Supreme Court No. 89549-0

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL SAVINGS,

Petitioner,

v.

MICHAEL P. KLEIN, personal representative of the Estate of Robert Klein, Deceased,

Respondent,

MEMORANDUM IN OPPOSITION TO AMICUS CURIAE WASHINGTON BANKERS ASSOCIATION'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

The Memorandum of Amicus Curiae Washington Bankers Association in Support of Petition for Review adds nothing to the briefing already submitted by the parties. The amicus brief asserts the same legal arguments and citations to legal authority as Washington Federal ("WaFed")'s Petition for Review ("Petition"). Respondent Michael P. Klein, personal representative of the Estate of Robert Klein (the "Estate"), urges that the Petition be denied.

II. ARGUMENT

The amicus brief and the Petition are directed at the same issue: whether Division One of the Washington State Court of Appeals was correct in determining that there was no genuine issue of material fact that "actual notice" was given within the meaning of RCW 11.40.020(1)(c). Division One held that proof of mailing, not proof of receipt, was sufficient to satisfy the requirement of "actual notice" *as expressly defined in the probate code*, and that the affidavit of mailing filed on the Estate's behalf was sufficient to establish *prima facie* evidence of mailing.

In its Petition, WaFed argued that the common law mailbox rule, rather than the probate code's actual notice provision, is the governing standard for proof of mailing both at common law and in the probate context. Petition, at 8 (citing *Tassoni v. Dep't of Ret. Sys.*, 108 Wn. App.

77, 29 P.3d 63 (2001), *review denied*, 145 Wn.2d 1030 (2002). The amicus brief asserts the same argument, based on the same line of case law discussing the mailbox rule. Memorandum of Amicus Curiae, at 4-5 (citing *Tassoni*, 108 Wn. App. 77). Like the Petition, the amicus brief asserts that the *Tassoni* decision from Division Two controls here and conflicts with Division One's decision. The amicus brief also cites to several cases that predated and informed the decision in *Tassoni*.

The amicus brief's citation to case law that is not included in the Petition is immaterial to this Court's analysis because there is no substantive difference between the legal proposition cited in *Tassoni* and the other cases cited in the amicus brief. All of these cases follow the same reasoning and apply the common law mailbox rule to determine proof of mailing.

As the Estate explains in its Answer to Petition for Review, the *Tassoni* line of cases is inapposite and does not conflict with the probate code's "actual notice" requirement. Answer, at 10. *Tassoni* and the other cases cited in the amicus brief are not probate cases, and they do not involve construing the probate code's actual notice language set forth in RCW 11.40.020(1)(c) and considered by Division One below. Answer, at 10. RCW 11.40.051 provides that a claim is "forever barred" if "the creditor was given actual notice *as provided in* RCW 11.40.02(1)(c). . . ."

(emphasis added). RCW 11.40.020(1)(c) in turn provides that the personal representative may "*give actual notice* to creditors who become known to the personal representative *by* serving notice on the creditor or *mailing the notice to the creditor at the creditor's last known address, by regular first class mail, postage prepaid* . . . ." (emphasis added.) "Where a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Brackman v. City of Lake Forest Park*, 163 Wn. App. 889, 262 P.3d 116 (2011) (holding that an affidavit of mailing is sufficient proof of service under the Mandatory Arbitration Rules, where the affidavit was made under oath or under penalty of perjury) (citation and quotes omitted). Neither the Petition nor the amicus brief cite legal authority that would support application of the common law mailbox rule in a probate case where "actual notice" is expressly defined. The Estate previously noted that "[t]here is no case in Washington that applies the mailbox rule in the context of probate proceedings or that otherwise invalidates a probate notice based on this rule." Answer, at 11. The Estate also previously noted that the language of Washington's non-claim statute comports with jurisprudence of the U.S. Supreme Court that determined what type of probate notice satisfies due process. Answer at 14-16; Answer, Appx. A at 11, 17-18.

Both the amicus brief and the Petition are also directed at challenging the sufficiency of the Estate's evidence of mailing. Like the Petition, the amicus brief contends that the proof of mailing offered in this case, *i.e.*, Anne Favretto's affidavit of mailing that was filed in the probate contemporaneous with its execution, is insufficient. However, as the Estate asserted in its Answer, the ability to challenge the adequacy of the Estate's mailing has been waived because WaFed failed to raise this issue in the trial court. Division One acknowledged the Estate's argument on this point, but assumed for the sake of argument that the issue was preserved and determined that the "caused" to be mailed language in Ms. Favretto's affidavit of mailing was sufficient to establish *prima facie* evidence of mailing. As the Estate explains its Answer, this Court need not reach this issue because it was not preserved on appeal.

However, even if this Court were to reach the issue and decides the mailbox rule applies, the supporting authority discussed in the Petition and the amicus brief are factually inapposite to this case. As noted above, none of the cases cited in the amicus brief or in the Petition involve a probate issue or construe the probate statute. Furthermore, none of the cases cited in the Petition or amicus brief involve *an affidavit of mailing* as evidence of mailing. Instead, the evidence discussed in those (mailbox rule) cases was limited to copies of the underlying notice; there was no

testimony or other documentation to establish evidence of mailing. Here, in contrast, there is a signed and dated affidavit of mailing attesting that Ms. Favretto caused the probate notice to creditors to be given to creditors by regular first-class mail on January 28, 2011. Answer, at 12 n.6.

