COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON
Case No.: 69352-2
(King County Superior Court No.: 12-2-01729-8)

DANIEL J. WATSON and KETWARIN ONNUJM,
Respondents/Cross-Petitioners,

v.

NORTHWEST TRUSTEE SERVICES, INC.,
Petitioner/Cross-Respondent

RESPONDENTS/CROSS-PETITIONERS' OPPOSITION AND MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF CROSS-PETITIONER

Respondents/Cross-Petitioners Daniel J. Watson and Ketwarin Onnum (hereafter "Respondents") object to Northwest Trustee Services' ("NWTS") Motion for Discretionary Review based on the lack of obvious error that will render further proceedings useless with respect to the FFA violations, and respectfully ask this Court to accept review of the King County Superior Court Memorandum Ruling with respect only to the lower court's denial of Respondents' CPA claim as designated in Part B of this motion.

B. DECISION OF SUPERIOR COURT

On August 27, 2012, King County Superior Court Judge Kimberley Prochnau issued a Memorandum Ruling granting in part NWTS and CitiMortgage, Inc.'s ("CitiMortgage") Amended Joint Motion for Summary Judgment. A true and correct copy of the Memorandum Ruling is in the Appendix (hereinafter "A") as A-1. Respondents seek reversal of the portion of the Memorandum Ruling granting NWTS' Motion for Summary Judgment to dismiss the Washington Consumer Protection Act ("CPA") claims against NWTS. While the trial court properly held that NWTS failed to comply with the Foreclosure Fairness Act (FFA), the court erred in holding that the failure to comply with the FFA did not constitute a per se violation of the CPA. The trial court so held despite the fact that that the FFA states:

> It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to (a) violate the duty of good faith under section 7 of this act; (b) fail to comply with the requirements of section 12 of this act; or c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031.

RCW § 61.24.135 (2)

The trial court based its dismissal of the CPA claims on the following grounds: Neither section 7 nor 12 of the FFA are applicable.[1] Although the lender did not send the pre-foreclosure options letter as required by RCW 61.24.031, creation of a new cause of action (a per se violation of the Consumer Protection Act) affects a substantive right and therefore the FFA is not retroactive with respect to the Consumer Protection Act claim. Thus while the Trustee's sale did not comply with the remedial portions of the FFA, it was not a per se violation of the Consumer Protection Act. (A-1, p. 10).

Respondents object to NWTS's motion for review of that portion of the Memorandum Ruling in which the trial court denied NWTS's motion for summary judgment on the wrongful foreclosure claim based on NWTS's failure to comply with the FFA pre-foreclosure notice requirements. The court based its decision on the following three grounds:

1) The FFA is a remedial statute and is applied retroactively. Although the Defendant sent out the Notice of Default prior to the passage of the FFA, its requirements may still be enforced against them. (A-1, p. 10).

2) The agency charged with implementation of the FFA and the development of rules concerning the mediation program, the Department of Commerce, appears to consider the protections of the FFA to be retroactive, and that the FFA applies to all owner-occupied properties where on the effective date of the FFA the notice of foreclosure had been served but the property has not yet been sold. (A-1, pgs. 7-8). See also Exhibit 4 to Declaration of Michele K. McNeill filed in support of Respondents' Opposition to NWTS' Amended Joint Motion for Summary

[1] Section 7 and Section 12 have been codified as RCW 61.24.163 and 61.24.174, respectively.

Judgment, a true and correct copy of which is in the Appendix at "A-2". Deference should be given to the administrative agency charged with administration and enforcement of an ambiguous statute. (A-1, p. 8).

3) At the time the Amended Notice of Trustee's Sale was issued, the FFA was in effect. Therefore, the FFA need not be applied retroactively as the trustee was required to conduct the sale in accordance with RCW 61.24.030(9). (A-1, p. 8).

