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Court of Appeals
Division III
State of Washington

No. 318176-III

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

DAVID ABERCROMBIE,

Appellant,

v.

RECONTRUST COMPANY, INC.; LANDSAFE TITLE OF
WASHINGTON, INC.; MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS INC.; COUNTRYWIDE HOME LOANS, INC.; BAC HOME
LOANS SERVICING, LP; and, BANK OF NEW YORK MELLON FKA
THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE
HOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES,
SERIES 2006-26

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Respondent ReconTrust Company, Inc. acted illegally in issuing two Notices of Trustee's Sale against real property owned by Appellant Abercrombie. Abercrombie is entitled to judicial declaration that ReconTrust Company, Inc. acted illegally, and for an award of attorney's fees under the terms of the Deed of Trust.

Abercrombie also appeals the summary judgment dismissal of his claims for violation of the Consumer Protection Act, Fair Debt Collection Practices Act, and the Collection Agency Act, based on underlying violations of the Deeds of Trust Act by Respondents.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting summary judgment dismissing Appellant Abercrombie's claims for declaratory relief, violation of the Consumer Protection Act, violation of the Fair Debt Collection Practices Act, and violation of the Collection Agency Act.

B. Issues Pertaining to Assignments of Error

1. Was Respondent ReconTrust Company, Inc. authorized to act as the trustee on Appellant's deed of trust when it did not maintain a physical address in Washington and failed in other respects to strictly follow the Deeds of Trust Act?

2. Was Respondent ReconTrust Company, Inc. properly appointed as the substitute trustee by MERS?

3. Whether the claims against Respondent ReconTrust Company, Inc. are moot?

4. Whether Abercrombie can sustain a Consumer Protection Act claim?

5. Whether Respondents constituted "debt collectors" under the Fair Debt Collection Practices Act?

6. Whether Abercrombie can sustain a Collection Agency Act claim?

III. STATEMENT OF THE CASE

A. The Deed of Trust Named MERS as the Beneficiary

Appellant Abercrombie owns the real estate that is the subject of this action, located at 111 Lookout Way, Chelan, Chelan County,

Washington (the "Property"). Clerk's Papers ("CP") 344. The Property is Residential Real Property as defined by RCW 61.24.005(11). CP 344.

In 2006, Plaintiff executed a Deed of Trust in reference to the Property, and a Promissory Note for a loan that was to be secured against the Property. CP 349-359. As disclosed in Section 6 of the Deed of Trust, the Property was owner-occupied at the time of the recording of the Deed of Trust. CP 353. The Deed of Trust further recites that Respondent Countrywide Home Loans, Inc. ("Countrywide") was the "Lender," Respondent Landsafe Title of Washington ("Landsafe") was the Trustee, and Respondent Mortgage Electronic Registration Systems, Inc. ("MERS") was the "beneficiary." CP 349-350. The Deed of Trust also states that MERS "is acting solely as a nominee for Lender and Lender's successors or assigns." CP 350. Despite being labeled the "beneficiary" in the Deed of Trust, the Promissory Note that Abercrombie executed was not delivered to MERS, nor were any payments on the Promissory Note made to or received by MERS. CP 344.

The Deed of Trust also provides that the "**Lender** may from time to time appoint a successor trustee to any Trustee appointed hereunder who has ceased to act." CP 358. Neither the "Lender," i.e., Countrywide, nor its purported successors, ever appointed a successor to Landsafe as the Trustee. CP 344.

The Deed of Trust, at section 26, provides for an award of “attorney’s fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument.” CP 358.

B. MERS Appointed ReconTrust as Substitute Trustee

On April 6, 2010, a document entitled “APPOINTMENT OF SUCCESSOR TRUSTEE,” dated March 30, 2010, was recorded purportedly to substitute Respondent ReconTrust Company, N.A. (“ReconTrust”) as the Trustee for the Deed of Trust in place of Landsafe. CP 363-364. However, this purported Appointment of Successor Trustee was executed only by MERS, claiming to be the “Beneficiary.” CP 364. In addition, the Appointment of Successor Trustee stated that ReconTrust’s address is outside of Washington, in Simi Valley, California, and provided no Washington address for ReconTrust. CP 363.