Furthermore, both the amicus brief and the Petition speak for the lending industry from the perspective of the lender. The amicus brief states that its members "have a strong industry wide interest in the outcome of this probate dispute . . .[so] they can protect their interests as creditors of an estate." Memorandum of Amicus Curiae, at 1. The amicus brief speaks for the same industry and the same industry sector (*i.e.*, lenders) as that of WaFed. This identity of interests means that the amicus brief fails to provide a perspective possessing any value unique from that of WaFed's Petition.

Both the amicus brief and the Petition assert that this case will have sweeping impacts beyond the probate context. The amicus brief asserts that the resolution of this case "may affect notice provisions in other statutes and proof of mailing at common law." Memorandum, at 1. Likewise, the Petition asserts that this case will have "sweeping impacts" and that "many, many parties will be affected [by this case] in the future[.]" Petition, at 18. As discussed above, the amicus brief covers the same ground as the Petition. Moreover, this assertion is false. The

WBA's amicus brief provides no explanation as to why the interpretation of the probate code's non-claim statute, RCW 11.40.020(1)(c), needs to affect or disturb the common law mailbox rule. It is well-settled that the mailbox rule applies to other contexts that are not governed by a more specific edict of the legislature. But the decision of Division One, below, poses no threat to the rule in those contexts.[1]

The WBA argues that "Estate creditors should not bear the entire risk of mail failure. . . ." Memorandum of Amicus Curiae, at 9. Yet this argument rests on a faulty assumption. In fact, banks do *not* bear the entire risk of mail failure under Division One's holding. Banks do have mechanisms to establish a failure on the part of a sender of a probate notice to creditors. Banks could conduct discovery of such a sender, including via deposition. Banks, when confronted with a motion for summary judgment, could seek discovery under CR 56(f). WaFed elected not to pursue these avenues and instead rested on its declarations in opposition to summary judgment. Answer, at 16. Other banks need not make this same strategic decision if they have reason to inquire further. To the extent that the WBA believes that the legislature should place more

[1] WaFed tacitly conceded that the mailbox rule does not apply here in its Brief of Appellant, when it characterized the mailbox rule as "instructive," rather than controlling. Answer, Appx. A at 18-19 (quoting Brief of Appellant below).

risk of mail failure upon estates instead of creditors, the WBA should take that argument to the legislature itself. The legislature has established a *mandatory* probate regime which is designed to encourage the early and final settlement of estates so that those entitled to property may receive it free from any encumbrances and charges that could lead to long litigation. *See* Answer, Appx. A at 11-15 (discussing Washington's probate regime); RCW 11.40.010; RCW 11.40.051(1). The legislature stated what form of notice is necessary to trigger this absolute bar, and has done so in a way to facilitate the efficient and least-expensive settlement of estates.

Similarly, the WBA complains that Division One's decision will cause its member banks to adopt different procedures for processing probate notices under Washington's non-claim statute. Memorandum of Amicus Curiae, at 9. The WBA fails to establish that the Washington non-claim statute differs from that of the non-claim statute of other states, how it differs, or what different procedures would be needed to address any differences. These policy arguments are better addressed to the legislature and are too speculative to consider here.

III. CONCLUSION

WBA's amicus brief makes the same legal arguments, cites to the same body of case law, and represents the same lender interest as WaFed's Petition. The probate laws seek to promptly administer estates and settle

expectations. There is no material dispute of fact that the PR gave "actual notice" as defined by statute, and WaFed failed to file its creditor's claim in a timely manner. WaFed's apparent failure in this case to adjust its practices to the declining real estate market and abide by the rules it knows well prevents it from recovering on the Promissory Note (though it still can recover on the Deed of Trust). To hold otherwise would award a windfall to WaFed.

Based on the Promissory Note's unilateral provision for attorney fees and RCW 11.96A.150 (TEDRA), this Court should award attorney fees and costs to the PR for the expense the estate incurred in defending against WaFed's Petition and the amicus brief brought by the WBA.

DATED this 22nd day of January, 2014.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 22nd day of January, 2014, I caused a true and correct copy of the foregoing "Memorandum in Opposition to Amicus Curiae Washington Bankers Association's Brief in Support of Petition for Review" to be delivered by messenger to the following counsel of record:

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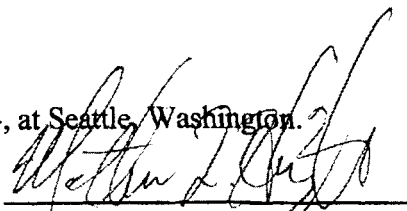
Dated this 22nd day of January, 2014, at Seattle, Washington.



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Respectfully submitted is Respondent's Memorandum in Opposition to Amicus Curiae Washington Bankers Association's Brief in Support of Petition for Review with the certificate of service attached thereto in the above referenced case.

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