73016-9

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NO. 73016-9-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Lorina Delfierro,

Appellant,

vs.

BSI FINANCIAL SERVICES; DEL TORO LOAN SERVICING, INC.; MARINERS INVESTMENT FUND, LLC; MARINERS INVESTMENT FUND II REO, LLC; MARINERS SECOND FUND II REO, LLC; SECOND MARINERS INVESTMENT FUND II REO, LLC; SECOND MARINERS RES FUND II REO, LLC; AMERICAN DEFAULT MANAGEMENT; PENSCO TRUST COMPANY CUSTODIAN FBO JEFFERY D. HERMANN, IRA ACCOUNT NUMBER 20005343; April Smith in her individual and official capacity; Teresa Ceniceros in her individual capacity; Jeffery D. Hermann in his individual capacity; Jennifer Tait in her individual and official capacity; and Steve Olson, in his individual capacity and in his official capacity.

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

This appeal is the latest attempt by Appellant to avoid the natural consequences of her default on her mortgage. Despite being given every opportunity to do so at trial, she failed completely to prove any of her allegations with evidence. Her appeal is a rambling hodgepodge of the same baseless allegations that were soundly rejected by the trial court. Rather than attempting to demonstrate to this Court that the findings of the trial court were clearly erroneous, Appellant apparently would have this Court simply retry her case on appeal. She remains over six years behind on her mortgage payments. This Court should deny her appeal.

II. STATEMENT OF THE CASE

On or about July 16, 2007, Plaintiff took out a loan for $572,850.00 to refinance a previous loan secured by property located at 4009 S.W. 323rd St., Federal Way, Washington ("Property"). The Deed of Trust was recorded on July 20, 2007. Plaintiff was the grantor, Equifirst was the lender, and MERS was the beneficiary and nominee for the lender and lender's successors and assigns. CP 38 (Ex. C.), 103.

By late 2007 or early 2008, Appellant began having trouble making her mortgage payments. 2RP 77, 8-12. On January 21, 2008,

Appellant filed her first lawsuit in an attempt to stop foreclosure. This lawsuit was dismissed. On February 9, 2009, a Notice of Trustee's Sale was recorded against the Property setting a sale date of May 15, 2009. CP 106. On May 15, 2009, Second Mariners Investment Fund II, REO, LLC, ("Mariners") purchased the Property at foreclosure sale. CP 107. As was pointed out at trial, the Trustee's Deed erroneously omitted the word "Investment" from the Mariners entity that purchased the Property. 5 RP 13, 14.

On June 4, 2009, Mariners filed an eviction action to remove Appellant from the Property. CP 122. In the subsequent eviction trial, evidence was presented that the trustee had erroneously advised Appellant's representative that the sale scheduled for May 15, 2009, would not be held. Because Appellant relied on this erroneous information to her detriment, the court dismissed the eviction action and voided the trustee's sale. CP 108, 109.

Because Appellant remained in default on her Deed of Trust, a second Notice of Trustee's Sale was recorded against the Property on April 5, 2010. RP 113. In an attempt to avoid foreclosure, Appellant filed for bankruptcy that same day. 3RP 11. With the bankruptcy stay in place, Appellant filed an Adversary Proceeding to "cram down" the lender in her chapter 13 plan utilizing a much lower value of the loan.

Following a trial on that issue, the bankruptcy court granted Appellant's motion and ruled that she could propose a chapter 13 plan which paid only$325,000, the stipulated value of the property at that time, to the lender. That decision was upheld by the Bankruptcy Appellate Panel on May 29, 2012.

In December, 2010, Second Mariners Investment Fund II, REO, LLC, transferred Appellant's loan to another Mariners entity, Mariners Investment Fund. 6 RP 76-77. On May 25, 2011, Mariners Investment Fund sold Appellant's loan to Pensco Trust Company Custodian FBO Jeffery D. Hermann, IRA Account Number 20005343 ("Pensco"). CP 41.

On July 16, 2012, although she had successfully "crammed down" the value of the loan by more than $250,000.00, Appellant made the strategic choice to dismiss her bankruptcy and file this lawsuit. CP 264.

After discovery, several defendants settled with Appellant. A motion for summary judgment removed many of the remaining causes of action.

The issues that remained at trial were: several causes of action alleging Notary Malfeasance and/or Notary Negligence against Defendant April Smith (these causes of action were dismissed by

Appellant at the start of trial); a Quiet Title action against Pensco; Unjust Enrichment/Accounting (although most of this cause of action was dismissed pre-trial, the court allowed the claim to proceed under the narrow issue of whether the sale of Appellant's loan from Mariners to Pensco was an arms-length transaction); and a Consumer Protection Act claim alleging that the sale of Appellant's loan from Mariners to Pensco was fraudulent.

