

No. 73522-5-I

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

MICAH SCHNALL,

Appellant,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, REGIONAL TRUSTEE
SERVICES, AND JOHN DOEs inclusive 1 through 20,

Respondents.

REPLY BRIEF OF APPELLANT

Appeal from King County Superior Court
Consolidated Case No: 11-2-19807-3 SEA
The Honorable Judge Bowman

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I. ARGUMENT

A. **This court should review the order denying Schnall's motion for summary judgment.**

1. **Trial court's errors would render a trial useless.**

The trial court's consideration of Campbell's testimony is an obvious error which would render a trial useless under RAP 2.3(b).

The trial court's finding that the errors in the Notice of Default did not serve as a basis to set aside the sale would render any subsequent trial useless, as there are no facts in dispute as to the language contained in the Notice of Default, and the trial court's error was therefore one of statutory interpretation.

2. **Motion for discretionary review was not warranted.**

Deutsche Bank argues that Schnall should have filed a motion for discretionary review. Resp. Br., p. 12. Such a motion was not warranted in this case. A notice of appeal of a decision which is not appealable will be given the same effect as a notice of discretionary review. RAP 5.1(c). Here, Schnall included both Orders in his Notice of Appeal. CP 389. In its consideration of the (appealable) order granting summary judgment in favor of Deutsche Bank, this Court must determine whether the trial court

erred. Since the issues in both orders are the same, the Court's consideration of a motion which would require the Court to determine whether there is obvious or probable error in the non-appealable order would be redundant with the Court's review of the appealable order.

Moreover, Deutsche Bank is not prejudiced by the absence of such a motion, as the purpose of the rule is to promote efficient use of judicial resources.

B. Schnall argued against the trial court's erroneous consideration of Campbell's testimony in his opening brief.

Deutsche Bank argues that since Schnall, in his opening brief, made an argument which relied on Campbell's testimony, that this means that Schnall did not assign error to the trial court. Resp. Br., p. 23. But Schnall's reliance on Campbell's testimony was purely *arguendo*. Nor was it necessary for Schnall to separately assign error to the denial of his motion to strike Campbell's testimony. Although a ruling on a motion to strike is discretionary within the trial court, a court cannot consider inadmissible evidence when ruling on a motion for summary judgment. IUI v. St. Paul Fire & Marine Ins. Co., 87 P.3d 774, 780 (2004). The admissibility of Campbell's testimony falls within the scope of the Issue of whether Deutsche Bank held the Note.

And even if Schnall should have made a separate assignment of error, Deutsche Bank cannot claim prejudice. Deutsche Bank admits that Schnall argued in his brief that Campbell's testimony was inadmissible. Resp. Br., p. 23, 28. Moreover, Deutsche Bank admits that the Campbell declaration testified to the contents of documents not in the record. Resp. Br., p. 28.

C. The trial court's consideration of Campbell's testimony is grounds for reversal.

Deutsche Bank argues that the trial court's ruling may be affirmed even without Campbell's testimony. Resp. Br., pp. 28-30.

1. Trial court was aware of Schnall's objection to Ortwerth's testimony.

Deutsche Bank argues that Schnall failed to file a separate motion to strike when Deutsche Bank cited the Ortwerth Declaration in its reply in support of its summary judgment motion. Resp. Br., p. 20. But while this may be true, it should not preclude a ruling on the merits.

Deutsche Bank admits that Schnall raised evidenciary objection to the Ortwerth Declaration in his reply in support of his own summary judgment motion. Resp. Br., p. 21. Judge Bowman heard both motions at the same time, and ruled on both on the same day. CP 396, CP 402. The

trial court was thus aware of Schnall's objection to Ortwerth's testimony when it granted summary judgment in favor of Deutsche Bank, even if Schnall's objection was not included in both sets of pleadings.

