

72623-4

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Case No. 72623-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

BIG BLUE CAPITAL PARTNERS OF WASHINGTON, LLC.,

Appellant,

v.

McCARTHY & HOLTHUS, LLP, et al.,

Respondents

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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Once again, the Respondent is confusing Big Blue Capital Partners of Washington, LLC (“BBCPW”) with Big Blue Capital Partners, LLC, which has different managers, a different business model, which purchased property in a different manner than in the instant case, and whose actions were taken well before BBCPW ever existed.

Regardless of the purchase price, BBCPW holds a valid fee title to the property and has rights that have been violated through this foreclosure process. Not only did BBCPW purchase the property from the trustee of the Riggles' bankruptcy, it purchased all claims that the Riggles had and which were stated on the Riggles' amended schedules.

BBCPW stands firm in its assertions that the trial court erred when it dismissed the claims of BBCPW. There were a multitude of problems with the foreclosure which are well spelled out in the opening brief and in the record.

BBCPW has valid and meritorious claims against QLS and QLS-WA and its attorneys, M&H, who was also an acting party in the foreclosure process, each of which had a hand in preparing, procuring and recording documents containing false information which has injured BBCPW. A clouded title is a valid damage. As is QLS-WA, QLS, and

M&H's interference with BBPCW's business expectation of being able to improve the property and then resell and convey it via a Statutory Warranty Deed without being subject to the potential liability of a future lawsuit caused by QLS-WA, QLS, & M&H's recording of documents containing false information.

Although this type of injury and damage can be difficult to mathematically quantify this Court has held that the injury or damage "*need not be proven with mathematical certainty...*" in Shinn v. Thrust IV, Inc. 786 P.2d 285, 56 Wn.App. 827 (1990)

It is well settled that damages need not be proven with mathematical certainty... Where damages cannot be ascertained with certainty, the trial court must exercise its sound discretion. (citing Interlake Porsche & Audi v. Bucholz, supra 45 Wn.App. at 510, 728 P.2d 597.)

BBPCW, in the case at bar, shows the clouds on title that M&H, QLS, and QLS-WA have created by preparing, procuring, and recording documents have created "reasonable doubt" as to who the real party of interest is under the Deed of Trust. This "reasonable doubt" is injurious to BBPCW because there exists the "reasonable probability of a lawsuit...on resale". Hebb v. Severson, 32 Wn. 2d. 152, 201 P.2d 156 (1948).

Respondents continue to ignore this.

In its split decision, the majority in Frias v. Asset Foreclosure Services, Inc., 181 Wn.2d 412, 239 (2014) held that the DOTA did not provide for a damages claim where no sale has occurred, however the findings of this court in Walker¹ related to a CPA claim relying upon Panag were upheld in Frias:

“In Panag v. Farmers Insurance Co. of Washington,⁶⁸ [Footnote 68: See Panag, 166 Wn. 2d at 62] our Supreme Court held, “[T]he injury requirement is met upon proof the Appellant's ‘property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.’ **Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury...**” Walker at 320.

Frias, supra.

BBPCW’s intent is to improve the property (CP 881 ¶ 2), clear title and then resell the property (CP 468 ¶ 5; CP 508 ¶ 3; CP 881 ¶3). Under Hebb, supra. BBPCW has an obligation to “*make and convey a good or marketable title*” to a prospective purchaser. M&H, QLS, and QLS-WA’s actions have caused BBPCW to lose time, incur investigative and litigation costs in order to determine who the real party of interest under the Deed of Trust is in order to ensure the clearing of that purported encumbrance. These are valid damages.

¹ Walker v. Quality Loan Service Corp., 308 P.3d 716, 176 Wn.App. 294 (Wash.App. Div. 1 2013)

II. FACTS

A. Underlying Loan

Mr. Riggle may have in fact stopped making his payments.

However, only the lender can instruct the Trustee to invoke its power of sale under the Deed of Trust. QLS- WA is acting on behalf of a party other than the lender, because only a "Note Holder" as defined in the Note² itself can be the lender/beneficiary of the Deed of Trust with the power to instruct the Trustee. And Nationstar has already declared to BBCPW that it does not hold the Note. Therefore, it is not a Note Holder who can instruct QLS-WA to do anything.

