Supreme Court No. 93871-7
Court of Appeals D2 No. 477289-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RESTORE EQUITY, LLC, a limited liability company,

Petitioner (Appellant and Plaintiff below),

vs.

The BANK OF NEW YORK MELLON, as trustee,

Respondent (Appellee and Def. below).

PETITIONER RESTORE EQUITY PETITION FOR REVIEW

Appeal from a decision of the Washington Court of Appeals, Division 2, in the matter of *Restore Equity, LLC v. the Bank of New York Mellon, as trustee,* case number No. 477289-II affirming:

A decision made by the Honorable Judge Edwards of the Grays Harbor Superior Court in the matter of *Restore Equity, LLC v. the Bank of New York Mellon, as trustee,* case number No. 11-2-01446-7 granting the Defendant's Motion For Summary Judgement.

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1. Identity of Petitioner and Its Counsel:

The Petitioner is Restore, Equity LLC, a Washington limited liability company and the owner of the real property which was foreclosed by a deed of trust trustee without notice. The Petitioner was the Appellant below in the matter of *Restore Equity, LLC v. the Bank of New York Mellon, as trustee,* Washington Court of Appeals, Division 3, case number No. 477289-II.

Petitioner's Counsel is the Law Offices of Edward P. Weigelt, Jr. and Edward P. Weigelt, Jr. 9222 36th Ave. SE Everett, Washington 98208, phone (425) 346-1646,fax (425) 357-6391 email: eweigeltjr@msn.com.

2. Identity of Respondent and Its Counsel.

The Respondent is the Bank of New York Mellon, as Successor Trustee to JP Morgan Chase Bank, as trustee for Novastar Mortgage Funding Trust, Series 2004-1, Novastar Home Equity Asset Backed Certificates, Series 2004-1. The Respondent was the beneficiary of the deed of trust foreclosed on and the purchaser of the property at the trustee's sale.

The Respondent was the Appellee and Defendant in the matters below. The Respondent Bank of New York Mellon is a party in this action only in its capacity as trustee of the Novastar Funding Trust.

Respondent's counsel is Joseph Ward McIntosh of McCarty and Holthus, LP 108 1st Ave. South Ste. 300, Seattle, WA. 98104, phone (206) 319-9100, fax (206) 780-6862 email: jmcintosh@mcCarthyHoltus.com

The Respondent's is also represented by Robert Norman of Houser and Allison, PC 1601 5th Ave. Seattle, WA. 98101 phone (206) 596-7838,

fax (206) 596-7839; (Houser and Allison, APC 3760 Kilroy Airport Way, Suite 260, Long Beach, California, 90806).

2. Court of Appeals Decision.

Petitioner Restore Equity seeks the review of the decision of Washington Court of Appeals, Division 2, entered on October 25, 2016 in the matter of *Restore Equity, LLC v. the Bank of New York Mellon, as trustee,* case number No. 477289-II.

The Court of Appeals' decision affirmed an order and decision made by the Honorable Judge Edwards of the Grays Harbor Superior Court in the matter of *Restore Equity, LLC v. the Bank of New York Mellon, as trustee,* in superior court case number No. 11-2-01446-7 granting the Respondent/Defendant's Motion For Summary Judgement seeking authorization to allow a deed of trust foreclosure to be done over.

A copy of the Court of Appeal's decision is attached hereto as Exhibit A.

3. Issues Presented For Review

This petition seeks review of the ability of a deed of trust beneficiary and/or deed of trust trustee to "re-do" the foreclosure of a note and deed of trust which had been previously foreclosed pursuant to the Deed of Trust Act (RCW 61.24 et seq.) after the sale had become final by the recording of the trustee's deed conveying the property to the beneficiary as the successor buyer of the property at the trustee's sale.

Underlying the issues in this case is that notice of the trustee's sale was given to Appellant solely because of the trustee's complete failure to investigate the "title to" and "ownership of" the property by either reviewing the public records or obtaining a current title report. The investigation of title/ownership and giving notice of the trustee's sale are a deed of trust trustee's most sacred and fundamental duties.

The ultimate issues presented in this petition thus center on what a deed of trust beneficiary, trustee and court should do when there is a failure of notice, and if the foreclosure can be "re-done" how to balance the inequities and legal complications arising from the "re-do" of a non-judicial foreclosure of a note and deed of trust sale. "Re doing" of a deed of trust foreclosure gives rise to several important issues of first impression and present the following issue for review:

> (a) Whether allowing a deed of trust foreclosure of a note and deed of trust to be re-done due to the trustee's failure to give notice of the trustee's sale to the property's owner is authorized by the Deed of Trust Act, RCW 61.24 et. seq. or undermines the objective of the Act to promote stability of land titles.
>
> (b) Whether allowing a "re-do" of a non-judicial foreclosure of a note and deed of trust due to the trustee's failure to exercise due diligence or error expands the circumstances of when a foreclosure of any type be re-done.
>
> (c). Whether the lower courts erred by allowing the deed of trust to be re-foreclosed after it had been extinguished by the trustee's sale and the recording of the trustee's deed.

