

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: February 18, 2015

4 **NO. 33,150**

5 **FLAGSTAR BANK, FSB,**

6 Plaintiff-Appellee,

7 v.

8 **JONATHAN K. LICHA, and**

9 **PAMELA S. MACKENZIE-LICHA,**

10 **husband and wife; et al.,**

11 Defendants-Appellants.

12 **APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY**

13 **Edmund H. Kase III, District Judge**

14 Sutin, Thayer & Browne, P.C.

15 Michelle K. Ostrye

16 Justin R. Sawyer

17 Albuquerque, NM

18 for Appellee

19 Eric Ortiz Law

20 Eric N. Ortiz

21 Joseph C. Gonzales

22 Jean Y. Chu

23 Albuquerque, NM

24 for Appellants

1 **OPINION**

2 **GARCIA, Judge.**

3 {1} Defendants Jonathan K. Licha and Pamela S. MacKenzie-Licha (the Lichas),
4 appeal the district court’s order granting summary judgment for foreclosure in favor
5 of Plaintiff Flagstar Bank, FSB (Flagstar). The Lichas primarily assert on appeal that
6 issues of fact concerning Flagstar’s standing to enforce the note and mortgage
7 precluded summary judgment. We disagree with the Lichas and affirm.

8 **BACKGROUND**

9 **A. The Loan and the District Court Proceedings**

10 {2} On March 4, 2009, the Lichas executed a promissory note to Lending
11 Solutions, Inc. (Lending Solutions) to borrow \$181,878. As security for the loan, the
12 Lichas signed a mortgage contract with Mortgage Electronic Registration Systems,
13 Inc. (MERS), as the nominee for Lending Solutions. On July 18, 2011, Flagstar filed
14 a foreclosure complaint against the Lichas, alleging that Flagstar was the current
15 holder of the note and the mortgage and that the Lichas were in default. The copy of
16 the note that Flagstar attached to its complaint contained an indorsement signed by
17 Ryan P. Tally, vice president of Lending Solutions, along with the words, “PAY TO
18 ORDER OF: FLAGSTAR BANK, FSB WITHOUT RECOURSE.” Flagstar also
19 attached to its complaint a copy of the mortgage with MERS and a copy of a

1 mortgage assignment from MERS to Flagstar dated April 29, 2011.

2 {3} The Lichas filed a pro se motion asking the district court to dismiss the
3 complaint on the basis that the complaint had failed to state a claim upon which relief
4 could be granted. The district court summarily denied the motion. Flagstar filed a
5 motion for summary judgment, which it later withdrew to give the Lichas opportunity
6 to answer the complaint. The Lichas then retained counsel, who filed an answer to the
7 complaint on their behalf. The answer asserted, among other things, that Flagstar
8 lacked standing to bring the complaint because it was not “the holder in due course”
9 and because it was “not the contractual party with respect to the transaction.”

10 {4} Flagstar renewed its summary judgment motion, asserting that it was “entitled
11 to enforce the [n]ote and [m]ortgage” because the note and mortgage were
12 “transferred and assigned to [Flagstar].” In support of this assertion, Flagstar referred
13 to a copy of the MERS assignment that it had attached to its complaint and it attached
14 an affidavit of Lisa Jones, an employee of Flagstar. In her affidavit, Ms. Jones stated
15 that “[t]he original [n]ote is maintained in a vault at Flagstar[,]” that “Flagstar’s vault
16 document management system” indicates “that Flagstar held possession of the
17 original [n]ote when it commenced the instant foreclosure action,” that Flagstar
18 continues to “hold[] possession of the original [n]ote[,]” and that she “reviewed the
19 copy of the [n]ote . . . and ha[s] confirmed that it is a true and correct copy of the

1 original [n]ote that is maintained at Flagstar.” Attached to this affidavit were copies
2 of the note containing the indorsement to Flagstar, the mortgage, and the MERS
3 assignment, which appear to be identical to the documents that Flagstar attached to
4 its complaint.

