

IN THE WASHINGTON COURT OF APPEALS
DIVISION 1

CASE NO. 73548-9-I
(Consolidated with Case Nos. 73648-5-I; 73549-7-I; and 73649-3-I)

OCWEN LOAN SERVICING, LLC,

Appellant/Cross-Appellee,

v.

MICHAEL E. and ROCIO BAUMAN,

Appellees/Cross-Appellants.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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INTRODUCTION

In their cross-appeal, Michael and Rocio Bauman argue that the rights of redemption in the foreclosure judgments and ensuing deeds that gave them title to purchase property in Snohomish County were of no effect because the Superior Court lacked the authority to include a right of redemption in its judgment. That argument has been squarely rejected by the Washington Supreme Court. Over fifty years ago, the Washington Supreme Court applied the plain language of the statute in question to hold that a trial court is free to include additional terms in a foreclosure judgment. The Baumans' contention that the trial court lacked authority in this case is simply wrong as a matter of settled law.

The Baumans are also wrong in arguing that Ocwen Loan Servicing, LLC ("Ocwen") failed to create a genuine issue of material fact as to whether it was the proper party to exercise the right of redemption in each case. As the Baumans tacitly concede in their brief, Ocwen produced a sworn affidavit executed by a witness with knowledge who attested facts establishing that, as of a time well before the redemption period expired, Ocwen was the party entitled to enforce the redemption right for each of the properties in question. Contrary to the Baumans' arguments, Washington law imposes no obligation for a party to do more to create a genuine issue of fact that cannot be resolved at summary judgment. For

that reason, the trial court's judgments in favor of the Baumans should be reversed.

ARGUMENT

I. Ocwen Had the Right to Redeem the Bonvicini and Turner Properties.

The Baumans err in arguing—both as a response to Ocwen's appeal and in a separate cross-appeal—that Ocwen lacked any right of redemption regarding the Bonvicini and Turner Properties. As noted above, the Baumans were able to buy each of the properties for about 15% of the market value because the judgments allowing the foreclosure sales expressly gave the secured lender a right of redemption. The Baumans' argument that the right of redemption in the judgments supporting the foreclosures for each of those properties was void finds no support in Washington law. In fact, even if Ocwen did not have a legal right to redeem pursuant to RCW 35.50.270, the Washington Supreme Court has expressly held that in a sale under RCW 84.64.080, the court has the authority to create additional terms as required by law or equity to be just.

A. The Snohomish County Superior Court Correctly Invoked the Right of Redemption under RCW 35.50.270.

First, the Baumans are wrong in arguing that RCW 84.64.080 is the correct statute governing the rights of redemption created in the foreclosure sale judgments. In each of the judgments that allowed the

sales to go forward, the Snohomish County Superior Court expressly noted that the sale of the property would be subject to “the right and equity of redemption from and after a date which is two years after the date of the sale thereof under this decree pursuant to RCW 35.50.270.” CP 706, 1578-81. In fact, the quitclaim deeds that gave the Baumans title to those properties also expressly included the right of redemption for the secured lender. CP 711, 1585.

The Baumans engage in linguistic gymnastics to avoid the plain effect of those holdings. According to the Baumans, the Cross Valley Water District’s foreclosure action was actually brought as a tax foreclosure action under RCW 84.64.080. The Baumans first argue that the Water District’s foreclosure derives from RCW 36.94.150, which provides that a lien for delinquent water services “shall be foreclosed in the same manner as the foreclosure of real property tax liens.” RCW 36.94.150. But what the Baumans conspicuously fail to mention is that RCW 36.94.150 expressly governs actions brought by “counties.” Cross Valley Water District is not a county; rather, it is a Municipal Corporation that operates a sewer system (i.e. Sewer District) and its water service liens are governed by RCW Ch. 57.08. And under that statute, Cross Valley Water District is permitted to “bring suit in foreclosure by civil

action in the superior court of the county in which the real property is located.” RCW 57.08.081.

Unlike RCW 84.64.080, Chapter 57 makes no mention of the terms for a right of redemption. Accordingly, the Baumans’ arguments that the rights of redemption provided for in the foreclosure judgments in this case were trumped by a statute that does not even apply have no merit.

B. Under Washington Law, the Snohomish County Superior Court Had Equitable Authority to Include with Its Foreclosure Judgment a Right of Redemption.

In any case, even if the Water District’s foreclosure action were governed by RCW 84.64.080, the Baumans are wrong in arguing that the express rights of redemption provided in the judgments were invalid.

