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.

PETITIONER'S OPPOSITION TO RESPONDENT/CROSS-PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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A. INTRODUCTION

Petitioner, Northwest Trustee Services, Inc. ("Petitioner" or "NWTS"), objects to Respondents/Cross-Petitioners Daniel J. Watson and Ketwarin Onnum's (hereafter "Respondents") Motion for Discretionary Review. The Respondents' Motion for Discretionary Review seeks reversal of the Superior Court's decision granting NWTS' motion for summary judgment as to the Consumer Protection Act ("CPA") claim.

B. ISSUES PRESENTED FOR REVIEW

Pursuant to Rule of Appellate Procedure 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 when it granted NWTS' motion for summary judgment as to the Consumer Protection Act ("CPA") claim.

C. LEGAL AUTHORITY

Under Rule of Appellate Procedure ("RAP") 2.3(b)(1) discretionary review may be granted where "the superior court has committed an obvious error which would render further proceedings useless..." *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 949, 977 P.2d 1231 (1999).

"Summary judgment is appropriate when 'there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a

matter of law.'" *Locke v. City of Seattle,* 162 Wn.2d 474, 478, 172 P.3d 705 (2007).

1. The Superior Court properly held that NWTS did not violate the CPA

Respondent argues that the plain language of the Foreclosure Fairness Act ("FFA") contradicts the Superior Court's ruling. Respondent's Motion for Discretionary Review, Pg. 8. However, analyzing the Superior Court's analysis, as well as the plain language of the Deed of Trust Act, reveals that no error was committed which merits discretionary review.

The Deed of Trust Act, as amended by the FFA, imposes a duty upon the beneficiary to make initial contact with the borrower by letter[1] prior to the issuance of a notice of default. RCW § 61.24.031(1)(a)–(b). As set forth by the step-by-step non-judicial foreclosure process established by the state legislature, a notice of default is predicated upon the issuance of a NOPFO. *Id.* §§ 61.24.031(1)(b), (2). Failure to comply with the initial contact requirement satisfies some of the elements of a CPA claim under RCW § 61.24.135(2)(c).

[1] The Department of Commerce is tasked with developing the model language for the letter. RCW § 61.24.031(1)(c). The letter is known as the Notice of Pre-Foreclosure Options letter ("NOPFO") and is available at http://www.commerce.wa.gov/Documents/Notice%20of%20Pre%20Foreclosure%20Options.pdf (last visited Oct. 25, 2012).

Applying the FFA amendments to the undisputed facts underlying this proceeding reveal that the Superior Court committed no error.

First, is undisputed that this requirement to provide the NOPFO went into effect with the enactment of the FFA on July 22, 2011. Second, it is undisputed that the notice of default was issued on February 5, 2011, prior to the enactment of the FFA.

Following, in order to determine whether summary judgment was appropriate against a claim based on a statutory requirement that did not exist at the time the notice of default was issued, the Superior Court necessarily and properly engaged in an analysis of whether that requirement to send a NOPFO applied retroactively.

As the 2011 FFA amendments provide a cause of action for the beneficiary's failure to provide documentation that it was not previously required to provide, they affect a substantive right. Respondents do not dispute this finding. The Superior Court properly analyzed the temporal aspect of this claim, as applying the FFA to these facts necessarily requires retroactive application.

While the Respondents claim that the plain language of the FFA contradicts the Superior Court's ruling, RCW § 61.24.135(2) clearly imposes a CPA violation for the failure to send a NOPFO, which is a requirement that derives from the FFA. It is undisputed that at the time the

notice of default was issued, the NOPFO requirement was not in effect as the FFA was yet to be enacted. Thus, at the time the notice of default was issued, a NOPFO was not required to be issued by the beneficiary.

Finally, Respondents' allege Petitioner NWTS committed a *prima facie* CPA violation when it issued the Trustee's Deed and stated compliance with the Deed of Trust Act when it failed to comply with RCW § 61.24.031. Again, this *prima facie* CPA violation is based on RCW § 61.24.135(2)(c) and the requirement to initiate contact with a borrower by sending a NOPFO. As set forth above, this requirement was not in effect when the notice of default was issued, an undisputed fact. Thus, the Superior Court correctly analyzed whether the FFA imposed requirements on a retroactive basis as to the CPA claim in its entirety.

