97897-2

Case No. 78044-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

U.S. BANK NATIONAL ASSOCIATION,

Appellant,

v.

HENRY MILLER,

Appellee.

PETITION FOR REVIEW TO THE WASHINGTON SUPREME COURT

Melissa A. Huelsman, WSBA #30935
Attorney for Respondent, Henry Miller
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 606
Seattle, WA 98104
206-447-0103

I. IDENTITY OF PETITIONERS

Petitioner Henry Miller is the former homeowner whose non-judicial foreclosure was not initiated nor completed by a trustee as authorized by the Deed of Trust Act ("DTA"), nor was it authorized by the beneficiary as defined under the DTA.

II. CIITATION TO COURT OF APPEALS DECISION

Mr. Miller seeks review of the decision of Division I of the Court of Appeals in this case (hereinafter the "Decision"), Case No. 78044-1-I. The unpublished Opinion was filed on October 28, 2019.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals properly consider the "facts" at issue since the motion was brought as a CR 12(b)(6) Motion to Dismiss and was converted to a Motion for Summary Judgment by the trial court?

2. Could the Appellate Court make the requisite factual determination sufficient to decide whether waiver applies at this stage?

IV. STATEMENT OF THE CASE

Summary of the relevant facts as pled in the Complaint:[1]

Mr. Miller and his family lived in the home for a number of years. He obtained a refinance on June 13, 2008 from U.S. Bank, but shortly after

[1] Both courts were required to rely upon the facts as pled under CR 12(b)(6), even though the trial court considered it a summary judgment motion at the oral argument.

he obtained the loan, he began experiencing financial problems with his construction business. CP 48-62. He applied for and eventually obtained a loan modification on October 1, 2010. CP 69-77.

After obtaining and paying on the loan modification for several months, Mr. Miller was seriously injured and could not work, so he fell behind again. By 2013, he was working with U.S. Bank to obtain another loan modification but received a letter in September from it that indicated he allegedly found something wrong with his loan application. CP 79-80. Mr. Miller vehemently denied any wrongdoing in obtaining the loan. CP 40.

The September 2013 U.S. Bank letter indicated that the loan was "referred to [its] legal counsel", Asset, on May 17, 2012 to initiate foreclosure. CP 79-80. But attempts at foreclosure had begun by Asset long before. Asset issued a Notice of Trustee's Sale ("NOTS") on **July 31, 2009** indicating that it served Mr. Miller by mail and a posting at the property with a Notice of Default ("NOD") on **July 1, 2009**. Mr. Miller was uncertain if that NOD was ever received, but certainly Asset and U.S. Bank were rushing as fast as possible to foreclose on his home, prior to his entry into the Loan Modification Agreement. The NOTS was signed by an Asset employee as a purported "agent" of Chicago Title Company of Washington, LSI Division ("Chicago Title"). CP 82-85. This alleged agency relationship was just the first instance of Asset acting as the foreclosing trustee, in contravention of

Washington law. RCW 61.24.010(1). *Id.*

U.S. Bank executed an Appointment of Successor Trustee on **July 1, 2009** purporting to appoint Chicago Title as the successor trustee "c/o Asset Foreclosure Services, Inc." at its California address, which was recorded in King County on **August 3, 2009**. CP 132-133. Notably, the Appointment was not recorded until **after** the NOTS was signed by Asset (on **July 31, 2009**) which means that no substitute trustee had been appointed when the NOTS was issued.a An Appointment of Successor Trustee only becomes effective upon recording. RCW 61.24.010(2). This foreclosure sale did not occur and a Notice of Discontinuance of Trustee's Sale was signed by **Lilian Solano** on **February 18, 2011** as "Trustee Sale Officer" for Asset as the "agent" for Chicago Title, recorded on **February 22, 2011**. CP 135-136.

In spite of U.S. Bank's assertions to Mr. Miller in the **September 13, 2013** letter that it had referred the foreclosure to Asset, a year earlier, on **August 14, 2012**, an employee of U.S. Bank signed another Appointment of Successor Trustee wherein it purported to appoint Peak as the successor trustee and it was recorded in King County on **August 17, 2012**, but was returnable to Asset at its California address. At all times since 2009, Asset has been the entity who was acting as the foreclosing trustee, in spite of its non-compliance with the DTA requirements. RCW 61.24.010(1); 61.24.040(f). CP 138-139. Asset was not compliant because it was not a

Washington corporation with an officer residing in the State of Washington, and it did not have an address in the State of Washington with a telephone number answerable at that address. RCW 61.24.010(1); RCW 61.24.040.