5 {5} In response to Flagstar’s renewed summary judgment motion, the Lichas made
6 four arguments relevant to this appeal. Their first argument concerned Flagstar’s
7 standing to foreclose. They argued that there were factual disputes about whether
8 Lending Solutions authorized MERS to assign the mortgage to Flagstar, whether
9 Flagstar gave any consideration for the assignment of the note and mortgage, and
10 whether Flagstar was the current owner of the mortgage. In support of their assertion
11 that Flagstar was not the owner of the mortgage, the Lichas submitted an affidavit of
12 Vanessa DeNiro, an attorney who performed a “loan audit” for the Lichas. Ms.
13 DeNiro stated in her affidavit that, based on her research, Ginnie Mae was the owner
14 of the mortgage loan. Her affidavit also contained numerous legal arguments and
15 conclusions of law.

16 {6} Second, the Lichas argued that they should have been afforded an opportunity
17 to conduct additional discovery on the issue of whether Flagstar had standing to
18 foreclose. Third, they argued that the district court should sanction Flagstar for “bad
19 faith discovery tactics” because it stated in its responses to the Lichas’ interrogatories

1 that the “subject loan” was “owned by Flagstar” when the “true owner is [Ginnie
2 Mae].” Fourth, they argued that “there was a potential violation of [the] Home Loan
3 Protection Act.”

4 {7} In its reply, Flagstar moved to strike the DeNiro affidavit because, among other
5 reasons, the affidavit contained statements that were “inadmissible hearsay, violate
6 the best evidence rule[,] or are inadmissible legal conclusions.” Flagstar argued that
7 the Lichas did not have standing to challenge the consideration paid for the
8 assignment of the mortgage to Flagstar. Flagstar also attached an affidavit and an
9 exhibit to its reply showing an undated endorsement in blank by Flagstar on the back
10 of the note.

11 {8} Without holding a hearing, the district court entered an order granting summary
12 judgment in favor of Flagstar, in which it concluded that Flagstar was entitled to
13 enforce the note and mortgage. In the same order, it struck the DeNiro affidavit and
14 denied the Lichas’ request for additional discovery, but it did not discuss the reasons
15 for these decisions. It later denied the Lichas’ motion to reconsider.

16 **B. Arguments on Appeal**

17 {9} All but one of the arguments set forth in the Lichas’ brief in chief were
18 preserved in the district court. The unpreserved argument asserts that the Jones
19 affidavit attached to Flagstar’s summary judgment motion did not show that Ms.

1 Jones had “personal knowledge” concerning her statement that Flagstar possessed the
2 original note on the date it filed for foreclosure because she relied on Flagstar’s
3 computer system for this information. Flagstar correctly counters that the Lichas did
4 not raise this argument in the district court. Thus, we do not address this issue
5 because the Lichas do not argue, and we do not find, that we should apply the public
6 interest exception to the rule that appellate courts do not address unpreserved
7 arguments. *See* Rule 12-216 NMRA; *O’Neel v. USAA Ins. Co.*, 2002-NMCA-028,
8 ¶ 32, 131 N.M. 630, 41 P.3d 356 (declining to consider unpreserved arguments on
9 appeal where there was no basis to apply the general public interest exception).

10 {10} The five preserved arguments that the Lichas renew in their brief in chief are
11 whether: (1) There were disputed issues of material fact regarding whether Flagstar
12 was the holder of the note and the mortgage; (2) The Lichas have standing to
13 challenge the validity of the assignment of the note and mortgage; (3) The DeNiro
14 affidavit should not have been stricken; (4) The district court should have allowed the
15 Lichas more time to conduct additional discovery; and (5) The district court should
16 have held a hearing before it decided to strike the DeNiro affidavit, deny the Lichas’
17 request for bad faith discovery sanctions against Flagstar, and grant summary
18 judgment in favor of Flagstar.

1 {11} The Lichas did not renew various other issues in their brief in chief that they
2 raised in the district court. However, because Flagstar raises two of these additional
3 issues in its answer brief and the Lichas address them in their reply brief, we shall
4 discuss them in this opinion. *See Brashear v. Packers*, 1994-NMSC-108, ¶ 7, 118
5 N.M. 581, 883 P.2d 1278 (“[I]f an appellee raises an argument not addressed by the
6 appellant in its opening brief, the appellant may reply.” (alteration, internal quotation
7 marks, and citation omitted)). These two additional issues are whether MERS was
8 authorized to assign the mortgage to Flagstar and whether the Lichas’ contention that
9 the original lender “may have” violated the Home Loan Protection Act precludes
10 summary judgment in favor of Flagstar.

