

COURT OF APPEALS
DIVISION II
CASE NO. 39611-4 II
FILED 11/14/03
BY *su*

NO. 39611-4 II

COURT OF APPEALS
DIVISION II
THE STATE OF WASHINGTON

Roger A. Lee and Elizabeth Lee, his wife,
Appellants

v.

Jon Parker, Trustee and Timberland Bank, a corp.,
Respondents

Reply Brief of Appellants

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I. Respondent’s Argument

THIS CASE IS MOOT BECAUSE LEES FAILED
TO ENJOIN THE FORECLOSURE SALE

Appellant’s Reply

THE QUESTIONS NECESSARY TO GIVE LEES
EFFECTIVE RELIEF ARE NOT MOOT AND
INVOLVE THE FAILURE OF THE TRUSTEE
TO CONDUCT A NONJUDICIAL SALE UNDER
A VALID POWER OF SALE PURSUANT TO
OUR DEED OF TRUST ACT

The principal contention of Respondent is that this Court lacks jurisdiction to consider any of the issues involved in this case because the Lees failed to enjoin their foreclosure sale pursuant to RCW 61.24.130 , making the case moot.

The issues in this action involve real and existing controversies which call for an effective adjudication of Lee’s rights in a non-judicial foreclosure of their own home.

The first and primary issue in this case is whether the trustee has conducted a valid non-judicial foreclosure under our Deed of Trust Act. (RCW 61.24) *The Answer is that he did not, because he had no valid power of sale.* Under the Deed of Trust Act, the foreclosure must be brought by the holder of the deed of trust and note as beneficiary. *The notices of default and foreclosure sale must also be made by the beneficiary.* This was not done in this action by the trustee. *Instead, all notices and sale foreclosure was in the name solely of the originator of Lees' loan, Timberland Bank.* Timberland sold or transferred the original \$350,000 loan to persons unknown to the Lees. Timberland continued to collect the monthly loan payments, presumably as a "loan servicer" , for what turned out to be the alleged holder and beneficiary, Freddie Mac.

RCW 61.24.005(2) provides in part:

Beneficiary means the holder of the instrument or document evidencing the obligations secured by the deed of trust...

RCW 61.24.030(7)(a) corroborates this definition:

That for residential real property, before the notice of trustee's sale is recorded, transmitted or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.

When the trustee was requested by the Lees to produce proof by the beneficiary of the original deed of trust and note, together with any interim transfers, the trustee refused. Instead, the trustee took the position (apparently in accordance

with instructions from Timberland Bank) that Lees were not entitled to these documents but could have copies of them and the address of the alleged holder and beneficiary, Freddie Mac. (CP 109 – 112; CP 105 – 107). The originals have never been produced.

Likewise, the trustee failed to comply with our Uniform Commercial Code in proof of an obligation before collection of that obligation can be made by the holder. Under the Code, if a note or obligation is lost, stolen or destroyed, the enforcer of the obligation must show proof of ownership of the original obligation or that the loss of the obligation was not caused by a sale or transfer of that debt. RCW 62A. 3 – 308; 62A.3- 309. This provision was simply ignored by the trustee.

THE FORECLOSURE SALE
WAS VOID *AB INITIO*

This case tracks Cox v. Helenius, 103 W2d 383, 693 P2d 683 (1985) in which the Court set aside, as void, a non-judicial foreclosure sale of a home because of a trustee refusing to continue or stop the sale when a lawsuit had been filed by the debtor *prior* to that sale. In addition, the home was sold at the sale for \$11,783 when its value was worth \$200,000 – 300,000.

In Helenius, the Coxes signed an agreement to purchase a pool for \$9,985. To secure payment they executed a note and deed of trust on their home. The pool turned out to be defective and the Coxes spent \$4004 to repair it. The seller was

asked to satisfy the existing deed of trust and pay the Coxes the excess for their repairs. It was refused and notice of payment default was sent to the Coxes. In response, the Coxes filed a lawsuit for their damages and satisfaction of the deed of trust. The Coxes later amended their complaint, and requested an injunction of the foreclosure sale, which the trustee, ignoring the Cox's action, knew about. Despite discussions of settlement between the attorneys, the sale took place and the Cox's home was sold for a fraction of its value.

In analyzing the failure of the Coxes to enjoin their sale, the Court was clear that debtors should be protected from non-judicial foreclosure, particularly when there was no Court to oversee the process. It acknowledged three ways for a debtor to contest a foreclosure: contest the default (RCW 61.24.030(6)(j)); restrain the sale (RCW 61.24.130); or contest the sale (RCW 61.24.040(2)). The Court found that an injunction was unnecessary. An action had been commenced before the sale on the obligation and it was known by the trustee.