Under longstanding Washington law, the trial court had full authority to add a right of redemption under the terms of RCW 36.94.150, as required in equity under the facts of the case.

RCW 84.64.080 vests the trial court with the authority to “make such other order or judgment as in the law or equity may be just.” The Washington Supreme Court has interpreted that very statute to mean that “the legislature has granted to the superior court authority” to set certain conditions for any order of sale as required by law or equity. *Chelan Cnty. v. Fellers*, 65 Wash. 2d 943, 946, 400 P.2d 609, 611 (1965) In *Fellers*, the trial court ordered the foreclosure sale of certain property to be conducted

in a manner designed to dispose of the foreclosed property in smaller lots so as to recover no more than the amount of the foreclosure judgment. *Id.* at 944, 400 P.2d at 609-10. The sale was not conducted in accordance with the order, however, and instead was purchased as a single tract by a single buyer. *Id.* at 944-45, 400 P.2d at 610. The foreclosed borrower brought an action to set aside the foreclosure sale; the buyer responded by arguing that the Chelan County Superior Court lacked any authority under RCW 84.64.080 to set such conditions for a foreclosure sale.

After the trial court set aside the foreclosure, the Washington Supreme Court affirmed, flatly rejecting the buyer's arguments. The Court noted that the express language of RCW 84.64.080 gave the Superior Court the power to “make such other order or judgment as in the law or equity may be just.” *Id.* at 946, 400 P.2d at 611 (quoting RCW 84.64.080). The Court held that the Superior Court properly exercised its discretion under the statute by imposing additional conditions for the foreclosure sale that were necessary to make the sale to be just and in compliance with equity.

Here, the Snohomish County Superior Court properly exercised its discretion to issue an order “as in the law or equity may be just” by including a right of redemption for the lender in light of what was—at best—an ambiguous statute. The Baumans correctly do not challenge the

equity of the Superior Court's decision. Under the Baumans' argument, the property would have gone to a foreclosure sale with an express right of redemption, which—unbeknownst to the world—was void. As a result, the Baumans would have bought property at an 85% discount, leaving a formerly secured borrower with a huge deficiency judgment on the mortgage loan, and a secured lender with a huge unsecured debt. For the same pragmatic reasons that this Court rejected a statutory interpretation that would allow the purchaser at a foreclosure sale to extinguish a redemption right (because of the windfall for the purchaser and the harm to the borrower) in *Metro. Fed. Sav. & Loan Ass'n v. Roberts*, 72 Wash. App. 104, 112-13, 863 P.2d 615, 619-20 (Wash. App. 1993), the Court should reject the Baumans' windfall argument here.

The Baumans mistakenly rely on the Washington Supreme Court's decision in *Burdick v. Kimball*, 53 Wash. 198, 202, 101 P. 845 (1909) to argue that the terms of a statutory right of redemption are per se exclusive of any other right. But *Burdick* does not support that argument. In *Burdick*, the question was straightforward: whether the unambiguous redemption statute that provided a redemption right for mortgaged property of "minor heirs" should be interpreted as a matter of law as vesting the redemption right for property of "minors." The Court rejected that argument, noting it was not permitted by the plain text of the statute.

Id. at 202. But nothing in the opinion discusses the trial court's ability to construe the redemption period through the lens of equity, or the power of the court to include additional conditions with its foreclosure judgment. Indeed, any such holding would be contrary to the Court's later decision in *Fellers*.

In short, the Baumans have failed to present any valid basis for arguing that the trial court erred in holding that the express right of redemption noted in the foreclosure judgments and included in their quitclaim deeds was void. The trial court correctly surmised that allowing the Baumans to take title to the Turner and Bonvicini properties by purchasing them at artificially low prices due to the express right of redemption in the foreclosure judgment would not be consistent with Washington law or equity. That portion of the trial court's ruling should be affirmed.

II. The Trial Court Erred in Granting Summary Judgment for the Baumans.

As Ocwen explained at length in its opening brief, the trial court erred in granting summary judgment in favor of the Baumans. For both of the loans in question, Ocwen presented sworn testimony establishing that it was the proper party to enforce the right of redemption. The Baumans'

efforts to set a different standard of proof are at odds with Washington law.

A. Ocwen Established a Genuine Issue of Material Fact as to Whether It Was the Proper Party to Enforce the Right of Redemption for the Turner Loan Through an Affidavit Attesting that It Was the Issuer for the Ginnie Mae Loan Pool that Contained the Loan.

