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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By__________

No. 319440

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

ONEWEST BANK, FSB,

Respondent,

v.

MAUREEN M. ERICKSON,

Appellant.

Reply Brief of Appellant

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Throughout this brief, Appellant Maureen Erickson ("Erickson") will reply to the brief of OneWest Bank ("OneWest") in the same sequence presented by OneWest.

I. REPLY TO ONEWEST'S STATEMENT OF THE CASE

A. Reply to Description of Factual History.

1. OneWest noted that on August 27, 2007, Shelley Bruna ("Bruna") was appointed in Idaho as conservator for the assets of Bill E. McKee ("McKee"). OneWest did not mention that McKee was a Washington resident and the subject property ("Property") is in Washington. Further, by August 27, 2007, McKee had already conveyed the Property to Erickson by quit claim deed. (CP 66, para. 6). In proceedings below, OneWest acknowledged that deed conveyed the Property from McKee to Erickson. (CP 15, para. 4 and 23, CP 23).

2. OneWest noted Bruna supposedly executed a promissory note ("Note") on McKee's behalf. OneWest did not contend Bruna acted on Erickson's behalf.

3. OneWest asserted an assignment of the deed of trust at issue ("DOT") from Financial Freedom Senior Funding Corporation ("Financial Freedom") to Mortgage Electronic

Registration Systems, Inc. ("MERS") (which also stated that it assigned the Note) was recorded "for notice purposes." In the summary judgment proceedings below, OneWest relied on that assignment as providing part of the basis giving OneWest the right to pursue foreclosure. (CP 3, para. 4; CP 30, para. 5, CP 48). OneWest did not argue the assignment was "for notice purposes."

4. Similarly, OneWest contended the assignment of the DOT from MERS to OneWest (which did not purport to assign the Note) was "for notice purposes." Again, in proceedings below, OneWest relied on this assignment as giving it the right to proceed with foreclosure and did not suggest the assignment was "for notice purposes." (CP 3, para. 5; CP 30, para. 6; CP 50).

II. REPLY TO DESCRIPTION OF PROCEDURAL HISTORY AND STATED ASSIGNMENTS OF ERROR

OneWest acknowledged that in response to OneWest's request for summary judgment, Erickson also requested summary judgment. Further, OneWest noted in response to assignments of error in Section II.2., that if OneWest's request for summary judgment was proper, Erickson's request for summary judgment should have been denied. If the trial court is

reversed on issues of law or undisputed evidence presented below, summary judgment for Erickson should be granted and summary judgment for OneWest should be denied. *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967), cited below at CP 63.

III. REPLY TO ONEWEST'S ARGUMENT

A. Claims and Issues for Review.

OneWest contended that this Court can confirm the trial court's summary judgment ruling on any ground supported in the record regardless of whether the trial court considered the argument, citing *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App 304, 310, 170 P.3d 53, 56 (2007), which, in turn, cited *LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989). OneWest's assertion is only partially complete.

In *LaMon v. Butler*, the Supreme Court noted that the issue in question was raised in memoranda and pleadings at the trial court level. On that basis, the issue was appropriate to consider on appeal. *Id.* at 200-201.

In this case, OneWest has presented a number of entirely new arguments that were never raised below, some of which conflict with its arguments below. Those new issues should not be considered. RAP 9.12

states "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trail court." (Emphasis added) New arguments and claims, raised for the first time on appeal, should not be considered. *Shreiner Farms, Inc. v. American Teller, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407 (2013); *Rafel Law Grp. PLLC v. Defoor*, 176 Wn. App. 210, 225, 308 P.3d 767 (2013).

Further, several of OneWest's contentions on appeal were not supported by argument or citation to authority. This Court should decline to consider those claims and arguments. See e.g. *Collins Clark County Fire Dist. No. 5*, 155 Wn. App 48, 95-96, 231 P.3d 1211 (2010); *Draszt v. Naccarato*, 146 Wn. App 536, 544, 192 P.3d 921 (2008).

