

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

NO. 74871-8-I

CONCEPCION HERMOSILLO, a single woman,

Appellant/Defendant,

vs.

ELIAS HAYDARI and AMIR BAHANDARI,

Respondents/Plaintiffs.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF
SNOHOMISH

APPELLANT HERMOSILLO'S OPENING BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 AUG 12 PM 3:41

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I ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to grant Defendant/Appellant a jury trial concerning Plaintiffs' right to possession of the property that is the subject of this litigation.

A. Issues Pertaining to Assignments of Error

1. Whether the Complaint or the trustee's deed provided sufficient factual detail showing QLS was the trustee on December 14, 2015, the date on which QLS executed and issued the trustee's deed.

2. Whether Defendant was entitled to a Jury Trial to Challenge Plaintiffs' Right-to-Possession Claim.

II STATEMENT OF THE CASE

On or about January 22, 2016 Defendants/Respondents filed an unlawful detainer complaint in Snohomish County Superior Court. *CP*, at 362-367. The complaint alleges the property that is the subject of this appeal was sold at public auction on December 4, 2015 (*Id.*, at 362). The complaint also alleges Defendants are the lawful owners of the property (*Id.*), but does not state how Defendants came to be the owners.

Although exhibits are not referenced in the complaint, Defendants submitted three exhibits with the complaint, one of which was an alleged trustee's deed that was issued, allegedly, by a lawful trustee. *Id.*, at 376.¹

¹ A copy of the trustee's deed is contained in the Appendix at A1 – A3.

The trustee's deed indicates Quality Loan Services of Washington ("QLS") is the current trustee (a legal conclusion, not a fact), but does not state a single fact, anywhere in the trustee's deed, in support of that indication. *Id.*, at 376-378. Additionally, the trustee's deed recites that the original trustee named in the deed of trust is Fidelity National Title Company of Washington ("Fidelity"). *CP*, at 376.

There are no facts recited in the trustee's deed that state how Fidelity ceased to be the trustee under the deed of trust, or how QLS, after Fidelity ceased to be the trustee, became the trustee. As far as the record before this court is concerned, Fidelity never ceased to be trustee under the deed of trust, and QLS was never lawfully appointed the successor trustee. *See CP*, at 376-378.

Since there are no factual recitals in the trustee's deed that prove QLS was the trustee on the day it executed, delivered, and recorded the trustee's deed, or on any other day for that matter, there are no facts in this record that establish Plaintiffs/Respondents lawfully purchased an interest in the property on December 14, 2015.

At the unlawful detainer hearing, Plaintiffs/Respondents had the responsibility of establishing their right to possession of the property. They attempted to do so by submitting the trustee's deed as proof of ownership and claiming the requisite number of days had passed since the trustee's sale had occurred. *CP*, at 376. In its answer to the complaint,

Defendant/Appellant objected to the sufficiency of the evidence by asserting that the complaint and supporting exhibits did not state a claim upon which relief could be granted. *CP*, at 343.

On February 9, 2016, after hearing the evidence and argument of counsel, the trial court rejected Defendant's/Appellant's insufficiency argument, denied a jury trial, and granted the writ of restitution. *Id.*, at 274-277.

From this judgment, Defendant appeals.

III ARGUMENT

A. Neither Complaint, Nor Trustee's Deed stated Sufficient Facts.

RCW 61.24.010(2) authorizes only a *beneficiary* to appoint a successor trustee. RCW 61.24.005(2) defines the *beneficiary* as the *holder* of the promissory note secured by the deed of trust. RCW 62A.1-201(b)(21), in relevant part, defines a *holder* as a person in physical possession of a blank-endorsed note. RCW 61.24.040(1) authorizes only a trustee to conduct a non-judicial foreclosure sale.