5. Statement of the Case.

In 2003 Ronald and Debra Crowder borrowed money from the Novastar Mortgage Trust and executed the subject Note and Deed of Trust. JP Morgan Chase was the original trustee of the Novastar Mortgage Funding Trust. The Respondent, Bank of Mellon, is the successor trustee, and current trustee of the Novastar Mortgage Funding Trust.

The Crowder Note provided for an "adjustable rate" of interest subject to minimum and maximum rates. The rates were tied to a variable interest rate index known as the LIBOR index. Over the course of the loan Novastar consistently raised the interest rate whenever the LIBOR index increased. This resulted in the monthly payment nearly doubling. It appears that Novastar did not lower the rate or reduce the payments when the adjustable LIBOR rate index declined. The proper computation of the note's adjustable interest rate is relevant to whether the Crowders defaulted on their payments or not.

In April, 2010 Quality Loan Services was appointed successor trustee of the subject Deed of the Trust. At that time it ordered a title report, but appears to have taken no further action to foreclose the Note and Deed of Trust. The amount of the monthly payments actually due under the Note was disputed because of apparent discrepancies in the interest rate adjustments.

In October, 2010 the Petitioner Restore Equity, LLC ("Restore") purchased the property from the Crowders. The Crowders' deed conveying the property to Petitioner Restore was duly recorded in Grays Harbor

recorder's office. The Petitioner purchased the property subject to the Crowder Deed of Trust and was aware of the discrepancies in the interest rate adjustments and over charging. The discrepancies had artificially increased the monthly payments to more than actually owed.

In April or May, 2011 the Bank of Mellon, as the then successor trustee of the Novastar Funding Trust, retained and instructed the Quality Loan Services as the successor trustee of the Deed of Trust to commence a non-judicial foreclosure of the Deed of Trust. Neither Quality Loan Service nor Bank of Mellon requested a title report, or ordered an "update" to the title report obtained by Quality Loan Service the year before. There was no evidence that anyone made any effort to investigate the title or ownership of the property, or determine whether there had been any changes to the condition of title such as change in ownership, new junior deeds of trusts, judgment liens, tax liens or other liens against the property which had attached since May of 2010.

In June, 2011 Quality Loan Service issued a Notice of Trustee's Sale. Neither the Respondent Bank of Mellon nor Quality Loan Service gave notice of the Trustee's Sale to the Petitioner Restore despite the fact that the Petitioner's ownership of the property was a matter of public record in both the county's real property records and the county's tax records. There is no dispute that the Crowders' deed conveying the property to Restore had been properly recorded with the county and properly indexed in the real property records.

On September 30, 2011 the Quality Loan Service as trustee of the Deed of Trust then conducted a trustee's sale and foreclosed the Deed of Trust. The property was sold without notice of the Trustee's Sale to the Petitioner. The Respondent Bank of New York Mellon was the successful buyer of the property at the Trustee's Sale. The Deed of Trust trustee then duly issued and recorded a Trustee's Deed conveying the property to Bank of Mellon. The Respondent's credit bid is believed to have exceeded the loan payoff due to prior errors in the assessment of interest. Quality Loan Service collected no money from the Respondent.

After the Trustee's Sale, the Bank of New York Mellon then commenced an unlawful detainer action against the Crowders. Restore was not a "named" party to that action but after learning of the lawsuit appeared as a "John Doe" or person claiming an interest in the property through the Crowders. After learning of the Bank of New York Mellon's claim of ownership of the property Restore then commenced the present action to quiet title. The Bank of New York Mellon's (first) unlawful detainer was dismissed and the litigation regarding ownership and title to the property were litigated in the context of the present case.

On May 26, 2015, while some discovery was still outstanding, the Honorable Judge Edwards of the Grays Harbor Superior Court granted the Respondent Bank of New York Mellon's Motion For Summary Judgment to dismiss the case. Superior Court Judge Edwards ruled that: (a) the trustee's sale did not affect Restore's ownership of the property; (b) the

trustee's sale and the trustee's deed did not extinguish the Respondent Bank of New York Mellon's deed of trust; and (c) the trustee's failure to give notice was a "mistake." Judge Edwards then authorized the Respondent Bank of New York Mellon to re-foreclose the note and deed of trust, i.e., to "re-do" the foreclosure sale.

On June 22, 2015 Restore timely filed an appeal pursuant to RAP 5.2. After the appeal was filed, Bank of New York Mellon then commenced two more related lawsuits: First, a judicial foreclosure of the Note and Deed of Trust (Bank of New York Mellon v. Crowder, Grays Harbor Superior Court case number 15-2-00542-8); and second, more recently its second unlawful detainer action seeking possession of the property on the basis of its being "the owner of the property" under the trustee's deed, (Bank of New York Mellon v. Crowder, Grays Harbor Superior Court case number 15-2-00784-6.