Respondents contend that the Superior Court correctly held that deference should be given to the Department of Commerce's interpretation, and the Court properly concluded that the pre-foreclosure requirements of the FFA applied to NWTS's Amended Notice of Trustee's Sale.[2]

C. ISSUES PRESENTED FOR REVIEW

1. Pursuant to RAP 2.3(b)(1) and (d)(3), whether the Superior court, by virtue of its August 27, 2012 Memorandum Ruling, committed an obvious error which would render further proceedings useless and/or the decision involves an issue of public interest which should be determined by an appellate court because:

a. The Memorandum Ruling held that NWTS' violation of RCW 61.24.031 did not constitute a per se violation of the CPA despite the express language of RCW 61.24.135(2), which states that "It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to...fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031," and

[2] NWTS has admitted that this was a new notice of sale since the original notice had been cancelled and was outside the 120 day time limit for postponing a sale.

b. The Memorandum Ruling did not consider whether NWTS' violations of the FFA constituted a *prima facie* violation of the CPA.

D. STATEMENT OF THE CASE

1. Facts

On February 5, 2011, a Notice of Default and Loss Mitigation Declaration were mailed to Respondents. See Declaration of Daniel Watson in Support of Plaintiffs' Opposition to Defendants' Joint Motion for Summary Judgment ("Watson Dec."), ¶ 5, Exhibit 4. A true and correct copy of the Watson Dec. is in the Appendix at "A-3".

On March 22, 2011, NWTS recorded a Notice of Trustee Sale under King County Record No. 20110322000728 (hereinafter "NOTS-1"). The Trustee's sale was scheduled to take place on June 24, 2011. (A-3, ¶ 6, Ex. 5).

On June 20, 2011, Plaintiffs filed a Chapter 7 Petition in United States Bankruptcy Court for the Western District of Washington. This resulted in the postponement of the initial Trustee sale. (A-3, ¶ 7).

On July 22, 2011, Washington's Foreclosure Fairness Act ("FFA" or "Act") amended the Deed of Trust Act, Chapter 61.24 RCW. The FFA requires specific notices be issued to a borrower before a Trustee's sale can be scheduled or held. These pre-foreclosure notice requirements changed the procedures required before a notice of Trustee's sale can be recorded. See RCW 61.24.030-031.

On September 22, 2011, Plaintiffs' bankruptcy debts, including the mortgage serviced by Defendant CitiMortgage, were discharged. (A-3, ¶ 7, Ex. 6).

On November 8, 2011, Defendant NWTS recorded an Amended Notice of

Trustee Sale under King County Record No. 20111108001313 ("NOTS-2").[3] (A-3, ¶ 8, Ex. 7). The sale date was set for December 23, 2011. *Id.*

Prior to recording the NOTS-2, Defendants NWTS did not initiate contact with Plaintiffs and exercise due diligence, nor did they issue a Notice of Default that complied with the requirements of RCW 61.24.031. (A-3, ¶ 8).

Defendants NWTS referenced the NOTS-1 but not the NOTS-2 in its Trustee's Deed recorded on January 10, 2012. (A-3, Ex. 9). Defendants NWTS also stated in the Trustee's Deed that "[a]ll legal requirements and all provisions of [Plaintiffs'] Deed of Trust have been complied with, as to acts to performed and notices to be given, as provided in chapter 61.24." *Id.* However, the evidence shows that Defendants NWTS did not comply with the requirements of RCW 61.24, as amended by the FFA.

On December 23, 2011, Plaintiffs' Property was sold by NWTS for $348,000. (A-3, ¶ 10). The trustee's sale took place 182 days after the originally scheduled sale date. (See Trustee's Sale Deed at A-3, Ex. 9). The tax appraised value of the property at the time was $443,000, and Respondent owed CitiMortgage $273,867.28. (A-3, ¶ 10).

Had the Plaintiffs received the pre-foreclosure notices required by the FFA, they would have taken advantage of the FFA and obtained a foreclosure mediation referral from a HUD Counselor or attorney to stop the sale. (A-3, ¶ 11).

[3] There were two notices of sale recorded on the same date, so technically the second notice is the third notice, but since NWTS has referred to the third notice as "NOTS-2" we will refer to it the same to avoid confusion.

