

FILED

JUL 28 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE # 291405

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RONALD C. LANDBERG, SR.

AND

KATHLEEN L. LANDBERG, Appellants,

V.

BRIAN H. WOLFE, TRUSTEE

AND

EQUITY TRUST, ET AL, Respondents

RESPONDENTS' AMENDED BRIEF

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I.

STATEMENT OF THE CASE

On May 21, 2007, Plaintiffs Kathleen L. Landberg and Ronald C. Landberg signed a Promissory Note in which they promised to pay \$367,000.00 plus any accrued interest on or before May 15, 2008. (CP 79) On the same date, Plaintiff Kathleen L. Landberg executed a Deed of Trust securing the Promissory Note with properties in Pend Oreille County, Washington. (CP 80-85) The original beneficiary of the Deed of Trust and the holder of the Note was Wind River Brokers, LLC, whose interest was transferred to Equity Trust Company on June 4, 2007. (CP 93)

The Landbergs failed to pay the Note as required. The beneficiary instructed the Trustee to commence a non-judicial Deed of Trust foreclosure. Said foreclosure was completed by Trustee's Sale on December 19, 2008. There were no bidders other than the beneficiary, Equity Trust Company. (CP 13)

On June 18, 2009, the property was sold by Equity Trust to the "Good Neighbors Partnership." (CP 13)

II.

PROCEDURAL CONTEXT

In Pend Oreille County Case No. 08-2-00218-3, Ronald C. Landberg and Kathleen L. Landberg, Appellants, filed a Complaint to restrain the Trustee's Sale. The alleged defect in the foreclosure process was an allegation that

Plaintiffs (Landbergs) were not provided with adequate and complete accounting of the expenses and costs. (CP 102-104)

An Emergency Motion for Injunction to Restrain the Trustee's Sale was filed by Appellants on December 18, 2008. (CP 105, 106) The allegation was that weather conditions were such that Appellant Ronald Landberg could not travel to find investors and that investors were unable to go to the property. (CP 105, 106)

On December 18, 2008, the Honorable Rebecca Baker, Judge of Pend Oreille County, entered an Order Denying Motion to Restrain the Trustee's Sale. (CP 107) That Order was appealed to the Court of Appeals, Division III. On May 26, 2009, the Court of Appeals Division III entered a "Certificate of Finality," mandating the case back to Pend Oreille Superior Court. (CP 9, 10)

Appellants then commenced this action by filing a Complaint to set aside the Trustee's Sale in the Case at Bar under Pend Oreille County Case No. 09-2-00242-4. The Complaint in this case alleged the following:

1. Inadequate and incomplete accounting of the expenses and costs pursuant to RCW 61.24.030(7)(e);
2. Horrific weather conditions limiting the ability to conduct the sale;
and
3. Inadequate sale price of the property.

Defendants brought a Motion for Summary Judgment combined with a Motion under Civil Rule 12(b) challenging the service of process and the

allegations contained in Plaintiffs' Complaint with an assertion that the earlier case was dispositive of some of these issues. (CP 74-76 & CP 18-28) Defendant Wolfe, as well as both Plaintiffs' Landberg, filed Declarations under oath. (CP 9-17, CP 32-34 & CP 35-37) The Court entered its Order Granting Summary Judgment on April 8, 2010. (CP 43-45) Appellants filed a Motion for Reconsideration which was denied and this Appeal followed. (CP 60-61)

III.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

In their opening brief, Appellants now state the issues before the Court are as follows:

1. The foreclosure sale was held and inclement weather prevented the Appellants and/or their representatives from reaching the sale site;
2. The Sale should have been delayed because Federal Courthouses were closed because of the weather and Appellants had notified Trustee Wolfe of their intent to file for bankruptcy to delay the sale;
3. The Court refused to consider that Ronald C. Landberg had standing with regard to property in Pend Oreille County;
4. Appellants were in the process of following up on discovery that pertained to the sale of property and a possible collusion between Trustee Wolfe and the Landberg neighbors who ultimately purchased the property;

5. Landbergs were denied access to their remaining property in Pend Oreille County, which allegedly was purchased from Burlington Northern Railroad because of the improper sale of the property in question; and
6. By refusing to hear the case in its entirety, the Court improperly supported the sale of the property and did not look at the fair market value and caused ultimate harm and damage to the Landbergs.

IV.