On October 25, 2016 the Court of Appeal's Division 2 affirmed the trial court's order and decision. The Court of Appeals relied heavily on the Washington Supreme Court decision of *U.S. Bank of Washington v. Hursey*, 116 Wn. 2nd 522, 806 P.2d 245 (1991). In this case the Supreme Court allowed a judicial judgment lien foreclosure to be "re-done" because of an innocent indexing error made by the court clerk. The error was not made by the parties or their agents.

Material to the present case is that the failure to give notice of the Trustee's Sale to Petitioner Restore was simply and solely because of

Quality Loan Services' and the Respondent's complete failure to exercise due diligence to determine who had an interest in the property. They failed to get title reports, failed to order updates to old and out of date reports, and failed to check the county's real property records.

5. Argument Why Review Should Be Granted.

The Court of Appeals and the superior court correctly held that the foreclosure and trustee's deed did not extinguish or affect the Appellant's ownership of the property because of the trustee's failure to give notice of the trustee's sale to the Appellant. The Court of Appeals, however, then erred by affirming the Respondent's or the deed of trust trustee's ability to "re-do" the foreclosure of the note and deed of trust. Petitioner seeks review of the Court of Appeals' decision allowing the Respondent Bank of Mellon as the beneficiary of the subject Deed of Trust and/or the Deed of Trust's trustee to "re-do" the foreclosure.

Review should be granted because the Court of Appeals errored in its decision. Under the Deed of Trust Act the trustee's sale becomes "final" unless the party in interest timely seeks to "void" or rescind the sale within eleven days, and notice of such action is given within fifteen days of the sale. RCW 61.24.050. If this does not occur then the trustee's sale becomes final by the recording of the trustee's deed. The Deed of Trust Act does not authorize the "re-do" of a foreclosure after it has become final. Rather to facilitate finality of the foreclosure process the Act renders the

foreclosure ineffective to affect the interests of a person who is entitled to notice but who is not given notice as provided by law. RCW 61.24.040(7).

To circumvent the Deed of Trust Act the Court of Appeals and the superior court expanded the statutory remedies by wrongfully concluding that the failure to give notice was an "excusable mistake." However, the failure to give notice of the trustee's sale to the Respondent was solely the result of the trustee's failure to exercise due diligence in determining ownership of the property—the trustee did not obtain a current title report. This is not an excusable mistake. *Citizens State Bank of New Castle v. Countrywide Home Loans,* Inc., 949 N.E.2d 1195 (Ind. Sup. Ct. 2011).

While rendering the sale ineffective as to Appellant may seem inequitable relative to the Respondent, the law is also clear that a purchaser of the property at a foreclosure sale (like the trustee), is held to have knowledge of relevant public records. This includes the deed conveying the property to the Appellant. A buyer who purchases the property subject to a lien is not relieved of its obligations to buy it simply because he was ignorant of liens which survive the sale. *Sixty-01 Association of Apartment Owners v. Parsons*, 181 Wn. 2nd 316, 335 P.3d 933 (2014).

The Washington Deed of Trust Act, RCW 61.24 et seq. seeks to provide an efficient, cost effective and final means of foreclosing a deed of trust by a disinterested trustee. The foreclosure procedure is strictly governed by this statute. If the process is followed then all parties with an interest in the property should have an adequate opportunity to prevent

wrongful foreclosure. The Act intends for the trustee's sale to be final. The finality of a trustee sale is necessary to promote the stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383,387, 693 P.2d 683 (1985).

A trustee's foreclosure sale is completed by the recording of a trustee's deed. The trustee's sale is "final" unless the trustee, beneficiary or any person with an interest in the property seeks to rescind or void the sale within eleven (11) days. RCW 61.24.050. Thereafter the statutory effect of a failure to give notice to someone who is entitled to it is to render the sale ineffective to affect that person's interest. RCW 61.24.040(7).

In the present case the trial court and Court of Appeals authorized the Respondent or trustee to re-foreclose the note and deed of trust. Whether a deed of trust foreclosure can be "re-done", and the circumstances which justify this action are important issues of first impression with significant impact on the stability of land titles, and the efficiency and effectiveness of a Deed of Trust Foreclosure. The possibility of a "re-do" interjects uncertainty in the trustee foreclosure sale process and negates the objective of finality of a foreclosure sale and thus stability of land titles.

A. Allowing a "Re-Do" of a Trustee's Sale Is Not Authorized By The Deed of Trust Act and Undermines The Statutory Objectives of Promoting Stability of Land Titles.

One of the key legislative objectives of the Deed of Trust Act is that it should promote stability of land titles. This is central to the Deed of Trust Act's provisions addressing the legal effect of a failure to give notice

of the sale. RCW 61.24.040(7) explains that the effect of the failure to give notice to a person entitled to receive notice is that the sale does not affect his interest. The plain language of RCW 61.24.040(7) is neither ambiguous nor inchoate. It provides that a trustee's sale and deed:

> ... shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section, if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;

The statute mandates that the sale shall not affect the interest of the omitted person is in accord with the long standing rule of law followed by Washington Courts for judicial foreclosures that the omitted junior lienholder's rights were not foreclosed, i.e., that the foreclosure decree was not effective to terminate the omitted lienholder's interest in the property. *Spokane Sav. and Loan Ass'n v. Lilopoulos, 160 Wash. 71, 73-74, (1930).*

Both the trial court and Court of Appeals correctly applied RCW 61.24.040(7) by concluding that the subject trustee's sale did not extinguish the Respondent's ownership of the property. However, both lower courts then went well beyond their statutory authorization and jurisdiction by authorizing the property to be "sold" a second time, i.e., they authorized the beneficiary or the trustee to re-foreclose the same note and deed of trust. RCW 61.24 does not authorize this action. Nor does the statute declare the sale "void."