2. Procedural Posture

On May 7, 2012, Respondents filed an Amended Complaint against NWTS, CitiMortgage, and National Legal Help Center ("NLHC") for Wrongful Foreclosure, Breach of Fiduciary Duty (only against NLHC), and Violation of Washington's Consumer Protection Act ("CPA"). A true and correct copy of the Amended Complaint is in the Appendix at "A-4".

On April 27, 2012, NWTS and CitiMortgage filed an Amended Joint Motion for Summary Judgment. A true and correct copy of the Joint Motion for Summary Judgment is in the Appendix at "A-5".

On June 7, 2012, Respondents filed an Opposition to Defendants' Joint Motion for Summary Judgment. A true and correct copy of the Opposition is in the Appendix at "A-6".

On June 20, 2012, NWTS and CitiMortgage filed a Reply to Plaintiffs' Response to Defendants Summary Judgment. A true and correct copy of the Reply is in the Appendix at "A-7".

On June 29, 2012, the summary judgment hearing took place and the Superior Court dismissed all claims against CitiMortgage with Prejudice and invited additional briefing with respect to the claims against Petitioner.

On July 12, 2012, Petitioner NWTS submitted supplemental briefing with respect to the claims against NWTS. A true and correct copy of Petitioner NWTS' supplemental brief is in the Appendix at "A-8".

On July 27, 2012, Respondents submitted supplemental briefing in regards to the claims against NWTS. A true and correct copy of Respondents' supplemental brief is in the Appendix at "A-9."

On August 27, 2012, Judge Prochnau granted NWTS' Amended Motion for Summary Judgment as to Respondents' CPA claim and denied summary judgment as to the wrongful foreclosure claim for failure to comply with the FFA. (A-1).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court Erred in Holding that NWTS' Violations of the FFA did not Constitute a *per se* Violation of the CPA

In its analysis, the Superior Court held that the FFA applied to the foreclosure process at the time NWTS issued NOTS-2 and that NWTS violated the FFA by failing to issue the Notice of Pre-Foreclosure Options mandated by the FFA. However, the Superior Court also concluded that this violation did not constitute a *per se* violation of the CPA. This is in contradiction to the plain language of the FFA.

a. The Plain Language of the FFA Contradicts the Superior Court's Memorandum Ruling.

The FFA provides:

> It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to (a) violate the duty of good faith under section 7 of this act; (b) fail to comply with the requirements of section 12 of this act; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031.

RCW 61.24.135 (2). A *per se* unfair trade violation occurs when a statute, which has been declared by the legislature to constitute unfair or deceptive acts in trade or commerce, is violated. *Urban v. Mid-Century Ins.*, 29 Wn.App. 798, 905 P.2d 404 (1995). Despite this unambiguous language, the Superior Court held that the CPA did not apply because "creation of new cause of action (a per se violation of the Consumer Protection Act) affects a substantive right and therefore the FFA is not retroactive with respect to the Consumer Protection Act claim." (A-1, p. 9). "An

unambiguous statute is not subject to judicial construction and the court must derive its meaning from the plain language." *Puget Sound Energy, Inc. v. City of Bellingham, Finance Dept.*, 163 Wn.App 329, 259 P.3d 345 (2011) (quoting *Sprint Spectrum, LP/Sprint PCS v. City of Seattle,* 131 Wn.App. 339, 346, 127 P.3d 755 (2006)). A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Sprint Spectrum,* 131 Wn.App at 346, 127 P.3d 755.

Here, the language in RCW 61.24.135 (2) is unambiguous. The FFA clearly states that failure to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031 prior to recording a notice of Trustee's sale constitutes an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW. Petitioner NWTS repeatedly acknowledged that it did not comply with RCW 61.24.031 prior to issuing its new NOTS-2. Because a failure to provide such notice under the FFA constitutes a *per se* violation of the CPA under the unambiguous language of the FFA, the Court erred in holding otherwise.

b. The Court's Holding that NWTS' Violations of the FFA were not a *per se* Violation of the CPA Contradicts the Court's Own Analysis.

