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Supreme Court No. 95654-5
Court of Appeals No. 75665-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHELLE MERCERI, a single woman,

Petitioner,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, a national
banking association, as trustee for holders of the BCAP LLC Trust
2007-AA2, et al,

Respondent.

**DEUTSCHE BANK NATIONAL TRUST COMPANY, a
national banking association, as trustee for holders of the BCAP
LLC Trust 2007-AA2'S ANSWER TO *AMICUS CURIAE*
MEMORANDUM OF THE NATIONAL ASSOCIATION OF
CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL
CONSUMER BANKRUPTCY RIGHTS CENTER IN
SUPPORT OF PETITION TO REVIEW**

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CONSTITUTIONAL PROVISIONS

Constitution of the State of Washington6

I. IDENTITY OF ANSWERING PARTY

Deutsche Bank National Trust Company, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2, et al, (“Deutsche”) respectfully submits this Answer to National Consumer Bankruptcy Rights Center (“NCBRC”) and the National Association of Consumer Bankruptcy Attorneys’ (“NACBA”) *Amicus Curiae* Memorandum in Support of Petition for Review of the decision of the Court of Appeals, Division One, dated January 22, 2018, in *Merceri v. Deutsche Bank*, No. 75665-6-I.

II. STATEMENT OF ANSWER

NCBRC and NACBA’s *Amicus Curiae* memorandum simply asserts that the Court of Appeals erred, and fails to satisfy or address the criteria for review as required under RAP 13.4(b).

III. ARGUMENT

A. The Court of Appeals never held that a nonjudicial foreclosure is not an action for purposes of tolling under RCW 4.16.230.

Deutsche references and incorporates its Answer to the Northwest Justice Project’s *Amicus Curiae* memorandum that asserts this identical issue. *Answer to Northwest Justice Project’s Memorandum*, pp. 2-4.

B. *The Court of Appeals determined that the bankruptcy stay tolls the statute of limitations.*

The Court of Appeals analyzed 11 U.S.C. § 108(c)(1), 11 U.S.C. § 362(a)(3), and RCW 4.16.230 in reaching its decision. *Merceri v. Deutsche Bank AG*, 2 Wn.App.2d 143, 910 P.3d 1140 (Div. 1, Jan. 22, 2018). The court held that 11 U.S.C. § 108(c)(1) does not itself provide for tolling, unless the statute of limitations would have expired while the automatic stay was in effect, but permits tolling if state statutes so provide. *Id.* at 148-149. It went on to hold that 11 U.S.C. § 362(a)(3) prohibits foreclosure, and therefore the bankruptcy stay tolls the state statute of limitations as provided in RCW 4.16.230.¹ *Id.* at 151.

The Court of Appeals' decision does not conflict with the Court's decision *Summerrise v. Stephens*,⁷⁵ Wn.2d 808, 454 P.2d 224 (1969). NCBRC and NACBA assert the same argument as *Amicus Pacific Coast Construction, L.L.C.* in this regard, and

¹ *Amici* summarily assert, without authority or argument, that federal law preempts the state tolling statute. *Memorandum*, p. 1. This is incorrect. 11 U.S.C. §108(c) allows thirty days after the stay terminates to file an action, even if the state statute of limitations ran during the automatic stay. It also allows states to employ additional tolling periods under state statutes. *Pettibone Corp. v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991) (The bankruptcy code provides thirty days of tolling, "if states want to give plaintiffs additional time, that is their business."). Under §108(c), a statute of limitations under state law does not expire until the later of: (1) the end of such period including the suspension of such period; or (2) 30 days after termination of the stay.

Deutsche references and incorporates its response to the same. *Answer to Pacific Coast's Memorandum*, pp. 3-5.

NCBRC and NACBA also rely on *Grotting v. Hudson Shipbuilders, Inc.*, 85 B.R. 568 (1988), for the idea that the “suspension” language in §108(c)(1) applies to periods of disability of a party, such as minority of a plaintiff or incompetency. *Memorandum*, p. 4. The court in *Grotting* did not hold that minority or incompetency are the only bases for suspension, but instead held: “the language in §108(c)(1) referring to ‘any suspension of such period’ means those nonbankruptcy law tolling periods *such as* minority or incompetency of a plaintiff.” *Grotting*, at 569 (emphasis added). RCW 4.16.230 is a “nonbankruptcy law” allowing for tolling. 11 U.S.C. §108(c) allows for tolling under “applicable nonbankruptcy law,” including state law. Whether the statute of limitations was tolled under RCW 4.16.230 is a matter of state law.

