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

MARION RUCKER AND APRIL MILLER,

Appellants,

v.

NOVASTAR MORTGAGE COMPANY INC.,

Respondents.

REPLY BRIEF OF APPELLANTS

Appeal from King County Superior Court
Case No: 08-2-34769-9
The Honorable Judge Barnett

Jason Anderson
Law Office of Jason E. Anderson
8015 - 15th Ave NW Ste 5
Seattle, WA 98117
(206) 706-2882
Attorney for Plaintiffs/
Appellants.

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I. INTRODUCTION

Following the filing of the Appellant's opening brief the Washington Supreme Court entered a decision in the case of *Bain v. Metropolitan Mortgage Group*, that clarifies many of the issues raised in this case. *Bain v. Metropolitan Mortgage Group*, 175 Wn2d 83, 285 P3d 34 (2012) (since the decision dealt with the role of Mortgage Electronic Registration Systems Inc., (MERS) I will refer to this decision as *Bain v. MERS*). The Appellant first intends to address the impact of this decision on this case before replying directly to the Respondent's arguments.

II. THE IMPACT OF BAIN V. MERS ON THIS CASE

Judge Coughenour, a Federal District Court Judge in the Western District of Washington certified three questions to the Washington Supreme Court. *Bain v. MERS* 175 Wn2d, 83, 90-91. These questions, and the short answer to each question is outlined below:

1. Is Mortgage Electronic Registration Systems, Inc., a lawful "beneficiary" within the terms of Washington's Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust? [Short answer: No]
2. If so, what is the legal effect of Mortgage Electronic Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act? [Short answer: We decline to answer based upon what is before us.]

3. Does a homeowner possess a cause of action under Washington's Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act? [Short answer: The homeowners may have a CPA action but each homeowner will have to establish the elements based upon the facts of that homeowner's case.]

Elements of this decision, including in particular the definition of a lawful beneficiary with power to pursue a foreclosure under the act are relevant to this case. The essential principles to be drawn from this decision are (1) that an undisclosed beneficiary cannot pick a nominee to conduct a foreclosure on its behalf, and (2) that a party that is not the holder of the note in question is not eligible to foreclose on a borrower.

The *Bain v. MERS* case dealt principally with whether MERS was permitted to pursue a foreclosure against a borrower. The deed of trust in this case identifies Mortgage Electronic Registration Systems Inc., as the beneficiary of the deed of trust. MERS was established to provide the financial industry with a mechanism for transferring property without recording transfers with the appropriate state property recorder. *Id* at 94-95. The Washington Supreme Court described the underlying question as "Whether MERS and its associated business partners and institutions can both replace the existing recording system established by Washington

statutes and still take advantage of legal procedures established in those same statutes." *Id* at 98. In other words the question is whether a party can seek the advantages of the Washington Deed of Trust Act while electing not to use the Washington property recording system. This decision should clarify that the disclosure of the true party in interest during the foreclosure process matters.

III. STRICT REPLY

A. APPELLANTS DID NOT WAIVE THEIR RIGHTS BY NOT OBTAINING AN INJUNCTION OF THE ALLEGED SALE.

Here, the appellants were misled about whether the scheduled non judicial sale would take place. April Miller testified that she contacted a Lysette Vargas at Quality Loan Service Corporation on several occasions. RP 17- 19. She discussed the origination issues related to the Rucker loans and the fact that Novastar had told her the loans were rescinded. RP 17-19. Quality eventually told Ms. Miller that due to the uncertainty related to the origination they were going to postpone the sale. RP 19. CP 6-7. Quality never contacted Ms. Miller following this discussion to state that the sale would go forward as scheduled. In reliance on this, no actions were taken to obtain an injunction.

Respondents rely upon *Brown v. Household Realty*, 146 Wn.App.157 (2008) to support their contention that the appellants have no rights to contest the sale because their rights have been waived. This proposition is contrary to

