

FILED
Court of Appeals
Division II
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

PNC BANK, NATIONAL ASSOCIATION,
ET, AL,

Plaintiff-Respondent,
vs.

CHARLES C. BABITZKE and MARY LOU
BABITZKE, ET AL,

Defendants,

JERRY C. REEVES,

Defendant-Appellant.

COURT OF APPEALS
CASE NO. **50763-3-II**

COWLITZ COUNTY
NO. **15-2-00284-9**

APPELLANT, JERRY C. REEVES' REPLY BRIEF

Appeal to the Court of Appeals, Division II from the
Order of the Superior Court for Cowlitz County
The Honorable Stephen M. Warning Superior Court Judge

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TABLE OF CONTENTS

PAGE NO.:

Table of Contents	i
Table of Authorities	ii-iii
I. INTRODUCTION	1-2
II. ARGUMENT	2-15
III. CONCLUSION	15-16

TABLE OF AUTHORITY

CASES CITED:	PAGE NO.:
1. <i>Call v. Thunderbird Mortgage Co.</i> , 58 Cal.2d 542, 375 P.2d 169, 25 Cal. Rptr. 265 (1962)	2, 3, 8, 10-11
2. <i>DeRoberts v. Stiles</i> , 24 Wash. 611, 64 P. 795 (1901)	9
3. <i>Fidelity Mutual Savings Bank v. Mark</i> , 112 Wn.2d 47, 767 P.2d 1382 (1989)	2-10
4. <i>Ford v. Nokomis State Bank</i> , 135 Wash. 37, 237 P. 314 (1925) ..	9
5. <i>Gray v. C.A. Harris and Son</i> , 200 Wash. 181, 93 P.2d 385 (1939) ...	9
6. <i>Perry v. Safety Fed. Sav. & Loan Ass'n</i> , 25 Ariz. App. 443, 544 P.2d 267 (1976)	9

STATUTES CITED:

RCW 64.04.010	9
RCW 64.04.020	9
RCW 6.24.130 (former)	8
RCW 6.24.160 (former)	9

RULES CITED:

Sec. 701, subdivision 1, Cal. Code of Civil Procedure 11

TREATISE CITED:

2 Washington Real Property Deskbook, Sec. 48.79, at 48-43
(2d ed. 1986) 8

I. INTRODUCTION

In the instant case, Respondent, PNC BANK N.A., has taken the position that Appellant Reeves did not have a right to redeem because he failed to obtain some kind of written document from Charles and Marylou Babitzke, following the entry of Respondent's Judgment and Decree of Foreclosure, CP 250-271, which named Charles and Mary Lou Babitzke as the judgment debtors in Respondent's judicial foreclosure. Respondent seems to believe, and takes the position that, Appellant's July 21, 2006 deed from the Babitzkes, which was duly and property recorded in the Cowlitz County as Auditor's No. 3305063 (mistitled as "Deed of Trust) and then corrected in Auditor's No. 3317244 ("Corrected Statutory Warranty Deed Replacing 'Deed of Trust' Dated July 21, 2006 Auditors Number 3305063"), CP 154, was insufficient to convey the Babitzkes' statutory rights of redemption. Respondent also contends that Appellant's transmittal of said deed to the Cowlitz County Sheriff was insufficient evidence of any right to redeem the subject property primarily because Appellant's deed was obtained prior to Respondent's Judgment and Decree

of Foreclosure and the subsequent sheriff's sale of the subject property. In other words, Respondent argues that, since a right of redemption does not exist until after a Judgment and Decree of Foreclosure is entered, a prior deed could not have conveyed that interest to Appellant. Respondent fails to acknowledge the fact that the Babitzkes' deed made Respondent their "successor in interest" for purposes of rights of redemption and a careful review of the case law in Washington reveals that Respondent position is absolutely incorrect.