Allowing a beneficiary of a deed of trust or the deed of trust trustee to "re-do" the foreclosure of the note and deed of trust introduces uncertainties into the foreclosure process. The recording of the trustee's deed is intended to render the sale final and terminates the underlying deed of trust. *In re Trustee's Sale of Real Prop. of Ball*, 179 Wash. App. 559 319 P.3d 844, (Div. 2 2014). The ability to "re-do" the foreclosure creates uncertainty because it means that the foreclosure did not extinguish the deed of trust. If a deed of trust is not extinguished by the sale and the trustee's deed then the deed of trust is a continuing lien against the foreclosed property after the foreclosure.

Since a foreclosed deed of trust continues as a lien after foreclosure it could be foreclosed a second time. This possibility adversely affects the marketability of the property and constitutes a cloud of title. Instead of promoting stability of land titles, the effect would be the exact opposite: title could never be cleared by a non-judicial foreclosure. This defeats a key objective of the Deed of Trust Act.

The present case illustrates some of the types of problems and complexities arising from a "re-do" of the sale. Because the deed of trust can be re-foreclosed, it is a lien against the property and the Petitioner can neither sell nor refinance it. The passage of time and uncertainty affect the ability to cure any default. The Petitioner intended to cure any default based on a correct computation of what was owed in the summer of 2011. This may now be moot if the sale is now "re-done" and six years of

disputed interest is added to the debt. The Crowders who made financial decisions in 2011 not to file bankruptcy are now parties to a judicial foreclosure action and filed bankruptcy.

The title complexities of allowing a "re-do" of a trustee's sale go well beyond those involving the present parties. There are open questions regarding the impact of re-doing a trustee's sale on the rights of junior lienholders and those who may have purchased the property: what happens to the liens of junior lienholders; if the obligations owed to a junior lienholder's were cross collateralized with other property which was then foreclosed on, must that foreclosure also be re-done; does the buyer of the property at the trustee's sale get a "refund" of the monies he paid to the trustee to buy the property at the trustee's sale; what are the rights of a third party lender who loaned money secured by the property purchased at the trustee's sale; do persons with an interest in the property arising from the purchaser of the property get notice of the "re-do" and are their liens necessarily junior to the deed of trust being re-foreclosed; must title companies now list as encumbrances any deeds of trust which had previously been foreclosed on because of the chance the sale will be "re-done" and their insured's interest could be extinguished by a later second sale of an old deed of trust.

B. Authorizing A Re-Do of a Sale Due to Trustee Misconduct Expands The Limited Circumstances Of When A Judicial Foreclosure May Be Re- Done.

The Deed of Trust Act does not authorized the "re-do" of a trustee's sale. The most relevant provision of this Act is found at 61.24.040(7) which indicates that the lien or interest of such omitted person shall not be affected by the sale. The statute states that: "such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;..."

There are no Washington cases interpreting this language nor authorizing a beneficiary or trustee to re-foreclose the note and deed trust after the trustee's sale. This is an issue of first impression.

The Court of Appeals looked toward cases involving judicial foreclosure involving "mistake." The seminal case involved a mistake by the court itself where the court clerks made an indexing error which resulted in the failure to name a junior judgment lienholder as a defendant. *U.S. Bank of Washington v. Hursey*, 116 Wn. 2nd 522, 806 P.2d 245 (1991). Because of the indexing error the junior lienholder's judgment lien was not a matter of public record and no notice was given to him.

The *U.S. Bank of Washington v Hursey, Id.* decision was predicated on an innocent mistake by a third party. Unlike the present case, the mistake was not done by the senior lienholder, its counsel, or its agents. Unlike *Hursey,* the Petitioner's interest in the property was duly recorded and a matter of public record. This distinction is of crucial importance because under Washington law the deed of trust trustee and the Respondent as buyer of the property at the foreclosure sale are held to have constructive

knowledge of all matters of public record. *Sixty-01 Ass'n of Apartment Owners v. Parsons*, 178 Wn.App. 228, 232-233, 314 P.3d 1121 (Div. 1 2013) (aff'd 181 Wn. 2nd 316, 335 P.3d 933).

A trustee's and buyer's actual and constructive knowledge is relevant to whether an "excusable mistake" was made, what the court should do about it, and the relief if any that a court should award. In the present case the deed of trust trustee failed to: (a) obtain a current title report; (b) failed to obtain updates of a year old title report in his file; (c) failed to obtain updates immediately before the sale date to determine changes in the title, if any; and (d) failed to investigate the county real property records. There was no indication that the Respondent obtained any title reports or did any due diligence of any type before buying the property at the trustee's sale. These facts militate against any finding that failure to give notice was simply an excusable mistake.