NCBRC and NACBA, just as Merceri claimed, assert that RCW 4.16.230 should not operate to extend the statute of limitations because Deutsche had the option to file a motion for relief from stay. *Memorandum*, pp. 5-6. The Court of Appeals addressed, and

rejected, whether statutory tolling required a creditor to exercise this due diligence. It held that it is not at liberty to add words where the legislature has chosen not to include them. *Merceri*, 2 Wn.App.2d at 153-154. None of the cases cited by *amici* are relevant to tolling due to an injunction or statutory prohibition. The statute does not contain a requirement that a plaintiff commence litigation to terminate an injunction. See *Hensen v. Peter*, 95 Wash. 628, 636, 164 P. 512, 515 (1917) (“It would be unreasonable and inconsistent for the law to present to a party, in one hand, a command to do an act within a certain time under the penalty of losing his rights, and, with the other hand, restrain him from doing the act.”). The automatic stay constitutes a statutory prohibition. See generally, *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214 (9th Cir. 2002).

Most critically, *amici* only assert that the Court of Appeals erred in this regard, but promote no basis for why review should be accepted. *Memorandum*, pp. 1-2.

NCBRC and NACBA also contend that the statute of limitations was tolled by a maximum of 30 days under 11 U.S.C. §108(c)(2). They argue that Congress could have made §108(c) a

tolling statute, but chose not to do so. *Memorandum*, p. 6. The issue, however, is not what Congress intended, but what the Washington legislature intended and enacted. RCW 4.16.230 is a tolling statute, and the Washington legislature intended that where there exists a statutory prohibition or injunction, tolling will apply.

The bankruptcy stay is a significant benefit for debtors. The automatic stay exists solely for the benefit of the debtor, and stops all collection efforts and foreclosure activity solely for debtor protection. *Merceri*, 2 Wn.App.2d at 148. Creditors who attempt to enforce a debt in violation of the automatic stay are subject to liability for damages and contempt of court. *Johnston Env'tl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 620 (9th Cir. 1993). The Court of Appeals explained:

The stay serves two purposes: “first, to give the debtor a “breathing spell” from his creditors; and second, to prevent one creditor from rushing to enforce its lien to the detriment of the other creditors.” *Id.* (quoting *Ahlers*, 794 F.2d at 393-94). The automatic stay remains in force until the property at issue “is no longer property of the estate.” 11 U.S.C. 362(c)(1).

Merceri, 2 Wash.App.2d at 148.

Debtors have the option to lift the stay pertaining to their

creditors. *See* 11 U.S.C. §362(d); generally, *In re Osborne*, 2001 Bankr. LEXIS 2314 at *1-2 (Ga. S. Bnkry. Ct., Mar. 14, 2001 (Debtor requested that automatic stay be lifted to have dispute heard in state court). In the event a debtor elects to keep the stay in place, tolling should apply.

C. Neither issue raised by NCBRC and NACBA satisfies the criteria required for review under RAP 13.4(b).

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Neither of the arguments presented by NCBRC and NACBA fits into the considerations governing acceptance of review under RAP 13.4(b). In fact, NCBRC and NACBA fail to even address

these criteria or RAP 13.4(b). NCBRC and NACBA present no Supreme Court case or published Court of Appeals opinion that is in conflict with the Court of Appeals' decision in this matter, nor do they argue that this case has the requisite Constitutional questions. Finally, there is no argument or even passing reference to "sweeping implications" that justify substantial public interest. See generally, *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903, 905 (2005).

Instead, NCBRC and NACBA argue that the appellate court did not "adequately consider" the "interactions between 11 U.S.C. §§108 and 362, and RCW 4.16.230." *Memorandum*, p. 1. NCBRC and NACBA request this Court to perform a comprehensive review of the state and federal statutes. *Id.* NCBRC and NACBA also request that the Court resolve "ambiguities" relative to the application of RCW 4.16.230, when in fact, no such ambiguities exist under the plain language of the statute. *Id.* Neither of these arguments satisfies the conditions for review pursuant to RAP 13.4(b).

IV. CONCLUSION

NCBRC and NACBA's memorandum fails to address any of

the criteria necessary for review under RAP 13.4(b) and raises issues that are beyond the scope of the Court of Appeals decision. NCBRC and NACBA's memorandum should not be considered in determining whether to grant review.

Respectfully submitted this 25th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2018, I caused to be delivered the foregoing DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2'S PARTIAL OBJECTION TO MOTION OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION TO REVIEW to the following parties in the manner indicated below:

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Under the penalty of perjury of the laws of the State of
Washington, the foregoing is true and correct.

Dated this 25th day of June, 2018, at Seattle, Washington.

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