COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
Case No.: 69352-2
(King County Superior Court No.: 12-2-01729-8)

DANIEL J. WATSON and KETWARIN ONNUM, Plaintiffs,
v.

NORTHWEST TRUSTEE SERVICES, INC., et al, Defendants.

NORTHWEST TRUSTEE SERVICES, INC., Petitioner,
v.

DANIEL J. WATSON and KETWARIN ONNUM, Respondents.

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Northwest Trustee Services, Inc. ("NWTS"), respectfully asks this Court to accept review of the King County Superior Court Memorandum Ruling designated in Part B.

B. DECISION

On August 27th, 2012, King County Superior Court Judge Kimberley Prochnau issued a Memorandum Ruling granting in part NWTS and CitiMortgage, Inc.'s ("CitiMortgage") Amended Joint Motion for Summary Judgment. A true and correct copy of the Memorandum Ruling is in the Appendix (hereinafter "A") as A-1.

Petitioner NWTS seeks reversal of the portion of the Memorandum Ruling denying NWTS' motion for summary judgment as to the damages claim for failure to comply with the Foreclosure Fairness Act, SSHB 1362, ch. 58, Laws of 2011 (hereinafter "FFA"). A true and correct copy of the FFA is in theAppendix as "A-8". The Superior Court based this ruling on two grounds:

First, the FFA, is a remedial statue and is applied retroactively. Thus, the Amended Notice of Trustee's Sale was defective as the FFA pre-foreclosure options letter was not provided prior to its issuance. (A-1, p. 10)

Second, at time the Amended Notice of Trustee's Sale was issued, the FFA was in effect. Therefore, the FFA need not be applied retroactively as the trustee was required to conduct the sale in accordance with § 4(9) of the FFA, codified at RCW § 61.24.030(9). (A-1, pp. 8–9)

C. ISSUES PRESENTED FOR REVIEW

1. Pursuant to RAP 2.3(b)(1), whether the Superior Court, by virtue of its August 27, 2012 Memorandum Ruling, committed an obvious error which would render further proceedings useless because:
    a. The Memorandum Ruling did not consider whether retroactive application of the FFA would affect a substantive right in applying the FFA retroactively as a remedial statute.
    b. The Memorandum Ruling erroneously applies FFA § 4(9), codified at RCW § 61.24.030(9), notwithstanding FFA § 8(2) and principles of statutory construction.

D. STATEMENT OF THE CASE

1. Underlying Superior Court Action

Watson Loan Transaction. On or about April 14, 2003, for valuable consideration, Respondents executed a promissory note ("Note") in the amount of $280,000.00 payable to ABN AMRO Mortgage, Inc.

("AMRO"). Declaration of Jeff Stenman in Support of Motion for Summary Judgment, ¶ 4, Exhibit 1. ("Stenman Decl.") A true and correct copy of the Stenman Decl. is in the Appendix as "A-2".

On or about April 17, 2003, in order to secure repayment of the Note, the Respondents executed a deed of trust ("Deed of Trust") encumbering real property located at 2821 West 10th Avenue, Seattle, WA 98118 (the "Property"). (A-2, ¶ 5)

The Deed of Trust was recorded on April 18, 2003 in the Official Records of King County, Washington as Ins. No. 20030418001614. (A-2, p. 5, Ex. 2).

Appointment of NWTS as Successor Trustee. On or about October 11, 2007, CitiMortgage, as successor by merger to AMRO, appointed NWTS as successor trustee under the Deed of Trust. (A-2, ¶ 6).

Notice of Default. Respondents fell into default under the terms of the Note and Deed of Trust by failing to perform monthly payment obligations beginning with the October 1, 2010 installment. On February 5, 2011, a Notice of Default and Loss Mitigation Declaration were mailed by first class and certified mail, return receipt requested, to Respondents at their last known addresses. (A-2, ¶ 7, Ex. 4).

Notice of Trustee's Sale. On March 22, 2011, NWTS recorded a Notice of Trustee's Sale in the Official Records of King County,

Washington as Instrument No. 20110322000728. Amended Complaint, ¶ 3.4, Exhibit 3. A true and correct copy of the Amended Complaint is in the Appendix as "A-3".The Notice of Trustee's Sale designated June 24, 2011 as date of the nonjudicial foreclosure. (A-3, Ex. 3)

The Watson Bankruptcy. On June 20, 2011, Respondents filed a Chapter 7 petition in the United States Bankruptcy Court for the Western District of Washington. (A-2, ¶ 9, Ex. 4).

