

No. 65857-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EMERALD GARDENS CONDOMINIUM OWNERS ASSOCIATION

Appellant,

v.

U.S. BANK, N.A., AS TRUSTEE FOR THE REGISTERED
HOLDERS OF MASTR BACKED SECURITIES TRUST, 2006-
AM1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES
2006-AMI

Respondent

APPELLANT'S REPLY BRIEF

FILED
 COURT OF APPEALS, DIVISION I
 STATE OF WASHINGTON
 2010 DEC 27 PM 1:11

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ORIGINAL

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I. INTRODUCTION TO REPLY

There are two separate issues in this case. First, did Kelly Sutherland, one of Respondent U.S. Bank's attorneys, informally appear in this lawsuit and was therefore entitled to notice of the Association's motion for default. Second, should the judgment be vacated under CR 60(b)(1) and the White test for U.S. Bank's "mistake, inadvertence, surprise and/or excusable neglect."

As to the first issue, there is no question that Mr. Sutherland's contacts with Appellant Emerald Gardens Condominium Owners Association's (the "Association") attorney were all pre-litigation. Under Washington law, pre-litigation contacts cannot constitute an informal appearance. The cases cited by U.S. Bank where this Court found that attorneys informally appeared involved attorneys who made post-litigation contacts with the express purpose of appearing in the lawsuit. That did not happen in this case.

Turning to the second issue, under the first two elements of the White test, U.S. Bank must show (1) substantial evidence of a prima facie defense to the Association's claim that U.S. Bank has no interest in the real property that is the subject matter of this lawsuit and (2) that its failure to appear was the result of "mistake, inadvertence, surprise and/or excusable neglect."

To show a prima facie defense, U.S. Bank claims it was entitled to be named in the Association's 2007 foreclosure lawsuit. U.S. Bank claims that the Association had notice of U.S. Bank's interest in the property before the Association recorded its Lis Pendens. U.S. Bank rests its argument on the fact that a prior recorded Notice of Trustee's Sale had language in its text that U.S. Bank had been assigned the Deed of Trust that the Association was seeking to eliminate in the lawsuit.

However, the record is clear that U.S. Bank did not have the Deed of Trust or any interest in the property at the time the Notice of Trustee's

Sale was recorded or when the Association's Lis Pendens was recorded. U.S. Bank did not obtain the Deed of Trust until June 1, 2007 and did not record the Assignment of Deed of Trust until June 15, 2007. Under Washington's Lis Pendens statute, U.S. Bank's interest was therefore subject to the outcome of the 2007 foreclosure lawsuit, which eliminated its Deed of Trust. Furthermore, under Washington recording statutes, the prior recorded Notice of Trustee's Sale cannot simultaneously operate as an Assignment of Deed of Trust, which is required to transfer the Deed of Trust and to give third parties notice of same.

With respect to whether U.S. Bank has met its burden to show "surprise, inadvertence, mistake and/or excusable neglect," it offers no evidence as to what happened to the summons and complaint after it was served with process in this lawsuit. The only evidence offered by U.S. Bank for why it did not appear is because "U.S. Bank uses numerous outside counsel to handle its matters, it took several weeks before the quiet

title pleadings were properly routed to [its attorney's] office." CP 18, 24. This is inexcusable neglect.

As a result, the Association respectfully requests that this Court reverse the trial court's order vacating the quiet title decree entered in this case.

II. REPLY ARGUMENT

A. U.S. Bank did not informally appear in this action.

1. Standard of Review

The Association agrees that, generally speaking, the standard of review for whether a party has substantially complied with the appearance requirements is an abuse of discretion.¹

However, the issue presented here is more specific. The issue here is whether a party can be deemed to have appeared solely through pre-litigation contacts, which the Supreme Court has specifically ruled cannot be done as a matter of

¹ Brief of Respondent, at p. 11.

law. Morin v. Burris, 160 Wn.2d 745, 758, 161 P.3d 956 (2007). Therefore, the standard of review is de novo.