11 **DISCUSSION**

12 **A. Standard of Review**

13 {12} We review a district court’s order granting summary judgment de novo.
14 *Summers v. Ardent Health Servs., L.L.C.*, 2011-NMSC-017, ¶ 10, 150 N.M. 123, 257
15 P.3d 943. “Summary judgment is appropriate where there are no genuine issues of
16 material fact and the movant is entitled to judgment as a matter of law.” *Montgomery*
17 *v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (internal
18 quotation marks and citation omitted). “On review, we examine the whole record for
19 any evidence that places a genuine issue of material fact in dispute, and we view the

1 facts in a light most favorable to the party opposing the motion and draw all
2 reasonable inferences in support of a trial on the merits[.]” *Handmaker v. Henney*,
3 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879 (internal quotation marks and
4 citation omitted). The party moving for summary judgment has the burden “to
5 establish that no genuine issue of material fact exists for trial and that the movant is
6 entitled to judgment as a matter of law.” *C & H Constr. & Paving Co. v. Citizens*
7 *Bank*, 1979-NMCA-077, ¶ 9, 93 N.M. 150, 597 P.2d 1190. However, “[t]he party
8 opposing a motion for summary judgment cannot defeat the motion . . . by the bare
9 contention that an issue of fact exists, but must show that evidence is available which
10 would justify a trial of the issue.” *Spears v. Canon de Carnue Land Grant*, 1969-
11 NMSC-163, ¶ 12, 80 N.M. 766, 461 P.2d 415; *see Guest v. Berardinelli*, 2008-
12 NMCA-144, ¶ 35, 145 N.M. 186, 195 P.3d 353 (“General assertions of the existence
13 of a triable issue are insufficient to overcome summary judgment on appeal.”).

14 **B. Standing**

15 {13} Standing is a jurisdictional prerequisite that “may not be waived and may be
16 raised at any stage of the proceedings, even sua sponte by the appellate court.” *Bank*
17 *of N.Y. v. Romero*, 2014-NMSC-007, ¶ 15, 320 P.3d 1 (internal quotation marks and
18 citation omitted). Plaintiffs who bring foreclosure actions must demonstrate that they
19 had the right to enforce the note and mortgage at the time that they filed the

1 foreclosure suit. *Id.* ¶ 17.

2 **1. Right to Enforce the Note**

3 {14} To establish the right to enforce a negotiable instrument such as a note, a
4 plaintiff must show that it is: (1) the “holder” of the instrument; (2) a “nonholder”
5 who possesses the instrument and has the rights of a holder; or (3) a person who does
6 not possess the instrument, but is nonetheless entitled to enforce it pursuant to certain
7 provisions of the Uniform Commercial Code (UCC). NMSA 1978, § 55-3-301
8 (1992); *see Romero*, 2014-NMSC-007, ¶ 20. The UCC defines the “holder” of the
9 instrument, in pertinent part, as “the person in possession of a negotiable instrument
10 that is payable either to bearer or to an identified person that is the person in
11 possession[.]” NMSA 1978, § 55-1-201(b)(21)(A) (2005); *see Romero*, 2014-NMSC-
12 007, ¶ 21. A third party who is not the payee of the instrument “must prove both
13 physical possession *and* the right to enforcement through either a proper indorsement
14 or a transfer by negotiation.” *Romero*, 2014-NMSC-007, ¶ 21. The UCC recognizes
15 two kinds of indorsements for the purpose of negotiating an instrument: a blank
16 indorsement and a special indorsement. *Id.* ¶¶ 24-25. “A blank indorsement . . . does
17 not identify a person to whom the instrument is payable[,] but instead makes it
18 payable to anyone who holds it as bearer paper.” *Id.* ¶ 24 (citing NMSA 1978, § 55-3-
19 205(b) (1992)). “[A] special indorsement ‘identifies a person to whom it makes the

1 instrument payable.” *Romero*, 2014-NMSC-007, ¶ 25 (quoting Section 55-3-205(a)).
2 “When specially indorsed, an instrument becomes payable to the identified person
3 and may be negotiated only by the indorsement of that person.” *Romero*, 2014-
4 NMSC-007, ¶ 25 (internal quotation marks and citation omitted).

5 {15} In this case, because the payee of the note was Lending Solutions, we must
6 determine whether Flagstar provided sufficient evidence of how it became the holder
7 by either an indorsement or transfer. *See id.* ¶ 21. Because the note that Flagstar
8 attached to its complaint was specially indorsed by Lending Solutions, identifying
9 Flagstar as the person to whom the note was payable, we conclude that Flagstar
10 provided sufficient evidence that it was the holder of the note with the right to enforce
11 it under the UCC. *See id.*; § 55-3-301; § 55-1-201(b)(21)(A); § 55-3-205(a).

