Court of Appeals, Division One, Case No. 69352-2

No. 90104-0
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL J. WATSON and KETWARIN ONNUJM, Respondents/Cross-Petitioners,

v.

NORTHWEST TRUSTEE SERVICES, INC.,
Petitioner/Cross-Respondent

WATSON-ONNUJM ANSWER TO NORTHWEST TRUSTEE SERVICES, INC.'S MOTION FOR DISCRETIONARY REVIEW BY THE WASHINGTON SUPREME COURT

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C. The Court of Appeals' decision did not constitute probable error such that substantially alters the status quo or prevents a party from taking further action because the decision does not reverse foreclosures and lienholders are still free to enforce liens that comply with current law.

II. ARGUMENT

NWTS focuses its Motion for Discretionary Review on an incorrect reading of the Court of Appeals' decision. The Court of Appeals did not rely on a determination that the FFA amendments were retroactive. Rather, the Court of Appeals held that the FFA amendments to the DTA applied prospectively to NWTS's November 2011 notice of trustee's sale that was not a continuation of a pre-FFA sale date, and NWTS failed to comply with the FFA notice requirements before recording its November

2011 notice of sale. Therefore, viewing the decision in light of the standards for discretionary review as presented by NWTS, the Court of Appeals did not commit obvious or probable error to warrant discretionary review by the Washington Supreme Court.

A. Standard of Review

Discretionary review of a Court of Appeals decision by the Washington Supreme Court is governed by RAP 13.4 and 13.5.[1] RAP 13.5 outlines the standards of discretionary review for interlocutory decisions of the Court of Appeals. RAP 13.5 (a). Interlocutory review is generally disfavored because it confuses the function of trial and appellate courts. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, 593–94 (2010).

NWTS's Motion for Discretionary Review relies on RAP 13.5(b)(1) and RAP 13.5(b)(2).[2] Under RAP 13.5(b)(1), discretionary review will only be accepted if the Court of Appeals has committed an obvious error which would render further proceedings useless. For example, in *Washington State Dep't of Labor & Indus. v. Davison*, the court found obvious error warranting discretionary review where the trial court's holding directly contravened a previous appellant ruling regarding

[1] NWTS brings its motion for discretionary review under RAP 13.5, thus the Watsons are responding to that argument.

[2] For purposes of analysis, RAP 13.5(b)(1)-(2) is identical to the standard for RAP 2.3(b)(1)-(2), which governs discretionary review of trial court decisions by the Court of Appeals. In relevant part, RAP 2.3(b)(1)-(2) states that "discretionary review may be accepted only in the following circumstances: (1) The superior court has committed an obvious error which would render further proceedings useless; (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; . . ."

the application of the law of fixtures. *See Id.,* 126 Wn. App. 730, 736, 109 P.3d 479, 481 (2005). Similarly, a lower court committed obvious error in denying a sanctions award where the court construed statutory language opposite from how previous courts had construed the same language. *In re Marriage of Wolk*, 65 Wn. App. 356, 359, 828 P.2d 634, 636 (1992).

Under RAP 13.5(b)(2), discretionary review is appropriate when the Court of Appeals commits a probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act. A court commits such probable error when the decision substantially alters the current status of one's life or circumstances or the party has no further legal recourse. *See e.g., Costanich v. Washington State Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 933, 194 P.3d 988, 992 (2008). In *Costanich,* the Court granted discretionary review where the appellate decision capped the total amount of attorneys' fees a party could receive. *Id.,* 164 Wn.2d at 933. In that case, the appellate decision altered the status quo because the decision reversed an award of attorneys' fees to a party, thereby taking away funds the party had already received. *Id.* Further, the decision substantially limited that party's freedom to act because they had no further legal recourse to pursue attorneys' fees. *Id.*, 164 Wn.2d at 990.

B. The Court of Appeals did not error in holding that the FFA amendments prospectively applied to NWTS's November 2011 Notice of Trustee's Sale.

The Court of Appeals did not commit an obvious error which would render further proceedings useless or make a probable error that substantially alters the status quo or substantially limits the freedom of a party to act. The Court of Appeals held that the FFA amendments to the DTA did not need to apply retroactively because the precipitating event for prospective operation of the FFA – the notice of trustee's sale – occurred after the FFA amendments went into effect. *See* Appendix 1, pgs. 5–7 ("Opinion").

