No. 93777-0

SUPREME COURT
STATE OF WASHINGTON

BYRON BARTON and JEAN BARTON, husband and wife,

Appellants,

v.

JP MORGAN CHASE BANK, N.A., et al.,

Respondents

TRIANGLE PROPERTY DEVELOPMENT, INC.'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners Byron and Jean Barton, husband and wife, are the former owners of the residential property known 6548 41st Avenue SW, Seattle, WA 98136. Respondent Triangle Property Development, Inc. ("Triangle") is the current fee title owner of the subject property, having purchased it for cash in April of 2014, in a non-judicial deed of trust foreclosure sale. The Bartons assert procedural flaws in the process leading up to the foreclosure. These assertions have been rejected as *res judicata* by the King County Superior Court and Division I of the Court of Appeals. In making their arguments, the Bartons have challenged the legal validity and effect of the foreclosure sale. In so doing, the Bartons challenge and interfere with the validity of Triangle's title.

II. FACTS

Triangle is a Washington corporation engaged in the business of buying, managing, improving and selling real property in the state of Washington. The property purchased in the April 11, 2014 foreclosure sale is one such property.

The Bartons borrowed money and pledged the property as collateral to secure their repayment obligation through deeds of trust. One such deed of trust arose from a loan the Bartons secured from Washington Mutual ("WaMu"), and was recorded in 2007 under King County

recording No. 20070814001628. *Court of Appeals Decision at 1-2.* The Bartons defaulted on the payment obligation on that loan in the summer of 2011. *Id at 2.* Respondent JP Morgan Chase Bank ("Chase"), as the successor holder of the promissory note, appointed Respondent Quality Loan Service Corporation ("QLS") as the successor trustee under the WaMu deed of trust. Chase directed QLS to initiate non-judicial foreclosure proceedings. *Id.*

In early July, 2012, QLS issued a Notice of Default to the Bartons. *Id.* The Notice of Default was sent to the Bartons by mail, and was posted conspicuously on the property. More than 30 days later, on August 20, 2012, QLS recorded a Notice of Sale. *Id.*

After recording of QLS' first Notice of Sale, the Bartons commenced suit against Chase, QLS and First American Title Insurance Company. They argued that Chase was not the owner of the note and rightful successor beneficiary under the Deed of Trust, and that Chase had never acquired the power to appoint QLS as successor Trustee. After the Bartons' suit was removed to federal court, it was dismissed without prejudice. *Id.* The Bartons do not claim to have cured their default under the promissory note, but after the Bartons sued, QLS did not follow

through with the scheduled non-judicial foreclosure sale, and the Notice of Sale expired. *Id.*

QLS issued a second Notice of Sale in April 2013, commencing a new and separate foreclosure process. *Id.* The Bartons sued Chase, QLS and First American again, repeating the same arguments as they had articulated in the first lawsuit (i.e., that Chase did not own the note and deed of trust, and QLS was not properly appointed as successor trustee). *Id.* The Bartons' second suit was removed to federal court, just like the first. As it had done the first time, QLS elected not to proceed with the scheduled non-judicial foreclosure sale, and the second Notice of Sale expired by passage of time. *Id.* The Bartons do not claim to have cured their default. On motion, the Bartons' second lawsuit was dismissed, this time **with prejudice**. *Id.*

In December, 2013, QLS issued a third Notice of sale, scheduling a new non-judicial foreclosure sale for April 11, 2014. *Id.* at 3. Triangle learned of the sale through public advertisement of QLS' third Notice of Sale. Triangle has no relationship with Chase or with QLS. On April 11, 2014, Triangle was the highest bidder, offering $646,000. *Id.* The public sale was competitive, with multiple bidders. Triangle's winning bid was

substantially more than the outstanding balance on the loan secured by the WaMu deed of trust.

Triangle received a trustee's deed from QLS on April 16, 2014, which was recorded under King County Recording No. 20140428001985, on April 28, 2014. In the 11 days following the sale, no one commenced an action to challenge the process, seeking to void the sale. On May 5, 2014, more than 11 days following the trustee's sale, the Bartons commenced this action, and named Chase, First American Title Insurance Company, and QLS as defendants. *Id.* The Bartons did not name or serve Triangle. But in their "claim for relief", the Bartons included a request for "judgment establishing Plaintiff estate [sic] as described above", and for "judgment barring and forever stopping Defendants from having any right or title to the premises adverse to plaintiff".

