

No. 45160-3-II

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

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Respondent,

vs.

IBRAHIMA NDIAYE

Appellant.

BRIEF OF RESPONDENT
FEDERAL NATIONAL MORTGAGE ASSOCIATION

Submitted By:
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I. RESPONSE TO ASSIGNMENT OF ERROR

1. The trial court properly entered an order issuing writ of restitution in favor of Federal National Mortgage Association (“Fannie Mae”).

II. STATEMENT OF THE CASE

a. Procedural History

On March 15, 2013, Fannie Mae filed its complaint for unlawful detainer. CP 3-16.

On March 19, 2013, an order to show cause was entered setting a hearing on April 5, 2013, for Fannie Mae’s motion for order issuing writ of restitution. CP 172-173.

On April 3, 2013, Ibrahima Ndiaye (“Ndiaye”), through counsel Kate Knapp Lengyel, filed an answer to motion for writ of restitution. CP 81-84.

On April 5, 2013, an order assigning this case for trial was entered. CP 178.

On April 15, 2013, Fannie Mae filed a motion for reconsideration of an order entered on April 5, 2013, which set the unlawful detainer for trial. CP 85-95.

On May 1, 2013, the Honorable James Dixon sent counsel for Fannie Mae and Ndiaye a letter denying Fannie Mae’s motion for reconsideration.

CP 179.

On June 21, 2013, Fannie Mae filed a motion for summary judgment before the Honorable Gary Tabor. CP 180-193. The motion for summary judgment relied on the documents previously filed with the court, including the affidavit of foreclosing trustee and affidavit of Nationstar Mortgage, LLC. CP 180-193, 17-57, 58-80.

On July 19, 2013, instead of granting or denying Fannie Mae's motion for summary judgment, the Honorable Tabor entered an order issuing writ of restitution in favor of Fannie Mae. CP 244-245.

On July 25, 2013, Ndiaye filed a notice of appeal. CP 246-249.

b. Statement of Facts

On or about April 24, 2007, Ndiaye granted a Deed of Trust ("DOT") to Mortgage Electronic Registration Systems Inc. ("MERS") solely as nominee for Ward Lending Group, LLC ("Ward Lending"), in order to secure repayment of a loan extended to Ndiaye for \$205,000.00, to acquire residential property located at 819 Oakcrest Drive Southeast, Lacey, WA 98503. CP 21-35. The beneficiary under the DOT was MERS solely as nominee for Ward Lending, Ward Lending was the lender, and Thurston County Title Company was the trustee. CP 22.

On or about December 1, 2008, Ndiaye defaulted on the terms of his loan. CP 37. Accordingly, a Notice of Default, which set forth the default

under the DOT, was mailed and posted to the subject property. CP 36-38, 41-42. The beneficiary under the DOT assigned, granted, and conveyed the DOT to CitiMortgage, Inc. CP 39. The Assignment of DOT was recorded on May 27, 2009, under Thurston County Auditor's File No. 4085318. *Id.*

Subsequently, the new beneficiary under the DOT, CitiMortgage, appointed Northwest Trustee Services, Inc., as successor trustee under the DOT. CP 40. The Appointment of Successor Trustee was recorded on May 27, 2009, under Thurston County Auditor's File No. 4085319. *Id.*

Following default, Ndiaye was in communication with the servicer, Nationstar Mortgage, LLC, regarding loss mitigation options. CP 58-80.