Fidelity is named the trustee in the original deed of trust ("DOT"). Given that Fidelity is named the trustee in the DOT, the only way QLS could have been the trustee on December 14, 2015, the date on which a representative of QLS executed the trustee's deed (*Id.*, at 378), is if QLS at some point in time was appointed the successor trustee by a lawful

beneficiary. Thus, to establish QLS was a trustee when (1) it conducted the trustee's sale on December 4, 2015, and (2) it issued the trustee's deed on December 14, 2015, the trustee's deed had to recite facts that established that (1) Fidelity, at some point, ceased to be the trustee, and (2) sometime after Fidelity ceased to be the trustee, QLS, by a statutorily-approved method, became the trustee.

The trustee's deed does not recite facts that establish that (1) Fidelity, at some point, ceased to be the trustee, or (2) sometime after Fidelity ceased to be the trustee, QLS, by a statutorily-approved method, became the trustee.

To establish that (1) Fidelity at some point ceased to be the trustee, and QLS, by a statutorily-approved method became the trustee, the trustee's deed would have to provide all of the following information: (a) on what date Fidelity ceased to be the trustee; (b) how Fidelity ceased to be the trustee (whether by resignation or by removal by the beneficiary [RCW 61.24.010(2)]); (c) by whom QLS was "*appointed*" the successor trustee (only a beneficiary can appoint a successor trustee [*Id.*]); (d) when QLS was "*appointed*" the successor trustee; (e) whether the entity that appointed QLS the successor trustee was in possession of Plaintiff's Note and DOT on the day the entity made the appointment; and (f) whether, on the day the entity made the appointment, the Note was blank-endorsed or was instead endorsed to a specific person, and the entity that made the appointment was the specific person to which the Note was endorsed.

B. Defendant entitled to Jury Trial to challenge Plaintiffs' Right to Possession Claim.

Under the circumstances here presented, RCW 59.12.130 entitles Defendant to a jury trial to challenge Plaintiffs' right to possession claim.

The DTA authorizes only a lawful trustee to conduct a trustee's sale. *RCW 61.24.040(1)*. In the absence of factual recitals in a trustee's deed that establish Plaintiffs' right to possession, the trial court should have refused to issue the writ of restitution. But whether or not the court issued the writ of restitution restoring possession of the property to Plaintiffs, it should have ordered a trial on Defendant's challenge of Plaintiff's alleged right to possession. *RCW 59.18.380*.

There are no facts recited in the trustee's deed that show the sale was conducted in compliance with all of the requirements of RCW Chapter 61.24 and the requirements of the deed of trust. The lack of these facts means the trustee's deed violates RCW 61.24.040(7). Therefore, the trustee's deed is neither prima facie nor conclusive evidence in favor of Defendants that the sale was conducted in compliance with all of the requirements of RCW Chapter 61.24. As a result, a compliance challenge is not prohibited by the DTA or RCW Chapter 59.12.

In fact, because the trustee's deed contains no factual recitals that establish QLS was a lawful trustee, and a trustee's sale is lawful only if it is conducted by a lawful trustee (RCW 61.24.040[1]), and

Plaintiffs/Respondents' complaint does not even allege, let alone prove, Plaintiffs bought the property at the trustee's sale. Plaintiffs presented no evidence at the unlawful detainer hearing that they were the owners of the property. By failing to prove they were the owners, they simultaneously failed to prove they were entitled to possession of the property. As a result, the writ of restitution should have been denied, and, following the unlawful detainer hearing, Defendant should have been granted a jury trial on the merits of the case.

In the absence of **facts** in the trustee's deed showing that Plaintiff obtained its interest from a lawful trustee, RCW 61.24.040(7) does not protect Plaintiff from a showing to the contrary. *Albice v. Premier Mortgage Services of Washington, Inc.*, 157 Wn. App. 912, 928, 239 P.3d 1148, 2010 Wash. App. LEXIS 2199. *Unsupported legal conclusions* (The claim that QLS is the "current trustee" without a recitation of factual details that support that claim is an unsupported legal conclusion, not a fact) are never entitled to a conclusive presumption of correctness. *Albice*, 157 Wn. App. at 924.

