

IN COURT OF APPEALS FOR WASHINGTON STATE

DIVISION II

No. 437121

JANICE GEARY,

Appellant

v

**ING Bank, FSB, a Delaware corporation;
Aurora Loan Services LLC, a Washington Limited Liability Company;
Quality Loan Service Corporation of Washington; a Washington Corporation**

Respondents

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF

WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

REPLY BRIEF OF APPELLANT

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Definitions

The terms used in this Reply Brief shall remain the same as in Appellants opening brief

“Aurora” for Aurora Loan Services LLC

“ING” for ING Bank FSB

“LLB” Lehman Brothers Bank

“LBH” Lehman Brothers Holding LLC

“MERS” Mortgage Electronic Registration System

“Pierce” Pierce Commercial Bank

“QLS” for Quality Loan Services of Washington

II. Response to Respondents Statement of Facts

QLS:

Respondent QLS states that it when it mailed a Notice of Default to Ms. Geary (nee Valli) dated March 13, 2009, it was acting as agent for the “beneficiary”. QLS has failed to produce any evidence except its self proclamation that it was an agent of MERS when issuing the “notice of default” and the Notice of Sale on April 20, 2009 claiming MERS was the foreclosing beneficiary. However, QLS admits that it was not until after the notice of default that it recorded the appointment successor trustee (by employees of McCarthy & Holthus, attorneys that own QLS, producing self serving appointments and notarizations). Aside from the fact that MERS cannot be a legal beneficiary under the Washington Deed of Trust Act, Lehman Brothers Bank [CP110,111] had already assigned all of its interest in the note on 6/1/2005 to Lehman Brothers Holding [CP130] when it attempted to assign the beneficial interest to MERS on 12/1/2005. See chain of title chart [CP 78] top level view of events

QLS makes the recitation of alphabet soup of LLB, LBH, Aurora, MERS, ING, in a proverbial vortex of prestidigitation leading the Court away from QLS lack of power to act - *and even when it acted powerlessly* it littered the landscape with errors, omissions and falsification of documents, including: assuming powers to sign instruments to itself without any written or recorded authority under the recording statutes of the State of Washington; presuming to sell the property to an entity in one instance and 5 months later trying to say that it sold the property to another entity; collusion among itself and the other defendants to deprive Ms. Geary.

Many of these acts by QLS demonstrated in this case have been repeated throughout

the State and the nation by QLS with the specific intent of depriving borrowers of their rights to due process, illegally dispossess owners of their homes and these are fully documented in the *Walker* case cited below and other cases.

Aurora:

Aurora hopes that a falsehood repeated often enough will become accepted as the truth. It keeps stating that Ms. Geary applied for a modification because she couldn't afford her mortgage. The un-rebutted record shows Ms. Geary never stated she could not afford her mortgage, instead she asked for a modification because she wanted a stable, non-adjustable interest rate. Ms. Geary had never paid a late payment penalty and had never been delinquent in her payments until Aurora informed her she would have to default on her loan before they could deal with her. Aurora never notified Ms. Geary that it did not have the power or authority to modify the mortgage until 3/11/09, [CP 647,1116]. Aurora's notice stated "Does not meet Criteria of INSURER / INVESTOR" months after encouraging her to default on her loan and while sending waves of paperwork for the modification. Aurora claims it sent notices to Ms. Geary that she did not qualify for a modification. However, their own charts from discovery reveal that she was qualified. [CP1128- 1134]. They also falsified income statements and other documents concerning the application in an attempt to justify their delay and "denial."

Not that it makes any difference because MERS was the unlawful link in the Deed of Trust rights, Aurora states that ING purchased the Note "in or about May of 2005" citing to a hearsay declaration [CP 478, ¶ 11] of a clerk who is employed by an affiliate of Aurora, not Aurora Loan Services, the party. Double hearsay. Furthermore, no admissible business record for ING was produced pursuant to RCW 5.45.020 to back up the hearsay statements. Triple hearsay. There is no admissible proof in the record to support any claim that ING was

ever a holder of the Note or that Aurora was its agent. Only hearsay and self-serving statements. In requests for discovery [CP1159-1160, RP 12{52-53}] Aurora's speaking agent stated under penalty of perjury that "Lehman Brothers Holding, Inc. owned the beneficial interests in the subject Deed of Trust before and on the date Notice of Default, and for a short time thereafter." Later in another declaration the same speaking agent stated that ING was the holder of the note." These contradictory statements were made subject to perjury within a month of each other. [CP 1170]. It should be noted that no one from ING has ever made a statement under perjury that ING owned the note at the time of foreclosure

Aurora further states in its brief that "the beneficial interest in the Deed of Trust tracked the Note ownership." A curious statement considering that ING never was a recorded beneficiary under the Deed of Trust, and no one produced admissible evidence of ownership .

