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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 319440

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

ONEWEST BANK, FSB,

Respondent,

v.

MAUREEN M. ERICKSON,

Appellant.

Brief of Appellant

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I. INTRODUCTION

This appeal involves the validity of a deed of trust under which Respondent OneWest Bank, FSB (“OneWest”) claims to be the successor beneficiary. The deed of trust at issue (“Deed of Trust”) was purportedly executed October 25, 2007 by a Shelley Bruna (“Bruna”) claiming to act as conservator on behalf of a Bill E. McKee (“McKee”) “as pursuant to court order 10/25/07.” (CP 44). The Deed of Trust allegedly encumbers real property commonly known as 4702 S. Pender Lane, Spokane, Washington (“Property”) (CP 37-38), which Property is owned by Appellant, Maureen Erickson (“Erickson”). (CP 4, para. 10). OneWest and Erickson each requested summary judgment. The trial court granted OneWest’s request and denied that of Erickson. Erickson contends the trial court improperly considered inadmissible evidence, the notary acknowledgement in the Deed of Trust was fatally deficient, OneWest is not the holder of the promissory note allegedly secured by the Deed of Trust (“Note”), and Erickson owned the Property when the Deed of Trust was allegedly executed.

Erickson contends the notary acknowledgement in the Deed of Trust is not consistent with the form for an acknowledgement provided by Washington law. The acknowledgement only had the notary public

confirm “I know or have satisfactory evidence that BILL E. MCKEE by Shelley Bruna, as his Conservator signed this instrument and acknowledged it to be . . .” (CP 44). Nothing in the acknowledgement suggested that Bruna had actually appeared before the notary public. As a result, the acknowledgement is not consistent with RCW 42.44.080(1)’s requirement that the “. . . person appearing before the notary public and making the acknowledgement . . .” is the person whose signature is on the document.

Erickson also contends OneWest is not the holder of the Note. The initial named beneficiary under the Deed of Trust, Financial Freedom Senior Funding Corporation (“Financial Freedom”), assigned the Deed of Trust and “. . . certain note(s) described therein” the (Note) to Mortgage Electronic Registration Systems, Inc. (“MERS”) by instrument recorded October 2, 2009. (CP 48-49). MERS assigned the Deed of Trust (but not the Note) to OneWest by instrument recorded February 3, 2012 (CP 49-50). OneWest filed an affidavit claiming it “. . . maintains control of the loan documents, including the original promissory Note.” (punctuation as in original) (CP 29, para. 3). No testimony supported a conclusion that OneWest is or ever has been in possession of the Note (as opposed to maintaining “control of” the Note). Further, the Note was expressly

assigned by instrument to MERS. No evidence suggests MERS further assigned the Note to OneWest.

Finally, the Property was not owned by McKee when the loan was made, OneWest had actual or constructive notice that McKee did not own the Property and, as a result, OneWest acquired no interest in the Property under the Deed of Trust. As noted above, the Deed of Trust was purportedly executed on October 25, 2007. Title to the Property had already been conveyed by McKee to Erickson by quit claim deed executed July 28, 2007 (CP 23). A court order entered January 28, 2008 related back to and was effective as of the date of entry of an earlier August 22, 2007 Spokane County Superior Court order also transferred ownership of the Property to Erickson (CP 19-22). By October 25, 2007, Erickson owned the Property, not McKee. Since Erickson and McKee were the only occupants of the Property and undisputed evidence shows they would have told any lender that inquired that Erickson owned the Property (CP 128-130, para. 19-21), Financial Freedom had notice that McKee did not own the Property. Since McKee did not own the Property, the Deed of Trust that was purportedly executed on McKee's behalf conveyed no interest encumbering the Property to Financial Freedom or its successor, OneWest.

II. ASSIGNMENTS OF ERROR

Erickson makes the following assignments of error:

1. The trial court erred by granting OneWest's request for Summary Judgment.

2. The trial court erred by not granting Erickson's request for Summary Judgment.

Issues related to assignments of error:

1. The standard of review.

2. Whether this case should be decided as a matter of law, given the agreed absence of disputed issues of material fact.

3. Whether matters offered in evidence by OneWest are inadmissible and should not be considered in determining this dispute.