12 {16} During the summary judgment proceedings, Flagstar submitted a copy of the
13 back page of the note showing that Flagstar had indorsed the note in blank. The
14 Lichas argue that Flagstar’s blank indorsement on the back of the note was a
15 “conflicting indorsement[]” that created an issue of fact precluding summary
16 judgment. We disagree. Flagstar’s blank indorsement is consistent with Lending
17 Solution’s special indorsement to Flagstar. Because Flagstar has shown that it is the
18 holder of the note due to Lending Solutions’ special indorsement, the effect of
19 Flagstar’s blank indorsement is to allow Flagstar to negotiate, or transfer, the note to

1 another person. *See* NMSA 1978, § 55-3-201(a) (1992) (defining “[n]egotiation” as
2 “a transfer of possession, whether voluntary or involuntary, of an instrument by a
3 person other than the issuer to a person who thereby becomes its holder”); *Casarez*
4 *v. Garcia*, 1983-NMCA-013, ¶ 16, 99 N.M. 508, 660 P.2d 598 (recognizing that when
5 a note is specially indorsed to a transferee, that transferee may “further negotiate[]”
6 the note “only by his indorsement”). The Lichas have not claimed that there is
7 evidence that Flagstar, after indorsing the note in blank, had transferred the note to
8 another person. Without such evidence, Flagstar’s blank indorsement on the note it
9 continues to hold has no effect on the issues we address in this appeal.

10 **2. Right to Foreclose the Mortgage**

11 {17} Our Supreme Court has recently held that where a plaintiff has not established
12 the right to enforce the note, it cannot foreclose the mortgage, even if evidence shows
13 that the mortgage was assigned to the plaintiff. *See Romero*, 2014-NMSC-007, ¶¶ 34-
14 35. In doing so, the Supreme Court included quotations from various authorities
15 recognizing that where the foreclosing plaintiff establishes the right to enforce the
16 note, the plaintiff automatically has the right to foreclose the mortgage that secures
17 the note. *See id.* ¶ 35. Authorities in New Mexico and elsewhere are consistent with
18 this principle. *See, e.g., Simson v. Bilderbeck, Inc.*, 1966-NMSC-170, ¶¶ 13-14, 76
19 N.M. 667, 417 P.2d 803 (recognizing that “[i]t has frequently been held that a

1 mortgage is but an incident to the debt, the payment of which it secures, and its
2 ownership follows the assignment of the debt” and concluding that the plaintiff,
3 “[h]aving a right . . . to enforce the note, . . . could foreclose the mortgage” (internal
4 quotation marks and citation omitted)); 55 Am. Jur. 2d *Mortgages* § 927 (2009)
5 (“Generally, the transfer or assignment of a negotiable promissory note carries with
6 it, as an incident, a deed of trust or mortgage upon real estate or chattels that secure
7 its payment. The mortgage follows the debt, in the sense that the assignment of the
8 note evidencing the debt automatically carries with it the assignment of the
9 mortgage. . . . An assignment of the obligation operates as an assignment of the
10 mortgage as effectively for all purposes as a formal written assignment. There is no
11 necessity for the granting or recording of a separate mortgage assignment.” (footnotes
12 omitted)).

13 {18} Consistent with these authorities, we clarify that in order to demonstrate
14 standing to bring a mortgage foreclosure action, the plaintiff must establish that it had
15 the right to enforce the note at the time it filed suit and that the note was secured by
16 a mortgage—the plaintiff need not additionally establish that the mortgage was
17 formally assigned because the right to enforce the mortgage automatically follows the
18 right to enforce the note. *See Romero*, 2014-NMSC-007, ¶ 35; *Simson*, 1966-NMSC-
19 170, ¶¶ 13-14; 55 Am. Jur. 2d *Mortgages* § 927. Therefore, the Lichas’ challenge to

1 the MERS assignment was not a material issue that precluded summary judgment
2 because, when Flagstar established the right to enforce the note, Flagstar
3 automatically established its right to enforce the mortgage. *See Romero*, 2014-
4 NMSC-007, ¶ 35; *see also Romero v. Philip Morris, Inc.*, 2009-NMCA-022, ¶ 12,
5 145 N.M. 658, 203 P.3d 873 (“An issue of fact is ‘material’ if the existence (or non-
6 existence) of the fact is of consequence under the substantive rules of law governing
7 the parties’ dispute.”), *rev’d on other grounds by* 2010-NMSC-035, 148 N.M. 713,
8 242 P.3d 280; *Simson*, 1966-NMSC-170, ¶¶ 13-14; 55 Am. Jur. 2d *Mortgages* § 927.