The beneficiary, CitiMortgage, assigned, granted and conveyed the Deed of Trust to Nationstar Mortgage, LLC. CP 43. The Assignment of Deed of Trust was recorded on July 14, 2011, under Thurston County Auditor's File No. 4219517. *Id.*

Subsequently, a second Assignment of Deed of Trust was recorded on January 10, 2012, under Thurston County Auditor's File No. 4246207. CP 44. The second Assignment of Deed of Trust assigned, granted, and conveyed all beneficial interest in the DOT to Nationstar Mortgage, LLC. *Id.*

Prior to transmitting a Notice of Trustee's Sale, the appointed successor trustee, Northwest Trustee Services ("NWTS"), obtained a

declaration from the beneficiary, Nationstar Mortgage, LLC, certifying that it is the holder of the note. CP 45. A Notice of Trustee's Sale was posted at the property address and mailed to the property address on January 17, 2012. CP 46-47, 52. The Notice of Trustee's Sale set the sale date for April 20, 2012, at 10:00 a.m. CP 48-51. The Notice of Trustee's Sale was published in the Tenino Independent, a newspaper of general circulation, on March 21, 2012, and April 11, 2012. CP 54-55.

Throughout the non-judicial foreclosure process, Ndiaye applied and was denied for a HAMP modification. CP 59. Ndiaye was notified of the HAMP denial and informed that he may be eligible for a non-delegated modification, but that the foreclosure sale was scheduled and a modification could not be guaranteed. *Id.*

Ndiaye was notified on April 11, 2012, that he had been denied for the non-delegated modification and no other loss mitigation options were available. *Id.*

On April 20, 2012, the trustee's sale of the real property went forward and the Trustee's Deed was issued to Fannie Mae on May 2, 2012. CP 56-57. The sale date was less than 120 days from the notice of trustee's sale, and in compliance with RCW 61.24.040.

Following the foreclosure sale, Fannie Mae was unaware of who occupied the property; thus, both the Washington and Federal notices to

vacate were mailed to the property via first class and certified mail on May 11, 2012. CP 8-14.

Upon expiration of the Washington 60 day tenant notice to vacate, Ndiaye having failed to vacate the property, Fannie Mae initiated this unlawful detainer action by personally serving an occupant of the premises, Abdoul Teuw, with the summons and complaint for unlawful detainer on August 1, 2012. CP 157.

Shortly after personal service of the unlawful detainer action, counsel for Fannie Mae received a response from Ndiaye, *pro se*. CP 161-171. Ndiaye's answer raised three issues. First, Ndiaye stated that he was confused because they received a 90 day notice to vacate, but the eviction proceeded before 90 days had passed. *Id.* Second, Ndiaye stated that the trustee's deed is not valid. *Id.* Lastly, Ndiaye stated that the foreclosure violated Making Homes Affordable Act. *Id.*

On March 15, 2013, Fannie Mae scheduled a show cause hearing with the court for April 5, 2013. CP 172.

On April 5, 2013, at the scheduled show cause hearing, Ndiaye appeared through counsel Kate Knapp Lengyel and Fannie Mae appeared through its associated counsel Patrick Rawnsley. RP (April 5, 2013) 2. Additionally, on April 5, 2013, Ms. Lengyel filed an answer to motion for writ of restitution, show cause. CP 174-177. The Honorable James Dixon

determined that this matter should be set for trial because there were several issues of material fact. RP (April 5, 2013) 4:21-24. An order assigning the case to a civil trial judge was entered. CP 178.

On April 15, 2013, Fannie Mae filed a Motion for Reconsideration, to be heard on May 3, 2012. CP 85-95. On May 1, 2013, prior to the scheduled hearing, the court provided a letter to the parties which denied Fannie Mae's Motion for Reconsideration and further stated "[a]s this court has previously advised, this issue is not a summary proceeding appropriate for the unlawful detainer calendar." CP 179.

On June 21, 2014, Fannie Mae filed a motion for summary judgment set before the Honorable Gary Tabor. CP 180-193. The hearing on Fannie Mae's motion took place on July 19, 2013. RP (July 19, 2013). After hearing argument from both sides, Judge Tabor made an oral ruling and stated:

"...I am still of the opinion, and I have not seen the case that changes that, that an unlawful detainer action is not the appropriate place to raise a collateral attack on the nonjudicial foreclosure, and so here today here's what I'm going to do. You can call this a summary judgment if you want. I'm not really sure that's appropriate. I'm simply granting the writ of restitution to the plaintiff."

