

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

BRIEF OF APPELLANTS, REVISED



TABLE OF CONTENTS

I.	Assignment of Error	Page 2
II.	Issues	Page 2
III.	Statement of the Case	Page 2
IV.	Summary of Argument	Page 3
V.	Argument	Page 4
VI.	Conclusion	Page 9

TABLE OF AUTHORITIES

Albice v. Premier Mortgage Services of Washington, 157 Wn. App. 912, 239 P.3d 1148 (Div 2 2010)

TABLE OF STATUTES

RCW 61.24	Page 4, 6, 7
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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Did the trial court err in summarily dismissing the complaint by ignoring the precedents set in *Albice v. Premier Mortgage Services, Inc.*

II. ISSUES

1. Did the trial court commit reversible error by failing to follow the precedent established in the case of *ALBICE vs. PREMIER MORTGAGE SERVICES*.
2. By summarily dismissing the case, did the trial court fail to consider any of the consumer protection complaints against the defendant resulting from defendant's bad faith business practices.

III. STATEMENT OF THE CASE

A. Factual Background

This case involves an action to set aside a non-judicial deed of trust foreclosure. The property foreclosed upon was owned by the appellants. Appellants were in the process of applying for a modification to their mortgage (CP28), held by Deutsche Bank National Trust as Trustee for the Certificate Holders of Soundview Home Loan Trust 2005-OPT3, Asset-Back Certificates, Series 2005-OPT3 (DBNT), with the mortgage holders agent, AHMSI (CP1). While appellants understood

that AMHI was under no obligation to modify their mortgage, by accepting appellants' application, AHMSI took upon itself an obligation to process that application in a professional manner and to act in good faith (CP27). Yet AHMSI lost appellants' application at least twice, lost repeated submission of documents made by appellants and consistently refused to allow appellants to speak directly to anyone in a decision making capacity. AHMSI did, however, postpone the stated foreclosure date on four occasions before finally completing the foreclosure on September 10, 2010, while appellants' application was still pending. Even after the foreclosure was completed, AHMSI continued to request that appellants submit copies of documents that had previously been submitted multiple times, continuing to treat appellants' application as an ongoing process (C27).

IV. SUMMARY OF ARGUMENT

1. AHMSI, at all times, acted as the servicing agent of DBNT.
2. By accepting appellants' application for mortgage modification, AHMSI obligated themselves to process that application in good faith which they did not do.
3. In any event, the foreclosure was procedurally flawed due to inconsistent and/or stale dating.

V. ARGUMENT

Neither party contests that, at all times in question, AHMSI acted as the loan servicing agent of the mortgage holder, DBNT. As such, DBNT must accept responsibility for every action and omission of AHMSI as if it were their own.

Appellants recognize that AHMSI was under no obligation to accept appellants' application for loan modification. But by accepting appellants' application, AHMSI took upon itself an obligation to process that application in a professional manner and to act at all times in good faith (CP27). In fact, AHMSI handled that application in an unprofessional and/or bad faith manner (CP28). Whether those unprofessional actions resulted from incompetence or intentional deceit is an open question. Without allowing appellants' case to proceed to the discovery phase, this question will never be answered. In either case, appellants were led to believe that AHMSI was operating in good faith when they clearly were not (CP28).

By postponing the actual foreclosure date on four separate occasions, AHMSI established an unstated policy that, as long as appellants proceeded with the loan adjustment in good faith, AHMSI would postpone foreclosure until the adjustment procedure had run its course. By foreclosing without having first finalized appellants' application, AHMSI clearly acted in bad faith (CP28).

While Defendant does cite relevant authority regarding Washington State law, all such authority presupposes a proper foreclosure. *Albice* provides:

The Deed of Trust Act (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). *Albice* at 920.

In the *Albice* case, there was a foreclosure that was not restrained.

However, all of the authority and arguments that the bank is making in the present case were made in the *Albice* case. However, the court noted that there was a facial invalidity to the trustee's deed in that the trustee's deed noted that the sale was dated 161 days from the notice of trustee's sale. Therefore, on its face, there is no way that the trustee's deed complied with the Act. The court found that if the procedure was invalid that the deed was void.

The plaintiff's Brief in Opposition to the Writ of Restitution goes through this and the problems in the bank's deed at length. The fact is, there is a good faith basis in law and fact to proceed with this case. There is binding Division 2 case law that sets forth that if a trustee's deed and the process to get to the trustee's deed is invalid then the aggrieved party has the ability to come before the court under a quiet title action and seek to have the deed voided. That is the case that is before the court regarding quiet title. Not only is there a factual background, there is a legal background (CP13).

Defendant's citation to *Plein v. Lackey*, 149 Wn.2d 214, 226 (2003) tries to establish a waiver. However, waiver is a defense. It does not get to whether or not Plaintiffs have appropriately stated a cause of action. It should be noted that all of the same arguments that could have been made in this case about appropriate notice and waiver were made in the *Albice* case. *Albice* cited to *Cox*

v. Helenius, 103 Wn.2d 383, 693 P 2d 683 (1985). In the *Albice* case, the court found that a trustee's violation of the statutory procedure divested the trustee of authority to conduct the sale. While the violation is different in *Albice* than in the present case, the legal proposition remains and the notion that Plaintiffs have somehow failed to state a legal claim is not appropriately put before the court.

