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No. 62677-9-1

THE COURT OF APPEALS, DIVISION I
IN THE STATE OF WASHINGTON

PAUL BRUEGGEMANN, *Appellant*,

v.

FLOYD HODGES, *Respondent*.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Mr. Brueggemann signed a Promissory Note and Deed of Trust and never paid a dime towards it. For that reason, the real estate that he used to secure the obligation was taken via foreclosure. Brueggemann has never offered a shred of proof that he did in fact comply with his obligation, regardless of whether the terms of that obligation were as he claims them or as Mr. Hodges claims them. Nor did he offer any proof that any party, including the court, was ever aware of his incarceration. The trial court's decisions should be upheld.

II. STATEMENT OF THE CASE

A. The Note.

On or about November 30, 2005 Appellant Brueggemann executed a Promissory Note in favor of Respondent Hodges in the principal amount of \$10,000 (the "Note"). CP98, 103. The Note was secured by a Deed of Trust on a condominium unit owned at the time by Brueggemann in the Cobblestone Condominium in Kirkland, Washington, with a street address of 12330 101st Court NE #A-2, Kirkland, Washington (the "Subject Property"). CP98, 104-9. The Deed of Trust was executed on November 28, 2005 and recorded under

King Co. Auditor's/Recorder's number 20051208001524 on December 5, 2005 (the "Deed of Trust"). CP104-9.

B. Foreclosure based on Brueggemann's default on the Note.

From November 30, 2005 to the present, Brueggemann has made absolutely no payments on this obligation. CP99. Under the terms of the Note, the full amount of principal and interest was due and payable on February 28, 2006. CP103.

On March 5, 2007, at the request of Mr. Hodges, RPW recorded the Appointment of Successor-Trustee, naming RPW as the new Trustee under the Deed of Trust. CP110-11.

On March 28, 2007, the Trustee sent out to Mr. Brueggemann a Notice of Default as required by statute. CP99, 113-6. The Notice of Default was mailed out via regular and certified mail. CP117. It was also posted on the Subject Property by a process server on March 29, 2007. CP118-9.

On June 15, 2007, the Trustee recorded the Notice of Trustee's Sale in the form approved by statute under King Co. Auditor's/Recorder's no. 20070615000370. CP120-6. The Notice of Trustee's Sale was mailed out by regular and certified mail to all the parties listed thereon no later than June 15, 2007. CP99. The Notice of Trustee's

Sale was also posted on the Subject Property on June 15, 2007. CP127-8.

Along with the Notice of Trustee's Sale, the Trustee mailed to Mr. Brueggemann the Notice of Foreclosure required by statute. CP100, 129-32.

C. Brueggemann attempts to stop the foreclosure.

On or about July 25, 2007, Mr. Brueggemann filed this action. CP9. The original, unfiled Complaint was mailed to RPW's offices and received on or about June 21, 2007. CP100. The unsigned, undated Amended Complaint was delivered to RPW's offices on or about August 24, 2007, with a signed Amended Complaint delivered on or about September 19, 2007. CP100. Soon after the August 24, 2007 delivery, Mr. Brueggemann called Justin Park, counsel for the Trustee and for Mr. Hodges, and was informed by Mr. Park that the mailing of the complaint (which named only Mr. Hodges as a Defendant) was not proper service of original process. CP100. Mr. Park repeatedly informed Mr. Brueggemann that it would be in his best interests to consult with an attorney. On one occasion, Mr. Park went so far as to explain to Brueggemann via e-mail the reasons that his service was defective and to direct Brueggemann to the proper statutes regarding

personal service. CP100, 133. Mr. Park clearly explained to Mr. Brueggemann that he was never authorized to accept service for Mr. Hodges. CP100, 133.

To date, Mr. Brueggemann has not had anyone serve the complaint on Mr. Hodges or anyone located at the Hodges' residence.

The Notice of Trustee's Sale set the date for the Trustee's sale as September 21, 2007. CP121. Prior to that date, as required by statute, the Trustee published the Notice in the appropriate newspaper. CP138,9.