B. Admissibility of Evidence.

OneWest claimed an exhibit attached to the Third Declaration of Babak Shamsi (CP 105-114), and the Affidavit of Plaintiff in Support of Motion for Summary Judgment filed August 2, 2013 (CP 150-169) are admissible. Both Erickson and OneWest agree that this Court is to make this determination *de novo.*

OneWest first claimed Erickson should not have challenged consideration of these materials utilizing a "motion to strike." OneWest

cited no authority holding such a request is improper; nor did OneWest make this assertion below. As noted above, new arguments first raised on appeal, and arguments unsupported by authority, should not be considered. Further, OneWest also made a motion below to strike an affidavit presented by Erickson (CP 169) (an argument OneWest did not preserve or make on appeal).

OneWest contended for the first time on appeal that Erickson's objection below to the Shamsi Declaration in a reply brief constituted a "procedural" failure. OneWest provided no argument or authority supporting this claim and did not assert it below. For both reasons, this claim should not be considered.

OneWest claimed "an attorney's sworn declaration in support of summary judgment is entitled to consideration based on testimonial knowledge, and that courts can take judicial notice of the record in a separate Idaho cause of action. OneWest provided no authority supporting a claim that an attorney has "testimonial knowledge" as a matter of course. Further, OneWest did not argue below that the court should take judicial notice of an Idaho proceeding and provided no authority stating this court may do so.

Mr. Shamsi's declaration did nothing more than confirm it was his understanding his client was able to locate the exhibit and fax it to him. He did not purport to know where his client got it. (CP 106, para. 5). Mr. Shamsi provided no foundation to support admission of the exhibit. The representative of his client that supposedly faxed the document to him provided no testimony, and Mr. Shamsi certainly had no knowledge enabling him to authenticate the exhibit. This document was, at best, inadmissible hearsay.

With regard to Plaintiff's August 2, 2013 Affidavit, OneWest acknowledged at the bottom of page 5 and top of page 6 that Mr. Lara's affidavit was required to be made on his personal knowledge. OneWest claimed that Mr. Lara satisfied that obligation because he personally examined the business records relating to the subject loan, and then "goes on to describe a number of records in OneWest's possession." OneWest contended Mr. Lara's affidavit and its exhibits therefore meet the requirements of CR 56(e). As argued below and in Erickson's opening brief, a review of the affidavit demonstrates that this is not so.

Mr. Lara did not state that any of the attached exhibits were part of OneWest's business records or suggest how they came into his possession. (CP 151). Further, the documents and document description that OneWest

sought to admit purportedly relate to matters that occurred between 2007 and 2011 and, if reviewed, purport to be communications to Financial Freedom, not OneWest (CP 153-168). The DOT was not assigned to OneWest until 2012. (CP 30, para 6; CP 50). Mr. Lara did not purport to have any familiarity or knowledge of procedures employed by Financial Freedom or MERS. The information and exhibits offered through Mr. Lara were inadmissible hearsay under ER 802.

OneWest's argument in the final paragraph on page 6 and continuing on to page 7 of its brief regarding a claimed closure of Financial Freedom and the ultimate acquisition of assets of its parent corporation by OneWest does not change the result. The argument was not raised below and should not be considered. Further, Mr. Lara did not purport to have any responsibility in connection with or knowledge of Financial Freedom's business practices with regard to records, and Mr. Lara had no knowledge that would enable him to authenticate any documents Financial Freedom may have received.

C. 1. Reply to OneWest's Claim that Erickson Lacks Standing.

For the first time on appeal, OneWest claimed that Erickson lacks standing to challenge the notarization in the deed of trust. This new argument should not be considered on appeal. If considered, it is not correct, as Erickson owns the Property. Washington has long recognized that a property owner has standing to assert personal defenses and challenges to the enforcement of a mortgage or deed of trust purportedly encumbering their property, even where that owner has no personal liability on the obligation. See e.g. *Kirkpatrick v. Collins*, 95 Wn. 399, 163 P. 919 (1917); *George v. Butler*, 26 Wn. 456, 67 P. 263 (1901).

2. The Deed of Trust's Acknowledgment was Deficient.

At page 9, OneWest contended that, under Washington law, an acknowledgement need not state that the signor actually acknowledged the instrument in the presence of the notary public. OneWest relied on the last portion of RCW 64.08.050 which describes the types of "satisfactory evidence" that the person whose signature has been acknowledged is the person they claim to be. OneWest ignored the middle portion of that section in which refers to the signor being the person that " . . . acknowledged before him or her on the date stated in the certificate . . ."