Triangle attempted to secure a loan to fund remodeling and repair efforts. Triangle obtained a preliminary commitment for title insurance from Fidelity National Title Insurance Company, which references the Bartons' lawsuit as an exception to title under Schedule B. Triangle's lender demanded, as a condition to making the loan, that the reference be removed. Triangle requested that the title company strike the reference from the preliminary commitment, but Fidelity declined. Because

Triangle could not get a title company to insure around the Bartons' claims in this lawsuit, Triangle's application for loan financing was declined. Triangle cannot sell the property, because any purchaser needing conventional mortgage financing will encounter the same exception on a commitment for title insurance. The Bartons' lawsuit, because of the way they articulated their claims, has wrongfully clouded Triangle's title, causing ongoing damage.

For these reasons, Triangle successfully intervened in this action, joining Chase and QLS in requesting that the court dismiss the Bartons' claims. *Id.* The Superior Court dismissed the Bartons' claims on summary judgment, but permitted the Bartons to file a motion to amend their pleadings. The Bartons filed a motion to amend. The proposed amended complaint asserted all the same arguments as before, slightly restated. In their proposed amended Prayer for Relief, the Bartons sought "equitable relief and damages". Just as the original complaint did, the proposed amended complaint would interfere with Triangle's title. Chase, QLS and Triangle all opposed the motion to amend. By order dated February 18, 2015, the Superior Court denied the Bartons' motion to amend.

The Bartons appealed the dismissal of their claims. The Court of Appeals, Division I affirmed the dismissal, citing *res judicata* to all of the Bartons' allegations concerning the foreclosure process. The Court of Appeals did not need to, and therefore did not address the issue of waiver, which requires a permanent dismissal of any argument or claim by the Bartons that the foreclosure sale to Triangle can be collaterally attacked.

III. ARGUMENT

A. Summary of Bartons' Challenges

Under their "Wrongful Foreclosure" claim, the Bartons argue that Chase failed to submit adequate proof that it properly acquired by assignment the original promissory note given by the Bartons to Washington Mutual ("WaMu") and the collateral in the form of the WaMu deed of trust. Without sufficient proof of ownership of the debt and collateral, the Bartons argue, Chase lacked authority to appoint QLS as a successor trustee under the deed of trust. Absent this authority, they say, QLS lacked legal power to conduct a foreclosure sale, or to transfer title following the sale. Thus, the Bartons say, the foreclosure sale lacked authority, and is a legal nullity. In this way, for more than two and one-half years now, the Bartons have interfered with Triangle's title, with no legal repercussion.

As a second challenge, assuming Chase had the authority to appoint QLS as successor trustee, the Bartons argue that QLS was required to issue new and successive Notices of Default for each successively scheduled trustee's sale, which QLS failed to do.[1] Referring to a June 7, 2012 amendment to the Deed of Trust Act, the Bartons claim that Chase/QLS failed to give them a statutorily required Notice of Pre-Foreclosure Options. Upon these alleged procedural flaws, the Bartons argue that the April 11, 2014 foreclosure sale to Triangle was a legal nullity. By implying that Triangle did not acquire good and valuable title, the Bartons have, for more than two and one-half years now, interfered with Triangle's title, with no legal repercussion.

The Bartons assert, as their third challenge, that QLS "continued" the foreclosure sale by an impermissibly long 436 days, in violation of RCW 61.24. As a consequence, they argue, the April 11, 2014 foreclosure sale is void, and Triangle acquired no interest in title through the Trustee's Deed issued in exchange for its payment of $646,000. Under this argument, and for more than two and one-half years now, the Bartons have interfered with Triangle's title, with no legal repercussion.

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[1] The Bartons do not deny receiving the first such notice of July 5, 2012, and they make no claim to have cured the default. They merely argue without citation to any legal authority that each newly recorded Notice of Trustee's Sale must be preceded by a new notice of default, even if the default under which the notice was given was never cured.

