Foreclosed Homeowner Beats Big Bank; Judge Voids Sale of Man’s Home

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By Ronald L. Ray —

In the ongoing “war for plutocracy,” by which the Rothschild dynasty of financial pharaohs and the weasels of Wall Street seek to separate the common people from their property, the debt-slavers normally count on the dutiful support of the courts when turning distressed homeowners into America’s homeless. But Snohomish County, Washington Judge George N. Bowden showed both courage and character on January 30 when he voided the foreclosure sale of Jacob Bradburn’s home by giant Bank of America (BOA).

In a sense, Bradburn’s story is that of the American “Everyman.” Following the 2008 economic collapse, caused by avaricious Big Banks, Bradburn fell upon hard times. He turned to his mortgage servicer for help in keeping his home, only to hear the advice given by seemingly every servicer and credit card company.

Because he was still current on his mortgage, he was told he had to “miss a payment” before he could qualify for refinancing. Like so many other debtors before him, Bradburn did so, but the conundrum of bank-induced consequences was such a “convoluted case in the minefield of mortgage foreclosure litigation,” wrote Bowden, that even the legally trained judge’s mind struggled with the muddle of facts.

Immediately after the missed payment, the BOA snake constricted around its prey. Bradburn was denied refinancing. A dispute arose over how much money he continued to owe on the house—not uncommon in the quicksand of additional interest andpenalties inflicted on delinquent homeowners, even when their delinquency was caused by a bank’s demand. And in the midst of Bradburn’s continuing efforts to seek assistance from the predatory lending institution, BOA foreclosed extrajudicially on his home and sold it out from under him. So much for helpful customer service.

But the BOA constrictor lives in a continent-wide jungle, designed to enrich the banksters through a complex secondary mortgage market where beneficiaries of promissory notes and mortgage instruments are ultimately unknown, and the actual holders of a mortgage change hands regularly. The name of this usurer’s paradise is Mortgage Electronic Registration System, Inc. (MERS), created by bankers for bankers.

Connecticut attorney Christopher G. Brown explains that MERS is like a private club for plutocratic poobahs—mortgage originators and secondary buyers and sellers—designed to prevent the “inconvenience” of paying government fees and taxes for registration each time a mortgage is sold. This eases a repeated change of creditors, enriching investors as much as 40 times over simply holding the mortgage. Often, transactions occur with deliberate anticipation of default and foreclosure. And, as in Bradburn’s case, MERS acts as a “placeholder” for the unknown actual creditors, preventing any equitable settlement of the mortgage debt prior to foreclosure.

Wading through the morass of names and contradictory claims by BOA, MERS and other financial entities involved, Judge Bowden concluded that the institutions violated both the strict requirements of the Deed of Trust Act and the Consumer Protection Act, prior to the home foreclosure sale. This included failing to appoint an independenttrustee.

Most surprisingly, Bowden then granted partial summary judgment for Bradburn and his attorney, Scott Stafne, of the law firm, Stafne Trumbull, LLC. This means that, even assuming all the facts in favor of BOA, evidence pointed overwhelmingly towards the violation of Bradburn's rights. Bowden voided the foreclosure sale of the Bradburn home and ruled that BOA, *et al.*, were subject to "liability under the Consumer Protection Act," due to "an unfair or deceptive practice, [which] occurred in a trade or commerce, and that those practices impacted the public interest."

Bradburn can continue to sue the banksters, and, most importantly for now at least, he can keep his home.

Ronald L. Ray is a freelance author and an assistant editor of THE BARNES REVIEW. He is a descendant of several patriots of the American War for Independence.

Superior Court of the State of Washington
for Snohomish County

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January 30, 2014

Re: Bradburn v. ReconTrust, et al. | No. 11-2-08345-2

Dear Counsel:

Enclosed please find copies of my order denying the defendant's motion for summary judgment, granting plaintiff's cross motion for partial summary judgment on his consumer protection claims, and granting plaintiff's motion for partial summary judgment declaring the foreclosure sale to be void and setting it aside.

I chose not to enter specific findings or conclusions of law, since they are not required. And any appellate court will undoubtedly sort through the record and discuss those salient facts which may be pertinent to its decision on review.

However, I did want to share my reasoning for the decisions I entered.

Obviously, this is yet another convoluted case in the minefield of mortgage foreclosure litigation involving MERS. Most of the facts surrounding the procedural history are not in dispute.

While I recognize that the law is well-settled that a borrower like Mr. Bradburn generally does not have recourse when he's denied a refinance loan, I was troubled by the allegation that he was told that he should stop making his mortgage payments so that he could qualify for refinancing with Bank of America (BANA) and that once he fell behind he not only wasn't approved for that refinance but then found himself unable to bring his mortgage loan current or resolve what he believed was a dispute about how much he was behind. Of course, that's not enough to prevail on a motion for summary judgment. And for purposes of these motions, it was accepted that he was in default on his loan. And there's also no question that the loan documents allowed for the nonjudicial foreclosure sale of his home in the event of default.

