72065-1

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Case No. 72065-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WILLIAM LEAHY AND SHALAWN LEAHY,

Plaintiffs-Appellants,

vs.

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON,

Defendant-Respondent.

Appeal from an Order of the King County Superior Court
Case No. 13-2-02307-SEA

RESPONDENT'S BRIEF

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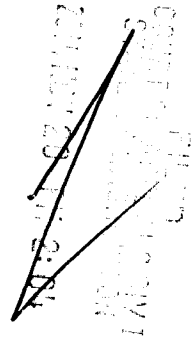

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INTRODUCTION

Appellants' Complaint raised a post-foreclosure challenge to the nonjudicial foreclosure of their non-owner occupied property. Appellants did not dispute that they were in default for four years prior to the sale, nor did they dispute that they were provided with all applicable foreclosure notices through the proper mediums. Instead, Appellants attempt to add requirements to a nonjudicial foreclosure not found in the Deed of Trust Act, namely a requirement that a new Notice of Default must be re-issued prior to the recordation of every Notice of Trustee's Sale. Because this requirement is not present in the Deed of Trust Act, Appellants have failed to demonstrate any error in the lower court's order granting summary judgment for Respondent Quality Loan Service Corporation of Washington. Further, Appellants have waived any claim of error by failing to enjoin the trustee sale or show prejudice of any kind.

STATEMENT OF THE CASE

William and Shalawn Leahy obtained a $320,000 loan from Washington Mutual Bank, FA in 2006, and executed a Promissory Note and Deed of Trust securing the loan against residential property located in Seattle, Washington. (CP 538; Opening Br. 8.) In 2008, Washington Mutual Bank was placed into receivership by the Federal Deposit

Insurance Company ("FDIC"). Thereafter, the FDIC, as receiver, sold certain assets of Washington Mutual, including its loan portfolio, to JPMorgan Chase Bank, N.A. ("Chase") under a Purchase and Assumption Agreement ("Agreement") between the FDIC and Chase. (*See* CP 565.)[1]

The Leahys admittedly fell into default on March 1, 2009. (*See* Opening Br. 8; CP 1, 300.) Thus, on or around April 9, 2010, Quality Loan Service Corporation of Washington, acting as agent for the beneficiary, issued a Notice of Default. (CP 389 ¶ 4, 395.) Accompanying the Notice of Default was a document entitled "Beneficiary Declaration Pursuant to Chapter 61.24 RCW (SB 5810) and Foreclosure Loss Mitigation Form." (CP 399-400.) Shortly thereafter, Quality obtained a Beneficiary Declaration attesting that the Beneficiary was the actual holder of the note. (CP 390 ¶ 9, 415.) An Assignment of Deed of Trust was also recorded on May 17, 2010 in the King County Recorder's office which, like the Beneficiary Declaration, identified the beneficiary of the Deed of Trust as Bank of America, National Association

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[1] The lower court took judicial notice of the FDIC/Chase Purchase and Assumption Agreement. (CP 615-616, 762); *see Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1093-94 (N.D. Cal. 2009) (The Purchase and Assumption Agreement is a matter of public record and subject to judicial notice when deciding a Motion to Dismiss).

as successor by merger to LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2006-AR15 Trust. (CP 713.)

After the Notice of Default was issued, but before the issuance a notice of sale, the Beneficiary appointed Quality Loan Service of Washington as the Trustee through an Appointment of Successor Trustee, which was recorded on July 13, 2010. (CP 390 ¶ 11, 417-418.) Quality issued a Notice of Trustee's Sale in July 2010, which was subsequently discontinued. (CP 390 ¶ 12, 420.) Another Notice of Sale was recorded on July 11, 2012. (CP 390 ¶ 14, 424.) The sale noticed by the July 2012 Notice of Sale was also discontinued. (CP 391 ¶ 15, 429.)

