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Court of Appeals
Division II
WASHINGTON STATE COURT OF APPEALS
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DIVISION TWO

BENEFICIAL FINANCIAL, U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST Respondent, V. PATRICIA CHATMAN (SHAW), Appellant and Petitioner.	CASE # 50755-2-II Super. Ct No. 15-2-00339-1 Appellant's Brief
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Appeal From a Judgment
of The Superior Court; County of Kitsap
Hon. Jeffrey P. Bassett, Judge

APPELLANT'S OPENING BRIEF

Patricia Chatman Shaw
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Port Orchard, WA 98367
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Appellant
Pro Se

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JURISDICTIONAL STATEMENT

Real property described as:

SEE LEGAL DESCRIPTON AS FOLLOW:

LOT 3 OF LARGE LOT SUBDIVISION RECORDED IN VOLUME 1, PAGE 113, UNDER AUDITOR'S FLIE NO. 8812080095, BEING A PORTION OF THE SOUTHWEST QUARTER OF THE NORTHWEST QUARTER, SECTION 7, TOWNSHIP 22 NORTH, RANGE 1 EAST, W.M., IN KITSAP COUNTY, WASHINGTON.

APN/Parcel # 072201-2-010-2006

Real property commonly known as:

5533 SW Paradise Lane, Port Orchard WA 98367 ¹

commonly Known as: 14511 Spindrift Lane SW, Port Orchard, WA 98367 ¹

A. Assignment of error

ASSIGNMENT OF THE ISSUES OF ERROR

The trial court erred in entering the order of July 28, 2017, denying defendant's motion to vacate default the judgment on or about March 9, 2016, without regard to *Rule RCW 60(b)4*.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Patricia A. Chatman (Shaw) seeks review by the appellate court for denying her *Rule 60 (b)4* motion to vacate a default judgment of foreclosure on her home. Hon. Judge Jeffrey P. Bassett decision was improper due to fact that he refused to address the facts and evidences regarding the history of two "Affidavit of Lost Note". First "Affidavit of Lost Note" dated and signed on, July 13, 2007, by Laura Hescott a known notorious "robo signer" who worked for Lenders Processing Service. And a second "Affidavit of Lost Note" dated, February 22, 2014. This one is incomplete and contradicts the first one, and as such of no probative value. When affidavits contradict each other, their evidence value cannot be determined on the papers. *Bader v. State, 43 Wash. App. 223 (1986)*.

¹ Alternatively, my home address is given as 14511 Spindrift Lane, Port Orchard WA. Because my home is located on a cross street, both addresses are correct.

B. STATEMENT OF THE CASE

On May 25, 2017, U.S. Bank Trust, N.A. As Trustee for LSF9 Master Participation Trust filed a Sheriff's return of service on Levy on Real Property. CP 1-6. The Defendant's filed on 06/29/17 an Affidavit in Support of Order to Show Cause, CP- 7-12, Order on Motion to Vacate Judgment CP-13 and order to Show Cause CP-14. A Motion Hearing was filed 07/07/17 CP-277. The Plaintiff's Response to Defendant's Show Cause was filed on 07/07/17. CP-284. The Defendant's filed an Affidavit in Further Support of Motin to Vacate Default Judgment on 07/19/17 CP-285-291. The Plaintiff's filed on 07/26/17 Supplemental Response to Defendant's Show Cause. CP-292-308. The Defendant's filed on 07/27/17 Affidavit in Opposition to Supplemental Response. CP-309-315.

Motion Hearing, filed 07/28/17 CP-316. On July 28, 2017, it was decided by the court that there is not clear and convincing evidence that there was fraud in obtaining a default. CP 317-318 RP-10-11.

STATEMENT OF THE FACTS

History of the Loan

I originally opened a credit line of \$95,200 with Beneficial Washington Inc. d/b/a/ Beneficial Mortgage Co. of Washington ("Beneficial") on my home at 5533 SW Paradise Lane, Port Orchard, WA. on November. 23, 1994. At that time, I purchasing a manufactured home, which is permanently affixed to the foundation on a 4.39 acre lot that I own.

