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No. 73336-2-I

COURT OF APPEALS
DIVISION I OF THE STATE OF WASHINGTON

BYRON BARTON and JEAN BARTON, husband and wife,

Appellants,

v.

JP MORGAN CHASE BANK, N.A., et al.,

Respondents

BRIEF OF RESPONDENT TRIANGLE PROPERTY DEVELOPMENT, INC.

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ORIGINAL

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I. INTRODUCTION

The Appellants, Byron and Jean Barton, husband and wife, are the former owners of the residential property known 6548 41st Avenue SW, Seattle, WA 98136. Respondent Triangle Property Development, Inc. ("Triangle") is the current fee title owner of the subject property, having purchased it for cash, in April of 2014, in a public non-judicial deed of trust foreclosure sale. The Bartons allege several procedural flaws in the process leading up to the foreclosure. On that basis, the Bartons challenge the validity and effect of the sale, and in so doing, challenge the validity of Triangle's title. For the reasons that follow, the decision of the King County Superior Court to reject the Bartons' challenges should be affirmed. Even if this court finds some flaw in the foreclosure process sufficient to warrant reversal of the order dismissing the Bartons' claims and remand to the Superior Court, the validity of Triangle's title to the subject property should nevertheless be affirmed.

II. FACTS

Triangle is a Washington corporation engaged in the business of buying, managing, improving and selling real property in the state of Washington. The property formerly owned by the Bartons is one such property.

The Bartons borrowed money and pledged the property as collateral to secure their repayment obligation through deeds of trust. One such deed of trust, recorded in 2007 under King County recording No. 20070814001628. CP 223-243 When the Bartons defaulted on the payment obligation on the loan secured by that deed of trust, Respondent JP Morgan Chase Bank ("Chase") directed Quality Loan Service Corporation, the successor trustee under the deed of trust ("QLS") to initiate non-judicial foreclosure proceedings.

In early July, 2012, QLS issued a Notice of Default to the Bartons. CP 647-59. The Notice of Default was sent to the Bartons by mail, CP 645, and was posted conspicuously on the property. CP 661-662. More than 30 days later, on August 20, 2012, QLS issued a Notice of Sale. CP 340-343.

After issuance of the Notice of Sale, the Bartons commenced suit against Chase, QLS and First American Title Insurance Company, arguing that Chase was not the owner of the note and rightful successor beneficiary under the Deed of Trust, and that Chase had never acquired the power to appoint QLS as successor Trustee. CP 349-379. After removal of the Bartons' suit to federal court, it was dismissed without prejudice. CP 408-410. The Bartons do not claim to have cured the

default under the promissory note, but QLS did not follow through with the scheduled non-judicial foreclosure sale.

QLS issued a second Notice of Sale in April 2013. CP 412-415. The Bartons sued Chase, QLS and First American again, repeating the same arguments as they had articulated in the first lawsuit. CP 247-274. As it had done the first time, QLS elected not to proceed with the scheduled non-judicial foreclosure sale. The Bartons' second suit was removed to federal court, just like the first. On motion, the Bartons' second lawsuit was dismissed, **with prejudice**. CP 417-421. The Bartons do not claim to have cured the default under the promissory note.

In December, 2013, QLS issued a third Notice of sale, scheduling a new non-judicial foreclosure sale for April 11, 2014. CP 461-464. The Bartons did not seek to enjoin the sale through a lawsuit in Superior Court. Triangle learned of the sale through public advertisement of the Third Notice of Sale. Triangle has no relationship with Chase or with the successor trustee. When QLS conducted the sale on April 11, 2014 Triangle offered the highest bid to purchase the property at $646,000. CP 568; 572-574. The public sale was competitive, with multiple bidders, and Triangle's winning bid was substantially more than the outstanding

balance on the loan secured by the deed of trust that was the subject of the foreclosure.

Triangle received a trustee's deed from QLS on April 16, 2014, which was recorded under King County Recording No.20140428001985, on April 28, 2014. CP 572-574. No one commenced an action to challenge the non-judicial deed of trust foreclosure sale process within 11 days following the trustee's sale, seeking to void the sale. CP 569

On May 5, 2014, more than 11 days following the trustee's sale, the Bartons commenced this action, and named Chase, First American Title Insurance Company, and QLS as defendants. CP 1-90 The Bartons did not name Triangle as a party. But in their "claim for relief", the Bartons included a request for "judgment establishing Plaintiff estate as described above" [sic], and for "judgment barring and forever stopping Defendants from having any right or title to the premises adverse to plaintiff".