At trial, evidence was presented that the original Note had been lost. In summary, that testimony was that in March, 2011, Mariners had sent the original Note, with an allonge in blank affixed thereto, to its attorney, Robinson Tait, P.S. for use in the bankruptcy adversary proceeding. After the Note was transferred to Pensco, Pensco retained the same law firm to represent it in the bankruptcy proceedings. Robinson Tait, P.S. held the original Note for Pensco until it was FedEx'd back to Mariners on April 3, 2012. After receiving the original Note, Mariners lost it. CP 37, 38, 39, 40. Based on the uncontroverted evidence provided, the trial court ruled that RCW 62A.3-310 had been satisfied and Pensco had the right to enforce the Note and Deed of Trust.

Evidence was also presented at trial that firmly established the chain of title of the Note and Deed of Trust from origination through

trial. Specifically, the trial court found that Mariners had purchased the Note and Deed of Trust from Fortress and had then sold the same to Pensco in an arm's-length transaction.

Following the trial, the court ruled that Appellant had failed to prove any of her allegations and entered judgment for defendants as to all of the remaining causes of action.

III. ARGUMENT

Like much of Appellant's pleadings, her opening brief is a rambling, confusing, scattergun collection of baseless allegations and half-truths. Although she was given every opportunity to present evidence to support her claims, she failed utterly to do so. Respondents were able to show a clear chain of title and possession of the note and to demonstrate that Pensco has the current right to enforce the Note and Deed of Trust under the lost note doctrine. The trial court's order dismissing the case and the Findings of Fact and Conclusions of Law that support that decision should be upheld.

The logic of Appellant's rambling arguments is difficult to follow. The following is an attempt to substantively address Appellant's arguments in as orderly a fashion as possible.

A. The Note

Despite overwhelming evidence presented at trial, Appellant continues to argue that the allonge was not affixed to the Note and that evidence presented under the lost Note doctrine was insufficient. Neither claim has any merit.

Testimony from Maya Swanes (3RP 71-106), Jennifer Tait (3RP 106-125), Steve Olson (5RP 7-98), and Jeffery Hermann (3RP 125-4RP 91) clearly established that the original Note included an allonge in blank affixed to it. This testimony also established the chain of custody of the original Note from Mariners to its attorney, Robinson Tait, P.S., who later held the Note as the attorney for Pensco. The testimony also established that Ms. Tait carefully reviewed the Note, attempted to make a color copy of the Note, and that the original Note was returned to Mariners, where it was lost.

Although Appellant continues to argue that the allonge was not affixed to the Note, she presented no evidence of this during the trial. The only evidence presented at trial was that the allonge in blank was attached as the last page of the Note, a color copy of which was admitted as Exhibit 35.

It is difficult to imagine more complete evidence to establish standing to enforce a lost Note than that presented by Respondents at trial. Unrefuted testimony was presented that Mariners obtained the Note when they purchased Appellant's loan from Fortress. Mariners delivered the original Note to Robinson Tait, P.S. during Appellant's bankruptcy because it was anticipated that the original Note might be needed in hearings before the bankruptcy court. A copy of the emails in which Ms. Swanes requested the original Note be sent were admitted as Exhibit 42. Upon receipt of the original Note, Robinson Tait entered it into their original documents log, excerpts of which were admitted as Exhibit 43. A copy of the bailee letter Ms. Swanes executed after receiving the original Note was admitted as Exhibit 36.

After the loan was sold to Pensco, Robinson Tait, P.S. was retained by Mr. Hermann and Pensco to represent their interests in the bankruptcy proceedings. Robinson Tait, P.S. continued to hold the Note for Pensco. Ms. Tait, the president of Robinson Tait, P.S., examined the Note and made a color copy of it for Mr. Hermann at that time. A copy of Ms. Tait's email to Mr. Hermann describing the original Note was admitted as Exhibit 45. The original Note was returned to Mariners via FedEx and a copy of

the FedEx invoice was admitted as Exhibit 46. Mr. Olson testified that the original Note was received by Mariners but that they cannot locate the original Note. 5RP 83.

Pensco established beyond any doubt that it had the right to enforce the Note under RCW 62A.3-309.

Appellant argues, without support, that Pensco cannot avail itself of RCW 62A.3-309 because it was not in possession of the Note when loss of possession occurred. This is simply incorrect. Despite Appellants baseless assertions to the contrary, Robinson Tait, P.S., held the original Note as the agent for Pensco at the time the Note was lost. Appellant's claims that Pensco was not a defendant in this lawsuit or a party to the bankruptcy proceedings is, like the rest of her claims, completely without factual support.

Appellant also assigns error to the trial court admitting the color copy of the Note (Ex. 35) for lack of foundation. Like the rest of Appellant's arguments, it is completely unsupported by the facts. Not only was the proper foundation laid, but counsel for Appellant affirmatively stated he had no objection to Exhibit 35. 3RP 84 at 7.

B. Purchase and Sale Agreements

Appellant argues that the purchase and sale agreements between Fortress and Mariners (Ex. 3) and then Mariners and Pensco (Ex. 41) should not have been admitted because they were produced after the discovery cutoff. This disingenuous argument was made to the trial court and the judge rejected it and admitted the documents. There is no evidence that this was an abuse of discretion by the trial judge and her ruling should not be overturned on appeal.