In *Sixty-01 Association of Apartment Owners v. Parsons, Id.* the Supreme Court rejected an aggrieved buyer of property at a judicial foreclosure sale who purchased the property under the incorrect belief that the sale extinguished a junior lien. The junior lien was a matter of public record. The Supreme Court concluded that a court in equity should not excuse the buyer from consequences of the sale when he fails to exercise due diligence in investigating the record title of the property.

The Court of Appeals' decision in the present case undermines the precepts found in *Sixty-01 Association of Apartment Owners v. Parsons*,

Id. and necessarily expands the concept of excusable mistake to include a complete failure to exercise due diligence. In the context of the present case, this litigation could have been avoided if the trustee had obtained a title report or if the Respondent Bank of New York Mellon itself had been a prudent bidder at the sale, obtained one, and then cross checked it against the Notice of Trustee's Sale and/or conferred with the trustee to verify to whom notice was given before it purchased the property. Obtaining a title report or investigating public records to determine who has a record interest is a very small inconvenience compared to the complications, litigation, attorney fees, and uncertainties of "re-doing" foreclosures. "Re-dos" undermine the very purposes of the Deed of Trust Act.

In the present case, the Court of Appeals Division 2, effectively excuses the deed of trust trustee and the Respondent for their ignorance. However, other appellate courts have held that failure to name and give notice to others who have an interest in the property which is of public record cannot be excused. In the context of a judicial foreclosure the Court of Appeals Division One concluded that ignorance is no excuse: "[L]ack of knowledge or notice of the subordinate interest of another person in the mortgaged land does not excuse a foreclosing mortgagee from making such person a party to his suit." *Valentine v. Portland Timber & Land Holding Co.*,15 Wn.App. 124, 127, 547 P.2d 912 (1976).

The Court of Appeals' decision in the present case is contrary to *U.S. Bank of Washington v. Hursey, id.* and Court of Appeals' Division

One decision of *Valentine v. Portland Timber & Land Holding C, id.* The Court of Appeals' decision in the present case represents a significant expansion of the concept of "excusable mistake" which it then erringly applied to a statutory procedure which has a statutory remedy.

In enacting the Deed of Trust Act, the legislature has considered the possibility of errors and mistakes in the trustee sales process. The legislature placed a time limit of eleven (11) days after the trustee's sale for either the trustee or beneficiary to declare the sale void and an additional 4 days (15 days after the sale) to rescind it. RCW 61.24.050(2). Thereafter, the sale becomes "final." RCW 61.24.050(1). Neither the Respondent Bank of New York Mellon nor the trustee timely declared the sale void, nor gave notice of rescission, and to allow a redo based on their purported ignorance disregards the provisions, purposes of the Act and judicial decisions.

Whether a deed of trust foreclosure can be redone for failure to give notice has been considered by the Indiana Supreme Court in its decision of *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, 949 N.E.2d 1195 (Ind. 2011). The court deemed the Hursey exception as being limited to the facts of that case since it involved an innocent mistake by the court itself. The court did not believe that the Hursey holding should be extended to the case before it in which the plaintiff had failed to name a defendant whose interest in the property was of public record. The Indiana

Supreme Court in *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc. Id.* at 1202-03 observed:

> Were such facts before us [Hursey facts], then the outcome of this case very well may have been different. Instead, the record is clear that Citizen Bank's lien on the property was properly recorded and indexed. Other than essentially declaring mistake or inadvertence Countrywide does not explain why the lien was overlooked. In sum, Countrywide has failed to demonstrate that it is entitled to the remedy of strict foreclosure. *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc. Id.* at 1202-03.

As in *Citizen State Bank, id.* the Respondent Bank of New York Mellon and trustee simply declared a "mistake" and never explained why.

C. *The lower courts erred by allowing the deed of trust to be re-foreclosed after it had been extinguished by the trustee's sale and the recording of the trustee's deed.*

The lower courts erred by allowing the deed of trust to be re-foreclosed after it had been extinguished by the trustee's sale and the recording of the trustee's deed. *In re Trustee's Sale of Real Prop. of Ball,* 179 Wash. App. 559 319 P.3d 844, (Div. 2 2014).

In *In re Trustee's Sale of Real Prop. of Ball, id.* the court considered whether the merger doctrine applied to a deed of trust foreclosure. The court concluded that the judicial doctrine of merger did not apply when the mortgage lien is a deed of trust which is non-judicially foreclosed by a trustee's sale. Merger did not apply because the foreclosure of a deed of trust is a statutory procedure through which the deeds of trust of junior lien creditors were extinguished by the sale. *Id.* 565. The court did not squarely address whether the senior deed of trust was also extinguished.