II. ARGUMENT

In *Fidelity Mutual Savings Bank v. Mark*, 112 Wn.2d 47, 767 P.2d 1382 (1989) (hereinafter, "The Mark Case"), the Supreme Court of Washington set forth a full discussion the term, "Redemption by a Successor in Interest", the very status that Appellant has claimed in the case before this Court. In that case, the Washington Supreme Court borrowed heavily from the definition of what is a "successor in interest" from the California Supreme Court sitting in the case of *Call v. Thunderbird Mortgage Co.*, 58 Cal.2d 542, 550, 375 P.2d 169,

25 Cal. Rptr. 265 (1962) (hereinafter the “Call” case). If one carefully reviews the facts and holdings of these two cases, one can come to only one conclusion and that is that Respondent, PNC Bank, N.A., has misapplied Washington law in its conclusion that Appellant never had a right to redeem. Further it is apparent that Appellant was clearly the “successor in interest” to the Babitzkes after he purchased the subject property, in July of 2006, and then showed evidence of this transaction by duly and properly recording a deed showing the conveyance of the subject property from Charles and Mary Lou Babitzke to him in the deed records of Cowlitz County.

The Mark case involves the redemption of real property sold by the sheriff at an execution sale. In the Mark Case, in 1971, Fidelity Mutual Savings Bank loaned \$50,000.00 to Albert and Mae Mark and secured the loan with a first mortgage on their house. In 1972, E. Louise Whittall loaned the Marks \$10,000.00 and secured the loan with a second mortgage on their house. Subsequently, the Internal Revenue Service made various assessments upon the Marks’ failure to pay their federal income tax liabilities and filed a notice of tax

lien on the Marks' property. This tax lien had third priority over the Fidelity loan of \$50,000.00 and the Whittall loan of \$10,000.00.

Ultimately, the Marks became delinquent in their payments owed to Fidelity and filed a bankruptcy petition in 1978. During the Marks' bankruptcy proceeding, Fidelity obtained relief from the automatic stay and proceeded to foreclose on the Marks' property. Fidelity obtained a summary decree of foreclosure in March of 1982 which expressly waived any possible deficiency judgment against the Marks. After two defective sheriff's sales were set aside, Fidelity's successor in interest, First Interstate Bank of Washington, purchased the Marks' property, in September of 1983, for the amount of its judgment plus statutory costs and interest for a total of \$62,650.00. In May of 1984, the IRS purchased the property from First Interstate. The IRS then executed its own certificate of redemption which was recorded and a copy transmitted to the sheriff. At oral argument the IRS conceded that it did not comply with Washington State's redemption statutes and that it had not redeemed from First Interstate.

On June 29, 1984, the Marks' family business, Marks' Westside RX, Inc., filed with the sheriff a notice of its intent to redeem. The notice stated Marks' Westside was the "assignee and successor in interest to Albert Muin Mark and Mae Lim Mark." It also stated the redemption would occur on July 12, 1984, in the amount of the purchase price of \$62,650 with interest, plus any assessment or taxes paid by the purchaser.

The Marks, on July 12, 1984, had executed a document titled, "ASSIGNMENT OF INTEREST," purporting to grant, bargain, sell assign, transfer and set over their rights, title, and interest unto Marks' Westside, their successor in interest in the subject property. This assignment included the right to redeem the property, by July 16, 1984, in the approximate amount of \$66,826.98. Most importantly, **this assignment was not acknowledged or recorded in compliance with Washington's real property transfer statutes.** (Emphasis supplied).

In the interim, on July 3, 1984, the Estate of Louise Whittall filed with the sheriff a notice of intent to redeem the property.

On July 6, 1984, Whittall's estate tendered a certified check to the sheriff in the amount of \$66,039.00. The sheriff issued a certificate of redemption to Whittall's estate on July 10, 1984. By letter dated July 11, 1984, Whittall's estate advised the sheriff that in the event of a redemption, the estate claimed as a second mortgage, in the principal amount of \$10,000.00, plus interest, costs and fees for a total of \$26,711.00.