Thereafter, Quality issued a third Notice of Trustee's Sale in September 2012, which set a sale date for January 18, 2013. (CP 391 ¶ 16.) The Notice of Sale was mailed to the Leahys, posted, and published in accordance with all requirements of the DTA. (*See* CP 391 ¶ 17-20, 437-488.) On the day before the scheduled sale, the Leahys filed suit against Quality Loan Service seeking to enjoin the foreclosure. Plaintiffs also sought a temporary restraining order from the King County Superior Court, but the court denied the requested injunction because the Leahys failed to follow the correct process. (CP 502.) Accordingly, the sale went forward as scheduled on January 18, 2013, and the property sold to a third party purchaser. (CP 392 ¶ 24.)

STANDARD OF REVIEW

This Court reviews a summary judgment order de novo, performing the same inquiry as the trial court. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). A motion for summary judgment will be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Scott v. Pac. W. Mt. Resort,* 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992). "A material fact is one that affects the outcome of the litigation." *Owen*, 153 Wn.2d at 789.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Knox v. Microsoft Corp.*, 92 Wn.App. 204, 207, 962 P.2d 839 (1998). Once the moving party produces evidence showing the absence of disputed material facts, the burden shifts to the nonmoving party to produce admissible evidence setting forth facts showing a genuine issue for trial. CR 56(e). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Discover Bank v. Bridges*, 154 Wn.App. 722, 727, 226 P.3d 191 (2010) (citing *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

ARGUMENT

I. Appellants Have Not Shown Any Violation of the Deed of Trust Act Based on the Issuance of a Second and Third Notice of Trustee Sale.

The thrust of the Leahys' argument is that by issuing a second Notice of Trustee's Sale on July 12, 2012 and a third Notice of Trustee's Sale on September 19, 2012, without also issuing a new Notice of Default, Quality violated the provisions of the Deed of Trust Act. (Opening Br. 16.) Simply put, this contention is not supported by the DTA.

The DTA provides that following issuance of a notice of default, a trustee must record a notice of sale specifying the date, time, and location of the sale date, along with other statutorily-outlined information. RCW 61.24.040(1). The trustee may then postpone the trustee's sale for up to 120 days from the date provided in the notice of sale without issuing a new notice. RCW 61.24.040(6) ("The trustee has no obligation to, but may . . . continue the sale for a period or periods not exceeding a total of one hundred twenty days . . ."). If the sale is not held within 120 days from the date provided in the notice of sale, a new notice of sale is required.

The Leahys contend that February 19, 2011 was "the last date upon which the Property could be lawfully sold" because that was 120 days

from the sale date identified in the first Notice of Trustee's Sale. According to the Leahys, a property cannot be sold more than 120 days from the sale date included in a notice of sale – regardless of whether a subsequent notice of sale is issued – without starting the entire process anew by issuing a new notice of default. (*See* Opening Br. 16.) However, the Leahys' argument does not find support in the DTA.

There is no language in the DTA that refers, either explicitly or implicitly, to an expiration date on a notice of default. To the contrary, courts have recognized that once a notice of default has been issued and the default remains un-cured, a trustee need only issue a new notice of trustee's sale to resume the foreclosure process following the discontinuance of an earlier sale. *See, e.g., Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 671 (1996) (trustee's issuance of new notice of sale following dismissal of the grantor's bankruptcy petition "was not cause for renewing the process from the beginning.").

In a case with similar facts and allegations originating out of the Western District Court of Washington, *U.S. Bank Nat'l Ass'n v. Woods*, 2012 U.S. Dist. LEXIS 78676 (W.D. Wash. June 6, 2012), the court rejected the borrower's argument that the notice of default "expired" when multiple notices of sale were issued. In so doing, the court observed that, "to the extent the borrowers are arguing that the notice of default

somehow expired, they fail to cite case or statutory authority on which they rely in making the argument and the Court is unaware of any." *U.S. Bank Nat'l Ass'n v. Woods*, 2012 U.S. Dist. LEXIS 78676, *18 (W.D. Wash. June 6, 2012). Here, similarly, the Leahys offer a theory that every new notice of sale must be preceded by a new notice of default, implying that a notice of default somehow expires by passage of time. However, like the borrowers in *Woods*, the Leahys offer no support, either rooted in statute or case law, to support this theory.