While the bank does bring up RCW 61.24.127, it does not reconcile such statute with the binding Division 2 authority in *Albice* that provides that a trustee's deed is void if the trustee does not follow appropriate procedure in conducting the sale.

Please note that Plaintiffs' complaint is not a claim under RCW 61.24.127 for common law fraud or misrepresentation, and it is not a claim against the trustee. There is a claim that the trustee's deed is void, but that is brought under the declaratory judgment provisions of the Revised Code of Washington and not under Title 61.24 *et seq.*

Further, the violation of the Consumer Protection Act is not based solely on the basis of the inappropriate trustee's sale. Rather, the Consumer Protection Act is based almost exclusively on action independent of the deed of trust foreclosure (CP4). Such unfair and deceptive acts arose out of the bank's complete failure to negotiate a loan modification in good faith. The bank made continued requests for additional information with regard to the loan modification, and exhibited bad faith in continuously requesting the same information over and over again (CP27). These deceptive actions reassured Plaintiffs that the foreclosure sale would not be going through. The bank even continued to request additional information for the loan modification after the date of the bank's invalid trustee's sale (CP28).

Assuming that the trustee's deed is void, there was no need to set it aside, there is only the need for a declaratory action for the court to declare the deed to be void. This would not have divested Plaintiffs of rights to pursue Consumer Protection Act claims against the bank that is engaged in unfair and deceptive practices in a loan modification process.

Regardless, this was not supposedly a summary judgment and was not a trial. It was simply the Plaintiff coming forward saying that a claim has been appropriately raised before the court. This was absolutely incorrect, as there are recognized claims in Washington law for Consumer Protection Act violations. There are recognized claims under Washington state statutes related to determination of rights in real property. There is recognized law under the Division 2 case of *Albice* that allows a plaintiff, after a trustee's sale, to challenge the trustee's authority and move to have the trustee's deed declared void and without legal effect.

The RCW provisions cited by the bank are simple recitations of the law. Plaintiffs have set forth in previous briefing that is appended to this brief, the violations that the bank made regarding the notice of default vis-à-vis the bankruptcy, vis-à-vis the notice of trustee's sale.

While the bank provided various arguments - arguments that were previously rejected at the eviction proceeding, the arguments are not appropriate in a motion under CR 12(b)(6).

If the court wanted additional briefing on the matter and to convert the matter into a summary judgment where Plaintiffs have appropriate time to research all of the information that was placed before the court on very short

notice, the court should have denied the motion under CR 12(b)(6) and given the bank leave to re-file the motion as a summary judgment motion.

The bank's brief was notably absent of any authority that states that a trustee's sale can be premised upon a notice of default which was invalid at the time of the issuance of the notice of trustee's sale. What is clear, and previously briefed, is that the laws under RCW 61.24 are designed to protect the homeowner - not to protect the bank. The additional requirements of disclosure related to notices involving owner-occupied residential property were designed to protect individuals, such as Plaintiffs. The failure of the bank to provide a notice of default that appropriately set forth the disclosures related to owner-occupied property means that the bank violated a prerequisite for issuing a notice of trustee's sale.

Again, this was a CR 12(b)(6) motion. This was not a trial or a summary judgment. The point is that there is a valid basis, both factually and legally, for moving forward with this claim.

The Consumer Protection Act is a well recognized claim in the state of Washington. Plaintiffs have set forth documents from the bank showing that the bank still requests information related to a loan modification after the trustee's sale occurred.

Plaintiffs have set forth allegations in the prior pleadings that they were misled by the bank about the loan modification process and that they would not proceed with the notice of trustee's sale (CP27).

A dismissal motion was not the forum in which to decide if each and every element of Plaintiffs' case meets each and every requirement of a Consumer Protection Act claim. A dismissal motion is a time to see and examine if Plaintiffs

have alleged a claim that is recognized at Washington law. The Consumer Protection Act is a statutory claim and is well recognized in Washington case law.

In the interests of brevity, we will not go into all of the cases cited. However, it does not appear that any of the prior cases were ever dismissed on CR 12(b)(6) motions but rather either on summary judgment motions or at trial.

VI. CONCLUSION

Significant oversights were made by the trial court in dismissing this suit. Appellants deserve to have the facts of this case explored via discovery and to have those facts heard in open court.

Respectfully submitted this 16th Day of April, 2012



John P. Reisinger



Barbara J. Reisinger

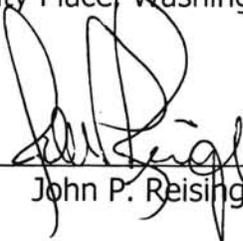
CERTIFICATE OF SERVICE

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 April 16, 2012, I delivered a true and accurate copy of the foregoing document in hard copy, via First Class U.S. Mail, to:

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Dated this 16th Day of April, 2012, at University Place, Washington.



John P. Reisinger

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