

No. 46726-7-II

**COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON**

BRANCH BANKING AND TRUST COMPANY,
Respondent,

v.

SANDRA J. SCAMEHORN AND WALTER D. SCAMEHORN,
Appellants.

RESPONDENT'S BRIEF

Craig Peterson, WSBA #15935
Tiffany Owens, WSBA # 42449
Robinson Tait, P.S.
710 Second Avenue, Suite 710
Seattle, Washington 98104
Telephone (206) 676-9640
Facsimile (206) 676-9659

Counsel for Respondent

BY 
DEPUTY

STATE OF WASHINGTON

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I. STATEMENT OF THE CASE

This appeal arises from a judicial foreclosure action brought by plaintiff-respondent Branch Banking and Trust Company (“Branch Banking”) against defendants-appellants Sandra Scamehorn and Walter Scamehorn (“the Scamehorns”) to enforce a certain promissory note (“Note”) that was secured by a certain trust deed (“Deed of Trust”) on real property commonly known as 2401 Crystal Spring Road W, Tacoma, Washington, 98466 (“Subject Property”)¹.

On May 8, 2007, Sandra J. Scamehorn and Walter D. Scamehorn, for value received, executed, and delivered a promissory note (hereinafter, “Note”) to Bayrock Mortgage Corporation. (CP 12-20). At the same time as the execution and delivery of the Note and in order to secure repayment of the Note, the Scamehorns made, executed, and delivered to Bayrock Mortgage Corporation a Deed of Trust encumbering the real property commonly known as 2401 Crystal Spring Road W, Tacoma, Washington. (CP 23-50). The Deed of Trust was recorded on May 11, 2007, in the official records of Pierce County under recording number 200705110225. (*Id.*).

¹ Appellant’s Brief seems to state facts from another Pierce County case, 13-2-13416-6, currently set for trial 4/22/2015 and not the property which is the subject of this appeal.

The beneficial interest in the Deed of Trust was assigned to PFG Mortgage Trust I by an Assignment of the Deed of Trust recorded on December 29, 2011, in the official records of Pierce County under recording number 201112290136. (CP 52-53). PFG Mortgage Trust I later assigned its interest to Branch Banking. The assignment from PFG Mortgage Trust I to Branch Banking was recorded on April 22, 2013, under Pierce County recording number 201304220220. (CP 55-56).

The Scamehorns failed to make the monthly payment due on August 1, 2011, and have not made any payments thereafter. (CP 95-144). On or about December 2, 2011, Green Planet Servicing, LLC, sent a letter to the Scamehorns on behalf of Branch Banking, advising them of the default. The letter was sent to the Scamehorns at the Subject Property's address. (CP 58). The notice clearly stated the amount of default and informed the Scamehorns that this amount needed to be paid by January 2, 2012 in order to cure the default. (*Id.*). The letter also advised that acceleration of the full amount remaining would result if the delinquency was not timely cured. (*Id.*). The Scamehorns failed to cure the default and Branch Banking initiated the foreclosure action.

Thereafter, the Scamehorns answered the complaint denying Branch Banking's claims and asserting affirmative defenses all premised on the theory that Branch Banking was not the holder of the promissory

note and/or the Scamehorns did not understand their original loan terms. (CP 70-74). Following a motion for Summary Judgment, the trial court found in favor of Branch Banking on its claims that the Scamehorns breached the terms of the promissory note, and that Branch Banking was entitled to acceleration of all amounts due under the promissory note and foreclosure of the trust deed accordingly. (CP 284-286). The trial court's ruling in the Order granting Summary Judgment was controlled by its finding that Branch Banking is the holder of the Note and entitled to enforce it and the Deed of Trust accordingly. (CP 284-286). Thereafter, a general judgment were entered and an Order of Sale was issued. The Subject Property was sold at a Sheriff's Sale on January 30, 2015.