In an attempt to support their claim, the Leahys cite *Watson v. Northwest Trustee Services, Inc.*, (Opening Br. 13), but they overstate *Watson*'s holding. The *Watson* court *did not* hold that a trustee can never issue a subsequent notice of sale without also issuing a new notice of default. In *Watson* the trustee had issued a notice of default and notice of sale before the Foreclosure Fairness Act ("FFA") went into effect, and following the statute's effective date the trustee attempted to issue an "amended" notice of sale without first complying with the FFA's pre-foreclosure requirements. *Watson v. Northwest Trustee Services, Inc.*, 180 Wn.App. 8, 14-15 (2014). The court held that the FFA's requirements applied retroactively to foreclosures that had been initiated by a notice of default prior to the statute's enactment, and therefore compliance with the FFA was required. *Id.* at 15. Nothing in the *Watson* case suggests that the

court believes a new notice of default is required before every subsequent notice of sale. To the contrary, the court recognized that after a notice of sale has been issued but the sale is discontinued, the trustee may proceed by issuing a second notice of sale, provided that the other requisites to a trustee's sale have been fulfilled.[2] *Watson*, 180 Wn.App. at 15.

In essence, the Leahys are attempting to read in requirements to the DTA that do not exist. It is the September 2012 notice of sale – not the earlier July 2010 notice of sale – that dictates the timeframe in which Quality Loan Service could lawfully conduct the sale. The undisputed evidence showed that the sale occurred on January 18, 2013, which was the exact date noticed in the September 2012 notice of sale. (CP 391 ¶ 16, 392 ¶ 24.) Because there is nothing in the DTA that would require a new notice of default to accompany every new notice of sale, Appellants' contentions fail to provide any basis to challenge the foreclosure.

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[2] To the extent that Appellants may attempt to contend that the foreclosure in the instant case was conducted without compliance with the FFA as in *Watson*, this argument is belied by Appellants' acknowledgment that the property is non-owner occupied. (Opening Br. 7, 10.) The requirements of RCW 61.24.031 apply only to deeds of trust recorded against owner-occupied residential property. RCW 61.24.031(7)(a).

II. Appellants Waived Any Claim for Alleged Defects in the Notice of Default.

Finally, the Leahys contend the Notice of Default failed to contain all the information required by RCW 61.24.030(8), including the address for the beneficiary, the phone number of the loan servicer, the exact amount needed to reinstate the loan, and the correct identification of Chase as successor to Washington Mutual Bank. (Opening Br. 22-23.) This claim fails at the outset because the Appellants waived the alleged defects by failing to raise them prior to the sale, and because they have not shown any prejudice resulting from the information in the Notice of Default.

A. Appellants Waived Any Alleged Errors in the Notice of Default.

Without even reaching the merits of their claims, the Court should affirm the dismissal of the Leahys' wrongful foreclosure claims because they have waived their right to bring any post-sale challenge by failing to avail themselves of the presale remedies outlined in RCW § 61.24.040(1)(f)(IX).