(Emphasis added) Obviously, one cannot acknowledge a document "before" someone else if both were not present in the same place.

OneWest also ignored RCW 42.44.080(1) that requires in part that an acknowledgement must state that the signor of the document ". . . acknowledged before him or her on the date stated in the instrument . . ." Similarly, RCW 42.44.100 sets forth forms for notary acknowledgments that are sufficient and all specify that the signor signed in the notary's presence. An acknowledgement that fails to confirm that the signor acknowledged the instrument before the notary does not meet the requirements stated in any of those statutory provisions.

Cases relied on by OneWest with respect to the validity of its acknowledgement actually support Erickson's position. Those cases are impossibly in conflict with OneWest's assertion that Washington law does not require that a signor actually appear before the notary. For example, *Ockfen v. Ockfen,* 35 Wn.2d 439, 440-441, 213 P.2d 614 (1950) recognized that a notary's acknowledgement on behalf of a signor that did not appear before him was defective (effectively meaning the signature was not acknowledged); but that such a deed would nonetheless be valid as between the original grantor and grantee, as well as the heirs who succeeded the interests of a deceased grantor. Erickson was not one of the

parties to the loan transaction and did not receive her ownership as McKee's heir. Title to the Property was conveyed to her by quit claim deed before the DOT was purportedly executed.

Similarly, in *Fidelity & Cas. Co. v. Nichols*, 124 Wn. 403, 404, 214 P. 820 (1923) the court acknowledged that the signors failure to appear before a notary made the acknowledgement ineffective, but held that the deed would be enforced as between the original parties. Erickson was not an original party to the DOT.

The acknowledgement prepared by OneWest's predecessor, Financial Freedom, failed to show that the signor acknowledged the instrument before the notary public. Washington courts recognize that an acknowledgement that is defective in form is invalid. See, e.g. *Bank of Commerce v. Kelpine Prods. Corp.,* 167 Wn. 592, 10 P.2d 238 (1932); *Yukon Inv. Co. v. Crescent Meat Co.,* 140 Wn. 136, 248 P. 377 (1926); *Ben Holt Industries, Inc. v. Milne*, 36 Wn. App. 468, 469-472, 675 P.2d 1256 (1984).

Finally, at page 10, OneWest cited RCW 65.08.030 which provides that a recorded, but defectively acknowledged, instrument will impart notice to third parties from and after its recordation. OneWest claimed therefore that "recordation of an improperly acknowledged deed

still results in its validity and enforceability." First, OneWest did not make that claim below and it should not be considered on appeal. Second, OneWest cited no authority suggesting recordation of its defectively acknowledged instrument would render it valid as against Erickson, who received title to the Property by quit claim deed before the DOT was supposedly executed.

D. 1. The Assignment of the Note and Deed of Trust to MERS was Binding on OneWest.

At page 13, OneWest acknowledged that the purpose of an assignment of a deed of trust is to provide notice to subsequent purchasers regarding which party owns a debt secured by the property. On pages 13 through 15 of its brief, OneWest cited numerous cases supporting the conclusion that the assignments from Financial Freedom to MERS of the Note and DOT, and subsequent assignment of only the DOT from MERS to OneWest, are valid. Erickson agrees and does not contest the validity of those assignments.

In proceedings below, OneWest also argued those assignments are valid. "Indeed, 'the assignment of a deed of trust and note is valid between the parties whether or not the assignment is ever recorded.' *In re*

United Home Loans, 71 B.R. 885, 891 (W.D. Wash. 1987)." (CP 83, ll. 9-11).

OneWest is arguing for the first time on appeal, and in a manner in conflict with its argument below, that the assignment of the Note and DOT and subsequent assignment of only the DOT, have no meaning. OneWest does not dispute both assignments were recorded, or that OneWest was fully aware of them when it accepted assignment of the DOT. As noted above, OneWest relied upon those assignments as a basis for pursuing its foreclosure in the proceedings below. Its new position, contrary to its position below, should not be considered.

