

73336-2

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Case No. 73336-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

BYRON BARTON and JEAN BARTON

Appellants,

vs.

JPMORGAN CHASE BANK, N.A., et. al.

Respondents.

BRIEF BY RESPONDENT QUALITY LOAN SERVICE CORP. OF
WASHINGTON

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I. INTRODUCTION

Quality advanced the foreclosure pursuant to law and contract. There is no substantive merit to the appellants' claims for wrongful foreclosure. Appellants' claims are also barred as matter of law under the doctrines of claim preclusion and waiver. This Court should affirm.

II. FACTS

A. Loan and Default.

In 2007, Mrs. Barton took out a loan from Washington Mutual Bank, FA ("WaMu") and gave a promissory note for the principal sum of \$456,000.00. CP at 216-221. As security for the note, the Bartons gave WaMu a deed of trust encumbering their real property. CP at 223-243. A year later, in 2008, JPMorgan Chase Bank, N.A. ("Chase") acquired WaMu's assets from the FDIC. CP at 295-338.

In July of 2011, the Bartons stopped making their loan payments to Chase. CP at 648. Failure to make payments is an event of default triggering the trustee's power of sale. On June 7, 2012, Chase appointed Quality as successor trustee under the deed trust for the purpose of advancing a foreclosure. CP at 345-47.

B. Foreclosure

On July 5, 2012, Quality issued the Notice of Default. CP at 647-59. The Notice of Default was mailed to the Bartons. CP at 645. It was also physically posted on the property. CP at 661-62. Prior to issuing the Notice of Default,

Chase provided to Quality a Foreclosure Loss Mitigation Form certifying compliance with the Deed of Trust Act's pre-foreclosure contact requirements. CP at 654.

On August 20, 2012, Quality issued its first Notice of Sale, scheduling an auction date of the property in December of 2012. CP at 340-43. Later that month, the Bartons filed their first lawsuit against Chase and Quality and others in superior court concerning the loan. CP at 349-379. Among other things, the lawsuit challenged the defendants' ability to enforce the deed of trust. The case was removed by defendants to federal court, where it was dismissed without prejudice. CP at 408-410. The sale did not go forward, and the first Notice of Sale eventually expired.

On April 4, 2013, Quality issued its second Notice of Sale, scheduling an auction date of the property in August of 2013. CP at 412-415. In response, the Bartons re-filed in superior court what was essentially the same lawsuit against Chase and Quality. CP at 247-274. The case was removed by defendants to federal court, where it was dismissed again, and this time *with* prejudice. CP at 417-21. The sale did not go forward, and the second Notice of Sale eventually expired.

On December 6, 2013, Quality issued its third Notice of Sale, scheduling an auction date in April of 2014. CP at 461-464. The Bartons did not move the superior court to enjoin the sale. The sale went forward as scheduled, and on

April 16, 2014, Quality issued a Trustee's Deed to the winning bidder. CP at 466-68.

C. Subject Lawsuit and Dismissal.

On May 5, 2014, the Bartons filed the subject lawsuit. CP at 1-90. Like their previous lawsuits, the Bartons alleged that defendants did not have the ability to enforce the deed of trust.

In December of 2014, Chase filed a motion to dismiss, which was supported by a request for judicial notice of documents. CP at 188-204; 209-468. Quality joined Chase's motion to dismiss. CP at 471-72. On January 16, 2015, the superior court granted defendants' motions to dismiss, but allowed the Bartons to move for leave to file an amended complaint. CP at 597-98.

On February 6, 2015, the Bartons filed their motion for leave to amend. CP at 623-638. The amended complaint made new allegations against Quality concerning the Notice of Default. Specifically, the Bartons alleged that the beneficiary failed to comply with the pre-foreclosure requirements, which are a pre-requisite to the Notice of Default. The Bartons also alleged that Quality erred in not personally serving the Bartons with the Notice of Default.

The motion for leave was opposed by Chase and Quality. CP at 639-662; 691-703. Quality's opposition included proof of mailing of the Notice of Default, and photographic proof that the Notice of Default was posted on the property. CP at 645; 661-62.

On March 2, 2015, the superior court denied the Bartons' motion for leave to amend, and ordered that all claims be dismissed with prejudice. CP at 726-27. This appeal followed.

III. ARGUMENT

A. Chase's Authority To Foreclose.

The claims related to Chase's authority to enforce the debt, and to appoint Quality as successor trustee to foreclose the property, were previously litigated and dismissed with prejudice, and those claims are now barred. Chase's motion to dismiss filed with the superior court sets forth the "res judicata" analysis, which is equally applicable to Quality. CP at 193-196. That briefing is incorporated herein.