In *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn. 2d, 560, 276 P.3d 1277, 2012 Wash. LEXIS 378, 2012 WL 1881022, the Washington Supreme Court affirmed the Appellate Court's decision in *Albice* on the ground that the trustee had failed to conduct the trustee's sale within 120 days of the originally scheduled sale date. *Albice*, 174 Wn. 2d at 568. The affirmance would not have been possible however if the

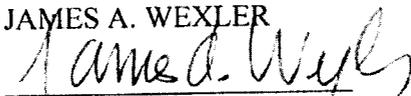
Supreme Court had not implicitly agreed with the Appellate Court's explicit ruling that a trustee's failure to comply with the factual-recital requirement of RCW 61.24.040(7) destroys the "*preclusive presumption*" effect given a correctly prepared trustee's deed. Because the trustee's deed in the case before this court does not provide any facts to support QLS's claim that it is the "current trustee," Defendants should have been free to argue at trial, in front of a jury, that Plaintiffs were not the lawful holder of the indebtedness and consequently were not entitled to foreclose because the property was not sold by a lawful trustee, and the trustee's deed was not executed, issued, and recorded by a lawful trustee.

CONCLUSION

For the foregoing reasons, this matter should be returned to the trial court, the unlawful detainer decision should be reversed, and the trial court should be ordered to grant Defendant/Appellant a jury trial.

RESPECTFULLY SUBMITTED this 12th day of August 2016.

JAMES A. WEXLER



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APPENDIX

11042128

WHEN RECORDED MAIL TO:
EASTSIDE FUNDING LLC
3933 LAKE WASHINGTON BLVD NE #100
KIRKLAND WA 98033
Forward Tax Statements to the address given above



201512179495 3 PGS
12/17/2015 2:19pm \$75.00
SNOHOMISH COUNTY, WASHINGTON

No 8609288 12/17/2015 9:07 AM 10.00
Thank you for your payment.
NICHOLE

TS No.: WA-12-530649-SH
Title Order No.: 02-12035423
Trustor: CONCEPCION H. AZADMANESH, a married woman as her sole and separate property
Deed of Trust Instrument/Reference No.: 200508100286
Deed of Trust book/page (if applicable):
Notice of Sale Instrument/Reference No.: 201504081086

SPACE ABOVE THIS LINE FOR RECORDER'S USE

TRUSTEE'S DEED UPON SALE

A.P.N.: 0051700004802

TRANSFER TAX: \$0.00

The GRANTOR, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, as current Trustee, (whereas so designated in the Deed of Trust hereunder more particularly described or as duly appointed Successor Trustee) under that Deed of Trust in consideration of the premises and payment recited below, hereby grants and conveys, without representation or warranty, expressed or implied, all right title and interest to

AMIR BAHANDARI AND ELIAS HAYDARI AND EASTSIDE FUNDING, LLC FOR SECURITY PURPOSES ONLY

(herein called GRANTEE), to all real property (the "Property"), situated in the County of SNOHOMISH, State of Washington, described as follows:

The East half of the South 17.67 feet of Lot 48 and the East half of Lot 49, Except the South 35.34 feet of said Lot 49, MODERN HOMES, DIVISION NO.1, according to the Plat thereof recorded in Volume 18 of Plats, Page 50, records of Snohomish County, Washington. Situate in the County of Snohomish, State of Washington.

RECITALS:

1. This conveyance is made pursuant to the powers, including the power of sale, conferred upon the current Trustee by that certain Deed of Trust between CONCEPCION H. AZADMANESH, a married woman as her sole and separate property, as original Grantor, to FIDELITY NATIONAL TITLE COMPANY OF WASHINGTON, as original trustee, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC AS NOMINEE FOR ERNST, INC., as original Beneficiary, dated 8/5/2005 and recorded

8/10/2005 as Instrument No. 200508100286 and re-recorded on 3/16/2012 as Instrument Number 201203160277 of the Official Records in the office of the Recorder of SNOHOMISH, Washington.