As a result of the bankruptcy filing, NWTS postponed the trustee's sale multiple times with a final postponement date of September 30, 2011. (A-2, ¶ 9) The postponed trustee's sale was ultimately cancelled due to the ongoing bankruptcy proceeding. *Id.* On October 31, 2011, the Bankruptcy Court terminated Respondents' Chapter 7 bankruptcy by standard discharge. (A-2, ¶ 9, Ex. 4).

Amended Notice of Trustee's Sale. On November 8, 2011, NWTS recorded an Amended Notice of Trustee's Sale in the Official Records of King County, Washington as Instrument No. 20111108001313. (A-3, Ex. 4).

The Amended Notice of Trustee's Sale designated December 23, 2011 as date of the nonjudicial foreclosure. *Id.* On or about November 8, 2011, NWTS mailed by certified and first class mail the Amended Notice of Trustee's Sale to the Respondents. (A-2, ¶ 11) On or about November

9, 2011, NWTS posted the Amended Notice of Trustee Sale on the Property. *Id.*

Non-judicial Foreclosure. On December 23, 2011, NWTS conducted a non-judicial foreclosure sale of the Property. (A-1, ¶ 12). Apple Equities, LLC was the high bidder at the sale, resulting in the issuance of a Trustee's Deed to Apple Equities, LLC dated December 29, 2011. *Id.*

Procedural Posture. Respondents filed a lawsuit against NWTS, ABN Amro Mortgage Inc., CitiMortgage, and Fairplay Foreclosures Washington, LLC for Wrongful Foreclosure and Quiet Title on January 11, 2012. Motion to Amend Complaint, ¶ 1. A true and correct copy of the Motion to Amend Complaint is in the Appendix as "A-4".

On May 7, 2012, Respondents filed an Amended Complaint. (A-3)

On April 27th, 2012, an Amended Joint Motion for Summary Judgment was filed by Petitioner NWTS and CitiMortgage. A true and correct copy of the Amended Joint Motion for Summary Judgment is in the Appendix as "A-5".

On June 29, 2012, the summary judgment hearing took place and the Superior Court dismissed claims against CitiMortgage with prejudice and invited additional briefing with respect to the claims against Petitioner NWTS. (A-1, p. 3)

On July 12, 2012, Petitioner NWTS submitted supplemental briefing with respect to the claims against NWTS. A true and correct copy of Petitioner NWTS' supplemental briefing is in the Appendix as "A-6".

On Jul 27, 2012, Respondents submitted supplemental briefing in regards to the claims against NWTS. A true and correct copy of Respondents supplemental briefing is in the Appendix as "A-7".

On August 27th, 2012, Judge Prochnau granted NWTS' Amended Motion for Summary Judgment as to the Consumer Protection Act claim and denied summary judgment as to the damages claim for failure to comply with the FFA. (A-1)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court Erred in Holding that the FFA applies Retroactively as a Remedial Statute

In its analysis, the Superior Court held that with the exception of the Consumer Protection Act ("CPA") provisions, the FFA operates retroactively as a remedial statute. (A-1, p.10) However, analyzing case law relating to retroactivity and remedial statutes reveals that the Superior Court's decision was contrary to law.

a. Remedial Statutes and Retroactivity

Statutory enactments are presumed to be prospective unless there is a legislative intent to apply the statute retroactively or the statute is

remedial and retroactive application furthers the remedial purpose. *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990).

An amendment is deemed remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect a substantive or vested right. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462–63, 832 P.2d 1303 (1992) (emphasis added). See also *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984); *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007).

Courts disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions. *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997).

b. The Superior Court did not consider whether retroactive application would affect a substantive right in determining the FFA applies retroactively as a remedial statute

As recognized by the Washington Supreme Court, to be deemed remedial and applied retroactively, a two-part analysis applies as a statute cannot affect a substantive *or* vested right.

