

Case No. 75020-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CONCEPCION HERMOSILLO, a single woman

Appellant,

vs.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, INC., et. al.

Respondents.

BRIEF BY RESPONDENT NEW YORK COMMUNITY BANK

Joseph Ward McIntosh, WSBA #39470
McCarthy & Holthus, LLP
108 1st Ave S, Ste 300
Seattle, WA 98104
206-319-9049
jmcintosh@mccarthyholthus.com

Attorney for New York Community Bank

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I. INTRODUCTION

Appellant Concepcion Hermosillo stopped paying her mortgage and a foreclosure followed. In response, Hermosillo sued the deed of trust beneficiary and trustee alleging “wrongful foreclosure” and violation of the Consumer Protection Act. Hermosillo’s “wrongful foreclosure” arguments go directly against settled foreclosure law of this state, which she often admits in her briefing. The case was appropriately dismissed on summary judgment. This Court should affirm.

II. FACTS

In August 2005, Hermosillo purchased the subject real property with a \$212,000.00 mortgage loan from Ernst, Inc. Hermosillo gave Ernst a promissory note secured by a deed of trust against the property. CP at 158-167; 237-259.

The mortgage loan was subsequently transferred to AmTrust Bank which at the time was also known as Ohio Savings Bank. CP at 154-55. In December of 2009, Amtrust Bank failed and the Office of Thrift Supervision was appointed as receiver on behalf of the FDIC. New York Community Bank acquired the loan from the FDIC. CP at 155. NYCB took possession of the original promissory note which was specially indorsed by the Office of Thrift Supervision on behalf of the FDIC to NYCB. CP at 155; 158-167; 291.

In April of 2012, Hermosillo and NYCB entered into a loan modification agreement lowering the monthly payment. CP at 423-28. The modification

confirmed – and contained Hermosillo’s express written acknowledgement – that NYCB owned the promissory note secured by the deed of trust. *Id.*

Despite the lowered monthly payment, Hermosillo stopped making her mortgage payments in June of 2012. CP at 267 (identifying the loan as due for the month of June of 2012). Failure to timely make mortgage payments was an event of default under the note and deed of trust triggering the trustee’s power of sale.

In March of 2013, NYCB appointed respondent Quality Loan Service Corp. of Washington (“Quality”) as successor trustee under the deed of trust to advance a foreclosure of the property. CP at 261-62. On March 14, 2013, Quality issued a Notice of Default. CP at 265-276. Prior to issuing the Notice of Default, NYCB complied with the pre-foreclosure contact requirements and gave Quality a Foreclosure Loss Mitigation declaration certifying compliance. CP at 273. On April 15, 2013, Quality issued its first Notice of Sale scheduling an auction date of the property for August 16, 2013. CP at 278-281.

Two days before the sale, on August 14, 2013, Ms. Hermosillo filed for Chapter 13 bankruptcy with the United States Bankruptcy Court for Western Washington under cause no. 13-17405. Quality discontinued its first Notice of Sale shortly thereafter due to the automatic stay. CP at 283-84. On December 3, 2013, the bankruptcy court confirmed Ms. Hermosillo’s reorganization plan which provided for cure of the mortgage arrears over 60 months. However, Ms.

Hermosillo failed to make required payments under the plan and the case was dismissed on March 3, 2015.

On April 7, 2015, with the loan still in default, Quality issued its second Notice of Sale scheduling an auction date for August 7, 2015. CP at 286-89. Prior to the issuance of the second Notice of Sale, NYCB provided to Quality a statutory beneficiary declaration confirming that NYCB was the holder of the promissory note. CP at 291.

The second sale was postponed to December 4, 2015. On December 1, 2015, the superior court denied Plaintiff's motion to enjoin the sale. CP at 217-219. On December 4, 2015, Quality auctioned the property for sale. The winning purchaser was a third party. On December 11, 2015, Quality issued a Trustee's Deed to the third party purchaser¹. On February 26, 2016, the superior dismissed NYCB and Quality on summary judgment. CP at 9-13.

For reasons discussed further below, the foreclosure was advanced pursuant to law in all respects. Dismissal on summary judgment was appropriate.

III. ARGUMENT

A. Foreclosure Was Proper

1. Default and Power of Sale.

Under the terms of deed of trust, the real property serves as collateral

¹ See Snohomish County Recorder's No. 201512170495

securing repayment of the promissory note. Hermosillo's failure to timely make mortgage payments in 2012 was an event of default triggering the trustee's power of sale. The foreclosure sale by the trustee was appropriately advanced on account of Ms. Hermosillo's default. *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 515-516 (Wash. 2015); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 93 (Wash. 2012) (if the borrower breaches the obligations owed to the beneficiary, the trustee under the deed of trust may foreclose the home in a trustee's sale).

2. Successor Trustee Appointed by "Beneficiary".

Under Washington's Deed of Trust Act, the "beneficiary" of the deed of trust with the power to appoint a successor trustee is the holder of the promissory note. RCW 61.24.005(2); *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012); *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 533 (Wash. 2015); *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 33 (Wash. Ct. App. 2016). The deed of trust automatically follows the promissory note under Washington law. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104 (Wash. 2012); *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 177 (Wash. Ct. App. 2016); *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 228 (Wash. Ct. App. 2016).