First, Ocwen demonstrated—at the least—that there was a genuine issue of fact as to whether it was the proper party to enforce the right of redemption for the Turner Note. Ocwen responded directly to the Baumans’ suggestion that it lacked standing to redeem the Turner Property because it was not the Issuer for the Ginnie Mae mortgage-backed securities that included the Turner Note. Ocwen produced Tonya Tillman’s affidavit explaining how Ocwen purchased assets from GMAC Mortgage, LLC (including servicing rights to the Turner Loan) through an agreement that became effective on February 15, 2013, and how “[t]hrough its acquisition of GMAC Mortgage, LLC’s servicing rights, Ocwen became the Issuer of Ginnie Mae Pool Number 892068” CP 716. Ms. Tillman’s affidavit further stated Ocwen “holds the original [Turner] Note and is entitled to enforce the Note.” CP 717, and identified an attached exhibit as a copy of the blank-endorsed promissory note. CP 719-23. In its brief, Ocwen explained how its status as the Issuer allowed it to rely upon a document custodian to maintain physical possession of a

promissory note and thus Ocwen was a “person entitled to enforce” the note as the holder of a blank-endorsed instrument under RCW 62A.1-201 and 62A.3-301. CP 900-03; *see Bain v. Metro. Mtg. Grp., Inc.*, 175 Wash. 2d 83, 104, 285 P.3d 34, 44 (2012); *Barkley v. GreenPoint Mortgage Funding, Inc.*, 190 Wash. App. 58, 69, 358 P.3d 1204, 1211 (2015).

The Baumans do not dispute the fact that, as of the time the court entered summary judgment in this case, Ocwen had produced sworn testimony that it had acquired servicing rights for the Turner Loan “effective February 15, 2013,” and that it became the Issuer for the pool containing the Turner Loan at the same time. In fact, the trial court’s own opinion acknowledges that the record evidence created “an inference” that Ocwen held the servicing rights to the Ginnie Mae securities and was their issuer sometime before June 2014—*i.e.*, during a time period before the redemption period expired. CP 655. Instead, the Baumans argue that “Ocwen had to produce evidence that Ginnie Mae approved Ocwen as the issuer for the pool containing the Turner loan on or before March 13, 2014.” Respondents’ Br. at 17. Conspicuously, the Baumans cite no authority for the proposition that Ocwen had to prove that Ginnie Mae had approved it as the issuer for the loan pool in order to create a genuine issue of fact as to its status as the issuer—especially in light of the uncontroverted sworn testimony that Ocwen was the issuer as of February

2013. Moreover, the Baumans' entire argument depends on a factual assumption—that Ginnie Mae has to “approve” an issuer—that itself was not adjudicated at summary judgment.

In granting summary judgment for the Baumans, despite Ocwen's evidence, the trial court misapplied the proper summary judgment standard. Rather than “consider[ing] all facts submitted and all reasonable inferences from them in the light most favorable to [Ocwen],” *Graff v. Allstate Ins. Co.*, 113 Wash. App. 799, 802, 54 P.3d 1266, 1268 (2002), the trial court did the opposite—it examined and weighed Ocwen's evidence and then granted summary judgment for the Baumans without giving Ocwen the benefit of any of the inferences demonstrated by the Tillman Affidavit and attached documents. Accordingly, the trial court's grant of summary judgment in the Turner case should be reversed.

B. Ocwen Established a Genuine Issue of Material Fact as to Whether It Was the Proper Party to Enforce the Right of Redemption for the Bonvicini Loan Through an Affidavit Attesting that It Was a Person Entitled to Enforce the Loan.

Similarly, Ocwen demonstrated its standing to enforce the Bonvicini Note despite the fact that the Baumans never challenged Ocwen's standing to redeem that property based on an alleged failure to demonstrate that it was the holder of the instrument. Again, Ocwen produced a sworn statement concerning its purchase of servicing rights

from GMAC Mortgage, LLC, including rights to the Bonvicini loan, “[e]ffective February 15, 2013.” CP 1588, 1590. The affidavit further stated that Ocwen “holds the original [Bonvicini] Note and is entitled to enforce the Note,” CP 1590 and identified an attached exhibit as a copy of the blank-endorsed promissory note. CP 1592-94. Ocwen also produced a copy of a Servicing Agreement “effective February 15, 2013,” CP 1711-1847, that gave Ocwen “the authority to sue to enforce or collect on the Bonvicini Loan.” CP 1590.