I was not concerned with the fact that the sale was ultimately postponed more than 120 days by the trustee, since a new notice of foreclosure sale was had been issued. I could find nothing in the Deed of Trust Act (DTA) or case law which required the lender or trustee to start over by filing another notice of default. The Act forbids a sale less than 120 days after that notice of default. This sale was well beyond that. I also felt that there was ample proof that the required notices were issued and posted, notwithstanding Mr. Bradburn's claims to the contrary. That's not to say that the notices were correct or proper under the DTA.

What seems to have been intended as a fairly simple procedure to avoid the necessity of a judicial foreclosure, namely the DTA, might be made more complicated and confounding than in the case at bar but it is difficult for me to see how. The DTA seems to contemplate a borrower and a lender with an independent trustee having the power to foreclose on the deed of trust in the event of default by the borrower. The lender would normally hold the underlying note and be the beneficiary of it. Here matters have been complicated by the sale of the underlying note from HomeStar Lending to Countrywide, which was later acquired by BANA. Fidelity Title was identified as the trustee but then MERS was characterized as the beneficiary "as the nominee" of the lender and their assigns. At summary judgment it was claimed that the note was "owned" by Fannie Mae although it was "held" by BANA, which was then described as the "servicer" of the note at the behest of Fannie Mae.

There was no evidence that MERS was ever the owner or holder of the note. Hence, under the *Bain* decision, MERS could not have been the beneficiary. *Bain* left open the issue of whether MERS could act as an agent of the lender or trustee, and in support of its motion for summary judgment defendants make that assertion here. More troubling is the role of ReconTrust. It was ReconTrust which issued the notice of default to the borrower. ReconTrust was not the trustee when that notice was issued. It's undisputed that ReconTrust was, at all times, a wholly owned subsidiary of BANA. There's no reason, or at least none that I could see, that would preclude ReconTrust from issuing a notice of default as an agent of BANA. But thereafter MERS named ReconTrust as the trustee. Or perhaps ReconTrust named itself as the trustee, since the signatory "G. Hernandez" was not an employee of MERS but rather was employed by ReconTrust. While the DTA appears to have been amended and arguably might permit a subsidiary to act as a trustee, the statutory requirement remains that the trustee be independent and not beholden to the lender or borrower. Acting as an agent of BANA and being a wholly owned subsidiary of BANA, it seems specious to attempt to argue that ReconTrust was an *independent* trustee.

And under what authority did MERS have the right to name that trustee? As the agent of BANA, having been named as the "nominee" by BANA's predecessors in interest? The evidence either compels or strongly points to the conclusion that MERS was a separately owned corporation and acted independently; it was not owned by BANA, and I do not see where it owed any fiduciary obligation or fealty to BANA (or Fannie Mae for that matter). While there is evidence to support the claim that the defendants were following the servicing guidelines promulgated by Fannie Mae, that's not tantamount to a claim that they were acting at the direction and control of the owner of this note.

Then there are the contradictory statements in the notices that were filed. BANA filed a declaration with ReconTrust which identified Fannie Mae as the owner and beneficiary of the deed of trust, yet ReconTrust later identified BANA as the beneficiary. Was that because of MERS purported assignment of the note in favor of BANA? What rights did MERS have to assign over to BANA the rights which presumably vested with Fannie Mae at that time? And if BANA somehow became the beneficiary, under what authority did ReconTrust, acting as the trustee, accept a credit bid from Fannie Mae at the foreclosure sale? Was that predicated on BANA's assignment of the deed of trust some three weeks after the trustee's sale? A primary reason for the requirement that the trustee have evidence to correctly identify the beneficiary of the deed of trust is so the borrower will know who he needs to contact to try to reinstate or resolve disputes about his loan, something which appears underscored by Mr. Bradburn's stated belief that he had been current with his payments until advised to fall in arrears and his dispute about how far behind his loan had fallen.

The case law has consistently held that the DTA must be strictly followed. Absent a valid waiver of the protections under the DTA, the failure to materially comply with that statute renders a foreclosure sale pursuant to it invalid. While Mr. Bradburn did not avail himself of the ability to seek to enjoin the sale, I felt the failure to strictly follow the requirements of the DTA required setting aside this foreclosure sale, particularly the appointment of a trustee that was not independent. I could not find that Fannie Mae as the claimed owner of the underlying note was a bona fide purchaser for value, even if it was not complicit in the violations of the DTA.

Having found the foreclosure sale to be fatally flawed by defendants' failure to strictly comply with the DTA, it follows *a priori* that plaintiff was "injured". I believe plaintiff met his burden to show that defendants' actions constituted an unfair or deceptive practice, that it occurred in a trade or commerce, and that those practices impacted the public interest. Insofar as plaintiff's home was wrongfully sold, he was "injured". The measure of his damages will need to be proven at trial. If he was in default in his loan and would have faced the loss of his home, he may yet face the same ultimate result. A jury may conclude that his damages are *de* minimus. And if he claims significant monetary damages, it will be up to plaintiff to prove causation, namely that those damages resulted from the wrongful conduct of defendants.

Very truly yours,

George N. Bowden