B. Foreclosure

As detailed in BBCPW's response to the Motion for Summary Judgment, Nationstar was not the beneficiary or the **holder** of the Note. QLS -WA claims it was appointed successor trustee under the Deed of Trust; BBCPW claims that QLS-WA could not have been appointed. This remains a material issue of disputed fact, which should have supported denial of summary judgment. As one of the bases for granting summary

² CP 420 §1 ¶ 2 "...Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the Note Holder".

judgment is that there are no disputed issues of material fact, the granting of QLS-WA and QLS's summary judgment was in error.

The foreclosure action was begun and continued without authority. QLS-WA and QLS were made aware of this by a letter from BBPCW and chose to ignore this information, do no investigating of the issues contained therein, and instead continued to act without authority. Not only that, QLS-WA has an obligation to act in good faith. When provided with the information that Nationstar disclosed to the current owner of the property, BBPCW, that Nationstar is not the Note Holder or Owner, that should and according to the Washington Supreme Court in Lyons, 336 P.3d 1150, (2014) does trigger a duty on QLS to investigate whether it did, indeed, have authority.

Whether Aurora/Nationstar "held the note" is a disputed issue of material fact. Again, basis for denial of summary judgment. The fact that "Nationstar serviced the loan for an investor" evidences BBPCW's argument that QLS-WA was advancing a foreclosure on behalf of the wrong party, Nationstar. QLS-WA advanced the foreclosure claiming that Nationstar is the Beneficiary. Even if Nationstar was in possession of the Note, that possession would have been on behalf of the "Investor", making the "Investor" the Beneficiary.

When BBCPW notified QLS-WA of these issues related to Nationstar denying it was the holder of the note, under Lyons, *supra*, QLS-WA had a duty to verify the veracity of the beneficiary declaration **before initiating** the Trustee Sale to comply with QLS-WA's statutory duty of good faith.

C. Appellant's Purchase of the Property

The facts in the record, specifically the Trustee's Deed recorded in King County records³, show that Appellant not only acquired its fee interest by deed in the property but also all "*... appurtenances and also all the estate which the debtor had at the time of filing the petition including any amendments in bankruptcy by the debtor(s) in said United States Bankruptcy Court for the District of Oregon, in said premises, and also any and all of the estate therein which the trustee has or ha[d] the power to convey or dispose of as trustee in the aforementioned bankruptcy estate. This conveyance is intended to transfer all legal and equitable interest, claims, and rights of the Bankruptcy Estate...*" clearly show that Appellant is the successor in interest to the Trustee of the Bankruptcy Estate. The debtor clearly possessed and identified potential claims related to the property and the encumbrances thereto.

3 CP 8-9, CP 485 ¶ 2, CP 491

Because Mr. Riggle amended his schedules and disclosed the potential rights and claims related to the property and the encumbrances purported to encumber title to the Property⁴ the Trustee was able to administer those rights and claims as he saw fit. The Trustee assigned, conveyed, and transferred to Appellant in an arms-length, for value, bone-fide transaction that was approved by a Federal Bankruptcy Judge, even after a purported creditor objected to the sale related to another of Mr. Riggle's scheduled properties. This transaction not only conveyed, assigned, and transferred the debtor's fee interest in the property, but also *"all the rights the estate holds to pursue all available claims related to the disputes and uncertainties regarding the rights of lien holders of the Real Property"* including any and all conceivable, future, non-possessory, contingent, speculative, and derivative, rights and claims of the debtor's related to the Property and/or the encumbrances purported to encumber title to the Property. Had the Trustee of the Bankruptcy Estate chosen to abandon and not to administer the disclosed claims rights and causes of action those claims rights and causes of action would have reverted back to the Debtor upon closing of the bankruptcy, however here the rights claims and causes of action including contingent, speculative, and

⁴ CP 496,499

derivative became rights and claims of Appellant by way of the transaction with the Trustee.