In holding that the FFA is a remedial statute, the Superior Court's analysis focused solely on whether the Petitioner had created a vested right before the FFA amendments went into effect. (A-1, pp. 5–8)

Nowhere in the Memorandum Ruling did the Superior Court engage or apply any analysis as to whether the retroactive application of the FFA would affect a substantive right, an analysis in conflict with established Washington Supreme Court precedent. See, e.g., *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462–63, 832 P.2d 1303 (1992).

Accordingly, the Superior Court committed an obvious error given the lack of analysis as to whether retroactive application of the FFA would affect a substantive right. Discretionary review is appropriate as applying this analysis would render further proceedings useless.

c. Retroactive Application of the FFA affects a Substantive Right

A statute is not remedial when it creates a new right of action. *Loeffelholz v. University of Washington*, — P.3d —, 2012 WL 4010400 (Wn. 2012) (citing *Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975)). A "right" is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right. *Dept. of Retirement Systems v. Kralman*, 73 Wn.App. 25, 33, 867 P.2d 643 (1994).

Applying Supreme Court precedent reveals discretionary review is appropriate as retroactive application of the FFA affects a substantive right.

As set forth in the Amended Complaint, the respondents allege that NWTS violated the FFA by failing to issue the required notice of pre-foreclosure options letter ("NOPFO"). (A-3, ¶¶ 4.3– 4.4).

Under the FFA, the NOPFO is a pre-foreclosure notice that must be sent to a borrower prior to the issuance of a notice of default. (A-1, p. 3) See also RCW § 61.24.031(1). In this case, it is undisputed that prior to the FFA, a beneficiary was not required to send a NOPFO to the borrower as a prerequisite to the issuance of a notice of default. Ultimately, at the time the notice of default was issued, the FFA and the NOPFO requirement did not exist. The question is whether requiring a NOPFO to be sent even though a pre-FFA notice of default was issued affects a substantive right.

The Washington Supreme Court's decision in *Johnston v. Beneficial Mgmt. Corp. of Am.* provides guidance. In *Johnston,* the respondents alleged that the petitioner vacuum cleaner suppliers and finance companies violated provisions of the Washington Consumer Protection Act ("CPA"). *Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d at 639. The Supreme Court noted that at the time the alleged violations took place, there was no statutory or common law private right of action based upon such acts or practices. *See id.* at 640. Following, the Court stated "RCW § 19.86.090 [CPA] is not merely remedial. It creates a new right of

action. It must therefore be presumed that the legislature intended it to apply to future transactions only." *Id.* at 641 (emphasis added).

Similar to *Johnston*, at the time the alleged violation of the FFA took place, there was no statutory requirement for the beneficiary or authorized agent to send a NOPFO to a borrower prior to issuing a notice of default. Similar to *Johnston*, as the failure to send a NOPFO creates a cause of action for failure to comply with the Deed of Trust Act RCW § 61.24 *et seq.*, as amended by the FFA, it must be presumed that the legislature intended it to apply to the issuance of future notices of default.

Accordingly, the Superior Court committed error as applying the FFA retroactively to require a NOPFO's issuance affects a substantive right given that it creates a new cause of action based on requirements that were not in effect at the time of the alleged violation.

The Superior Court's error is manifested in the underlying proceeding itself. Retroactive application of the FFA would mean that any pre-FFA notice of default was *per se* defective since the beneficiary did not provide the letter, as such requirement did not exist. A borrower could then bring a Wrongful Foreclosure suit on this very basis – failure to comply with RCW § 61.24.031.

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2. The Superior Court committed error in interpreting § 4(9) as requiring the issuance of a NOPFO on a pre-FFA notice of default notwithstanding FFA § 8(2).

The Superior Court notes that at the time the Amended Notice of Trustee's Sale was issued, the FFA was in effect and therefore, a NOPFO was required to be issued given that it was a "precipitating event". (A-1, pp. 8–9) The Superior Court based this finding on FFA § 4(9), codified at RCW § 61.24.030(9).

Following, the Superior Court notes that it is not necessary to find the FFA applies retroactively. (A-1, pp. 8–9) Analyzing case law relating to prospective application of a statute and the provisions of the FFA itself reveals that the Superior Court's decision was in error.

a. Applying the Superior Court's reasoning requires Retroactive Application of the FFA

The Washington Supreme Court has set forth parameters in determining when a statute is deemed to be applied retroactively. If a statute's application changes the legal effect of "prior facts or transactions," then the statute's application is more properly characterized as retroactive. *In re Flint*, 174 Wn.2d 539, 547, 277 P.3d 657 (2012).