B. Pre-Foreclosure Requirements and Notice of Default.

For occupied residential real property, the Deed of Trust Act (the "DTA") requires the beneficiary to make, or at least attempt to make, pre-foreclosure contact with the borrower. RCW 61.24.031. The beneficiary certifies its compliance with the pre-foreclosure contact requirements by completing a Foreclosure Loss Mitigation Form. RCW 61.24.031(9). The completed Foreclosure Loss Mitigation Form is included with the Notice of Default. RCW 61.24.031(2). Unless done in bad faith, the trustee is entitled to rely on the completed Foreclosure Loss Mitigation Form as proof of the beneficiary's compliance with the pre-foreclosure contact requirements. RCW 61.24.031(2).

In this case, Chase provided to Quality a completed Foreclosure Loss Mitigation Form certifying compliance with the pre-foreclosure contact requirements. Quality included the Foreclosure Loss Mitigation Form in its Notice of Default. There are no pled facts that would suggest Quality's reliance on the completed Foreclosure Loss Mitigation Form was in bad faith.

C. Service of the Notice of Default

Under RCW 61.24.030(8), the Notice of Default is mailed to the borrower and grantor, and either personally served on them *or* "posted in a conspicuous place on the premises".

In this case, Quality mailed the Notice of Default to the Bartons and posted it at eye level next to the front door of the property. The posting was in the most "conspicuous" place possible. The posting of the Notice of Default was done in lieu of personal service. Quality was not required to personally serve the Bartons with the Notice of Default.

D. Waiver of Claims

Notwithstanding that Quality complied with the statute in all respects in issuing the Notice of Default, the Bartons objections are nonetheless waived because they failed to move the superior court to restrain the sale.

Waiver of the right to object to a trustee's sale occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to the foreclosure prior to the sale, and (3) failed to obtain

a court order enjoining the sale. *Leahy v. Quality Loan Serv. Corp. of Wash.*, 190 Wn. App. 1, 10 (Wash. Ct. App. 2015) (citing *Plein v. Lackey*, 149 Wn.2d 214, 227 (2003)).

The elements for waiver are present in this case. First, the Bartons knew of their right to file a lawsuit with the superior court to enjoin sale. The three Notices of Sale issued by Quality, which the Bartons do not deny receiving, informed them of this right. CP at 341 ¶ IX; 413 ¶ IX; 462 ¶ IX. Furthermore, the Bartons' previous lawsuits demonstrate they were aware of their ability to sue.

Second, the Bartons had actual or constructive knowledge of their defenses prior to sale. The three Notices of Sale issued by Quality contained recitals that a Notice of Default was mailed and posted in July of 2012. CP at 341 ¶ VI; 413 ¶ VI; 462 ¶ VI. After receiving the first Notice of Sale, the Bartons knew or should have known that the beneficiary had certified to the trustee compliance with the pre-foreclosure contact requirements.

Third, the Bartons failed to move the court to restrain the sale. The subject lawsuit was filed after the sale, where the property was sold to a third party bidder.

The three waiver elements identified in *Leahy* are met in this case. The *Leahy* Court went on to hold that, under the circumstances, all of the borrower's claims for relief should be deemed waived:

As in *Koegel*, we conclude that the omissions and errors alleged by

the Leahys with respect to the notice of default do not justify invalidating the sale or granting other relief. The Leahys admit that they defaulted on their loan in March 2009. They admit that they received the notice of default and three separate notices of sale. They had knowledge of the identity of the trustee and beneficiary, and they had no difficulty contacting the trustee to communicate their concerns regarding the foreclosure.

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The circumstances in *Leahy* are almost identical here. The Bartons admit they stopped making their loan payments. They do not deny receiving the three Notices of Sale from Quality. The Bartons obviously knew about Chase and Quality, and knew how to contact them and raise objections, and also how to sue them. Yet the Bartons failed to raise their issues prior to sale. As in *Leahy*, the Bartons' claims for relief, including monetary relief under the Consumer Protection Act and Deed of Trust Act, should be deemed waived.

IV. CONCLUSION

The claims against Quality were properly dismissed, and it was appropriate for the superior court to deny leave to amend. This Court should affirm.

Dated: January 18, 2016

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CERTIFICATE OF MAILING

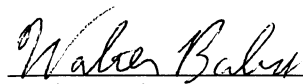
The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct. On January 18, 2016, I arranged for service of the forgoing Brief by Respondent Quality Loan Service Corp. of Washington on the following parties via overnight mail:

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