On November 23, 1994, I received a Deed of Full Reconveyance indicating that the 1994 mortgage had been fully paid.

On December 24, 1997, I signed a Deed of Trust for a new line of credit of \$116,000. When I signed that Deed of Trust in 1997, I did not sign a Note. I am a dog groomer with no real estate experience, I had never purchased a home in Washington previously, and I did not find this unusual.

In the summer of 2006, I tried to refinance my mortgage with no success. Since I was unable to refinance, I thought something must be wrong with my credit or income, so I decided to added my daughter as a cosigner. We tried for several months, to refinance with Well Fargo Financial

and again with no success. Wells Fargo Financial advise me that something was wrong with my title and to contact Beneficial, because Beneficial was uncooperative and would not give them a payoff amount. In October of 2006 I tried to work with Beneficial who continued to be uncooperative. I eventually learn that the reason Beneficial was uncooperatives was due to the fact that the title to the mobile home has never been eliminated, despite the fact that Land Title Company has been paid back in 1994. As I investigated this problem, it just got worse. I spent hours trying to track down information, especially with the Department of Licensing. I discovered that the mobile home had never had a title issued. It is my understanding that this unit was actually manufactured in the sate of Washington, but it was clear from all the checking and crosschecking done by the Department of Licensing that no title had ever been issued. I was informed that the only choice for getting the title was to go back to the manufacturer, who was no longer in business. At that point I hired Attorney, Mr. John Andrews of Bishop, Cunningham & Andrews of Bemerton, WA. Because of the several state agencies involved with mobile homes and mobile home inspections, it is not certain that I can get a title issued at all and the process can take several years. My choice at that point is to ask the court to quiet title the mobile home since I have the bill of sale and not a title.

The only way, I could get Beneficial to response to this issue in January 2007 and to get some kind of resolution was to stop making my payment. Now, I had their attention. Their response was to foreclose. I recieved a notice in July 2007 that they were going to foreclose.

Apparently to cover this omission of the fact that they did not have a note, on July 13, 2007, Beneficial filed a "Lost Note Affidavit." (Exhibit 1) In its relevant parts, that affidavit states: "The original Note or Credit Line Security Agreement has been lost or misplaced, and there is no other note or security agreement outstanding secured by the Deed of Trust... Beneficial represents that it has not previously assigned any of the claims released herein and that it is the present beneficiary under the trust deed." As will be explained further in this affidavit, this carefully-worded affidavit nowhere says that Beneficial ever owned the Note nor does it comply with the "lost instrument" affidavit requirements set down in *RCW 62A-3.309. 2*

I had my day in the Superior Court of Washington County of Kitsap On December 20, 2007, Beneficial stipulated to removing a lien it had mistakenly placed on my manufactured home, leaving only a lien on the land. Beneficial, Mr. Andrews and myself had a conference call on January 2008, in Mr. Andrews office, regarding my issues with lost note and title and relocating me. Beneficial offered to moved my manufactured home to a smaller lot. Nothing ever happen with this issue and was left unresolved.

Having discovered these problems, Wells Fargo would not make a loan on just the land, so I had to give up on my plans for refinancing. I did look into selling the place, but that was not possible under the current circumstances. I cannot sell the mobile home without a title, and I cannot sell the land with mobile home on it. I have spoken to several realtors and could not get anyone to do a listing. In addition to the problems caused by the title defect, there were other serious problem caused by the lender. They were aware of these title problems and have issued a defective Notice of Trustees Sale (they had no note). The real estate market had hit rock bottom and peoples were losing their home and Beneficial never spoke with my attorney or me again. Due to series of unfortunates events. Mr. Andrews law firm lost my records, so I have no proof of the conversations that were between Mr. Andrews and Beneficial.

On February 17, 2015, Beneficial Financial Inc. filed a Summons and Complaint concerning my home. It was never served on me, and I only learned of it when was I subsequently served with a notice of the sheriff's sale that would take place on July 7, 2017. I hired a firm which audits mortgage records to reconstruct what was going on.