BBCPW's purchase was not subject to the mortgage lien, it was a purchase of the property **and** the rights of Riggle without clearing the encumbrances due to existing disputes and concerns related to the validity that BBCPW intended to resolve prior to clearing the liens, to ensure clean, clear, marketable, fully insurable title to the property. Such assurance would then allow BBPCW to resell the property through a Statutory Warranty Deed at a later date and make a profit from that sale. (See, CP 884¶B)

D. Lawsuit and Dismissals

M&H is integrally involved with the foreclosure. The original "referral" was sent to M&H and QLS-CA , **not** to QLS-WA. Many items of discovery responses use QLS/QLS-QA/M&H interchangeably and shared M&H/QLS/QLS-WA employees conduct activities related to the foreclosure. See QLS-WA/QLS discovery response @ CP 756.

E. About the Appellant

First of all, the Respondent is outright WRONG. The appellant is not an affiliate of Big Blue Capital Partners, LLC. Furthermore, BBCPW did **not** start in Oregon, nor was BBCPW or its manager in any way

involved in the transactions discussed in the two Oregon cases cited by Respondents. Additionally, the method of acquisition of that Oregon company is markedly different from the methods upon which BBCPW acquired not only the property, but also the rights of both Mr. Riggle and the bankruptcy trustee.

Respondents misrepresent BBCPW's business model. BBCPW acquires property in order to resell those properties for a profit at a future date. BBCPW's business model was also created with the intent of discouraging neighborhood blight that exists because distressed property owners who file for bankruptcy typically lack the capacity to effectively manage real property, causing the properties to fall into significant disrepair. Those properties deteriorate even further, due to the lengthy delays (commonly years) before Note Holder's, foreclose and then additional, months and commonly years, before those properties are resold. Unfortunately, it is often the case that title available on property acquired from a bankruptcy trustee is not of pristine quality and when property title issues are identified, as was here, entities such as BBCPW, in addition to acquiring just the physical rights and title to the property, the entity will acquire the rights of the previous property owner (here, the Riggles), and subsequently the bankruptcy estate, via the bankruptcy

Trustee, so as to clear up those title issues and restore the property title to a clean, clear, and marketable status.

Furthermore, it is a red herring for the Respondent to focus this court on the Appellant's alleged business model, in essence launching a character assassination upon the Appellant and steering this Court away from the true issues in this case -- did the purported foreclosure trustee, QLS-WA, advance a non-judicial foreclosure process on behalf of the incorrect party, and furthermore, did QLS-WA prepare, procure, and then record documents containing false statements against the title to BBPCW's real property.

It is also a misstatement of the facts that Big Blue Capital Partners of Washington, LLC v. Northwest Trustee Services No 44810-6 II, "the underlying facts are almost identical to the present case." In that case, Division II upheld **solely** the dismissal of BBPCW's **pre-foreclosure** damages claimed under DoTA relying upon Frias v. Asset Foreclosure, supra. In that case, BBPCW had not brought a claim for damages under CPA and further, Division II declined to address anything related to BBPCW's errors regarding declaratory relief claims or its oral motion to join additional parties on the basis that Division II claimed BBPCW did not present any argument on those issues. It has been clearly decided by

the Washington Supreme Court that any claims for pre-foreclosure damages cannot be brought under the Washington Deed of Trust Act itself but must be brought on a case by case basis under the Consumer Protection Act, as BBCPW has done here. Therefore, the Division II case contained separate claims and the property was purchased under different terms and is a different scenario than presented in this case.

BBCPW does not attempt to capitalize on a ruse or delay foreclosure through litigation. BBCPW's intentions are to acquire properties, improve the value, and resell those properties by Statutory Warranty Deed, thereby making a profit. QLS-WA and its cohorts (QLS-CA and M&H) have interfered in BBCPW's ability to do so by advancing a non-judicial foreclosure in the name of a party who has **admitted** it is **not the owner/holder of the note** and further, QLS-WA, *et. al.* have attempted to profit erroneously from doing so. In their attempts, the Respondents have further damaged BBCPW by recording documents containing false statements against the property title.