Given the degree of detail of Campbell's testimony with respect to facts relating to Deutsche Bank's possession of the Note, and the complete absence of attached records in blatant violation of CR 56(e), it is understandable that Schnall, in objecting to Campbell's testimony, might inadvertently overlook Ortwerth's comparatively small inadmissible statements, especially considering that Ortwerth's declaration included many attached records referenced by other statements in her declaration. Schnall's error is also understandable given that LCR 56 requires evidentiary objections to be included in the pleadings rather than in separate motions, and given the general complexity of handling simultaneous motions for summary judgment.

2. Ortwerth's testimony is inadmissible.

Deutsche Bank argues that "[p]aragraph 12 of the Ortwerth Declaration does not set forth any testimony regarding the content of documents that are not in the record" Resp. Br., pp. 27-28. But the statements in Ortwerth's declaration are "based upon [Ortwerth's] review of the documents and records regarding the Loan." CP 237 at 2. Thus,

each statement of fact in Ortwerth's declaration must attach the records from which the fact is drawn.

- a. Ortwerth's testimony regarding Deutsche Bank's possession fails to meet requirement of CR 56(e).

Ortwerth testified "The Trust has been the owner and holder of the Note at all times through the Schnall non-judicial foreclosure." CP 240 at 12. But Ortwerth failed to reference and attach the records from which this fact was drawn.

Deutsche Bank attempts to overcome this problem by arguing that "to the extent Paragraph 12 does identify a document, the Note was properly authenticated and before the Court in Paragraph 9 of the Ortwerth Complaint [sic]." Resp. Br., pp. 27-28. But examination of the Note itself does not provide evidence as to the date on which Deutsche Bank came into possession. The indorsements are not dated, nor is there any special indorsement evidencing negotiation to Deutsche Bank. CP 249. Thus, the source documents from which Ortwerth drew her fact regarding the time period of Deutsche Bank's possession are not in the record. See Melville v. State, 115 Wn.2d 34, 36 (1990). This hearsay testimony does not meet the requirement of CR 56(e). Id. The explicit, but plain standards of CR 56(e) must be complied with in summary judgment proceedings. Id.

b. Ortwerth's testimony regarding an alleged "indorsed copy" of the Note fails to meet requirement of CR 56(e).

Deutsche Bank argues that Ortwerth's testimony regarding the existence of a separately "indorsed copy" of the Note "is supported by adequate foundation which explains the basis for Ortwerth's assertions: her own personal review of Ocwen's business records." Resp. Br., pp. 26-27. This argument fails.

Ortwerth testified that Quicken Loans separately indorsed a copy of the note in addition to indorsing the original. CP 240 at 11. In support, Ortwerth attached a document which she asserts is a copy of an "indorsed copy." CP 240 at 11, CP 267. But said attached document does not itself provide evidence which supports her assertion - rather, it is simply a copy of the promissory note. Nothing in the copy she attached shows that it is a separately indorsed copy. The relevant records, i.e., those records from which Ortwerth drew her fact that the copy she attaches is a copy of a separately indorsed copy, are not before the court.

3. Ortwerth's testimony fails to establish disputed fact.

Deutsche Bank argues that Schnall's accusation regarding "false" testimony does not constitute a valid evidentiary objection. Resp. Br., p.

26. But Schnall's allegation that Ortwerth's statement is "false" is not an evidenciary objection; rather, it is a statement of fact.

Upon examination of the documents in question, reasonable minds could not disagree that the indorsement by Quicken Loans on the copy of the supposed "indorsed copy" is *identical* to the indorsement by Quicken Loans on the twice-indorsed copy, rather than being a unique indorsement as one would expect to see if the documents were in fact separately indorsed. CP 271, CP 249. Nor is any explanation given as to how or when Ocwen (or Ocwen's predecessor, Onewest Bank) came into possession of the "indorsed copy." Moreover, Boyle has not recanted his testimony that the single-indorsed copy he provided was of the original note. CP 406, CP 458. Thus, even if Ortwerth's statement were admissible, it would fail to establish, even as a disputed fact, that the copy of the note provided by Boyle was not a copy of the original note.

