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ORIGINAL

No. 72113-5-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BYRON BARTON and JEAN BARTON

Appellants

v.

TRIANGLE PROPERTY DEVELOPMENT, LLC,

Respondent.

Appeal from Superior Court for King County
The Honorable Mariane C. Spearman and Commissioners
Nancy Bradburn-Johnson and Carlos Velategui

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Quality Loan Service Corporation auctioned the Bartons' property at a trustee's sale in King County. The property was allegedly sold to Triangle Property Development LLC and a Trustee's Deed was recorded by Eastside Funding LLC.

On May 5, 2014, Defendants/Appellants (the Bartons) filed a lawsuit in King County Superior Court wherein Byron and Jean Barton (Appellants in the instant case) are the Plaintiffs and JP Morgan Chase Bank, First American Title Company, and Quality Loan Service Corporation of Washington are the defendants. That case raises causes of action for Wrongful Foreclosure and Violation of the Deed of Trust Act,

Fraud and Misrepresentation, Violation of the Consumer Protection Act (RCW §19.86) and other common law claims.

Triangle Property Development, LLC executed a “Complaint for Unlawful Detainer” naming Byron L. Barton and Jean Barton, and John Doe Tenants(s) as Defendants and they posted the Complaint for Unlawful Detainer on the property located at 6548 41st Ave. SW, Seattle, Washington 98136.

The Bartons’ filed a Motion to Stay Proceedings on Unlawful Detainer based on their pending lawsuit which the Court denied on June 6, 2014. A Writ of Restitution was issued at the hearing on June 11, 2014.

At no time did Quality Loan Service Corp. of Washington, JP Morgan Chase, or any other alleged beneficiary, trustee or servicer provide a Notice of Pre-Foreclosure Options to the Bartons, a prerequisite to the Notice of Default, in violation of RCW §61.24.031. At no time did Quality Loan Service Corp. of Washington, or any other trustee, beneficiary, or servicer serve the Bartons with a Notice of Default prior to the recording of a Notice of Trustee’s Sale.

On May 28, 2014, the Bartons filed a Notice of Appeal with the Superior Court for King County, and a hearing on their Motion to Stay

Writ of Restitution Pending Appeal pursuant to RCW §59.12.220 was held on July 3, 2014, which the court denied.

II. ASSIGNMENTS OF ERROR

1. The trial court erred on June 6, 2014 when it denied the Bartons' (Defendants/Appellants) Motion to Stay Unlawful Detainer proceedings.

2. The trial court erred on June 11, 2014 when it entered judgment in favor of the Respondent, and found in favor of Respondent in its Unlawful Detainer action and issued a Writ of Restitution.

3. The trial court erred on July 3, 2014 when it denied the Bartons' Motion to Stay pending appeal.

Issues Pertaining to Assignments of Error

Did the trial court erroneously deny a motion to stay the unlawful detainer hearing based on the issues in the lawsuit brought by Appellants against JP Morgan Chase and Quality Loan Service Corp. of Washington? (Assignments of Error No. 1, 2).

Did the trial court erroneously deny a motion to stay the unlawful detainer hearing pending appeal of the Writ of Restitution when it ordered an extremely unreasonable bond amount? (Assignment of Error No. 3).

Did the trial court erroneously issue a Writ of Restitution when the trustee's sale was invalid and Respondent did not have the right to possession? (Assignment of Error No. 2).

III. STATEMENT OF THE CASE

On April 11, 2014, Quality Loan Service Corporation auctioned the Bartons' property at a trustee's sale in King County. On April 28, 2014, Eastside Funding LLC recorded a Trustee's Deed alleging that the property was sold to Triangle Property Development LLC (Respondent) and Eastside Funding LLC.

On May 5, 2014, Appellants commenced a lawsuit in King County Superior Court wherein Byron and Jean Barton are the Plaintiffs and JP Morgan Chase Bank, First American Title Company, and Quality Loan Service Corporation of Washington are the defendants. (*Barton v. Chase*, Case No. 14-2-12762-6). The summons and complaint in Case No. 14-2-12762-6 were served on JP Morgan Chase Bank on May 14, 2014. Case No. 14-2-12762-6 raises causes of action for Wrongful Foreclosure and Violation of the Deed of Trust Act, Fraud and Misrepresentation, Violation of the Consumer Protection Act (RCW §19.86) and other common law claims. Plaintiffs in that case are demanding injunctive relief and damages.