On May 20, 2010, a Notice of Trustee’s Sale, dated April 19, 2010, was recorded. CP 368-372. Purporting to act as the duly appointed Trustee, ReconTrust executed the Notice of Trustee’s Sale. CP 371.

The Notice of Trustee’s Sale identified ReconTrust’s address only as a post office box in Van Nuys, California. CP 371. The only physical address in Washington given for ReconTrust was only that of ReconTrust’s “Agent for service of process,” CT Corporation, in Olympia, Washington. CP 371. The only phone number listed for the physical address is (360) 357-6794. CP 371. On at least two different occasions,

Abercrombie dialed (360) 357-6794. CP 346. On each such occasion Abercrombie spoke with a CT Corporation employee, who denied that she or anyone else associated with CT Corporation System in any way represented ReconTrust. CP 346. The employee also stated that the sole relationship between CT Corporation System and ReconTrust was that CT Corporation had contracted to accept service of process for ReconTrust. CP 346.

C. Abercrombie Filed Suit to Stop the Foreclosure

Abercrombie moved for a Temporary Restraining Order to stop the Trustee's Sale of the property originally scheduled for August 20, 2010. CP 123. Respondents opposed the motion, and Abercrombie's motion was denied. CP 201-202. However, Respondents rescheduled the Trustee's Sale for December 3, 2010. CP 325. In November 2010, Abercrombie filed a Motion for Partial Summary Judgment, set to be heard prior to the rescheduled sale date. CP 213-230. Respondents also opposed that motion. CP 261-299. However, on the eve of the motion hearing date, Respondents cancelled the Trustee's Sale. CP 418, 842. As a consequence, the court issued no formal order on Abercrombie's Motion for Partial Summary Judgment, but issued a minute order finding Abercrombie's motion "moot inasmuch as defendants had cancelled the sale for tomorrow." CP 842. The Notice of Trustee's Sale expired on

December 18, 2010, 120 days after the originally scheduled Trustee's Sale date of August 20, 2010. *See* RCW 61.24.040(6).

Respondents did not reschedule the Trustee's Sale based upon the original April 19, 2010 Notice of Trustee's Sale. Instead, Respondents recorded a new Notice of Trustee's Sale on February 2, 2011, setting a new Trustee's Sale date of May 6, 2011. CP 374. Because the new Notice of Trustee's Sale suffered from exactly the same defects as the first Notice of Trustee's Sale, Abercrombie filed a Motion for Summary Adjudication of Issues and Injunctive Relief set for hearing prior to the Trustee's Sale date of May 6, 2011. CP 320-342. Respondents once again opposed Abercrombie's motion, and Abercrombie's motion was denied. CP 384-408, 446-447.

At the core of the trial court's reasoning for denying Abercrombie's motion was its determination that MERS could serve as a deed of trust beneficiary. In its oral ruling, the trial court relied specifically on *Daddabbo v. Countrywide Home Loans, Inc.*, No. C091417 RAJ, 2010 WL 2102485 (W.D. Wash. May 20, 2010) for the proposition that "MERS can, in fact, act as a beneficiary." CP 473. Respondents had relied on *Daddabbo* in their opposition brief. CP 391. The Supreme Court of Washington expressly disagreed with *Daddabbo* and similar cases in its landmark ruling two years later, *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 109-10, 285 P.3d 34 (2012), in

which it held that MERS could not serve as a deed of trust beneficiary in the state of Washington.

The original sale date set by the new Notice of Trustee's Sale, May 6, 2011, was later rescheduled to August 5, 2011. CP 492. Respondents filed a Motion for Summary Judgment and to Cancel Lis Pendens on June 22, 2011. CP 449-469. On July 20, 2011, the trial court granted that portion of Respondents' motion seeking to cancel the lis pendens, thus clearing title to allow Respondents to proceed with the foreclosure sale. CP 593. However, Respondents nonetheless did not proceed with the Trustee's Sale—the new Notice of Trustee's Sale was again allowed to expire, and thus no foreclosure sale ever occurred. CP 723-724.