4. Whether a deficiency in the Deed of Trust acknowledgement renders any purported lien against the Property invalid.

5. Whether OneWest carried its burden of proving it is the holder of the Note.

6. Whether OneWest's predecessor in interest under the Deed of Trust had notice that Erickson owned the Property.

7. If OneWest's predecessor had notice that Erickson owned the Property, whether OneWest's predecessor satisfied the bona fide purchaser doctrine's requirements.

8. If OneWest and its predecessor did not satisfy the bona fide purchaser doctrine, whether the Deed of Trust encumbers the Property.

III. STATEMENT OF THE CASE

OneWest and Erickson agree on many of the events underlying this dispute, and agree there are no disputed issues of material fact. The undisputed material facts in this matter include the following:

1. On June 28, 2007, McKee conveyed ownership of the Property to Erickson by quit claim deed. (CP 128-129, para. 19; CP 139).

2. On August 22, 2007, a court order dismissed a cause of action between McKee and Erickson in Spokane County Superior Court, which order was corrected by Order entered January 8, 2008, but effective nunc pro tunc as of August 22, 2007, conveying the Property to Erickson. (CP 15, para. 3; 19-22).

3. On August 27, 2007, an Idaho District Court issued Letters of Conservatorship to Bruna "of Idaho Fiduciary Services" to act on McKee's behalf (CP 18).

4. At all relevant times, McKee was a resident of the State of Washington and the Property is located in Spokane County, Washington (CP 66, para. 1-4).

5. McKee and Erickson were the only occupants of the Property at all relevant times. Both McKee and Erickson were in a position to tell any lender or lender's representative that Erickson owned the Property, not McKee. McKee had, in that timeframe, instructed his Idaho attorney to advise the Idaho court that he had transferred ownership of the Property to Erickson. During that time, Erickson had told the Idaho Court and others, including Bruna and the loan officer acting as the lender's representative with respect to the loan at issue, that she owned the Property. (CP 128-131, para. 19-23).

5. On October 25, 2007, Bruna, allegedly acting as McKee's Conservator, purportedly executed the Deed of Trust. The Deed of Trust named Financial Freedom as the Beneficiary. (CP 36-44).

6. The Deed of Trust acknowledgement, the notary public taking the acknowledgement certified ". . . I know or have satisfactory evidence that . . ." Bruna signed the instrument and acknowledged it. Nothing in the acknowledgement suggests Bruna signed the Deed of Trust or acknowledged any facts regarding it in the notary's presence. (CP 44).

7. Bruna also purportedly executed the Note on October 25, 2007, and at some point, a stamped statement indicating the Note was endorsed in blank without recourse was added to the last page of the Note. No testimony was provided regarding the alleged endorsement and no evidence suggests the Note was endorsed to OneWest. (CP 29, para. 3; 33-35).

8. On October 2, 2009, an instrument was recorded with the Spokane County, Washington Auditor providing that Financial Freedom assigned the Deed of Trust and the Note it secured to MERS. (CP 48).

9. On February 3, 2012, an instrument was recorded with the Spokane County Auditor providing that MERS assigned the Deed of Trust (but not the Note), to OneWest. (CP 49-50).

10. OneWest and Erickson each requested summary judgment. OneWest requested summary judgment allowing it to proceed with judicial foreclosure of the Deed of Trust (CP 12, l. 17-26), and Erickson requested summary judgment declaring that the Deed of Trust did not create a lien against the Property and dismissing OneWest's foreclosure action. (CP 63, l. 3-13).

11. On May 22, 2013, OneWest filed an affidavit, stating in paragraph number 3 that it is the holder of the Note and that it "maintains

control” of the Note. Nothing in that affidavit or in any other document stated that OneWest was in possession of the Note or that the Note was assigned to it. (CP 29, para. 3).

