Supreme Court No. 93291-3

Court of Appeals No. 32816-3-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES BLAIR

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; BANK OF AMERICA, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; FEDERAL HOME LOAN MORTGAGE CORPORATION; and DOE DEFENDANTS 1 through 20

Respondents.

ANSWER OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC. TO MEMORANDUM OF AMICUS CURIAE ATTORNEY GENERAL OF WASHINGTON

Submitted By:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes and Codes

Court Rules

Secondary Sources

I. IDENTITY OF ANSWERING PARTY

Respondent Northwest Trustee Services, Inc. ("NWTS") hereby answers the amicus curiae memorandum of the Washington State Attorney General ("WSAG") in support of Appellant Blair's Petition for Review as follows below.

II. STATEMENT OF RELIEF SOUGHT

NWTS maintains that the Washington Supreme Court should decline to accept discretionary review of the published decision in *Blair v. NWTS*, 193 Wn. App. 18, 372 P.3d 127, 136 (2016), *as amended on denial of reconsideration.*

III. SUMMARY OF ARGUMENT

First, the WSAG unsuitably urges the Court's consideration of a legal issue that Mr. Blair failed to assert either in his Complaint or in opposition to summary judgment. This new claim of error must be disallowed.

Second, the WSAG erroneously assumes that any reliance on Bank of America's beneficiary declaration was the exclusive predicate to recording a Notice of Trustee's Sale and thus gave rise to an "unlawful foreclosure." Rather, the limited record shows NWTS had other sufficient forms of proof to comply with RCW 61.24.030(7)(a).

Third. the WSAG seeks to invent a connection between the Notice of Trustee's Sale and Mr. Blair's unrelated expenses. Causation was not demonstrated and summary judgment was consequently appropriate.

As such, the WSAG's amicus curiae memorandum does not establish a basis for Supreme Court review pursuant to R.A.P. 13.4(b).

IV. RESPONSE TO ISSUE PRESENTED BY AMICUS WSAG

1. NWTS did not cause injury to Mr. Blair. The outcome of the Court of Appeals' decision was correct.

V. ARGUMENT

A. The WSAG Lends its Support to an Issue Not Pled Below.

Nowhere in its memorandum does the WSAG cite to the specific allegations pled in the operative Complaint. Doing so would have revealed that Mr. Blair's Complaint does not mention either RCW 61.24.030(7)(a), a beneficiary declaration, or the prerequisites to a sale notice. CP 1-19.

Instead, Mr. Blair argued the question of "*who* has the legal right to foreclose...." and "*who* may bring a non-judicial foreclosure proceeding...." CP 15 (Compl., ¶¶ 3.7, 3.8) (Emphasis added).

Mr. Blair's contentions all focused on whether NWTS followed the Deed of Trust Act ("DTA") "by proceeding with a foreclosure sale which

was initiated by an entity which did not have legal authority to do so." *Id.* at 16 (Compl., ¶ 3.9). In other words, Mr. Blair (incorrectly) believed Bank of America was not the beneficiary.

Indeed, all of the challenges raised in Mr. Blair's pre-sale – and prohibited – DTA cause of action seek liability for non-compliance due to an allegedly false beneficiary. *Id.* at 17 (Compl., ¶¶ 3.13-3.15). Only for the first time on appeal did Mr. Blair suddenly attack NWTS in light of *Lyons v. U.S. Bank, N.A. et al.*, 181 Wn.2d 775, 336 P.3d 1142 (2014). This approach does not provide a proper ground for further appellate review.

The WSAG is supporting an argument that was simply not raised in the pleadings below. But even turning to the merits, the WSAG's position does not justify revisiting this case.

B. A Beneficiary Declaration is Just One Form of Proof that Can Satisfy RCW 61.24.030(7)(a).

The Court of Appeals' decision, like both the WSAG and Mr. Blair, assumes that NWTS relied strictly on Bank of America's beneficiary declaration to the exclusion of any other documentation. Amicus Brief at 2; *see also Blair*, 372 P.3d at 136.