9 **3. Consideration**

10 {19} We reject the Lichas’ argument that the question of whether Flagstar gave
11 consideration for the note and mortgage was a material issue that precluded summary
12 judgment. The Lichas cite no authority and this Court has found no authority that
13 requires the holder of a note, as the plaintiff in a foreclosure action, to establish that
14 it gave consideration to the original lender for the right to enforce the note and
15 mortgage. Although New Mexico courts have not directly addressed this issue, we
16 agree with the weight of authority that concludes that persons may not raise the
17 defense of lack of consideration where they were not parties to the transfer because
18 such defense is available only to the parties to the transfer. *See 59 C.J.S. Mortgages*
19 § 412 (2009) (“An assignment of a mortgage must be supported by a good and

1 valuable consideration in order to be valid *as between the parties*. However, the want
2 of consideration is not available as a defense to one who was not a party to the
3 assignment and hence was not thereby injured[.]” (emphasis added) (footnotes
4 omitted)); *Reeves v. ReconTrust Co.*, 846 F. Supp. 2d 1149, 1164 (D. Or. 2012)
5 (concluding that the defense of lack of consideration is not available to third-party
6 debtors to void the mortgage assignment to MERS). Therefore, because the Lichas
7 were not parties to the transfer of the note and mortgage from Lending Solutions to
8 Flagstar, we conclude that the Lichas’ lack-of-consideration argument does not raise
9 an issue of material fact precluding summary judgment.

10 **C. Exclusion of the DeNiro Affidavit**

11 {20} We review a district court’s decision to strike an affidavit at the summary
12 judgment stage of the proceedings for an abuse of discretion. *See Akins v. United*
13 *Steelworkers of Am.*, 2009-NMCA-051, ¶ 40, 146 N.M. 237, 208 P.3d 457 (“We
14 review a district court’s decision to admit or exclude evidence for abuse of
15 discretion.”), *aff’d* 2010-NMSC-031, 148 N.M. 442, 237 P.3d 744; *Mitchael v.*
16 *Intracorp, Inc.*, 179 F.3d 847, 854-55 (10th Cir. 1999) (“Like other evidentiary
17 rulings, we review a district court’s decision to exclude evidence at the summary
18 judgment stage for abuse of discretion.” (internal quotation marks and citation
19 omitted)). In doing so, we “presume[] that the district court [wa]s correct” and “the

1 burden is on the appellant to clearly demonstrate the district court’s error.” *Akins*,
2 2009-NMCA-051, ¶ 40. Affidavits supporting or opposing a summary judgment
3 motion

4 shall be made on personal knowledge, shall set forth such facts as would
5 be admissible in evidence, and shall show affirmatively that the affiant
6 is competent to testify to the matters stated therein. Sworn or certified
7 copies of all papers or parts thereof referred to in an affidavit shall be
8 attached thereto or served therewith.

9 Rule 1-056(E) NMRA. At the summary judgment stage, a district court “must
10 consider evidence even if the *form* of the evidence, such as a deposition, would be
11 inadmissible at trial,” but “it cannot consider evidence if the *substance* of the
12 evidence is inadmissible at trial.” *Wilde v. Westland Dev. Co.*, 2010-NMCA-085,
13 ¶ 28, 148 N.M. 627, 241 P.3d 628 (first emphasis added). For instance, “hearsay . . .
14 is not generally admissible at trial, so affidavits or depositions containing hearsay are
15 not sufficient evidence of a fact.” *Id.* (internal quotation marks and citation omitted).
16 Furthermore, opinions of witnesses concerning questions of law are inadmissible at
17 trial. *See Beal v. S. Union Gas Co.*, 1960-NMSC-019, ¶¶ 29-30, 66 N.M. 424, 349
18 P.2d 337.