"A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment." *In re Estate of Burns*, 131 Wn.2d 104, 110–11, 928 P.2d 1094 (1997); *See also, Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wn. 2d 523, 535, 520 P.2d 162, 170 (1974). The precipitating event for the operation of a statute is the event that gives rise to the activity that the statute seeks to address. *In re Estate of Burns*, 131 Wn.2d at 112. Courts first look to the plain language of the statute to determine which activity the challenged provision aims to address. *Id.*

For example, in the *Aetna Life* case, the Court considered the precipitating event for application of a statute requiring insurance companies to pay assessments. *Aetna Life Ins. Co, supra,* 83 Wn.2d at 535. The purpose of the statute was to collect assessments used to assure performance of contractual obligations for insurance companies that had

become insolvent. *Id.* at 526. In the light of the purpose of the statute, the Court determined that the precipitating event was the order of liquidation. *Id.* at 535. The Court held that the statute applied to an order of liquidation entered after the effective date of the statute, regardless of whether the situation giving rise to the precipitating event originated prior to enactment of the statute. *Id.*

In the Watsons' case, the precipitating event for the operation of the DTA as amended by the FFA was the notice of trustee's sale that NWTS recorded in November 2011. A notice of trustee's sale must be in full compliance with the DTA on the date that the notice of trustee's sale is "recorded, transmitted or served." RCW 61.24.030(9). A trustee's sale must be conducted "in compliance with all of the requirements of [the DTA]". RCW 61.24.040(7). When NWTS recorded its November 2011 notice of trustee's sale, the DTA required that the beneficiary of the deed of trust first comply with RCW 61.24.031 and RCW 61.24.163. The trustee must also include specific language in a notice of trustee's sale about the FFA mediation process, including the deadline for the borrower to take advantage of that process. RCW 61.24.040(1). The Watsons received none of the benefits of the amended DTA notice requirements when NWTS recorded its November 2011 notice of trustee's sale. Even NWTS's notice of trustee's sale lacked the specific language required by the DTA in effect on the date the notice was recorded.

Contrary to NWTS's argument, the Court of Appeals' decision comports with existing precedent. Rather than disregard case law on statutory construction and the prospective application of a statute, the Court of Appeals specifically applied a settled principal of statutory construction to this case. In addition, enforcing statutory compliance encourages trustees to conduct procedurally sound sales. *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn. 2d 560, 572, 276 P.3d 1277, 1284 (2012). "When trustees strictly comply with their legal obligations under the [DTA], interested parties will have no claim for postsale relief, thereby promoting stable land titles overall." *Id.*

C. The Court of Appeals did not error in finding that the FFA amendments were retroactive.

Although the Court of Appeals' decision does not rest on the determination that the FFA amendments are retroactive, the Watsons address that issue in response to NWTS's argument. If the Court of Appeals opinion is construed to stand for the proposition that the FFA amendments are retroactive, the Court did not commit obvious error which would render further proceedings useless or make a probable error that substantially alters the status quo or substantially limits the freedom of a party to act.

Statutory amendments are presumed to operate prospectively so that individuals have the opportunity to know what the law is and to conform their conduct accordingly. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 272, 285 p.3d 854 (2012). The presumption can be overcome

if the statute is retroactive, curative or remedial. *Miebach v. Colasurado*, 102 Wn.2d 170, 181, 686 P.2d 1074 (1984). Watson agrees that the proper inquiry in this case is whether the FFA is remedial.

1. The FFA relates to the practice, procedure and remedies involving non-judicial foreclosures and does not affect a trustee's vested right.

A statute is remedial and has a retroactive application when it relates to a "practice, procedure, or remedies and does not affect a substantive or vested right." *Miebach v. Colasurado*, 102 Wn.2d 170, 181, 686 P.2d 1074 (1984). A party does not have a vested right in any particular form of procedure. *Tellier v. Edwards*, 56 Wn.2d 652, 654, 354 P.2d 925 (1960). A vested right requires "title, legal or equitable, to the present or future enjoyment of the property." *Miebach*, 102 Wn.2d at 181 (quoting *Gillis v. King Cy.*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953).