Appellant propounded discovery and Respondents provided a large number of documents in response. After the discovery cut-off had passed, Appellant sent a letter requesting more documents. The documents now being complained of as being provided untimely were provided in response to this letter. 5 RP 67-68, 6 RP 11-14. It disingenuous for Appellant to complain about discovery that was provided after the discovery cut-off when it was not even requested until after that date.

Additionally, it is undisputed that the documents were provided by the time the Motion for Summary Judgment was briefed. This was over a month before the trial date. Appellant made no attempt

to continue the trial date due to this alleged late discovery and had ample time to address the documents at trial.

A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g)or 37(b), and its determination will not be disturbed absent a clear abuse of discretion. *Associated Mortgage Investors v. G.P. Kent Constr. Co.,* 15 Wash.App. 223, 229, 548 P.2d 558 (1976); *Fisons,* 122 Wash.2d at 355–56, 858 P.2d 1054; *Burnet,* 131 Wash.2d at 494, 933 P.2d 1036. An abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortgage,* 15 Wash.App. at 229, 548 P.2d 558. A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.' " *State v. Rohrich,* 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis,*115 Wash.2d 294, 298–99, 797 P.2d 1141 (1990)). Questions of law are reviewed de novo. *In re Firestorm 1991,* 129 Wash.2d 130, 135, 916 P.2d 411 (1996); *Fisons,* 122 Wash.2d at

339, 858 P.2d 1054 (noting that "[a] trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law"). *Mayer v. Sto Industries, Inc.,* 156 Wash.2d 677, 684, 132 P.3d 115, 118-119 (2006).

In this case, Appellant did not even seek any sanction for the alleged discovery violations other than the suppression of the documents. The court carefully considered the issues and the facts surrounding the production of the documents and admitted the documents into evidence. The trial court's decision was reasonable and should be upheld on appeal.

Appellant improperly cites to the decision in *Idahosa v. King County,* 113 Wn.App 930, 55 P.3d 657 (2002) to support her argument. The portion of the decision quoted in Appellant's brief addresses the unrelated issue of the trial court's decision to strike Idahosa's response to a summary judgment motion, not any discovery violations.

Appellant also suggests in her Opening Brief that no testimony should have been allowed "as to Fortress, FF1 and SNPWL" as a result of the alleged discovery violation. This suggestion is ridiculous for several reasons. First, Appellant herself elicited testimony about Fortress' purchase of Appellant's loan from their

witness Karen Stacy. 3 RP 49-56. Second, such a sanction should be used in only the most extreme cases of willful violations of discovery orders: 'it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.' " *Fred Hutchinson Cancer Research Ctr. v. Holman,* 107 Wash.2d 693, 706, 732 P.2d 974 (1987) (quoting *Smith v. Sturm, Ruger & Co.,* 39 Wash.App., 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, *review denied,* 103 Wash.2d 1041 (1985)).

C. Sufficiency of Proof

Appellant's slapdash Opening Brief makes various claims that the evidence at trial was insufficient to establish Pensco's ownership of the Note and right to enforce it. These claims are also without merit.

Respondents had no burden of proof. Appellant had to prove her case by a preponderance of the evidence and she was unable to meet even this low standard.

Respondents were able to establish both the right to enforce the Note and Deed of Trust under RCW 62A.3-309, and a chain of title for these documents. Mariners purchased the loan from Fortress as

part of a package of loans. Mariners then sold this particular loan to Pensco. The trial court properly found that both of these sales were arm's-length transactions for fair value.

D. Del Toro Loan Servicing, Inc.

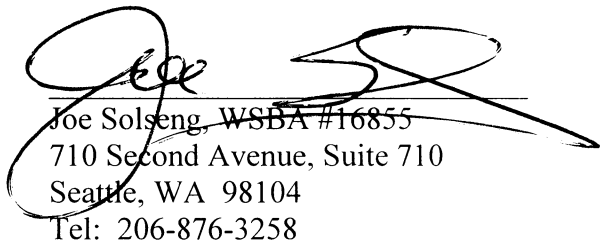
Appellant also asks the Court to reverse the trial court's order granting Del Toro Loan Servicing, Inc.'s motion for summary judgment. Opening Brief at P. 23. No reason for this request is given and no facts are presented concerning Del Toro Loan Servicing, Inc. The Court should deny this request.

IV. CONCLUSION

Appellant's Opening Brief raises the same unfounded allegations she made in her Amended Complaint. She had her opportunity to try to prove these allegations at trial and failed utterly to do so. The trial was conducted fairly and Appellant does not complain of not being allowed to present any evidence she wanted to support her allegations. The trial merely exposed Appellant's allegations for the imaginary claims they were. Appellant's appeal should be denied in its entirety.

Respectfully submitted this 24th day of July, 2015.

ROBINSON TAIT, P.S.



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CERTIFICATE OF SERVICE

I, Isabelle Evans, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a paralegal at Robinson Tait, P.S., attorneys for Respondents, and am competent to be a witness herein.

On July 24, 2015, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing RESPONDENTS' BRIEF to the following:

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