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

2 **DEUTSCHE BANK NATIONAL**
3 **TRUST COMPANY, AS TRUSTEE**
4 **FOR MORGAN STANLEY**
5 **MORTGAGE LOAN TRUST 2005-10,**

6 Plaintiff-Appellee,

7 v.

NO. 34,337

8 **RAUL HUERTA and MARY**
9 **FRIETZE-HUERTA a/k/a MARY**
10 **FRIETZE, husband and wife,**

11 Defendants-Appellants,

12 and

13 **NATIONAL CITY BANK; ABC**
14 **Corporations I-X; XYZ Partnerships**
15 **I-X; John Does I-X and Jane Does**
16 **I-X; THE UNKNOWN HEIRS AND**
17 **DEWISEES OF ANY OF THE ABOVE,**
18 **IF DECEASED,**

19 Defendants.

20 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
21 **Nancy J. Franchini, District Judge**

22 **McCarthy & Holthus, LLP**
23 **Denise A. Snyder**

1 Jeanette Martinez Whittaker
2 Albuquerque, NM

3 for Appellee

4 Joshua R. Simms, P.C.
5 Joshua R. Simms
6 Albuquerque, NM

7 for Appellants

8 **MEMORANDUM OPINION**

9 **VIGIL, Chief Judge.**

10 {1} Defendants appeal from the district court’s order approving the special master’s
11 report and confirming the foreclosure sale. Unpersuaded that Defendants
12 demonstrated error, we issued a notice of proposed summary disposition, proposing
13 to affirm. Defendants have responded to our notice with a memorandum in opposition.
14 We have duly considered their response and remain unpersuaded that Defendants have
15 successfully attacked Plaintiff’s standing to bring this foreclosure action. We affirm.

16 {2} On appeal, Defendants argue that the district court erred by denying their
17 motion to vacate summary judgment, the upcoming sale, and foreclosing on the
18 property, in light of *Bank of New York v. Romero*, 2014-NMSC-007, 320 P.3d 1. [DS
19 3] Defendants also argue that Plaintiff did not provide sufficient evidentiary support
20 that it owned the note and mortgage at the time of the suit to establish standing. [DS

1 3] Lastly, Defendants contend that the district court erred by holding that Plaintiff met
2 its burden to show that the entire instrument of the note and mortgage were transferred
3 to Plaintiff pursuant to NMSA 1978, § 55-3-203(d) (1992). [DS 4]

4 {3} We do not repeat our proposed analysis in its entirety in this Opinion. Rather,
5 we explain what arguments have been abandoned and address the arguments raised
6 in Defendants' response. Our notice proposed to hold that, under our case law,
7 Plaintiff established a prima facie showing that it had standing as a holder in due
8 course of the note on the basis that it alleged to be the holder of the note and
9 mortgage, [RP 3] and demonstrated its possession of the original note, indorsed in
10 blank, and the mortgage assignment at the time Plaintiff filed the complaint, by
11 attaching the note's indorsement in blank and assignment of the mortgage to the
12 complaint. [RP 1-30] We further observed that Defendants' Rule 1-060(B)(4) NMRA
13 motion did not state why these documents failed to establish Plaintiff's standing to
14 seek foreclosure at the time of the complaint or why the documents may have
15 established less than all the rights to enforce the note. [RP 390-97] The specific
16 grounds alleged by Defendants on appeal for challenging Plaintiff's standing,
17 implicitly attacking the validity or authenticity of the page containing an indorsement
18 in blank [RP 12] and the assignment of the mortgage via MERS, [RP 30] were raised
19 for the first time in the docketing statement. The first of these arguments was not

1 raised at all or developed below. We also noted that Defendants never challenged nor
2 even mentioned the affidavit attached to the motion for summary judgment, stating
3 that at the time of the complaint Plaintiff had possession of the note, the indorsement
4 of it, and an assignment of the mortgage. [RP 264] Without sufficient preservation or
5 development, we decline to address these matters on their merits. Lastly, we proposed
6 to hold that to the extent that Defendants generally argue the assignment of the
7 mortgage via MERS is invalid, our case law seems to hold otherwise. *See Romero*,
8 2014-NMSC-007, ¶¶ 34-35; *Simson v. Bilderbeck, Inc.*, 1966-NMSC-170, ¶¶ 13-14,
9 76 N.M. 667, 417 P.2d 803. We pointed out that Defendants have not elaborated on
10 their mortgage assignment issue in a manner that would remove it from the control of
11 our case law.

12 {4} In response to our notice, Defendants have not pursued those issues attacking
13 the validity or authenticity of the page of the note containing an indorsement in blank
14 that we deemed unpreserved and undeveloped. The failure to respond to our proposed
15 disposition of these matters constitutes an abandonment of them. *Cf. Frick v. Veazey*,
16 1993-NMCA-119, ¶ 2, 116 N.M. 246, 861 P.2d 287 (“Failure to file a memorandum
17 in opposition constitutes acceptance of the disposition proposed in the calendar
18 notice.”). We therefore hold, for the reasons stated in the notice, that Plaintiff had
19 standing to enforce the note. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124
20 N.M. 754, 955 P.2d 683 (holding that a party opposing summary disposition has the

1 burden to clearly point out errors in fact or law contained in the notice of proposed
2 disposition).

3 {5} Defendants focus their arguments in response to our notice on Plaintiff’s
4 alleged inability to enforce the mortgage assigned by MERS. [MIO 2-6] Defendants
5 dispute our reliance on case law and principles suggesting that a mortgage
6 automatically follows the promissory note and specifically attack this Court’s decision
7 in *Flagstar Bank, FSB v. Licha*, ___-NMCA-___, ¶ 17, ___ P.3d ___ (No. 33,150,
8 Feb. 18, 2015), as overstating the Supreme Court’s opinion in *Romero*. [MIO 5] Upon
9 a motion for rehearing, that *Flagstar* opinion was withdrawn and a new opinion has
10 recently been filed. *Flagstar Bank FSB v. Licha (Flagstar II)*, ___-NMCA-___, ___
11 P.3d ___ (No. 33,150, June 4, 2015). Although the new opinion removes the
12 “automatically follows” language, this removal does not aid Defendants. While
13 narrowing that particular bit of language, the revised *Flagstar II* opinion points out
14 that where MERS has the status of a nominee, it has the authority to assign a
15 mortgage. *See Id.* ¶ 17. In *Flagstar II*, we also stated that a party’s bare assertion that
16 MERS lacks authority to assign a mortgage, without any attempt to distinguish
17 MERS’s status in the current case from its status as a nominee as discussed by the
18 Supreme Court in the *Romero* case, will not be a basis for invalidating the assignment
19 of the mortgage. *Flagstar II*, ___-NMCA-___, ¶ 17. Defendants made no such attempt
20 in district court to distinguish MERS’s status in *Romero*—as nominee for the original

1 lender or a successor in interest to that lender—from MERS’s claimed status in the
2 current case as a nominee for the lender and its successors and assigns. [RP 14]
3 Because Defendant does not challenge MERS’s assignment of the mortgage with any
4 reference to facts in the record, we therefore determine that MERS’s assignment of
5 the mortgage in this case was valid, as was the assignment in *Flagstar II*.

6 {6} For the reasons stated in our notice and in this Opinion, we affirm district
7 court’s order approving the special master’s report and confirming the foreclosure
8 sale.

9 {7} **IT IS SO ORDERED.**

10 _____
11 **MICHAEL E. VIGIL, Chief Judge**

12 **WE CONCUR:**

13 _____
14 **TIMOTHY L. GARCIA, Judge**

15 _____
16 **M. MONICA ZAMORA, Judge**