Confronted with that evidence, all the Baumans can do is argue that Ocwen still had the obligation to do something more—namely, to ignore Ms. Tillman’s sworn statements and instead flyspeck Ocwen’s documents with the alleged position that they fail to establish Ocwen’s power to enforce the right of redemption. Respondents’ Br. at 19-22. Curiously, the Baumans did not notice any defects before the trial court’s summary judgment, as they did not even challenge Ocwen’s lack of authority to enforce the right of redemption on those grounds until later. But more importantly, the Baumans’ argument turns the summary judgment standard on its head. As the United States Supreme Court has held in applying the parallel federal rule, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a

motion for summary judgment or for a directed verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Accordingly, the Baumans’ arguments are misguided, and the trial court erred by granting summary judgment in their favor as to the Bonvicini Loan.

The trial court’s rulings as to each of the loans appears to have been based on a suspicion regarding the propriety of Ocwen’s enforcement of the financial instruments because Ocwen was only the servicer of each debt, and not the owner of the underlying indebtedness. But as the Washington Supreme Court’s recent decision in *Brown v. Washington State Dep’t of Commerce*, 184 Wash. 2d 509, 359 P.3d 771 (2015) (en banc) made clear, that suspicion was misplaced. In *Brown*, the Court addressed the question of whether the holder of a blank-endorsed promissory note—who was not the owner of the underlying indebtedness—was the “beneficiary” of the deed of trust securing the note, and thus exempt from mandatory foreclosure mediation program under RCW 61.24.163. The unanimous court held that the holder of the note was “beneficiary” of the attached deed of trust, even though it did not own the underlying indebtedness. *Id.* at 540, 359 P.3d at 785-86. Furthermore, the Court held that the note’s holder properly proved its status as the beneficiary by submitting an “undisputed declaration submitted under

penalty of perjury that it [was] the holder of the note.” *Id.* at 544, 359 P.3d at 787.

The same reasoning extends to this case. Ocwen used an “undisputed declaration submitted under penalty of perjury” to establish that it was the holder of each of the promissory notes in question, even though it does not own the underlying indebtedness. The trial court’s refusal to accept that evidence at face value—and instead hold that Ocwen failed to even create a genuine factual dispute as to its authority to enforce the rights of redemption—cannot be squared with Washington law.

Furthermore, the trial court’s exacting standard for demonstrating a genuine issue regarding Ocwen’s standard conflicts with the Washington Supreme Court’s recent decision in *Onewest Bank. FSB v. Erickson*, No. 91283-1 (Wash. Feb. 4, 2016), *slip op. available at* <http://www.courts.wa.gov/opinions/pdf/912831.pdf>. In *Erickson*, the Court recognized that in a judicial foreclosure, “the additional protections in the deeds of trust act” that set a higher burden on a party proving standing to bring a nonjudicial foreclosure “do not apply.” *Id.* at *35. Under that reasoning, the Court rejected a challenge to the plaintiff’s standing to foreclose in light of the plaintiff’s production of the original promissory note and a sworn statement attesting that it was the holder of the instrument. *Id.* Here, the trial court erred in applying an onerous

standard for Ocwen's proof of standing in a judicial action in light of Ocwen's production of the very evidence that the *Erickson* Court held to be sufficient.

III. The Trial Court Abused Its Discretion By Denying Ocwen the Opportunity to Supplement the Record Once It Received Notice of the Standard Being Applied.

Finally, the trial court's orders denying Ocwen's motions to reconsider constituted abuses of its discretion and should be reversed. In each case, the trial court departed from the settled summary judgment standard in order to rule against Ocwen, stating that Ocwen had failed to meet some more exacting standard of proof than that required under Washington law (even though the Baumans had barely advanced any such argument in either case). In response to those rulings, Ocwen moved for reconsideration, providing with their motion a mountain of the documentary evidence that the trial court held was necessary just to create a genuine issue of fact. By first announcing at summary judgment that Ocwen had an obligation to produce that very evidence, then refusing to consider it upon presentation, the trial court abused its discretion.

In their brief, the Baumans accuse Ocwen of suggesting that this Court should go on a "wild goose chase" to determine whether Ocwen's arguments as to its motion for reconsideration are correct. That is the opposite of Ocwen's position. Ocwen made it very clear to the trial court

why there were—at the least—triable issues remaining in the litigation at the time of summary judgment by having its witness attest to those issues under oath. The trial court instead held that Ocwen had failed to meet its burden because it did not produce the huge mountain of documentary evidence along with those sworn statements. But Washington law includes no such requirement, and the trial court erred by imposing one.

CONCLUSION

For the reasons stated above and in its initial brief, Ocwen requests that the Court reverse the trial court's grant of summary judgment for each of the consolidated cases and remand the cases for further proceedings.



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