NWTS did not have a vested right to the Watsons' property when it issued its notice of default. Rather, NWTS had a mere expectation that the DTA would not change, and such an expectation is insufficient to constitute a vested right. In *Densley,* the Court held that amendments changing the Washington Public Employee's Retirement System were not remedial because they affected an employee's vested retirement benefits, which were calculated on the number of hours worked. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 221-224, 173 P.3d 885 (2007). The amendments, if applied retroactively, would have changed the employee's vested retirement benefits by providing him with additional retirement

service credits he was not previously entitled to receive. *Id.* at 224. Unlike the employee in *Densley*, NWTS had no vested right that was being changed or otherwise affected by the FFA amendments. The employee in *Densley* had a right to the benefits based on hours worked; NWTS had merely an expectation of a right to foreclose and sell the Watsons' property and an expectation that the DTA would not change by the time it recorded a notice of trustee's sale. If we are to believe NWTS's argument, then a trustee will never have to abide by any changes to the DTA as long as they have a notice of default that was delivered to the borrower prior to the amendment or amendments.

Additionally, the Court of Appeals did not commit probable error because the court's retroactive application of the FFA amendments does not affect the validity or finality of a foreclosure sale or subsequent transfer of the property. In this case, the Watsons are seeking damages to compensate them for the loss of equity they suffered when their home was sold by NWTS with a notice of trustee's sale that did not comply with the DTA. Contrary to what NWTS asserts, a borrower's wrongful foreclosure claim for damages "may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property." RCW 61.24.127(2)(c). The Court's decision in *Albice* might very well affect the validity or finality of a foreclosure sale or subsequent transfer of property where a borrower is seeking to quiet title, but that does not mean the decision was wrong. *Albice, supra,* 174 Wn. 2d at 572.

Thus, the Court of Appeals' opinion does not undermine the tenet of the DTA to promote the stability of land titles. If anything it promotes stability by requiring trustees to strictly comply with the DTA and conduct procedurally sound sales.

2. The FFA did not create a substantive right because it did not create a new cause of action.

The FFA changed non-judicial foreclosure procedures that a trustee must follow and added RCW 61.24.135 that, in part, established a per se violation of Washington's Consumer Protection Act ("CPA"). The CPA was an existing cause of action available to borrowers before the FFA amendments went into effect. The FFA merely established the public impact prong of a CPA claim as authorized by RCW 19.86.093, but the remaining elements of a CPA claim, including damages, must still be proven. Thus, the FFA did not establish a new cause of action that amounts to the addition of a new substantive right.

The Court of Appeals did not error in reversing the trial court's ruling to dismiss the Watsons' CPA claim, which was a pre-existing cause of action. Had it not done so, the status quo would have been substantially altered and the Watsons ability to proceed with their case substantially limited as their damages would have been consumed by attorneys' fees that are only recoverable in this case under the CPA claim.

3. The Watsons' right to mediation was severely impaired by NWTS's failure to comply with the DTA because the Watsons were not aware of this foreclosure alternative option.

The Court of Appeals' did not commit error because its decision upheld the remedial purpose of the FFA. A remedial statute will be applied retroactively if the application will "further its remedial purpose." *Macumber v. Shafter*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). The remedial purpose of the FFA amendments is to reduce foreclosures in our State that have contributed to the decline in the state's housing market, loss of property values, and other loss of revenue to the state. 2011 c 58 § 1(a). The legislative intent behind the FFA is to:

> (a) Encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process;
>
> (b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and
>
> (c) Provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate...

2011 c 58 § 1 (2)(a)-(c).

The "framework" used by homeowners and beneficiaries to reach a resolution and avoid foreclosure involves pre-foreclosure notices that NWTS completely ignored when it issued its November 2011 notice of trustee's sale. Compliance with the pre-foreclosure outreach provisions of the FFA is explicitly tied to the notice of trustee's sale. The FFA amendments were designed not only to inform homeowners of their pre-foreclosure options, but of their right to utilize the skills of a housing counselor free of charge, and the right to be referred into mediation. A

homeowner will not be informed of these rights if a trustee is allowed to proceed with a notice of sale without the pre-foreclosure notices required by the FFA simply because they served a notice of default before July 22, 2011.

