Supreme Court Case No. 90104-0

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

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DANIEL J. WATSON and KETWARIN ONNUM

Respondents/Cross-Petitoners,

v.

NORTHWEST TRUSTEE SERVICES, INC.

Petitioner/Cross-Respondent

REPLY OF NORTHWEST TRUSTEE SERVICES, INC. ON MOTION FOR DISCRETIONARY REVIEW BY THE WASHINGTON SUPREME COURT

Submitted By:
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I. INTRODUCTION

Petitioner/Cross-Respondent Northwest Trustee Services, Inc. ("NWTS") replies as follows below to the Answer of Respondents/Cross-Petitioners Daniel Watson and Ketwarin Onnum (Answer of Watsons) on NWTS' Motion for Discretionary Review by the Washington Supreme Court.

II. REPLY ARGUMENT

A. The Court of Appeals Decision Requires NWTS to Retroactively Apply Amendments to the Deed of Trust Act and Unnecessarily Issue a Second Notice of Default.

The Watsons contends that the Court of Appeals "did not rely on a determination that the FFA amendments were retroactive." Answer of Watsons at 5. But this is simply not true.[1]

The "notice requirements" set forth in the Deed of Trust Act ("DTA") all must occur *before a Notice of Default is issued.* RCW 61.24.031(1)(a).[2] When the Court of Appeals held that "NWTS failed to comply with the FFA's notice requirements before recording its

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[1] In fact, through its affirmation of the trial court's ruling on Watson's Deed of Trust Act-related claim, the Court of Appeals essentially agreed with the finding that "the FFA is a remedial statute (with the exception of the Consumer Protection Act provisions) and, therefore, *is applied retroactively.*" *See* NWTS' Petition for Review, Apx. 1 at 10 (Order) (Emphasis added).

[2] *See also* Answer of Watsons at 9 ("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."). *But see* Answer of Watsons at 14 ("compliance with the pre-foreclosure outreach provisions of the FFA is explicitly tied to the notice of trustee's sale.").

November 2011 notice of trustee's sale," it necessarily found that the *pre-Notice of Default* loss mitigation outreach requirements were not satisfied. *See* Court of Appeals' Opinion at 7; *compare* RCW 61.24.030(9), RCW 61.24.031(1) (the latter defines the point where proper outreach occurs).

Accordingly, the only way for NWTS to have satisfied RCW 61.24.031 and comply with the Court of Appeals' reasoning would have been to restart the foreclosure process with a new Notice of Default *based on requirements in the law that changed in July 2011*. As a result, the Court of Appeals' decision clearly makes application of the July 2011 amendments retroactive vis-à-vis the Notice of Default that was lawfully issued in February 2011.

This consequence forces NWTS, and other trustees, to be unable to rely on the law as it exists when a Notice of Default is issued, because any change to the DTA after issuance would be applied *ex post facto*.

Indeed, a critical fact the Watsons overlook is that the DTA does not mandate the issuance of more than one Notice of Default. *See* RCW 61.24.030; *see also Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 910 P.2d 1308 (1996) (adding new terms to cure "was not cause for renewing the process from the beginning."); *cf.* Answer of Watsons at 19 (suggesting a Notice of Default can get "old"). In terms of timing, a Notice of Default shall be transmitted "at least thirty days before

notice of sale...." RCW 61.24.030(8). Then, the Notice of Trustee's Sale must allow up to 120 days before the auction where residential real property is involved. RCW 61.24.040(1).[3]

While the Watsons maintain that NWTS utilized a Notice of Trustee's Sale "that did not comply with the DTA," the facts show otherwise. Brief of Watson at 12. The Watsons defaulted on the subject loan in October 2010. Motion for Discretionary Review to Court of Appeals (Motion for Review) at Apx. A-2, ¶ 7. The Notice of Default and Loss Mitigation Declaration were issued on February 5, 2011. *Id.* The first Notice of Trustee's Sale was recorded on March 22, 2011. *Id.*, ¶ 8. This would have resulted in a sale *before the DTA was amended*, but the Watsons filed bankruptcy. *Id.*, ¶ 9.

After the bankruptcy case was resolved, NWTS recorded an Amended Notice of Trustee's Sale on November 8, 2011. *Id.*, ¶ 10.[4] Based on the Court of Appeals' holding, NWTS should have been prohibited from taking this proper step, allowed under RCW 61.24.130(4), and instead reversed the entire process in order to issue a second Notice of Default *because the law changed in the interim*. This is absolutely an

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[3] Or 90 days where RCW 61.24.031 does not apply. *Id.*
[4] The sale was held on December 23, 2011 as the Watsons made no attempt to restrain it from occurring. *Id.*, ¶ 12.

improper retroactive application of statutory amendments, and the Court of Appeals erred in reaching such an outcome.