III. ARGUMENT

A. Foreclosure Was Not Advanced Pursuant to Law

The crux of this suit is that QLS-WA, *et. al.* attempted to foreclose in the name of Nationstar (whom QLS-WA, *et. al.* purported was the

beneficiary of the Note). Nationstar itself has previously stated in writing that it is not the beneficiary directly to BBCPW in response to its qualified written request and Notice of Disclosure. Therefore, QLS-WA, et. al. could not have been acting pursuant to the instructions of the beneficiary and anything that QLS-WA et. al. did under that alleged authority was NOT pursuant to law. BBCPW provided this information to QLS-WA, et. al. who continued to pursue a foreclosure. According to Lyons, the Trustee has a duty to investigate. Clearly when put on notice by BBCPW QLS-WA should have investigated and had a duty to investigate before continuing its actions. It did not.

i. Trustee was Not Lawfully Appointed

Nationstar could not have appointed QLS-WA as Trustee *because Nationstar itself declared it was not the beneficiary*. Therefore QLS-WA could not have been lawfully appointed. There are disputed issues of material fact. Under summary judgment standards, the evidence must be taken in the light most favorable to the non-moving party, here BBCPW. CR56. This was not done so by the trial court.

Further, the evidence relied upon by the Respondents is riddled with hearsay and conflicting declarations. See, CP 478 -479; CP 877, 878. If there, in fact, is a custodian holding the note, that custodian would

purportedly be holding the Note on behalf of the investor (for which no evidence in the record exists, other than that supplied by BBCPW), Nationstar is **not** the holder by way of a custodian, the Investor is. CP 465 ¶2, lines 16-21. The case cited by QLS-WA, Cashmere Valley Bank v. Department of Revenue, 181 En.2d 662, 634, 334 P.3d 1100 (2014) is discussing the certificate holders who have purchased securities from the Issuer of a REMIC trust, not the Trustee of the Trust, in this case, Deutsche is the Trustee of a REMIC trust, not a certificate holder and Nationstar is neither.

ii. Notice of Sale

The Notice of Trustee Sale recites information that is false and QLS-WA had a duty to ensure the truthfulness and accuracy of the statutory form it prepares. The statutory forms it has prepared here contain false information that has been recorded against the Property thereby clouding the title.

iii. Defect in Foreclosure/Cloud on Title and Trustee Bias

QLS-WA violated its duty of good faith by failing to investigate, even at a cursory level, the issues disclosed by Big Blue Washington in the Notice of Disclosure. See Lyons at 1149. In that case, the conflict over the actual Beneficiary was brought to the attention of NWTS but there was

no evidence that anyone at NWTS investigated this conflict. The Lyons court held that it was a material issue of fact whether NWTS investigated the status of the loan and had determined the proper beneficiary when the matter was referred to NWTS's attorney. The Lyons court further stated that such issues could indicate a lack of impartiality and therefore were a violation of NWTS's duty of good faith. According to the Washington Supreme Court the Lyons' claim should have survived summary judgment and not been dismissed summarily.

The same factual scenario exists here.

B. Standing

This issue has been exhaustively briefed by Appellant in its Opening Brief and was in front of the trial court. See CP 470-473; CP 8-9; CP 869-871; 872-873. Further, if BBCPW has no standing to have these issues adjudicated then, taking the inferences in the light most favorable to the non-moving party, BBCPW. Those inferences being that QLS-WA, QLS-CA and/or M&H **have** violated Washington law, then **no party** could adjudicate these issues and hold their feet to the fire, so to speak. That is not justice. The Washington Supreme Court has in a case that QLS-WA was a Defendant in opined as much. See Klem v. Wash. Mut. Bank, 176 Wn. 2d 771, 792, 295 P.3d 1179 (2013). “*This no-harm,*

no-foul argument again reveals a misunderstanding of Washington

Law... ”

BBCPW is not trying to assert new rights, it is asserting both its rights as the current holder of the deed, and the rights it acquired -- the rights of Mr. Riggle and the Riggle's bankruptcy estate.