4. Campbell's inadmissible testimony was sole basis for trial court's finding regarding possession of the Note.

Deutsche Bank cites to State v. Bourgeois, 133 Wn.2d 389, 403 (1997), arguing that the trial court's error in considering Campbell's testimony was harmless because it was "of minor significance in reference to the overall, overwhelming evidence as a whole." Resp. Br., p. 29. But

the trial court recites, in its Finding regarding possession of the Note, facts which are stated only by Campbell, not by Ortwerth. CP 393 at 6, CP 323, CP 385, CP 236. Moreover, while the trial court ruled on the admissibility of Campbell's testimony, there is no indication that the trial court considered Ortwerth's testimony regarding Deutsche Bank's possession of the Note. CP 392 at 1. Nor is there any indication that the trial court considered Ortwerth's statement regarding an "indorsed copy."

Deutsche Bank points out that "the trial court did not rule on any evidenciary objection regarding the Ortwerth Declaration." Resp. Br., p. 20. But this argument cuts both ways. The trial court also did not rule on Schnall's evidenciary objection to Ortwerth's testimony in its order denying Schnall's motion, even though Deutsche Bank admits that Schnall did raise objection in his reply in support of his own motion. Resp. Br., p. 21. Since the trial court considered both motions simultaneously, the lack of discussion of the admissibility of Ortwerth's testimony in either order indicates that the trial court chose not to consider Ortwerth's testimony, or address its admissibility, because it found Campbell's testimony to be sufficient. Thus, far from being "of minor significance," Campbell's testimony was dispositive.

D. Burden of proof is on Deutsche Bank, not Schnall.

Deutsche Bank argues that none of the evidence regarding the possession of the note was provided by Schnall. Resp. Br., p. 15. Deutsche Bank further argues that Schnall had the obligation to present evidence that facts are in dispute. Resp. Br., p. 18. These arguments are not on point.

The DTA requires the public recordation of assignments. *See* RCW 61.24.040(1)(f) (Notice of Trustee's Sale) at I. Since the publicly recorded MERS assignment was invalid, Deutsche Bank had the burden of establishing that it held the note at the time it appointed the successor trustee. *Bain v. Metropolitan Mortg. Group, Inc.*, 285 P. 3d 34, 48 (2012). If Deutsche Bank has failed to do so, the burden does not fall on Schnall to independently provide his own evidence that some other party held the note.

E. Defective notice constituted a material, not technical, violation.

Deutsche Bank argues that Schnall cannot show a material statutory violation. Resp. Br., p. 37. In support, Deutsche Bank cites to *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108 (1988), which held that the "purpose of the notice of default is to notify the debtor of the amount he owes and that he is in default." Resp. Br., p. 39.

1. Notice of default must unambiguously identify to borrower the party with authority to modify loan.

In 2009, the legislature amended RCW 61.24.030, adding the requirement that a notice of default identify the owner of the obligation. ESB 5810-PL (2009) at Sec. 8(l). The legislature intended for borrowers to be unambiguously informed as to who owns their loan, in order to encourage borrowers to reach out to lenders to work on foreclosure prevention.

Part of the problem is that very few consumers, who are acting in good faith, can figure out who to negotiate with - who has the authority to negotiate with them. It's always somebody else's job. The banks have sold the loans to other folks; unusual investment instruments have been packaged together and sold and resold and repackaged, and even educated consumers have difficulty figuring out to whom they can speak to work something out. The servicers are responsible for collecting the debt, not solving the problem. What we would say is this: that the entity, before being able to foreclose, the entity that actually owns the loan, should have to prove that they have the authority to foreclose. Right now there's nobody with whom the buyer, the purchaser of the home, can negotiate. So we think that you have to actually be present to win, and actually show your lottery ticket, on the part of those folks who own the loans and present the paper as part of that foreclosure conversation and we think that that would help get to the bottom of a lot of the ambiguousness for consumers out there and would help them a great deal.