established precedents and is not supported by several cases challenging wrongful foreclosure sales. *Brown* has been largely over-ruled by the Legislature in RCW 61.24.127 (2009) which preserved damage claims notwithstanding a failure to enjoin a nonjudicial sale. Two subsequent cases have rejected the *Brown* waiver holding and have limited it to its facts. Waiver is a voluntary relinquishment of a known right. In *Albice v. Premier Mortgage*, supra, the court allowed a homeowner to challenge a sale after not seeking an injunction because of proof that the sale was void. *Albice v. Premier Mortgage*, 174 Wn.2d 560; 276 P.3d 1277 (2012). This was held, even though the amendments to RCW 61.24 described above in .127 did not apply to the facts in *Albice*. More recently, in *Frizzell v. Murray*, 283 P.3rd 1139 170 Wn.App. 420 (Div. II-August 28, 2012) the appellants sought an injunction but were unable to post a bond. The court pointed out that waiver was an equitable doctrine, not to be rigidly applied. Here, the appellants believed that the sale would not take place. CP 6-7. Respondents also cite *Cox v. Helenius* to support the waiver argument even though the *Cox* case held just the opposite. In *Cox*, as in this case, the appellants believed that the sale would not take place. The Supreme Court in *Cox*, vacated a sale to a *bona fide* purchaser because the trustee there has misled the homeowner, just as here, as to whether the sale would happen. In *Cox v. Helenius*, 103 Wn.2d 383, 391 (1985) the court invalidated a completed foreclosure because, in part:

. . . after a trustee undertakes a course of conduct reasonably calculated to instill a sense of reliance thereon by the grantor, that course of conduct may not be abandoned without notice to the grantor. Lupertino v. Carbahal, 35 Cal. App. 3d 742, 111 Cal. Rptr. 112, 116 (1973). Helenius should have either informed the Coxes' attorney that, in his opinion, she had failed to properly restrain the sale or have delayed foreclosure until resolution of the underlying dispute, especially since the extensive damage to the Coxes' property put the very issue of default into question. RCW 61.24.040(6) allows a trustee to continue a sale "for any cause he deems advantageous".

Clearly, Novastar (or Quality Loan) misled the appellants about whether the foreclosure would occur. Other states have the same rule. See, *In re Staffordshire v. Cal-Western*, 149 P.3rd at 153-54 (Ore 2004); *Taylor v. Just*, 59 P.3rd 308 (Idaho 2002). It should also be noted that Quality Loan also was held liable for considerable damages for failing to postpone a sale when the homeowner had a potential sale that would have netted the homeowner about \$100,000. See, *Klem v. Washington Mutual*, 165 Wn.App. 1015 (Div. I – 2011) (review by Supreme Court on a consumer protection issue, *pending*).

B. FORECLOSURE NEVER ANNOUNCED

1. One of the Key Factual Disputes is Whether the Rucker Property Was Announced For Sale on June 29, 2007.

A close review of the evidence from the two parties demonstrates factual disputes that must be resolved in favor of the Appellants for purposes of Summary Judgment.

The Notice of Trustee Sale created by Quality Loan Service Corporation of Washington stated: "[A]trustee sale would be held on 6/29/2007 at 10:00 AM at the main entrance to the Administration Building, 500 4th Avenue, Seattle, WA."

Novastar relies on two pieces of evidence to establish that the Rucker property was announced for sale and that Novastar was the winning bidder at the sale. These consist of the Declaration of Jake Patterson and the July 2, 2012 trustee deed.

1. Trustee Deed

The trustee deed is signed by Tony Rodriguez in San Diego, California. CP 1311-1315. The trustee deed contains no meaningful recitation of the details related to the sale and is not based on personal knowledge. The trustee deed in and of itself is not admissible evidence that a trustee sale was announced and completed.

2. Patterson Declaration

Novastar also relies on the declaration of Jake Patterson. CP 1816-1820. This declaration is not as useful as Novastar claims. Mr. Patterson submitted a previous declaration on October 22, 2008. CP 62. This

declaration states "After reviewing the sale sheet for the sale in question I can state that the notations are consistent with a normal sale, that there is nothing that stands out about the sale to the best of my recollection." From this statement it is clear that Mr. Patterson does not remember the sale in question and is relying solely on a bid sheet to draw his conclusions. This bid sheet, CP 1816, identifies a date and time for a sale but does not indicate a location to conduct the sale. The bid sheet contains a place to insert a bid amount for the beneficiary that is not filled out. The bottom of the bid sheet contains several blanks to be filled in to identify the date and time of a sale, the successful bidder and the sale amount. This section is also left blank. The only notations on this bid sheet are a dollar amount of 106,852.95 at the top of the page. Some scribbles that may say "RTB" in the middle side of the page and an illegible signature.

Mr. Patterson later provides a second declaration that also indicates that he does not remember the sale in question but now states that his notes indicate that he conducted a sale:

at the main entrance to the Administration Building, 500 4th Avenue, Seattle, WA (the time and place provided for in the Notice of Sale, attached as Exhibit E to the Affidavit of Sierra West filed in support of Novastar Novastar's Response to Plaintiff's Motion for Preliminary Injunction).