The complaint in that action under that section titled "Execution of Note and Deed of Trust" does not include a signed Note, but states: "A true and correct copy of the Lost Note Affidavit is attached as Exhibit B."

On October 19, 2016, Beneficial Financial filed for entry of judgment, asserting I had "failed to appear or answer and an Order of Default having been entered previously...."

Again, I was not served, and this was crucial because it started the clock on my time for redemption.

On June 12, 2017, I was finally served with something ---The Order of Sale --- and launched an investigation to determine what was happening. Curiously, the sheriff's Notice of Sale does not list Beneficial as owner of the loan, but identifies the "grantors" as "U.S. Bank Trust N.A. as Trustee for LSF9 Master Participation Trust." ("LSF9")

On information and belief, based on business magazine articles, LSF9 is a Delaware statutory trust with a business model of buying mortgages that bank have written off and foreclosing on them. Although no assignment of my mortgage is record under 65.080.070, on searching foreclosure-related lawsuits in other jurisdictions, it appears that Beneficial Financial sold mortgage such as mine to LSF9 in 2014 and 2015, the document audit firm I hired said my loan is listed as being owned by LSF 9.

LEGAL ARGUMENTS

RCW 62A.3-309 explains when lost instruments may be enforced. There are number of requirements stated in two subsections of this statute. The first subsection provides: "(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred..." [Emphasis added]

As a United States bankruptcy panel of the Ninth Circuit explained, "The plain meaning of *RCW 62A.3-309(a)* is that a person no longer in possession of an instrument is nonetheless entitled to enforce it if that person was in possession and entitled to enforce it when the loss of possession occurred." [Emphasis added]

But the Beneficial affidavit is clearly missing the pivotal claim that it owned the Note at the time it says it was lost.

In the foreclosure complaint, relying on the "lost note" affidavit, Sean Campbell of the Washington law firm Robinson Tait, says Beneficial owns the Note. But Mr. Campbell's

believes that his client “owns the note” is based solely on the inadequate “lost note” affidavit signed in 2007 by “Laura Hescott”

In rejecting foreclosure papers purportedly signed by the same Ms. Hescott in 2011, a New Jersey appeals court wrote:

“The assignment was executed by an individual identified as Laura Hescott who signed the assignment as an assistant vice-president of Washington Mutual Bank. Ms. Hescott has been identified as an employee of Lender Processing Services, Inc. (“LPS”), a servicer of default mortgages. The bonafides of the practices of this service provider have been the subject of increased judicial scrutiny.” *Deutsch Bank v. Wilson*, Superior Court of New Jersey, Appellate Division, 1384-09t1, 2011.

Since 2011, foreclosure document signed by employees of LPS have become more than just “subject of increased judicial scrutiny.” According to a press release issued by the U.S. Department of Justice issued on June 25, 2013, Lorraine Brown, president of LPS, was sentenced by a Federal judge in Florida for her role in forging millions of false mortgage documents. <https://www.justice.gov/opa/pr/former-executive-florida-based-lender-processing-services-inc-sentenced-five-years-prison> (Last accessed June 29, 2017)

The fraud was created long before Mr. Campbell’s firm took on this case, and his most serious sin was in not checking the provenance of the “lost note” affidavit before relying on it.

Hence, the “Laura Hescott” lost note affidavit is of no value not only because it fails to comply with this state’s version of the Uniform Commercial Code by stating that the note was in the plaintiff’s possession when it was “lost” but also because it is --- put charitably – of questionable provenance.

Unless it held the Note, Beneficial had no standing to foreclose: Without the Note, Beneficial did not own the mortgage; Unless it owns the mortgage, it cannot appoint a trustee to sell the property.

See Restatement (Third) of Property (Mortgages) § 5.4(a) (“A transfer in full of the obligation automatically transfers the mortgage as well”); see also *Carpenter v. Longan*, 83 U.S. 271 (1872) (“The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.”). The Washington Supreme Court reiterated this principle in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash. 2d 83, 104 (2012), stating “Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around.”