Senate Financial Institutions, Housing & Insurance
Committee Hearing,
Feb. 18, 3:30pm, at 1:09:15
<http://www.tvw.org/watch/?eventID=2009021150>

Unfortunately the biggest problem is that folks get depressed when they're in foreclosure and are very difficult to reach, so I think this is a good step. It'll cause people to get hold of lenders and they can work on the foreclosure prevention.

Id., at 1:17:30

2. Notice at issue failed to unambiguously identify party with present authority to modify and foreclose.

Here, the notice at issue informed Schnall that Deutsche Bank might be holder or become holder by way of future assignment. CP 299. This language failed to communicate unambiguously that Deutsche Bank was the present holder of Schnall's loan.

Moreover, an assignment of beneficial interest together with the Note, from MERS to Deutsche Bank, was subsequently publicly recorded. CP 293. Schnall could reasonably be expected to understand that the language on the Notice of Default was in reference to this assignment, and that Deutsche Bank had thus become the holder of the loan by way of the MERS assignment. But the MERS assignment was invalid, both prima facie and in fact.

MERS tracks ownership of mortgage-related debt, rather than holding debt itself. Bain, at 36. MERS never held Schnall's Note and did not transfer the promissory note to Deutsche Bank through the MERS assignment. CP 41 at ll. 1-3. Nor did MERS assign Quicken Loans'

interest. CP 43 at ll. 11-13, ll. 20-22. Thus, the Notice of Default, apart from being ambiguous on its face, communicated to Schnall that Deutsche Bank acquired Schnall's loan by way of assignment from a party who did not itself hold, and could thus not assign, Schnall's loan.

3. Notice at issue did not encourage Schnall to reach out.

The notice at issue actually dissuaded, rather than encouraged, the borrower to reach out. Schnall had, prior to receipt of the Notice of Default, attempted to negotiate loan modification with OneWest Bank. CP 273-276, CP 36-38. Since Schnall had already tried and failed to negotiate modification with OneWest Bank, Schnall was not, upon receipt of a notice which identified OneWest Bank as servicer for a party who was not unambiguously the holder of Schnall's loan, encouraged to expend effort to again reach out to OneWest Bank.

F. Prejudice need not be established in cases of material violation.

Deutsche Bank argues that prejudice is required to invalidate the non-judicial foreclosure. Resp. Br., p.37. In support, Deutsche Bank cites to Koegel, as well as Amresco Independent v. SPS Properties, 119 P.3d 884 (2005), and an unpublished federal case, Bavand v. OneWest Bank, FSB, No. 13-35344, 587 Fed.Appx. 392 (9th Cir. 2014). Resp Br., p. 42.

However, none of these authorities support a prejudice requirement where there is a material violation of the DTA.

1. Koegel only established prejudice requirement where there is waiver and violation is purely technical.

a. Defect in *Koegel* was formal, not material.

Koegel held that prejudice need be established in order to void a sale where a trustee's error is a technical, formal error, nonprejudicial, and correctable. Koegel, at 113. In Koegel, the notice of default contained an inaccurate description of the property to be foreclosed. Koegel, at 111. Koegel held that the "purpose of the notice of default is to notify the debtor of the amount he owes and that he is in default." Koegel, at 112. The notice of default noted the deed of trust that was subject to foreclosure. Id. Identification of that deed put the borrower on notice as to which property was in jeopardy. Id. Thus, despite the inaccurate description, the notice in Koegel accomplished its purpose, rendering the error purely formal.

b. *Koegel's* refusal to invalidate sale required waiver.

The Koegel court's refusal to invalidate sale was based on waiver in addition to lack of prejudice. "Avoiding the sale in this circumstance would undermine all three objectives, especially considering appellant's

failure to pursue presale remedies." Koegel, at 113. "Appellant was aware of his right to restrain the sale and of his defenses to the sale, yet did not act. Therefore, appellant waived his right to contest the sale." Koegel, at 116.

Here, Schnall twice requested, and was twice denied, preliminary injunction. See Schnall v. Deutsche Bank Nat. Trust Co., No. 68516-3-1 (2013).