B. The Bartons' Petition For Review Should be Denied.

The basis for acceptance of a petition for review is set forth in RAP 13.4(b). Review will be accepted only where it can be shown that (1) the decision of the Court of Appeals conflicts with a decision of the Supreme Court; (2) the decision of the Court of Appeals conflicts with another decision of the Court of Appeals; (3) a significant question of law under the Constitution of the state of Washington or of the United States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Bartons concede that no constitutional issue is implicated in this case. Although the Bartons claim that the Court of Appeals decision in this case conflicts with another decision of the Court of Appeals, they do not cite any conflicting Court of Appeals decision. The Bartons do not make any viable argument for acceptance of review under RAP 13.4(b)(1) or (3).

The Bartons do cite *Albice v. Premier Mortgage Services of Washington Inc.*, 174 Wn.2d 560, 239 P.3d 1148 (2012), presumably asserting that the Court of Appeals decision in this case is in conflict with that Supreme Court decision. And, referring to "the Respondents' actions" as "unfair", and that a statement by QLS of compliance with the Washington Deed of Trust Act had been met was "untrue", the Bartons

presumably imply that the Court of Appeals decision involves an issue of substantial public interest that should be determined by the Supreme Court. Hence, it appears that the Bartons base their argument that review should be accepted under RAP 13.4(b)(1) and (4).

1. The Court of Appeals Decision Does Not Conflict With Albice v. Premier Mortgage Services of Washington, Inc.

The Bartons have repeatedly cited *Albice v. Premier Mortg. Svcs.*, 174 Wn.2d 560, 239 P.3d 1148 (2012) in support of their argument that the April 11, 2014 foreclosure sale was void. The Bartons erroneously argue that the April 11, 2014 foreclosure sale was a "postponement" of the sale originally scheduled in QLS' August 20, 2012 Notice of Sale.

The *Albice* holding was limited to the conclusion that the trustee under a deed of trust lost statutory authority to conduct a foreclosure under a single, recorded notice of sale more than 120 days after the originally scheduled sale date. Here, quite unlike the facts in *Albice*, the foreclosure sale was not "postponed" or "continued". The first two Notices of Sale recorded by QLS in August of 2012 and in April of 2013 each expired, thereby ***terminating*** the first two foreclosure processes. QLS initiated a third, new foreclosure process when it recorded the third Notice of Sale on December 6, 2013.

QLS initiated and advertised the April 11, 2014 foreclosure sale in the manner set forth in RCW 61.24.030 and .040, including issuance, recording and advertising of a Notice of Sale, and conducted the sale on the scheduled date. There is no legal basis to invalidate the foreclosure sale under the holding of *Albice.* Triangle (unlike the successful purchaser in *Albice*), had no knowledge of any prior scheduled sales, and had no communication with the Bartons or with QLS in advance of the actual sale on April 11, 2014. Triangle is a bona fide purchaser for value.

Albice presented a rare set of facts under which a specific borrower did not waive the right to seek post-sale invalidation of the sale despite failing to seek a pre-foreclosure sale injunction. In *Albice*, for approximately five months, with just one recorded Notice of Sale pending, the trustee repeatedly postponed a sale without recording a new Notice of Sale, while the borrower tendered and the secured lender accepted periodic payments under a formal forbearance agreement between them. After more than five months of accepting such payments, and with just a single payment left to cure the borrower's default, the secured lender instructed the trustee to proceed with a foreclosure sale.

The *Albice* Court applied RCW 61.24.040(6), which permits a trustee to continue a sale for up to 120 days, by public proclamation at the

time and place of the scheduled sale, and notice by mail to certain persons specified in that statutory section, or alternatively by advertising the postponed sale in a legal newspaper circulated in the county in which the property is located. When the Trustee does all of those things, a sale can be postponed for up to 120 days, without recording of a new notice of sale with the county auditor's office. The trustee in *Albice*, by postponing a sale under a single recorded Notice of Sale for more than 120 days, failed to comply with the statute and lost the authority to conduct the sale.

In the present case, QLS recorded a new Notice of Sale, and conducted the sale on its only scheduled date., There is no conflict between the dismissal of the Bartons' claims in this case and the holding in *Albice*. The facts between the two cases are simply different.