D. Brueggemann's request for a TRO.

Only four (4) days before the Trustee's Sale, September 17, 2007, Mr. Brueggemann filed a motion for a TRO, seeking to prevent the Trustee's Sale. CP100. On that date, Mr. Park was called by the Commissioner's Court as Mr. Brueggemann had appeared in that Court *Ex parte*, seeking to have his TRO granted, this without delivering a copy of the motion to counsel for Mr. Hodges. CP100. The Court continued the hearing to the morning of September 19, 2007 and allowed Mr. Hodges to file a response prior to that hearing. The motion paperwork was received in the Trustee's office after 5:30pm on September 17, 2007. CP100.

On September 19, 2007, at the TRO hearing, Mr. Brueggemann did not appear. CP101. Mr. Hodges' response to the motion was presented, and the Commissioner denied the motion. CP101, 140.

E. The Trustee's Sale.

On September 21, 2007, the Trustee's Sale was held as outlined in the Notice of Trustee's Sale. CP101. A buyer came forward and outbid Mr. Hodges, and the Subject Property was sold. Once payment was received and completed, a Trustee's Deed was completed and recorded on September 28, 2007 under King Co. Auditor's/Recorder's number 20070928000811. CP101, 141-3. Thereafter, a copy of the Trustee's Deed was appropriately provided to Mr. Brueggemann. CP101.

F. Brueggemann's lawsuit is dismissed under CR 12(b)(6).

On October 7, 2007, Brueggemann once again amended his complaint, and also filed a motion to add defendants to his complaint, namely, Mrs. Hodges, and Romero Park & Wiggins P.S., counsel for Mr. Hodges. CP54. On November 1, 2007, Mr. Hodges responded to that motion, showing the Court that Brueggemann never served these new parties, and the motion to add new parties was denied. CP50-51, 65-71.

On January 17, 2008, Hodges filed a motion to dismiss Brueggemann's lawsuit under CR 12(b)(6). CP90-97. The basis for that motion was the fact that even if Brueggemann's allegations were entirely true, he would have no basis for preventing the Trustee's Sale, as he was in default on the Note, no matter which set of terms were used. CP90-97. Brueggemann filed no opposition and did not appear at the hearing on this motion, and the motion was granted on February 15, 2008. CP144-5. An award of attorney fees was made and judgment entered in Mr. Hodges' favor on March 5, 2008. CP146-73.

G. Brueggemann's motion to vacate the judgment is denied.

On March 19, 2008, the Court issued an order staying execution of judgment based on a letter from Brueggemann to the Court alleging that Mr. Hodges knew that Brueggemann was incarcerated in Yakima when the Motion to Dismiss was heard. CP174. In compliance with the terms of that Order, Hodges filed a response to Brueggemann's handwritten motion (CP185-97) to vacate the judgment and provided a copy of the same to Brueggemann in jail. CP175-83. Hodges offered his declaration and that of his counsel, Mr. Park stating affirmatively that the first they learned of Mr. Brueggemann's incarceration was when his motion to vacate arrived at Mr. Park's offices. CP175-83.

Brueggemann offered no proof of his allegations. The Court denied Brueggemann's motion to vacate and lifted the stay of execution of the judgment on April 18, 2008. CP184.

III. ARGUMENT

A. STANDARD OF REVIEW

Because this case was terminated by the granting of Hodges' Motion to Dismiss, we must assume that the errors alleged by Brueggemann refer to that trial court decision. The standard of review for trial court decisions to dismiss under CR 12(b)(6) is *de novo*. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

As Brueggemann also assigns error to the decision to award fees, the proper standard of review for a fee award is generally abuse of discretion. *Mayer v. City of Seattle*, 102 Wn.App. 66, 80, 10 P.3d 408 (2000).

B. THE COURT WAS CORRECT TO GRANT THE MOTION TO DISMISS NOTWITHSTANDING BRUEGGEMANN'S CLAIM OF FORGERY.

A trial court should grant a CR 12(b)(6) motion to dismiss when "it appears the plaintiff could prove no set of facts consistent with the complaint which would entitle him to relief." *Dennis v. Heggen*, 35 Wn.App. 432, 434, 667 P.2d 131 (1983) (*citing Halvorson v. Dahl*, 89

Wn.2d 673, 674, 574 P.2d 1190 (1978)). The factual allegations of the complaint must be accepted as true for the purposes of the motion.