RP (July 19, 2013) 14:14-23. An order issuing writ of restitution, which did not mention whether Fannie Mae's motion for summary judgment was granted or denied, was entered. CP 244-245.

Ndiaye's appeal follows the order for writ of restitution. CP 246-249.

III. RESPONSE ARGUMENT

A. Standard of Review.

The Court of Appeals reviews a case on a de novo basis when the relevant facts are undisputed, and the only questions are questions of law. *Hogan v. Sacred Heart Medical Center*, 101 Wn. App. 43, 49, 2 P.3d 968 (Div. 3 2000). Furthermore, an order granting or denying summary judgment is reviewed de novo. *Ski Acres, Inc. v. Kittitas County*, 118 Wn. 2d 852, 854, 827 P.2d 1000 (1992).

Here, the underlying facts of the case are not in dispute; thus, this court should review the case on a de novo basis. In his statement of facts, Ndiaye does not challenge the facts as presented to the lower court, but rather disagrees, as his sole assignment of error, with the trial court's determination that "an unlawful detainer is not the appropriate place to raise a collateral attack on the nonjudicial foreclosure." Br. Appellant at 2 (Assignment of Error).

B. The trial court properly entered an order issuing writ of restitution in favor of Federal National Mortgage Association as Ibrahima Ndiaye failed to raise a valid defense to the unlawful detainer action.

The trial court properly entered an order issuing writ of restitution in favor of Fannie Mae because Ndiaye failed to raise a valid defense to the unlawful detainer action.

The unlawful detainer action is a summary proceeding limited solely to the question of possession and collateral issues may not be asserted. *Peoples Nat. Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 30-31, (1971); *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 208 (1987); *Heaverlo v. Keico Industries, Inc.*, 80 Wn. App. 724, 728, (1996) (citing *Munden v. Hazelrigg*, 105 Wn.2d 39, 45 (1985)); *Josephinum Associates v. Kahli*, 111 Wn.App. 617, 624 (2002); *Plein v. Lackey*, 149 Wn.2d 214, (2003). The purpose of the unlawful detainer action is “to preserve the peace by providing an expedited method for resolving the right to possession of property. *Heaverlo v. Keico Industries, Inc.*, 80 Wn. App. at 728 (1996). Thus, in order to protect the summary proceeding, “other claims, including counterclaims, are generally not allowed.” *Id.* The unlawful detainer proceeding “do[es] not provide a forum for litigating claims to title. *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523, 526, 963 P.2d 944 (1998). Furthermore, a trustee’s deed is prima facie evidence of a proper

sale and the only evidence necessary to prove the right to possession. RCW 61.24.040(7); *Glidden v. Municipal Authority of City of Tacoma*, 111 Wn.2d 341 (1988).

Here, the trial court correctly determined that the appropriate time for Ndiaye to raise defenses to the foreclosure proceedings was prior to the foreclosure sale, not after. A primary purpose of the non-judicial foreclosure statute is to avoid expensive and lengthy judicial foreclosure proceedings. By allowing for collateral issues to be asserted in the unlawful detainer action, the court would be forcing lenders to effectively proceed with a second foreclosure.

In *Peoples Nat. Bank of Wash. v. Ostrander*, the court noted that in enacting the non-judicial foreclosure statute, “the legislature did not contemplate that after a trustee’s sale further lengthy proceedings would be required to obtain possession. It gave the purchaser...the right to obtain possession of the real property by summary proceedings in an unlawful detainer action.” *Peoples Nat. Bank of Wash. v. Ostrander*, 6 Wn. App. at 31. Presale judicial remedies provided to borrowers under the Deed of Trust Act are adequate and an unlawful detainer action is not an appropriate proceeding to raise challenges to the foreclosure. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113-114 (1988).