Finally, as a pure and unmitigated violation of all of its duties to Ms. Geary, it proclaimed her dead and filed to collect the mortgage insurance. [CP 1195-1197]

ING:

The statement of the case from ING refers to "Capitol One, N.A.", as the entity submitting the brief. Since Capitol One has never been substituted as a party in the original proceeding or in this appeal, Ms. Geary objects to any facts or argument from Capitol One. The claim that Capitol One has the residual interest further shows that no one knew or knows the results of slicing up these securities. Even so, ING's "introduction" is mostly pure argument and not a factual recital.

To the extent that the Court considers "Capitol One's" briefing the following is contested. Capitol One attempts to deflect ING's defense of its position by casting aspersions upon Ms. Geary, her marriage and her profession. The letter referenced in ING's brief was addressed to LBH for something ING was accusing LBC of doing and contained *self serving statements*. The accuracy of the statements in the letter were not contested at the

hearing because they were not produced for the accuracy of the statements in the letter. ER 801 (d)(2) The point for introduction was that ING filed a claim in the Bankruptcy of LB on “*an unsecured claim.*” [CP 156, 57]. The statements in the letter are sexist in implying that Ms. Geary was not free to marry and that her earning capacity was not accurate. Apparently, ING clings to the adage: “Let the woman learn in silence with all subjection” Since such matter is offensive, irrelevant and not necessary to the issues before the Court, Ms. Geary moves to strike the statements. In light of the fact that this loan was originated in the atmosphere of one of the most compelling cases of corruption in Washington loan history by Pierce Commercial Bank, from which ING seeks to benefit, it is certainly unseemly to make these statements. The tactics of Pierce in promoting and securing the loans are assignable to ING and not Ms. Geary.

ING further claims that the Trustee’s Deed Upon Sale could be reformed because it was a scrivener’s error. However, the error claimed is not about a legal description it is about QLS announcing at the sale that Aurora purchased the property and filed a trustee’s deed and tax affidavit to that effect. Aurora files a 1099 to the IRS as lender [CP 1193] ING was not a beneficiary at the time of the sale and could not have bid in its interest.

ING put in an “unsecured” claim in the Lehman Brothers Holdings bankruptcy for investments with Lehman Brothers Capital [CP 156-157], at best this claim is an unsupported, unauthenticated stemming from a party not named in this action, chain of title while putting to a lie that any debt it was owed was secured by the Deed of Trust. ING points to a exhibit but stops a page short of the truth in its brief to mislead, by not including the true nature of ING’s relationship with Lehman Brothers Capital in the Lehman Brothers Holdings Bankruptcy Case. [CP157]

ING’s counsel during the SJ hearing admitted that there were mistakes and the note “caught up after the sale.” [RP p.23] *initially there was direction to foreclose in the name of Mayers (sic). But what does it matter what the initial direction was. Ultimately, they*

foreclosed. Incorrectly. ! [RP p.70]

III. Response to Issues Raised by Respondents

Perhaps best stated briefly, the issues settled in *Bavand v. Onewest Bank, Court of Appeals, Division I, No. 68217-2* are virtually a mirror image of some of the issues here; except for the misrepresentations regarding the modification applications, falsifying and changing information submitted by Ms. Geary on her application and changing positions with respect holder of the note, and attempting to change the “purchaser” at the unlawful “deed of trust” sale.