However, a statute is not retroactive simply "because some of the requisites for its actions are drawn from a time antecedent to its passage." *Id.* Nor does a statute operate retrospectively just because it upsets

expectations based on prior law. *Ludvigsen v. City of Seattle,* 162 Wn.2d 660, 668, 174 P.3d 43 (2007).

Expectations based on prior law must be distinguished from vested rights, however. *In re Flint*, 174 Wn.2d at 547. A statute has retroactive effect if it takes away or impairs a party's vested rights acquired under existing laws. *Id.* The same is true if a statute's application increases liability for past conduct or imposes new duties or disabilities with respect to completed transactions. *Id.* at 547–48.

In this case, applying the Superior Court's analysis requires retroactive application of the FFA. The Superior Court notes that "the "precipitating event" was the failure to provide information regarding Pre-Foreclosure Options before recording the second notice of sale." (A-1, pp. 9) However, this analysis conflicts with the Supreme Court's analysis in *In re Flint.*

As set forth above, the NOPFO is a statutory pre-requisite to the issuance of a notice of default. RCW § 61.24.031(1). Applying §4(9) of the FFA as interpreted by the Superior Court and requiring the issuance of a NOPFO would change the legal effect of the pre-FFA notice of default. Notably, it would require every nonjudicial foreclosure to be restarted where a pre-FFA notice of default was issued and a notice of trustee's sale had yet to be issued.

As such application imposes new duties on the trustee and beneficiary with respect to a completed step in the foreclosure process, the Superior Court applied the FFA retroactively. This is an obvious error that merits discretionary review given that retroactive application does not apply for a remedial statute when a substantive right is affected.

b. Sections 4(9) and 8(2) of the FFA contradict the Superior Courts Analysis

As set forth above, the Superior Court interprets the FFA to require the issuance of the NOPFO prior to the issuance of a notice of trustee's sale given § 4(9) of the FFA, now codified at RCW § 61.24.030(9). (A-1, pp. 8–9) However, analyzing the other provisions of the FFA and applying principals of statutory construction reveal that the Superior Court committed an obvious error which would render further proceedings useless.

First, to interpret § 4(9) of the FFA as requiring any pre-FFA notice of default to comply with § 5(1) where a post-FFA notice of trustee's sale necessarily requires retroactive application. It would be impossible for a pre-FFA notice of default to comply with the NOPFO requirements given that the NOPFO requirements did not exist when the notice of default was issued. Accordingly, to apply § 4(9) of the FFA, codified at RCW § 61.24.030(9), to require issuance of a NOPFO

necessarily requires retroactive application of the FFA, contrary to the Superior Courts analysis. (A-1, pp. 8–9)

Second, in the event a notice of default was recorded prior to the enactment of the FFA, § 8(2) of the FFA expressly preserves the right of the borrower to be referred to mediation: Section 8(2) of the FFA states that:

> "A borrower under a deed of trust on owner-occupied residential real property who has **received a notice of default on or before the effective date of this section** may be referred to mediation under section 7 of this act by a housing counselor or attorney."

However, to apply the Superior Court's analysis would render § 8(2) meaningless. If any pre-FFA notice of default was invalid due to the beneficiary's failure to send a NOPFO, then it would have been unnecessary for the state legislature to preserve the right to be referred to mediation where a notice of default was issued prior to the FFA.

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). To interpret FFA § 4(9) would render § 8(2) meaningless as any pre-FFA notice of default would be per se invalid.

As such interpretation increases liability for past conduct and imposes new duties for a completed step in the nonjudicial foreclosure

process, the Superior Court applies the FFA retroactively. See *In re Flint*, 174 Wn.2d at 547–48. Accordingly, the Memorandum Ruling so far departs from the standard of law as to require appellate review.

F. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the Memorandum Ruling denying Northwest Trustee Services, Inc.'s motion for summary judgment as to the damages claim for failure to comply with the FFA.

Dated at Bellevue, Washington this 5th day of October, 2012.

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By: _____

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