In the present case the Court of Appeals sidestepped the implications and rational of the *Ball* decision. As already noted the objectives of the Deed of Trust Act are to promote an efficient and cost effective process which promotes stability of land titles. In material part, the Act's objectives are met by the finality of a deed of trust foreclosure. Finality is achieved by the extinguishment of the underlying deed of trust and liens against the property.

The Court of Appeals' failure to recognize the extinguishment of the Respondent's deed of trust is error. In part this error arises because the *Ball* decision is less than a model of clarity and did not clearly close the door on arguments of whether the foreclosure of the deed of trust extinguishes any ability to redo a sale or whether the merger doctrine applies. These are also an important questions which should be addressed by the Supreme Court.

VI. CONCLUSION AND RELIEF REQUESTED

At the heart of this case is whether a trustee's sale can be "re-done", and if so, the reasons why. Whether a trustee's sale can be "re-done" due to failure to give notice to a junior lienholder and/or owner due to a trustee's breach of duty is an important question of first impression because the answer has ramifications which go well beyond the interests of the parties to this appeal.

A "re-do" of a trustee's sale presupposes that there is no merger or extinguishment of the debt and/or the deed of trust into the trustee's deed.

As such the deed of trust continues as a mortgage lien against the property after the sale which can be foreclosed "a second time."

The effect of the continuation of the deed of trust as a mortgage lien against the property after foreclosure creates uncertainty in the condition of title and may render unmarketable title. This contravenes the purposes of the Deed of Trust Act to promote an efficient cost effective means to foreclose a deed of trust. *Cox v. Helenius*, Id., (1985).

The finality under the Deed of Trust Act reflects an allocation of risk placing the risk of notice errors on the foreclosing lienholder and buyer. It is easy for the trustee and Respondent Bank of New York Mellon to do their homework and do it right. To the extent the Respondent is unable to "re-do" the sale, the Respondent still has a remedy—an action against the trustee for its failure to honor is most fundamental and sacred duties to the Petitioner and the Respondent.

This is an important case for the court to consider because it raises open issues which need to be resolved by this court.

DATED this 27th day of November, 2016.

Law Offices of Edward P. Weigelt, Jr.

By: Edward P. Weigelt, Jr. WSBA 12003
Attorney For Appellant Restore Equity, LLC

Exhibit A to Petition

Court of Appeals Decision

Filed
Washington State
Court of Appeals
Division Two

October 25, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RESTORE EQUITY, LLC, a limited liability company, Appellant, v. The BANK OF NEW YORK MELLON, as successor in interest, Respondent.	No. 47728-9-II UNPUBLISHED OPINION

SUTTON, J. — Restore Equity, LLC appeals the superior court's order granting summary judgment to the Bank of New York Mellon (NY Mellon), rescinding the foreclosure, and dismissing its claims to quiet title, and for declaratory judgment, accounting, and Consumer Protection Act (CPA)[1] violations. We hold that rescinding the foreclosure is the appropriate remedy. Therefore, we affirm.

FACTS

On December 15, 2003, Ronald and Debra Crowder executed a promissory note to repay NovaStar Mortgage, Inc. a total of $126,000. To secure repayment of the note, the Crowders executed and recorded a Deed of Trust encumbering property located in Elma, which included the following relevant provision:

> If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in

[1] Ch. 19.86 RCW.

> Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument.

Clerk's Papers (CP) at 36.

In December 2009, the Crowders defaulted on the loan. In May 2010, Quality Loan Services Corporation of Washington (QLS), as an agent of NY Mellon,[2] the successor trustee, issued a notice of default to the Crowders.

In October 2010, the Crowders conveyed the property to Restore Equity by quit claim deed, and the conveyance was recorded in November. The Crowders did not obtain permission to transfer their interest in the property as required by the Deed of Trust. The Crowders also assigned to Restore Equity "any and all [of their] claims against NovaStar Mortgage, Inc., its assigns, successors, . . . related to any and all encumbrances against The Property including but not limited to the Deed of Trust . . . to include the underlying note and loan." CP at 49.

In June 2011, NY Mellon appointed QLS, as the successor trustee under the Deed of Trust and recorded the appointment. QLS issued a Notice of Trustee's Sale and set the date of sale for September 30. The notice stated that "[t]the sum owing on the obligation secured by the Deed of Trust is . . . $120,923.65 [plus interest] . . . and such other costs and fees as are provided by statute." CP at 100. The total amount owed on the loan was $150,968.00. QLS posted the Notice of Trustee's Sale on the property and sent a copy of the notice to the Crowders via certified and first class mail, but did not send notice of the sale to Restore Equity, who had a recorded interest in the property.

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[2] The Bank of New York Mellon was the successor trustee to JPMorgan Chase Bank, the trustee for NovaStar Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1.

In September, the property was sold at a nonjudicial foreclosure sale. NY Mellon was the highest bidder with a total bid of $150,968. On October 5, QLS executed a trustee's Deed of Trust in favor of NY Mellon and recorded the Deed of Trust.

On October 18, Restore Equity sent a letter to QLS informing them that Restore Equity had not received notice of the trustee's sale and that "[it did] not regard the sale as [affecting its] interest in the property." CP at 155. NY Mellon concedes that QLS did not send a Notice of Trustee's Sale to Restore Equity but does not provide any explanation.