On May 8, 2014, Plaintiff Triangle Property Development, LLC executed a "Complaint for Unlawful Detainer" naming Byron L. Barton and Jean Barton, and John Doe Tenants(s) as Defendants. CP 1-3. On May 23, 2014, Triangle Property Development LLC posted the

Complaint for Unlawful Detainer on the property located at 6548 41st Ave. SW, Seattle, Washington 98136.

A show cause hearing for a Writ of Restitution was set on the matter for Friday, May 30, 2014 to be heard before a Commissioner in King County Superior Court. CP 11. This hearing did not go forward.

The Bartons' filed a Motion to Stay Proceedings on Unlawful Detainer based on their pending lawsuit for wrongful foreclosure, violation of the Deed of Trusts Act, and other common law causes of action, which the Court denied on June 6, 2014. CP 35. An amended show cause hearing for a Writ of Restitution was set for June 11, 2014, to be heard before a Commissioner in King County Superior Court, after which a Writ of Restitution was issued on June 11, 2014, over the objections and arguments of the Bartons. CP 16, CP 19-26.

At no time did Quality Loan Service Corp. of Washington, JP Morgan Chase, or any other alleged beneficiary, trustee or servicer provide a Notice of Pre-Foreclosure Options to the Bartons, a prerequisite to the Notice of Default, in violation of RCW §61.24.031. At no time did Quality Loan Service Corp. of Washington, or any other trustee, beneficiary, or servicer serve the Bartons with a Notice of Default prior to the recording of a Notice of Trustee's Sale.

On May 28, 2014, the Bartons filed a Notice of Appeal with the Superior Court for King County. CP 14-15. On June 24, 2014, the Bartons' filed a Motion to Stay Writ of Restitution Pending Appeal pursuant to RCW §59.12.220 and scheduled the hearing for July 3, 2014. CP 74-83. On July 3, 2014, the court heard the Bartons' Motion to Stay Writ of Restitution pending appeal, and the court denied the motion to stay. CP 97-98.

Because of the failure of the court commissioners to issue a stay pending appeal, on July 18, 2014, a King County Sheriff's deputy forcibly evicted the Bartons from their home in an unsafe and confrontational manner that put Mr. Barton's health and safety at risk. The Barton family had nowhere else to live, and because Mr. Barton is disabled, finding affordable housing that would accommodate his health and safety needs was incredibly difficult. Affordable housing is scarce in West Seattle as well as the entire city, and despite the Bartons' vigorous efforts, they could not find adequate housing. The sheriffs initially physically removed Mr. Barton from the house and placed him into an ambulance. Within approximately half an hour, the sheriffs removed him from the ambulance, placed him in his wheelchair and left him sitting on the sidewalk across the street from his house, accompanied by his wife, Jean Barton.

Mr. Barton is a decorated Veteran who served in the U.S. Navy during the Vietnam war and was honorably discharged. He is now disabled as he recently suffered a heart attack and stroke and is unable to walk or speak coherently.

IV. SUMMARY OF ARGUMENT

The court erred in failing to grant a stay of the unlawful detainer proceedings based on the fact that Appellants had a civil lawsuit pending which challenged the validity of the trustee's sale under the Deed of Trust Act. Because of the invalidity of the Trustee's Sale, the respondent did not have the right to possession.

The court erred in failing to grant a stay pending appeal after Appellants filed a Notice of Appeal of the Writ of Restitution. Because of the invalidity of the trustee's sale, respondent did not have the right to possession of the property, so a stay pending appeal should have been granted. Appellants were prepared to pay a reasonable bond at the hearing on the motion to stay pending appeal on July 3, 2014, but the court insisted that an extremely unreasonable bond amount was proper, which Appellants were unable to pay. The merits of the stay were not at issue, only the amount of the bond.

V. LEGAL ARGUMENT

A. Standard of Review

An appellate court reviews questions of law de novo. *State v. McCormack*, 117 Wash.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992). Issues of statutory interpretation are reviewed de novo. *Hartson P'ship v. Goodwin*, 99 Wash.App. 227, 231, 991 P.2d 1211 (2000). This appeal involves both statutory interpretation and questions of law, so the court should apply the de novo standard of review.