On July 12, 1984, Marks' Westside tendered a cashier's check for \$66,826.00 to redeem the property which included the amount of Fidelity's judgment, plus costs and interest. This sum did not include the amount of Whittall's mortgage. Attached to the tender was a copy of the July 12, "Assignment of Interest". Later, on July 18, 1984, the Marks executed a quitclaim deed to their property to Marks' Westside as grantee, which deed was duly and properly acknowledged and recorded.

The sheriff refused to issue a certificate of redemption to Marks' Westside, finding that a justiciable controversy existed. The sheriff referred the matter to King County Superior Court for resolution and deposited the Marks' Westside check into the

registry of the court.

On September 7, 1984, the IRS purchased the property from Whittall's estate. Whittall's estate then assigned its certificate of redemption to the IRS. There is evidence in the record indicating that the IRS attempted to redeem from Whittall's estate. At oral argument the IRS conceded that it purchased the estate's interest in the property and that it had not redeemed.

Whittall's estate and the IRS moved for an order directing the sheriff to issue a deed to the United States. The Marks and Marks' Westside responded with a motion for an order directing the sheriff to issue a deed to Marks' Westside. The trial court ordered the sheriff to issue a deed to the United States. The Court of Appeals affirmed in an unpublished opinion. The Washington Supreme Court granted the Marks' and Marks' Westside's petitions for discretionary review and affirmed the decision of the trial court and the Court of Appeals.

Of most import to this case is the fact that the Supreme Court of Washington looked to the California case of *Call v. Thunderbird Mortgage Co.*, 58 Cal.2d 542, 550, 375 P.2d 169, 25 Cal.Rptr. 265 (1962) for the definition of what is a “successor in interest” to the judgment debtor as Appellant claims in this case. The Washington Supreme Court quoted approvingly, the following definition from the Call case,

“**** a ‘successor in interest’ to the judgment debtor is ‘one who has acquired (or succeeded to) the interest of the judgment debtor in the property, subject of course, to the effect of the judgment and sale’ Marks case, *supra* at 52.

The Supreme Court in the Marks case went on to note,

“See 2 Washington Real Property Deskbook sec. 48.79, at 48-43 (2d ed. 1986). Under this definition, the status of a ‘successor in interest’ for the purpose of former RCW 6.24.130 arises in relation to the property sold at the foreclosure sale. Although the right of redemption is not an interest in real property, the Legislature has linked the exercise of the right to the judgment debtor’s ownership interest in the property. Thus, former RCW 6.24.130 requires that a successor in interest succeed to the judgment debtor’s interest in the property.” *Id.* at 52.

The Supreme Court of Washington went on to hold in the Marks Case as follows,

“Title to real property can only be conveyed by a valid, acknowledged deed and the conveyance must be recorded in the

county where the property is situated. RCW 64.04.010 and 020. Here, Marks' Westside is not a successor in interest to the Marks' right of redemption because the unacknowledged and unrecorded July 12, 1984 "assignment of interest" was insufficient to convey the Marks' interest in the property. *Id.* at 53.

Our cases have consistently recognized that a valid conveyance is necessary to transfer the right of redemption. See, e.g., *Gray*, at 187, 93 P.2d 385; *Ford v. Nokomis State Bank*, 135 Wash. 37, 45-46, 237 P. 314 (1925); *DeRoberts v. Stiles*, 24 Wash. 611, 618-20, 64 P. 795 (1901); accord, *Perry v. Safety Fed. Sav. & Loan Ass'n*, 25 Ariz. App. 443, 445, 544 P.2d 267 (1976). To hold otherwise would permit a judgment debtor to convey the naked right to redeem without also conveying the debtor's reversionary interest in the property. This would create great uncertainty in dealing with real property as a judgment debtor could sell the right of redemption to any number of people, none of whom would be in a position to verify if they were the sole holders of this valuable right. Moreover, permitting an assignee to exercise the right of redemption without having any other interest in the property is inconsistent with the legal effect of a redemption. The effect of redemption is to set aside the sale and restore the judgment debtor to the estate. Laws of 1961, ch. 196, sec. 2, p. 1896 (former RCW 6.24.160). To allow an assignee without an interest in the property's title to redeem would accomplish nothing since any redemption would inure to the benefit of the holder of legal title – the judgment debtor-mortgagor. *Id.* at 53.