Although the Court of Appeals reached the right outcome, this conclusion regarding compliance with RCW 61.24.030(7)(a) does not

comport with the limited record.

Absent from the plain language of the DTA is any requirement to use a beneficiary declaration or "investigate" the beneficiary's identity. Rather, trustees are compelled to "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" at a time "before the notice of trustee's sale is recorded, transmitted, or served." RCW 61.24.030(7)(a).

The necessary "proof" of who is entitled to enforce a note can take many different forms. *See, e.g., Singh v. Fed. Nat. Mortg. Ass'n*, 2014 WL 3739389, *6 (W.D. Wash. Jul. 28, 2014) ("RCW 61.24.030(7) does not require a beneficiary declaration...."); *Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225, *4 (W.D. Wash. Mar. 26, 2013); *see also Pelzel v. Nationstar Mortg., LLC*, 186 Wn. App. 1034 (2015) (unpublished), *review denied*, 184 Wn.2d 1018 (2015) ("[p]roof that the beneficiary is the note's holder is sufficient for a successor trustee to initiate a nonjudicial foreclosure, regardless of whether the beneficiary is the note's owner.").

Possessing a beneficiary declaration, or even taking some measure

of reliance on it, is immaterial to adherence with RCW 61.24.030(7)(a).[1]

Critically, the evidence here establishes that Bank of America was actually the beneficiary. The WSAG is so concerned with procedure that it ignores substance – urging liability be cast upon NWTS despite the unquestionable truth of Bank of America's authority to foreclose. Amicus Brief at 2, *inter alia*.

As the Court of Appeals recognized (leading to the correct result), any further investigation on the part of NWTS could only lead to the inescapable veracity of Bank of America's beneficiary status. *Blair*, 372 P.3d at 137 (NWTS would have "learned BoA was the holder of the note endorsed in blank, thus having the proof required by the statute and allowing it to proceed with foreclosure against Mr. Blair's property.").

The investigatory standard for trustees is merely "cursory" when

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[1] When the Notice of Trustee's Sale was recorded in April 2012, numerous courts firmly upheld reliance on an "ambiguous" beneficiary declaration. *See, e.g., Trujillo v. NWTS*, 181 Wn. App. 484, 326 P.3d 768 (2014), *as modified* (Nov. 3, 2014), *review granted*, 182 Wn.2d 1020 (2015), and *rev'd in part*, 183 Wn.2d 820, 355 P.3d 1100 (2015) (declaration contained reference to RCW 62A.3-301); *In re Butler*, 512 B.R. 643 (Bankr. W.D. Wash. Jul. 9, 2014), *aff'd* 2015 WL 9309511 (W.D. Wash. Jun. 10, 2015) (same); *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, n. 7 (W.D. Wash. 2013) (same; "the declaration NWTS obtained from OneWest... satisfies the [RCW 61.24.030(7)] requirement...."). Over two years later, *Lyons* became the first Washington appellate decision to find an ambiguity in the declaration. Therefore, a reasonable interpretation of law defense to CPA liability was available to NWTS and precludes the need for additional review. *See, e.g., United Servs. Auto. Ass'n v. Speed*, 179 Wn. App. 184, 203, 317 P.3d 532 (2014), *review denied*, 180 Wn.2d 1015, 327 P.3d 55 (2014) (If a reasonable factual or legal interpretation compels a certain result, then "there can be no bad faith claim based on [the denial of coverage].").

not confronted with conflicting information. *See Lyons*, *supra.* at 788 (A foreclosure trustee must 'adequately inform' itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a 'cursory investigation'...."). "Cursory" is defined as "rapidly often superficially performed with scant attention to detail." Webster's Third New Int'l Dictionary 558 (2002). The WSAG seeks to impose duties on trustees which are far beyond what this Court has proscribed, and which are not found in the DTA.

The limited record corroborates Mr. Blair failed to give any notice to NWTS of his speculative claim against Bank of America, or inform NWTS that it was "wrongfully foreclosing." *Cf. Lyons* at 788. Moreover, the Note was payable to Bank of America's known predecessor in interest, Mr. Blair was making loan payments to Bank of America, NWTS was asked to foreclose by Bank of America, and NWTS was appointed trustee by Bank of America.

