

IN COURT OF APPEALS FOR WASHINGTON STATE DIVISION II

No. 437121
No. 44619-7-II

JANICE GEARY,
Appellant

v

ING Bank, FSB, a Delaware corporation;
Aurora Loan Services LLC, a Washington Limited Liability Company; Quality Loan Service
Corporation of Washington; a Washington Corporation Respondents

APPELLANT'S SUPPLEMENTAL BRIEF related to unlawful detainer

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Supplemental Statement of Facts Relevant to the Unlawful Detainer

Geary submits this supplemental brief for issues related to the unlawful detainer Action by the Respondent ING BANK, fsb, which have not be addressed fully in the briefs already before the court. All issues, authority and argument previously advanced are incorporated into this brief.

The definitions of the parties in the opening brief are incorporated herein.

*Unless otherwise designated the Clerk's Papers references are references to papers submitted in ING v. Valli, Pierce County Case # 11-2-08149-0 are designated [*CP].
References to papers submitted previously with the opening brief are designed [CP]*

Geary adopts the statement of facts set forth in her opening brief and reply brief and supplements those facts as follows:

The litany of corrupt steps taken by the Respondents leading to the foreclosure have been addressed in previous briefs, these are particular and additional for the unlawful detainer action of the defendant ING.

The Gearys will have lost \$700,000.00 in paying off junior loans and payments to the putative note holders as of 12/31/2011 [CP 913], HOA litigation, contesting unlawful detainer actions from both Aurora and ING . Because of the intentional and illegal activities of the respondents their title has been impugned with constant delays because of changes of counsel, postponements, delays and multiple unlawful detainer actions.

The trial court granted summary judgment for unlawful detainer based on an unsustainable summary judgment in the case of Geary v. ING, Aurora and Quality Loan Services, et. al. consolidated with this appeal. The "sale" upon which ING based its unlawful detainer action was originally listed as held on 7/24/2009 by the "Trustee" QLS. [CP 146-147]. After a series of postponements it was conducted on 11/20/2009. QLS was ostensibly nominated by MERS as the ostensible "beneficiary." The "sale" took place on 11/20/2009 after several extensions of the sale date. QLS, under oath, executed a "Trustee's Deed Upon Sale" dated 11/23/2009 and recorded according to statute on 12/01/2009. The Grantee was

listed as Aurora as the purchaser “*in pro per*” . [*CP 57 -58]. In an Real Estate Excise Tax Affidavit dated 11/23/2009, agents for both QLS and Aurora signed “under penalty of perjury” that QLS was the “Seller” and Aurora was the “Buyer” Aurora commenced an unlawful detainer action on January 7, 2010, Pierce County Superior Court, Cause #10-2-05164-9 declaring it was the purchaser at the Trustee’s Sale, subject to Rule 11 sanctions. Then almost five months later, QLS executed and recorded a “Corrective Trustee’s Deed Upon Sale” that named ING as the purchaser “*in pro per.*” This was recorded on May 24, 2010. (Counsel for QLS and Aurora were the same throughout this process).

The unlawful detainer action under review here was started on April 11, 2011. The complaint did not reference the previous Trustee’s Deed Upon Sale dated 11/20/2009 nor did it refer to the “Corrective Trustee’s Deed, merely exhibited it to the complaint. [*CP 1 - 24]. It is an extreme point of interest that a sub-sub-sub agent of Aurora’s triple hearsay declaration in the quiet title action stated that ING “became owner of the Note on or about May 2005.” [*CP 434].

As of November 2009, Aurora is the recorded “beneficiary” under the DOT.

In its “Trustee’s Deed Upon Sale” [*CP 57-59] QLS, the illegal trustee, states that Aurora was the purchaser *in pro per* [CP 58], meaning, of course, that Aurora bid in its note evidencing the beneficiary interest in the deed of trust. This trustee’s deed was filed on 12/01/2009. (Curiously the signature was dated 11/23/2009, but the notary was not dated until 11/25/2009, consistent with the tactics of QLS found in other cases.) A excise tax affidavit was filed with the Pierce County Auditor verifying this “sale.” However, on May 24, 2010, Quality recorded a “Corrective Trustee’s Deed Upon Sale” [*CP 61-63] QLS also records a Corporate assignment of the then *extinguished* DOT to ING from Aurora on May 24, 2010 in true form [CP 180] while pursuing the first UD action for 14 months.

Counsel for ING stated in its responsive brief in NO. 43712-1-II “First, because ING Bank was never a beneficiary under Mrs. Geary’s deed of trust prior to the foreclosure sale . . .” [Page 44, ING’s responsive

brief]. This statement is accepted as a verity.

