

FILED
Court of Appeals
Division II
State of Washington
3/15/2018 11:21 AM
Case No. 51297-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BRIAN WINTERS, et. al.,

Plaintiffs

vs.

WELLS FARGO BANK N.A., et. al.

Defendants

APPELLANT'S OPENING BRIEF

Joseph Ward McIntosh, WSBA #39470
McCarthy & Holthus, LLP
108 1st Ave S, Ste 300
Seattle, WA 98104
206-319-9049
jmcintosh@mccarthyholthus.com

Attorney for Quality Loan Service Corp. of Washington

TABLE OF CONTENTS

I. INTRODUCTION 1
II. ASSIGNMENT OF ERROR 1
III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1
IV. STATEMENT OF THE CASE 1
V. STANDARD OF REVIEW 5
VI. ARGUMENT 5
A. Quality Properly Appointed Successor Trustee. 5
B. Quality Had A Duty to Advance the Sale Due to the Default..... 6
C. Quality was a Qualified Trustee with a Resident Officer. 7
D. Quality is Allowed to Charge the Beneficiary for its Services. 8
E. *Hooker* Was Decided on an Incomplete Record / Not Precedential. 8
VII. CONCLUSION 10

CASES

Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 103-104 (2012) 5, 8
Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 106 (2012) 6
Bavand v. OneWest Bank, FSB, 196 Wn. App. 813, 843 (2016) 6
Blair v. Nw. Tr. Servs., Inc., 193 Wn. App. 18, 33 (2016) 5
Brodie v. Northwest Trustee Serv., 579 Fed. Appx. 592, 593 (9th Cir. 2014)..... 7
Brown v. Dep't of Commerce, 184 Wn.2d 509, 544 (2015)..... 6, 8
Djigal v. Quality Loan Serv. Corp. of Wash., 2016 Wash. App. LEXIS 2585, 15-16 (Div. 2 2016)..... 6
GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 144 (2014)..... 10
Hurney v. HSBC Bank, USA, N.A., No. 75043-7-I, 2017 Wash. App. LEXIS 1295, at *8-9 (Div. 1 2017)..... 7
Meyer v. U.S. Bank Nat'l Ass'n, 530 B.R. 767, 778 (W.D. Wash. 2015) 7
Pelzel v. Nationstar Mortg., LLC, 2015 Wash. App. LEXIS 638, 14-15 (Div. 2 2015) (same) 6
Rucker v. NovaStar Mortg., Inc., 177 Wn. App. 1, 10-11 (2013)..... 8

STATUTES

RCW 61.24.005(2)..... 5
RCW 61.24.010 9
RCW 61.24.020 8
RCW 61.24.030(b)..... 6
RCW 61.24.090 9

I. INTRODUCTION

Quality's foreclosure complied with the Deed of Trust ("DTA") in all respects and it was error for the Superior Court to deny summary judgment.

II. ASSIGNMENT OF ERROR

Whether the Superior Court erred in denying Quality's motion for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether a deed of trust beneficiary can act through an agent in appointing a successor trustee and executing a beneficiary declaration.
2. Whether there was an issue of material fact that prevented summary judgment in favor of Quality.

IV. STATEMENT OF THE CASE

In 2006, Brian and Rebecca Winters executed a Note promising repayment of a \$114,400.00 loan. CP at 130-133. The Winters also executed a Deed of Trust securing repayment of the loan and encumbering their residential Property commonly known as 306 S. 6th Street, Satsop, Washington. CP at 134-153.

Sometime after origination, the loan was sold into a securitized mortgage trust with Wells Fargo Bank, N.A. acting as trustee. CP at 2 ¶ 1.2. Wells Fargo's servicing agent was Select Portfolio Servicing, Inc. ("SPS"). CP at 2 ¶ 1.3. Wells Fargo gave SPS a Limited Power of Attorney to act on its behalf in connection with the loan including the execution of foreclosure documents. CP at 157-58.

In 2012, the Winters stopped making their loan payments. CP at 174 (identifying the loan as due for the month of January of 2012).