B. Contrary to The Watsons' Argument, the July 2011 Amendments Did Create New Substantive Rights and Should Not Have Been Applied Retroactively on Watson's CPA Claim.

The Watsons state that "the FFA did not establish a new cause of action that amounts to the addition of a new substantive right." Answer of Watsons at 13.[5] But this is also untrue.

Before July 2011, there was no Consumer Protection Act ("CPA") claim based on non-compliance with the loss mitigation outreach requirements found in RCW 61.24.031 – the very same requirements which the Court of Appeals found NWTS should have gone back in time to comply with. *See* Court of Appeals' Opinion at 7.

The issue of statutory amendments creating a new substantive right was most recently addressed by the Court of Appeals, Division Three in *Houk v. Best Dev. & Const. Co., Inc.*, 322 P.3d 29 (2014), *pub. ordered.* *Houk* analyzed a statutory change where, previously, "no requirement existed" for certain documentation to trigger a statute of limitations. *Id.* at 31. The Court observed, "A statute which provides a claimant with the right to proceed against persons previously outside the scope of the statute

[5] The question is whether a "substantive right" is created, not whether all the elements of a cause of action are created *per se*.

deals with a substantive right, and therefore applies prospectively only." *Id.* at 32, *quoting Dep't of Ret. Sys. v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994).

Similarly, the July 2011 DTA amendments which created a "right to proceed against persons previously outside the scope of the statute" through a CPA claim based on RCW 61.24.135, should not be given retroactive effect. The trial court agreed with NWTS' argument on this point, ruling "the FFA is not retroactive with respect to the Consumer Protection Act claim," but the Court of Appeals erroneously disagreed, stating "we also conclude that the FFA provisions addressing the CPA apply." Court of Appeals' Opinion at 8.

The Watsons incorrectly assert that the CPA claim "was a pre-existing cause of action." Answer of Watsons at 13. Because the requirements of RCW 61.24.031 necessarily relate to outreach occurring before the *February 2011* Notice of Default, the Court of Appeals should not have allowed NWTS to face CPA liability pursuant to a law that did not exist until *July 2011*.

The result of the Court of Appeals' ruling is the impermissible creation of new legal requirements, *i.e.*, a second or subsequent Notice of Default, which do not exist in the DTA. *Cf. Spokane Methodist Homes, Inc. v. Dep't of Labor & Indus.*, 81 Wn.2d 283, 288, 501 P.2d 589, 592

(1972), *citing Anderson v. City of Seattle*, 78 Wn.2d 201, 471 P.2d 87 (1970) ("[i]t is not the prerogative of the courts to amend the acts of the legislature.").

C. The Watsons' Right to Mediation was Not "Severely Impaired," But Rather Expanded, When the DTA was Amended.

The Watsons claim that NWTS should have notified them of mediation rights pursuant to RCW 61.24.163 "without having to wait for another notice of default or the notice of trustee's sale." Brief of Watsons at 15.

But again, there is absolutely no statutory requirement for "another notice of default" based on any reason before a Notice of Trustee's Sale is recorded when the original Notice of Default was proper at the time of its issuance. Instead, the Watsons received an Amended Notice of Trustee's Sale in accordance with RCW 61.24.130(4), which was predicated on the lawful Notice of Default issued in February 2011 and the Watsons' bankruptcy filing.

Once RCW 61.24.165(2) came into effect, any borrower with a pre-July 22, 2011 Notice of Default could elect mediation at any time up to the day of sale. Notably, *the Legislature recognized the validity of pre-July 22, 2011 notices of default* when enacting this statute, because the

Legislature permitted those notices to stand – while expanding the timeframe for borrowers to elect mediation.

The Watsons basically assert that, without NWTS rolling back the foreclosure process and issuing a second Notice of Default, they would "never know about the FFA mediation or other foreclosure options" that came into being after that Notice. Brief of Watsons at 19. But the Watsons' lack of knowledge about mediation options, or the fact they were duped into paying the National Legal Help Center, Inc. for no real assistance, should not ascribe liability onto NWTS simply by virtue of following the DTA's proscribed steps. *Accord State v. Reed,* 84 Wn. App. 379, 384, 928 P.2d 469 (1997), *citing State v. Patterson,* 37 Wn. App. 275, 282, 679 P.2d 416 (1984) ("ignorance of the law is no excuse.").

The Watsons did not "lose the right to participate in the FFA mediation process" – which could have been exercised up to the sale date – because NWTS recorded the Amended Notice of Sale; to the contrary, they failed to act because they unfortunately relied on a California scam that promised to offer guidance but ended up just taking the Watsons' money. *See* Compl., ¶¶ 3.9, 3.10. The Watsons' ability to request mediation existed whether they knew it or not, and no matter what was contained in the properly-recorded Amended Notice of Trustee's Sale.