2. Pre-litigation contacts alone do not constitute an informal appearance.

The Washington Supreme Court has adopted the brightline rule that “parties cannot substantially comply with the appearance rules through pre-litigation contacts.” Morin, 160 Wn.2d at 757. “The defendant must go beyond merely acknowledging that a dispute exists and instead acknowledge that a dispute exists in court.” (Emphasis added.) Id at 756. Showing a mere intent to defend, whether shown before or after a case is filed, is not enough to appear. Id.

Subsequent to the seminal case of Morin, this Court stated that “the test for whether a party’s conduct constitutes an informal appearance is not the number of contacts made by the party, but whether the party, after the suit has commenced, has shown intent to defend in

court." (Emphasis added.) Sacotte Construction, Inc. v. National Fire & Marine Ins. Co., 143 Wn. App. 410, 416, 177 P.3d 1147 (2008).

There can be no question that U.S. Bank did not formally appear under this standard. Mr. Sutherland's contacts with the Association's attorney were solely pre-litigation. In fact, they occurred almost three months before U.S. Bank was served with process and nearly four months before this lawsuit was filed in court. As a matter of law, these contacts do not constitute an informal appearance in this action.

U.S. Bank relies heavily on Sacotte in support of its contention that it informally appeared. In that case, Sacotte Construction Inc. ("Sacotte") sued one of its subcontractor's insurance companies National Fire & Marine Insurance Company ("NFM") for failure to defend and obtained a default judgment. 143 Wn. App. at 413-14. Prior to obtaining the default order, NFM's attorney Jarrett Sale called Sacotte's attorney Greg Harper with the express purpose of

entering an informal appearance. Id. at 414. This Court held that the phone call was an informal appearance “because it was made after the complaint was filed specifically to avoid default with notice, showing NFM’s intent to defend.” (Emphasis added.) Id. at 416.

U.S. Bank also relies on Old Republic National Title, Ins. Co. v. Law Office of Robert E. Brandt, PLLC. 142 Wn. App. 71, 174 P.3d 133 (2007). In that case, attorney Robert Brandt filed a third-party complaint against the Andersons. Id. at 73. After the third party complaint was filed, the Andersons’ attorney, James Ihnot, called Brandt’s attorneys and informed them that he represented the Andersons in the action. Id. at 73. Brandt’s attorneys even filed a notice for hearing listing Ihnot as the attorney for the Andersons. Id. A couple weeks later, Brandt’s attorneys obtained a default order and default judgment against the Andersons without notice to Ihnot. Id. This Court ruled that taken together, the telephone call and the

notice of hearing showed that Ihnot informed Brandt's attorneys that he represented the Andersons "in this action." Id. at 75.

The facts of both Sacotte and Old Republic are distinguishable from those of this case. Above all, both of the attorneys' telephone calls to opposing counsel that constituted informal appearances were made after the lawsuits had commenced. The appearing attorneys also acknowledged the lawsuits were in court.

Indeed, in Sacotte, the entire purpose of attorney Sale's telephone call was to enter an informal appearance to prevent the possibility of a default being taken against his client. In Old Republic, attorney Ihnot called Brandt's attorneys to specifically inform them that he represented the Andersons in the action. He expressly acknowledged that there was a lawsuit in which he was appearing. Furthermore, Brandt's attorneys acknowledged that Ihnot represented the Andersons by listing him as attorney of record in a motion note filed with the Court.

None of these dispositive facts exist here. Mr. Sutherland's telephone call and letter to the Association's attorney came almost three months before U.S. Bank was served with process in this lawsuit and nearly four months before this lawsuit was filed. Mr. Sutherland made no reference to this lawsuit because it did not yet exist. His letter makes specific reference only to the Association's 2007 foreclosure decree. CP 122. In the body of his letter, he states that his client is disputing the sheriff's deed issued in that particular case. Id. Furthermore, Mr. Sutherland informed the Association's attorney that a motion to vacate the 2007 foreclosure decree would be forthcoming. However, nearly three years after that judgment was entered, a motion to vacate still has not been filed.

