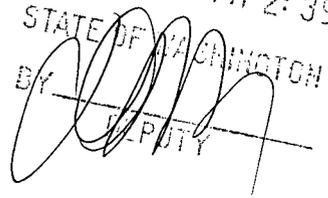


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COURT OF APPEALS
DIVISION II

2013 DEC 20 PM 2:39

STATE OF WASHINGTON

BY  DEPUTY

THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

NO. 43712-1-II (“Foreclosure Action”)
And
NO. 44619-7-II (“Unlawful Detainer Action”)

CONSOLIDATED

JANICE GEARY f/k/a JANICE VALLI,

Appellant,

v.

ING BANK, FSB; AURORA LOAN SERVICES LLC; QUALITY
LOAN SERVICE CORPORATION OF WASHINGTON, INC.,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT ING BANK, FSB

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I. INTRODUCTION

On October 17, 2013, the Commissioner of the Washington State Court of Appeals, Division II, issued a ruling consolidating COA Nos. 44619-7 (the Unlawful Detainer Action) and 43712-1 (the Foreclosure Action). That ruling stated in pertinent part that “ING shall . . . file a supplemental respondent’s brief to address issues specific to the unlawful detainer action and that have not been addressed in other briefing.” This memorandum is being filed in response to that order. This memorandum is therefore intended to be read only after reviewing ING Bank’s Brief of Respondent, which was filed in COA 43712-1 (the Foreclosure Action) on August 21, 2013. That original brief is hereinafter referred to as “BoR”.

II. STATEMENT OF ISSUES RELATING TO THE UNLAWFUL DETAINER ACTION

1. Does a federally-chartered savings bank have authority to do business in the State of Washington? Answer: Yes.
2. Is MERS a “lawful beneficiary” in this case? Answer: Yes.
3. Can a trustee correct a scrivener’s error? Answer: Yes.
4. As the purchaser of the Buckley property at the November 20, 2009 sale, is ING Bank entitled to possession pursuant to RCW 61.24.060(1)? Answer: Yes.

III. STATEMENT OF FACTS

ING Bank and the Gearys are in agreement that ING did not hold the note prior to April 23, 2010. CP 180 (4/23/10 assignment of deed of trust and note by Aurora to ING). *See also* Appellants' Supplemental Brief, p. 2 ("The Gearys do not accept that ING was the holder of the note. . . .").

IV. ARGUMENT

A. ING BANK IS A FEDERAL SAVINGS BANK, NOT A NON-PROFIT CORPORATION

The Gearys argue that ING Bank, fsb, did not prove it was qualified to do business in this state under RCW 24.03.390, which requires a "foreign corporation" to obtain a certificate of authority from the State of Washington. One problem with the Gearys' argument is that RCW Ch 24.03, the "Nonprofit Corporation Act," does not apply to a *federal savings bank*. Furthermore, RCW 24.03.005(2) states that "'foreign corporation' means a corporation not for profit organized under laws other than the laws of this state."

ING Bank, fsb, (now merged into Capital One) is not such a "foreign corporation." Instead, ING Bank was a federal savings bank qualified by and chartered under federal law to do business nationally. *See, e.g.*, 12 USC §1464. The Gearys have simply misunderstood the cited state statute. Furthermore, appellant's argument is procedurally objectionable because it was not argued to the

trial court below. (See *CP 365- 378.¹) Having abandoned the issue in its opposition to ING Bank’s motion for summary judgment, ING Bank had neither cause nor reason to address the matter in its briefing. The issue therefore is not presented to this Court in the appeal from the summary judgment order found at *CP 471-2.

B. MERS IS A “LAWFUL BENEFICIARY” IN THE CASE AT BAR

The Gearys repeatedly argue that MERS is an “unlawful beneficiary.” However, just like any other company, MERS is entitled to be a proper, lawful beneficiary under a deed of trust, so long as its role in that instrument complies with the requirements of the Deed of Trust Act, RCW Ch. 61.24 *et. seq.*

In Bain v. Metropolitan Mortg. Group, Inc., 175 Wash.2d 83, 285 P.3d 34 (2012), the state supreme court succinctly summarized the problem created by MERS’ involvement in the Bains’ deed of trust:

As MERS itself acknowledges, its system changes “a traditional three party deed of trust [into] a four party deed of trust, wherein MERS would act as the contractually agreed upon beneficiary for the lender and its successors and assigns.”

Bain, 175 Wash.2d at 96. The supreme court then answered the US District Court’s certified question as follows:

¹ ING Bank will employ the same format as the Gearys and refer to the Clerk’s Papers in the Unlawful Detainer Action with an “*” before “CP”.

Under the plain language of the deed of trust act, this appears to be a simple question. Since 1998, the deed of trust act has defined a “beneficiary” as “the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” LAWS OF 1998, ch. 295, § 1(2), codified as RCW 61.24.005(2). [Footnote omitted.] Thus, in the terms of the certified question, if MERS never “held the promissory note” then it is not a “lawful ‘beneficiary.’ ”

Id., at p. 98-99. The recent decision of Rucker v. Novastar Mortgage, Inc., ___ Wash.App. ___, 311 P.3d 31 (Div. I, 2013), decided on August 5, 2013, but ordered published only on October 2, 2013, is of similar effect:

Applying these principles, our Supreme Court has explained that “only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property.” Bain, 175 Wash.2d at 89, 285 P.3d 34. “[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale.”