D. The Court of Appeals' Decision Not Only Renders Further Proceedings Useless, But it Gives Rise to a Dangerous Precedent.

The Watsons state that the Court of Appeals "did not commit an obvious error which would render further proceedings useless...." Brief of Watsons at 21. But the effect of the appellate decision would be to remand this case with direction that NWTS should have issued a new Notice of Default; this reality cannot be cured because the sale has already occurred and RCW 61.24.127(2)(c) prohibits unsettling its finality.

Therefore, NWTS would be placed in the position of automatic liability for its supposed non-compliance with the DTA and face "damages to compensate [the Watsons] for the loss of equity they suffered...." Brief of Watsons at 12. Further proceedings would be completely useless under this circumstance.

Moreover, the purpose of the FFA was, in relevant part, for "homeowners and *beneficiaries* to communicate with each other to reach a resolution...." *Bain v. Metropolitan Mtg. Co.*, 175 Wn.2d 83, 103, 285 P.3d 34 (2012), *quoting* Laws of 2011, Ch. 58 § 1 (emphasis added). Trustees like NWTS are not implicated in the FFA, and do not participate in the mediation process. *Cf.* Brief of Watsons at 22. Yet, under the Court of Appeals' decision, trustees would be subject to strict liability because of

statutory amendments concerning the FFA which are not retroactive on their face, curative, or remedial.

Additional review is necessary in order to ensure that the DTA is interpreted in a manner that satisfies the Act's core goals. *See Albice v. Premier Mtg.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). Strict *construction* of the DTA should not mean strict *liability* under the DTA or CPA due to NWTS' reliance on the operative law when the Notice of Default was issued. *Cf.* Brief of Watsons at 20, *citing Albice v. Premier Mtg., supra.*

III. CONCLUSION

The DTA does not require the re-issuance of a new Notice of Default when an Amended Notice of Trustee's Sale is later recorded after a bankruptcy. *Compare* RCW 61.24.030, RCW 61.24.130(4).

The Court of Appeals' finding that "NWTS failed to comply with the FFA's notice requirements before recording" an Amended Notice of Sale is contrary to law, and retroactively imposes the requirements of RCW 61.24.031 on lenders or trustees who properly issued notices of default in reliance on the law as it existed at that time.[6]

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[6] In fact, the Court of Appeals' holding affects not just trustees, but many other business entities as well since a Notice of Default can be issued by the beneficiary, its authorized agent, *or* a trustee. RCW 61.24.031(1)(a).

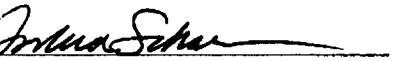
In other words, while a trustee must have proof of loss mitigation outreach efforts before recording a notice of *sale*, the actual outreach itself occurs before the notice of *default*. *Compare* RCW 61.24.030(9), RCW 61.24.031(1). Thus, when NWTS had proof of CitiMortgage's outreach when it recorded the Amended Notice of Trustee's Sale, NWTS complied with the DTA because said efforts were properly accomplished in accordance with the DTA before the July 2011 amendments took effect.

The Legislature fully recognized that pre-July 22, 2011 notices of default were still valid after the statutory amendments, because they allowed borrowers to request mediation *based on those notices*. RCW 61.24.165(2).

For these reasons, NWTS respectfully reiterates its request for the Washington Supreme Court to accept discretionary review of the Court of Appeals' decision, as well as stay publication thereof during the pendency of further appellate proceedings.

DATED this 9th day of May, 2014.

RCO LEGAL, P.S.

By: 
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Of Attorneys for Petitioner/Cross-Respondent Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was 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 13, 2014, I caused a copy of **Reply of Northwest Trustee Services, Inc. on Motion for Discretionary Review by the Washington Supreme Court** to be served to the following in the manner noted below:

Michelle K. McNeill David I. Goldstein Skyline Law Group, PLLC 2155 112th Ave. NE, Suite 290 Bellevue, WA 98004 Attorneys for Appellants	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Federal Express Overnight Delivery [ ] Facsimile

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

Signed this 13th day of May, 2014.

Kristine Stephan, Paralegal

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From: OFFICE RECEPTIONIST, CLERK
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From: Kristi Stephan [mailto:kstephan@rcolegal.com]
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Watson and Onnum (Respondents/Cross-Petitioners) v. Northwest Trustee Services, Inc. (Petitioner/Cross-Respondent)
Case No. 90104-0
Filed by: Joshua Schaer
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Please file the attached **Reply of Northwest Trustee Services, Inc. on Motion for Discretionary Review by the Washington Supreme Court**

If there are any questions, please contact us. Thank you.

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