NWTS argues that the Watsons' rights under the DTA were not impaired because the FFA amendments expanded their right to mediation. The provision that NWTS relies upon for this proposition provides that "[a] borrower under a deed of trust on owner-occupied residential real property who has received a notice of default on or before July 22, 2011, may be referred to mediation under RCW 61.24.163 by a housing counselor or attorney." RCW 61.24.165(2). This portion of the FFA does not say that such a borrower is not entitled to receive any of the FFA pre-foreclosure notices as asserted by NWTS, but rather it simply allows a housing counselor or attorney to refer them into mediation without having to wait for another notice of default or the notice of trustee's sale. And, more importantly, how is a borrower like the Watsons supposed to get referred into mediation if they do not even know about their right to meet with a housing counselor or attorney to get the referral or that Washington has such a mediation process when the beneficiary and trustee have failed to notify them as such? One cannot take advantage of a right they do not know about, which is why the FFA requires the trustee in a non-judicial foreclosure of a borrower's primary residence to notify the borrower of their rights under the FFA, including mediation.

The FFA was not intended to offer less protection for borrowers who received their notice of default on or before July 22, 2011 by allowing a beneficiary and trustee to avoid informing them of their pre-foreclosure mediation options just because a notice of default was mailed prior to the enactment of the FFA. The position taken by NWTS keeps borrowers like the Watsons in a position of ignorance that ends in the foreclosure of their primary home without any knowledge of their right to mediation or other pre-foreclosure options. This position goes against the express remedial purpose of the FFA, which is to reduce the number of foreclosures in our state, and would provide borrowers like the Watsons less protection and not more.

D. The Court of Appeals did not error when it held that NWTS failed to comply with the DTA as amended by the FFA.

The Court of Appeals did not commit obvious error which would render further proceedings useless or make a probable error that substantially alters the status quo or substantially limits the freedom of a party to act by holding that the prospective application of the FFA amendments applied to NWTS's November 2011 notice of trustee's sale. NWTS's notice of trustee's sale was not a continuation of any prior notice of sale and required substantial compliance with the DTA in effect when the notice of trustee's sale was recorded. RCW 61.24.040(7) (the sale must be conducted in compliance with all of the requirements of Chapter 61.24 RCW). Operating prospectively, the FFA amendments required that NWTS follow all statutory requirements of the DTA prior to recording its

November 2011 notice of trustee's sale. The precipitating "event" is not the notice of default as argued by NWTS. If this were the case, then a trustee could ignore every amendment to the DTA when recording a notice of trustee sale simply because the notice of default was issued before each and every amendment, including the statute that was added to the DTA in 2012.

NWTS is also mistaken in its motion at page 11 when it states that the Watsons "were afforded, and took advantage of, their full opportunity to engage in mediation and seek to avoid foreclosure." There is nothing in the record that supports this statement. In fact, the record shows just the opposite is true. The Watsons knew nothing about the FFA mediation process. They were never referred into mediation. Instead, they paid a California company to help them with a loan modification and were told that the foreclosure sale set for December 2011 had been cancelled when in fact it had not. The Watsons were denied all of the pre-foreclosure notices required by the FFA, including the one cautioning them about companies like the one they hired.

The FFA modified the process that a trustee must follow to foreclose on a deed of trust under the DTA. It includes language to be used in a notice of trustee sale, RCW 61.24.040(1)(f)-(g) and (9), a statement to be mailed along with the notice, RCW 61.24.040(2). RCW 61.24.040(1)(g) requires notice to the borrower to contact a housing counselor or attorney licensed in Washington to assess the borrower's

situation and refer them into mediation if they are eligible. It also requires the trustee to inform the borrower of phone numbers to call and that assistance may be available at little or no cost. *Id.* It requires the trustee to inform the borrower of the 20 day deadline for the borrower to take advantage of mediation after the notice of trustee sale is recorded or they lose their right to mediation. *Id.* The notices in RCW 61.24.040(1)(g) are required if a borrower received a pre-foreclosure letter under RCW 61.24.031. *Id.* The pre-foreclosure letter under RCW 61.24.031 is required if the property is "owner-occupied residential real property." RCW 61.24.031(7)(a). The Watsons received none of the pre-foreclosure notices required by the FFA, including those required in the notice of trustee's sale, because NWTS did not believe that the FFA amendments applied to any borrower who had received a notice of default prior to July 22, 2011.