Here, the Bartons had no agreement with Chase to cure their default, and made no interim payments to Chase. Unlike the borrower in *Albice*, the Bartons had reason to initiate an injunction action prior to the advertised foreclosure sale if they believed (as they have consistently claimed) that they have a basis to challenge it. On two prior occasions, the Bartons ***did*** commence civil lawsuits, and on those two prior occasions, the foreclosure process was terminated. The Bartons had a reason to

commence suit to enjoin the foreclosure sale scheduled for April 11, 2014. They had opportunity to do so. They had knowledge of how to do so.

The Bartons' situation is much more like the Borrower in *Plein v. Lackey,* 149 Wn.2d 214, 227, 67 P.3d 1061 (2003). In *Plein*, a borrower received a notice of default and a subsequent notice of sale, commenced an action, but neglected to seek a temporary injunction to halt the sale before its scheduled date. The sale proceeded as scheduled and the borrower would not be heard later to upset the finality of the sale, and to divest the innocent purchaser of title.

2. The Bartons' Petition Raises No Issue of Substantial Public Interest.

In their petition for review, the Bartons argue that actions of Chase and QLS were "unfair", and that statements by QLS and Chase of compliance with the Deed of Trust Act are untrue. But these assertions do not raise any issues of substantial public interest because, as the Court of Appeals found, these arguments are *res judicata.* All of the alleged facts offered to support the Bartons' claim for "Wrongful Foreclosure" were known to the Bartons long in advance of the commencement of this civil action. The Bartons' claims (1) that Chase lacked proof of ownership of the WaMu note and deed of trust, and (2) that Chase and QLS failed to deliver all required pre-foreclosure notices to the Bartons before recording

the Notice of Sale, were assertions that were made or could have been made by the Bartons in their first two lawsuits. As the Court of Appeals correctly concluded, there is a concurrence of (1) persons and party, (2) quality of the persons for or against whom the claim is made (3) subject matter, and (4) cause of action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The Court of Appeals correctly found all four elements of the test for *res judicata* to be present in this case.

Complaints that the actions of Chase or QLS were "unfair" do not raise any issue of substantial public interest. The Bartons may believe that the Deed of Trust Act in Washington should be amended, to provide different or greater protections to a borrower before a nonjudicial foreclosure sale can take place. Legislative amendment is not the province of the court, and does not present any basis for acceptance of a Petition for review.

3. The Bartons Waived any Claim to Invalidate or Attack the Foreclosure Sale.

The most compelling argument against the Bartons and in favor of Triangle – waiver – is the argument the Court of Appeals did not need to reach, but that deserves attention and clear enforcement. Of the Supreme Court, for any reason, determines that the Bartons should be permitted to advance their arguments on further appeal, this Court should reject that

any outcome on appeal may impact Triangle's ownership interest, and should limit the Bartons' claims to claims for monetary damages, and should quiet title to the Property in Triangle.

By failing to initiate an action to enjoin the non-judicial deed of trust foreclosure sale, the Bartons waived the right to attack it collaterally. RCW 61.24.127, entitled "Failure to bring civil action to enjoin foreclosure — Not a waiver of claims", provides:

> (1) 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*** asserting:
>
> (a) Common law fraud or misrepresentation;
>
> (b) A violation of Title 19 RCW;
>
> (c) Failure of the trustee to materially comply with the provisions of this chapter; or
>
> (d) A violation of RCW 61.24.026,
>
> (2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:
>
> ...;
>
> (b) ***The claim may not seek any remedy at law or in equity other than monetary damages***;
>
> (c) ***The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;***

> (d) ***A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon***;
>
> (e) ***The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale ...***

(emphasis added)

It is difficult to imagine a more clear expression of legislative intent. Just as the Bartons have cited to this statute for the proposition that their claims have not **all** been waived by failure to seek an injunction prior to the foreclosure sale, Triangle has repeatedly pointed to this same statutory language, begging the court permanently to bar the Bartons from interfering with Triangle's fee title ownership.