In October, Restore Equity filed a claim to quiet title and for declaratory relief against NY Mellon. Restore Equity claimed that its "interests were not extinguished by the Trustee Sale or the Trustee's Deed" and that it was the current and lawful owner of the Elma property. CP at 6-7. Alternatively, Restore Equity alleged an action for accounting under Chapter 61.24 RCW to require that any surplus funds from the sale be distributed to junior lien holders. Restore Equity also alleged that NY Mellon's failure to properly calculate the interest constituted an unfair and deceptive act and requested damages under the CPA. In November, QLS stated that the foreclosure sale would be rescinded and a new foreclosure sale would be initiated.

In April 2015, NY Mellon filed a motion for summary judgment[3] and dismissal of all of Restore Equity's claims. Restore Equity opposed the motion and argued that the trustee's sale did not terminate its interests in the property under RCW 61.24.040(7) and that the trustee is not entitled to rescind the foreclosure and initiate a new foreclosure.

[3] The motion for summary judgment was filed on behalf of NY Mellon and the other trustees.

The superior court ruled that Restore Equity's interest in the property was not affected by the trustee's foreclosure sale of the property to NY Mellon and ordered that the foreclosure sale be rescinded. The superior court also ruled that Restore Equity was not entitled to any surplus funds under RCW 61.24.080,[4] and that Restore Equity could not establish the elements for a CPA violation. The superior court granted summary judgment to NY Mellon, rescinded the foreclosure, and dismissed Restore Equity's claims. Restore Equity appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review summary judgment orders de novo and perform the same inquiry as the superior court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts are considered in the light most favorable to the nonmoving party. *Hisle*, 151 Wn.2d at 860. The moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The nonmoving party may not rely on argumentative assertions that unresolved factual issues remain. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823,

[4] RCW 61.24.080(3) provides that any surplus "shall be deposited . . . with the clerk of the superior court of the county in which the [trustee's] sale took place" and that "[a] party seeking disbursement of the surplus funds shall file a motion requesting disbursement in the superior court for the county in which the surplus funds are deposited."

848, 92 P.3d 243 (2004). "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." *Atherton*, 115 Wn.2d at 516.

II. SUMMARY JUDGMENT

A. RESCINDING THE FORECLOSURE

Restore Equity argues that the superior court erred when it granted summary judgment to NY Mellon, rescinded the foreclosure, and dismissed its claims for quiet title and declaratory relief because genuine issues of material fact exist.[5] We disagree.

The Deed of Trust Act, chapter 61.24 RCW, was enacted by the legislature to further three objectives for the nonjudicial foreclosure process so that the process (1) is efficient and inexpensive, (2) provides an adequate opportunity for interested parties to prevent wrongful foreclosure, and (3) promotes the stability of land titles. Chapter 61.24 RCW; *Jackson v. Quality Loan Serv. Corp. of Wash.*, 186 Wn. App. 838, 848, 347 P.3d 487 (2015), *review denied*, 184 Wn.2d 1011.

RCW 61.24.040(1)(b) provides that "[t]o the extent the trustee elects to foreclose its lien or interest . . . against a borrower or grantor . . . and if their addresses are stated in a recorded instrument evidencing their interest . . . [the trustee shall] cause a copy of the notice of sale . . . to be transmitted by both first-class and either certified or registered mail." "[The trustee's sale] shall not affect the lien or interest of any person entitled to notice . . . if the trustee fails to give the required notice to such person." RCW 61.24.040(7). A party is not an omitted lienholder in a

[5] Restore Equity also argues that NY Mellon was required to raise the error in the foreclosure sale within 11 days of the sale under RCW 61.24.050(2). Br. of Appellant at 32. Restore Equity failed to raise this issue at the superior court, and we decline to review the issue. RAP 2.5(a).

nonjudicial foreclosure unless they have a recorded interest in the property. *See* RCW 61.24.040(1)(b).

Rescinding a foreclosure is the proper remedy when a junior lienholder has been mistakenly omitted from a foreclosure action. *U.S. Bank of Wash. v. Hursey*, 116 Wn.2d 522, 526, 806 P.2d 245 (1991).[6] In *Hursey*, the foreclosing mortgagee failed to join the junior lienholder because it was unaware of the lien because the county court clerk had mistakenly reversed the names when the junior lienholder's judgment was entered and, thus, the junior lienholder was not listed in the court records as the judgment creditor. *Hursey*, 116 Wn.2d at 524.