The facts of this case are much more analogous to those of Morin v. Burris. 160 Wn.2d 745, 161 P.3d 956 (2007). In that case, Sherri Morin was injured in a car accident in November 1998 when her car was rear-ended by a car driven

by a Jeffrey Barth. Id. at 750. On several occasions from December 1998 to November 1999, Morin had unsuccessful discussions with Keith Haupt, a claims adjustor for Barth's insurance carrier. Id. When Morin refused a settlement offer from the carrier, she retained attorney Stephen H. Good, Jr., who had unsuccessful settlement discussions with Haupt in June 2001. Id. Just as in this case, there was no further contact between the parties for several months before Good filed suit against Barth on November 2, 2001. Id. A default judgment was entered on December 3, 2002.

The Supreme Court upheld the default judgment despite the fact that there had been an abundance of pre-litigation contacts that focused on settling the ongoing dispute between the parties. In particular, the court ruled that the defendant had "not substantially complied with the appearance rules" and the court found "no action in [this] case acknowledging that the [dispute was] in court." Id. at 758.

Similarly, in this case, there were some contacts between the two parties pertaining to the Association's 2007 lawsuit. These contacts likewise included unsuccessful settlement discussions. However, the contacts were entirely pre-litigation. And just like in Morin, the communication between the parties stopped, never to be resumed, months before the actual lawsuit was filed.

To rule that Mr. Sutherland informally appeared would be to promote the exact problem that concerned the Morin Court when it stated that if pre-litigation contacts were to constitute an appearance, then it "would permit any party to a dispute . . . to simply write a letter expressing intent to contest litigation, then ignore the summons and complaint or other formal process and wait for the notice of default judgment before deciding whether a defense is worth pursuing." Morin, 160 Wn.2d at 757.

That is the type of behavior that U.S. Bank wants this Court to allow. U.S. Bank wants this

Court to disregard the fact that it was properly served with process in Seattle and did not respond. It wants this Court to hold that the onus is on the plaintiff to make sure that a defendant properly appears rather than on the defendant or the defendant's counsel. Above all, it is really asking this Court to make a ruling contrary to the Supreme Court's 2007 Morin ruling (and this Court's subsequent formulation of the informal appearance requirements in Sacotte and Old Republic) and hold that a couple of contacts between attorneys months before a lawsuit exists meets the informal appearance requirements.

However, the law is well-settled and clear. U.S. Bank did not informally appear nor was it entitled to notice of the Association's default motion. The trial court's ruling that it was entitled to notice of the default motion should be reversed.

B. U.S. Bank does not satisfy the first two elements of the White test to vacate a default judgment under CR 60(b)(1).

1. U.S. Bank does not have a meritorious defense to the Association's claims.

U.S. Bank claims it was a necessary party to the Association's 2007 foreclosure lawsuit and, since it wasn't a named defendant, the foreclosure decree is void.² U.S. Bank claims it was a necessary party because the Association had constructive notice of U.S. Bank's interest before the Association recorded its Lis Pendens. The basis of U.S. Bank's claim is that a Notice of Trustee's Sale was recorded with the King County Recorder on April 3, 2007 (CP 82) before the Association recorded its Lis Pendens on May 18, 2007 (CP 177) and that the text of the Notice of Trustee's Sale stated that the Deed of Trust "was assigned by AAMES FUNDING CORPORATION DBA AAMES HOME LOAN to U.S. Bank, N.A." This language comes in the body of the text, toward the bottom of the first page.

² Brief of Respondent, p. 19

- a. The language in the Notice of Trustee's Sale that U.S. Bank was Assigned the Deed of Trust is not correct.

U.S. Bank's claim that the language in the Notice of Trustee's Sale recorded on April 3, 2007 gave notice to the Association of U.S. Bank's interest in the property is meritless because U.S. Bank had no interest at that time. The Snohomish County Auditor's public records and the record before this Court demonstrate that U.S. Bank did not obtain the Deed of Trust until after the Association recorded its Lis Pendens.