The 2012 amendments to the DTA support application of the FFA notice requirements regardless of when the notice of default was issued. On June 7, 2012, the DTA was further amended as follows:

> (1) A borrower who has been referred to mediation before June 7, 2012, may continue through the mediation process and does not lose his or her right to mediation.
>
> (2) A borrower who has not been referred to mediation before June 7, 2012, may only be referred to mediation after a notice of default has been issued but no later than twenty days from the date a notice of sale is recorded.
>
> (3) A borrower who has not been referred to mediation before June 7, 2012, and who has had a notice of sale

> recorded may only be referred to mediation if the referral is made before twenty days have passed from the date the notice of sale is recorded.

RCW 61.24.008 (2012). The borrower will not know about the 20-day time limit to be referred into mediation unless they have received a notice of trustee's sale with the language added by the FFA. If a trustee is allowed to rely on an old notice of default that pre-dates the FFA, which could be years earlier, and include no language about mediation and the 20-day deadline in the notice of sale, as was done in this case, the 2012 amendment is rendered nonsensical. How can a borrower be limited to the 20-day cut-off for a mediation referral under RCW 61.24.008 if the notice of trustee's sale does not have to include the 20-day deadline language required by the FFA? The logical conclusion is that a notice of trustee's sale that is recorded, transmitted, or served on or after July 22, 2011 must comply with the FFA, even if that means sending out a pre-foreclosure letter and a revised notice of default.

If we are to agree with NWTS, a trustee can simply ignore the FFA amendments when a notice of default has been issued prior to the FFA amendments, regardless of the number of years that have passed, and these borrowers will never know about the FFA mediation or other foreclosure options. They will lose the right to participate in the FFA mediation process 20 days after the notice of trustee sale is recorded even though the notice of sale tells them nothing about this deadline. This is what happened to the Watsons. NWTS recorded its November 2011 notice of

trustee's sale using pre-FFA language from the DTA that said nothing about mediation or the 20 day cutoff. NWTS's position goes against the very purpose of the FFA, and denies borrowers like the Watsons the foreclosure alternative options afforded by the FFA. The burden on a trustee to send a pre-foreclosure letter and another notice of default prior to recording a notice of trustee's sale on or after July 22, 2011 is minimal compared to the loss suffered by borrowers and the State of Washington when a property is foreclosed.

The DTA must be strictly construed in the borrower's favor. *Albice v. Premier Mortgage,* 174 Wn.2d 560, 276 P.3d 1277 (2012). This is what the Court of Appeals did, and as such did not error.

E. The Court of Appeals did not make a probable error that substantially alters the status quo or substantially limits the freedom of a party to act.

The Court of Appeals did not commit probable error that warrants discretionary review because the decision does not substantially alter the status quo nor does it substantially limit the ability of a beneficiary or trustee to act upon the rights afforded them under a deed of trust or the DTA. One of the reasons why courts presume that statutory amendments operate prospectively is because "individuals should have the opportunity to know what the law is and to conform their conduct accordingly." *Supra*, at 9, citing *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 272, 285 P.3d 854 (2012). Any legislative enactment or amendment will alter the legal landscape in some form, and lienholders – or whoever else is affected –

must comply with the changes. This does not mean that the status quo is substantially altered or that a party's freedom to act is substantially limited to the point that warrants discretionary review. NWTS had the opportunity to follow current law at the time its November 2011 notice of trustee's sale was recorded, and it simply failed to do so.

