

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON
No. 42688-9-11

BARBARA J. REISINGER and JOHN P. REISINGER, husband and wife,
Appellants,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for the
Certificate Holders of Soundview Home Loan Trust 2005-OPT3,
Asset-Back Certificates, Series 2005-OPT3,
Respondents,

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

SUPPLEMENTAL BRIEF OF APPELLANTS

FILED
COURT OF APPEALS
DIVISION II
2012 OCT 22 PM 1:07
STATE OF WASHINGTON
BY
DEPUTY

TABLE OF AUTHORITIES

Albice v. Premier Mortgage Services of Washington

Kristin Bain v. Mortgage Electronic Registration Systems, Inc.

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The Appellants believe they have a valid claim against the Respondent based on an improper administrative foreclosure and a second claim based on violations of the Consumer Protection Act (CPA). Appellants believe their suit against the Respondent was improperly dismissed by the Superior Court. Since the original Appellant's Brief was filed, the Washington State Supreme Court has rendered two decisions which we believe the Appeals Court should consider in ruling on our appeal. With these two decisions, the State Supreme Court has sent a clear and unambiguous message to the mortgage lending industry that neither sloppy foreclosure procedures nor deceitful administrative policies will be tolerated in the State of Washington.

ALBICE V. PREMIER MORTGAGE SERVICES OF WASHINGTON, INC.

NO. 39265-8

In this ruling, the Court upheld the appeals court decision in favor of Albice. Of particular applicability is that the court upheld Albice/Teccas's argument that the trustee's failure to comply with certain statutory requirements, specifically, that Premier conducted the sale 161 days after the original sale date under RCW 61.24.040(6), thereby rendering the sale void.

- A. The Trustee's Deed recites the Notice of Trustee's Sale of February 2008. The purported sale date is September 10, 2010. A simple calculation shows that 931 days had passed from the recording of the Notice of Trustee's Sale to the date of the Trustee's Sale itself. The 2008 Notice of Trustee's Sale recites a sale date of May 23, 2008. RCW 61.24.040(6) provides that a trustee may continue a sale for a period "not exceeding a total of 120 days." That takes the sale date

out to mid-September of 2008. The purported sale took place two years later - well beyond the statutory time limit.

B. Respondent's response will undoubtedly be the Appellants filed a bankruptcy and under RCW 61.24.130(4), the Respondent could re-note the trustee's sale on a 45 day notice. However, to comply with RCW 61.24.130(4), it is necessary to reissue a Notice of Trustee's Sale under RCW 61.24.040(1)(a) through(f). So, why, if the trustee issued the amended Notice of Trustee's Sale dated March 31, 2010 and recorded it on April 4, 2010, would the trustee not reference the Amended Notice in the Trustee's Deed, as opposed to referencing the original September 2008 Notice of Trustee's Sale? There are at least two possibilities. First, the trustee simply made a mistake in the Trustee's Deed. Secondly, the trustee realized that the amended Notice of Trustee's Sale was invalid and had to hide it from scrutiny by not mentioning it in the Trustee's Deed or in any of the court documents. The first option is a facial invalidity that would void the trustee's sale. The second option is a substantive, procedural invalidity. Either option is sufficient to void the trustee's deed and defeat the Respondents claim for possession.

C. The Albice case provides:

The Deeds of Trust Act sets out the procedures that must be followed to properly foreclose a debt secured by a deed of trust. Chapter 61.24 RCW. A proper foreclosure action extinguishes the debt and transfers title to the property to the beneficiary of the deed of trust or to the successful bidder at a foreclosure sale. *In re Marriage of Kaseburg*, 126 Wn. App. 546. 588. 108 P.3d 1278 (2005)

- D. In the Albice case, the trustee's deed noted a sale date 161 days after the notice of trustee's sale date. In the present case, we are dealing with over 800 days. The maximum delay is 120 days. So, on its face, the Trustee's Deed is invalid. Theoretically, a March 30, 2010 amended Notice of Trustee's Sale could have been appropriate (but not in this case as discussed below). However, in no way can a September 2010 trustee's deed reference a February 2008 Notice of Trustee's Sale and be in compliance with RCW 61.24
- E. Another facial invalidity is that the Trustee's Deed references a 90 day period. RCW 61.24.130(4) requires a 45 day period. The obvious retort is "90 days is more than 45 days so it complies anyway." However, if the 90 days as opposed to 45 days is proper, given that the amended sale date was May 14, 2010, and the amended Notice of Trustee's Sale was dated March 30, 2010, the Notice of Default period would go back roughly to February 14, 2010 -approximately three weeks prior to Respondent obtaining relief from stay from the Bankruptcy Court. This is simply another facial invalidity in the trustee's documents.
- F. But there is more - in 9 of the Notice of Trustee's Sale it states "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 RCW 61.24."
- G. RCW 61.24.030 sets forth a form of a notice of default that must be followed and, per RCW 61.24.030(8), is a prerequisite of noting a

trustee's sale. RCW 61.24.030(8)(k) requires notice related to owner occupied property which is applicable in the present case. Appellants never received such disclosure. The reason Appellants did not get the notice is two fold.