It is unreasonable and per se unconstitutional to allow the Respondents to deprive BBCPW of its real property interests acting on behalf of a party who does not possess authority without due process. Wash. Const. Art I, Sect. III.

C. Claims Against Trustee

BBCPW has argued that QLS-WA and QLS-CA, relied upon a chain of documents blindly created based upon an electronic referral, to M&H, of various information related to the DoT and that QLS-WA lacks authority to take the actions lawfully required to complete a non-judicial trustee sale. This is because among other issues pled in BBCPW's complaint, QLS-WA and QLS-CA were not lawfully appointed and the DoT itself, as a matter of law, is an illegal and unenforceable document.

QLS-WA and QLS-CA wholly ignore the fee interest possessed by BBCPW, instead Respondent continues to cite out of jurisdiction cases that are unrelated to the legal and factual matters at issue in this case.

QLS-WA further asserts that the grantee of mortgaged property who takes fee ownership of property “subject to a mortgage” cannot dispute the mortgage’s validity”, citing Brummett v. Washington’s Lottery, 171 Wn.App. 664, 288 P.3d48 (2012) (standing of a private citizen to sue the Washington Lottery’s advertising agency). Newport Yacht Basin Ass’n of Condo Owners v. NW Inc., 168 Wn. App. 86, 285 P3d 70 (2012) is a case regarding the standing of condo owners to challenge a real estate contract by their unincorporated association.

As demonstrated above, QLS-WA, et. al’s cases are inapposite and irrelevant to the facts that exist here, because none of the cases confront or deal with the issue of whether the Property or interest holders possess similar interests as what BBCPW had acquired: its fee simple interest in the Property and in addition has obtained all legal and equitable interests, whether known or unknown, that the bankruptcy debtor possessed at the time they filed for bankruptcy. To say that a person cannot have determined the accuracy of a purported security interest effecting their Deed or to say that a person cannot have determined the authority of another who is aggressively attempting to deprive the property owner of its rights has no recourse would be in direct violation of the Deed of Trust Act’s second and third basic objective “...*Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.*” See Bain v. Metro Mortgage Group, Inc., 175 Wn2d 83, 285 P.3d 34 (2012), QLS-WA’s arguments would also be to bar BBCPW from being

able to invoke the protections provided under the Washington Constitution Article I Section III .

In addition, both the Oregon and federal district court cases QLS-WA, et. al cite are also inapposite and are of no precedential value. These cases cited by QLS-WA, et. al rely on the law of other jurisdictions, which the Washington Supreme Court in Bain v. Metro Mortgage Group, Inc., 175 Wn2d 83, 285 P.3d 34 (2012), instructs are of no precedential value in construing the Washington Deed of Trust Act, because such cases construe and rely on statutes markedly different from this state's Deed of Trust Act.

i. Claim #1 Deed of Trust Act

The trial court has also misinterpreted the DOTA stating that the DOTA's protections are limited to "borrowers" when in fact the DOTA provides a much wider description of its application both in the duty of good faith that is owed by trustees under RCW 61.24.010 "*The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.*" (emphasis added). The DOTA further defines the term "grantor" in the subsections of RCW 61.24.005:

(7) Grantor: means a person, or its successors, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations.

(11) Person: "means any natural person, or legal or governmental entity" who have interests in a property subject to non-judicial foreclosure proceedings.

Whereas, BBPCW is undeniably the “successor” to David Riggle.
(CP 471 Ln 13 – CP 473 Ln 2) this definition clearly includes BBPCW.

ii. Claim #2 - Consumer Protection Act

BBCPW stands by its claims for damage pursuant to the Washington Consumer Protection Act as stated in BBCPW's Complaint for Damages at CP 35-38. This matter is fully briefed in the Opening Brief and will not be further expounded upon.

iii. Claim #3 - Declaratory Relief

The absence of a pending trustee sale does not change the dispute of purported rights of QLS-WA or that QLS/QLS-WA continues its threat to “*resume a foreclosure on behalf of Nationstar.*” (CP 404 Ln 6-7); this court’s determination as to whether M&H, QLS, and/or QLS-WA have authority to act as trustee will be final and conclusive determination of Defendant’s authority to deprive BBPCW of its real property interests.