At the time of the trial court's July 20, 2011 ruling canceling the lis pendens, the Supreme Court had recently granted review in *Bain*. As a result, the trial court withheld ruling on the merits of Abercrombie's claims. CP 718. After the Supreme Court's decision in *Bain* was issued, Respondents filed a Renewed Motion for Summary Judgment, in which, once again, Respondents argued that all of their actions taken with respect to the two Notices of Trustee's Sale were legal under the Deed of Trust Act, RCW ch. 61.24, and seeking dismissal of all of Abercrombie's claims. CP 714-728. The trial court granted Respondents' motion for summary judgment in part, dismissing Abercrombie's claims for declaratory relief that the Respondents' actions violated the Deeds of Trust

Act, and dismissing Abercrombie's claims for violation of the Consumer Protection Act, Fair Debt Collection Practices Act, and Collection Agency Act. CP 823-824.

The trial court also ruled in Abercrombie's favor that "MERS was never the holder of the Plaintiff's note and therefore MERS did not meet the definition of trust deed "beneficiary" under Chapter 61.24 RCW." CP 824. Respondents have not appealed from that adverse ruling.

D. The ReconTrust Consent Decree

While this case was pending, Respondent ReconTrust was sued by the Washington Attorney General for, among other things, the same types of violations of the Deeds of Trust Act that Abercrombie alleged in this case. CP 734-746. ReconTrust entered into a consent decree in that lawsuit which required it to "maintain a physical presence" in the state of Washington in the event that it ever resumed operating as a foreclosure trustee. CP 737.

IV. ARGUMENT

A. Strict Construction of the Washington Deeds of Trust Act ("DOTA")

The DOTA is strictly construed in favor of borrowers. All of its requisites must be met, and it must be construed to further its three goals of inexpensive efficiency, adequate opportunity for interested parties to prevent wrongful foreclosure, and promotion of the stability of land titles. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007);

Queen City Savings and Loan Association v. Mannhalt 111 Wn.2d 503; 760 P.2d 350 (1988); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111, 752 P.2d 385, *review denied*, 111 Wn.2d 1004 (1988); *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). As stated in *Udall*: “The Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” 159 Wn.2d at 915. The rule of construction in favor of borrowers arises because the DOTA is in derogation of the common law protections of judicial supervision and benefits such as the right of redemption. *Queen City*, 111 Wn.2d at 514 (Dore, J., dissenting) (cited with approval in *Udall*, 159 Wn.2d at 916).

The facts in this case and similar cases around the country could not demonstrate more clearly the soundness of that rationale. In *Udall*, the court held that where one of the requisites of the act was not met, the putative sale was void. 159 Wn.2d at 385-388. Division III of the Court of Appeals likewise held that because “the statutes allowing for nonjudicial foreclosure dispense with many protections commonly enjoyed by borrowers, ‘lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor’.” *CHD, Inc. v Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007), *review denied*, *CHD, Inc. v Boyles*, 162 Wn.2d 1022, 178 P.3d 1033 (2008) (citations omitted).

Finally, as in all statutory construction, no language in the act may be deemed inoperative or superfluous. Every word, clause and sentence must be given effect. *Cox*, 103 Wn.2d at 387-388.

B. Respondents Violated the DOTA

1. Only Countrywide met the statutory definition of “beneficiary” under RCW 61.24.005(2) so as to have the power to appoint a substitute Trustee at the time the Deed of Trust for Plaintiff’s property was recorded; MERS has never been a beneficiary empowered to appoint a substitute Trustee

The Washington legislature has spoken clearly on the definition of “beneficiary,” and neither lenders nor the courts are at liberty to redefine the term. RCW 61.24.005(2) unambiguously defines the term “Beneficiary” as used in the DOTA as: “...the *holder* of the instrument or document evidencing the obligations secured by the deed of trust” (Emphasis added.)