Marks' Westside had not succeeded to the Marks' statutory right of redemption when it attempted to redeem on July 12, 1984 and therefore its attempted redemption was invalid. The statutory period has now passed without a valid redemption by the Marks or Marks' Westside" *Id.* at 53.

The holding of the Supreme Court in the Marks case makes it clear that there must be a valid, acknowledged and recorded

interest to convey a property owner's statutory right of redemption, such as a deed. What it does not make clear is whether that conveyance must come before or after a judicial foreclosure proceeding for such a conveyance to be a valid transfer of the mortgagor's statutory right of redemption.

However, one must look no further than the Call case for the answer to this question. Without going through an extensive litany of the facts of the Call case, this Court only need consider that the defendant, Thunderbird Mortgage Co., Inc., was ultimately held to be the successor in interest to the judgment debtor because it held a deed from the judgment debtors, the McGinnises, dated June 2, 1955, recorded February 8, 1957. In the Call case, the subject judicial foreclosure was filed on or about October 1954 and the judgment of foreclosure was entered on or about May 2, 1957, a date after the Thunderbird deed and after its recording date of February 8, 1957. The foreclosure sale was held on June 10, 1957. The California Supreme Court had no problem in finding that the defendant, Thunderbird Mortgage, was the successor in interest of the debtors because it held a deed from the original debtors,

the McGinnises, dated June 2, 1955, recorded February 8, 1957.

The California Supreme Court found that,

“Previous to the execution sale, Thunderbird had obtained a deed to the property from the owners and judgment debtors (the McGinnises); the deed was dated June 2, 1955, and recorded February 8, 1957.” *Id.* at 25 Cal. Rptr. 269.

“This clearly and without any doubt made Thunderbird the ‘successor in interest’ of the judgment debtor (McGinnis) and under section 701, subdivision 1 Code of Civil Procedure, ‘Property sold to redemption * * * may be redeemed in the manner hereinafter provided, by * * * 1. The judgment debtor, or his successor in interest, in the whole or any part of the property.’ Under the statute Thunderbird had the legal right to redeem. This right of redemption follows as a result of the establishment of the status of being a successor in interest to the judgment debtor and the **date of the deed or other conveyance is immaterial. Certainly the statute giving the right of redemption to a successor in interest of the judgment debtor specifies no requirement of the date of such succession in interest. Logically, there is no reason why the succession in interest must follow the execution sale; a judgment debtor may have conveyed the property (and all his interest therein) long before the date of the execution sale (as in the instant case) and the grantee’s status as successor in interest gives him the right of redemption in order to protect his interest as owner of the property in question. * * ***” (Emphasis supplied). *Id.* at 25 Cal. Rptr. 269.

In the case before this Court, Appellant was in exactly the same position as Thunderbird Mortgage in that he had already obtained a duly and properly recorded deed from the original debtors, the Babitzkes, many years prior to the Respondent’s

judicial foreclosure proceeding. It was therefore Appellant that was the “successor in interest” to the Babitzkes and it was Appellant that should have had the right to redeem as though he stood in the shoes of the Babitzkes who were named as the judgment debtors in Respondent’s foreclosure complaint. It was also, therefore, error for the Superior Court to deny him the right to redeem after he made application to do so following the Cowlitz County Sheriff’s refusal to acknowledge his status as the “successor in interest” to the Babitzkes. Further, Appellant should have been required to supply the sheriff with no other additional documentation showing his right to redeem other than the deed which he presented showing that he had previously purchased the interest of the Babitzkes in the subject property. That very deed showed that Appellant had become the “successor in interest” of the Babitzkes and thereafter had any statutory right of redemption that the Babitzkes might have had or **thereafter acquired**. (Emphasis supplied).