2. Amresco does not support any prejudice requirement.

a. No DTA violation in Amresco.

In Amresco there was *no* statutory noncompliance, whether technical or otherwise. "Because the Trustee fully complied with the statute and Amresco did not act to preserve its lien, the trial court properly granted summary judgment to SPS." Amresco, at 888.

b. Amresco's discussion of prejudice was dicta.

A solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination, constitutes dicta. State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 89 (1954). In Amresco, the specific reasons for refusing to invalidate the sale were absence of DTA violation and waiver, not lack of prejudice. Amresco, *id.* Moreover, in its discussion of prejudice, Amresco applied no facts of the

case that was at bar. Amresco, at 887. Courts are not bound to follow dicta. Concerned Citizens v. Town of Coupeville, 62 Wn. App. 408, 416 (1991).

3. Bavand is not relevant to the instant case.

At issue in Bavand was whether a notice of default which identified the holder, rather than the owner, satisfied DTA requirements. "The relevant question under Washington law is therefore not, as Bavand asserts, whether OneWest is the note's owner; instead, the key question is whether OneWest is the note's holder." Bavand, at 3. Bavand held that it did. OneWest was "the indisputable current holder of both the promissory note and the deed of trust." Bavand, at 4. "The notice of default provided all the necessary information to Bavand by identifying OneWest as the foreclosing party," Bavand, at 5. This rendered the trustee's failure to list the owner, Freddie Mac, a *technical*, non-prejudicial issue. Bavand, at 5.

Here, Schnall's Notice of Default failed to unambiguously identify *either* holder *or* owner. Bavand did not reach this issue.

Moreover, in Bavand, absence of violation and prejudice were not dispositive. The borrower's DTA claims were foreclosed as there was no completed trustee's sale. Bavand, at 6.

4. Material non-compliance removes authority to conduct sale.

"When a party's authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6), failure to act within that time violates the statute and divests the party of statutory authority. Without statutory authority, any action taken is invalid." Albice v. Premier Mtg. Svcs., 276 P.3d 1277, 1282 (2012).

Here, the sale was conducted outside of the time limits prescribed by the DTA. Since a compliant notice of default was never served to Schnall, the 30-day clock between the issuance of a notice of default to the issuance of a notice of sale could not start ticking. Nor could the clock start ticking from the issuance of a notice of sale to the sale itself. Thus, absent a compliant notice of default, there was no authority to conduct a sale, rendering the sale invalid. *See Albice*, at 1281.

5. Ability and intent to pay are irrelevant.

Deutsche Bank argues that "the default was not due to any action taken by the Trust, but due to the mortgage payment being unaffordable," and that Schnall "had no intention of curing the arrears." Resp. Br., p. 40. Deutsche Bank argues that Schnall was not prejudiced by the defective notice of default because "he knew who to pay, did not contest his default, and had no intent to reinstate his loan." Resp. Br., p. 42.

a. DTA would be eviscerated.

A requirement that borrowers show they have the ability and intent to pay would give too much power to lenders, effectively removing the protections given to borrowers by the provisions of the DTA. Lenders could simply ignore portions of the DTA they found inconvenient, relying on the fact that borrowers facing foreclosure would find it difficult to establish that they had the ability and intent to pay and thus not be able to successfully challenge non-compliant sales.

b. No jurisdiction for unlawful detainer.

A borrower's ability to pay is irrelevant with respect to the issuance of a writ of restitution based on a trustee's deed. RCW 59.12.032 requires that a trustee's sale comply with RCW 61.24.040. Moreover, the recitals in a trustee's deed are “prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers.” RCW 61.24.040(7). Here, Deutsche Bank was not a bona fide purchaser, as the trustee's sale was held well after the commencement of the instant action. Absent statutory compliance, there is no jurisdiction for an unlawful detainer action under RCW 59.12.032. Ability to pay is not a factor.