In December of 2013, Wells Fargo, through SPS, appointed Quality as successor trustee under the Deed of Trust to advance a non-judicial foreclosure of the Property. CP at 165-66. When Quality was appointed successor trustee in December of 2013, employee Sierra Herbert-West was a state resident (CP at 115) and a corporate officer. CP 161 (Ms. Herbert-West elected as corporate assistant secretary in July of 2013); CP 122 Article IX (“assistant secretary” is a corporate officer position under Quality’s bylaws).

On August 4, 2014, Quality issued the first notice in the non-judicial foreclosure process – the Notice of Default. CP 170-81. The Notice of Default was executed by Gladys Limon who was a Quality assistant secretary. CP 161 (Gladys Limon elected as assistant secretary in July of 2013).

The Notice of Default correctly identified the loan owner as Wells Fargo as trustee for the securitized mortgage trust, and correctly identified SPS as the loan servicer. *Id.* The Notice of Default included a Foreclosure Loss Mitigation declaration confirming Wells Fargo complied with the DTA’s pre-foreclosure contact requirements. CP 180.

In the same month the Notice of Default was issued, Quality had at least three resident officers: (1) president Philip Martin, (2) vice president Robert McDonald, and (3) and Ms. Herbert-West who continued to serve as corporate

secretary. CP 168. Mr. McDonald and Ms. Herbert-West have remained resident officers to present day. CP at 116 ¶ 13.

The Winters acknowledge receiving the Notice of Default. CP at 5 ¶ 2.5. The Winters never raised any issues with Quality about the beneficiary's compliance with the pre-foreclosure contact requirements. CP at 116-117 ¶ 13.

The Winters did not cure the default as required by the Notice of Default.

On September 5, 2014, Quality issued its first (of two) Notices of Sale scheduling an auction date for January 9, 2015. CP 185-88. The first Notice of Sale was executed by Maria Montana who was an assistant secretary for Quality. CP at 168 (electing Maria Montana as a corporate assistance secretary in August of 2014).

When the first Notice of Sale was issued, Quality had in its possession a statutory beneficiary declaration, executed by SPS, confirming Wells Fargo was the holder of the Note. CP 163.

When the first Notice of Sale was issued, and continuing to present day, Quality has had a physical office in Seattle. CP at 117 ¶ 14. The Seattle office has at all times had telephone service and resident employee(s). *Id.* There are approximately seventeen employees currently working in the Seattle office and not less than a dozen have been employed in the Seattle office at all times relevant to first setting of the sale. *Id.*

The first Notice of Sale was discontinued by Quality in April of 2015. CP

190-91.

Sometime in 2015, the Winters were offered a loan modification by SPS to bring their loan current and cure the default. CP at 8-9 ¶ 2.13. The Winters declined the offer. *Id.* The Winters never cured their original default from 2012.

On August 25, 2015, Quality issued its second Notice of Sale scheduling an auction date of the Property for January 8, 2016. CP 195-98. The second Notice of Sale was executed by Lauren Esquivel who was a Quality assistant secretary. CP 193.

The Winters admit receiving the second Notice of Sale. CP at 9 ¶ 2.14. The Winters did not raise with Quality any issues about the sale, including the alleged promise from SPS that it would not proceed. CP at 117 ¶ 17.

On January 8, 2016, as scheduled, Quality auctioned the Property for sale. CP 201 ¶ 10. The winning bidder was Wells Fargo by way of credit bid. *Id.* On January 15, 2016, Quality issued to Wells Fargo a Trustee's Deed. CP 200-202.

After the sale, in September of 2016, the Winters sued Quality, Wells Fargo, and SPS alleging the foreclosure did not comply with the DTA. CP at 1-21. As Quality's foreclosure was advanced pursuant to the Deed of Trust Act ("DTA") in all respects, Quality promptly moved for summary judgment and dismissal. CP at 207-217.

In response to summary judgment, the Winters submitted Findings of Fact and Conclusions of Law from *Hooker v. Bank of America*, King County Superior

Court Cause No. 14-2-11009-0, where it was found in connection with a different foreclosure that Quality was not properly appointed trustee by the beneficiary and that Quality did not have a resident officer. CP at 244-253.