II. STANDARD OF REVIEW

The standard of review from the Trial Court's granting summary judgment is de novo. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wash. App. 819, 825, 142 P.3d 209, 212 (2006). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007) (alteration in original) (quoting CR 56(c)). When determining whether an issue of material fact exists, the court construes all facts and inferences in

favor of the nonmoving party. *See Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists only where reasonable minds could reach different conclusions. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). To establish the existence of a genuine issue of material fact, the nonmoving party “may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.” *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

III. ARGUMENT

1. The Promissory Note was properly transferred to Branch Banking.

Appellants assert that Respondent does not hold the Promissory Note in this case because it was not indorsed to them but instead indorsed in blank. A promissory note is a negotiable instrument whose transfer and enforcement is governed by the UCC as codified in RCW 62A.3-101 et al. RCW 62A.3-203 provides that an “instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” In addition to physical delivery, a transfer of a negotiable instrument may also be accomplished by an indorsement of the instrument. *See* RCW 62A.3-201 and RCW 62A.3-204. An instrument may be indorsed either to a specific person or entity, or it may be indorsed “in blank.” *See* RCW 62A.3-205

(a). If an instrument is indorsed in blank, the instrument becomes “payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.” RCW 62A.3-205 (b). With regard to the right of enforcement, RCW 62.A.3-301 provides that the “[p]erson entitled to enforce” an instrument means (i) the holder of the instrument. . .” RCW 62.A 3-301.

In the present case, the evidence in the record demonstrates that Branch Banking received physical delivery of the note and is still in possession of the Note. The evidence also demonstrates that the Note was indorsed from the original lender, Bay Rock Mortgage Corporation, to an intermediate note holder, PFG Mortgage Trust I. The evidence also demonstrates that PFG Mortgage Trust I indorsed the Note in blank as authorized by RCW 62A.3-205(b). Accordingly, the chain of indorsements for the Note accurately reflect the transfers of possession of the Note and further, as the Note is indorsed in blank and is in Branch Banking’s possession, there is no dispute that Branch Banking has standing enforce the Note under RCW 62A.3-101 et al.

Unlike promissory notes, deeds of trust relate to the conveyance of an interest in real property. As such, any assignment of a deed of trust is required to be in writing, signed and acknowledged. RCW 61.16.010.

Any such assignment “may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded.” RCW 65.08.070. In the present case, the record shows that PFG Mortgage Trust I did execute and record an Assignment of the Deed of Trust to Branch Banking. Nonetheless, even if no assignment had been recorded, Branch Banking would still be entitled to enforce the Note and Deed of Trust because “the security instrument will follow the note, not the other way around.” *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104 (2012). Accordingly, there is ample evidence in the record to establish that Branch Banking is the holder of the Note. The record also demonstrates that Branch Banking is the assignee of the Deed of Trust. As such, Branch Banking is the Holder of the Note and can properly seek foreclosure of the Note and Deed of Trust.

2. The Trial Court did not find that Mortgage Electronic Registration Systems, Inc. (MERS) held the Note and MERS is not a party to this action, MERS’ involvement in an assignment of the Deed of Trust has no bearing on Plaintiff being the Holder of the Note.

Appellants state that the Trial Court found that MERS held the

Promissory Note in this case. This is incorrect, there was no ruling or assertion made that MERS was the Holder of the Promissory Note or that MERS had ever been the Holder of the Promissory Note.

MERS as nominee for Bayrock Mortgage Corporation assigned the Deed of Trust to PFG Mortgage Trust I pursuant to an Assignment of Deed of Trust recorded on December 29, 2011, under Pierce County recording number 201112290136. (CP 52-53). That is the extent of MERS' involvement in this case, they were involved in an assignment of the Deed of Trust, not the Note.

To the extent that the Scamehorns attempt to point to the chain of assignments to dispute Plaintiff's right to enforce the terms of the Note and Deed of Trust, any such argument would be misguided. As stated above, the Washington State Supreme Court affirmed that "the security instrument will follow the note, not the other way around." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104 (2012). In doing so, the *Bain* court recognized a long held precept of Washington law that the holder of the note is entitled to enforcement of any security interest given to insure performance under the note. Thus, because Branch Banking is the holder of the Note, it is entitled to enforce the Note regardless of the status of the chain of assignments of the Deed of Trust.

3. The Trial Court did not err in Finding that the Negative Amortization Terms of the Note or the use of the LIBOR-Based Interest Rate were Not Unconscionable.