Under the definition provided by DOTA and the evidence in this case, Countrywide was the beneficiary and had the power to substitute another trustee for Landsafe Title of Washington, the original trustee. All of the evidence in this case irrefutably demonstrates that MERS never became a beneficiary and never acquired the power to appoint a substitute trustee. Furthermore, *Bain* has now resolved the issue beyond dispute—MERS cannot be “beneficiary” under a Deed of Trust in Washington.

2. ReconTrust Company, N.A. was not a Trustee under the Deed of Trust pursuant to RCW 61.24.005(13)

a. *ReconTrust was not properly appointed as a substitute Trustee*

RCW 61.24.010(2) provides: “The trustee may ... be replaced by the *beneficiary*....the *beneficiary* shall appoint a trustee or a successor trustee.” (Emphasis supplied.) This same procedure is found at RCW 61.24.005(13): “‘Trustee’ means the person *designated* as the trustee in the deed of trust or *appointed* under *RCW 61.24.010(2)*.” (Emphasis supplied.)

The Deed of Trust specifically designates Landsafe as the trustee. The only recorded appointment of a successor trustee is made by MERS, yet, as discussed above, MERS is not the *beneficiary* and, lacking that status has not the power of appointment of the trustee. Landsafe then remains the trustee.

RCW 61.24.010(2) provides: “*Only* upon recording the appointment of a successor trustee ... the successor trustee shall be vested with all powers of an original trustee.” (Emphasis supplied.) Because the only authority that ReconTrust asserts comes from someone other than the beneficiary, ReconTrust was never duly appointed as a Trustee and its actions are void. Given that inability, under RCW 61.24.030(7)(a), ReconTrust was without the power to record, transmit or serve any of the notices of sale at issue in this case.

- b. *ReconTrust is not eligible to serve as a Trustee under any Deed of Trust in Washington because it does not maintain a physical presence in Washington.*

In its notices of sale, ReconTrust provided only a post office box address in California, not the address of its physical presence. Because the DOTA requires the Trustee to maintain a physical presence and phone number within the state of Washington, the address given was insufficient.

ReconTrust also failed to fulfill the requirement of the DOTA of maintaining a physical presence in this state. RCW 61.24.030(6) provides:

That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address

The sole relationship of ReconTrust to this state at all times relevant to this matter has been a contractual arrangement with CT Corporation System at 1801 West Bay Drive NW, Suite 206, Olympia, Washington, 98502. When asked, the personnel at that office very clearly stated that there was and has been no one who was in any way an employee or representative of or related in any way to ReconTrust at that office other than the sole relationship of CT Corporation Systems to ReconTrust, by contract, to accept legal process on ReconTrust's behalf.

The statute requires more than that. It emphatically states that: first, the Trustee must maintain a place in Washington where personal service of process can be made; and secondly, the Trustee must maintain a physical presence and phone service in Washington. To give meaning to “every word” of the statute one must interpret the second use of the word trustee in that sentence to mean more than someone of suitable age and discretion. Likewise the requirement of telephone service would be total surplusage if all that was intended was to have someone available to accept process. If the transparency and responsiveness required to further the goals of efficiency, minimal expense, opportunity to avoid wrongful foreclosure and stability of real property titles are to exist, the party responsible for seeing that those goals are accomplished should be present in this state.

Had the legislature only had availability for service of process in mind it would have needed only one clause where it used two; and that one clause would not have fulfilled the objectives of the Act. The rules of construction for the Act allow no other interpretation.

ReconTrust has all but admitted that it acted in violation of Washington law by entering into the consent decree with the Washington Attorney General. That consent decree arose from a lawsuit against it filed by Washington Attorney General for the same violations of law alleged by Plaintiff in this case. Under the consent decree, ReconTrust is

prohibited from acting as a trustee under any deeds of trust in Washington unless, among other things, it establishes a physical presence within the state.