ARGUMENT

ISSUES IMPROPERLY BEFORE THE COURT

In Appellants' Brief they assign five (5) "assignments of error." Among other things they assign error: 2) that the Trial Court erred in denying Appellant Ronald C. Landberg, Sr.'s ownership/protectable interest in property; 3) the Trial Court erred in denying Appellants' Motion to Complete Discovery; and 4) the Trial Court erred in denying Appellants' Motion for Reconsideration.

Related to these are issues pertaining to assignment of errors 3, 4, and 5: Ronald C. Landberg's standing; discovery in the neighborhood case; and access to Landberg property.

Looking first at Pend Oreille County Case No. 08-2-00218-3, the Amended Complaint shows both Plaintiffs Ronald C. Landberg, Sr. and Kathleen L. Landberg. (CP 102-104) The Complaint was filed on December 18, 2008 and

alleges an incomplete or inadequate accounting of expenses and costs by the Trustee. (CP 103) In that same case there was an Emergency Motion for Injunction to Restrain the Trustee's Sale brought by the Appellants because of adverse weather conditions. (CP 105, 106)

In the case at bar, Pend Oreille County Case No. 09-2-00242-4, the Appellants' Ronald C. Landberg, Sr. and Kathleen Landberg were both Plaintiffs. This is a Complaint to set aside the Trustee's Sale. The issues itemized in the Complaint are: 1) bad weather conditions; 2) inadequate documentation of accounting by Trustee; and 3) the sale price was lower than the market price of a piece of property. After Defendants/Respondents brought a Motion to Dismiss the Complaint, Plaintiffs filed a Response to the Motion (CP 29-31), Declaration of Ronald C. Landberg, Sr. (CP 35-37) and a Declaration of Kathleen C. Landberg (CP 32-34). In none of those pleadings was the issue of the standing of Ronald C. Landberg raised. In reviewing the Court's Verbal Opinion, there is no comment made by the Court concerning the standing of Ronald C. Landberg. (RP April 8, 2010)

The issues stated by Appellants are in their respective Declarations and must be carefully scrutinized. While there is reference in the Declaration of Ronald C. Landberg (CP 36) concerning "further discovery," there is no effort made by him to discuss what the discovery was about. Nor is there any allegation of "collusion" between Trustee Wolfe and the Landberg neighbors

before the Trustee's Sale. His assertions about access and the neighbor's lawsuits are after the Trustee's Sale was held. (CP 36)

Likewise, there was no discussion as to the Landbergs being denied access to the remaining property in Pend Oreille County because of the Trustee's Sale. (CP 32-34 & CP 35-37)

The case law is replete with admonitions that the Court of Appeals will not consider items that are unsupported in the record. See Housing Authority of Grant County v. Newbigging, 19 P.3d 1081, 105 WA App 178 (2001); Hill v. BCTI Income Fund-I, 23 P3d 440, 144 Wn. 2.d 172 (2001); State v. Falling, 50 WA App 47, 52 n. 3, 747 P2d 1119, (1987); and Bartell v. Zuckriegel, 112 WA App 55, 47 P.3d 581 (2002).

Simply put, the Appellants' "other property" was not raised in Appellants' Complaint nor in their argument to the Court regarding the Motion to Dismiss in a way that the Trial Court would have any way to connect the dots as to how the Trustee's Sale would impact the "other property." Appellants presented no ultimate fact or genuine fact, merely vague assertions.

"Failure to raise an issue before the Trial Court generally precludes a party from raising it on appeal." Lundstrom, Inc. v. Nikkei Concerns, 52 Wn App. 250, 758 P.2d 561 (1988).

V.

MOTION FOR SUMMARY JUDGMENT

A. Standard of Review. Appellants failed to address the standard of review for Summary Judgment Motions. This is discussed in Roger Crane and Associates v. Felice, 74 Wn. App. 769, 875 P.2d 705 (1994). The Court of Appeals states:

“[1] Standard of Review. The standard of review of a summary judgment is well settled. We engage in the same inquiry as the trial court and view the evidence in a light most favorable to the non-moving party.”
[citations omitted].
Roger Crane and Associates v. Felice, supra page 773.