Issues Presented

1. Since ING produced no authority to do business as it alleged in its complaint were they foreclosed from conducting an action under RCW 24.03.390?

2. If the “Trustee’s Sale” was invalid under a number of appellate court rulings holding that MERS cannot be a legal beneficiary under the Washington Deed of Trust Act (DOTA), can ING receive any right to possession of the property under an invalid deed of trust sale?

3. Can a Trustee conduct a “do-over” sale once it has recorded a Trustees Deed Upon Sale under the DOTA?

4. Must ING nevertheless produce some kind of consideration for its “purchase” at the Trustee’s Sale

Supplemental Table of Authorities

Cases

Supreme Court Cases

Bain v. Metropolitan Mortg. Group, Inc., 285 P.3d 34, 175 Wn.2d 83 (Wash. 2012)	2
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Walker v. Quality Loan Serv. Corp., No. 65975-8-1, (Wash. App. Aug. 2013).	2
Wilson v. Daniels , 31 Wn.2d 633 , 643-44, 198	5

Washington Statutes

RCW 24.03.390	
RCW 61.24	1
RCW 61.24.050 (1)	3
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Authority and Argument

The only basis for its claim of right to an unlawful detainer was the summary judgment issued in Pierce County Cause # 11-2-09057-0. While this claim, whose validity is on appeal in this action, dismissed certain claims of the Gearys, it did not validate any of the rights of the parties, especially the right of possession by ING. Specifically, it did not validate the claim that ING had any rights in the deed of trust or the note.

Authority and Argument

1. ING produced no authority to do business even though the allegations in its complaint were contested in the answer. RCW 24.03.390

ING alleged in its complaint that it was fully qualified to do business in this state before filing its suit for unlawful detainer. The appellants contested this in their answer to the complaint. [*CP 28]

RCW 24.03.390 Conducting affairs without certificate of authority No foreign corporation which is conducting affairs in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state until such corporation shall have obtained a certificate of authority.

Such proof was never forthcoming because ING was not qualified under RCW 24.03.390 to maintain a proceeding in this state. A non resident corporation must prove, not only its capacity to bring this action in the superior court, but also its ownership of the contract upon which the action was based. *Nat. Bus. & Prop. Exch. v. Shinolt*, 52 Wn.2d 71(1958)

2. ING can receive no benefit from a “Trustee’s Sale” invalid under a number of appellate court rulings holding that MERS cannot be a legal beneficiary under the Washington Deed of Trust Act (DOTA) RCW 61.24

Disregarding for the moment the multiple breaks in the chain of title to the note and deed of trust

pointed out in the Geary's opening brief, which renders the deed of trust unenforceable, Counsel for ING stated in its responsive brief in NO. 43712-1-II "First, because ING Bank was never a beneficiary under Mrs. Geary's deed of trust prior to the foreclosure sale..." [Page 44 of ING's responsive brief]. In a triple hearsay statement by a sub agent or a sub agent of Aurora, the agent states that ING became the owner of the Note in 2005. [*CP 434]. The Gearys do not accept that ING was the holder of the note, but if ING was the holder at the time of foreclosure, neither the "Trustee's Deed Upon Sale" nor the "Corrective Trustee's Deed Upon Sale" were valid and ING has no rights emanating from either instrument. Our Supreme Court in *Bain v. Metropolitan Mortg. Group, Inc.*, 285 P.3d 34, 175 Wn.2d 83 (Wash. 2012), When an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale. *Rucker v. Novastar Mort.* (Div I, No. 67770-5-1, Aug 13, 2013); *Walker v. Quality Loan Serv. Corp.*, No. 65975-8-1, slip op. at 7 (Wash. App. Aug. 2013).

3. ING can receive no benefit from a "do-over" sale because the property was previously sold and a Trustees Deed Upon Sale was previously recorded under the DOTA?

As pointed out above, the trustee's sale was invalid under any scenario, but as the line of the twisted documents go, it certainly cannot be a "purchaser" under the "Corrective" trustee's deed.

QLS, the illegal trustee, stated in the original Trustee's Deed Upon Sale that Aurora Loan Services was the purchaser *in pro per* [*CP 58], meaning, of course, that Aurora bid in its note evidencing the beneficiary interest in the deed of trust. [Of course, now Aurora asserts it was not the holder of the note, a mere servicer. This did not occur to Aurora when it commenced an unlawful detainer action against the Appellants in 2010? [*CP 387] This first trustee's deed was recorded on 12/01/2009. [*CP 57-58] (Curiously the signature was dated 11/23/2009, but the notary was not dated until 11/25/2009, consistent with the tactics of QLS found in other cases.) A excise tax affidavit was filed

with the Pierce County Auditor by QLS and IRS 1099-A by Aurora [*CP 411] verifying this “sale.”