The "bid sheet" in question do not list an address and cannot be a basis for refreshing his memory regarding the location of the sale. The

reference to the Sierra West Affidavit indicates that Mr. Patterson in fact does not remember where he conducted the trustee sale (if he did) and is simply referring to Mr. West's documents to state an address that he does not remember.

If Mr. Patterson in fact had conducted a trustee sale, he should have entered a bid by Novastar in the blanks provided on the form and filled out a certification regarding the sale. This never occurred. This places the evidence provided by Novastar regarding whether the sale was announced on precarious footing before ever considering the evidence provided by the Ruckers in response to Novastar's motion for summary judgment.

It is interesting to note that the directions on the bid sheet direct Mr. Patterson to call 15 minutes prior to the sale and to call again after the sale. There is no record anywhere that Mr. Patterson in fact called the trustee as would be expected if he appeared and announced a sale on June 29, 2007. Further the "bid sheet" cited by Mr. Patterson regarding the Rucker property does not show that it was faxed while the other examples he provides contain fax telephone stamps on those documents. This indicates that the bid sheets are faxed into the trustee after a sale and that the Patterson "bid sheet" was never faxed as was customary.

Declaration of Robert Monjay.

The declaration of Robert Monjay calls into question the existence of an auctioneers certificate. He testified that on October 8, 2008 he called Quality Loan Service Corporation and asked if it had an auctioneer certificate. He was told that it had no such record and directed him to contact Priority Posting. Mr. Monjay called Priority Posting regarding this declaration and was told that it had no records and would have forwarded any records to Quality Loan Service Corporation. Priority Posting then stated that Northwest Legal actually conducted the sale. Mr. Monjay finally called Northwest Legal who in turn stated that it had no records and would have forwarded any records to Priority Posting. CP 185-186.¹ An inference should be drawn that the "bid sheet" was created at the time of Mr. Patterson's declaration and was not a business record kept in the ordinary course of business. It is certainly true that there was no testimony by a record custodian to determine how this document was stored if at all.

Testimony of April Miller

April Miller testified on several occasions in person or by declaration that she visited the King County Administration Building and that no sale was announced. Novastar claims that Ms. Miller's testimony should be disregarded based on claimed shifts in this testimony over the

¹ Since Priority Posting and Northwest Legal are both acting as agents for Quality Loan Service Corporation of Washington who is a defendant in this action, these statements are admissions by a party opponent under ER 801(d)(2).

course of three years of litigation. However, a close review of this testimony establishes that any changes in her testimony could just as easily be attributed to changes in memory over time but bear the same consistent theme. She was at the King County Administration Building on June 29, 2007 and she never heard a sale of the Rucker property announced. For simplicity, a review of statements is outlined below:

Verified Complaint:

18. On June 29, 2007, the Millers appeared at the main entrance to the Administration Building at 500 4th Avenue, Seattle, WA.

19. The Millers were told, by a man who identified himself as the auctioneer, that the sale had been postponed.

20. The Millers remained at the Administration Building until after 10:00 AM and no sale was held. CP 3.

Erlick Testimony. Ms. Miller made some statements briefly during a hearing on a motion for a preliminary injunction on October 23, 2008. At this hearing Ms. Miller was sick and was not in a position to testify regarding the circumstances of the foreclosure and did not testify under oath. Respondents Verbatim Report 17.²

Barnett Testimony. The Preliminary Injunction hearing was subsequently continued to November 18, 2008 where testimony was taken. At this time Ms. Miller testified:

A. Sorry. My husband drove me down because I wanted to make sure that nothing popped up funny because things had been popping up that didn't make sense to me.

Q Okay. And where did you go?

A We went to the building on Fifth Avenue, which now we discovered is the Admin building, with my husband, and he walked around, as I set on the bench looking for someone from Quality Loan Service.

Q About what time did you arrive?

A About like between 9:10 or 9:15, around about.

Q Okay. And what happened if anything -- well, how long did you stay?

A For about an hour or more.

Q What happened if anything about 10 o'clock?

A There was a sale and there -- I didn't hear anybody crying.

Q Slowly.

A There was a sale. They started the sales on different properties and we went around looking to see if anyone had our address.

Q About how many sales were going on?

A There was quite a few.

Q Did you talk to criers?

A Mostly my husband did. I talked to a few.

Q Did you talk to a crier for the property you were living in?

A No.

Q So about what time did you leave?