B. Inadequate Affidavits. This matter comes on for Appeal because of the Order entered by Honorable Judge Allan Nielsen following Defendant Wolfe’s Motion for Summary Judgment combined with Motion under Civil Rule 12(b). This becomes a Motion for Summary Judgment. Affidavits or Declarations setting forth evidentiary facts should be submitted by both parties. (CP 9-17, CP 32-34 & CP 35-37) While the Declarations of Ronald Landberg and Kathleen Landberg were in the Trial Court’s file, and considered by the Trial Court, they are not adequate to raise genuine issue of material fact. As stated in Curran v. City of Marysville, 53 Wn. App. 358, 766 P.2d 1141 (1989):

“ . . . An Affidavit does not raise genuine issue for trial unless it sets forth facts evidentiary in nature, i.e., information as to” what took place, an act, an incident, a reality as distinguished from supposition or opinion [citation omitted] Ultimate facts,

conclusions of fact are conclusory statements of fact or insufficient to raise questions of fact.” Curran v. Marysville, supra page 367.

Part of Appellants problem is that they are now averring statements of fact that they did not make available to the Trial Court. Attached to their Brief as “appendix” are weather reports, which were not made available to the Trial Court. The Trial Court sits in the same county that the Trustee’s Sale took place and knew of personal knowledge whether there was inclement weather or not.

Likewise, they failed to bring forth any evidentiary Affidavit from Barbara Kendall or any other potential investor as to their ability to become financially supportive of the Landbergs or that the weather was so bad that they couldn’t come to the sale.

“Much of the content of the purchasers’ affidavits opposing the motions for summary judgment are devoted to hearsay and conclusory statements of fact, which neither the trial court nor this court is at liberty to consider in passing upon motions for summary judgment. CR 56(e). Gunnar v. Brice, 17 Wn. App 819, page 823, 565 P.2d 1212 (1977).

VI.

ISSUES BEFORE THE COURT

A. **Postponement of Sale.** Appellants’ argue that Trustee Wolfe should have postponed the pending Trustee’s Sale because of inclement weather conditions, the potential that Ronald C. Landberg, Sr. would file

bankruptcy, or the ability of Landbergs to obtain new financing. These assertions call into question RCW 61.24.040(6) which states:

“The Trustee may for any cause the Trustee deems advantageous, continue the sale for a period or periods not exceeding a total of 120 days by a public proclamation at the time and place fixed for sale and the Notice of Sale or, alternatively, by giving notice of the time and place to postpone sale in the manner and the person specified in RCW 61.24.040(1)(b)(c) and (d) . . .”

Appellants’ failed to cite any case law which supports the allegation that the Trustee acted inappropriately. From a factual basis, the Order of the Trial Court affirms the discretion given to the Trustee to postpone or not postpone depending on the Trustee’s view of what is advantageous.

1) Inclement weather. Trustee Wolfe asserted in the Motion for Summary Judgment that his representative in Newport, Washington, a licensed attorney, assured him that people were getting around in that area. (CP 10) That is unrefuted. Two (2) Trial Judges in Pend Oreille County were aware of the weather conditions there on December 18th and 19th. (CP 107 and RP April 8, 2010) In fact, in Case No. 08-2-00218-3, in response to Appellants’ Motion for an Emergency Restraint of Trustee’s Sale based on the weather, the Trial Court refused to grant such a delay on the day before the Trustee’s Sale. (CP 107) Had the weather been so bad that no one could get about, that Trial Judge, independently of Trustee Wolfe, could have restrained the Sale. She did not. Wolfe states in his Declaration that no potential investor called him before

the Trustee's Sale to ask for time or complain about the weather. (CP 10) That statement is unrefuted.

2) Potential Bankruptcy. The automatic stay under the U.S. Bankruptcy Code does not take effect until there is an actual filing of bankruptcy. 11 USC § 362 Part of negotiations is for the debtor to continually threaten to file bankruptcy if the Lender or the Trustee doesn't capitulate to their demands. It is a simple question to ask: Is it "advantageous" for a Trustee to postpone a sale to enable the debtor to file bankruptcy and obtain a Stay and further delay the Trustee's Sale and add additional costs?

3) Potential for New Financing. The averments contained in the Appellants' Brief concerning the actions of Trustee Wolfe regarding a new financing package and their friend Barbara Kendall, is not inconsistent with the assertions by Trustee Wolfe in the Motion to Dismiss the Trial Court level. (CP 10) Again the Trustee must determine that a postponement would be "advantageous." The Landbergs had been seeking new money to refinance this loan since the day of the loan in May 2007. Accordingly, they needed to have a plan with interested investors. Even Ms. Kendall didn't have any more investors than herself as stated by Trustee Wolfe (CP 10). The Appellate Court has only the assertion of Appellants that the "friend backed out." At the time of the hearing on the Motion, Appellants' could have brought forward an Affidavit or Declaration by Barbara Kendall as to her feelings following the conversation with Trustee Wolfe but they did not do that. Trustee Wolfe's statement in his

Declaration (CP 10) set forth his conversation with Ms. Kendall, which remains in the record unrefuted except by the hearsay averments of Appellants.