12. On June 20, 2013, OneWest filed a declaration attaching what purported to be a court order as an exhibit. According to the Affidavit from OneWest’s counsel, OneWest was able to locate and provide OneWest’s counsel with a faxed copy of what was purported to be a Court order. Nothing disclosed the source for the purported order or otherwise authenticated it. OneWest’s counsel did not claim to have first-hand knowledge of the document or its source. (CP 106, para. 5).

13. On July 18, 2013, Erickson filed a declaration confirming that she did not recall seeing or signing any court order in the Idaho proceedings, including the purported order attached as an exhibit to OneWest’s declaration filed June 20, 2013. (CP 131, l. 1-3).

14. On August 2, 2013, OneWest filed another Affidavit of Plaintiff, with additional items attached as exhibits. The Affidavit discussed being familiar with OneWest’s maintenance of business records. However, none of the records was identified as being a OneWest business record. Further, the purported documents were all supposedly generated

between 2008 and 2011 (CP 150-152). As noted above, the Deed of Trust was not assigned to OneWest until February, 2012. (CP 49-50).

15. On August 7, 2013, Erickson filed a Reply Memorandum requesting, in part, that the Declaration and Affidavit filed July 18, 2013 and August 2, 2013, be stricken because the purported evidence had not been authenticated and constituted hearsay. Additionally, objection was made to some of the purported attachments as being hearsay within hearsay. (CP 179, l. 6 – 181, l. 14).

16. The trial court granted summary judgment in favor of OneWest pursuant to two orders. The first order was entered July 2, 2013 partially granting OneWest's request for summary judgment on two issues and denying Erickson's request for summary judgment on those issues (CP 113-115); and the other was entered August 16, 2013, granting OneWest's motion for summary judgment (CP 188-189). The effect of those orders was to deny Erickson's request for summary judgment.

IV. LEGAL ARGUMENT

1. Standard for review.

This Court reviews de novo a trial court's order granting or denying summary judgment, engaging in the same inquiry as the trial

court. *Triplett v. Dep't. of Soc. & Health Servs.*, 166 Wn. App. 423, 427, 268 P.3d 1027 (2012); *Masunaga v. Gapasin*, 52 Wn. App. 61, 68, 757 P.2d 550 (1988). “When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. ... Summary judgment is proper if no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. ... Statutory interpretation is also a question of law reviewed *novo*.” *Triplett*, 166 Wn. App. 427; CR 56(c). A court cannot consider inadmissible evidence when ruling on motions for summary judgment. See e.g. *Ebel v. Fairwood Park II Homeowners' Ass'n.*, 136 Wn. App. 787, 790, 150 P.3d 1163 (2007); CR 56(e).

2. No issues of material fact remain.

Erickson and OneWest agree that there are no disputed issues of material fact. (See e.g. CP 262:30). Each contends, however, that applicable case law and statutory provisions, when applied to the undisputed facts, justify a ruling in its favor. Since there are no disputed issues of material fact, and all issues to be resolved depend upon application of the facts to statutory provisions and case law, this case should be resolved as a matter of law. *Triplett v. DSHS*, *supra* at 427.

3. Evidence offered by OneWest is inadmissible and should not be considered.

As noted above, a court ruling on summary judgment motions cannot consider inadmissible evidence. See e.g. Ebel, 136 Wn. App. at 790; CR 56(e). The trial court should not have considered inadmissible evidence in ruling on the competing summary judgment requests and this Court should not consider inadmissible evidence in this appeal.

The document attached as an exhibit to the Declaration filed by OneWest on June 20, 2013 was not authenticated in any way. OneWest's counsel claimed only that on June 18, 2013, OneWest "was able to locate and provide to [OneWest's] counsel a faxed copy of an executed Order . . ." (CP 106, para. 5). No witness with first-hand knowledge authenticated the purported document, and no foundation was provided that would have permitted the document to be admitted in evidence, all as required by CR 56(e). Since it was not authenticated, it is hearsay, barred from admission under ER 801 and 802. Under well established case law governing this issue, this Court should not consider this document in ruling on this appeal.