2. The Deed of Trust was executed to secure, together with other undertakings, the payment of one or more promissory note(s) ("Note") in the sum of \$212,000.00 with interest thereon, according to the terms thereof, and other sums of money which might become due and payable under the terms of said Deed of Trust.
3. The Deed of Trust provided that the Property is not used principally for agricultural or farming purposes and the current Trustee has no actual knowledge that the Property is used principally for agricultural or farming purposes.
4. That a Default occurred in the obligations secured and/or covenants of the Deed of Trust referenced in paragraph one (1), as set forth in the Notice of Trustee's Sale described below, and that the current Trustee, transmitted the Notice of Default to the required parties, and that a copy of said Notice was posted or served in accordance with law.
5. The current Trustee has been instructed to exercise the power of sale in accordance with and under the relevant terms of the above referenced Deed of Trust and the Washington Deed of Trust Act.
6. That because the defaults specified in the "Notice of Default" were not cured, the current Trustee, in compliance with the terms of the Deed of Trust, recorded on 4/8/2015 in the SNOHOMISH County, Washington recorder's Office, a "Notice of Trustee's Sale" of the Property as instrument no. 201504081086.
7. The current Trustee fixed the place of sale as: On the steps in front of the North entrance to the Snohomish County Courthouse, 3000 Rockefeller Avenue, Everett, WA 98201, in the State of Washington, a public place, at 10:00 AM. In accordance with the law caused copies of the statutory "Notice of Trustee's Sale" to be transmitted by mail to all persons entitled thereto and either posted or served prior to the statutory minimum number of days before the final sale; further, the current Trustee caused a copy of said "Notice of Trustee's Sale" to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the date of the sale, and once between the fourteenth and the seventh day before the date of the sale; and further, included with the Notice, which was transmitted to or served upon the Deed of Trust grantor or his successor in interest, a "Notice of Foreclosure."
8. During foreclosure, no action by the Beneficiary, its successors or assigns was pending on an obligation secured by the Deed of Trust.
9. All legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in chapter 61.24 RCW.
10. That because the defaults specified in the "Notice of Trustee's Sale" were not cured at least ten days prior to the date scheduled for the Trustee's Sale and said obligation secured by said Deed of trust remained unpaid, on 12/4/2015, the date of sale, which was not less than 190 days from the date of default in the obligation secured, the GRANTOR then and there sold the Property at public auction to said GRANTEE, the highest bidder therefore, for the sum of \$230,000.00, in the form of cash, certified check, cashier's check, money order, or funds received by verified electronic transfer, as provided in chapter 61.24.070 RCW.

This conveyance is made without representations or warranties of any kind, expressed or implied. By recording this Trustee's Deed, GRANTEE understands, acknowledges and agrees that the Property was purchased in the context of a foreclosure, that the current Trustee made no representations to GRANTEE concerning the Property and that the current Trustee owed no duty to make disclosures to GRANTEE concerning the Property, GRANTEE relying solely upon his/her/their/its own due diligence investigation before electing to bid for the Property.

In witness thereof, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, as GRANTOR, has this day, caused its name to be hereunto affixed by its officer thereunto duly authorized by its corporation by-laws:

QUALITY MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

TS No.: WA-12-530649-SH

Date:

12/11/15

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON

Janice Stavee

By: Janice Stavee, Assistant Secretary

State of: Washington

County of: King

I certify that I know or have satisfactory evidence that Janice Stavee is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument

Dated:

12-11-15

Cynthia Feeney

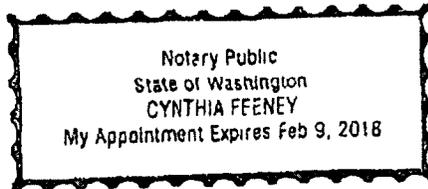
Signature

Administrative Specialist II - Notary

Title

My appointment expires:

Feb 9 2018



RCW 61.24.005

.....