Without something more than a good friend wanting to help, at the last minute, would there be an advantage to postponing the Sale to let that good friend try to find other investors? In their response to Defendant's Motion, Plaintiffs make only unsubstantiated hearsay averments. They could have an Affidavit from Ms. Kendall as to what was actually said, but they did not.

B. **Restraint of Sale.** The Washington Deed of Trust Act specifically sets forth the safeguards to protect the borrowers/appellants against any wrongful foreclosure. That is found in RCW 61.24.030(6)(j) and RCW 61.24.130(1) wherein the Grantor may enjoin or restrain the sale. When the borrowers have notice of the ability to restrain the sale, they are deemed to have waived their rights if they did not properly bring a Complaint. Steward v. Good, 51 Wn. App 509, 754 P.2d 150 (1988), and Koegel v. Prudential Mutual Savings Bank, 51 Wn. App. 108, 752 P.2d 385 (1988).

Discussion of restraining a Trustee's Sale is found at 27 Marjorie Dick Rombauer, Washington Practice: Creditors' Remedies-Debtors Relief, Section 3.62 (1998), which sets forth four (4) criteria that are mandatory: 1) start a lawsuit; 2) have five (5) days' notice of a hearing on a Restraining Order; 3) establish "any proper grounds"; 4) made payment to the Clerk of the Court of payments that are due under the defaulted Deed or by statute. Appellants' accomplished the first two items in Pend Oreille County Case No. 08-2-00218-3

and the Court in that case did not address “any proper grounds.” The problem is that the Appellants’ failed to take step four and pay any money to the Clerk. No money whatsoever. There is no allegation by Appellants that they have ever paid any money to the Clerk. What Debtors are trying to accomplish is get the Court of Appeals to review the Trustee’s Sale without ever complying with the statute. They want to do it for free. The legal principal is confirmed in the case of Plein v. Lackey, 149 Wn. 2d 214, 227, 67 P.3d 1061 (2003).

This latter argument by Respondents is the “bottom line” of this whole case. The Appellants Landberg knew of their ability under the statute to restrain the sale of the Trustee for “proper cause.” They started a lawsuit but failed to pay the money into the Court as required by the statute. While they attempted to get a continuance because of weather, they never made an effort to get a genuine “Restraint of Sale.” Therefore they did not comply with RCW 61.24.130. They should not be able to come back now, after the fact, and after the property has been sold to third parties. They have “waived” those arguments. For this issue the cases of Country Express Stores v. Sims, 87 Wn. App. 741, 943 P.2d 374 (1997) and People’s National Bank v. Ostrander, 6 Wn. App. 28, 491 P.2d 1058 (1971), seem to be dispositive. It is stated:

“Other cases also support this principal. In People’s National Bank v. Ostrander [supra] the Court affirmed summary judgment for the deed of trust beneficiary against a counterclaim in an unlawful detainer action brought after the sale. The counterclaim alleged the deed of trust had been obtained by fraud. The Debtor/Grantor knew of the

alleged fraud, had notice of the sale, and failed to restrain the sale in order to litigate the fraud issue, waiting until after the sale to assert its defense. The Court noted: “To allow one to delay asserting a defense until this late stage of the proceedings would be to defeat the spirit and intent of the trust deed act.” Ostrander, 6 Wn. App at 32, Country Stores v. Sims, supra, page 751.

That is also why res judicata should apply to this case. The parties in Pend Oreille County Case No. 08-2-00218-3 are Ronald C. Landberg and Kathleen L. Landberg and Brian Wolfe, Trustee. In that case there was a ruling by the Trial Judge on the issue of inclement weather. (CP 107) Then, by failing to following through on their initial Complaint, the Landbergs have waived their right to now complain about inclement weather or inadequate compilation of costs. Res judicata is a defense to the action when there is an identity between the two actions in four respects: 1) subject matter; 2) cause of Action; 3) persons and parties; and quality of the persons for or against whom the claim is made. These criteria found in In Re Metcalf, 963 P2d 911, 92 WA App 165 (1998), and Henderson v. Bardahl International Corp., 72 WA 2d 109, 431 P2d 961 (1967).

