Case No. 93871-7

THE SUPREME COURT OF THE STATE OF WASHINGTON

RESTORE EQUITY, LLC,

Appellant,

vs.

BANK OF NEW YORK MELLON,

Respondent.

ANSWER TO PETITION FOR REVIEW BY RESPONDENT BANK OF NEW YORK MELLON

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I. ANSWER

A. Facts.

In 2003, Ronald and Debra Crowder took out a $126,000.00 mortgage loan secured by a deed of trust against their property. The loan was subsequently sold into a securitized mortgage trust with Bank of New York Mellon ("BONY") acting as trustee for the trust. In 2009, the Crowders stopped making their mortgage payments. Failure to timely make mortgage payments was an event of default triggering the deed of trust trustee's power of sale.

In preparation for a non-judicial foreclosure, the deed of trust trustee in April of 2010 obtained a title report. In October of 2010, after the title report had issued, the Crowders quitclaimed the property (without obtaining the required permission from BONY) to appellant Restore Equity. The foreclosing trustee did not know about the deed because it was recorded after the title report was issued, and the trustee did not mail a copy of the Notice of Sale to

Restore Equity.

As scheduled, on September 30, 2011, the trustee auctioned the property for sale. The property reverted to BONY at sale by way of credit bid. After the sale, BONY and the trustee discovered the deed and the missed mailing to Restore Equity.

What followed was litigation over the effect of the missed-mailing to Restore Equity and the remedies available to the parties. The superior court in the underlying action held that reforeclosure was appropriate under *United States Bank of Wash. v. Hursey*, 116 Wn.2d 522 (Wash. 1991) (reforeclosure is proper where a junior lienholder has been mistakenly omitted from a foreclosure action). The superior court was affirmed by the Court of Appeals for Division II in *Restore Equity v. Bank of N.Y.*, 2016 Wash. App. LEXIS 2587 (Wash. Ct. App. Oct. 25, 2016).

For reasons discussed below, Restore Equity has failed to set forth grounds for this court to accept review of the appellate court decision. Review should be declined.

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A. Re-Foreclosure is Appropriate under *Hursey*.

It has long been the rule under *Hursey* that reforeclosure is appropriate where a junior interest is mistakenly omitted from the foreclosure action, as the reforeclosure is a fair remedy which places the parties in the position they would have been had the omitted party been joined. *United States Bank of Wash. v. Hursey*, 116 Wn.2d 522, 526-28 (Wash. 1991). As acknowledged by the Court of Appeals for Division II, Restore Equity's attempts to distinguish *Hursey* are not persuasive.

Restore Equity primarily argues that *Hursey* should not apply because BONY was responsible for the missed mailing, whereas the foreclosing lienholder in *Hursey* was not. As an initial matter, this assertion is factually incorrect. It was the trustee, not BONY, who was responsible for advancing the foreclosure and who missed the mailing. Second, as acknowledged by the Court of Appeals, *Hursey* did not impose a general due diligence requirement on the foreclosing mortgagee or trustee or limit its holding to apply only to cases where the foreclosing mortgagee or

trustee was not at fault when it failed to join a junior lienholder. *Restore Equity v. Bank of N.Y.*, 2016 Wash. App. LEXIS 2587, 8-9 (Wash. Ct. App. Oct. 25, 2016) (citing *United States Bank of Wash. v. Hursey*, 116 Wn.2d 522, 524 (Wash. 1991)). The *Hursey* Court was not focused on the reason for the mistaken omission of a junior interest, but instead on the fact that reforeclosure was a "fair remedy" which put the parties back in the position they would have been had the mistake not been made without prejudicing anyone's rights. *Hursey*, 116 Wn.2d at 526-528.

B. ***Sixty-01 Ass'n of Apt. Owners v. Parsons.***

Restore Equity contends the *Hursey* decision was not followed by the Washington Supreme Court in *Sixty-01 Ass'n of Apt. Owners v. Parsons*, 181 Wn.2d 316 (Wash. 2014), and that *Sixty-01* supports the proposition that a party's lack of due diligence is not a "mistake" which warrants a reforeclosure. Restore Equity is wrong. *Sixty-01* does not mention reforeclosure, and importantly, does not overturn or even discuss *Hursey*. A review of *Sixty-01* establishes that Restore Equity's argument,

which is raised for the first lime on appeal, does not present a basis to overturn the trial court's ruling.

The issue addressed in *Sixty-01* is whether a successful purchaser at a sheriff's sale has a right to withdraw his or her bid prior to confirmation or if a judgment creditor is entitled to confirmation of the sale absent substantial irregularities, even if the purchaser no longer wishes to purchase the property. *Sixty-01 Ass 'n of Apartment Owners v. Parsons*, 181 Wn.2d 316, 318 (Wash. 2014). The Washington Supreme Court held that a third-party purchaser does not have a unilateral right to withdraw a successful bid before confirmation. *Id.*

Sixty-01 is distinguishable as it focuses on whether a third party purchaser can withdraw a bid prior to confirmation of a sheriff' sale. The purchaser sought to withdraw his bid after learning of liens encumbering the property, stating he would have never bid on the properties if he knew it was encumbered. *Id.* at 320-321.

In contrast, this case concerns whether BONY can

reforeclose the deed of trust due to the trustee's missed-mailing. Unlike *Sixty-01*, where a bidder is seeking to unwind a sheriff's sale so he can absolve himself from a bad business decision, the reforeclosure preserves the status quo. There was no omitted party to the foreclosure in *Sixty-01*, a central issue in this present proceeding.

C. *Hursey* Does Not Conflict With the Deed of Trust Act.

Restore Equity also argues that re-foreclosure under *Hursey* is inconsistent with the Deed of Trust Act (the "DTA") because under the DTA trustee sales are final and the DTA does not expressly provide for re-foreclosure. This argument is flawed for multiple reasons.

First, "final" trustee deeds may be voided by judicial decree. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 568 (2012). The DTA does not restrict courts from doing so.

Second, a trustee's statutory ability to unilaterally rescind within eleven days of sale under RCW 61.24.050(2) (which was

not even in-effect when the trustee sale in this case occurred) does not impair or restrict a court's ability to rescind the sale after the eleven day window has passed. The superior court in this case had the ability to void the sale so it could be re-done to include the mistakenly omitted junior interest-holder, consistent with *Hursey*.

Finally, as noted in BONY's appellate brief, this argument was not raised by Restore Equity in the superior court action, and the Court of Appels did not address this argument in its opinion. Thus, this argument is not properly before the court for review.

D. <u>Reforeclosure Does Not Prejudice Anyone's Rights.</u>

Restore Equity is not prejudiced in the slightest by a re-foreclosure, nor is anyone else. Restore Equity took a deed to the encumbered property in pre-foreclosure and never made any payments on the secured debt. Restore Equity is using the trustee's missed-mailing to try and get an immense un-earned windfall in the form of a free house at the expense of the mortgage holder.

Furthermore, Restore Equity's broad appeal to the "stability of land titles" is misplaced. This is not a "stability of land title"

case. A reforeclosure to include the mistakenly omitted interest will occur here without any detriment to the "stability of land title" or prejudice to any of the parties, as they will retain all rights they had before. Simply put, "stability of land title" is not implicated by this case.

II. CONCLUSION

The Court of Appeals correctly affirmed the judgment of the superior court. Restore Equity has failed to establish grounds for review. Review should be denied.

Dated: December 26, 2016

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