A. Appellant Properly Raised Issues Pertaining to Respondents’ Summary

Judgment Motions

QLS properly sets out that Mrs. Geary moved for summary judgment on the issue of Quiet Title against all defendants. It was, rather, the other Respondents that moved for summary judgment on all of the other issues raised in the complaint. Among the issues raised beside the Quiet Title were: Fraud, Violations of the Deed of Trust Act, Declaratory Judgment, and Consumer Protection Violations and requested damages pursuant to **RCW Ch. 61.24, RCW 19.86.090, RCW Ch. 7.24.190, CR 68**. As pointed out in each of the briefs filed before this Court, the burden of proving that one is entitled to summary judgment is on the moving party.

All issues before the trial court on summary judgment proceeding will be considered on appeal. *Albice v. Premier Mortgage Servs. Of Wash., Inc*, 157 Wn. App. 912 (2010). An order on summary judgment is reviewed by the Appeals Court de novo, engaging in the same inquiry as the trial court. *Triplett v. Dep't of Soc, & Health Servs.*, 166 Wn.App. 423, 268 P.3d 1027, *review denied*, 174 Wn.2d 1003, 278 P.3d 1111 (2012).

All the Respondents brought before the trial court in their motions for summary judgment were suppositions and argument and they did not address the alleged violations of the law and the actions of the Respondents in their misrepresentations regarding the authority

to modify the mortgage, their changing of critical information supplied by Ms. Geary for modification, their misrepresentations (and contradictory statements) regarding the ownership of the note, the misrepresentations about the power to foreclose on her property and the chicanery involved in attempting to change the “purchaser” at the unlawful “deed of trust” sale. Both *Walker* and *Bavand* have concluded the Trial Court was wrong and such that the lack of power to act and attempts to foreclose without such power are violations of the CPA.

B. The Actions of Respondents, if proven, are wrongfully violations of the Washington Consumer Protection Act (RCW 19.86) (“CPA”)

QLS was not a legal agent or trustee entitled to any collection efforts against the Ms. Geary. They were not empowered to issue the notice of default, the notice of foreclosure, conduct the nonjudicial sale or issue a trustee’s deed or to “correct” the illegal trustee’s deed. the Case of decided 9/9/2013, is a carbon copy of the issues raised in this case. As the Court stated in *Bavand v. Onewest Bank, Court of Appeals, Division I, No. 68217-2-1*, ***“Under the Deeds of Trust Act, only a properly appointed trustee may conduct a non judicial foreclosure. Moreover, only a proper beneficiary has the power to appoint a successor to the original trustee named in the deed of trust.”*** Aurora induced Ms. Geary to default on her loan when she asked for a modification - not because of inability to pay the note, but because she was seeking a stable interest rate rather than an Adjustable Interest Rate. [CP 647]. *Bavand* also states: This statute makes equally clear that only upon the recording of the appointment of a successor trustee with the auditor in the relevant county is a successor trustee "vested with all the powers of an original trustee." As the Court in *Bavand* noted the mere fact that it represented that it was empowered to conduct the non-judicial foreclosure when it did not was a material misrepresentation.

Aurora made major misrepresentations about its authority to modify her loan by providing her an application less than 3 weeks of her sons death “ under duress” . They sent

ineffective notices, changed the income statements of Ms. Geary and in the end *declared her dead* in order to collect insurance from the mortgage insurer. [CP1195-1197] The Court in *Bavand* also stated that violations of the DTA could arise to a violation of the CPA upon proof presented and the issue could not be resolved on summary judgment. *Bavand*, p 29-31.

Ms. Geary is not pointing to mere ministerial acts or technical glitches in procedure, but acting without authority, wilful deliberate acts, misrepresenting the requirements for modification, misrepresenting their authority to process the modification, refusal to identify the “true beneficiary” under the act, falsifying documents, assigning itself powers without authority, issuing notices without authority, attempting to change the “Trustee’s Deed” in violation of the statute. This is not the first time around the track for QLS in reported cases concerning its unlawful judicial foreclosure tactics (*Walker v. Quality Loan Services, et. al., Court of Appeals, Division II, No. 65975-8-I*). The respondents reliance on the trial court’s findings is not relevant in an appellate review of a summary judgment. As pointed out in Ms. Geary’s opening brief, findings of fact and conclusions of law by a trial judgment are disregarded upon appeal.