3. The Notices of Trustee's Sale failed to comply with the requirements of RCW 61.24.040 in that they did not: (a) identify the original beneficiary; (b) accurately state the assignment and recording history of the beneficial interest; or (c) identify a physical address for the Trustee in Washington.

ReconTrust recorded false and deficient Notices of Trustee's Sale, thus failing to fulfill the requisite notice required in the DOTA. RCW 61.24.040 requires the insertion of the name of the original beneficiary along with the description of subsequent assignments of that beneficiary's interest and the recording information of those assignments. That requirement is an integral and important component of the statutory scheme of the Act. Without such information it would be very difficult, if not impossible to determine the chain of title to the beneficial interest and thus the identity of the holder of the power of appointment of the trustee. Likewise, by inserting a false name for the original beneficiary a putative trustee could, as in this case, fraudulently appear to hold the power of sale. Both circumstances directly contravene the statutory purposes of the act by: (1) requiring significant effort in the form of research and or investigation to determine the chain of title to an interest in the property (i.e. inefficiency and expense); (2) thwarting the ability of interested parties to know the real parties in interest (i.e. avoid wrongful

foreclosure); and (3) creating a break in the chain of title to the beneficial interest in the deed of trust (i.e., creating instability in the title to land).

ReconTrust inserted the name of MERS as the beneficiary in its Notices, which, as discussed above, was false. ReconTrust's false Notices were in contravention of the language and purpose of the Act and represented a failure to provide the requisite notice under RCW 61.24.040.

C. Abercrombie is Entitled to Relief

After litigating against Respondents' multi-year campaign of illegal foreclosure attempts against Abercrombie, Abercrombie is entitled to a judicial declaration finding that Defendants' actions were unlawful, and an award of attorney's fees under the prevailing party attorney's fees clause in the Deed of Trust. Even where, as here, no foreclosure sale actually took place, "a borrower has an actionable claim against a trustee who, by acting without lawful authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred." *Walker v. Quality Loan Serv. Corp.*, 176 Wash. App. 294, 313, 308 P.3d 716, 724 (2013), as modified, (Aug. 26, 2013).

D. Abercrombie's Statutory Claims Survive

Abercrombie's claims for relief for violations of the Consumer Protection Act, the Fair Debt Collection Practices Act, and the Collection Agency Act should not have been dismissed on the record below.

1. Consumer Protection Act

A violation of the CPA is demonstrated by proving the following elements: “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inv. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Walker v. Quality Loan Serv. Corp., 176 Wash. App. 294, 318-19, 308 P.3d 716, 724 (2013), as modified, (Aug. 26, 2013) disposes of all of Respondent’s argument below concerning Abercrombie’s Consumer Protection Act claim. *Walker* presented a similar set of facts as presented here. Division I of the Court of Appeal held that where a foreclosure trustee’s illegal actions forced the borrower to litigate to stop the foreclosure, a Consumer Protection Act violation was present. *Id.*

2. Fair Debt Collection Practices Act

Respondents’ sole argument below against Abercrombie’s FDCPA claim was that Respondents are not “debt collectors.” *Walker* has also disposed of argument. *Walker v. Quality Loan Serv. Corp.*, 176 Wash. App. 294, 317, 308 P.3d 716, 726 (2013), as modified (Aug. 26, 2013) (reversing trial court’s dismissal of FDCPA claim).

3. Collection Agency Act

Respondents, particularly including MERS, ReconTrust and BANA, were not licensed as collection agencies under the Collection

Agency Act, which means that they violated RCW 19.16.110, which in turn is a per se violation of the CPA. RCW 19.16.440.

V. CONCLUSION

Appellant respectfully requests that the trial court's order dismissing his claims be reverse, and that he be awarded attorney's fees on appeal.

RESPECTFULLY SUBMITTED AND DATED this 13th day of January, 2014.

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CERTIFICATE OF SERVICE

I, Michael D. Daudt, declare and say as follows:

I certify that on January 13, 2014, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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

DATED this 13th day of January, 2014.



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