Had Appellant been allowed his request to redeem, his redemption would have wiped out the effect of the execution sale and the property would have been returned to its pre-

foreclosure status with it being subject to any junior lien holder that held liens inferior to Respondent, PNC Bank, N.A. This result would have protected the interests of all involved.

Respondent PNC Bank would have been paid its first lien, plus costs and fees, in full, and junior lien holders, such as Gravity Segregation, LLC; Kennedy Construction Company; and Suntrust Bank.

Appellant should not have been required to tender the funds necessary to attempt to redeem to the sheriff in the three days that existed from the date of the adverse ruling by the Superior Court. The sheriff had already made it clear to Appellant that it was not going to allow him to redeem the subject property unless he first obtained an Order of the Superior Court allowing him to do so; and the sheriff also made it clear that it was instead going to work with Gravity Segregation, LLC, on its Notice of Intent to Redeem. CP 143. Since Appellant was denied such an Order by the Superior Court, tendering the necessary funds to the sheriff would have been a useless act that would have accomplished nothing. Therefore, Respondent's argument that Appellant should be denied a right of redemption

because he failed to tender funds to the sheriff should be ignored.

As a final matter, any argument that Respondent did not interfere with Appellant's bid to redeem the subject property is disingenuous and ignores the email traffic that was sent to the Cowlitz County Sheriff by Respondent's counsel advising that he believed that Appellant did not have a legal right to redeem. CP 228-229. This email traffic was sent on or about May 19, 2017, (and thereafter) and clearly advised the sheriff that Appellant's documentation was insufficient (although he had sent a copy of his deed from the Babitzkes showing his purchase of their property) and it argued that Appellant was not the "successor in interest" to the Babitzkes (when he clearly was) and that he did not meet the requirements of a lien creditor or that of an assignee of a judgment creditor, deed of trust holder or mortgage holder. Appellant and his Oregon counsel thereafter spent approximately one month attempting to convince the sheriff's counsel, Dana Gigler, that Appellant's status was not that of a lien creditor nor that of an assignee but was that of a "successor in interest" to the judgment debtors,

the Babitzkes. It was not until case law on this issue was submitted to counsel for the sheriff, that was, in turn, sent to counsel for Respondent, that Respondent's counsel backed off of his position and left it up to the sheriff and the sheriff's counsel to determine if Appellant had met his statutory burden. CP 169-176. In other words, the damage had been done and valuable time of over one month had been taken by Respondent's counsel's actions. As a consequence, if this Court finds that Appellant was wrongfully denied his right to redeem he should now be given a reasonable amount of time in which to obtain the necessary financing to do so. The sixty days asked for by Appellant is just and fair, under the circumstances, given Respondent's obvious interference.

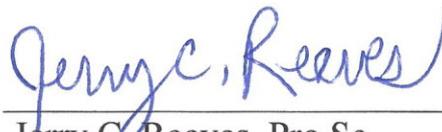
III. CONCLUSION

Respondent, PNC Bank, N.A., and its counsel, were just plain wrong in their conclusion that Appellant's pre-foreclosure deed was insufficient to transfer the judgment debtors' rights of redemption just because it was given before those redemption rights came into existence. Appellant was, therefore wrongfully denied his right to redeem, both by the Superior Court and by

the Cowlitz County Sheriff. The ruling of the Superior Court should be reversed and Appellant should be granted a reasonable time to redeem from Respondent. Appellant has suggested that such reasonable amount of time would be sixty (60) days especially given the obvious and irrefutable interference with Appellant's attempt at redemption with the Cowlitz County Sheriff.

DATED: This 4th day of May, 2018.

Respectfully Submitted,



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DECLARATION OF SERVICE

I hereby certify and declare that on May 4, 2018, a copy of the foregoing Reply Brief of Defendant-Appellant Jerry C. Reeves was electronically filed with the Washington Court of Appeals, Division II at the following address:

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I hereby further certify and declare that on May 4, 2018, that I mailed a true and correct cop of the foregoing Reply Brief of Defendant-Appellant Jerry C. Reeves to the following attorneys of record for Plaintiff-Respondent and the parties of record:

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