F. Attorneys' Fees and Costs Permitted Under the CPA Claim and RAP 18.1

Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract, and the request is made pursuant to appellate rule governing attorney fees and expenses. *Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518, 535, 79 P.3d 1154 (2003); *In re Guardianship of Wells,* 150 Wn.App. 491, 503, 208 P.3d 1126 (2009). Mr. Watson's Consumer Protection Act claim pursuant to Chapter 19.86 RCW allows for recovery of reasonable attorneys' fees and costs of the suit. RCW 19.86.090. To the extent that attorneys' fees and costs may be awarded to the Watsons under RAP 18.1, the Watsons hereby request attorneys' fees and costs incurred in answering NWTS's petition for review to this Court pursuant to RAP 18.1(j).

III. CONCLUSION

Whether the FFA is a remedial statute and can be applied retroactively, and/or NWTS was obligated to comply with the DTA as amended when it recorded its notice of trustee sale on November 8, 2011, the Court of Appeals did not commit an obvious error which would render further proceedings useless as required by RAP 13.5 (b)(1). Nor did the

Court of Appeals commit probable error where the decision substantially alters the status quo or substantially limits the freedom of a party to act as required by RAP 13.5 (b)(2). Based on the foregoing, NWTS's motion for discretionary review by the Washington Supreme Court should be denied, and the Court of Appeals decision should be published. Publication will further the purpose of the FFA, which is to reduce the number of foreclosures in our State.

Watsons also requests recovery of attorneys' fees and costs incurred in answering NWTS's petition for review to this Court pursuant to RAP 18.1(j).

DATED this 7th day of May, 2014.

Respectfully submitted,

SKYLINE LAW GROUP PLLC

By: Michele K McNeill
Michele K. McNeill, WSBA # 32052

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On May 7, 2014, I caused a copy of the foregoing Watsons' Answer to Northwest Trustee Services' Motion for Discretionary Review by the Washington Supreme Court to be served upon the following no later than 12:00 P.M. on May 8, 2014 in the manner noted below:

Washington Supreme Court Temple of Justice P.O. Box 40929 415 12th Avenue SW Olympia, WA 98504-0929	[ ] U.S. Mail, Postage Prepaid [X] Hand Delivery by ABC/LMI [ ] Email
Joshua Schaer Routh Crabtree Olsen, P.S. 13555 SE 36th Street, Suite 300 Bellevue, WA 98006-1489	[ ] U.S. Mail, Postage Prepaid [X] Hand Delivery by ABC/LMI [ ] Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 7th day of May, 2014

Julia M. Bryan
Legal Assistant

Appendix 1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DANIEL J. WATSON and KETWARIN ONNUM, husband and wife,

Respondents,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Petitioner,

CITIMORTGAGE, INC.; NATIONAL LEGAL HELP CENTER, INC.; and JOHN DOES 1-10,

Defendants.

No. 69352-2-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 21, 2014

LEACH, C.J. — Northwest Trustee Services Inc. (NWTS) seeks discretionary review of the superior court's denial of NWTS's motion for summary dismissal of the claim by Daniel Watson and Ketwarin Onnum (the Watsons) for damages allegedly caused by NWTS's breach of the foreclosure fairness act, chapter 61.24 RCW (FFA). The Watsons cross petition, seeking review of the superior court's dismissal of their claims under the Consumer Protection Act, chapter 19.86 RCW (CPA). Because the trial court committed probable error and substantially altered the status quo when it dismissed the Watsons' CPA claims, we grant the Watsons' petition and reverse the trial court's decision. Because the trial court did not commit error when it denied NWTS's

motion for summary dismissal of the Watsons' FFA claims, we deny NWTS's petition.

Background

In April 2003, Daniel Watson and his wife, Ketwarin Onnum, financed the purchase of a home by executing a promissory note payable to ABN AMRO Mortgage Inc. and a companion deed of trust. Through various mergers and business transactions, CitiMortgage acquired the note and a beneficial interest under the deed of trust. It later appointed NWTS as successor trustee.

On February 5, 2011, NWTS sent the Watsons a notice of default. On March 22, 2011, NWTS recorded a notice of trustee's sale, with the sale scheduled for June 24, 2011. On June 20, 2011, the Watsons filed for bankruptcy, which caused the trustee sale to be postponed and then canceled.