In its Memorandum Ruling, the Superior Court ruled that Respondents' CPA claim was barred because "the FFA is not retroactive with respect to the Consumer Protection Act claim." This ruling contradicts at least two sections of the Superior Court's own analysis.

i. The Court Erred in Holding that Because the FFA was not Retroactive with Respect to the CPA Claim, That There Was No *per se* Violation of the CPA.

In Section C of its Ruling, the Superior Court correctly concluded that the FFA need not be applied retroactively in order to deny Petitioner NWTS' Motion for Summary Judgment as to damages for wrongful foreclosure. Rather, the court held that "the laws that were in effect at the time of the new Notice of Sale are simply being applied...[a]t the time of the new Notice of Sale, the FFA was in effect, and therefore, the trustee was required to conduct the sale in compliance with all of its requirements." The logical conclusion of this analysis is that if the FFA claim need not be applied retroactively in order to give it force and effect in the current action, then the CPA claim similarly does not need not to be applied "retroactively," as the court states in Section D of its Ruling. Rather, allowing Respondents to move forward with their CPA claim simply applies the laws that were in effect at the time the new Notice of Trustee's Sale was recorded.

ii. The Court Erred in Relying on *Johnston v. Beneficial Mgmt. Corp. of Am.* in its Reasoning for why there was no *per se* CPA Violation.

The Superior Court's reliance on *Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 538 P.2d 510 (1975), in determining that there was no *per se* CPA violation, is misplaced. In *Johnston,* the Appellant sued the Respondents for violations of the CPA for unfair practices or acts committed by the Respondents both *prior* to the enactment of the CPA and different unfair practices or acts that occurred *after* enactment of the CPA.

The alleged unfair and deceptive act which occurred prior to enactment was the use of "high pressure sales tactics to induce the Appellant to purchase a vacuum cleaner and a membership in the family buying power plan." The alleged unfair and deceptive acts or practices that occurred after enactment of the CPA were (1)

continued "deceitful" acceptance of payments under the plan by Respondents; (2) failure by the Respondents to affirmatively advise Appellant that the service charge Appellant was paying was higher than that allowed by statute; and (3) that the vacuum cleaner he purchased was overpriced. The Appellant averred that even if the Respondents could not be held liable for CPA violations for acts that occurred prior to the enactment of the CPA, that the Respondents could be held liable for deceptive acts that continued to occur after the enactment of the CPA.

The Court held that the Respondents could not be held liable for acts committed prior to enactment of the CPA. *Johnston, supra,* 85 Wn.2d at 642. As for the alleged acts or practices committed by Respondents after the enactment of the CPA, the Court held that the Respondents were not liable because the acts or practices committed after enactment were fundamentally different than those committed prior to enactment, and that said acts simply did not constitute CPA violations. *Id.,* 85 Wn.2d at 642-644. "[T]he only alleged acts or practices of the seller in this case which would fall within the definition of 'unfair or deceptive acts or practices' were those which were used to persuade (Appellant) to purchase the vacuum cleaner and family buying power plan." *Id.,* 85 Wn.2d at 644. The Court's denial of Appellants' CPA claims for acts which occurred after the enactment of the CPA had nothing to do with issues stemming from retroactive application of the statute, but with the nature of the acts themselves.

Here, Respondents do not claim that Petitioner NWTS violated the CPA by failing to provide Notice of Pre-Foreclosure Options prior to enactment of the FFA. Rather, Respondents' claim is based on Petitioner's failure to provide such notice prior to issuing its new NOTS-2 on November 8, 2012, while the FFA was in full force and

effect. Because Petitioners did not issue the Notice of Pre-Foreclosure Options to Respondents prior to issuing its NOTS-2, and because such failure to do so is a *per se* violation of the CPA according to the express language of the FFA, the Superior Court erred in dismissing Respondents' CPA claim.