Furthermore, as stated in *Walker* and *Bavand* that if allegations of Respondents’ violations and misrepresentation as to the true beneficiary were proven it could be a violation of the CPA. *Walker* went one step further and said that some conduct might be violations of the **Fair Debt Collections Practices Act, 15 USC §1692 (e)** and would provide a independent ground for the violations of the DTA and therefore violations of the CPA.

Walker also built on the Supreme Court’s decision in *Bain v. Metropolitan Group, 175 Wn.2d 83, 285 P.3d 34 (Wash. 2012)* holding that remedies exist beyond injunctive relief if there were statutory violations of the DTA. *Bavand* took it a step further stating: *Most recently, the supreme court, in Schroeder v. Excelsior Management Group, LLC, reinforced the principal that waiver does not occur where the trustee's actions in a nonjudicial foreclosure are unlawful.*

The evidence of Respondents' misconduct is expansive as previously pointed out in the record.

C. ING Is Responsible for the Act and Omissions of its Agent under the CPA.

ING claims that it was a bona fide purchaser. ING was not a bona fide purchaser, because if it claims that Aurora was its agent and "servicer", therefore all knowledge of all of the defects set forth above Aurora are imputed to ING. Aurora was the one entity Ms. Geary was allowed to communicate with. Knowledge of an agent is imputed to the principal even though it would be to the agent's advantage to conceal the information when the agent is the sole representative through which the principal acts. *Bergin v. Thomas*, 30 Wn. App. 967, 638 P.2d 621 (1981). Furthermore, ING, well before it could have been the purchaser was monitoring the loan situation regarding Ms. Geary. See the bankruptcy filing in LB [CP 160]

All of the acts and omissions of Aurora and QLS are imputed to the principal. A principal is liable for the wrongful acts of its Agent(s), including statutory violations. *Futureselect Portfolio v. Tremont Group Holdings, Inc.*, Court of Appeals, Div I, 68130-3-I, August 12, 2013. ING openly admits in arguments that it was an interested party and gave directions to Aurora. The comment to WPI 50.04 "The principal is liable for the negligence of the agent. See Comment to WPI 50.03, *Act of Agent is Act of Principal.*"

D. The Lack of Authority and Power to Initiate the Non-judicial Foreclosure Makes it Void.

Certainly, if a rogue agent cannot initiate a non-judicial foreclosure, the sale of the

property at a non-judicial sale is void. An agreement that has a tendency " 'to be against the public good, or to be injurious to the public' " violates public policy. *King v. Riveland*, 125 Wash.2d 500, 511, 886 P.2d 160 (1994) (quoting *Marshall v. Higginson*, 62 Wash.App. 212, 216, 813 P.2d 1275(1991)). An agreement that violates public policy may be void and unenforceable. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

If MERS never held the note it never had the authority to act, and all "authority" flowing therefrom was invalid, and notices and other actions were violations of the DTA. *Bain, Bavand, and Walker* When an entity acts beyond its specific statutory authority, no obligation is created. The contract is void. *Chemical Bank v. WPPSS*, 99 Wash.2d 772, 666 P.2d 329 (1983).

E. Respondents' arguments that Ms. Geary is not entitled to Quiet Title is confounding and contradictory.

First, QLS states that Ms. Geary cannot move for quiet title because she must "recover on the strength of (her) own title and not the weakness of" others, citing the 1903 case of *Humphries v. Sorenson*, 33 Wash. 563 (1903). QLS and Aurora have no right to oppose the quiet title against them because they claim no equitable or legal title, neither in the trial court nor in its briefing before this Court. The legislature has enacted a statutory right of action under RCW 7.28.010: "Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county . . ." The party with superior title, whether legal or equitable, must prevail. *Finch v. Matthews*, 74 Wash.2d 161, 166, 443 P.2d 833 (1968).

Contrary to the Respondents' claims Ms. Geary has never contested the initial validity of the note. Her complaint was not to extinguish the note as was the claims in *Walker* and *Bavand*. Her claim is that there is no interest through the DTA of QLS (which it admits), Aurora (which it admits) nor ING (which it denies).