Restore Equity argues that *Hursey* does not apply because NY Mellon was at fault by failing to exercise due diligence,[7] failing to provide proper notice to Restore Equity of the trustee's sale as required, and its mistake was not an excusable mistake because Restore Equity's interest

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[6] Restore Equity relies on *Spokane Sav. & Loan Soc'y v. Liliopoulos*, 160 Wn. 71, 294 P. 561 (1930) and *Valentine v. Portland Timber & Land Holding Co.*, 15 Wn. App. 124, 547 P.2d 912 (1976) to support its argument that the naming of all parties having an interest in the property is the "plaintiff's concern" and that the failure to notify the holder of a junior interest "does not excuse a foreclosing mortgagee from [joining them as a party] to [the] suit." *Liliopoulos*, 160 Wn. at 74; *Valentine*, 15 Wn. App at 128 (quoting G. OSBORNE MORTGAGES s 322 (2d ed. 1970) at 671). However, Restore Equity's reliance is misplaced because both *Liliopoulos* and *Valentine* further specifically state that, although failure to notify or join an interested party renders its interest unaffected by the foreclosure, the foreclosing mortgagee *is not required* to join the party to the action.

[7] NY Mellon argues that Restore Equity failed to raise this argument at the superior court and that we are precluded from reaching this issue under RAP 2.5(a). However, Restore Equity argued in its opposition to summary judgment that NY Mellon had a "duty to determine whose interest is being affected." CP at 124.

in the property was publicly recorded.[8] The *Hursey* court did not impose a general due diligence requirement[9] on the foreclosing mortgagee or limit its holding to apply only to cases where the foreclosing mortgagee was not at fault when it failed to join a junior lienholder.[10] *Hursey*, 116 Wn.2d at 526-27.

QLS inadvertently failed to provide Restore Equity with the Notice of Trustee's Sale as required by RCW 61.24.040(1)(b)(ii). Because Restore Equity was an omitted party in the foreclosure sale, Restore Equity's interest in the property was not extinguished by the nonjudicial foreclosure of the property pursuant to RCW 61.24.040(7).

Rescinding the foreclosure here does not deny Restore Equity any rights that it possessed before the foreclosure, and rescinding the foreclosure puts the parties in the same position they were in before the foreclosure. *Hursey*, 116 Wn.2d at 528. Thus, we hold that the superior court

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[8] NY Mellon argues that Restore Equity failed to raise this argument at the superior court and that we are precluded from reaching this issue under RAP 2.5(a). However, Restore Equity argued in its opposition to summary judgment that "no effort was made to identify persons who may have an interest in the property and entitled to notice." CP at 116.

[9] Restore Equity argues that when a junior lienholder possesses an interest that is a matter of public record, the failure of the foreclosing mortgagee to join the junior lienholder cannot be a mistake that warrants rescinding the foreclosure under *Hursey*, citing *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, 949 N.E.2d 1195, 1201 (Ind. 2011). However, *Citizens* is an opinion issued by the Indiana Supreme Court and is not mandatory authority. Restore Equity does not provide sufficient argument to warrant deviation from the broader holding by our own Supreme Court in *Hursey*.

[10] Restore Equity relies on *Rasmussen v. Emp't Sec. Dep't*, 98 Wn.2d 846, 658 P.2d 1240 (1983). Restore Equity's reliance is misplaced because *Rasmussen* discusses the adequacy of excuses when filing an appeal with the court and does not discuss omitted parties in foreclosure proceedings at all.

did not err when it granted summary judgment to NY Mellon, rescinded the foreclosure, and dismissed Restore Equity's claims.

B. MERGER OF INTERESTS

Restore Equity argues that even if rescinding the foreclosure is the appropriate remedy, NY Mellon cannot rescind the foreclosure because the trustee's sale and the trustee's Deed of Trust conveying the property to NY Mellon merged and extinguished its Deed of Trust, citing *In re Trustee's Sale of Real Property of Ball*, 179 Wn. App. 559, 319 P.3d 844 (2014). We decline to reach this argument.

We do not review "issues for which inadequate argument has been briefed or only passing treatment has been made." *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004); RAP 10.3(a)(6). Restore Equity provides no argument that merger applies to merge a debt secured by a Deed of Trust with a trustee's deed, that NY Mellon held these two interests at the same time, or that NY Mellon intended for these interests to unite. Thus, we do not address this argument.

CONCLUSION

We hold that rescinding the foreclosure is the appropriate remedy, and we affirm the superior court's order granting NY Mellon's motion for summary judgment, rescinding the foreclosure, and dismissing Restore Equity's claims.[11]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Lee, P.J.

LEE, P.J.

Melnick, J.

MELNICK, J.

[11] Because Restore Equity's alternative claims were based on the assumption that its rights were extinguished by the foreclosure sale, and we are affirming the superior court's order rescinding the foreclosure, we do not address the alternative claims.

Supreme Court No. _____
Court of Appeals D2 No. 477289-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RESTORE EQUITY, LLC, a limited liability company,

Petitioner (Appellant and Plaintiff below),

vs.

The BANK OF NEW YORK MELLON, as trustee,

Respondent (Appellee and Def. below).

CERTIFICATE OF SERVICE OF PETITIONER RESTORE EQUITY PETITOIN FOR REVIEW

I hereby certify under penalty of perjury that I served or caused to be served upon the Respondent Bank of Mellon a copy of the Petitioner's Petition For Review by service upon its attorney by U.S. first class mail and electronically on November 28, 2016, as follows:

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Dated this 28 day of November, 2016.

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