Obviously relying on *Hooker* (because no other rebuttal evidence was submitted in opposition creating a genuine issue of material fact), the Superior Court denied Quality's motion for summary judgment. CP 260-262. A motion for reconsideration was also denied. CP 263. Discretionary review of the summary judgment denial was accepted by this Court.

V. STANDARD OF REVIEW

Summary judgment is reviewed de novo. *Bavand v. OneWest Bank, FSB*, 196 Wn. App. 813, 825 (2016).

VI. ARGUMENT

A. Quality Properly Appointed Successor Trustee.

Under Washington's Deed of Trust Act (the "DTA"), the "beneficiary" of the deed of trust with the power to appoint a successor trustee and advance a foreclosure is the holder of the note. RCW 61.24.005(2); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 103-104 (2012); *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 33 (2016); *Bavand v. OneWest Bank, FSB*, 196 Wn. App. 813, 843 (2016). The trustee advancing the foreclosure is allowed to rely on a sworn beneficiary declaration in confirming the note holder. RCW 61.24.030(b); *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 544 (2015).

Furthermore, the beneficiary can act through an authorized agent in appointing the successor trustee and executing the beneficiary declaration. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 106 (2012) (the DTA approves of the use of agents); *Djigal v. Quality Loan Serv. Corp. of Wash.*, 2016 Wash. App. LEXIS 2585, 15-16 (Div. 2 2016) (holding that beneficiary's agent could execute the trustee appointment and beneficiary declaration); *Pelzel v. Nationstar Mortg., LLC*, 2015 Wash. App. LEXIS 638, 14-15 (Div. 2 2015) (same); *Daviscourt v. Quality Loan Servs. Corp. of Wash.*, No. 74979-0-I, 2017 Wash. App. LEXIS 1987, at *21 (Division 1 2017); *Hurney v. HSBC Bank, USA, N.A.*, No. 75043-7-I, 2017 Wash. App. LEXIS 1295, at *8-9 (Div. 1 2017) (same); *Cummings v. Nw. Tr. Servs. of Wash.*, No. 74264-7-I, 2016 Wash. App. LEXIS 2886, at *14 (Div. 1 2016) (same); *Meyer v. U.S. Bank Nat'l Ass'n*, 530 B.R. 767, 778 (W.D. Wash. 2015) (same); *Brodie v. Northwest Trustee Serv.*, 579 Fed. Appx. 592, 593 (9th Cir. 2014) (same);

In this case, Wells Fargo was the “beneficiary” of the Deed of Trust because Wells Fargo held the Note. Wells Fargo’s authorized agent was SPS and their agency relationship is express and in writing. Wells Fargo through its authorized agent lawfully appointed Quality as successor trustee under the Deed of Trust and gave Quality a conforming beneficiary declaration prior to sale confirming Wells Fargo held the Note. The appointment of the Quality as trustee and the beneficiary declaration comply with the DTA in all respects.

B. Quality Had A Duty to Advance the Sale Due to the Default.

Under the DTA, if a borrower breaches the obligations owed to the beneficiary the trustee commences a non-judicial foreclosure. RCW 61.24.020; *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 515-516 (2015); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 93 (2012); *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 10-11 (2013).

The Winters' failure to make loan payments triggered the power of sale under the Deed of Trust. A foreclosure of the encumbered Property was the remedy for default pursuant to the Deed of Trust and the DTA. Quality, as Deed of Trust trustee, had a contractual and statutory DTA duty to advance the foreclosure pursuant to the Winters' undisputed default.

Mr. Winters alleges that SPS told him there would be no foreclosure if he was working on a loan modification. CP at 26 ¶ 10. There is no evidence in the record that Quality was ever made aware of SPS's alleged promise to Mr. Winters that no foreclosure sale would proceed. Quality was not involved in any discussions between Mr. Winters and SPS, including discussions concerning the foreclosure and the loan modification attempts. Quality advanced the foreclosure pursuant to its statutory and contractual duty.

C. Quality was a Qualified Trustee with a Resident Officer.

A domestic corporation acting as trustee must have at least one corporate officer who is a Washington resident. RCW 61.24.010. Quality is a domestic corporation. Quality's corporate records, which were before the Superior Court on

summary judgment, conclusively show that at all relevant times when acting as trustee under the Deed of Trust Quality had a Washington resident officer.