A cursory investigation of these facts pointed to Bank of America as beneficiary, and even some unknown, more detailed, form of investigation would have led to the same knowledge. Nothing would have changed regardless of a reference to RCW 62A.3-301 in Bank of America's declaration. Mr. Blair's litigation should not continue on.

C. Mr. Blair's Expenses Were Unrelated to NWTS' Compliance With RCW 61.24.030(7)(a).

The WSAG surmises that NWTS' issuance of a Notice of Trustee's Sale led Mr. Blair to incur "costs to investigate and stop the unlawful sale." Amicus Brief at 6. Putting aside that the sale notice was valid under the DTA as discussed above, and not "unlawful," this statement is still inaccurate for several reasons.

First, Mr. Blair's costs were ostensibly incurred to hire counsel when he "was facing foreclosure... and... not being properly reviewed for a loan modification...." CP 1094, ¶ 2. Because Mr. Blair was already facing foreclosure when he received the unchallenged Notice of Default, anything he paid was not connected to the later Notice of Trustee's Sale. Mr. Blair failed to produce contrary evidence in opposition to summary judgment. *See Blair*, 372 P.3d at 138 ("We are unable to locate any facts in the record that support a causal link....").

Second, the WSAG accuses NWTS of forcing Mr. Blair to conduct his own "investigation," but the WSAG cannot articulate what Mr. Blair supposedly needed to learn when he was already paying Bank of America, negotiating with Bank of America to seek a loan modification, and sending financial records to Bank of America in support of that request. Mr. Blair could not be confused about who was foreclosing after he

defaulted. Instead, his counsel tried to contend ownership of the loan matters in the non-judicial process, but *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), established otherwise.

Third, Mr. Blair could not legitimately claim injury under the CPA for the cost of filing suit and restraining the trustee's sale. An "injury" is limited to the loss of business or property interests. *See, e.g., Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 13, 206 P.3d 1255 (2009); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992); *see also Haley v. Allstate Ins. Co., Inc.*, 2010 WL 4052935, *7-8 (W.D. Wash. Oct. 13, 2010) (rejecting CPA claim where injury was cost of litigating). Mr. Blair lost neither business nor property.

The Court of Appeals did not err when it found a lack of causation between NWTS' actions and Mr. Blair's alleged expenses. Mr. Blair's CPA claim was unsustainable as a result.

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VI. CONCLUSION

The WSAG presents arguments favoring Mr. Blair that are not supported by the record below.

In sum, the WSAG amicus curiae memorandum should not persuade this Court to accept Mr. Blair's Petition for Review.

DATED this 20th day of September, 2016.

RCO LEGAL, P.S.

By: /s/ Joshua S. Schaer
Joshua S. Schaer, WSBA #31491
Attorneys for Respondent NWTS

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On September 20, 2016, I caused a copy of the **Answer of Respondent Northwest Trustee Services, Inc. to the Memorandum of Amicus Curiae Attorney General of Washington** to be served to the following in the manner as noted:

Melissa A. Huelsman, Law Offices of Melissa A. Huelsman, P.S. 705 2nd Ave., Ste. 601 Seattle, WA 98104-1726 Attorney for Appellant	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email: mhuelsman@predatorylendinglaw.com
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Benjamin Roesch Amy Teng Attorney General of Washington 800 Fifth Ave., Ste. 2000 Seattle, WA 98104 Amicus Curiae for Mr. Blair	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [ ] Email:

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 26th day of September, 2016.

Kristine Stephan, Paralegal

OFFICE RECEPTIONIST, CLERK

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Sent: Tuesday, September 20, 2016 10:28 AM
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James Blair (Petitioner) v. Northwest Trustee Services, Inc., et al. (Respondents)
Supreme Court No. 93291-3
Court of Appeals Div. III No. 32816-3-III
Filed by: Joshua Schaer
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Please file the attached **Answer of Respondent Northwest Trustee Services, Inc. to Memorandum of Amicus Curiae Attorney General of Washington.**

If there are any questions, please contact us. Thank you.

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