

72915-2

72915-2

FILED
May 12, 2015
Court of Appeals
Division I
State of Washington

No. 72915-2-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

PODBIELANCIK, ROBERTA S.,

Appellant/Plaintiff,

v.

LPP MORTGAGE, LTD; DOVENMUEHLE MORTGAGE, INC.;
NORTHWEST TRUSTEE SERVICES, INC.; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.; and Does 1-10,

Respondents/Defendants.

OPENING BRIEF OF APPELLANT

John A. Long, WSBA No. 15119
Attorney for Appellant

Law Offices of John A. Long
22525 SE 64th Place, Ste. 262
Issaquah, WA 98027
(425) 427-9660

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 5

1. Assignments of Error 5

2. Issues Pertaining to Assignments of Error..... 5

 a. Issues Pertaining to the Declarations of Jeff Stenman and Mary Przybyla (Assignment of Error No. 1)..... 5

 b. Issues Pertaining to the finding that no unlawful acts by Defendants resulted in injury to Podbielancik (Assignment of Error No. 2)..... 6

 c. Issues Pertaining to Order Granting Summary Judgment (Assignment of Error No. 3) 7

B. STATEMENT OF THE CASE 8

1. Events Leading up to the Lawsuit..... 8

 a. Deed of Trust Origination, Transfers, and Default on Payments. 8

 b. The Trustee’s Sale..... 8

 c. The Public Auction and Trustee’s Deed 10

 d. Legal Proceedings 10

C. ARGUMENT 12

1. Admissibility of Declarations 12

 a. The Declaration of Przybyla 13

 b. The Declaration of Stenman..... 14

2. Unlawful Acts by Defendants Caused Injury to Podbielancik 16

 a. Postponement of Sale without Notice 16

 b. False Minimum Bid..... 18

 c. Injury to Podbielancik 20

3. Summary Judgment Was Not Appropriate 21

D. CONCLUSION 22

TABLE OF AUTHORITIES

Washington Cases

<i>Albice v. Premier Mortg. Services of Washington, Inc.</i> , 174 Wn.2d 560 (Wash. 2012).....	16
<i>Cox v. Helenius</i> , 103 Wn.2d 383 (Wash. 1985).....	19
<i>Discover Bank v. Bridges</i> , 154 Wn.App. 722 (Wash.App. Div. 2 2010)	12
<i>Dunlap v. Wayne</i> , 105 Wash.2d 529, 535 (1986).....	10
<i>Frias v. Asset Foreclosure Servs., Inc.</i> , 181 Wn.2d 412 (Wash. 2014).....	20, 21
<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771 (Wash. 2013).....	19, 21
<i>Mason v. Mortg. Am., Inc.</i> , 114 Wn.2d 842, 854, 792 P.2d 142 (1990).....	21
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 57 (2009)	20
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 201 (1998)	21
<i>Schroeder v. Excelsior Mgmt. Grp., LLC</i> , 177 Wn.2d 94, 104 (2013).....	17
<i>Udall v. T.D. Escrow Servs., Inc.</i> , 159 Wash.2d 903, 915-16 (2007)	16, 18

Statutes

RCW 61.24 7
RCW 61.24.040(4)..... 16
RCW 61.24.040(6)..... 17, 18

Rules

CR 56(e)..... 12
ER 1002 12
ER 801 12

A. ASSIGNMENTS OF ERROR

1. Assignments of Error

1. The trial court erred in considering the information provided in the Declaration of Jeff Stenman (CP 284-288) and the Declaration of Mary Przybyla (CP 269-283) in support of the October 10, 2014 motion for summary judgment as evidence.

2. The trial court erred in making the finding that there were no unlawful acts by Defendants that caused actual injury to Podbielancik in its November 10, 2014 order granting summary judgment to all defendants. CP 364-365.

3. The trial court erred in entering the order of November 10, 2014, granting the October 10, 2014 motion for summary judgment for all Defendants. CP 364-365.

2. Issues Pertaining to Assignments of Error

a. Issues Pertaining to the Declarations of Jeff Stenman and Mary Przybyla (Assignment of Error No. 1)

1. The Declaration of Mary Przybyla states, in part, that according to DMI's business records LPP authorized DMI to convey step-bid instructions to NWTS which included specific instructions regarding the minimum bid amount, the actual bid amount, and that there were no competitive bids. CP 269-283, ¶ 20-21. None of the business records

referenced in the declaration were included, attached, or were otherwise part of the record. Are the assertions made by Przybyla in connection with business records that have not been provided hearsay and inadmissible as evidence in support of the motion to dismiss pursuant to CR 56(e)?