As stated, Appellant’s declaratory judgment claim does not require any showing of an injury to meet the elements to establish a right to declaratory relief those elements are: (1) an actual, present, and existing dispute...(2) parties having genuine and opposing interests...and (3) a judicial determination which will be final and conclusive. Lechelt v. City of Seattle, 32 Wn.App. 831, 835-46, 650 P.2d 240, 243 (1982), *citing*

Ronken v. Board of County Com'rs, 89 Wn.2d 1 (1977); Appellant has shown that there is a dispute: QLS/QLS-WA claim to possess authority to act as trustee and initiate non-judicial proceedings, whereas, Appellant claims QLS/QLS-WA do not have such authority; Appellant and QLS/QLS-WA clearly have opposing interests – QLS/QLS-WA seek to deprive Appellant of its interests in the property which Appellant wants to retain; this court's determination as to whether QLS/QLS-WA have authority to act will be final and conclusive determination of QLS/QLS-WA authority to deprive Appellant of its real property interests.

It is also not only common knowledge, but has a fact that has been identified by the legislature in the recent amendments to the DOTA that maintaining a property in a prolonged foreclosure, as QLS/QLS-WA have done here, negatively impacts the marketability. This is a valid damage.

iv. Claim #4 - Injunctive Relief

The Court in its order points out that there currently is no pending sale to be enjoined. This is undisputed, however BBCPW has attempted to make it clear that BBCPW is not seeking to enjoin a currently scheduled trustee sale under the Deed of Trust Act. BBCPW has requested at all times the enjoinder of QLS/QLS-WA from acting in a capacity that it lacks authority to act in. The final adjudication of BBCPW Declaratory Relief would make the need for an injunction moot either way summary

judgment is not appropriate. Counsel for QLS/QLS-WA in open court admitted his and his clients' knowledge of, the existence of an "investment trust" who purportedly owns the Note. This argument in addition to the fact that neither QLS-WA nor QLS-CA possessed any proof that Nationstar was the owner or holder of the Note when it issued the Notice of Trustee Sale causes the action of issuing the Notice of Trustee Sale and recording it in the King County public records to be a clear misrepresentation that Nationstar is, or was at that time, the beneficiary of the deed of trust. This misrepresentation has clouded BBCPW's real property title, and the scheduling the trustee sale caused injury to BBCPW by limited BBCPW's ability to enter into its expected discussion with the real owner of the note so that BBCPW could seek a solution to fully clear title, then resell the property. QLS/QLS-WA's actions, (1) purporting to be the validly appointed trustee, (2) scheduling of a trustee sale without proof that Nationstar was, in fact, the "owner of the note", (3) in violation of the duty of good faith under the DOTA; and (4) continuing to threaten to reinitiate the trustee are all unfair and deceptive acts prohibited by Washington statute. This in addition to each of the injuries caused by QLS and QLS-WA provides Plaintiff constitutional standing.

D. Claims Against M&H

First, BBCPW is not currently seeking to pierce the corporate veil or more accurately, the entity veil, because that doctrine has to do with the liability of the shareholders (or partners) of the entity in question for the acts of the entity itself, when the shareholders or partners have acted outside of and in derogation of the entity's independent status. BBCPW here is alleging that M & H has *independently*, albeit in the context of the same non-judicial foreclosure process, violated, and acted separate and apart from QLS-WA's breach of duties to BBCPW.

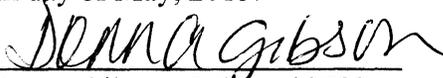
E. Attorneys' Fees on Appeal

Whereas BBCPW is the successor-in-interest to David Riggle, there is a contractual right for attorney's fees and damages, including upon appeal.

IV. CONCLUSION

This case should be reversed and remanded back to the trial court as there remain disputed issues of material fact that need to be determined and BBCPW should be allowed to fully litigate its claims against all parties.

Respectfully submitted this 11th day of May, 2015.



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