A I would say we left somewhere after lunch because we went down to eat.

Q What time did you leave the County Administration building?

A I didn't have a watch because I had a cast on. I don't know what time we left. I know we were there a long time. My husband was walking around looking.

Q Was it after 10 o'clock?

A Yes.

Q Was it a couple minutes after 10 o'clock?

A No, we were there like at least an hour or more.

See Appellants Verbatim Report 15-17.

April Miller Declaration

"My father and I were still concerned that a sale might take place. Novastar had made several statements to us that had turned out not to be true. First, they said they would fund two loans, then they rescinded them. They recorded two deeds of trust to secure unfunded loans. They started foreclosure proceedings based on a claim that my father had defaulted on a loan he never received. Because of all of this, on June 29, 2007, my husband and I went to the Administration Building, 500 4th Ave., Seattle. This was the place listed on the Notice of Trustee Sale.

The sale was scheduled for 10:00 AM. We arrived an hour or so before that time. While we were there, we asked several people about the sale. No one we spoke with had any information about the property or the sale. We stayed in the sale area for some time after 10:00 AM. We heard many properties being called. No one called my father's property.

CP 178-181.

April Miller Deposition

April Miller had very little to add in her deposition to her prior testimony. This deposition took place in April 2011, nearly four years after the foreclosure sale took place. Ms. Miller admitted that she no

longer recalled some of the detail but did confirm that she went to the sale location.³ CP 1525.

Carl Miller Declaration

Carl Miller declared:

On June 29, 2007 my wife and I went to the King County Administration Building to confirm that my father in law's property was not sold at a foreclosure sale. I was with my wife. My wife and father in law [had] previously been told that there would not be a foreclosure sale but they were concerned that Novastar and Quality Loan Service would make another mistake. To make sure that did not happen, my wife and I went to the place scheduled for the sale. The sale was scheduled for 10:00 Am. We arrived about an hour or so before that time. While we were there, we asked several people about the sale. No one we spoke with had any information about the property or the sale. We stayed in the sale area for some time after 10:00 AM. We heard many properties being called. No one called my father in law's property.

CP 176-177.

There is definitely no evidence impeaching or calling into question Mr. Miller's testimony. The common theme through Ms. Miller's statements and Mr. Miller's statements is that they went to the sale

³ The Appellant would like to clarify one part of the deposition. At lines 21-25 the questioning went:

Q. You don't remember if it was raining or

A. I don't even recall that day. That was years ago.

Q. But it does state here in [Carl Miller's] declaration: "We heard many properties being called." So do you remember other properties being called?

A. That day it was probably being called, but I don't remember.

Ms. Miller's answer at line 25 would have been regarding whether the other properties were being called, not her own residence. CP 1525.

location and no sale was conducted. Minor changes in the way these events were described may create a basis for questioning their creditability, but it is not a basis for summary judgment.

Inconsistency in Records

The notes and records provided by Novastar during the course of litigation also fail to establish that a sale was announced and an auction conducted. Novastar relies on the Declaration of John Holtman to argue that it instructed Quality Loan to conduct a foreclosure. However, the notes related to this foreclosure are inconsistent and do not bear out this conclusion. During the dates leading up to the purported foreclosure, these notes indicate that on July 2, 2007 it was to "Begin - REO - deed in lieu.". CP 2095. A deed in lieu is a common alternative to foreclosure. A HUD fact sheet described a deed in lieu as follows:

"A Deed in Lieu of foreclosure (DIL) is a disposition in which a mortgager voluntarily deeds collateral property in exchange for a release from all obligations under the mortgage."⁴

In other literature a deed in lieu is described as an alternative to foreclosure.⁵

⁴ See HUD.GOV Faq,
http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/nsc/faqdil

⁵ See HUD.Gov pamphlet on how to avoid foreclosure, page five. Available at
<http://www.hud.gov/offices/adm/hudclips/forms/files/pa426h.pdf>

The indication that Novastar is reviewing a deed in lieu creates an inference that Novastar was discussing an alternative to foreclosure with the Ruckers. It is implausible that this discussion would take place if Novastar believed the foreclosure was completed.

The notes on December 31, 2007 add Marion Rucker, indicating that he still has an interest in the loan and the property. This would not be the case if a foreclosure occurred.

B. Novastar Was Never Permitted Under Washington Law to Pursue a Trustee Sale on its Own Behalf.

Novastar claims that it was permitted to pursue a foreclosure under the deed of trust under its own name because it was (1) the beneficiary, or (2) an agent for the beneficiary. We will deal with each argument in turn.