2. The Declaration of Jeff Stenman makes several assertions based upon Stenman's review of NWTS's business records, including a review of a sworn declaration of Vincent Wheaton. CP 284-288 ¶ 4, 5, 17, and 19. None of the business records, or the declaration of Vincent Wheaton, referenced in the declaration were included, attached, or were otherwise part of the record. Are the assertions made by Stenman in connection with business records that have not been provided hearsay and inadmissible as evidence in support of the motion to dismiss pursuant to CR 56(e) et seq.?

b. Issues Pertaining to the finding that no unlawful acts by Defendants resulted in injury to Podbielancik
(Assignment of Error No. 2)

1. NWTS issued a Notice of Trustee's Sale that a public auction of Podbielancik's property would be conducted at 10:00 a.m. CP 25-39. Without public proclamation or other notice to potential bidders at the sale, NWTS continued the sale of Podbielancik's property until 2:02 p.m. CP 288-289. Does the failure to call a sale at the stated time with no notice

of a postponement strictly comply with RCW 61.24 et seq., the Deed of Trust Act governing non-judicial foreclosures?

2. Defendants published a minimum bid of \$500,429 for Podbielancik's property to potential purchasers at the auction. CP 284. This information was publically available in print and online leading up to the sale and was in print at the sale. CP 65-67. \$500,429 was more than the amount required to pay off Podbielancik's loan in full at the date of the sale. CP 61. After receiving no competing bids, the property was sold to LPP for \$280,000. CP 288. Was the failure to start the bidding at the advertised minimum bid deceptive, a violation of NWTS's duty of good faith, or otherwise unlawful?

3. Podbielancik's property was sold at a non-judicial foreclosure sale, and as a result she has lost title to her home. Podbielancik has accrued significant legal expense, and has suffered significant emotional distress throughout the pendency of the foreclosure and subsequent lawsuit. CP 340-341. Have any unlawful actions of the Defendants resulted in injury to Podbielancik?

c. Issues Pertaining to Order Granting Summary

Judgment (Assignment of Error No. 3)

1. Whether there was a genuine issue as to a material fact and Defendants were entitled to summary judgment as a matter of law.

B. STATEMENT OF THE CASE

1. Events Leading up to the Lawsuit

a. Deed of Trust Origination, Transfers, and Default on Payments

On March 29, 2007 Podbielancik executed a Deed of Trust to secure 1st position loan for her property. CP 35-50. The lender was First Magnus Financial Corporation, and MERS was named as the beneficiary. CP 35-50. On November 17, 2008, an assignment of the Deed of Trust was recorded, stating MERS transferred their beneficial interest to LPP Mortgage (“LPP”). CP 52.

Around May of 2010 Podbielancik stopped making mortgage payments to the current servicer, Dovenmuehle Mortgage, Inc. (“DMI”). CP 61.

On July 26, 2011, LPP Mortgage executed and recorded an appointment of successor trustee appointing Northwest Trustee Services, Inc. (“NWTS”) as the Trustee of the Deed of Trust. CP54.

b. The Trustee’s Sale

NWTS recorded a Notice of Trustee’s Sale on September 5, 2012, setting the time and date of the sale as 10:00 a.m. on January 4, 2013. CP 59-63. The Notice of Trustee’s Sale stated the principal balance of the loan as \$404,832.95 and the amount of default as \$74,077.16. CP 61.

Around the same date that NWTs caused a Notice of Trustee's Sale to be recorded, NWTs caused information regarding the upcoming sale to be posted online and in print for potential purchasers of the property at auction and the general public. CP 65-67. Among this information was a published "Minimum Bid" stated as the minimum amount that NWTs would accept at auction for the property. This "Minimum Bid" amount was listed at \$500,429. CP 66. At the time of the sale, the total of the principal balance, accrued interest, escrow advances, late charges, and all fees and costs necessary to pay off Podbielancik's loan in full was less than \$500,429.