19 {21} Ms. DeNiro stated in her affidavit that she had performed a “Mortgage
20 Securitization Analysis and Legal Chain of Title Report” based on her research and
21 analysis of “documents[]” and “county records[,]” and her use of “internet tools and

1 commercial and government websites.” Her affidavit contained four parts: a
2 “securitization analysis”; a “chain of title report”; a “supplementary legal analysis”;
3 and a conclusion. In her securitization analysis, she stated that her research revealed
4 that “[t]he [m]ortgage associated with [the subject loan] is a mortgage back [sic]
5 security . . . guaranteed by [Ginnie Mae] (Ginnie Mae II RPB Trust/Pool 2009).”
6 (Emphasis omitted.) She did not identify or include copies of any of the documents,
7 county records, or website pages that she relied on in making this determination. She
8 then stated that:

9 By [Ginnie Mae] purchasing the said [m]ortgage [l]oan and selling
10 certificates as shares of the [Ginnie Mae] RPB Pool 2009[] to investors
11 based on the placement of the loan, [Ginnie Mae] was exercising rights
12 of ownership over the said [m]ortgage [l]oan[, and b]y exercising such
13 rights of ownership, [Ginnie Mae] made a claim of ownership of the said
14 [m]ortgage [l]oan.

15 In the chain of title report, Ms. DeNiro stated that she did not find the assignment of
16 the mortgage from MERS to Flagstar in the county records. She then concluded that
17 “[t]here is no legal evidence that Flagstar is the owner of the said [m]ortgage” or “the
18 [n]ote” and that Flagstar was “at most, a mere servicer of the [m]ortgage.” The
19 remainder of this part of the affidavit, and the parts identified as supplementary legal
20 analysis and conclusion do not contain facts, but rather legal arguments and legal
21 conclusions.

22 {22} The Lichas contend that the district court should not have excluded the DeNiro

1 affidavit because it established a genuine issue of material fact as to the ownership
2 of the note and mortgage. We reject this contention.

3 {23} Most of the statements that Ms. DeNiro made in her affidavit concerned legal
4 conclusions that would have been inadmissible at trial, and were thus properly
5 excluded. *See Beal*, 1960-NMSC-019, ¶¶ 29-30 (concluding that expert testimony
6 was properly stricken at trial because it is not the function of any witness, expert or
7 non-expert, to state an opinion on a matter of law); *Wilde*, 2010-NMCA-085, ¶ 28
8 (stating that our Supreme Court has made clear that a court cannot consider evidence
9 at the summary judgment stage “if the *substance* of the evidence is inadmissible at
10 trial”). The only statement in her affidavit concerning a disputed *factual* issue about
11 Flagstar’s standing was that “[t]he [m]ortgage associated with [the subject loan] is a
12 mortgage back [sic] security . . . guaranteed by [Ginnie Mae] (Ginnie Mae II RPB
13 Trust/Pool 2009)[,]” which resulted in Ginnie Mae having “rights of ownership [over]
14 the said [m]ortgage [l]oan.” (Emphasis omitted.) This statement was properly
15 excluded for two reasons. First, Ms. DeNiro claimed that she relied on “documents[.]”
16 and “county records[,]” and her use of “internet tools and commercial and
17 government websites” in making her statements, but none of these sources were
18 identified or attached to the affidavit, in violation of Rule 1-056(E). *See* Rule 1-
19 056(E) (“Sworn or certified copies of all papers or parts thereof referred to in an

1 affidavit shall be attached thereto or served therewith.”); *cf. State v. Lopez*, 2009-
2 NMCA-044, ¶¶ 14, 26, 146 N.M. 98, 206 P.3d 1003 (holding that, pursuant to the
3 best evidence rule, trial testimony relying on documents was inadmissible without
4 submission of such documents or an explanation as to why the documents were
5 unavailable). Second, Ms. DeNiro’s statements are vague and only appear to
6 reference the ownership of the mortgage—not the note. Because we have concluded
7 that the right to foreclose the mortgage automatically follows the right to enforce the
8 note, and Flagstar established that it had the right to enforce the note, Ms. DeNiro’s
9 statements about ownership of the mortgage were not material to the issue of
10 Flagstar’s right to file this foreclosure action. *See Romero*, 2009-NMCA-022, ¶ 12.
11 Therefore, we conclude that the district court did not abuse its discretion in striking
12 the DeNiro affidavit. *See Akins*, 2009-NMCA-051, ¶ 40; *see also Mitchael*, 179 F.3d
13 at 854.