G. Deutsche Bank did not possess the Note throughout the foreclosure proceedings.

Deutsche Bank argues that Campbell's testimony that Deutsche Bank shipped the blank-endorsed Note to Onewest Bank does not defeat Deutsche Bank's possession at the time of the sale because the Pooling and Servicing Agreement established that OneWest Bank was acting as its agent. Resp. Br., pp. 31, 39. But this argument again reaches the issue of the admissibility of Campbell's testimony. This same Pooling and Servicing Agreement requires that the servicer, if needing the note for purposes such as foreclosure, deliver to the trustee a Request for Release. CP 116. But Campbell failed to attach this, or any other, record.

Moreover, Deutsche Bank's status as holder at the time of the sale still would not overcome the problem that OneWest Bank indorsed the note *in its own name*, after Deutsche Bank had already appointed RTS as successor trustee. See Op. Br., p. 7.

H. Schnall did not admit the the Notice of Default gave unambiguous notice.

Deutsche Bank cites to Schnall's bankruptcy pleadings, alleging that "Schnall himself has already acknowledged that the Trust was listed as the beneficiary on the Notice of Default." Resp. Br., p. 41. This is incorrect. Schnall was arguing that since MERS was listed as the beneficiary on the deed of trust, and MERS was not identified as the

present beneficiary on the Notice of Default, that the purported present beneficiary should produce the note and chain of transactions to show that it is in fact the present beneficiary. CP 207 at 33.

Schnall's observation that the beneficiary as listed on the Deed of Trust "is apparently not the same party that initiated foreclosure on his house with a Notice of Default" is not an admission that the Notice of Default informed him that Deutsche Bank held the note. Rather, the opposite. Deutsche Bank points out the Schnall listed the mortgage debt as unsecured in his bankruptcy filing. Resp. Br., p. 41. While Schnall's decision to list the debt as unsecured as a method to force the purported beneficiary to prove standing may have been inartful, Schnall would not have felt it necessary to do so had he been served with a notice of default which unambiguously identified the present beneficiary, and had that present beneficiary become so by way of valid assignment.

I. Schnall is not trying to avoid payment.

Deutsche Bank argues that Schnall is attempting to "avoid foreclosure and skirt his contractual responsibilities." Resp. Br., p. 42. The record does not support this allegation. Schnall made payments for nearly three years before defaulting in August, 2009. CP 245, CP 300. Schnall attempted to negotiate loan modification, and defaulted due to hardship.

CP 273-276. Schnall made trial payments. CP 36-38. Schnall has been making monthly deposits to the court registry in the amount of the mortgage payment since November, 2012, pursuant to supersedeas orders. Op. Br. at Appendix A-1, Appendix A-2.

Moreover, if the sale is declared invalid, Schnall would still be obligated under the Note. Should Schnall then fail to meet the obligation, Deutsche Bank would still have recourse to foreclosure.

II. CONCLUSION

Schnall requests that the Order granting Deutsche Bank/MERS' summary judgment motion be reversed in part, that the dismissal of MERS be affirmed, that the Order denying Schnall's summary judgment motion be reversed, and that the trial court be directed to issue an order declaring the trustee's sale of Schnall's property invalid.

Respectfully submitted this 11th day of March, 2016.



Micah Schnall,

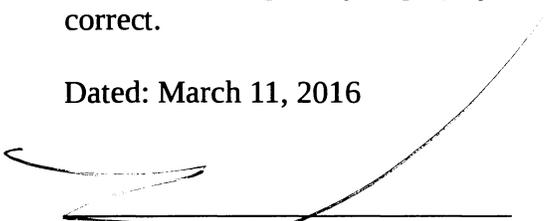
Appellant. (pro se)

CERTIFICATE OF SERVICE

On March 11, 2016, I served the forgoing documents: REPLY BRIEF OF APPELLANT, via email (by agreement) to counsel for Deutsche Bank National Trust Company and Mortgage Electronic Registration Systems Inc., Sakae S. Sakai, at his address ssakai@houser-law.com.

I declare under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

Dated: March 11, 2016



Micah Schnell
11521 167th Pl. NE
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