In this case, NYCB is the "beneficiary" of the deed of trust because NYCB holds the promissory note. The deed of trust follows the promissory note. It was not necessary for NYCB to acquire the deed of trust by recorded deed or

assignment as Hermosillo appears to argue².

Furthermore, the recorded assignment from MERS (the nominal beneficiary at origination) to NYCB was done to terminate MERS's agency interest in the deed of trust. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 842 (Wash. Ct. App. 2015) (MERS may terminate its agency interest by assigning its nominee interest in the deed of trust). The assignment from MERS to NYCB is not what vested NYCB with "beneficiary" status under the deed of trust as Hermosillo also appears to argue.

3. Second Notice of Default Not Required.

A non-judicial foreclosure in Washington consists of two statutory notices. The first notice is a Notice of Default, which is required at least 30 days prior to the issuance of a Notice of Sale. RCW 61.24.030(8). The second notice is the Notice of Sale, which sets the auction date for the property. RCW 61.24.040(1)(f). The Notice of Sale expires by operation of law 120 days after the original auction date. RCW 61.24.040(6); *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560 (Wash. 2012). The Notice of Default, however, does not expire and does not need to be re-issued before a new Notice of Sale. *Leahy v. Quality Loan Serv. Corp. of Wash.*, 190 Wn. App. 1, 7

² Hermosillo also inexplicably spends considerable time briefing the difference between a note holder and owner, which overlooks that fact that NYCB is both in this case. This is not a loan with a servicer who holds the promissory note for a separate investor / owner, as was the case in *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 544 (Wash. 2015).

(Wash. Ct. App. 2015).

In this case, it is undisputed that Hermosillo failed to timely make her mortgage payments in 2012. Quality issued a Notice of Default following Hermosillo's nonpayment in 2012. The 2012 default was never cured. Thus, no new Notice of Default was required before Quality issued its second Notice of Sale in 2015.

B. NYCB Properly Dismissed on Summary Judgment.

Hermosillo's only claim for relief in her amended complaint was for damages under the Consumer Protection Act. CP at 384-398. A private claim under the CPA requires (1) an unfair or deceptive act or practice (2) occurring in trade or commerce; (3) that impacts the public interest; (4) injury to business or property; and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (Wash. 1986). Whether an action constitutes an "unfair or deceptive" practice is a question of law. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., PLLC*, 168 Wn.2d 421, 442 (Wash. 2010). Failure to satisfy even one of the elements is fatal to a CPA claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (Wash. Ct. App. 2002).

For reasons already discussed, the foreclosure in question was advanced pursuant to the law in all respects. There was no wrongdoing by NYCB in advancing the foreclosure, let alone conduct that would rise to the level of "unfair and deceptive" compensable under the CPA. And even if Hermosillo is correct

and the state supreme and appellate courts have erred in their recent foreclosure law opinions, NYCB and Quality were still entitled to rely on the published case law from those courts. *Perry v. Island Sav. & Loan Assoc*, 101 Wn.2d 795, 810-811 (Wash. 1984); *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 155 (Wash. 1997) (acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law).

Furthermore, Hermosillo did not suffer any damage to “business or property” proximately caused by NYCB. The property was foreclosed because Hermosillo stopped making her mortgage payments to NYCB, which is the remedy she agreed to when she took out the loan. Hermosillo’s failure to pay her mortgage was the-but -for cause of the foreclosure. *Babrauskas v. Paramount Equity Mortg.*, 2013 U.S. Dist. LEXIS 152561 (W.D. Wash. Oct. 23, 2013) (plaintiff’s failure to meet his debt obligations is the “but for” cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title); *McCrorey v. Fannie Mae*, 2013 U.S. Dist. LEXIS 25461 (W.D. Wash. Feb. 25, 2013) (plaintiff’s failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure).

Finally, Hermosillo alludes to being unable to pay the arrearage because a second Notice of Default was not issued by the trustee. This argument is disingenuous. Nowhere is it alleged that Hermosillo was unable to obtain a

reinstatement of the arrears. To the contrary, a reinstatement quote was given to Hermosillo allowing her to pay before the date of sale, and she failed to pay.

In sum, Hermosillo did not and cannot satisfy any of the CPA elements. Dismissal of the CPA claim was appropriate.

IV. CONCLUSION

NYCB was properly dismissed on summary judgment. This Court should affirm.

Dated: August 30, 2016

MCCARTHY & HOLTHUS, LLP



Joseph Ward McIntosh, WSBA # 39470
Attorney for New York Community Bank

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 September 1, 2016, I arranged for service of the forgoing Brief of Respondent New York Community Bank on the following parties via overnight mail:

James A. Wexler
2025 201st Ave. SE
Sammamish, WA 98075

SIGNED this 1 day of September, 2016, at Seattle, Washington.



Walter Babst
Legal Assistant