After acquiring the Property, Triangle attempted to secure a loan to fund remodeling and repair efforts. Triangle obtained a preliminary commitment for title insurance from Fidelity National Title Insurance Company, which references the Bartons' lawsuit as an exception to title under Schedule B. 569; 575-590. Triangle's lender demanded, as a

condition to making the loan, that the reference be removed. Triangle requested that the title company strike the reference from the preliminary commitment, since Triangle was not named in the lawsuit, and since the Bartons had not enjoined the trustee's sale, and neither the trustee nor the beneficiary had sought to void the sale within the 11-day time period under RCW 61.24.050(2).[1] Fidelity declined. Triangle inquired whether Chicago Title would insure around the Bartons' lawsuit, and Chicago Title declined too. CP 591 Because Triangle could not get a title company to insure around the Bartons' claims in this lawsuit, Triangle's lender rejected Triangle's application for loan financing. CP 570 Triangle cannot sell the Property, because any purchaser needing conventional mortgage financing will encounter the same exception on a commitment for title insurance. The Bartons' lawsuit, because of the way in which they articulate their claims, is wrongfully clouding Triangle's title, causing ongoing damage.

For these reasons, Triangle successfully intervened in this action, joining Chase and QLS in requesting that the court dismiss the Bartons'

[1] RCW 61.24.050(2) does not expressly provide for a borrower to sue to void a trustee's sale after the fact, but factual circumstances could exist in which the trustee, beneficiary or authorized agent of the beneficiary may declare the trustee's sale and trustee's deed void for certain specified reasons. If that had happened (it did not) the Bartons could presumably sue to give effect to that determination.

claims. CP 550-591; 605-607. Shortly after Triangle filed its motion to intervene, the Superior Court dismissed the Bartons' claims, but permitting the Bartons to file a motion to amend their pleadings. CP 59-598 As they were permitted to do, the Bartons filed a motion to amend their complaint. CP 623-638 The proposed amended complaint, like the original, does not name Triangle, nor allege any new facts concerning Triangle's ownership rights, nor assert any causes of action against Triangle by name. But the Bartons assert all the same arguments as before, slightly restated, arguing that the April 11, 2014 sale was void. And in their Prayer for Relief, they request "equitable relief and damages". CP 628-638 Just as the original complaint did, these allegations interfere with Triangle's rightful title. As Chase and QLS did, Triangle also opposed he motion to amend. CP 680-690 By order of February 18, 2015, the Superior Court denied the Bartons' motion to amend. CP 726-727 The Bartons have appealed that order.

III. ARGUMENT

A. Summary of Bartons' Challenges

Under their "Wrongful Foreclosure" claim, the Bartons argue that Chase failed in a number of respects to submit proof that it properly acquired by assignment the original promissory note given by the Bartons to Washington Mutual ("WaMu"), and the collateral in the form of the

WaMu deed of trust. Without sufficient proof of ownership of the debt and the collateral, the Bartons argue, Chase lacked authority to appoint QLS as a successor trustee under the deed of trust. Absent this proof, they say, QLS lacked legal power to conduct a foreclosure sale, or any transfer of title following the sale. Thus, they say, the foreclosure sale lacked legal authority, and is a nullity, impliedly concluding that Triangle's ownership is not legitimate.

As a second challenge, the Bartons argue that QLS was required to issue new and successive Notices of Default for each successively scheduled trustee's sale, and that QLS failed to do so (the Bartons do not deny receiving the first such notice of July 5, 2012, and they make no claim to have cured the default before initiation of the foreclosure that led to the April 11, 2014 sale to Triangle). Referring to a June 7, 2012 amendment to the Deed of Trust Act, the Bartons claim that Chase/QLS failed to give them a statutorily required Notice of Pre-Foreclosure Options. Upon these alleged procedural flaws, the Bartons to argue that the April 11, 2014 foreclosure sale to Triangle was a nullity, and imply that Triangle did not acquire good and valuable title.

The Bartons assert, as their third challenge, that QLS "continued" the foreclosure sale by an impermissibly long 436 days, in violation of

RCW 61.24, and that the foreclosure sale is therefore void, and that Triangle acquired no interest in title through the Trustee's Deed issued in exchange for its payment of $646,000.

B. The Bartons' Claims are Barred by Res Judicata, and Amendment to Their Complaint Would be Futile.

All of the alleged facts offered to support their claim for "Wrongful Foreclosure" were known to the Bartons long in advance of their original complaint, and they were asserted (clearly or not-so-clearly), in the Bartons' original complaint. Mere literary editing of a complaint will not alter the legal outcome. The Bartons' claim for "Wrongful Foreclosure" was stated in the original complaint, and was dismissed on Chase's motion (as it had twice before been dismissed in the Bartons' first two lawsuits. It would be futile to permit the Bartons to start over again with the same claim, based on slightly and vaguely altered factual allegations, where all of the asserted facts occurred prior to filing of the original complaint.