Instead, Aames Funding Corporation ("Aames"), the party named and served in the Association's 2007 foreclosure lawsuit, had the Deed of Trust at the time the Notice of Trustee's Sale was recorded. It wasn't until May 25, 2007 (almost two months after the Notice of Trustee's Sale was recorded) that Aames assigned the Deed of Trust to a third party, Ocwen Loan Servicing ("Ocwen"). The "Corporate Assignment of Deed of Trust" assigning "all beneficial interest" in the

Deed of Trust from Aames to Ocwen was recorded under Snohomish County Auditor's File Number 200706150783. CP 76.³

Ocwen then assigned the Deed of Trust to U.S. Bank on June 1, 2007. A "Washington Assignment of Deed of Trust," dated June 1, 2007 was recorded under Snohomish County Auditor's File Number 200706150784. CP 78. The Assignment of Deed of Trust provides in pertinent part:

This ASSIGNMENT OF DEED OF TRUST is made and entered into as of the 1st day of JUNE 2007, from OCWEN LOAN SERVICING, LLC . . . to U.S. BANK N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF MASTR ASSET BACKED SECURITIES TRUST, 2006-AM1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AM1

Id. The Assignment is signed by the Senior Vice President of Ocwen and acknowledged on that same day, June 1, 2007. Id. As a result, there is incontrovertible evidence that U.S. Bank did not have the Deed of Trust until June 1, 2007, long

³ The Deed of Trust was actually assigned by Accredited Home Lenders, who was successor in interest to Aames by way of merger. This is spelled out in the Corporate Assignment of Deed of Trust. CP 76.

after both the Notice of Trustee's Sale and the Association's Lis Pendens was recorded.

- b. U.S. Bank takes its interest subject to the outcome of the Association's lawsuit because the Association's Lis Pendens was recorded prior to U.S. Bank's Assignment of Deed of Trust.

In actions affecting title to real property, a party may file a Lis Pendens with the auditor of the county in which the property is situated. RCW 4.28.230. The statute goes on to provide in pertinent part:

From the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action.

(Emphasis added.) Id. In other words, recording of a Lis Pendens provides constructive notice to the world that a lawsuit affecting property is pending. Washington Real Property Deskbook,

Mortgages, § 20.14(4)(b). Persons who subsequently acquire an interest in the property do so subject to the property's ultimate disposition in the pending suit. Snohomish Regional Drug Task Force v. 414 Newberg Road, 151 Wn. App. 743, 752, 214 P.3d 928 (2009). Filing of the Lis Pendens serves to freeze the status of property in time – a party to the action in which the Lis Pendens is filed may not alter the outcome of the underlying action by transferring its interest in the property to another because the cloud on title follows the transfer. Id.

U.S. Bank did not acquire or record its interest in the property until after the Association's Lis Pendens was recorded. As a result, under the plain language of the statute, U.S. Bank took its interest subject to the outcome of the Association's 2007 foreclosure lawsuit, which eliminated the Deed of Trust.

U.S. Bank could have very easily prevented itself from being in this position. Had it simply checked the Snohomish County Auditor's public

records before accepting the Deed of Trust, as a reasonably prudent person would have, it would have discovered the Association's Lis Pendens and could have either refused the assignment or appeared in the lawsuit to defend its interest.

There is no question that Aames was the proper party to name and serve in the Association's 2007 foreclosure lawsuit, which is exactly what the Association did. Therefore, U.S. Bank has no defense, much less a meritorious defense, to the Association's claim that it has no interest in the property. The Deed of Trust it was assigned was eliminated by the Association's 2007 foreclosure lawsuit.

c. Even if the language in the Notice of Trustee's Sale was correct, it does not give notice of an Assignment of Deed of Trust under the recording statutes.

Washington law is clear that an assignment of a Deed of Trust constitutes a real property "conveyance." RCW 65.08.060. A "conveyance" of real property shall be by deed. RCW 64.04.010. A "deed" must be in writing, signed by the party

bound by same and acknowledged by that party before a notary public. RCW 64.04.020. To be effective against third parties, the conveying deed itself must be recorded. RCW 65.08.070.