The Court found that a trustee is a fiduciary for both the creditor and the debtor and *must act impartially* between them. *The trustee had a duty to either inform Cox that the sale had not properly been restrained or to have delayed the sale until the underlying dispute was resolved.* Helenius at 390. Where there was a clear conflict by the trustee, he should have under the Code of Professional Responsibility (CPR DR5-105B), transferred his role to a third person. Helenius at 390.

The Lee case does not involve a grossly inadequate price, but does effectively destroy their equitable interest in their home. The Lees had put down at the outset \$55,000. During the next two years, they paid approximately \$64,800 in principal and interest for an equity of \$120,000. Like Helenius, the Lees received notices of default and foreclosure, but the notices were defective because the true holder of the debt and beneficiary under the deed of trust did not give the notices, or conduct the sale. Aside from that, the trustee breached his fiduciary role by not continuing the sale and/or resigning his role to a new trustee. Nor did, of course, the trustee submit the original note and mortgage with all transfers to the Lees. The Lees' lawsuit was filed on March 31, 2009, seeking an accounting of their original documents and restraint of their home sale until they were produced. It constituted an "action on the obligation" and injunction is not required under these facts.

The material defects and illegal conduct of the trustee, connected with his power of sale, justify an equitable setting aside, or voiding of, the sale to Freddie Mac and issues for trial, as well as damages arising from such conduct.

II. Respondent's Brief

ATTORNEY'S FEES WERE ALLOWABLE
TO THE TRUSTEE UNDER THE TERMS OF
THE DEED OF TRUST AND NOTE

Appellant's Reply

ATTORNEY'S FEES ARE NOT AWARDABLE
IN A VOID FORECLOSURE SALE AND/OR A
MERGER BY PURCHASE AT THE SALE

If, on the remand, the trial Court sets aside the sale here and orders a resale, because the sale is void and of no effect, attorney's fees awarded to the trustee would be vacated. In any event, it was an abuse of discretion for the trial Court to award attorney's fees of \$3,437.50 for defending against Lee's Motion to Join Freddie Mac as a party. The entire interest of Lee's in their home was sold allegedly to Freddie Mac and the sale extinguished the deed of trust and note by merger of both estates into the fee. Van Woerden v. Union Improvement Co., 156 W 555, 287 P2d 870 (1930). Likewise, the Respondents are not entitled to attorney's fees in this appeal for like reasons.

III. Respondent's Brief

THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN DENYING LEAVE TO
JOIN FREDDIE MAC AS AN ADDITIONAL PARTY

Appellant's Reply

Persons having an interest in litigation and a just adjudication are ordinarily joinable under CR 19 and CR 20 of the Superior Court rules. Freddie Mac is alleged by

Timberland Bank and their attorney and trustee, to be the purchaser of Lee's equitable interest at the foreclosure sale. Freddie Mac is also alleged to have been the owner, beneficiary and holder of the documents at the time of default. Our Court has made it mandatory to permit joinder for a complete determination of a case when it cannot be made without the presence of another party. This case cannot be resolved without the presence of Freddie Mac as a party.

McKinnis v. Los Lugos Gold Mines, 188 W 447, 62 P2d 1092 (1936)

(mandatory upon the Court to bring in parties necessary to have a complete determination); State, Ex rel Continental Cas. Co. v. Sup. Ct., 33 W2d 839, 207 P2d 707 (1949); Capital Nat'l Bank v. Johns, 170 W 250, 16 P2d 452 (1932) (purpose of rule on joinder is to avoid a multiplicity of suits and determine all subjects of controversy in one action).

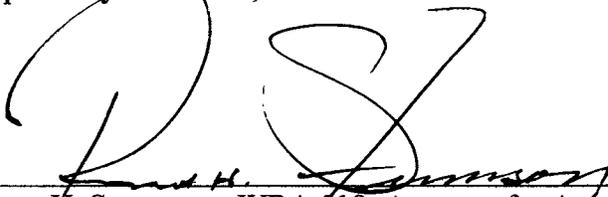
IV. Conclusions

- A. This Court can give the Lees effective relief by voiding their foreclosure sale for failure of the trustee to conduct a lawful sale;
- B. Enjoinder of the sale was not required when Lees brought suit for production of their original documents to protect themselves against third parties and the trustee ignored the action and sold the property;
- C. Freddie Mac has a direct interest in the issues of this action and joinder should be allowed;

- D. Attorney's fees are improper in this action because of merger of title in Freddie Mac as a result of the sale and the voiding of the sale for unlawful conduct of the trustee.
- E. The Lees may maintain their action of damages against the trustee for his unlawful conduct both as a trustee with a conflict of interest and unlawful sale.

Dated this 21st day of December, 2009.

Respectfully submitted,



Robert H. Stevenson, WBA 819, Attorney for Appellants

BY DEPUTY
STATE OF WASHINGTON
09 DEC 22 PM 1:03
COUNTY OF KING

On this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the attorney of record for plaintiff defendant, enclosing a true copy of the document to which this affidavit is affixed.

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

12-21-09

