that "[w]ith respect to each [m]ortgage [l]oan, the Servicer is either (a) the owner of all the right, title and interest in and to the [m]ortgage loan *or* (b) the owner of the servicing rights related to each [m]ortgage [l]oan." Thus, the FSA permits the servicer to hold less than all of the rights to the mortgage loan. The cited portions of the FSA say nothing about what a trustee can and cannot do and do not prohibit a servicer from delegating any of the obligations it has under the FSA to another entity.

{13} For these reasons, we are unpersuaded that the attorneys confirmed any dishonesty by their admissions after the appeal that BOA was the loan master servicer and that they were hired by BOA to represent BNYM. These statements do not contradict earlier assertions that the attorneys represented BNYM—the FSA does not establish the contrary, even if the attorneys were engaged by BOA to represent BNYM after BOA determined that BNYM *was* the owner. Barnes cites materials suggesting this process has been disapproved—but the question before us at this stage is not the propriety of the arrangement but whether the attorneys lied about it. The evidence presented does not indicate that the attorneys "deliberately planned and carefully executed a scheme to defraud the court"—or even "perjury [that was] revealed by after-discovered evidence." *See Moya*, 1988-NMSC-048, ¶ 8.

{14} Nor does the record establish an attempt to defraud the court based on BNYM's production of a redacted FSA. As an initial matter, the redacted FSA was attached to a filing by BNYM in February 2018. The record shows no motion by Barnes to compel the complete, unredacted FSA. As Barnes recognizes, his claim is not that the terms of the FSA have been breached but rather that the terms of the FSA establish that the attorneys must have been lying. Because we conclude that the unredacted FSA did not reveal requirements that BOA, and not BNYM, be the plaintiff in the foreclosure action, any failure to produce the document did not prejudice Barnes for the purposes of establishing the dishonesty of the attorneys.

{15} Barnes makes one new argument concerning the FSA. He maintains the FSA is in fact relevant to his case because a provision contained in the FSA, which concerns loan modification, can be read as an acknowledgment that a mortgagor is a third-party beneficiary of the FSA. This case has nothing to do with loan modification, and the provision to which Barnes refers expressly limits mortgagor third-party-beneficiary status to that provision of the FSA.

{16} In addition, Barnes alleges that the district court lost its ability to perform its duties properly as a result of the fraud and deception committed by BNYM's attorneys. Fraud upon the court involves deliberate and planned actions to defraud the court. *See, e.g.*, *Moya*, 1988-NMSC-048, ¶ 8. Barnes cites a number of examples he claims show the effects the attorneys' fraud had on the district court. Barnes claims that the district court was clearly deceived when it mirrored arguments made by Attorney Negrin in its findings; failed to name BOA as an indispensable party; applied the standard for ordinary fraud to his claim of fraud on the court; misunderstood Barnes's argument regarding the FSA; and dismissed the FSA argument without reviewing his document. As previously noted, the arguments made by Barnes concerning fraud are not supported by the FSA.

{17} Other arguments made by Barnes have not been developed or are not supported by cited authority. For example, Barnes contends that the district court erred in refusing to allow an extension of the page limits for his motion. Barnes does not explain the legal basis for this argument or cite any authority to support it. *See Wilburn v. Stewart*, 1990-NMSC-039, ¶ 18, 110 N.M. 268, 794 P.2d 1197 ("Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed . . . on appeal."). Therefore, we will not address these claims. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (noting that an appellate court will not review unclear or undeveloped arguments).

{18} Barnes claims that the district court erroneously applied the standard for ordinary fraud rather than the standard for fraud upon the court. If this did in fact occur, it was to Barnes's benefit because fraud upon the court is more difficult to establish than ordinary fraud. *See Moya*, 1988-NMSC-048, ¶ 8 (describing fraud upon the court as a deliberate plan or scheme to defraud the court beyond perjury that "is revealed by after-discovered evidence"); *Unser v. Unser*, 1974-NMSC-063, ¶ 26, 86 N.M. 648, 526 P.2d 790 ("Fraud and misrepresentation under Rule [1-0]60[(B)] requires the same elements as fraud in the ordinary sense[, including] a misrepresentation of a fact, known to be untrue by the maker, and made with an intent to deceive and to induce the other party to act upon it with the other party relying upon it to his injury or detriment."). Once again, we affirm the district court's finding that Barnes did not show that fraud occurred in this case. Barnes's brief-in-chief includes a number of quotes from legal documents, including a complaint and a memorandum, in a case or cases other than this case. We point out that the allegations made in pleadings, such as those quoted by Barnes, do not constitute evidence. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 25, 267 P.3d 806. Barnes's claim that BNYM's attorneys "concealed" the FSA is without merit. A partial version of the FSA was placed in the record in 2018. Barnes never sought an order to produce the complete FSA. *Cf. Fed. Nat'l Mortg. Ass'n* (*Fannie Mae*) *v. Trissell*, 2022-NMCA-001, ¶ 29, 503 P.3d 381 (noting that all litigants have a right to use discovery tools to acquire needed evidence). Barnes has failed to demonstrate that BNYM or BNYM's attorneys engaged in fraud or fraud on the court. The district court did not abuse its discretion in denying Barnes's post-appeal motions.[1]

II. Violation of Due Process

{19} Barnes claims he was denied due process when BNYM moved for summary judgment while withholding the FSA. The requirements for due process are notice with the opportunity to be heard. *Sandia v. Rivera*, 2002-NMCA-057, ¶ 17, 132 N.M. 201, 46 P.3d 108. Barnes was given ample notice and numerous opportunities to meaningfully participate in the proceedings below. In addition, this argument is not in fact a due process argument. Rather, it is just a restatement of Barnes's argument regarding the FSA. As we explained above, the doctrine of law of the case

[1]Having concluded that BNYM had authority to bring the foreclosure action in this case, we reject Barnes's contention that BNYM was required to establish an agency relationship with BOA in order for the district court to exercise personal jurisdiction here.

establishes that the FSA is irrelevant to this case because Barnes has no power to enforce the terms of that document.

CONCLUSION

{20} Based on the foregoing, we affirm the district court's order.

{21} **IT IS SO ORDERED.**

Jacqueline R. Medina

JACQUELINE R. MEDINA, Chief Judge

WE CONCUR:

ZACHARY A. IVES, Judge

Katherine A. Wray

KATHERINE A. WRAY, Judge