

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

IBRAHIMA NDIAYE) no 45160-3-II

)
)
appellant)

v.)
)

FEDERAL NATIONAL MORTGAGE)

ASSOCIATION)

)
)
respondent)
)

BRIEF OF APPELLANT IBRAHIMA NDIAYE

FILED
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(2) Tables.

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(3) Introduction.

In this case, Mr. Ndiaye wishes to attack the nonjudicial foreclosure which resulted in the filing of unlawful detainer action against him. This matter was set for trial, but the trial court ruled that “an unlawful detainer action is not the appropriate place to raise a collateral attack on the nonjudicial foreclosure” Mr. Ndiaye believes that the ruling is improper, and that in some circumstances a collateral attack is allowed, unless a waiver is found following a three part test.

(4) Assignments of Error.

The court, in its ruling of July 19, 2013, erred in ruling “an unlawful detainer action is not the appropriate place to raise a collateral attack on the nonjudicial foreclosure”

(5) Statement of the Case.

This case arises from an action for a writ of restitution for possession of property at 819 Oakcrest Drive SE, in Lacey Washington.

According to the "Statement of Facts" in the Federal National Mortgage Association's Motion for Summary Judgement dated June 20, 2013,(Clerk's Papers 180-193), Mr. Ndiaye granted a deed of trust to Mortgage Electronic Registration Systems, Inc. solely as nominee of Ward Lending Group in April of 2007. Thurston County Title was the Trustee.

According to this same document, Mr. Ndiaye defaulted on the loan secured by this deed of trust to Mortgage Electronic Registration Systems, Inc. in December of 2008.

According to this same document, Mortgage Electronic Registration Systems, Inc. as beneficiary, assigned the deed of trust to Citimortgage, Inc. on May 27, 2009, and Citimortgage, Inc., appointed Northwest Trustee Services as successor trustee.

According to this same document, on July 14, 2011, Citimortgage, Inc, assigned the beneficiaries interest in the deed of trust to Nationstar Mortgage, LLC. A second assignment to Nationstar was recorded on January 10, 2012.

According to this same document, the trustee, Northwest Trustee Services began nonjudicial foreclosure proceedings. During the proceedings, Mr. Ndiaye applied for and was denied a HAMP loan modification. The trustees sale took place on

April 20, 2012 and the Trustee's Deed was issued to the plaintiff, Federal National Mortgage Association on May 2, 2012.

Federal National Mortgage Association filed a Complaint for Unlawful Detainer on March 15, 2013, (clerk's papers 3-16). An answer was filed by then counsel for Mr. Ndiaye, Kate Knapp Lengyel on April 5, 2013 (clerk's papers 81-84) objecting to Federal National Mortgage Association's title because the ruling in *Bain v. Metropolitan Mtg.* 175 Wn. 2d 83, 47 (2012), 285 P. 3d 34 (Wash. 2012) that Mortgage Electronic Systems, Inc, was ineligible to be a beneficiary of a deed of trust. Anticipating that Federal National Mortgage Association would argue that Mr. Ndiaye had waived his rights by not having brought a separate suit to enjoin the trustee's sale, Mr. Ndiaye through counsel cited the decision in *Albice v. Premier Mtg.* 175 Wn. 2d 83, 91 & 110 (2012), 285 P. 3d 34 (Wash. 2012) arguing that this case stood for the proposition that courts should apply waiver only when to do so is equitable under the circumstances.

On April 5, 2013, Judge Dixon of the Thurston County Superior Court heard the case. He ruled that the case was complex, not suited to the unlawful detainer calendar, with disputed matters of fact, and order the matter set before a trial court. (Order is contained on page 4 of the record of the hearing on April 5, 2013).

Federal National Mortgage Association filed a motion for reconsideration on April 15, 2013. (clerk's papers 85-95) The court denied this motion on May 1, 2013. (Clerk's Papers 179).

Federal National Mortgage Association filed a Motion for Summary Judgment

on June 21, 2013. (clerk's papers 180-193). Mr. Ndiaye, through his new counsel, John Turner, filed a response on July 17, 2013. (clerk's papers 233-243).

A hearing was held on July 19, 2013 before Judge Tabor of the Thurston County Superior Court. At this hearing, although counsel argued the issues of the validity of the deed of trust sale and whether a waiver should be applied under *Albice*, (previously cited) , the court declined to rule on these issues, (see report of proceedings 7/19/13, page 14), and ruled that

“ -an unlawful detainer action is not the appropriate place to raise a collateral attack on the nonjudicial foreclosure” (report of proceedings 7/19/13 page 14 , lines 16,17,and 18).

Judge Tabor then granted the Writ of Restitution in favor of Federal National Mortgage Association.

(6) Argument.

This case involves an unlawful detainer action under RCW 61.24.060, which authorizes a purchaser at a trustee's sale to obtain possession of the purchased property using the summary proceedings for unlawful detainer in chapter 59.12 RCW. Chapter 59.12 RCW provides for a limited summary proceeding "to preserve the peace by providing an expedited method for resolving the right to possession of property." *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (1996). To protect the summary nature of such proceedings, the action is a narrow one and is limited to the question of possession and ancillary issues such as damages and rent due. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523, 526, 963 P. 2d 944 (1998); *Heaverlo*, 80 Wn. App. at 728.

The "Deeds of Trust Act" RCW 61.24 RCW provides that a borrower may restrain a sale "on any proper legal or equitable ground." RCW 61.24.130; *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P. 3d 1061 (2003). Mr Ndiaye did not take any action to restrain the sale.

The failure to take advantage of presale remedies under the Act may result in waiver of the right to object to the sale. *Plein*, 149 Wn.2d at 227. "Waiver is an equitable principle that can apply to defeat someone's legal rights where the facts support an argument that the party relinquished their rights by delaying in asserting or failing to assert an otherwise available adequate remedy." *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 569, 276 P. 3d 1277

(2012). Waiver of any post -sale contest occurs where a party "(1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." Plein, 149 Wn.2d at 227.

The court in Mr. Ndiaye's case ruled that "an unlawful detainer action is not the appropriate place to raise a collateral attack on the nonjudicial foreclosure" Report of Proceedings 7/19/13, page 14. This seems contrary to the cases cited above which would allow a collateral attack where a waiver of post sale contest had not taken place. The court did not find that a waiver had taken place, and it seems that Mr. Ndiaye may not have had "actual of constructive knowledge of a defense to foreclosure prior to sale".

(7) Conclusion.

Mr. Ndiaye requests the court reverse the trial courts ruling granting the writ of restitution, and remand the case to Superior Court for a trial to establish whether or not a waiver had occurred of Mr. Ndiaye's right to bring a collateral attack on the nonjudicial foreclosure.

Date: May 27, 2014

Signed

A handwritten signature in black ink, appearing to be 'ND' with a stylized flourish.

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DECLARATION OF MAILING

I, Nathan Dysart, hereby declare under penalty of perjury that I placed in the United States Mail, First Class Postage prepaid, the following documents:

Brief of Appellant Ibrahima Ndiaye

To

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On March 29, 2014.

This declaration made in Olympia WA on March 29, 2014

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