Rucker, 311 P.3d at pp. 37-38.

The problem for the Gearys is that on December 1, 2005, a Corporate Assignment of Deed of Trust was recorded in which MERS was assigned by Lehman Brothers Bank, fsb, both that deed of trust and the promissory note for the Buckley property. (CP 130.) Thus, the note and deed of trust were not “split,” and MERS was a lawful beneficiary. The Gearys’ failure to address the issue after it was raised in ING Bank’s Brief of Respondent merely drives home the importance of this distinction.

C. A TRUSTEE CAN CORRECT A SCRIVENER'S ERROR

At pages 2 to 3 of the Appellant's Supplemental Brief, the Gearys essentially argue that the purchaser of real property at a trustee's sale cannot obtain a corrected trustee's deed naming it as the actual owner, even if the trustee makes a scrivener's error and writes down the wrong name for the new owner. Besides being very bad public policy on its face, ING Bank analyzed this issue in detail at BoR, pp. 32-25, and established that recent case law permits the correction of such scrivener's errors. *See Glepco, LLC v. Reinstra*, 175 Wash.App. 545, 307 P.3d 744 (Div. 1, 2013).

D. AS THE PURCHASER AT THE NOVEMBER 20, 2009 FORECLOSURE SALE, ING BANK IS ENTITLED TO POSSESSION OF THE BUCKLEY PROPERTY UNDER RCW 61.24.060(1)

In *Rucker*, the borrowers disputed that a foreclosure sale had actually occurred. *Id.*, 311 P.3d 31 at ¶26. In that decision, the Court of Appeals found that there was "no genuine issue of material fact with regard to the existence of the sale" because the sale was scheduled to occur at 10:00 a.m. on June 29, 2007, and the individual charged with conducting the sale testified that it did occur. *Id.*, ¶27. The Ruckers had tried to create a material issue of fact through negative evidence, i.e., by testifying that they went to the foreclosure sale and, as far as they could see, no sale took place. *Id.*, ¶28. The Court of Appeals was unconvinced, finding the Ruckers' arguments to be "mere speculation." The

court further observed that “the fact that April and Carl did not hear Rucker’s property being called does not indicate that no sale took place.” *Id.*, ¶30.

In the case at bar, it is undisputed that the sale took place. Indeed, the record shows that the Gearys affirmatively knew the sale would occur on November 20, 2009. (*See, e.g.*, CP 1180, CP 1183.) Furthermore, the original Trustee’s Deed (CP 170-171), and the Corrective Trustee’s Deed (CP 185-186), each reflects the fact that the sale took place on the stated date for the consideration of “\$668,991.68 in lawful money of the United States.” (CP 186.) There is, then, no dispute that the Buckley property was sold on November 20, 2009, for good and adequate consideration. The Gearys arguments to the contrary, including the assertion that there is no proof of consideration, are just like the Ruckers’ assertions, namely mere speculation.

This, then, brings us to RCW 61.24.060(1), which reads in relevant part as follows:

(1) The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants who are not tenants, who were given all of the notices to which they were entitled under this chapter. The purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.

This, then, establishes both that ING Bank is entitled to the Buckley property, and also, that the trial court's judgment in the Unlawful Detainer Action should be affirmed.

E. ING BANK REQUESTS AN AWARD OF ITS FEES AND COSTS

Mrs. Geary's deed of trust and note provide for an award of attorneys' fees and costs in any action to construe or enforce those instruments. Both were assigned to ING Bank. (CP 87, ¶9; CP 94, ¶26; CP 120, ¶7(E); CP 180.) ING Bank accordingly requests an award of reasonable attorneys' fees and costs on appeal pursuant to RAP 18.1.

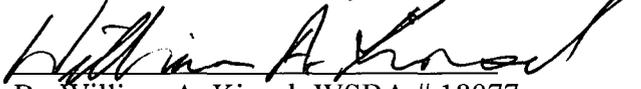
V. CONCLUSION

Because ING Bank, fsb, validly purchased title to the Buckley property at the trustee's sale on November 20, 2009, this Court should:

1. Affirm that ING Bank, fsb, is entitled to possession of the property under RCW 61.24.060;
2. Dismiss this appeal; and Award Respondent ING Bank, fsb, its reasonable attorneys' fees and costs incurred on appeal pursuant to RAP 18.1.

Dated this 20th day of December, 2013.

KINSEL LAW OFFICES, PLLC



By William A. Kinsel, WSBA # 18077

Attorney for ING Bank, fsb

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2013, I caused to be delivered the foregoing SUPPLEMENTAL BRIEF OF RESPONDENT ING BANK, FSB to the following parties in the manner indicated below:

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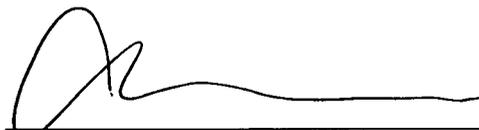
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Dated this 20th day of December, 2013, at Seattle, Washington.



Ashley Stalwick