When Quality was appointed successor trustee in December of 2013, Sierra Herbert-West was a Washington resident and a corporate “assistant secretary” which is an officer position under Quality’s bylaws. When Quality issued its Notice of Default in August of 2014, its President Phil Martin, Vice President Robert McDonald and Secretary Sierra Herbert-West were all Washington residents. Mr. McDonald and Ms. Herbert-West have continuously served as resident officers through present day.

D. Quality is Allowed to Charge the Beneficiary for its Services.

Under the DTA, the trustee is allowed to charge a fee for its services and reimburse for expenses incurred. RCW 61.24.090(1)(b).

In this case, Quality advanced the sale, incurred costs, and was allowed to charge the beneficiary for those. Quality has made no effort to obtain payment from any party other than the beneficiary. Furthermore, the Winters did not pay the trustee’s fees or any of its costs and did not make any effort to reinstate the obligation without paying the accrued fees and costs.

E. Hooker Was Decided on an Incomplete Record / Not Precedential.

Hooker is not precedential and should not have been relied upon to defeat Quality’s motion for summary judgment.

As a threshold matter, a Washington superior court decision has no

precedential value. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 144 (2014).

More importantly though, *Hooker* was decided on an incomplete record and there two key pieces of evidence that were missing in *Hooker* that were before the Superior Court in this case:

First, in *Hooker*, the power of attorney between the beneficiary and its servicer was not introduced into evidence. CP at 245 ¶ 12. The *Hooker* Court concluded that no principal-agency relationship existed between the beneficiary and the loan servicer (CP at CP at 245 ¶ 12; CP at 249 ¶ 8) and found the foreclosure documents executed by the servicer allegedly on behalf of the beneficiary were defective. CP at 245 ¶¶ 15-16.

In this case, the power of attorney between the beneficiary (Wells Fargo) and the servicing agent (SPS) was before the Court on summary judgment. There can be no dispute that SPS was Wells Fargo's agent with the power to execute the trustee appointment and beneficiary declaration. And as already explained, with citations to numerous authorities, under Washington law the beneficiary is allowed to act and execute these foreclosure documents through an authorized agent.

Second, in *Hooker*, Quality's bylaws were not introduced into evidence. The bylaws are important because they establish that "assistant secretary" is a corporate officer position, and the *Hooker* Court took specific notice the bylaws were missing from evidence:

20. Quality presented no evidence that, during any time relevant to this case, its corporate bylaws authorized its board of directors to appoint any person to serve as an “assistant secretary” of the corporation.

CP at 246 ¶ 20

In this case, Quality’s bylaws were before the Court on summary judgment. The bylaws in no uncertain terms identify “assistant secretary” as a corporate officer position to be chosen by the board of directors. There can be no dispute in this case that Quality had a resident corporate officer at all relevant times, which includes a board-elected corporate “assistant secretary” in December of 2013 when Quality was first appointed successor trustee under the Deed of Trust.

VII. CONCLUSION

Quality’s foreclosure complied with the DTA in all respects and the Superior Court erred in not dismissing Quality on summary judgment.

DATED March 15, 2018

/s/ Joseph Ward McIntosh

Joseph Ward McIntosh, WSBA # 39470

Attorney for Quality Loan Service Corp. of Washington

MCCARTHY & HOLTHUS, LLP

March 15, 2018 - 11:21 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51297-1
Appellate Court Case Title: Brian J. Winters and Rebecca L. Winters v. Wells Fargo Bank, et al
Superior Court Case Number: 16-2-00628-7

The following documents have been uploaded:

- 512971_Briefs_20180315112047D2798445_3787.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Opening Brief.pdf

A copy of the uploaded files will be sent to:

- Mhuelsman@predatorylendinglaw.com
- kkrivenko@wrightlegal.net
- paralegal@predatorylendinglaw.com
- rcarson@wrightlegal.net

Comments:

Sender Name: Joseph McIntosh - Email: jmcintosh@mccarthyholthus.com

Address:
108 1ST AVE S STE 300
SEATTLE, WA, 98104-2104
Phone: 206-596-4842

Note: The Filing Id is 20180315112047D2798445