B. The Court Erred in Granting the Writ of Restitution At the Unlawful Detainer Hearing

The unlawful detainer statute, RCW §59.12 *et seq.*, is in derogation of the common law and must therefore be strictly construed in favor of the tenant. *Hous. Auth. of City of Everett v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 745 (1990); *Truly v. Heuft*, 138 Wn.App. 913, 918, 158 P.3d 1276 (2007). The trustee's sale in this matter was in violation of the Deed of Trust Act, specifically RCW 61.24.031(1)(a) and 61.24.031(1)(b) and should be found to be invalid and rescinded because Appellants never received a Notice of Default or a Notice of Pre-foreclosure Options, both required by the Deed of Trust Act.

Because a show cause hearing is merely a summary proceeding, the arguments and factual disputes were improperly disposed of on June 11, 2014 when the Court issued the Writ of Restitution. *Carlstrom v. Hanline*, 98 Wn. App. 780, 788, 990 P.2d 986 (Wash. App. Div. 1, 2000). An unlawful detainer action is an issue of right to possession. Because the trustee's sale was unlawful and did not proceed according to the requirements of the Deed of Trust Act, Triangle Property Development is not the rightful owner of the property and does not maintain the right to possession. The Writ of Restitution should not have been issued because Triangle Property was not the rightful owner.

C. The Court Erred in Failing to Grant a Stay of the Unlawful Detainer Proceedings

Appellants provided evidence to the court on June 6 and June 11, 2014 that the trustee's sale was deeply flawed and did not comport with the requirements of the Deed of Trust Act because Appellants were not provided with a Notice of Default or a Notice of Pre-Foreclosure Options prior to the issuance of the Notice of Trustee's Sale. The basis for the Bartons' lawsuit against JP Morgan Chase and Quality Loan Service Corp., that neither party is entitled to foreclose on the property, should have been enough to grant a stay or injunction against the unlawful detainer proceeding, because if JP Morgan Chase was not the beneficiary

and it sold the property to Triangle Property Development at the trustee's sale, then Triangle Property Development was not the rightful owner and did not have the right to possession or a Writ of Restitution.

Appellants did not bring an action to restrain or enjoin the Trustee's Sale that took place on April 11, 2014 in King County. However, the Deed of Trust Act provides that the failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale may *not* be deemed a waiver of a claim for damages asserting: (a) Common law fraud or misrepresentation; (b) A violation of Title 19 RCW; (c) Failure of the trustee to materially comply with the provisions of this chapter; or (d) A violation of RCW 61.24.026.¹ These are essentially the claims raised in the Barton's Complaint in *Barton v. JP Morgan Chase Bank, et al.*, Case No. 14-2-12762-6.

Because the set of facts that are raised in *Barton v. JP Morgan Chase Bank* are facts related to the basis of Plaintiff's unlawful detainer case against the Bartons, and there is a likelihood of success on the merits of the Barton's complaint, the drastic measure of removing someone

¹ RCW 61.24.127.

² "Because the DTA 'dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor.'" *Walker* at 7, quoting *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

³ "The supreme court has repeatedly stated that the Deeds of Trust Act 'must be

from their home under dubious and unlawful circumstances should be avoided until the Barton's civil claims can be heard and resolved.

The Deed of Trust Act must be strictly construed in favor of the borrowers, because lenders do not need the authority of the courts to initiate foreclosure proceedings. This principle has been repeatedly upheld by Washington courts. *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013),² *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn 2d 903, 915-16, 154 P.3d 882 (2007), *Bavand v. OneWest Bank*, 176 Wn. App. 475, 309 P.3d 636 (2013),³ *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677, 682 (Wash. 2013), *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012). Because of the glaring violations of the DOTA by the Trustee, Quality Loan Service Corp., and JP Morgan Chase Bank in failing to provide the Bartons with a Notice of Default and

² “Because the DTA ‘dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower’s favor.’” *Walker* at 7, quoting *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

³ “The supreme court has repeatedly stated that the Deeds of Trust 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 non-judicial foreclosure sales.’” *Bavand* at 6 quoting *Schroeder v. Excelsior Mgmt. Group, LLC* 177 Wn.2d 94, 105, 297 P.3d 677, 682 (Wash. 2013).

a Notice of Pre-Foreclosure Options, the court should view the Trustee's Sale as void and stay any unlawful detainer proceedings.