Similarly, the documents attached to OneWest's August 2, 2013 affidavit are inadmissible. The affidavit was signed by Rudy Lara,

identified as an assistant secretary of OneWest. The affidavit claimed in paragraph one that business records maintained by OneWest "... are made at or near the time by, or from information provided by, persons with knowledge of the activity and transaction reflected in such records, and are kept in the ordinary course of business activity conducted regularly by OneWest." However, none of the exhibits attached to the affidavit were identified as being any part of OneWest's business records. (CP 150-153).

Moreover, the facts do not support a contention that the offered documents were compiled or assembled by OneWest. As noted above, those documents purportedly relate to events and communications that occurred between 2007 and 2011. (CP 152; 165-168). As noted above, the Deed of Trust was supposedly executed in favor of Financial Freedom on October 25, 2007 (CP 36-44). Financial Freedom did not assign the Deed of Trust to MERS until about October 2, 2009 (CP 48), and MERS did not purport to assign the Deed of Trust to OneWest until January 17, 2012 (CP 49-50). Thus, none of the attachments to this affidavit were shown to have been made at a time when OneWest held any involvement with this transaction. Again, the documents and the proffered testimony in that affidavit were not shown by facts to evidence testimony based on

personal knowledge, demonstrating that any of the documents or statements in the affidavit would be admissible in evidence.

Nor could the attachments and description of the attachments qualify as business records or information drawn from business records. On their face, and based on undisputed evidence produced by OneWest, none of the alleged documents relied upon by OneWest were compiled or assembled as by OneWest, at or near the time the events they purport to memorialize or any other time. The affidavit information and attached documents were not authenticated, and they are not admissible. See e.g. *Young v. Liddington*, 50 Wn.2d 78, 309 P.2d 761 (1957).

Even if the records had qualified as business records, that would not permit consideration of Bruna's letter (Exhibit "E"), as the letter is hearsay within hearsay. The business records exception to the hearsay rule codified at RCW 5.45.010 and RCW 5.45.010.020 permits a party to properly authenticate and introduce its own business records, not to skip authentication, and testimony from someone with firsthand knowledge regarding a third party's hearsay letter. See e.g. *Sturgis Co. v. Baker Co.*, 11 Wn. App. 597, 524 P.2d 413 (1974). As noted above, a court ruling on summary judgment is not to consider inadmissible evidence. *Ebel*, supra; CR 56(e).

4. The deficient Deed of Trust acknowledgment prevented a lien from attaching to the Property.

RCW 64.04.010 requires that every conveyance of an interest in property be by instrument meeting the requirements of a deed. RCW 64.04.020 specifies that every deed must be acknowledged.

RCW 42.44.080 (1) specifies that a notary public taking an acknowledgement must determine “that the person appearing before the notary public and making the acknowledgement is the person whose true signature is on the document.” Obviously, to do that, the acknowledgement must confirm that the person appeared before the notary public and made an acknowledgement. Further, RCW 64.80.050 requires that a certificate of acknowledgment state that the person signing the document “acknowledged before him or her on the date stated in the instrument . . .” Obviously, that requires that the person signing the document be in the notary public’s presence.

Similarly, the provisions in RCW 42.44.100 set forth sufficient forms of notary acknowledgment provisions, each of which specify that the acknowledgment must provide in writing that the person appeared before the notary public.

The notary acknowledgement in this case was apparently completed in Spokane County, Washington, but does not state that Bruna, who was apparently from Idaho, ever appeared before the notary. It provided that the notary public knew or was provided with satisfactory evidence that Bruna signed the Deed of Trust. The acknowledgment provided by the initial lender in this case is thus deficient on its face and fails to meet the substantive requirements for acknowledgements on deeds in the State of Washington.

A conveyance failing to meet the requirements for a deed because it was not properly acknowledged, renders the instrument ineffective, except as to a party to the instrument. *Bank of Commerce v. Kelpine Prods. Corp.*, 167 Wash. 592, 10 P.2d 238 (1932). Ms. Erickson was not a party to the Deed of Trust and the Deed of Trust did not create a lien that affects her ownership in the Property.