As to ING the issue must be tried to the Court with proof from ING that it has a

superior interest in the Property. *Bavand*, p. 27. It must show that it had an interest in the security instrument. A purchase money note is not automatically a security interest in property. In *Bavand* the court said that payment of the note might divest any claim of ownership by a person have a claim of equitable security through loan obligation. This case is entirely different from both *Bavand* and *Walker* in that the note was paid because Aurora submitted a claim against the loss insurance carrier claiming that Ms. Geary had deceased. [CP 1195-1197] Though the note has been extinguished, the reports of her death are greatly exaggerated as Mark Twain once wrote.

F. This is not a Scrivener's Errors Case, as Claimed by ING

As the Court in *Bavand*, following *Bain* and *Walker*, reiterated that the failure to follow the statute is not just a technical violation, it makes the action void. ING states that the "Corrective Trustee's Deed Upon Sale" was correcting a mere scrivener's error. Even if the other fatal flaws were not present, the change in Grantee by the "Trustee" does not fall with the equitable action of reformation. While legal descriptions might give rise to reformation, there must be sufficient information within the four corners of the contract to show specific intent in the mind of the conveyer. *Martin v. Seigel*, 212 P.2d 107, 35 Wn.2d 223 (Wash. 1949). The Martin Court stated that trend in deciding instruments has been away from indefinite and vague, and in the direction of preciseness and accuracy.

Certainly, QLS knew who Aurora was, announced at the sale that it was the purchaser, knew who ING was at the time of the sale, filed an excise tax affidavit showing Aurora was the purchaser and waited five months to claim the "error." A change of mind cannot give rise to a reformation. "A scrivener's error occurs when the intention of the parties is identical *at the time of the transaction* but the written agreement errs in expressing that intention." [my emphasis] *Reynolds v. Farmers Ins. Co.*, 90 Wn. App. 880, 885, 960 P.2d 432 (1998).

Yet, even if scrivener's error was truly present, QLS had no power to issue the first

trustee's deed, it clearly did not have the power to "correct" a void deed.

G. Ms. Geary's failure to obtain an injunction is not a waiver.

Bavand, quoting *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 111-12, 297 P.3d 677 (2013) stated : " that waiver does not occur where the trustee's actions in a nonjudicial foreclosure are unlawful. *Bavand*, P. 14.

CONCLUSION

The foreclosure is void because of the invalid assignment of the deed of trust to MERS.

The commencement of the non-judicial process by an unlawful beneficiary, MERS; the sale was conducted by an unlawful trustee; QLS, Aurora and ING committed deception and misrepresentation which lead to the default of Ms. Geary on her loan; they applied for mortgage insurance claiming Mrs. Geary was dead; and they unlawfully attempted to change the nature of the sale more than 15 days after a Trustee's Deed Upon Sale in violation of the DTA. All of these are violations of the CPA.

Ms. Geary asks the Court to reverse the summary judgment dismissing the complaint and reverse the summary judgment in favor of Quality, Aurora and ING, to declare the trustee's sale void and to quiet title in her favor and against Aurora and QLS.

Ms. Geary asks the Court to reverse the denial of summary judgment for quiet title and to remand to the Court with instructions to grant quiet title or in the alternative for proceedings to determine who has superior title.

Ms. Geary asks the Court to reverse the summary judgment in favor of the Respondents and to remand for trial on the issues of Consumer Protection Act Violations.

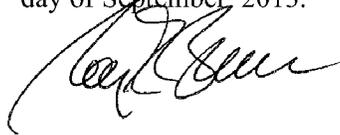
Ms. Geary asks the Court to remand to the trial court with instructions to grant leave to amend the complaint to allegation other statutory violations such as the Truth in Lending

Act, the DTA and other claims consistent with the current opinions of the Washington Courts regarding actions of servers, purported trustees and lenders.

Ms. Geary asks the Court to to remand to the trial court with instructions to grant leave discovery of issues raised by the Respondent in its appeal and to unredact disclosures.

Ms. Geary also asks the Court to reverse the summary judgment regarding the misrepresentation and Consumer Protection claims and to remand to the trial court for trial on the issues presented in the complaint.

Respectfully submitted this 20th day of September, 2013.



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 20th day of September 2013, counsel emailed and delivered an original Response Brief to all respondents Briefs and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery placed with Federal Express for next business day delivery to each of the following parties and their counsel of record:

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