The Notice of Trustee's sale clearly does not meet the statutory requirements to validly assign the Deed of Trust. For example, it was not signed by the party transferring the beneficial interest or acknowledged by a notary public. Instead, it was merely signed by a third party who has no apparent authority to transfer the beneficial interest. At most, the reference to U.S. Bank having the Deed of Trust was merely third-party hearsay. (This is to say nothing of the fact that the document is entitled, indexed and recorded as a Notice of Trustee's Sale and not an Assignment of Deed of Trust.)

As discussed above, months after the Notice of Trustee's Sale was recorded, an Assignment of Deed of Trust (CP 78) was executed transferring the Deed of Trust from Ocwen to U.S. Bank. Unlike the Notice of Trustee's Sale, the Assignment of

Deed of Trust meets the real property conveyancing requirements as it was a written instrument, signed by the party transferring the beneficial interest and acknowledged.

To be effective against third parties, the Assignment of Deed of Trust itself must be recorded. RCW 65.08.070. The Assignment of Deed of Trust was recorded on June 15, 2007. As a result, it was not valid against the Association (or anyone else) until that day. Because it was recorded after the Association recorded its Lis Pendens on May 18, 2007, U.S. Bank took its interest subject to the outcome of the Association's foreclosure lawsuit.

2. U.S. Bank has not established "mistake, inadvertence, surprise, and/or excusable neglect."

U.S. Bank spends the vast majority of its argument discussing Hardesty v. Stenchever. 82 Wn. App. 253, 917 P.2d 577 (1996). In that case, the State of Washington was sued and a default judgment was obtained. Id. at 258. The Court granted the motion to vacate, reasoning that it

was reasonable for the Assistant Attorney General to mistakenly believe that outside counsel would be served with process and would handle the case. Id. at 582.

After discussing Hardesty, U.S. Bank sums up its argument as to why it established "mistake, inadvertence, surprise, and/or excusable neglect," by saying it was reasonable for U.S. Bank to believe it was represented by Mr. Sutherland in this lawsuit and that a default would not be taken without notice.⁴

However, unlike the defendant in Hardesty, U.S. Bank does not offer a single fact to support that it held those beliefs. There is no affidavit or declaration from a U.S. Bank employee stating that (1) U.S. Bank believed Mr. Sutherland represented U.S. Bank in this lawsuit or (2) U.S. Bank believed a default would not be taken without notice. Nor did U.S. Bank offer any sort of business record that might tend to prove that

⁴ Brief of Respondent at p. 27

this was the case. There is simply nothing at all in the record to support this claim.

U.S. Bank also argues that the Association's counsel should have given notice to Mr. Sutherland prior to obtaining a default judgment.⁵ However, this has nothing to do with whether U.S. Bank acted with excusable neglect. Rather, this goes to whether Mr. Sutherland informally appeared, which is a separate issue.

U.S. Bank also does not address that it admitted to the trial court that the reason it did not appear is that it "uses numerous outside counsel to handle its matters, it took several weeks before the quiet title pleadings were properly routed to [its attorney's] office." CP 18, 24. There is no precedent supporting the notion that it's excusable neglect for a defendant to take several weeks to route the lawsuit paperwork to its attorney. To allow otherwise would be to give U.S. Bank its own appearance rules due to its size.

⁵ Brief of Respondent at p. 26-27.

The record is clear. U.S. Bank's failure to appear did not result from any misplaced belief that Mr. Sutherland would appear in the lawsuit. Instead, it simply did not get the paperwork to him fast enough. This is inexcusable neglect.

III. CONCLUSION

U.S. Bank did not appear in this lawsuit and U.S. Bank was therefore not entitled to notice of the Association's default motion. Furthermore, U.S. Bank does not have a meritorious defense to the lawsuit nor does it offer any evidence constituting a valid excuse for not appearing. The Association respectfully requests that this Court reverse trial court's order vacating the quiet title decree.

Dated this 23rd day of December, 2010

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Certificate of Service

Christina R. Berry, under penalty of perjury under the laws of the State of Washington, declares as follows:

That a true and correct copy Appellant's Reply Brief was caused to be delivered via legal messenger on the date signed below to counsel for the Respondent as follows:

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