(2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

RCW 61.24.010

.....

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

RCW 61.24.040

A deed of trust foreclosed under this chapter shall be foreclosed as follows:

(1) At least ninety days before the sale, or if a letter under RCW ~~61.24.031~~ is required, at least one hundred twenty days before the sale, the trustee shall:

RCW 61.24.040

Foreclosure and sale—Notice of sale.

A deed of trust foreclosed under this chapter shall be foreclosed as follows:

(1) At least ninety days before the sale, or if a letter under RCW ~~61.24.031~~ is required, at least one hundred twenty days before the sale, the trustee shall:

.....

(7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, except that these recitals shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section, if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding[.]

RCW 59.12.130

Jury—Actions given preference.

Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter shall take precedence of all other civil actions.

RCW 59.18.380

Forcible entry or detainer or unlawful detainer actions—Writ of restitution—Answer—Order—Stay—Bond.

At the time and place fixed for the hearing of plaintiff's motion for a writ of restitution, the defendant, or any person in possession or claiming possession of the property, may answer, orally or in writing, and assert any legal or equitable defense or set-off arising out of the tenancy. If the answer is oral the substance thereof shall be endorsed on the complaint by the court. The court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer, and if it shall appear that the plaintiff has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution, returnable ten days after its date, restoring to the plaintiff possession of the property and if it shall appear to the court that there is no substantial issue of material fact of the right of the plaintiff to be granted other relief as prayed for in the complaint and provided for in this chapter, the court may enter an order and judgment granting so much of such relief as may be sustained by the proof, and the court may grant such other relief as may be prayed for in the plaintiff's complaint and provided for in this chapter, then the court shall enter an order denying any relief sought by the plaintiff for which the court has determined that the plaintiff has no right as a matter of law: PROVIDED, That within three days after the service of the writ of restitution issued prior to final judgment, the defendant, or person in possession of the property, may, in any action for the recovery of possession of the property for failure to pay rent, stay the execution of the writ pending final judgment by paying into court or to the plaintiff, as the court directs, all rent found to be due, and in addition by paying, on a monthly basis pending final judgment, an amount equal to the monthly rent called for by the lease or rental agreement at the time the complaint was filed: PROVIDED FURTHER, That before any writ shall issue prior to final judgment the plaintiff shall execute to the defendant and file in the court a bond in such sum as the court may order, with sufficient surety to be approved by the clerk, conditioned that the plaintiff will prosecute his or her action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he or she may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out. The court shall also enter an order directing the parties to proceed to trial on the complaint and answer in the usual manner.

If it appears to the court that the plaintiff should not be restored to possession of the property, the court shall deny plaintiff's motion for a writ of restitution and enter an order directing the parties to proceed to trial within thirty days on the complaint and answer. If it appears to the court that there is a substantial issue of material fact as to whether or not the plaintiff is entitled to other relief as is prayed for in plaintiff's complaint and provided for in this chapter, or that there is a genuine issue of a material fact pertaining to a legal or equitable defense or set-off raised in the defendant's answer, the court shall grant or deny so much of plaintiff's other relief sought and so much of defendant's defenses or set-off claimed, as may be proper.

Certificate of Service

I, James A. Wexler, attorney for Appellant/Defendant, certify and declare that I caused a copy of the Appellant's Opening Brief and this Certificate of Service to be filed with:

The Clerk of the Court (with a Judge's working copy to be hand delivered)
Court of Appeals Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

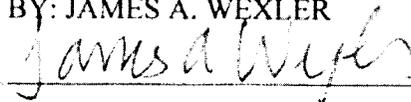
AND delivered as mutually agreed by e-mail to:

Joshua Dabling, WSBA #44792
Dabling Law Firm, PLLC
23607 Highway 99 # 3 E
Edmonds, WA 98026
425 210 5495
jarabarow@hotmail.com

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

Dated this 12 Day of August 2016 at Sammamish, Washington.

BY: JAMES A. WEXLER



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