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1. *Appellants Have Waived any Right to Equitable Claims Invalidating the Sale.*

Waiver is an equitable principle that can apply to defeat a party's legal rights where the facts support an argument that the party relinquished his rights by delaying in asserting or failing to assert an otherwise available adequate remedy. *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 569 (2012). Courts, including the Washington Supreme Court, have found waiver in a foreclosure setting where facts support its application. *See id*; *Frizzell v. Murray*, 179 Wn.2d 301, 307 (2013) (finding that the plaintiff waived her right to contest the nonjudicial foreclosure by failing to restrain the sale); *Plein v. Lackey*, 149 Wn.2d 214, 229 (2003) (finding that plaintiff waived objections to the foreclosure proceedings by failing to obtain a preliminary injunction). Waiver of a post-sale challenge occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to the foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Plein*, 149 Wn.2d at 227. The Washington Supreme Court has stated that adequate remedies to prevent wrongful foreclosure exist in the presale remedies allowed by the DTA, and thus it has found waiver in these circumstances furthers the goals of

providing an efficient and inexpensive foreclosure process and promoting the stability of land titles. *Id* at 228.

One such case is *Frizzell v. Murray*, decided in December 2013. The plaintiff in *Frizzell* defaulted on her loan and, after the beneficiary initiated nonjudicial foreclosure, filed suit. Along with the suit, the plaintiff sought and obtained a preliminary injunction the day before the sale, which was conditioned upon payment into the court registry. But the plaintiff failed to make the required payments, and the sale took place. *Frizzell v. Murray*, 179 Wn.2d 301, 305 (2013). After analyzing the case under the standards used in *Plein*, the Court concluded that the plaintiff waived her right to contest the nonjudicial foreclosure. *See id.* at 307. The Court reasoned that the plaintiff received the notice of right to enjoin the sale and she filed a motion to enjoin the sale. *Id.* at 307. In addition, she had knowledge of a defense to the foreclosure of the prior sale, demonstrated by the claims made in her complaint. *Id.* at 307. Finally, although she brought an action to obtain a court order, the order was conditioned upon a payment to the court that she failed to make and she did not request reconsideration of the decision nor did she appeal the order. *Id.* at 307. The instant case presents an even more clear-cut set of facts than those relied upon by the Court in *Frizzell* for a finding of waiver.

First, the Leahys received notice of their right to enjoin the sale. The Leahys identify three separate Notices of Sale that they received in the case. (*See* Opening Br. 9-11.) The September 2012 Notice of Sale provided notice of the January 18, 2013 sale date, which is the operative sale date in this case. (CP 432.) In addition, each of the three Notices of Trustee's Sale, which mirror the language recommended in the DTA, contained within them a paragraph that stated as follows:

> Anyone having any objections to this sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

(CP 421, 425, 433.) Thus, the Leahys were aware of their right to enjoin the January 18, 2013 sale no later than September 19, 2012, some four months prior to the scheduled sale, and potentially as early as July 2010.

Second, the Leahys had knowledge of their asserted defenses prior to the sale. The Leahys acknowledge receiving the April 2010 Notice of Default, and therefore were in possession of the facts necessary to determine whether it contained the statutorily-required information. (*See* Opening Br. 8-9.)

Finally, the Leahys failed to timely bring an action to obtain a court order enjoining the sale. The Leahys did seek a court order

enjoining the sale and their request was denied. (CP 392 ¶¶ 22-23, 502.) As the Court explained in *Plein*:

> Simply bringing an action to obtain a permanent injunction will not forestall a trustee's sale that occurs before the end of the action is reached. Moreover, if it did, it would render the requirements of RCW 61.24.130 meaningless because it would be unnecessary to obtain an actual order restraining the sale or to provide five days' notice to the trustee and payment of amounts due on the obligation. A statute must not be judicially construed in a manner that renders any part of the statute meaningless or superfluous.

Plein, 149 Wn.2d at 227 (internal citations denied).

The Leahys should have been aware of their claims many months – even years – before the January 18, 2013 sale day. In fact, Appellants contacted Quality Loan Service with threats to file an action on December 27, 2012 and January 11, 2013. (CP 392 ¶¶ 21-22.) Had the Leahys sought a restraining order at that point, it would have been timely under RCW § 61.24.130(2). Instead, they waited until the day before the sale, in clear violation of statute, to seek an injunction. (*See* CP 502.) Their requested injunction was denied, and the sale proceeded.