Corrigal v. Ball & Dodd Funeral Home, 89 Wn.2d 959, 961, 577 P.2d 580 (1978).

1. **Brueggemann did not deny his default nor the appropriateness of foreclosure.**

The trial court, even when accepting Brueggemann's allegations as true for the sake of the motion to dismiss, understood that there was no basis for his claims. A read of his Complaint¹ turns up these critical facts: (1) Brueggemann did not deny that Hodges loaned him money under the terms of a Promissory Note; (2) Brueggemann did not deny that he granted Hodges a secured interest in real property via the Deed of Trust; and (3) Brueggemann did not deny that he has failed to pay Hodges according to the terms of the Note. CP54-61. Brueggemann disputes whether interlineations on the Note should be included as terms of the Note, but even if the non-interlineated terms are taken to be the actual terms (please note that Hodges does not agree with this position), Brueggemann was still in default on the loan and foreclosure was an available remedy. Therefore, under any set of circumstances

given the allegations in Brueggemann's complaint, Hodges was entitled to foreclose on his Deed of Trust, which he did.

2. **Brueggemann alleged no set of facts that would have allowed the Court to set aside the properly conducted Trustee's Sale.**

In his complaint, Brueggemann set out as his basis for overturning the Trustee's Sale his claim that he had not received a "certified" copy of the Note and Deed of Trust. CP56. His complaint recanted this allegation later on by stating that a copy of the Note and Deed of Trust was in fact received. CP58. He then alleged that certain charges listed in the Notice of Trustee's Sale were inappropriate and that Mr. Park's position, representing Hodges personally and being the Trustee, created a problem with the foreclosure. None of these allegations, even if true, were sufficient to allow Mr. Brueggemann any relief from this Court.

The charges to which Brueggemann objected are stated in the Notice of Trustee's Sale. CP122. Brueggemann identified no reason why these charges were inappropriate. It was clear that these charges were simply an attempt to capture all costs through the completion of the foreclosure, as is allowed by statute. Indeed, the document itself

¹ Mr. Brueggemann filed a complaint and at least two *amended* complaints. For ease of reference, we will be referring to his most recent complaint, titled "Third Amended Complaint for Damages." *See* CP54-61.

specified that they were *estimates* and the final numbers would only be known when the foreclosure was complete. A simple call to the Trustee could have obtained a current figure at any point. The listing of these charges is a standard process under the foreclosure statutes, RCW chap. 61.24, and was not an appropriate basis for relief to Mr. Brueggemann.

Brueggemann claimed that *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985) stood for the proposition that a party may not serve as Trustee of the Deed of Trust and Attorney for the Beneficiary. CP56. However, the *Cox* court itself clarified the position that only when there is an actual conflict, must one of the duties be turned over to a third party. *Id.* at 390. Further cases have clarified this issue.

Cox v. Helenius, ... does not prohibit a trustee from also acting as the attorney for the beneficiary. ... While a trustee acting as counsel for one of the involved parties could avoid any risk of conflict when litigation arises by arranging for a substitute trustee, neither *Cox* nor any other authority requires the trustee to do so. Indeed, *Cox* noted that a trustee is not required to ensure that the grantor is protecting his or her own interest.

Cascade Manor Associates v. Witherspoon, Kelley, Davenport & Toole, P.S. 69 Wn.App. 923, 935, 850 P.2d 1380 (1993). Indeed, the *Cox* court points out that the legislature in 1975 specifically permitted this type of arrangement. *Cox*, 103 Wn.2d at 390.

The issue then becomes whether the Trustee has acted in a way such as to adversely affect the Brueggemann's interest. Here, it is undisputed that Mr. Park provided all information requested by Brueggemann, including going beyond the call of duty to inform Mr. Brueggemann of the deficiencies in his attempted service of process. CP100, 133. Brueggemann identifies no issues wherein he did not receive all notices to which he was entitled. The Trustee completed its duties and upheld its obligation to Mr. Brueggemann in this matter.