At the point the original trustee’s deed was recorded [*CP 57 - 58] the sale became final and, even if the trustee was a legal one, the trustee’s powers over the property ceased. RCW 61.24.050 (1) states . . . *if the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter.*

Subsection (2) gives the trustee *11 days* after the announcement of the sale to void the sale. At no point does the trustee have 5 months to rig the sale to another “purchaser.”

But, on May 24, 2010, QLS recorded a “Corrective Trustee’s Deed Upon Sale” [*CP 6163] saying that ING was the purchaser *in pro per*. This tactic of changing the parties and the documents willy nilly is consistent with the many manipulations in this case, and cases in which QLS (See *Rucker v. Norstar*, supra) and Aurora are involved in general. These schemes cannot be valid in equity or under the DOTA. Courts must strictly construe the non judicial foreclosure provisions of the deed of trust act (RCW 61.24) in favor of the Borrower. *Chd, Inc. v. Boyles* 138 Wn. App. 131, (2007). 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 public foreclosure sale. *Albice v. Premier Mortgage Servs. Of Wash., Inc.* 157 Wn. App. 912 (2010). The Gearys are not advocating that the original sale was proper in any manner because of the countless defects in the process, but argue that ING cannot gain any interests through the “Corrective” trustee’s deed in any case.

The “Trustee’s Deed” was signed and recorded under oath by notary before recording with the Pierce County Recorder. RCW 64.04.020 mandates that “Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds.” The multiple changing and executing of these instruments in these foreclosure case comes under the criminal statutes.

RCW 9A.72.010 Perjury and Interference with Official Proceedings.

"Materially false statement" means any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; whether a false statement is material shall be determined by the court as a matter of law.

ING's claim of having rights to the property merely because it was given a "Corrective" trustee's deed has no legal weight. The mere recording of an instrument cannot create legal obligations where none existed before. *Fidelity & Dep. Co. v. Ticor Title Ins.*, 88 Wn. App. 64, 943 P.2d 710, at page 69.

2. ING produced no probative evidence of right to possession.

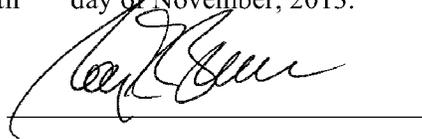
ING provided no evidence of consideration for the purchase, even if the sale was valid (which under a slew of reasons set out by Geary in previous briefs it is not a valid foreclosure sale). ING's brief to the trial court made an argument that title to the property is not an issue in an unlawful detainer proceeding citing *Puget Sound Inv Group v. Bridges*, 92 Wn. App. 523 1998. ING urges a rather twisted interpretation of the unlawful detainer issue because the Court of Appeals, *upheld the trial court's refusal to issue a writ of restitution* in the *Puget Sound* case. The very issue in an unlawful detainer action is who has superior title, and it is not based on the weakness of one party but the strength of the party asserting right to possession. In such an action there is only one issue before the court - the right to possession. The statutory incidents are dependent on this right. *Kessler v. Nielsen* 123, 3 Wn. App. 120, 472 P.2d 616 (1970). There is a presumption that a party in possession has a right to possession until the party seeking ouster meets its burden of proof. *Duprey v. Donahoe* 52 Wn.2d 129 (1958).

Before any party may obtain an unlawful detainer and a writ of restitution they must show a superior right to possess over the party in possession. The burden is upon the plaintiff in an unlawful detainer action to prove, by preponderance of the evidence, the right to possession. *Hous. Auth. of City of*

Pasco v. Pleasant 393, 126 Wn. App. 382 (2005) The purpose of an unlawful detainer action is to determine the right of possession. *First Union Mgmt. v. Slack*, 36 Wn. App. 849, 854, 679 P.2d 936 (1984). Unlawful detainer statutes are in derogation of the common law and are strictly construed in favor of the party in possession. *Canterwood Place L.P. v. Thande* 106 Wn. App. 844 , 848, 25 P.3d 495 (2001) (citing *Terry* , 114 Wn.2d at 563 ; *Silva* , 94 Wn. App. at 734; *Wilson v. Daniels* , 31 Wn.2d 633 , 643-44, 198

Ms. Geary asks the Court to remand the unlawful detainer action back to the trial court to dismiss the action, and to grant relief as previously asked in the prior briefing.

Respectfully submitted this 21th day of November, 2013.

A handwritten signature in black ink, appearing to read "Roy G. Brewer", is written over a horizontal line.

Roy G. Brewer WSB #11757 Attorney for
Janice Geary (nee Valli)

Certificate of Service

Certificate of Service

That on November 21 , 2013, I caused to be delivered copies of the following document:
Appellants Motion, to the following parties in the manner indicated below:

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