The Washington Deed of Trust Act (“DTA”) provides the borrower a

specific method in which to restrain or halt a Trustee's Sale of the property. If a borrower fails to effectively halt or restrain the sale, only certain claims survive, which must be raised in a separate civil action. *Plein v. Lackey*, 149 Wn.2d 214, 226 (2003). Particularly, RCW 61.24.127(1)(a)-(c) provides that the failure of the borrower to halt or restrain the sale is not deemed a waiver of: (1) common law fraud or misrepresentation; (2) a violation of Title 19 RCW; or (3) failure of the trustee to materially comply with the provisions of this chapter. The statute, under RCW 61.24.127(2)(b), goes on to state that "The claim may not seek any remedy at law or in equity other than monetary damages." RCW 61.24.127(2)(c) provides that "the claim may not affect in any way the validity or finality of the foreclosure sale." Simply put, if the borrower does in fact bring a separate civil suit to contest the foreclosure, the borrower will be limited to monetary damages; the borrower will not be entitled to possession of the property. The Waiver Doctrine, as described above, promotes the three main goals to the Washington deed of trust act, which are: (1) that the non-judicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103 Wn.2d 303 (1985).

The Waiver Doctrine applies where the defendants "(1) received

notice of the right to enjoin the same, (2) had actual or constructive knowledge of a defense to a foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.” *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163 (2008). An assertion by defendants that they did not have knowledge of their claims or that they were ignorant of the legal bases is insufficient to defeat application of the Waiver Doctrine because all that is required is for the defendant to have “knowledge of the facts sufficient to establish the elements of a claim that could serve as a defense to foreclosure.” *Id.* at 164.

While the Washington Supreme Court recently found that waiver did not occur in *Albice v. Premier Mortg. Services of Washington, Inc.*, that decision does not apply in the case at hand. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). In *Albice*, the trustee’s sale was undisputedly conducted outside the 120-day window permitted by statute. *Id.* at 1282. Here, Ndiaye has not alleged any irregularities with the non-judicial foreclosure process. As required by statute, Nationstar Mortgage, LLC produced a beneficiary declaration to the foreclosing trustee prior to the issuance of the notice of trustee’s sale, stating that the beneficiary is the holder of the note, which is the only proof required by the statute. *See* RCW 61.24.030(7)(a). Additionally, as presented in the affidavit of foreclosing trustee, all notices of the

foreclosure sale, including the notice of default and notice of trustee's sale, were provided to Ndiaye. CP 17-80. Furthermore, the decision in *Albice* does not expressly overrule foreclosure waiver cases of *Plein v. Lackey*, 149 Wn.2d 214 (2003) or *Cox v. Helenius*, 103 Wn.2d 383 (1985). Nor does the Court discuss *Brown v. Household Realty Corp.*, 146 Wn. App. 157 (2008).

Additionally, *Albice* does not cite or discuss RCW 61.24.127, which preserves a few causes of actions for damages, but explicitly states that the few non-waived claims “may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property.” RCW 61.24.127(2)(c). The court based its waiver analysis on the “may” language in the former RCW 61.24.040(1)(f)(IX). In contrast to RCW 61.24.040(1)(f)(IX), RCW 61.24.127 does not contain any permissive language. Lastly, the *Albice* court's failure to discuss RCW 61.24.127 is presumably attributable to the fact that the foreclosure sale at issue in that case occurred before 2007, which is *before* the Washington Legislature enacted RCW 61.24.127. *See* Engrossed S. B. 5810, at 8-9, 61st Legis. Reg. Sess. (2009). Thus, the *Albice* analysis and holding on waiver should have little if any impact on the case at hand.

