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

2 **WELLS FARGO BANK, N.A.,**

3           Plaintiff-Appellee,

4 v.

**NO. 34,078**

5 **SHEMINA NAGJI, a married person as her**  
6 **sole and private estate; CHARTER BANK;**  
7 **ABC Corporations I-X, XYZ Partnerships I-X,**  
8 **John Does I-X and Jane Does I-X, THE UNKNOWN**  
9 **HEIRS AND DEVISEES OF ANY OF THE ABOVE,**  
10 **IF DECEASED,**

11           Defendants-Appellants.

12 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**  
13 **Denise Barela Shepherd, District Judge**

14 McCarthy & Holthus, LLP  
15 Jeanette Whittaker  
16 Albuquerque, NM

17 for Appellee

18 Joshua R. Simms, PC  
19 Joshua R. Simms  
20 Albuquerque, NM

1 for Appellants

2 **MEMORANDUM OPINION**

3 **WECHSLER, Judge.**

4 {1} Defendant appeals the district court’s money judgment and decree of  
5 foreclosure, based on a promissory note and mortgage sued on by Plaintiff. We issued  
6 a notice proposing to affirm the district court’s order, and Defendant has responded  
7 with a memorandum in opposition. We are not persuaded by the memorandum and  
8 affirm for the reasons stated below and in the notice of proposed disposition.

9 {2} Defendant first argues that although Plaintiff may have established that it is the  
10 holder of the promissory note, it did not establish that it is the owner of the note. [MIO  
11 1] Defendant relies on a statement in *Bank of New York v. Romero*, 2014-NMSC-007,  
12 ¶ 17, 320 P.3d 1, to the effect that the bank in that case had the burden of establishing  
13 “timely ownership” of the note in order to establish its authority to pursue a  
14 foreclosure action. Reading the *Romero* opinion as a whole, however, it is clear that  
15 the Supreme Court’s mention of ownership was not intended to legally distinguish that  
16 concept from status as a holder of a negotiable instrument under the Uniform  
17 Commercial Code (UCC). As *Romero* states in subsequent paragraphs, under the UCC  
18 a holder of an instrument is entitled to enforce that instrument. *Id.* ¶¶ 20-21. In this

1 case, therefore, it was sufficient for standing purposes for Plaintiff to establish that it  
2 was the holder of the promissory note. In the notice, we discussed the fact that  
3 Plaintiff had done so by attaching to its complaint a copy of the promissory note  
4 bearing a special indorsement from the original lender to Plaintiff, and an indorsement  
5 in blank. Defendant has not challenged that discussion, and we therefore hold, for the  
6 reasons stated in the notice, that Plaintiff had standing to enforce the promissory note.  
7 *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683  
8 (holding that a party opposing summary disposition has the burden to clearly point out  
9 errors in fact or law contained in the notice of proposed disposition).

10 {3} Defendant also disputes our statement in the notice that a mortgage  
11 automatically follows the promissory note, and our proposed holding that Defendant’s  
12 argument attacking the assignment of the mortgage by MERS is therefore unavailing.  
13 In making that statement and proposed holding, we relied on an opinion issued in the  
14 case of *Flagstar Bank FSB v. Licha*, (No. 33,150, Feb. 18, 2015). Upon a motion for  
15 rehearing, however, that opinion was withdrawn and a new opinion has recently been  
16 filed. *Flagstar Bank FSB v. Licha*, \_\_\_-NMCA-\_\_\_, \_\_\_ P.3d \_\_\_ (No. 33,150, June  
17 4, 2015). Although the new opinion removes the “automatically follows” language  
18 that we relied on in the notice, this removal does not aid Defendant. While narrowing  
19 that particular bit of language, the revised *Flagstar* opinion points out that where