Accordingly, the Superior Court properly analyzed whether the CPA applied retroactively in granting NWTS' motion for summary judgment as to the CPA claim.

2. Assuming *arguendo* that the Superior Court committed an error, such error would not render further proceedings useless

Respondents allege that the Superior Court committed error "Because Petitioners did not issue the Notice of Pre-Foreclosure Options to Respondents prior to issuing its NOTS-2, and because such failure to do so is a *per se* violation of the CPA according to the express language of

the FFA..." Respondents/Cross-Petitioners' Opposition and Motion for Discretionary Review, Pg. 12.

It is clear that the root of the Respondents' CPA allegation is that Petitioner NWTS violated the CPA through the failure to issue a NOPFO to the Respondents. Even setting aside the retroactive application of the CPA claim, analyzing the express terms of the FFA reveal that any alleged error would not render further proceedings useless, an express requirement under RAP 2.3(b)(1) for discretionary review.

ii. The CPA claim under RCW § 61.24.135(2)(c) applies to a beneficiary, not a trustee

Analyzing the clear and unambiguous language of the Deed of Trust Act reveals that it is the *beneficiary's* obligation and statutory duty to comply with the NOPFO requirement. It is undisputed that Petitioner NWTS acted as *trustee* in the Watson foreclosure.

First, the FFA amendments clearly indicate who is responsible for issuing a NOPFO: "A beneficiary or authorized agent shall make initial contact with the borrower by letter..." RCW § 61.24.031(1)(b) (emphasis added). In addition, the heading of the statute speaks for itself: "Notice of default under RCW 61.24.030(8) – Beneficiary's duties – Borrower's options." RCW § 61.24.031 (emphasis added). The statute is clear that the beneficiary is the entity responsible for sending the NOPFO.

Second, the FFA tasked the Department of Commerce with the duty of developing the language contained in the NOPFO. RCW § 61.24.033. The statute unambiguously states: "The department must develop model language for the initial contact letter to be used by beneficiaries as required under RCW 61.24.031." *Id.* § 61.24.033(1)(a) (emphasis added). Again, the heading of the FFA amendment reaffirms this duty as it is titled "Model language for initial contact letter used by beneficiaries – Rules." *Id.* (emphasis added).

While Respondents allege that the Superior Court committed error in granting summary judgment as to the CPA claim given NWTS' failure to send the NOPFO, the statute itself reveals that this error is harmless and would not render further proceedings useless given that the trustee has no duty to comply with the requirement underlying the CPA claim.

There is no genuine issue of material fact as to whether NWTS, as *trustee* under the Deed of Trust, was required to issue a NOPFO. As set forth by the Washington Supreme Court, "When the plain language is unambiguous – that is, when the statutory language admits of only one meaning – the legislative intent is apparent, and we will not construe the statute otherwise." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The CPA claim is based on the failure to "initiate contact with a borrower and exercise due diligence as required under RCW 61.24.031".

RCW § 61.24.135(2)(c). As set forth above, as a matter of law, the *beneficiary* is the party responsible for issuing a NOPFO. It is undisputed that the Respondents' CPA claim is based on the failure of NWTS, as *trustee*, to issue a NOPFO.

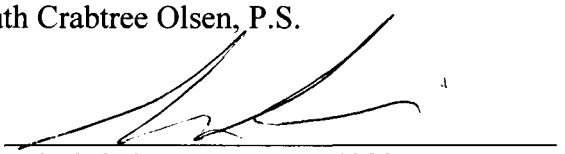
Given that NWTS has no duty to send the NOPFO, any error by the Superior Court would not render further proceedings useless as NWTS is not responsible for sending the NOPFO as a matter of law. Accordingly, discretionary review under RAP 2.3(b)(1) should be denied.

D. CONCLUSION

For the foregoing reasons, this Court should deny the Respondents' Motion for Discretionary Review as the Superior Court did not commit any obvious error that would render further proceedings useless.

Dated at Bellevue, Washington this 25th day of October, 2012.

Routh Crabtree Olsen, P.S.

By: 

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