It is indisputable that the Leahys received notice of their right to enjoin the sale, had actual or constructive notices of the defenses they offer now well before the sale, and failed to act. Accordingly, the Leahys' delay prevents them from now asserting a claim based on the content of the Notice of Default.

2. *Appellants have Waived any Right to Damages*

The facts of the instant case support a finding that the Leahys waived not only any relief invalidating the sale, but any claims for damages as well. RCW 61.24.040(1)(f)(IX) must be read in conjunction with RCW 61.24.127, which states that, "the failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages." *However*, RCW 61.24.127(3) states that the damages exemption to the waiver rule applies "*only* to foreclosures of owner-occupied residential real property." Because the Leahys acknowledge the property is non-owner occupied, they cannot avail themselves of RCW 61.24.127 to avoid the waiver of their claims for damages.[3] (*See* Opening Br. 7, 10.) As such, the record supports a finding that the Leahys have waived both any equitable

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[3] Shalawn Leahy filed a Declaration attesting that the Plaintiffs occupied the property only from February 2010 through May 2010. (CP 718.) The record also demonstrates that Plaintiffs advised Quality in December 2010 that they believed the property was occupied by squatters and accordingly requested that the foreclosure move forward. (CP 390 ¶ 13.) And as pointed out to the lower court, Plaintiffs alleged in both the Complaint and the First Amended Complaint that they were residents of Snohomish County, Washington, not King County where the property is located. (*See* CP 372.)

remedies relating to the nonjudicial foreclosure under RCW 61.24.040(1)(f)(IX), and any claim to monetary damages.

B. Appellants Failed to Demonstrate Prejudice.

The DTA is meant to further three public policy objectives. First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387 (1985). In light of these objectives, it is incumbent upon the litigant seeking to set aside a trustee's sale based on a procedural irregularity to show prejudice. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113 (1988). Indeed, in *Koegel*, the Court held that the appellants failed to show prejudice where a notice of trustee's sale issued less than thirty days after the notice of default in violation of the Deed of Trust Act. *Id.* at 112, 116. The Court noted the appellants were aware of the procedural defect and their right to contest the sale but failed to take advantage of the available legal remedies even though, as in the present case, they threatened litigation well in advance of the sale date. *Id.*

The record in this case provides no indication of prejudice. The Leahys admit to having defaulted on their loan in March 2009. (*See* Opening Br. 8.) The Leahys further admit that they received the Notice of

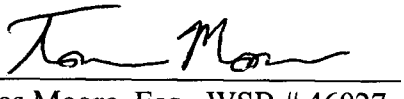
Default and three separate Notices of Sale. (Opening Br. 8-11.) The Leahys had knowledge of the identity of the trustee and beneficiary, and they had no trouble contacting the trustee to communicate their concerns regarding the foreclosure. (CP 390 ¶ 13, 392 ¶¶ 21-23.) As in *Koegel*, the Leahys threatened to initiate litigation, but failed to do so in the time required. Further, their Opening Brief makes no attempt to demonstrate prejudice caused by the alleged omitted information in the Notice of Default. (*See* Opening Br. 22-23.) Without such a showing, the Leahys have not demonstrated any basis to overturn the lower court's grant of summary judgment to Defendant.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's decision granting Quality Loan Service Corporation of Washington's motion for summary judgment.

Dated: November 19, 2014

Respectfully Submitted,
McCarthy & Holthus, LLP

By: 

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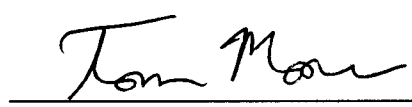
CERTIFICATE OF SERVICE

I certify that on October 20, 2014, I served a copy of the foregoing document, described as **RESPONDENT'S BRIEF**, on the following persons via email pursuant to prior agreement of the parties.

William and Shalawn Leahy
shalawnie@yahoo.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this Declaration was executed in Seattle, Washington.

Dated: November 20, 2014



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