C. The Bartons Waived any Claim to Invalidate or Attack the Foreclosure Sale.

The most compelling argument against the Bartons and in favor of Triangle is that, by failing to initiate an action to enjoin the non-judicial deed of trust foreclosure sale, they waived the right to attack it collaterally.

RCW 61.24.127, entitled "Failure to bring civil action to enjoin foreclosure — Not a waiver of claims", provides:

> (1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim ***for damages*** asserting:
>
> (a) Common law fraud or misrepresentation;
>
> (b) A violation of Title 19 RCW;
>
> (c) Failure of the trustee to materially comply with the provisions of this chapter; or
>
> (d) A violation of RCW 61.24.026,
>
> (2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:
>
> (a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;
>
> (b) ***The claim may not seek any remedy at law or in equity other than monetary damages***;
>
> (c) ***The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;***
>
> (d) ***A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon***;
>
> (e) ***The claim may not operate in any way to encumber or cloud the title to the property that was subject***

> ***to the foreclosure sale***, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with RCW 4.56.190, become a judgment lien on real property then owned by the judgment debtor; and
>
> (f) The relief that may be granted for judgment upon the claim is limited to actual damages. However, if the borrower or grantor brings in the same civil action a claim for violation of chapter 19.86 RCW, arising out of the same alleged facts, relief under chapter 19.86 RCW is limited to actual damages, treble damages as provided for in RCW 19.86.090, and the costs of suit, including a reasonable attorney's fee.

(emphasis added)

It is difficult to imagine a more clear expression of legislative intent. The Bartons admit that they did not seek to enjoin the April 11, 2014 foreclosure sale. RCW 61.24.127 allows the Bartons to maintain an action "for damages" despite this failure. That right to seek damages includes claims arising out of alleged fraud and misrepresentation; alleged violations of the Consumer Protection Act (RCW 19.86); or alleged failure of the trustee to comply with the procedural requirements of RCW 61.24. Ostensibly, this is what the Bartons are doing. But the Bartons stubbornly refuse to couch their claims as purely claims for money damages. They persistently seek to undermine Triangle's ownership.

Under RCW 61.24.127, an action for damages by a borrower may ***not*** seek any remedy other than monetary damages, may ***not*** affect in any

way the validity or finality of the foreclosure sale, and the Bartons are prohibited from recording a *lis pendens* or any other document of similar effect related to the subject real property. In other words, when the Bartons failed to initiate an action to enjoying the sale, they ***waived*** any right to interfere by a subsequent lawsuit with the validity and finality of title vested in the successful bidder at that sale – Triangle.

In their complaint (original and proposed amended), the Bartons gloss over the details in citing California case of *Barrionuevo v. Chase Bank, N.A.* 885 F. Supp.2d 964 (N.D. CA, 2012) for the proposition that a cause of action may exist for "wrongful foreclosure" where a party alleged not to be the true beneficiary orchestrates a nonjudicial foreclosure sale. The Bartons ignore that the plaintiffs in *Barrionuevo* were, in fact, suing to enjoin a proposed foreclosure sale, not to attack the validity of a sale that had already occurred. And, as Chase pointed out, this same argument was raised and rejected in the Bartons' prior lawsuit, and is barred by *res judicata.*

The Bartons rely primarily upon the Washington Supreme Court decision in *Albice v. Premier Mortg. Svcs.,* 174 Wn.2d 560, 239 P.3d 1148 (2012) for the proposition that a nonjudicial deed of trust foreclosure sale can be deemed void and of no legal effect even in the absence of an action

to enjoin it. The holding in *Albice*, however, was limited to the conclusion that the trustee under a deed of trust lost statutory authority to conduct a foreclosure sale past 120 days from the originally scheduled sale date. In the present case, unlike the facts of *Albice*, the foreclosure sale was not "postponed" or "continued". Rather, QLS terminated previous foreclosure processes, and initiated new foreclosure processes upon newly recorded and published Notices of Sale.

With respect to the foreclosure sale that occurred on April 11, 2014, the uncontestable fact is that QLS issued and advertised that sale in the manner set forth in RCW 61.24.030, including issuance, recording and advertising of a notice of trustee's sale, and conducting the sale on the advertised date. The April 11 sale was not a postponement of the first foreclosure process. Under the uncontrovertible facts of this case, there is no legal basis for invalidating the foreclosure sale under the holding of *Albice.* Triangle, unlike the successful purchaser in *Albice*, had no knowledge of any prior scheduled foreclosure sales, and had no communication with the Bartons or with QLS in advance of the actual sale on April 11, 2014. Triangle is a bona fide purchaser.