1 MERS has the status of a nominee, it has the authority to assign a mortgage. *See*  
2 *Flagstar*, \_\_\_-NMCA-\_\_\_, ¶ 17. In *Flagstar*, we also stated that a party’s bare  
3 assertion that MERS lacks authority to assign a mortgage, without any attempt to  
4 distinguish MERS’s status in the current case from its status as a nominee as discussed  
5 by the Supreme Court in the *Romero* case, will not be a basis for invalidating the  
6 assignment of the mortgage. *Id.* That is exactly the situation here—following trial the  
7 district court specifically found that MERS assigned the mortgage as the nominee for  
8 a successor in interest to the original lender, and therefore the assignment properly  
9 assigned the beneficial interest in the mortgage to Plaintiff. [RP 413] In other words,  
10 the district court determined that MERS had exactly the same status in this case as it  
11 did in the *Flagstar* and *Romero* cases, as nominee for the original lender or a  
12 successor in interest to that lender. Defendant has not challenged that finding with any  
13 reference to facts in the record, and we therefore determine that MERS’s assignment  
14 of the mortgage in this case was valid, as was the assignment in *Flagstar*.

15 {4} Defendant’s final argument makes reference to the alleged fact that the  
16 assignment of the mortgage from MERS to Plaintiff may not have been properly  
17 recorded. [MIO 3-4, 7] Defendant appears to rely on this alleged fact to argue that the  
18 assignment is therefore invalid and ineffective to transfer any interest in the mortgage  
19 to Plaintiff. This argument was not made below or in Defendant’s docketing

1 statement, and we therefore treat this argument as a motion to amend the docketing  
2 statement. We deny the motion to raise this new argument, because, as discussed  
3 below, it was not preserved in the district court and Defendant has not demonstrated  
4 that it is legally or factually viable. *See State v. Rael*, 1983-NMCA-081, ¶¶ 15-16, 100  
5 N.M. 193, 668 P.2d 309 (discussing requirements for amending a docketing statement,  
6 including that issue sought to be raised must have been preserved below and must be  
7 viable).

8 {5} We can find no mention of the “recording” argument in Defendant’s written  
9 closing argument, and the district court did not mention the issue in its findings and  
10 conclusions. [RP 377-83, 409-16] Furthermore, as we pointed out above, the issue was  
11 not discussed in Defendant’s docketing statement, which is further evidence that it  
12 was not raised in the district court. Finally, Defendant has not explained how it was  
13 raised below. We therefore find it was not raised in the district court and was not  
14 preserved for appeal. *See, e.g., Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106  
15 N.M. 492, 745 P.2d 717 (“To preserve an issue for review on appeal, it must appear  
16 that appellant fairly invoked a ruling of the trial court on the same grounds argued in  
17 the appellate court.”).

18 {6} Furthermore, Defendant has not shown that the argument is supported in either  
19 fact or law. Defendant’s mere assertion that the MERS assignment was not recorded

1 is not evidence, so the factual basis for Defendant's argument has not been  
2 established. *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104  
3 (noting that mere assertions and arguments of counsel are not evidence). In addition,  
4 Defendant has cited no authority for the novel proposition that the failure to record a  
5 transaction renders that transaction legally ineffective, and the only authority we have  
6 found is to the contrary. The purpose of the recording statute is limited to protecting  
7 subsequent good-faith purchasers for value or judgment-lien holders, not to give the  
8 transaction legal validity. *See, e.g., Withers v. Bd. of Cnty. Comm'rs of San Juan*  
9 *County*, 1981-NMCA-032, ¶ 6, 96 N.M. 71, 628 P.2d 316. Defendant's argument  
10 therefore appears to fail both factually and legally, and we deny the implied motion  
11 to amend the docketing statement on that basis as well as on the basis that the  
12 argument was not preserved below.

13 {7} Based on the foregoing, we affirm the district court's money judgment and  
14 decree of foreclosure.

15 {8} **IT IS SO ORDERED.**

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**JAMES J. WECHSLER, Judge**

1 **WE CONCUR:**

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

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5 **MICHAEL D. BUSTAMANTE, Judge**