2. The Court Erred by Failing to Consider Whether Petitioners Committed a Prima Facie Violation of the CPA.

In their Opposition to Petitioner's Motion for Summary Judgment, Respondents argued that, in addition to the *per se* CPA violations committed by Petitioner by failing to issue the Notice of Pre-Foreclosure Options, that Petitioner also committed a *prima facie* CPA violation when it represented in its Trustee's Deed, recorded on January 10, 2012, that "[a]ll legal requirements and all provisions of [Respondents'] Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in Chapter 61.24 RCW."

As set forth above, Petitioner acknowledges that it did not provide Respondents with the Notice of Pre-Foreclosure Options, as required by the FFA at RCW 61.24.031. The FFA was in full force and effect both when the Petitioner issued its new NOTS-2 on November 8, 2011, and when the Petitioner recorded its Trustee's Deed on January 10, 2012. For the Petitioner to represent that it had fully complied with the provisions of RCW 61.24, when it openly acknowledges that it did not comply with the requirements set forth in 61.24.031, which were in effect at the time it made such a representation, is an unfair or deceptive act occurring in trade or commerce. The Superior Court erred in failing to even consider whether Petitioners committed a *prima facie* CPA violation by representing in its Trustee's Deed that it had fully complied with RCW 61.24 when in fact it had not.

Based on the foregoing, the superior court committed an obvious error which would render further proceedings useless and/or the decision involves an issue of public interest which should be determined by an appellate court.

3. The Superior Court's Ruling on the CPA Claim is Reviewable

Based on the foregoing, the trial court committed an obvious error which would render further proceedings useless because whatever damages Respondent can recover at this point will simply be eaten up by legal fees to establish the amount of damages at trial. Without the CPA violation, Respondent has no other means of recovering legal fees.

Alternatively, the decision involves an issue of public interest which should be determined by an appellate court. The Deed of Trust Act, RCW 61.24, does not limit the amount of time between a notice of default and notice of Trustee's sale other than the minimum requirement. See RCW 61.24.030(8). Any notice of Trustee's sale issued after the enactment of the FFA where the notice of default was issued before enactment of the FFA is susceptible to the same non-compliance with the FFA notice procedures as occurred in this matter where a new notice of sale is issued. Without the CPA violation mandated by the FFA, homeowners will be placed at a great disadvantage should they not be able recover legal fees. This is especially true when the borrower has not suffered a loss of equity. The FFA was designed to level the playing field between borrowers and lenders by giving borrowers the opportunity to work with attorneys and certified HUD counselors and to participate in foreclosure mediations. RCW 61.24.005 (Notes: legislative intent) ("A-10"). The CPA provision in the FFA is a fundamental part of this.

F. OPPOSITION TO NWTS' MOTION FOR DISCRETIONARY REVIEW

Denial of a motion for summary judgment "is generally not an appealable order under RAP 2.2(a) and discretionary review of such orders is not ordinarily granted." *DGHI, Enterprises v. Pac. Cities, Inc.*, 137 Wn. 2d 933, 949, 977 P.2d 1231, 1238-39 (1999); *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44,* 103 Wn.2d 800, 801-02, 699 P.2d 217 (1985).

The Court should not accept review of the superior court's ruling denying NWTS' motion for summary judgment on the wrongful foreclosure claim. The superior court did not commit an obvious error which would render further proceedings useless as required by RAP 2.3(b)(1), nor did the court commit probable error where the decision substantially alters the status quo or substantially limits the freedom of a party to act as required by RAP 2.3(b)(2).

G. CONCLUSION

This Court should accept review for the reasons indicated in Part E and reverse the superior court's ruling on NWTS' motion for summary judgment that NWTS' failure to comply with the FFA was not a violation of the CPA. The Court should not accept review of the superior court's ruling denying NWTS' motion for summary judgment as to the wrongful foreclosure claim because the court did not commit an obvious error which would render further proceedings useless or probable error where the decision substantially alters the status quo or substantially limits the freedom of a party to act.

DATED this 17th day of October, 2012.

Respectfully submitted,

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APPENDIX PROVIDED UNDER SEPARATE COVER