5. OneWest did not prove it is the holder of the Note and therefore cannot maintain this action.

As noted in the statement of facts above, the Deed of Trust was apparently assigned by Financial Freedom to MERS, and then by MERS to OneWest. In proceedings below, OneWest did not dispute this sequence of events, and instead relied on it. After all, as the party seeking

to enforce a note obligation through judicial foreclosure of the Deed of Trust that supposedly secures that Note, OneWest has the burden of proving its claims. *Higgins v. Daniel*, 5 Wn.2d 134, 105 P.2d 24 (1940).

Even though OneWest provided evidence that the Deed of Trust was eventually assigned to it, the same cannot be said regarding the Note. The Note was assigned in writing by Financial Freedom to MERS in the same instrument that assigned to MERS the Deed of Trust (CP 48). No evidence suggests MERS further assigned the Note. As provided above, the 2012 assignment of the Deed of Trust from MERS to OneWest did not also assign the Note. (CP 49-50).

In Washington, an assignment of a deed of trust that explicitly states that both the deed of trust and the underlying debt are both being transferred is effective to assign the underlying note. *In re United Home Loans, Inc.*, 71 B.R. 885 (W.D. Wash. 1987). Here, that expressly happened with the Note in the assignment of the Note and Deed of Trust to MERS. Thus, based on the instrument relied upon by OneWest, the Note was assigned to MERS and it became its holder. However, no evidence shows MERS further assigned the Note.

In proceedings below, OneWest argued in reply to Erickson's claim on this issue that the Note had been endorsed in blank by Financial

Freedom at some undisclosed point in time, and that OneWest somehow became the Note's holder thereafter by obtaining possession of it.

The first fallacy in OneWest's position is that if the Note was endorsed in blank before it was assigned to MERS, the express assignment of the Note to MERS in the Assignment of the Note and Deed of Trust to MERS then caused MERS, not Financial Freedom to become the Note's holder and, while Financial Freedom may have endorsed the Note in blank, the succeeding holder never did.

If, on the other hand, the Note was endorsed in blank by Financial Freedom after it assigned the Note by separate instrument to MERS, then MERS was no longer the Note's holder with a right to assign anything. Either way, the undisputed evidence shows that MERS became the holder of the Note and never assigned that interest further.

Additionally, the evidence from OneWest's representative does not establish that OneWest has possession of the Note. Other than an unsupported conclusory assertion that OneWest is the holder of the Note, the sworn testimony carefully states that OneWest has "control over" the Note, not physical possession of it (CP 29, para. 3).

Washington courts recognize that a mortgage or deed of trust is merely an incident of the underlying debt and, as a result, is considered to

follow that debt instrument. *Fidelity & Deposit Co. v. Ticor Title Ins.*, 88 Wn. App. 64, 69, 943 P.2d 710 (1997); *Price v. N. Bond & Mortg. Co.*, 161 Wash. 690, 297 P. 786 (1931). In Washington, a deed of trust creates “nothing more than a lien in support of the debt which it is given to secure.” *Bain v. Metro Mortg. Grp., Inc.*, 175 Wn.2d 83, 92, 285 P.3d 34 (2012). Since the Deed of Trust follows the Note, and since OneWest is not the holder of the Note (which was assigned to MERS, but not to OneWest), OneWest has no entitlement to collect the debt supposedly secured by the Deed of Trust. As a result, OneWest is left without any underlying obligation to enforce in order to support a foreclosure action. There is simply no obligation to which OneWest has any rights that it can collect through foreclosure of the bare Deed of Trust that has apparently been assigned to it.

6. OneWest’s predecessor had actual or constructive knowledge that Erickson owned the Property.

When the Deed of Trust was executed, McKee and Erickson were the only occupants of the Property. Both McKee and Erickson were in a position to tell any lender that inquired that Erickson owned the Property. Testimony was provided by Erickson regarding information that would

have been provided to an inquiring lender, such as Financial Freedom (CP 131, para. 23; 133, para. 29.b.). That testimony was undisputed.