Even if considered, any inference that ownership of a note and deed of trust can only be transferred by negotiation of the note is not supported by the authority cited by OneWest or by law. In discussing means by which ownership of a debt secured by a mortgage can be transferred, Washington's Real Property Deskbook, Third Addition, Section 46.11 (2) states "[t]he debt or the obligation is normally transferred by an endorsement of the note <u>or</u> an assignment" (Emphasis added)

OneWest also argued for the first time on appeal that Erickson has no standing to challenge the validity of the assignments. Again, Erickson

is not challenging the validity of those assignments, Erickson believes they are binding on OneWest, particularly where OneWest relied on them below. Moreover, as with other new arguments on appeal, OneWest raised no issue of standing below and the argument should not be considered.

Both parties agreed below that Financial Freedom's assignment of the Note and DOT to MERS assigned ownership of the Note to it. OneWest was aware of that recorded assignment when it accepted a later assignment of the DOT (but not the Note). A purported negotiation of the Note in blank by Financial Freedom would therefore not have been effective to further transfer ownership of the Note to anyone coming into its possession. If Financial Freedom's purported negotiation in blank occurred before the assignment to MERS, the recorded assignment of the Note to MERS transferred ownership of the Note and it was MERS, not Financial Freedom, that became the Note's owner and needed to further assign or endorse it. Conversely, if a purported blank endorsement was stamped on the Note after Financial Freedom assigned it to MERS, then it would not have done so as the owner of the Note. Either way, ownership of the Note has remained with MERS based on the recorded assignment.

2. MERS' Role in the Transfers. At pages 15 through 18, OneWest cited numerous cases indicating that MERS would not have been the owner of the Note or DOT. At page 17, OneWest challenged Erickson's reliance on *In re United Home Loans*, supra, ignoring the fact that OneWest relied upon that case below as valid authority and cited it in its own summary judgment briefing. (CP 83, 9-11). Further, this is another argument OneWest raised for the first time on appeal. Since it conflicts with OneWest's argument below and was first raised on appeal, it should not be considered.

3. OneWest is not the noteholder.

At pages 18 and 19, OneWest provided argument that was never presented in any pleadings or documents below that Financial Freedom was a subsidiary of IndieMac and that OneWest acquired the assets of the former IndieMac bank. Again, this new argument is contrary to OneWest's position below, was not presented to the trial court, and should not be considered on appeal. Even if it were considered, OneWest does not contend that Financial Freedom or MERS ceased to exist as separate entities, even if acquired by OneWest.

Further, as noted in Erickson's opening brief, OneWest's representative, Mr. Lara, did not simply indicate that OneWest "is the

holder of the note." He clarified that OneWest "has control of the Note." (CP 29, at para. 3). Mr. Lara did not explain what it meant for OneWest to have control of the note, but neither Mr. Lara nor any other representative of OneWest stated that OneWest has ever had physical possession of it.

Finally, even if OneWest had obtained physical possession of the Note, a recorded assignment had transferred ownership of the Note to MERS. Based on authority relied on both parties below, that recorded assignment of the Note and DOT transferred ownership of the Note to MERS.

E. OneWest is Not Protected Under Washington's Bona Fide Purchaser Doctrine.

At pages 19 through 24, OneWest argued that it was protected by Washington's bona fide purchaser doctrine. As OneWest noted, the doctrine protects "a good faith purchaser for value who is without actual or constructive notice of another interest in purchased real property." *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 127, 233 P.3d 871 (2010). OneWest does not dispute that the only occupants of the Property, McKee and Erickson, knew and were prepared to disclose to anyone that inquired that Erickson owned the Property, not McKee.

At about the time the loan was made, McKee asked his attorney to make sure that the judge involved in the Idaho action was aware the Property had been conveyed to Erickson. (CP 30, para. 21; CP 140-141). During this time, Erickson also told people involved in the transaction and dealing with the property that she, not McKee, owned the Property. She even told the loan representative involved in the completion of this loan transaction the Property had been conveyed to her, and that testimony is unrefuted. (CP 129-130, para. 20). McKee and Erickson were both ignored.