14 **D. The Lichas’ Request for Further Discovery**

15 {24} The Lichas argue that the district court should have granted its request for more
16 time to conduct discovery before it granted Flagstar’s summary judgment motion. We
17 disagree.

18 {25} “[W]e review a district court’s decision limiting discovery solely on the
19 grounds of abuse of discretion.” *Sanchez v. Church of Scientology*, 1993-NMSC-034,

1 ¶ 17, 115 N.M. 660, 857 P.2d 771. Generally, “a court should not grant summary
2 judgment before a party has completed discovery.” *Sun Country Sav. Bank of N.M.,*
3 *F.S.B. v. McDowell*, 1989-NMSC-043, ¶ 27, 108 N.M. 528, 775 P.2d 730. In
4 determining whether summary judgment was premature based upon discovery issues,
5 we consider the following factors: (1) whether the nonmovant sought a continuance
6 during the summary judgment motion stage to complete its discovery; (2) whether,
7 between the time the summary judgment motion was filed and the grant of summary
8 judgment, the nonmovant had sufficient time to obtain discovery; (3) whether the
9 nonmovant submitted an affidavit in opposition to the summary judgment motion
10 “contain[ing] a statement of the time required to complete the discovery, the
11 particular evidence needed, where the particular evidence was located and the
12 methods used to obtain the evidence[]”; and (4) whether the party who moved for
13 summary judgment “gave an appropriate response to a discovery request from the
14 nonmoving party.” *Id.*

15 {26} Applying these factors, the record shows that the Lichas propounded
16 interrogatories and requests for production upon Flagstar on September 7, 2012.
17 Flagstar responded to these requests on October 31, 2012 and supplemented its
18 responses on March 6, 2013. The record shows that during the four-month period
19 between the time they received Flagstar’s initial responses and the time that Flagstar

1 filed its summary judgment motion, the Lichas made no formal objection to the
2 manner in which Flagstar responded to their requests, nor did they seek additional
3 discovery from Flagstar. Only after Flagstar moved for summary judgment did the
4 Lichas contend in their opposition to the motion that “[f]urther discovery is needed
5 to determine whether MERS had proper authorization to act on behalf of Lending
6 Solutions” when it assigned the mortgage to Flagstar; that Flagstar “continuously
7 refused to provide requested original loan documents or consideration or value given
8 in exchange for the [a]ssignment of [m]ortgage”; that the Lichas needed time to
9 “inspect the . . . loan application and all disclosures made or not made to them” and
10 the “full mortgage file” so that they could “determine whether the loan is void or
11 voidable due to fraud or misrepresentation”; and that Flagstar “has refused to provide
12 true discovery responses” because its statement that “the loan had never been
13 securitized” was “false.” The Lichas did not submit an affidavit with their opposition
14 detailing the time required to complete their discovery or the methods needed to
15 obtain the evidence they sought.

16 {27} During the next three-month interval between the time that Flagstar moved for
17 summary judgment and the district court’s order granting it, the Lichas did not
18 propound any further discovery requests upon Flagstar, they did not move to compel
19 Flagstar to produce any documents they claimed that Flagstar improperly withheld,

1 and they did not move for a stay or continuance of the summary judgment
2 proceedings. Furthermore, the Lichas do not dispute Flagstar’s claim that it provided
3 them with an “opportunity to inspect the original note but the Lichas failed to do so.”
4 For these reasons, we conclude that the Lichas did not act reasonably in pursuing the
5 deficiencies claimed to exist in discovery and the district court did not abuse its
6 discretion in denying the Lichas more time to pursue discovery. *See Sanchez*, 1993-
7 NMSC-034, ¶ 17; *Sun Country Sav. Bank of N.M., F.S.B.*, 1989-NMSC-043, ¶ 29
8 (affirming summary judgment where nonmovant “did not act reasonably in
9 discovering . . . information” because it did not file a motion to compel, did not seek
10 a continuance of the summary judgment proceedings, did not attempt to conduct
11 additional discovery while the summary judgment motion was pending, and did not
12 include an affidavit elaborating on the time and methods needed to complete
13 discovery).