In *Bain v. Metropolitan Mortgage*, which is cited previously, this state’s Supreme Court ruled “....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.” [Emphasis added]

Beneficial’s claim to hold the Note is based solely on the Hescott affidavit, which is not only legally sufficient, but most likely created from thin air; without the power of attorney naming Ms. Hescott as attorney in fact for Beneficial, it is of no value. The late entry of LPS9 throws a further uncertainty into the pot. If as the sheriff says, LPS9 is the true plaintiff, and it purchased Note before the foreclosure judgment, then again Beneficial lacks standing to foreclose.

According to the Delaware Secretary of State, LPS9 was incorporated in 2014 and according to lawsuits found on Google, it has been foreclosing on mortgages it purchased from Beneficial since 2014.

SECOND AFFIDAVIT OF LOST NOTE

Ms. Hood makes untruthful factual assertions and tried to “slip in” without identifying it a second Affidavit of Lost Note. This one is incomplete and contradicts the first one, and as such of no probative value.

Further, she has opened the door to further discussion of who owns the Note on my home and has standing to foreclose --- Beneficial Finance, as she asserts, and or LSF 9, a Delaware statutory trust which buys up mortgages that banks have written off in order to foreclose on them.

THE QUESTIONS ARE WHETHER I SHOULD HAVE BEEN MAKING MORTGAGE PAYMENTS, WHO I SHOULD HAVE BEEN MAKING SUCH PAYMENTS TO AND HOW MUCH.

Ms. Hood asserts I have “failed to make the monthly payment due on February 1, 2010.” That statement is completely devoid of any statement, accounting or spread sheet from Beneficial Finance, and as such, Ms. Hood’s statements are inadmissible hearsay. There is a reason Beneficial is silent on this crucial point. This is because the figures recited by Ms. Hood are nothing but an educated guess. She states that my rhetorical question in my response of “Who should I pay?” Ms. Hood states: “Thus there is no possible confusion that Beneficial... is the owner and that they [sic] are entitled to enforce the note.”

In support of this argument, Ms. Hood attaches (without explaining why it was not submitted previously) a second loss note affidavit, dated seven years after the first such affidavit. When affidavits contradict each other, their evidence value cannot be determined on the papers. *Bader v. State*, 43 Wash. App. 223 (1986)

But while this second affidavit doesn’t prove that Beneficial owned the Note when it was lost and more than the first, it does prove that the reason there is no supporting affidavit from the bank is that its figures are purely hypothetical.

TAKING MS. HOOD’S STATEMENT THAT BENEFCIAL OWNS THE NOTE AND MORTGAGE, THEN THE WRONG PLAINTIFF IS TRYING TO FORECLOSE.

The court is respectfully directed to Exhibit 1 of this affidavit. It is the Order of Sale dated April 12, 2017. It bears the same Index Number as this case (15-2-00339-1) but instead of Beneficial appearing as the plaintiff, the plaintiff is identified as “U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust.”

There of course is no endorsement of the non-existent note, and furthermore, no record of assignment of the mortgage from Beneficial to LSF9. *CR 17(a)* provides “Every action shall be prosecuted in the name of the real party in interest” There is no record that Ms. Hood sought

under *CR 15* to substitute LSF9 as the plaintiff here. The Washington Supreme Court recently held that a plaintiff is allowed to amend a complaint under *CR 15(c)1* to substitute the real party in interest under *CR 17(a)*, with relation back of the amendment, where: (1) the defendant is not prejudiced; and (2) the only change wrought by the amendment is in the representative capacity in which the action is brought. *See Beal, 134 Wash.2d at 773, 954 P.2d 237.*

Ms. Hood's insistence the Beneficial own the note opens two scenarios:

1. LSF9 lacked standing to bring on a foreclosure sale because it is not owner of the Note and mortgage. Or
2. LSF 9 was the real party in interest and the foreclosure was improperly prosecuted by Beneficial.

Both are fatal to the plaintiff's case.

THE NEWLY INTRODUCED 'AFFIDAVIT OF LOST NOTE' ACTUALLY BENEFITS ME.

As noted previously, Ms. Hood has attached (without mentioning she is changing her client's position) a second Affidavit of Lost Note. To briefly reprise:

On February 17, 2015, Beneficial Financial I Inc. filed a Summons and Complaint concerning my home.