Even taking Brueggemann's complaint allegations as true, there are no allegations regarding the conducting of the Trustee's Sale that are sufficient to grant any relief to Mr. Brueggemann. The motion was properly granted on these grounds alone.

3. Brueggemann never served Hodges.

Even if Brueggemann's allegations in his Complaint were true and effective, he has never, to this day, effected valid service on Mr. Hodges. Brueggemann mailed his Complaint to the offices of Hodges counsel, never personally serving anything. CP133-37. In compliance with his duty under *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985), counsel informed Mr. Brueggemann of the distinction between personal service and service on counsel. CP100, 133. Notwithstanding

the advice provided, Mr. Brueggemann has not served Mr. Hodges or anyone else. CP100.

With regard to the motion to dismiss, the bottom line is that even when assuming Brueggemann's complaints to be true, he never paid his obligation, he received all notice to which he was entitled, and he never served any parties. The trial court was right to dismiss the case.

C. THE COURT WAS RIGHT TO AWARD ATTORNEY FEES.

Brueggemann states no basis for his allegation of error regarding the trial court's award of attorney fees other than his opinion that the motion to dismiss should not have been granted. That issue is discussed above. The basis for the fee award is simple, both the Note and Deed of Trust have fee provisions. CP150-58. Absent any basis for this claim, the court should uphold the trial court's award of fees.

D. BRUEGGEMANN'S INCARCERATION PROVIDES NO BASIS FOR OVERTURNING THE TRIAL COURT'S DECISION.

Brueggemann apparently assigns error to the trial courts decision to grant the motion to dismiss during his incarceration for drunken driving. However, the incarceration itself is no basis for overturning the trial court.

CR 60 is specific on the appropriate bases for overturning a prior decision. Brueggemann has never offered the court any basis appropriate

under CR 60. In truth, the entire issue comes back to the first point made in this brief: Brueggemann was admittedly in default on the Note. The dismissal of the case and the completion of the foreclosure naturally follow from that point. Brueggemann has not and cannot offer any evidence to the contrary, and therefore the court's decisions are sound.

With regard to his absence due to incarceration, there is simply no evidence that either the court or Mr. Hodges ever knew of it. CP175-83. Brueggemann offers no such proof. When the court learned of the incarceration, it did exactly what was needed, it gave Brueggemann the opportunity to be heard by allowing his motion to vacate and staying execution of the judgment until that motion could be heard. CP174. Once it became clear that even with a full chance to brief the issues, Brueggemann had no basis for his position, the court released the stay and ended this matter. CP184.

Brueggemann offers no basis for the proposition that if a Plaintiff becomes incarcerated that he is entitled to anything more than what the trial court gave him: an opportunity. Because the facts are in support of the trial court's decision, the judgment should stand.

IV. CONCLUSION

Taking all of Mr. Brueggemann's factual allegations to be true, Mr. Brueggemann has admittedly failed to pay any money towards his obligation to Mr. Hodges. That is the real reason for the foreclosure and the dismissal of Brueggemann's lawsuit. Brueggemann does not deny his default. He cannot deny it, as it is true. Absent any basis for overturning the trial court's decision, Brueggemann's appeal should be denied and dismissed.

RESPECTFULLY SUBMITTED this 6th day of November, 2009.

ROMERO PARK & WIGGINS P.S.



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No. 62677-9-1

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FLOYD HODGES, *Respondent*.

CERTIFICATE OF SERVICE

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ORIGINAL

I, Diana Sanders, am a citizen of the United States and a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action. I hereby Declare, under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. On Friday, November 6, 2009, I caused one copy of the following:
 - A. Brief of Respondent; and
 - B. This Certificate of Service.

to be sent via U.S. Mail, postage pre-paid First Class delivery to:

Paul Brueggemann, Pro Se
16125 Juanita-Woodinville Way NE, #1205
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RESPECTFULLY SUBMITTED this 6th day of November, 2009.

ROMERO PARK & WIGGINS P.S.



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