NWTs did not send any documents or otherwise inform Podbielancik that the sale would be continued, held at a different time, or different location. On January 4, at 10:00 a.m. Podbielancik personally attended the foreclosure auction conducted by NWTs. CP 69-70. At no point did the auctioneer announce her property for sale, no bids were taken for the property, and no actual auction of the property took place at the date and time indicated in the Notice of Trustee's Sale. CP 69. There was no announcement of a postponement or rescheduling of the sale of the property. Podbielancik remained at the auction for several hours until the auctioneer stopped calling properties for auction and then left. CP 69.

On January 14, 2013, 10 days after the scheduled sale of Podbielancik's property, a Trustee's Deed was recorded. CP 72-73. The Trustee's Deed states that on January 4, 2013, the property was sold to the highest bidder, LPP Mortgage, for the amount of \$280,000.00. CP 72-73. This amount was over \$220,000 less than what NWTS announced as being the minimum bid. CP 66.

c. The Public Auction and Trustee's Deed

Podbielancik personally attended the public auction and at no time did she hear the property called by the auctioneer. CP 69. No bids were taken for the property, and no actual auction of the property took place at the date and time listed in the notice. CP 287-288. There was no announcement of a postponement or rescheduling of the sale of the property. CP 284-288.

On January 14, 2013 a Trustee's Deed was recorded with the county. CP 72. The Trustee's Deed states that on January 4, 2013 the property was sold at auction to LPP Mortgage, who was the highest bidder, for the sum of \$280,000.00. CP 73. This amount was over \$220,000 less than the "Minimum Bid". CP 66.

d. Legal Proceedings

On September 12, 2013, Podbielancik filed a Complaint against the servicer (Dovenmuehle Mortgage), nominee (MERS), beneficiary

(LPP Mortgage), and trustee (NWTS) of her deed of trust and mortgage. CP 1-73. The Complaint stated causes of action against Defendants for Declaratory Relief, Intentional Misrepresentation, Negligent Misrepresentation, Negligence, Unjust Enrichment, Violations of the Fair Debt Collections Practices Act, Violations of the Consumer Protection Act, Wrongful Foreclosure, Breach of Duty to Act in Good Faith as a Neutral Third Party, Quiet Title, and Accounting with King County Superior Court under cause number 13-2-32288-9. CP 1-73.

The case was then consolidated with a related unlawful detainer action filed by Defendants, removed to Federal District Court, bifurcated, and remanded back to Superior Court where, on October 10, 2014, Defendants filed a motion for summary judgment. CP 78.

Podbielancik filed an objection to the motion for summary judgment on October 27, 2014, and Defendants filed a reply to the Podbielancik's objection on October 30, 2014. CP 291-352 and CP 353-363.

The hearing on the motion for summary judgment was held on November 7, 2014. RP 3. At the hearing the presiding judge listened to oral arguments but did not issue a ruling on the motion, but instead delayed the entry of an order until the following Monday, in order to review the relevant case law and statutes. RP 29

On November 10, 2014 an order was entered granting summary judgment to all defendants on all causes of action stated in Podbielancik's complaint. CP 364-365.

Podbielancik filed a motion for reconsideration of the order granting summary judgment on November 20, 2014, and on December 5, 2014 the motion for reconsideration was denied. CP 366-385 and CP 386.

On December 30, 2014 Podbielancik filed a Notice of Appeal in the Superior Court resulting in the current case. CP 387-391.

C. ARGUMENT

1. Admissibility of Declarations

Affidavits in support of a summary judgment motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to what is in the affidavit. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." CR 56(e); *Discover Bank v. Bridges*, 154 Wn.App. 722 (Wash.App. Div. 2 2010)

ER 801 defines hearsay as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". In addition, ER 1002 states: "To prove the content of a writing, recording, or photograph, the original

writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute.”

a. The Declaration of Przybyla

When Defendants filed their motion for summary judgment they included a declaration made by Mary K. Przybyla in support of the motion. CP 269-283. Paragraph 20 of the declaration states:

Per authorization from LPP, DMI conveyed LPP’s step-bid instructions to NWTS which included information that LPP would bid up to \$500,428.67 at the Trustee’s Sale, and such information should also be conveyed to the public, but LPP would begin bidding at \$280,000 if no competitive bids were placed.

Paragraph 21 of that same declaration states:

According to DMI’s business records, LPP successfully bid on the Property for \$280,000, because there were no competitive bids.

