

Case No. 47595-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DJIBRIL DJIGAL

Appellant,

vs.

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

Respondents.

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STATE OF WASHINGTON

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FILED
COURT OF APPEALS
DIVISION II

BRIEF BY RESPONDENT QUALITY LOAN SERVICE CORP. OF
WASHINGTON

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I. INTRODUCTION

Appellant filed this lawsuit to stop a trustee's sale of his property, and he sought recovery of fees and costs incurred in connection with doing so. There was nothing wrong with the foreclosure and the costs and fees he incurred are not recoverable damages, and the case was appropriately dismissed on summary judgment. This Court should affirm.

II. FACTS

Respondent Quality Loan Service Corp. of Washington ("Quality") incorporates the facts set forth in co-respondents' answering brief. Facts unique to Quality are restated and supplemented as follows.

Appellant Djibril Djigal ("Djigal") filed the underlying lawsuit to stop a trustee sale set for August 23, 2013. The trustee sale was set by a Notice of Sale issued on April 22, 2013. CP at 346-49. This Notice of Sale was the fourth issued by Quality since Djigal's default in 2008. The earlier sale notices issued by Quality were no longer operative.

The subject Notice of Sale indicated that a Notice of Default issued earlier in the year, in March of 2013. CP at 347 ¶ VI. Djigal in his pleadings confirms receiving a Notice of Default in 2013. CP at 10.

The Notice of Sale indicated that the deed of trust had been assigned to Nationstar Mortgage, LLC ("Nationstar"). CP at 346 ¶ 1. This recital was true; on October 17, 2012, an assignment of the deed of trust to Nationstar was

recorded with the county's records. CP at 150-51. No subsequent assignments have been recorded.

Prior to the issuance of the Notice of Default and Notice of Sale, Quality had been appointed by Nationstar as successor trustee under the deed of trust. CP at 343-344. The appointment instrument was executed by Quality through a recorded power of attorney with Nationstar. CP at 488-490.

Finally, prior to issuing the Notice of Sale, Nationstar had executed a beneficiary declaration, attesting under penalty perjury that Nationstar held the promissory note secured by the deed of trust. CP at 357. The beneficiary declaration was true, Nationstar did, in fact, hold the promissory note. CP at 277.

For reasons discussed further below, there were no defects in the foreclosure sale that Djigal incurred costs and fees attempting to stop. His allegations that the foreclosure was wrongful and actionable fail on the facts and law. Dismissal was appropriate.

III. ARGUMENT

A. Foreclosure Was Proper

1. Trustee's Power of Sale Was Triggered

Under the terms of Djigal's deed of trust, his real property serves as collateral securing repayment of the promissory note. His failure to make mortgage payments dating back to 2008 is an event of default triggering the

trustee's power of sale and duty to advance a foreclosure pursuant to the parties' contract.

2. Foreclosure Advanced by "Beneficiary"

Under Washington's Deed of Trust Act, the "beneficiary" of the deed of trust with the power to advance a foreclosure 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);

In this case, Nationstar held the promissory note and therefore was the "beneficiary" of the deed of trust. Nationstar, as beneficiary, had the power to appoint Quality as successor trustee and advance the foreclosure. The fact that Nationstar appointed Quality through a power of attorney does not make the instrument defective. *Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767, 778 (W.D. Wn. 2015) (rehearing denied) (possession of a power of attorney means that an authorized agent is empowered to bind the principal and the acts of such agent are deemed to be those of the principal itself) (citing *Ennis v. Smith*, 171 Wn. 126, 130, 18 P.2d 1 (1933)). The beneficiary is allowed to act through agents. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106 (Wash. 2012) (Washington law, and the Deed of Trust Act itself, approves of the use of agents); *Neess v. Nw. Tr. Servs., Inc.*, No. C11-1939-JCC, 2012 WL 10277178, at *1 (W.D. Wn. Apr. 6, 2012) (dismissing with prejudice wrongful foreclosure lawsuit where foreclosing trustee was appointed via power of attorney).

Notably, at no point in this litigation has Nationstar denied appointing Quality as successor trustee, or denied giving a power of attorney to Quality to execute the appointment instrument.

3. Beneficiary Declaration

The trustee, in verifying the identity of the “beneficiary,” is entitled to rely on a statutory beneficiary declaration as to the holder. RCW 61.24.030(7)(a); *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 544 (Wash. 2015); *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484 (Wash. Ct. App. 2014); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 849 (Wash. Ct. App. 2015).

In this case, prior to issuing the Notice of Sale, Quality obtained a beneficiary declaration confirming Nationstar held the promissory note. The beneficiary declaration complies with the statute in all respects. It unambiguously states that “Nationstar Mortgage is the actual holder of the Promissory Note”. CP at 356. It does not suffer from the ambiguity of the beneficiary declaration in *Lyons v. U.S. Bank NA*, 181 Wn.2d 775, 780 (Wash. 2014), where the declaration stated that Wells Fargo was the “actual holder” of the promissory note, or “ha[d] requisite authority...to enforce [it].”

Furthermore, the beneficiary declaration testimony has proven true. Nationstar did, in fact, hold the promissory note. Quality ultimately did not need

the beneficiary declaration to protect itself because the foreclosure was advanced by the proper beneficiary.

B. Claims For Relief Properly Dismissed on Summary Judgment.

For reasons set forth in co-respondents' answering brief, which are incorporated herein, Djigal's claims for relief fail on the law and evidence, and were properly dismissed on summary judgment.

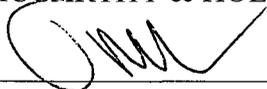
The only claim directed exclusively at Quality, and not addressed in co-respondents' answering brief, is the claim for breach of trustee duty under the Deed of Trust Act. That claim fails as a matter of law because there is no independent cause of action for monetary damages under the Deed of Trust Act for violations absent a completed foreclosure sale. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 429 (Wash. 2014).

IV. CONCLUSION

The claims against Quality were properly dismissed. This Court should affirm.

Dated: January 18, 2016

MCCARTHY & HOLTHUS, LLP



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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 January 19, 2016, I arranged for service of the forgoing Brief by Respondent Quality Loan Service Corp. of Washington on the following parties via overnight mail:

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