At best, by admittedly failing to seek to enjoin the April 11, 2014 foreclosure sale, the Bartons did not waive their claims under certain enumerated causes of action (e.g., common law fraud or misrepresentation; violation of Title 19 RCW; failure of the trustee to materially comply with the provisions of RCW chapter 61.24; or violation of RCW 61.24.026). The Bartons have asserted certain of those claims in this action. But according to the language of the same statute that allows them to argue non-waiver of certain legal **claims**, the Bartons are absolutely prohibited from claiming any **remedy** other than money

damages, and they cannot "affect in any way the validity or finality of the foreclosure sale", they cannot record any document impacting Tringle's title, and their lawsuit may not in any way encumber or cloud the title to the property that was subject to the foreclosure sale. Unfortunately, the Superior Court and Court of Appeals have both focused on the threshold issue of *res judicata*, which has allowed the Bartons to cause ongoing injury to Triangle as they exhaust their arguments in the courts.

The Bartons have, for more than two and one-half years, stubbornly refused to couch their claims as purely claims for money damages. They persistently seek to undermine Triangle's ownership. It is firmly to pronounce that the Bartons did indeed ***waive*** any right to interfere with Triangle's title.

Arguments by the Bartons that Chase is not the rightful owner of the promissory note and deed of trust, and that QLS was not properly appointed as the successor trustee are, for all the reasons argued in Chase's motion to dismiss, barred by the doctrine of *res judicata*. These arguments were raised, briefed, argued and rejected with prejudice in the prior lawsuit. Arguments that Chase and QLS impermissibly "postponed" the trustee's sale, rendering it void, are factually unsupported and incorrect. The first two Notices of Sale expired. QLS was never required

to issue new and successive Notices of Default, where the Bartons never cured the first default. *Leahy v. Quality Loan Serv. Corp of Wash.* 190 Wn.App. 1, 359 P.3d 805 (2015). All notices that the Bartons claim not to have received and pre-foreclosure processes the Bartons claim not to have undertaken were matters the Bartons could have argued in their first and second lawsuits, and are, therefore, *res judicata.* The Superior Court correctly ruled in favor of Chase and QLS in dismissing the Bartons claims, and the Court of Appeals correctly declined to reverse.

Meanwhile, for more than two and one-half years, Triangle has been unfairly held hostage to the Bartons' legal experimentation. The mere existence of the Bartons' lawsuit, as they pleaded it, interferes with Triangle's ability to borrow against or to sell clear title to the property. It should be obvious that allowing the Bartons to cling to the argument that they can challenge the validity and finality of the April 11, 2014 foreclosure sale causes significant prejudice and ongoing injury to Triangle.

IV. CONCLUSION

The framework of the Deed of Trust Act, and various cases interpreting it, leads inevitably to the conclusion that the April 11, 2014 trustee's sale to Triangle must be upheld.

The Court of Appeals decision does not conflict with *Albice.*

Because the Bartons' arguments of pre-foreclosure procedural flaws were or could have been asserted in their prior actions, they are res judicata, and do not implicate any issue of substantial public interest. There is no basis under RAP 13.4(b)(1) or (4) to accept review. And even if the Bartons could "pull a rabbit out of a hat", and convince the court that Chase and QLS somehow stumbled in orchestrating the non-judicial deed of trust foreclosure sale – a finding that is nowhere justified by the evidence in the record – the only sensible, and equitable consequence of such a finding would be to reverse and remand to the Superior Court, with instructions that the Bartons are limited to maintaining an action for damages, and that any claims to an interest in title to the property are barred, because the Bartons waived any such claims when they failed to initiate an action to enjoin the sale prior to its scheduled April 11, 2014 date. If this court is inclined to accept review, it should do so with a preliminary determination that Triangle's fee title ownership of the property is quieted against any claim of interest by the Bartons, and that seeking to invalidate the foreclosure sale is not within the scope of their legal challenge.

DATED this 4th day of November, 2016.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By _____
David J. Lawyer, W.S.B.A. #16353
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DECLARATION OF SERVICE

I, Jerilyn K. Kovalenko, hereby declare under penalty of perjury under the laws of the State of Washington that on November 15, 2016, I caused to be served true and correct copies of the forgoing *Answer to Petition for Review* to the individuals named below in the specific manner indicated:

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DATED this November 15, 2016, at Bellevue, Washington.

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