The Trial Court did not err by granting Summary Judgment in this case in spite of the fact that the Appellants claimed the Negative Amortization Terms of the Note and the use of the LIBOR-Based Interest Rate were unconscionable. Whether a contract is unconscionable is a question of law reviewed de novo on appeal. *Torgerson v. One Lincoln Tower, LLC*, 166 Wash. 2d 510, 210 P.3d 318 (2009), *as corrected* (July 16, 2009). Appellants have not met their burden of establishing a genuine issue of material of fact. Instead they have relied on speculation and argumentative assertions in an attempt to establish that there are any factual issues.

Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh. *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 344-45, 103 P.3d 773, 781 (2004). Procedural unconscionability describes the lack of a meaningful choice, considering all the circumstances surrounding the transaction including manner in which contract was entered, whether party had reasonable opportunity to understand terms of contract, and whether important terms were hidden in fine print. *Nelson v. McGoldrick*, 127 Wn.2d 124,131, 896 P.2d 1258 (1995).

The Appellants' arguments in their Response to Summary Judgment focused on substantive unconscionability and claim that the concept of negative amortization in and of itself is unconscionable. The Scamehorns point to no proof or evidence that would lead the Trial Court to believe that the contract was unconscionable. This general claim ignores the fact that there are sound economic and business reasons for selecting a loan with a negative amortization feature. In the present case, the negative amortization feature of the Scamehorns loan allowed the Scamehorns to enjoy a significantly low monthly payment during the operative years of the Note. The arguments provide no proof of substantive unconscionability and the arguments fail to show the contract was one sided or overly harsh. The Scamehorns' loan is not the type of loan that so shocks the conscious as to be deemed unconscionable as a matter of law.

Additionally, the Scamehorns have failed to show procedural unconscionability. The terms that explained the negative amortization feature were clearly set forth and explained in the Note. There is no evidence presented by the Scamehorns that they were not given the opportunity to full understand the contract or that there were any problems with the transaction. Furthermore, the terms were not hidden in fine print but rather in the same size font as the rest of the document and clearly

marked with headings. (CP 12-20). The standard for procedural unconscionability is not met and the argument for procedural unconscionability must fail.

Additionally, there was nothing inherently unconscionable about the use of the LIBOR index at the time of the origination of the Scamehorns' loan and the Appellants have given no evidence to support that it was unconscionable, either procedurally or substantially. The LIBOR index has been commonly used throughout the lending industry and there would be no reason for a lender to question its use in a promissory note at the time of the loan. The Appellants have failed to provide any evidence at all regarding their claims of the use of the LIBOR-Based Interest Rate being unconscionable. Additionally, the Appellants have provided no evidence to suggest that the original lender or its successors in interest participated in or were aware of the subsequent scandal. Without any evidence of knowledge or participation in the manipulation or fraud mentioned by Appellants, the choice to use one of the most commonly relied upon interest rate indices is not unconscionable as a matter of law and the Plaintiff was entitled to summary judgment on this issue.

IV. CONCLUSION

For all of the reasons stated above, Branch Banking respectfully asks this Court to affirm the trial court's granting of Summary Judgment.

Dated this 27 day of February, 2015.



Tiffany Owens, WSBA #42449
Craig Peterson, WSBA #15935
Robinson Tait, P.S.
Attorneys for Respondent

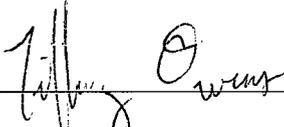
CERTIFICATE OF SERVICE

I, T. Alan Owens, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am an employee at Robinson Tait, P.S., attorneys for Respondent, and am competent to be a witness herein.

On February 27, 2015, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing RESPONDENT'S BRIEF to the following:

David J. Britton
535 Dock St. Ste. 108
Tacoma, WA 98402
Attorney for Appellant Sandra Scamehorn and Walter Scamehorn



Robinson Tait, P.S.

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Robinson Tait, P.S.
710 Second Avenue, Suite 710
Seattle, Washington 98104
Telephone (206) 676-9640
Facsimile (206) 676-9659

Counsel for Respondent

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2. The Trial Court did not find that Mortgage Electronic Registration Systems, Inc. (MERS) held the Note and MERS is not a party to this action, MERS’ involvement in an assignment of the Deed of Trust has no bearing on Plaintiff being the Holder of the Note.