On July 22, 2011, the FFA amended the deeds of trust act, chapter 61.24 RCW (DTA).[1] Among other changes, the FFA changed the requirements for preforeclosure notice[2] and allowed recovery of damages for violations of the CPA.[3]

On September 22, 2011, the bankruptcy court discharged the Watsons' debts, including the note. On November 8, 2011, NWTS recorded an amended notice of trustee's sale, with a new sale date of December 23, 2011. NWTS mailed a copy of the notice by certified and first class mail to the Watsons and

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[1] RCW 61.24.005-.177 (LAWS of 2011, ch. 364, § 3).
[2] RCW 61.24.030, .031, .040.
[3] RCW 61.24.135.

posted a copy of the notice at the premises. NWTS did not send a new notice of default or otherwise contact the Watsons before recording this notice.[4] A third party purchased the Watsons' house at a trustee's sale on December 23, 2011. The trustee's deed recorded by NWTS on January 10, 2012, referred to the March 22, 2011, notice of trustee's sale, which described the notice of the sale that was ultimately canceled, but did not mention the notice recorded November 8, 2011.

The Watsons filed a lawsuit against NWTS and CitiMortgage, alleging wrongful foreclosure and to quiet title. They later amended the complaint to include additional claims for violation of the CPA. The amended complaint also added National Legal Help Center as a defendant. NWTS and CitiMortgage filed an amended joint motion for summary judgment. The court dismissed all claims against CitiMortage and requested additional briefing on the claims against NWTS, which the parties provided. The trial court dismissed the Watsons' CPA claim, but not their claim for wrongful foreclosure for failure to comply with the FFA.

Both NWTS and the Watsons seek discretionary review.

Analysis

Discretionary review is available in the following circumstances:

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[4] The Watsons attempted to seek legal help by contacting a California entity called the "National Legal Help Center," but this entity is apparently not an attorney or counsel approved by HUD (U.S. Department of Housing and Urban Development), and contrary to its representations to the Watsons, it did not stop the foreclosure.

> (1) The superior court has committed an obvious error which would render further proceedings useless;
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
>
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
>
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.[5]

NWTS contends that by denying its motion for summary judgment as to the wrongful foreclosure claim, the trial court "committed an obvious error which would render further proceedings useless." The Watsons argue that the court committed error warranting review by dismissing their CPA claims.

Wrongful Foreclosure under the FFA

The trial court denied NWTS's motion to dismiss the Watsons' wrongful foreclosure claims on two alternative grounds. First, the court ruled that the FFA is a remedial statute and, as such, should be applied retroactively. Alternatively, the trial court ruled that it did not need to apply the FFA retroactively because the "precipitating event" triggering the statute's application was not the February 2011 notice of default but the amended notice of trustee's sale, recorded in November 2011, after the effective date of the FFA.

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[5] RAP 2.3(b).

Courts presume that statutory amendments operate prospectively and generally disfavor retroactive application because "'individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'"[6] A statute applies retroactively if it changes the legal effect of "'prior facts or transactions'"[7] or "'attaches new legal consequences to events completed before its enactment.'"[8] But a statute does not apply retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law."[9] "A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment."[10]

NWTS argues that under the FFA, the preforeclosure requirements are linked to the original notice of default sent in February 2011, before the FFA took effect. NWTS contends that the process that culminated in the trustee's sale was one continuous transaction. Therefore the trial court erred by applying the July 2011 FFA amendments to the sale process.

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[6] Loeffelholz v. Univ. of Wash., 175 Wn.2d 264, 272, 285 P.3d 854 (2012) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)); In re Pers. Restraint of Flint, 174 Wn.2d 539, 546, 277 P.3d 657 (2012).

[7] Flint, 174 Wn.2d at 547 (internal quotation marks omitted) (quoting State v. Varga, 151 Wn.2d 179, 195, 86 P.3d 139 (2004)).

[8] Flint, 174 Wn.2d at 548 (internal quotation marks omitted) (quoting State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007)).

[9] Landgraf, 511 U.S. at 269 (citation omitted).

[10] In re Estate of Burns, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997).