Any investigation of the Property would have demonstrated that both McKee and Erickson lived there. Erickson is an adult and there was no reason to believe she was a tenant. She was undeniably a resident and occupant of the Property and it would have been appropriate to understand the circumstances under which she occupied the property as her primary residence. In this respect, this situation was not dissimilar from that in *Chittick v. Boyle*, 3 Wn. App. 678, 683, 479 P.2d 142 (1970) in which the court held that occupancy of property by a tenant would require a purchaser of that property to ascertain the contents of the lease arrangement as part of the reasonably prudent inquiry of occupants of a property that Washington law requires. Cases such as *Miebach v.*

Colasurto, 102 Wn.2d 170, 685 P.2d 1074 (1984) require the circumstances involving a property and its occupation to be taken into account in determining whether a subsequent encumbrancer is protected by the bona fide purchaser doctrine.

Here, any examination or inquiry would have revealed that Erickson occupied the Property as its owner. On this basis, OneWest and its predecessors were bound by the notice a reasonable inquiry of those actually in possession of the Property would have disclosed.

F. Erickson Can Challenge Bruna's Appointment as a Conservator.

OneWest contended Bruna was appointed as a conservator and that, as a conservator appointed in Idaho to deal with property purportedly owned by a resident of the state of Washington, had authority to assert control over Washington property. While OneWest has cited selected provisions within Idaho law dealing with the appointment of a conservator I.C. Title 15. OneWest ignored IC 15-1-301(2) and (3) which, in part, sets out the jurisdictional limits for I. C. Title 15.

These provisions make it clear that Idaho courts accept jurisdiction over Idaho residents and Idaho property of non-residents. This section in

the Idaho Code does not purport to give a conservator control over a Washington resident's Washington property.

Further, as noted by Erickson below (CP 59-60), Idaho limits the jurisdictional reach of its courts by its long-arm statute. I.C. 5-514 confers jurisdiction on Idaho courts over people outside Idaho arising out of " … (a) [t]he transaction of any business in this state … (c) [t]he ownership, use or possession of any real or personal property situate within this state …" Idaho's long-arm statute establishes the limits for determining compliance with constitutional due process requirements. *Southern Idaho Pipe & Steel Co. v. Val-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 567 P.2d 1246 (1977). Erickson raised these arguments below. (CP 59-60).

Idaho cases are consistently in accord. *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 803 P.2d 978 (1990) recognized that a person's physical presence in Idaho at one time is not sufficient to confer jurisdiction to Idaho courts over that person. *Schneider v. Sverdsten Logging Co.*, 104 Idaho 210, 657 P.2d 1078 (1983) recognized that some action giving rise to the cause of action must fall within the scope of Idaho's long-arm statute for its courts to assert jurisdiction. There has been no suggestion that Idaho had any connection to the Proeprty in order to grant Ms. Bruna control over it. Since Idaho had no jurisdiction over

McKee's Washington property, *Friese v. Walker*, 27 Wn. App 549, 619 P.2d 366 (1980) provides that the purported order on which OneWest claims to have relied is subject to collateral attack

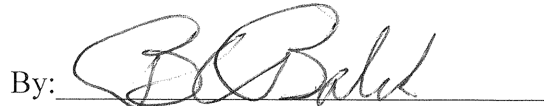
Reliance by OneWest's predecessor in interest under the DOT on letters of conservatorship issued by an Idaho court purporting to deal with Washington property by a Washington resident was problematic at best. OneWest's loan required that McKee reside at the Property as his primary residence (CP 39, para. 5), precluding any assumption McKee was an Idaho resident. OneWest's predecessor should have inquired further of the owner of this Property and not simply relied upon the Idaho conservator's appointment. Knowledge that would have been obtained through a reasonable inquiry of McKee and his adult daughter, as the only occupants of the Property, preclude OneWest from claiming it took free of Erickson's interest in the Property as a bond fide purchaser.

CONCLUSION

For the reasons stated above, summary judgment in favor of OneWest should be reversed, summary judgment should be granted in favor of Erickson, and this matter should be remanded to the trial court for further action consistent with the decision.

RESPECTFULLY SUBMITTED this 31st day of December 2013.

LAYMAN LAW FIRM, PLLP

By: 

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