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To the extent that the Scamehorns attempt to point to the chain of assignments to dispute Plaintiff's right to enforce the terms of the Note and Deed of Trust, any such argument would be misguided. As stated above, the Washington State Supreme Court affirmed that "the security instrument will follow the note, not the other way around." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104 (2012). In doing so, the *Bain* court recognized a long held precept of Washington law that the holder of the note is entitled to enforcement of any security interest given to insure performance under the note. Thus, because Branch Banking is the holder of the Note, it is entitled to enforce the Note regardless of the status of the chain of assignments of the Deed of Trust.

3. The Trial Court did not err in Finding that the Negative Amortization Terms of the Note or the use of the LIBOR-Based Interest Rate were Not Unconscionable.

The Trial Court did not err by granting Summary Judgment in this case in spite of the fact that the Appellants claimed the Negative Amortization Terms of the Note and the use of the LIBOR-Based Interest Rate were unconscionable. Whether a contract is unconscionable is a question of law reviewed de novo on appeal. *Torgerson v. One Lincoln Tower, LLC*, 166 Wash. 2d 510, 210 P.3d 318 (2009), *as corrected* (July 16, 2009). Appellants have not met their burden of establishing a genuine issue of material of fact. Instead they have relied on speculation and argumentative assertions in an attempt to establish that there are any factual issues.

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The Appellants' arguments in their Response to Summary Judgment focused on substantive unconscionability and claim that the concept of negative amortization in and of itself is unconscionable. The Scamehorns point to no proof or evidence that would lead the Trial Court to believe that the contract was unconscionable. This general claim ignores the fact that there are sound economic and business reasons for selecting a loan with a negative amortization feature. In the present case, the negative amortization feature of the Scamehorns loan allowed the Scamehorns to enjoy a significantly low monthly payment during the operative years of the Note. The arguments provide no proof of substantive unconscionability and the arguments fail to show the contract was one sided or overly harsh. The Scamehorns' loan is not the type of loan that so shocks the conscious as to be deemed unconscionable as a matter of law.

Additionally, the Scamehorns have failed to show procedural unconscionability. The terms that explained the negative amortization feature were clearly set forth and explained in the Note. There is no evidence presented by the Scamehorns that they were not given the opportunity to full understand the contract or that there were any problems with the transaction. Furthermore, the terms were not hidden in fine print but rather in the same size font as the rest of the document and clearly

marked with headings. (CP 12-20). The standard for procedural unconscionability is not met and the argument for procedural unconscionability must fail.

Additionally, there was nothing inherently unconscionable about the use of the LIBOR index at the time of the origination of the Scamehorns' loan and the Appellants have given no evidence to support that it was unconscionable, either procedurally or substantially. The LIBOR index has been commonly used throughout the lending industry and there would be no reason for a lender to question its use in a promissory note at the time of the loan. The Appellants have failed to provide any evidence at all regarding their claims of the use of the LIBOR-Based Interest Rate being unconscionable. Additionally, the Appellants have provided no evidence to suggest that the original lender or its successors in interest participated in or were aware of the subsequent scandal. Without any evidence of knowledge or participation in the manipulation or fraud mentioned by Appellants, the choice to use one of the most commonly relied upon interest rate indices is not unconscionable as a matter of law and the Plaintiff was entitled to summary judgment on this issue.

IV. CONCLUSION

For all of the reasons stated above, Branch Banking respectfully asks this Court to affirm the trial court's granting of Summary Judgment.

Dated this 27 day of February, 2015.



Tiffany Owens, WSBA #42449
Craig Peterson, WSBA #15935
Robinson Tait, P.S.
Attorneys for Respondent

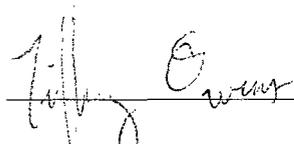
CERTIFICATE OF SERVICE

I, T. Henry Owens, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am an employee at Robinson Tait, P.S., attorneys for Respondent, and am competent to be a witness herein.

On February 27, 2015, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing RESPONDENT'S BRIEF to the following:

David J. Britton
535 Dock St. Ste. 108
Tacoma, WA 98402
Attorney for Appellant Sandra Scamehorn and Walter Scamehorn


Robinson Tait, P.S.

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