1. Novastar Mortgage Was Not a Beneficiary Under the Act.

Novastar Mortgage Inc., first takes the position that it is a beneficiary under the deed of trust as defined under the deed of trust act. A Beneficiary is defined as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." *Bain v. Metropolitan Mortgage Group Inc.*, 175 Wn.2d 83, 99, 104, (2012) (citing RCW 61.24.005(2)). A "holder" with respect to a negotiable instrument is

defined as the person in possession if the instrument is payable to bearer, or in the case of an instrument payable to an identified person, if the identified person is in possession." *Id.*, 175 Wn.2d 83 (2012). The original note executed by the unauthorized power of attorney for Marion Rucker, was not a note payable to the bearer. Instead, it was payable to Novastar Mortgage Inc.,. Thus, if Novastar Mortgage transferred this note to another entity, which it admits it did, (CP 1300) it would no longer be the holder of the note and would no longer be the beneficiary.

2. Novastar Mortgage Inc., Was Not Entitled to Foreclose In its Own Name.

The next argument Novastar makes is that it was entitled to foreclose in its own name as an agent. A Beneficiary is entitled to act through its agents. A Beneficiaries right to act through its agents does not give the agent the right to misrepresent its capacity during the course of the foreclosure process. Some examples in the deed of trust statute that stress the appropriate designation of the Beneficiary are as follows:

RCW 61.24.020 provides that the county auditor shall record the [deed of trust] as a mortgage and shall index the names of the trustee and beneficiary as mortgagee. A Beneficiary may never act as a trustee. This restriction under the statute could never be monitored if foreclosures could always be conducted by an agent for an undisclosed Beneficiary.

RCW 61.24.030(4) provides a requisite to a trustee sale is that no action has been commenced by the beneficiary of the deed of trust on an obligation secured by the deed of trust. Again, this restriction could never be policed if an Agent could act for an undisclosed Beneficiary.

RCW 61.24.040(1)(f)(I) provides that the Notice of Trustee Sale must identify that the sale will be conducted in favor of _____, as Beneficiary, the beneficial interest in which was assigned by _____, under an Assignment. This requirement that the Trustee identify the Beneficiary suggests that the requirement is to identify the Beneficiary itself and not an agent pretending to be the Beneficiary.

The Notice of Foreclosure form mandated under RCW 61.24.040(1)(f) requires the Trustee to state:

"The attached Notice of Trustee's Sale is a consequence of default's in the obligation to _____, the Beneficiary of your Deed of Trust and owner of the obligation secured thereby."

(emphasis added). The statement that the obligation is owed to the owner of the obligation, is language that means that the party to be identified as the Beneficiary is the transferee of the Borrower's obligation. If Novastar transferred the Rucker loan to the Funding Trust, Novastar would not be the owner of the note.

Recent changes to the Deed of Trust Act provide further evidence that the Washington Legislature intended that a Washington borrower know who was foreclosing on him or her.

Novastar Mortgage effectively admitted, through the recordation of the amended trustee deed that it was not entitled to a trustee deed. The attempt to alter the deed three years after the purported foreclosure to identify a new party that was never part of the foreclosure should not be permitted.

C. Beneficiary Still Unknown.

Throughout the course of litigation, Novastar has failed to consistently identify the transferee of the Rucker loan prior to June 29, 2007. The Trustee Deed identifies the Beneficiary as Bank of New York Mellon as Trustee for Novastar Mortgage Funding Trust Series 2006-2. CP 574-577.

Novastar later refers to a servicing and pooling agreement regarding a trust called, JP Morgan Chase Bank, National Association trustee for Novastar Mortgage Funding Trust, Series 2006-2, Novastar Home Equity Loan Asset Backed Certificate, Series 2006-2. CP 579. Novastar later submits a declaration identifying the transferee as Novastar Mortgage Funding Trust, Series 2006-2, NFI 2006-2, Group II. CP 1403.

Under these circumstances it would be appropriate to remand this matter to Superior Court for trial on this issue.

/s/ Jason Anderson
Jason Anderson, WSBA # 32232
Attorney for Respondents

Certificate of Mailing

I hereby certify that on this date I emailed a copy of the document to which this is appended to the appellant, as follows;

Copies sent to:

Annette Cook	ACook@bwmlegal.com
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Signed under penalty of perjury, under the laws of the State of Washington, at Seattle, Washington, on the date set forth below;

/s/ Jason Anderson (signature)
12/20/2012 (date)