The assertions by Przybyla that 1) the authorization from LPP (which was then forwarded to NWTS by DMI) contained specific bidding instructions, and 2) DMI’s business records indicate that LPP successfully bid on the property for \$280,000 and there were no competitive bids are

both statements offered in evidence to prove the truth of the matter asserted. CP 272. Both statements relate to written documents which were not included with the affidavit or otherwise produced. CP 269-283.

b. The Declaration of Stenman

Also included in support of the motion for summary judgment was the declaration of Jeff Stenman. CP 284-288. The declaration contains the following paragraphs:

Paragraph 4: On March 15, 2011, NWTS received a referral to commence a non-judicial foreclosure proceeding against the Property. CP 285.

Paragraph 5: Per instructions that we received through a secure communication platform which is routinely relied upon in the course of our business as containing accurate information, the foreclosure was to be conducted in the name of LPP Mortgage Ltd. CP 285.

Paragraph 17: On January 3, 2013, NWTS received a step-bid from LPP stating that LPP would open trustee's sale bidding at \$280,000, but bid up to \$500,428.67 (which is considered as \$500,429) in the event of competitive bidding. Therefore \$500,429 was stated as the "minimum"

bid to potential buyers, because LPP would bid no lower than that amount in a contested auction. CP 287.

Paragraph 19: NWTS' business records contain a sworn declaration signed by on-site sale agent Vincent Wheaton, formerly employed by Foreclosure Expeditors/Initiators, LLC ("FEI"). According to this declaration, the "Rules of Auction," which stated an opening bid amount, were read prior to the Property sale. Also, there were no third-party bids made for the Property, and consequently, the Property was sold to LPP for \$280,000 at 2:02 p.m. on January 4, 2013. CP 287-288.

Each of the statements in paragraphs 4, 5, 17, and 19 of the Stenman declaration are offered in evidence to prove the truth of the matter asserted, and contain a reference to a written record which was not attached to the declaration or otherwise a part of the record. CP 287. The written records not included are 1) the March 15, 2011 referral to commence the foreclosure, 2) the instructions received through the "secure communication platform" that the foreclosure was to be conducted in the name of LPP, 3) the step-bid instructions received from LPP, 4) the declaration signed by Vincent Wheaton, and 5) the "Rules of Auction". CP 284-288.

Absent the actual written record each of the statements made by Przybyla and Stenman are hearsay, are not admissible as evidence and should not be considered when deciding whether summary judgment is appropriate. A court may not consider inadmissible evidence when ruling on a motion for summary judgment. *Dunlap v. Wayne*, 105 Wash.2d 529, 535 (1986).

2. Unlawful Acts by Defendants Caused Injury to Podbielancik

a. Postponement of Sale without Notice

The deeds of trust act, RCW 61.24, creates a three-party mortgage system allowing lenders, when payment default occurs, to nonjudicially foreclose by trustee's sale. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560 (Wash. 2012). The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. *Albice*, 174 Wn.2d at 567. Because the act 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. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wash.2d 903, 915-16 (2007).

RCW 61.24.040(4) governs the auction of property subject to nonjudicial foreclosure and states, in part: "On the date and at the time

designated in the Notice of Sale, the trustee or its authorized agent shall sell the property at public auction to the highest bidder.[...]

RCW 61.24.040(6) governs the postponement of a nonjudicial sale and states: “The trustee has no obligation, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by (a) a public proclamation at the time and place fixed for sale in the notice of sale and if the continuance is beyond the date of the sale, by giving notice of the new time and place of the sale by both first class mail and either certified or registered mail[...]

According to Podbielancik, as well as the Declaration of Stenman, the sale did not take place at 10:00 a.m. on January 4, 2013 as specified in the Notice of Trustee’s Sale. CP 69 and CP 287-289. Podbielancik attended the trustee’s sale and at no time heard her property called for sale or heard an announcement postponing the sale of the property. CP 69. None of the evidence provided by Defendants attests to the sale being called at 10:00 a.m. or that a proclamation postponing the sale made. CP 69 and CP 287-289.