- H. First, the provision was added into the law in 2009. Respondant's amended Notice of Trustee's Sale references in Section VI that the notice of default was mailed on January 16, 2008, There is no way a 2008 notice of default on an owner-occupied property could ever satisfy the 2010 statute setting forth the prerequisite to set a notice of trustee's sale. While Respondent might protest that it is not Respondent's fault that the law was changed, all Respondent had to do upon obtaining relief from stay was to send a new notice of default. Respondent chose to short circuit the law and short circuit a prerequisite.
- I. This also creates facial invalidity as the bankruptcy was public record and the order for relief from stay was issued on or about March 4, 2010 (also of public record). The Amended Notice of trustee's Sale, which is of public record and was recorded in the Auditor's Office, was dated March 30, 2010, only 26 days after the order from relief from stay. It takes a minimum of 30 days to pass from a notice of default to a notice of trustee's sale. This is another defect in the timeframe that would put parties on notice of the problem.
- J. Prior to the hearing, the court should read the Albice case as it relates to vague recitals ("notably absent in the trustee's deed is any mention

of the six continuances" in which "conclusory recitals make it impossible to determine as a matter of fact whether the sale took place within the statutory required time. . ." Id. Albice cites to RCW 61.24.040(2) and emphasizes that the statute requires that a deed "shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter..."

- K. The facts recited in the Trustee's Deed setting forth the dates does not give rise to the conclusion that the sale is proper - the facts recited in the Trustee's Deed mandates the conclusion of an improper timeline - 931 days passing - far in excess of the statutory requirements. The trustee's "[L]egal conclusions without supporting facts are insufficient to demonstrate that the sale complied with all the statutory procedural protections." The Albice court agreed with a California court that "where recitals of regularity appear on the face of the deed but the deed also sets forth facts that are inconsistent with that recital, the deed is void on the basis that the recitals are not valid." In it's ruling on this case, Division 2 of the Court of Appeals cited an Alaska case rejecting "a trustee's bald statements that he or she complied with the law, as distinguished from recitals of fact" and said that to do so dilutes "the statutory protections afforded borrowers by the Act".

The Albice decision essentially eviscerates the Respondents trustee deed.

BAIN V. MORTGAGE ELECTRONIC REGISTRATION SYSTEM (MERS)

NO. 86206-1

The court, in its decision, discussed in depth the criteria for a Consumer Protection Act (CPA) action related to improper foreclosure.

- A. The court specified that to prevail in a CPA action, the plaintiff must show (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. Appellants' appeal demonstrates that all five criteria have been met.
- B. The court specifically stated "To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has the capacity to deceive a substantial portion of the public." Appellants have demonstrated a consistent pattern of deceptive behavior on the part of the Respondent's Servicing Agent, AHMSI. Whether this pattern of deception was a result of purposeful fraud or mere incompetence has yet to be determined, but the net effect of the deception is the same.
- C. That Appellants' application for mortgage modification occurred in trade and commerce stands without need for further discussion.
- D. With regard to public impact, the court determined "that MERS is involved with an enormous number of mortgages in the country". AHMSI services thousands of mortgages for the Plaintiff and other mortgage holders. There is no reason to believe that the treatment received by Appellant was unique, but even if it were, that it occurred in such a large context

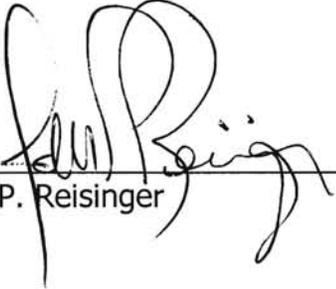
demonstrates public impact. Additionally, the State Legislature recognized the problem and passed 2SHB-1362 in the 2011 session. Although passed too late for applicability to this specific case, that the Legislature saw sufficient justification to pass the bill in the first place demonstrates that sloppy foreclosures and deceitful administrative policies were rampant in Washington State.

- E. Regarding injury, the court said “there are many different scenarios, such as when homeowners need to deal with the holder of the note to resolve disputes or to take advantage of legal protections, where the homeowner does need to know more and can be injured by ignorance. Further, if there have been misrepresentations, fraud, or irregularities in the proceedings, and if the homeowner/borrower cannot locate the party accountable and with authority to correct the irregularity, there certainly could be injury under the CPA. This scenario directly parallels the experience of Appellants in attempting to obtain a modification to their mortgage. Appellants were never allowed to know or talk to the person with decision making authority and were directly injured by the withholding of this information.

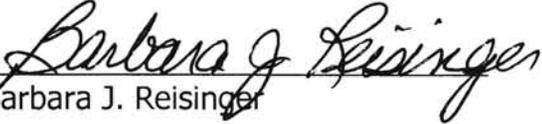
As previously stated, with these two decisions, the State Supreme Court has sent a clear and unambiguous shot across the bow of the mortgage lending industry. Neither sloppy foreclosure procedures nor deceitful administrative policies will be tolerated in the State of Washington. This case has undeniable earmarks of both of these defects but the specifics of this particular case will never see the light of day unless the court reverses

the action of the Superior court and allows this case to continue. Justice delayed may be justice denied but in this case, justice is plainly being denied outright. Justice demands that this case be allowed to continue.

Respectfully submitted this 19th day of October, 2012.



John P. Reisinger



Barbara J. Reisinger

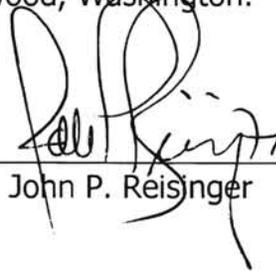
CERTIFICATE OF SERVICE

I, John P. Reisinger, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

On October 19, 2012, I delivered a true and accurate copy of the foregoing document in hard copy, via email and First Class U.S. Mail, to:

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Dated this 19th Day of October, 2012, at Lakewood, Washington.



John P. Reisinger

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