The *Albice* court ruled that the borrower's failure to seek a pre--foreclosure sale injunction did not constitute a waiver of a right to seek

post-sale invalidation of the sale. But in that case, for approximately five months, with the advertised foreclosure sale pending and being sequentially postponed, the borrower in *Albice* was tendering, and the secured lender was accepting, periodic payments under the terms of a Forbearance Agreement between the borrower and the lender. The *Albice* court found that under these facts, the lender had created an expectancy on the part of the borrower that its last periodic payment would be accepted, and that its default would be cured, and the foreclosure process would be terminated. Under those facts, the borrower in *Albice* had no legal basis to commence an action to enjoin the advertised foreclosure sale, and had no reason to think it was necessary either.

Here, the Bartons had no agreement with Chase to cure their default, and made no interim payments to Chase. The Bartons had every reason to initiate an injunction action prior to the advertised or closure sale if they believed (as they consistently have claimed) that they have a legal basis to challenge the foreclosure. On two prior occasions, the Bartons ***did*** commence civil lawsuits, and on those two prior occasions, the nonjudicial foreclosure process was terminated. Why the Bartons did not commence a civil action in hopes of terminating the scheduled foreclosure sale on April

11, 2014 is known only to the Bartons. They had a reason to do so, opportunity to do so, and the knowledge of how to do so.

The undisputed facts do not permit the Bartons to take advantage of the ruling in *Albice*. Rather, the Bartons' situation is more similar to the Borrower in *Plein v. Lackey,* 149 Wn.2d 214, 227, 67 P.3d 1061 (2003). In *Plein*, a borrower received notices of default and trustee's sale, commenced an action seeking permanent injunctive relief, but neglected to seek a temporary injunction to halt the sale. The sale proceeded as scheduled, and the borrower would not be heard later to upset the finality of the sale, and to divest the innocent purchaser of the property from title.

There are no new allegations or legal theories contained in the Bartons' proposed first amended complaint that would alter the outcome, at least with respect to that portion of their complaint that seeks to interfere with Triangle's title. Arguments by the Bartons that Chase is not the rightful owner of the promissory note and deed of trust, and that QLS was not properly appointed as the successor trustee are, for all the reasons argued in Chase's motion to dismiss, barred by the doctrine of *res judicata*. Arguments that Chase and QLS impermissibly "postponed" the trustee's sale, rendering it void, are factually unsupported and incorrect. The Bartons' efforts to liken themselves to the borrowers in *Albice* fall

short. The Superior Court correctly ruled in favor of Chase and QLS in dismissing the Bartons claims.

Meanwhile, Triangle has been unfairly held hostage to the Bartons' legal experimentation. As explained in Triangle's motion to intervene, the mere existence of the Bartons' lawsuit, as they pleaded it, interferes with the ability of Triangle to borrow against or to sell clear title to the property Triangle purchased at foreclosure nearly two years ago. It defies explanation that the Bartons ever believed they could commence and maintain this action, openly claiming a right to invalidate the foreclosure sale, seeking to divest Triangle of its title, and not to name and join Triangle. Since Triangle intervened, it should be obvious that to allow the Bartons to amend their complaint and to prolong the resolution of this legal controversy causes significant prejudice and injury to Triangle.

IV. CONCLUSION

The framework of the Deed of Trust Act, and various cases interpreting it, leads inevitably to the conclusion that the April 11, 2014 trustee's sale to Triangle must be upheld.

If the Bartons can "pull a rabbit out of a hat", and convince this court that Chase and QLS somehow stumbled in orchestrating the non-judicial deed of trust foreclosure sale – a finding that is nowhere justified by the evidence in the record – the only sensible, and equitable

consequence of such a finding is to reverse and remand to the Superior Court, with instructions that the Bartons are limited to maintaining an action for damages, and that any claims to an interest in title to the property are barred, because the Bartons waived any such claims when they failed to initiate an action to enjoin the sale prior to its scheduled April 11, 2014 date.

DATED this 18th day of February, 2016.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By _____
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DECLARATION OF SERVICE

I, Jerilyn K. Kovalenko, hereby declare under penalty of perjury under the laws of the State of Washington that on February 18th, 2016, I caused to be served true and correct copies of the forgoing *Brief of Respondent Triangle Property Development, Inc.* to the individuals named below in the specific manner indicated:

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DATED this February 18, 2016, at Bellevue, Washington.

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