Under *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104 (2013), if the trustee operates outside of the provisions of the Act, “The trustee [does] not have authority to proceed with [a] nonjudicial

foreclosure.” *Id.* at 111. When a party's authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6), failure to act within that time violates the statute and divests the party of statutory authority. *Udall*, 159 Wash.2d at 915-16. When NWTS failed to call the sale or announce a postponement, NWTS divested itself of its jurisdiction to proceed with a nonjudicial foreclosure.

b. False Minimum Bid

Prior to the sale, Defendants caused a minimum bid amount to be made publically available with the minimum bid listed at \$500,429, even though they were aware that LPP did not intend to open the bidding at \$500,429. CP 272. Instead LPP intended to open the bidding at \$280,000, over \$220,000 less than the advertised minimum bid. CP 287-288.

The Declaration of Tschirhart filed in support of the motion for summary judgment states that the Defendants believed the value of Podbielancik’s property to be \$350,000. CP 267. When NWTS advertised a minimum price over \$150,000 any reasonable potential purchasers of the property were, including Podbielancik, would be dissuaded from bidding on the property, or even attempting to get together the funds. CP 66.

A potential purchaser may have been willing to bid on the property up to \$500,000, but wouldn’t because of the advertised minimum bid. CP 66. The exact payoff amount at the time of Trustee’s Sale is unknown, but

the arrearages and principal together are less than \$479,000, less than 4 months before the sale. CP 249-252. If LPP, or another bidder, purchased the property for higher than the total payoff of the loan, Podbielancik would have been entitled to receive the amount in excess of the payoff.

The trustee is bound by his office to present the sale under every possible advantage to the debtor as well as to the creditor. He is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike. *Cox v. Helenius*, 103 Wn.2d 383 (Wash. 1985). An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim. *Klem v. Washington Mutual Bank*, 176 Wn.2d 771 (Wash. 2013).

In this case the actions by the trustee in posting a false minimum bid did not equally serve the interests of both the debtor and the creditor, but instead allowed LPP mortgage to purchase the property at foreclosure for 20 percent less than market value, while at the same deterring potential bidders, including Podbielancik. CP 288. The use of a false minimum bid

should be considered a deceptive practice and a violation of the trustee's duty of good faith.

c. Injury to Podbielancik

The trial court order granting summary judgment in favor of Defendants states that "Plaintiff can show no unlawful act by a defendant that caused injury to her" CP 364-365. Recently the Washington State Supreme Court ruled: Without question, where a plaintiff actually loses title to her house in a foreclosure sale or actually remits foreclosure fees, that plaintiff has suffered injury to his or her property. However, those injuries are not necessary to state a CPA claim--other business or property injuries might be caused when a lender or trustee engages in an unfair or deceptive practice in the nonjudicial foreclosure context. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412 (Wash. 2014).

Podbielancik was deprived of her interest in the subject property at the time of the sale and has therefore been injured by the actions of Defendants. CP 254-255.

Because the CPA addresses "injuries" rather than "damages," quantifiable monetary loss is not required. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57 (2009). A CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. *Id.* at 55-56 & n.13. Where a

business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded. *Id.* at 62. *Frias* 181 Wn.2d at 431 (Wash. 2014).

The injury element can be met even where the injury alleged is both minimal and temporary. *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

A trustee's failure to act impartially between note holders and mortgagees, in violation of the DTA, can support a claim for damages under the CPA. *Klem*, 176 Wn.2d at 792.

3. Summary Judgment Was Not Appropriate

When reviewing a motion for summary judgment the court should “interpret all facts and inferences therefrom in favor of [...] the nonmoving party.” *Reid v. Pierce County*, 136 Wn.2d 195, 201 (1998). Summary judgment is appropriate only if the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Here, there are several questions of material fact that remain, including whether NWTS did announce a postponement of the sale. CP 69 and CP 287-288.

D. CONCLUSION

Appellant respectfully requests that this Court reverse the trial court's finding that no unlawful acts by defendant resulted in injury to Podbielancik. Appellant further requests that this Court reverse the trial court's order granting summary judgment to Defendants on all causes of action stated in Podbielancik's complaint.

May 11, 2015

Respectfully Submitted,

/s/ John A. Long
John A. Long
Attorney for Appellant
WSBA No. 15119

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on May 11, 2015, I caused service of the foregoing on each and every attorney of record herein:

VIA FIRST CLASS U.S. MAIL

Mr. Joshua S. Schaer
RCO Legal, P.S.
1355 SE 36th St., Ste 300
Bellevue, WA 98006

VIA E-MAIL

jschaer@rcolegal.com

DATED this 11th day of May, 2015 at Issaquah, Washington.

/s/ John A. Long

John A. Long

WSBA No. 15119