As stated in Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 423 P.2d 624 (1967).

“This Court from early years has dismissed a subsequent action on the basis that the relief sought could have and should have been determined in a prior action. The theory on which dismissal is granted is variously referred to as res judicata or splitting cause of action. [citation omitted]

...

On the main question in this case, there is no uncertainty about the rule in this State. As early as Sayward v. Thayer, 9 Wash. 22, 36 Pac. 966, (1894), it was stated:

“The general doctrine is that the plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

That rule has been steadfastly adhered to and followed in this state. Some of our case so holding are, as follows: [Citing cases] In the last case, it was taken for granted that the rule is so well understood in this State that it was referred to in the terse, yet comprehensive, language, as follows:

“The matter in controversy here was included within the matter in controversy there. It either was, or else could have been, adjudicated in the former action. That judgment, therefore, became res judicata of the issues and matters here presented.”

Sanwick v. Puget Sound Title Ins. Co., supra, pages 441-442.

C. **Fair Market Value.** Lastly, the Appellants allege that there was not a sale at “fair market value.” Respondents submit that Appellants have confused the sales. First there is a Trustee’s Sale on December 19, 2008. Then there is a sale by the beneficiary (Equity Trust) who purchased at the Trustee’s Sale by bidding in the amount owed by the Landbergs. (CP 13) That sale by the

beneficiary to the neighbors is not before this Court because it was not a sale by the Trustee.

Appellants' argument on "Fair Market Value" is misplaced. Respondent believes they have confused the Trustee's Sale with the subsequent sale by the beneficiary to the Good Neighbors. There is nothing in the statute RCW 61.24 which requires the Trustee to obtain fair market value at the Trustee's Sale. If the only bidder is the lender and the lender bids in the amount owed, there is no relationship between that bid and fair market value. The case of Cox v. Helenius, 103 Wn 2.d 383, 693 P.2d 683 (1985) confirms:

"The Trustee of a Deed of Trust is not required to obtain the best possible price for the trust property if the only bidder is the lender."
Cox v. Helenius, supra page 389.

If Appellants' are concerned about the sale to the Good Neighbors, then the lawsuit against Trustee Wolfe is misplaced since Wolfe, acting as Trustee, had no connection to that subsequent sale. There has been no showing by Appellants' of any activity on the part of Trustee Wolfe, while acting as Trustee, that precluded any other buyer or financial arrangements by Appellants to come forward between December 19, 2008 and closing of the sale to the Good Neighbors on June 18, 2009, some six (6) months after the Trustee's Sale.

V.

CONCLUSION

Appellants have failed in many respects. First, they failed to properly put forward factual allegations in the Motion before the Trial Court which resulted in the Trial Court entering an Order Granting Summary Judgment and dismissing Plaintiffs' Complaint. Then, in the Court of Appeals, they have argued issues which were not raised at the Trial Court level. Thirdly, and most importantly, they filed a suit to restrain the sale in Case No. 08-2-00218-3 when they knew or should have known of any deficiencies leading to the Trustee's Sale. They failed to comply with mandatory terms required by the statute. Hence, they have "waived" their right to now complain of that Trustee's Sale. Accordingly, the Trial Court's "Order Granting Defendants Motion for Dismissal of Plaintiffs Complaint pursuant to Civil Rule 12 and Civil Rule 56," should be affirmed.

DATED this 22nd day of July, 2011.

BRIAN H. WOLFE, P.C.

By: 
Brian H. Wolfe, #4306
Trustee and Attorney for Respondents

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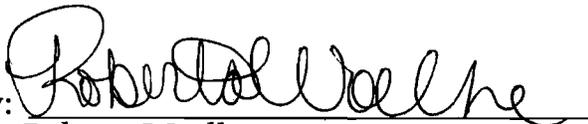
I hereby certify that I have mailed the foregoing Respondents' Amended Brief on the individuals listed below, by mailing to said individuals as indicated, a true copy thereof, postage prepaid and addressed to said individuals at their last known addresses as follows:

Kathleen Landberg
800 Vine Street
Milton, WA 98354

Ronald Landberg
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DATED this 22nd day of July, 2011.

BRIAN H. WOLFE, P.C.

By: 
Roberta Woelke
Legal assistant to Brian H. Wolfe