Because the DTA eliminates many protections enjoyed by borrowers under judicial foreclosures, "lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor."[11] Under the FFA it "shall be requisite to a trustee's sale" that a written notice of default containing specific information set forth in the statute first be transmitted by the beneficiary or the trustee to the borrower.[12] A trustee, beneficiary, or authorized agent may not issue this notice of default until 30 days after satisfying certain due diligence requirements.[13] The beneficiary or agent first must send a letter that includes information such as the borrower's right to meet with a HUD-approved housing counselor or attorney who can help with mediation, assist in arranging a meeting with the lender, or work toward a resolution such as a loan modification.[14] This "Pre-Foreclosure Options Letter" or a "Notice of Pre-Foreclosure Options" must provide toll-free numbers to help borrowers find HUD-approved housing counselors or civil legal aid resources.[15]

Where the filing of a bankruptcy court petition has stayed a trustee's sale, the trustee may set and give notice of a new sale date not less than 45 days after the date of the bankruptcy court order permitting the sale.[16] RCW 61.24.130(5) through (6) allow a trustee's sale "on any date to which such sale has been

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[11] Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).
[12] RCW 61.24.030(8).
[13] RCW 61.24.031(1)(a), (5).
[14] RCW 61.24.031(1)(c)(iii), (iv), (f), (2)-(4).
[15] RCW 61.24.031(1)(c)(ii).
[16] RCW 61.24.130(4).

properly continued in accordance with RCW 61.24.040(6)." This statute allows a trustee to continue the sale for a period or periods not exceeding a total of 120 days.[17]

NWTS claims its original March 22, 2011, notice of trustee's sale fulfilled its obligations under the DTA. But this notice described a sale scheduled for June 24, 2011. NWTS first continued and ultimately canceled this sale. RCW 61.24.040(6) allowed continuance of the June 24, 2011, sale date for no more than 120 days, or until October 22, 2011.[18] After that date, the DTA required a new notice. Therefore, although NWTS labeled its second notice an "amended" notice of trustee's sale, this notice necessarily scheduled a new sale. Because NWTS recorded the "amended" notice in November 2011, the notice requirements of the FFA applied.

Because NWTS failed to comply with the FFA's notice requirements before recording its November 2011 notice of trustee's sale, the Watsons have demonstrated issues of material fact regarding the lawfulness of NWTS's nonjudicial sale of the Watsons' property. NWTS has failed to establish grounds for discretionary review. We dismiss its petition for review.

Violation of the CPA

We next address the Watsons' petition for review. Because the trial court committed probable error and substantially altered the status quo when it

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[17] RCW 61.24.040(6).

[18] See Rouse v. Wells Fargo Bank, N.A., No. C13-5706, 2013 WL 5488817, at *2 (W.D. Wash. Oct. 2, 2013).

dismissed the Watsons' CPA claims, we grant the Watsons' petition and reverse the trial court's dismissal of this claim.

The FFA states in a section added in 2011,

> It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter 19.86 RCW, for any person or entity to: (a) Violate the duty of good faith under RCW 61.24.163; (b) fail to comply with the requirements of RCW 61.24.174; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031.[19]

Relying on its retroactivity analysis, the trial court ruled that "creation of a new cause of action (a per se violation of the Consumer Protection Act) affects a substantive right and therefore the FFA is not retroactive with respect to the Consumer Protection Act claim." Because we conclude that the FFA applied to NWTS's November 2011 notice, we also conclude that the FFA provisions addressing the CPA apply. The trial court erred and substantially altered the status quo when it dismissed the Watsons' CPA claims. We reverse the trial court's dismissal of the Watsons' CPA claims and remand for further proceedings.

Conclusion

Because the trial court did not commit error when it denied NWTS's motion for summary dismissal of the Watsons' FFA claims, we deny NWTS's petition. Because the trial court committed probable error and substantially altered the status quo when it dismissed the Watsons' CPA claims, we grant the

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[19] RCW 61.24.135(2) (LAWS of 2011, ch. 58, §14).

Watsons' petition, reverse the trial court's dismissal of their CPA claims, and remand for further proceedings consistent with this opinion.

Leach, C.J.

WE CONCUR:

Spearman, J.

Appelwick, J.