Although RCW 61.24.127(2)(b) provides that a post-foreclosure claim may not seek any remedy at law or in equity other than monetary damages, courts have set aside trustee's sales as void when there were statutory defects in the Sale, and insufficiency of the recitals in the Trustee's Deed. *See generally, Albice v. Premier Mortgage Services of Washington, Inc.*, 239 P.3d 1148 (Wash.App. Div. 2, 2010). The Court in *Albice* found that "a trustee's bald statements that he or she has complied with the law, as distinguished from recitals of fact demonstrating such compliance, tend to dilute the statutory protections afforded borrowers by the Act." *Id.* at 1155. The court found that the notable absence in the trustee's deed of any mention of the six continuances, the forbearance agreement, or any of the make-up payments, which would have cured the default if accepted, left the trustee's deed in violation of the Deed of Trust Act requirements. *Id.* at 1153-1154. The court was "unwilling to accept a trustee's legal conclusions contrary to the actual facts of the foreclosure process as conclusive evidence where an accurate reporting of the facts would have shown the legal conclusions to be incorrect." *Id.* at 1154.

There are some very similar omissions in the Trustee's Deed and the Notice of Trustee's Sale that was issued in this case. First, the NOTS declared that a Notice of Default was sent to the Bartons, when no such notice was sent to them. This is a material false statement in the NOTS. Second, the Trustee's Deed recitals declare that "All legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in chapter 61.24 RCW." Trustee's Deed, Para. 9, CP 49. The recitals also declare that "the current Trustee transmitted the Notice of Default to the required parties, and that a copy of said Notice was posted or served in accordance with the law. Trustee's Deed, Para. 4, CP 49. These statements are false, as noted above, no Notice of Default or Notice of Pre-Foreclosure Options were provided to the Bartons. These Notices are required under the Deed of Trust Act, RCW 61.24 *et seq.*

D. The Court Erred in Failing to Grant a Stay Pending Appeal of the of the Writ of Restitution

RCW 59.12.220, **Writ of Restitution Suspended Pending Appeal**, states as follows:

"If a writ of restitution has been issued previous to the taking of an appeal by the defendant, and said defendant shall execute and file a bond as provided in this chapter, the clerk of the court, under the direction of the judge, shall forthwith give the appellant a certificate of the allowance of such appeal; and upon

the service of such certificate upon the officer having such writ of restitution such officer shall forthwith cease all further proceedings by virtue of such writ....”

The statute’s only requirement for a stay of a Writ of Restitution pending appeal is a defendant’s filing of a bond, intended to protect against the plaintiff’s potential economic loss that may accrue until the appeal is determined. *See* RCW 59.12.100.

Similarly, RAP 8.1 grants a party as a matter of right a stay against enforcement of any decision affecting its right to possession of property by the filing of a bond, cash, or alternate security. RAP 8.1(b). Allowed alternate security includes “...the establishment of an account consisting of cash or other assets held by a party...or any other reasonable means of securing enforcement of a judgment.” RAP 8.1(b)(4). “Once an unlawful detainer is commenced and the defendant does not cede the right to possession, the defendant has the right to have the issue determined.” *Housing Authority of the City of Pasco and Franklin County v. Pleasant*, 126 Wn. App. 382, 389, 109 P.3d 423 (Wash. App. Div. 3, 2005). The Bartons raised in their Motion to Stay Proceedings on Unlawful Detainer and their Response to Plaintiff’s Motion for Writ of Restitution arguments relating to Plaintiff’s standing and statutory non-compliance. As a writ of

restitution cannot issue without sufficient evidence showing compliance with statutory notice provisions, the Bartons arguments hold substantial merit. *Id.*, citing *Marsh-McLennan Building, Inc. v. Clapp*, 96 Wn. App. 636, 641-42, 980 P.2d 311 (Wash. App. Div. 1, 1999).

Appellants offered to post a bond in the amount of \$4,000.00, the reasonable amount the house would rent for on the market, and \$4,000.00 per month thereafter. Respondent proposed a bond of \$34,000.00 in one lump sum to be paid to the court to secure the stay, and the court found this amount to be reasonable. This is in violation of the policy behind the Deed of Trust Act, RCW 61.24.130(1)(a), which requires the homeowner to make “the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.” A reasonable monthly payment should have been the amount required to secure the stay, not a full year’s worth of rental payments in one lump sum up front. The amount of \$34,000.00 was unreasonable and not in compliance with the Deed of Trust Act. The court denied the stay pending appeal solely because Appellants could not pay that amount into the court registry on the day of the hearing.

E. CONCLUSION

Accordingly, this Court should reverse the trial court orders and remand for further proceedings consistent with the Court's opinion.

Signed and dated this 21st day of December, 2014.

/s/ Jill J. Smith
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CERTIFICATE OF SERVICE

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division II, and properly served to the counsel listed below, on December 21, 2014.

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