14 **E. Home Loan Protection Act**

15 {28} Although the Lichas do not raise an issue in their brief in chief concerning the
16 Home Loan Protection Act (HLPA), NMSA 1978, §§ 58-21A-1 to -14 (2003, as
17 amended through 2009), Flagstar argues in its answer brief that it is not subject to the
18 HLPA claims that were made by the Lichas during the summary judgment
19 proceedings. The Lichas counter in their reply brief that Flagstar is subject to the

1 HLPA, that the Lichas “presented a factual dispute as to whether [Flagstar] may have
2 violated the HLPA[,]” and that this factual dispute precluded summary judgment.
3 However, the Lichas do not identify or discuss the nature of the factual dispute they
4 claim exists. Instead, they merely state that more discovery is required to determine
5 whether there was an HLPA violation. Because the Lichas do not identify an actual
6 factual issue with regard to the HLPA in their appellate briefs, and because we have
7 concluded that they did not act reasonably in pursuing discovery prior to the summary
8 judgment ruling, we need not further address the legal question of whether Flagstar
9 violated the HLPA. *See Montgomery*, 2007-NMSC-002, ¶ 16. (“Summary judgment
10 is appropriate where there are no genuine issues of material fact and the movant is
11 entitled to judgment as a matter of law.” (internal quotation marks and citation
12 omitted)); *Spears*, 1969-NMSC-163, ¶ 12 (“The party opposing a motion for
13 summary judgment cannot defeat the motion . . . by the bare contention that an issue
14 of fact exists, but must show that evidence is available[.]”); *Guest*, 2008-NMCA-144,
15 ¶ 35 (“General assertions of the existence of a triable issue are insufficient to
16 overcome summary judgment on appeal.”).

17 **F. Hearing**

18 {29} Finally, the Lichas claim that the district court erred when it decided the
19 summary judgment motion without a hearing. We reject this contention because we

1 are aware of no authority, and the Lichas have cited none, that requires a district court
2 to hold a hearing on a summary judgment motion. *See Curry v. Great Nw. Ins. Co.*,
3 2014-NMCA-031, ¶ 28, 320 P.3d 482 (“Where a party cites no authority to support
4 an argument, we may assume no such authority exists.”), *cert. denied*, 2014-
5 NMCERT-003, 324 P.3d 375. We have previously recognized that “[i]n considering
6 a motion for summary judgment, the [district] court . . . is not required to[] hold an
7 oral hearing. . . . when the opposing party has had an adequate opportunity to respond
8 to [the] movant’s arguments through the briefing process.” *Nat’l Excess Ins. Co. v.*
9 *Bingham*, 1987-NMCA-109, ¶ 9, 106 N.M. 325, 742 P.2d 537. The Lichas filed a
10 written response in opposition to Flagstar’s summary judgment motion and have not
11 claimed that they did not have an opportunity to respond to Flagstar’s arguments
12 during the briefing process. Therefore, we conclude that the district court did not err
13 when it granted summary judgment without a hearing.

14 {30} The Lichas also argue that the district court should have held a hearing on their
15 request for discovery sanctions against Flagstar because: statements in the DeNiro
16 affidavit contradicted some of Flagstar’s responses to the Lichas’ discovery requests;
17 a hearing would have allowed the district court to determine whether Ms. DeNiro’s
18 statements were correct and Flagstar’s statements were false; and if Flagstar’s
19 statements were false, the district court could have granted the Lichas’ request for bad

1 faith discovery sanctions. We reject this argument for three reasons. First, we have
2 already concluded that the statements in the DeNiro affidavit were inadmissible and
3 the district court properly struck them. Second, even if the district court had
4 considered the DeNiro affidavit, the statements in the affidavit that contradict
5 Flagstar's right to foreclose the mortgage fail as a matter of law because Flagstar
6 established it had the right to enforce the note. Third, the Lichas cite no authority, and
7 we have found none, that requires a district court to hold a hearing on an unresolved
8 request for discovery sanctions for the separate purpose of weighing the credibility
9 of individuals who have made conflicting statements during the discovery process.
10 *See Curry*, 2014-NMCA-031, ¶ 28.

11 **CONCLUSION**

12 {31} For the reasons set forth herein, we affirm the district court's order granting
13 summary judgment in favor of Flagstar.

14 {32} **IT IS SO ORDERED.**

15

16

TIMOTHY L. GARCIA, Judge

1 **WE CONCUR:**

2

3 **MICHAEL E. VIGIL, Chief Judge**

4

5 **M. MONICA ZAMORA, Judge**