As noted above, Erickson told those involved in the loan process that she owned the Property and that she would have also provided that information to other lender representatives had they inquired. For example, she told the local loan representative dealing on behalf of Financial Freedom and Bruna that she had a deed and owned the Property. She was ignored.

McKee is now deceased, but a little more than a month before the Deed of Trust was executed, he wrote a letter to his attorney, asking that the Idaho Judge be advised that he had conveyed the Property to Erickson by deed. (CP 130, para. 21; 140-141). This demonstrates he was obviously aware that Erickson owned the Property and wanted to share that information.

Settled Washington case law states that information a mortgage lender would receive by inquiring of the occupants of the applicable property constitutes actual notice of that information. *Glaser v. Holdorf*, 56 Wn.2d 204, 210, 352 P.2d 212 (1960); *Chittick v. Boyle*, 3 Wn. App. 678, 479 P.2d 142 (1970); *Nichols v. DeBritz*, 178 Wn. 375, 35 P.2d 29 (1934). In this case, inquiry by Financial Freedom (including the

information that undisputed testimony confirms was provided to the lender's lending representative), mandates that Financial Freedom had notice that Erickson owned the Property when it accepted the Deed of Trust.

As Financial Freedom's successor under the Deed of Trust through assignment, OneWest obtained no better position or greater rights than Financial Freedom had and it is bound by the notice Financial Freedom is deemed to have had. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 662 P.2d 385 (1983). Even if OneWest was not bound by notice to Financial Freedom, the June 2007 quit claim deed in favor of Erickson and the January 2008 court order conveying the Property to Erickson effective as of August 2007 were matters of public record before the Deed of trust was assigned to OneWest. Both of those showed that the effective dates for the conveyance each made predated the Deed of Trust's October 2007 stated execution date.

7. OneWest does not satisfy the bona fide purchaser doctrine.

The fact that OneWest is bound by notice that Erickson owned the Property when Financial Freedom accepted the Deed of Trust is determinative on the issue of whether OneWest can claim protection under Washington's bona fide purchaser doctrine. To qualify as a bona fide

purchaser, OneWest must have (a) been a purchaser, (b) acted in good faith, (c) paid value, and (d) been without actual or constructive notice of the rights, equities or claims of others to or against the Property. *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992); *Colfax Nat'l Bank v. Jennie Corp.*, 49 Wn. App. 364, 742 P.2d 1262 (1987); RCW 65.08.070. For purposes of the doctrine, the term "purchaser" includes a mortgagee, as well as a subsequent assignee of a mortgage. RCW 65.08.060(2).

As stated above, OneWest failed to satisfy element (d) of the bona fide purchaser doctrine. Based on undisputed facts, Financial Freedom and OneWest were both charged with notice that Erickson, not McKee, owned the Property when the Deed of Trust was purportedly executed.

8. The Deed of Trust does not encumber the Property.

No challenge was made regarding Erickson's ownership of the Property. She acquired ownership through both quit claim deed and court order and no evidence or inference from evidence suggested either was invalid. Since Erickson's claim of ownership was well founded, Financial Freedom and OneWest are subject to Erickson's claim. *Glaser*, 56 Wn.2d at 210; *Chittick*, 3 Wn. App. at 678.

There is no suggestion that Bruna had any authority to execute any Deed of Trust for or on behalf of Erickson. The Deed of Trust Bruna allegedly executed on behalf of McKee conveyed no interest to anyone since, on the claimed execution date, McKee did not have an ownership interest in the Property to encumber.

V. CONCLUSION

For the reasons stated above, Erickson requests that the trial court's denial of her summary judgment motion and the granting of OneWest's motion for summary judgment both be reversed and that this matter be remanded to the trial court for further action consistent with that ruling.

RESPECTFULLY SUBMITTED this 5th day of November 2013.

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