The complaint in that action under that section titled "Execution of Note and Deed of Trust" does not include a signed Note, but states: "A true and correct copy of the Lost Note Affidavit is attached as Exhibit B." That affidavit bears the signature of a Laurie Hescott and is dated July 13, 2007. The plaintiffs here do not deny that Ms. Hescott is a notorious "robo signer" who worked for Lenders Processing Service. Further, the Hescott affidavit does not satisfy Washington law because it does not assert that Beneficial was in possession of the Note when it was "lost."

While it is of questionable value for any other purpose, that affidavit does establish the Beneficial was not in possession of any note in 2007.

The newly submitted affidavit is a “fill in the blanks” form signed by Lori Washington as a vice president and assistant secretary. It was not attached to the foreclosure complaint and dated May 30, 2015...three months after the foreclosure complaint was filed.

In the new “Lost Note Affidavit” Ms. Washington says (starting with Para. 4) :

“On or about the date on which this Affidavit was executed, a diligent search for the original Note was conducted. This search included looking in the physical files and secure storage facilities where the original Note and others documents related to account 2498 were maintained....Lender was not able to locate either the original or a copy of the Note.”

Ms. Washington’s affidavit no doubt is intended to satisfy the business records hearsay exception of the Washington Rules of Evidence, which in *RCW 5.45.020* that: “A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event...” [*Emphasis added*]

However, Ms. Hescott swore eight years earlier that the Note was lost. Since it was not made “at or near the time” the Note was lost, Ms. Washington’s affidavit does not meet the hearsay exception. But the most telling part of Ms. Washington’s recital begins with Para. 7:

“The terms of the Note were input into the servicing system, and including among other things the principal balance, the property address, the names of the obligors and mortgagors, interest rate, payment dates, term and account number” were used to calculate what I might owe.

Since, however in calculating my alleged obligations, there is no interest rate described in the mortgage and Beneficial didn’t have the original Note or even a copy in order to see what interest rate applied, that figure is nothing better than an educated guess. A 1% or 2% error in interest rates over the course of a mortgage would amount to thousands of dollars.

Ms. Hood’s supplemental affidavit was received from Federal Express. The FedEx airway bill will show no signature. This is because my home, which has valuable show dogs, is protected by

a locked gate. FedEx delivery merely tossed the envelope over the gate. But there is no claim that the process server got over the gate to, as he claims, serve me. This claim also defies logic --- that a defendant who would lose her home by not showing up to defend a foreclosure would simply ignore it.

Beneficial had a history of Notice of Trustee's Sale and Discontinuance of which I was never notified of these sale and discontinuance, which prove the fact that Beneficial could not foreclose without the note and I was never served or notified.

1. Recorded: 03/09/2009 200903190054 - Discontinuance 10/07/2009 20091070001

what I might owe now, in bringing an action to foreclose when it appears that it sold my mortgage the LSF9 years ago (or conversely, simply making up a story of a "lost note" when it knows there is no note, permitting its lawyers to amend the caption to put a Band-Aid on this problem) it has made it impossible for me to find financing with a lender at today's low interest rates.

In light of these facts, I ask that:

- ¶ The default judgment of foreclosure be vacated;
- ¶ That I be allowed to appear nunc pro tunc in this action, and defend it on the grounds that Beneficial does not own the Note and lacks standing to foreclose.
- ¶ That I be allowed to assert counter-claims, including but not limited to, that accelerating a note and scheduling a foreclosure sale when it knew that the "lost note" affidavit was bogus violated this state's *Unfair Business Practices Act, RCW 19.86.20*;
- ¶ That the court entertain an action to Quiet Title on my home, as there are currently at least three claimants or potential claimants to it: Me. Beneficial and LSF9.
- ¶ Together with such other and further relief as the court deems just.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at BRE ORCHARD, WA, this 5TH day of February 2018

Patricia Chatman Shaw

Patricia Chatman Shaw, pro se

PATRICIA SHAW - FILING PRO SE

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Transmittal Information

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Appellate Court Case Number: 50755-2
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