Furthermore, the Washington Supreme Court recently reaffirmed the waiver doctrine, which restricts certain post-sale claims and prohibits

challenges to the validity and finality of a completed sale. *Frizzell v. Murray*, 179 Wn.2d 301 (2013) (citing *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 223 (2008), and *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003)). *Frizzell* cites to RCW 61.24.040(1)(f)(IX), which provides that:

[a]nyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in waiver of any proper grounds invalidating the Trustee's sale.

The Supreme Court finds that, even when an order to enjoin the sale is sought, ignoring “the conditions for an injunction would render aspects of the waiver provision and injunction statute meaningless.”

Frizzell v. Murray, 179 Wn.2d at 308.

Here, the claims raised by Ndiaye are not proper in an unlawful detainer action because they reach beyond the scope of possession and are outside the court's jurisdiction. Attached to Fannie Mae's Complaint for unlawful detainer was a recorded copy of the Trustee's Deed, which is sufficient evidence to prove that Fannie Mae is entitled to possession. CP 6-7. Further, the claims asserted have been waived by Ndiaye's failure to obtain an injunction prior to the foreclosure sale. In the Notice of Trustee's

Sale, Ndiaye was notified of his right to restrain the sale; however, Ndiaye did not attempt to restrain the sale or raise claims regarding the foreclosure or events leading up to the foreclosure until after the sale was completed. CP 50. All of the claims raised are claims Ndiaye had knowledge of prior to the foreclosure sale; thus, Ndiaye should have timely asserted his claims. Even if Ndiaye were to file a separate civil action and prevail, he would be limited to monetary damages. Ndiaye is not entitled to possession of the property and will not be entitled to possession of the property even if successful in a separate civil action. Therefore, the trial court order issuing writ of restitution was proper and should not be reversed.

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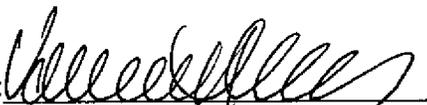
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IV. CONCLUSION

The order issuing writ of restitution was properly entered by the trial court and should not be reversed because the unlawful detainer action is a summary proceeding limited solely to the question of possession and any claims Ndiaye has regarding the foreclosure sale must be brought in a separate civil action where his remedy will be limited to monetary damages.

DATED this 11th day of August, 2014.

RCO LEGAL, P.S.

By: 
Valerie I. Holder, WSBA No. 42968

Of Attorneys for Respondent Federal
National Mortgage Association

RCO LEGAL PS

August 11, 2014 - 11:39 AM

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No. 45160-3-II

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

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Respondent,

vs.

IBRAHIMA NDIAYE

Appellant.

CERTIFICATE OF SERVICE

Submitted By:
Valerie I. Holder, WSBA No. 42968
RCO LEGAL, P.S.
13555 S.E. 36th St., Suite 300
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(425) 457-7874

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.
2. That on August 11, 2014, I caused a copy of the **Brief of Respondent Federal National Mortgage Association** to be served to the following in the manner noted below:

Nathan Dysart 1226 State Ave NE Olympia, WA 98506 Attorney for Appellant Ibrahima Ndiaye	<input type="checkbox"/> US Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile
--	--

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

Signed this 11th day of August, 2014.



Natalia Tran, Paralegal

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

Federal National Mortgage Association

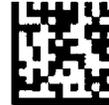
Respondent,

vs.

Case No.: 45160-3-II

Ibrahima Ndiaye

DECLARATION OF DELIVERY



STATE OF WASHINGTON
COUNTY OF KING ss.

The undersigned, being first duly sworn on oath deposes and says: That he/she is now and at all times herein mentioned was a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

That on **08/12/2014** at **4:00 PM**, at the address of **1226 State Ave NE, Olympia**, within **THURSTON** County, **WA**, the undersigned delivered the following document(s): **Brief of Respondent Federal National Mortgage Association** to **Office of Nathan Dysant**, by then and there leaving 1 true and correct copy(ies) of the above documents in a conspicuous place at the address listed.

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

Date: 8-13-14



Aaron Hayes

TOTAL: \$66.00

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