Asset issued a NOD signed on **May 22, 2012** by its employee "as Agent for the Trustee and/or Agent for the Beneficiary". It did not have a completed section required by RCW 61.24.031. The reinstatement amount listed therein was payable to Asset in California. CP 87-94. The NOD also read that the beneficial interest in Mr. Miller's loan was either "presently held by or will be assigned to U.S. Bank", which means that at the time that the NOD was issued, it was being issued on behalf of an entity that may or may not have had the right to demand initiation of a non-judicial foreclosure proceeding. CP 87. But that did not stop any of the Defendants from proceeding with the attempted non-judicial foreclosure. Consistent with multiple DTA violations, the NOD did not have statutorily required language identifying the owner of the loan and the servicer, as well as their addresses. RCW 61.24.030. CP 87-94.

On **July 9, 2012**, a U.S. Bank employee signed an Assignment of Deed of Trust as though she were an officer of MERS which purported to assign the beneficial interest in Mr. Miller's Deed of Trust to U.S. Bank, the original lender, recorded in King County on **August 17, 2012.** CP 141. On **August 16, 2012,** the same **Lilian Solano (Asset employee),** now listed as

the "Trustee Sale Officer" for Peak signed a new NOTS and notarized in California. In the notarization information, Ms. Solano is identified as a "Trustee Sale Officer of ASSET FORECLOSURE SERVICES, INC.". The well pled facts made clear that Asset was foreclosing on Mr. Miller's home, using Peak's name, to give the false impression that it was in compliance with Washington law. CP 96-99; 138; 150. That foreclosure sale also did not happen, although it was repeatedly continued. CP 41.

Mr. Miller made complaints about the actions of U.S. Bank with regard to its claims of impropriety related to his loan application to the Consumer Financial Protection Bureau and to the Washington State Attorney General. During a conversation with one of the AG's investigators he mentioned Peak and its involvement in the foreclosure operating out of California and apparently that issue was sent to U.S. Bank as part of the complaint. In its response dated **May 8, 2013**, U.S. Bank admitted that its "legal counsel conducting the foreclosure", **Asset**, was in California, but the "trustee charged with conducting the trustee sale" was Peak. CP 101-102. U.S. Bank went on to make excuses for not responding to Mr. Miller by making vague references to the "fraud" investigation that allegedly precluded modification. *Id.*

Before the **May 8, 2013** letter from U.S. Bank had even been received by Mr. Miller, another NOTS was issued under the signature of

Lilian Solano, "Trustee Sale Officer" using an address at 506 Second Avenue, 26th Floor, Seattle, WA 98104. That address is NOT the address for Peak. It is the address for the law firm that represents Peak in litigation. CP 107. Ms. Solano again signed the document in California because that is where she was located and where Asset actually conducts business. The return address on the NOTS listed Peak as the entity to whom it was returned, but used the California Asset address. The NOTS was recorded in King County on **May 10, 2013** and the sale was scheduled for **September 13, 2013**. CP 104-107.

Mr. Miller continued to try to get a loan modification, including using the FFA mediation process, to no avail. CP 42-43. Another non-judicial foreclosure was started on **February 11, 2014** by an NOTS signed by **Lilian Solano**, Asset employee, as though she was a Trustee Sale Officer for Peak. CP 114-117. The NOTS is returnable to Asset's address and was recorded in King County on **February 14, 2014**, with a sale date of **June 27, 2014.** This NOTS was predicated upon a NOD that was allegedly issued on **January 10, 2014**. Because Mr. Miller was engaged in continued efforts to obtain a loan modification, he believed that the foreclosure would be continued until there was a final decision, just as had happened before. CP 43. A foreclosure auction was held on **October 10, 2014**. A Trustee's Deed Upon Sale was executed on **October 20, 2014** by Kelli Espinoza, alleged

"EVP Default Operations" of Peak in Los Angeles, California. (Ms. Espinoza also notarized Ms. Solano's signatures.) Title was transferred to U.S. Bank and recorded in King County, California on **October 24, 2014**. CP 143-144.

Mr. Miller sought out legal advice from David Leen and he wrote some letters to the Defendants in 2014 and into 2015, threatening legal action if they did not rescind the foreclosure sale. CP 44. Unfortunately for Mr. Miller, Mr. Leen did not file suit in a timely fashion and he did not learn of the deadline for remedies under RCW 61.24.127 (two years) until after that deadline passed. *Id.*

Motion Practice

This Court must also consider, as the Court of Appeals did not, the nature and scope of the Motion practice. Peak and Asset filed a Motion to Dismiss and the only evidence of adherence to Washington's DTA requirements[2] was Secretary of State records re: Peak using a lawyer from a separate law firm as its registered agent and as an alleged "governor".[3] Secretary of State records made clear that Asset is not a Washington corporation. It ignored entirely the rest of the information about Peak and Asset in the Facts portion of the Complaint, which the trial court and

[2] RCW 61.24.010(1) – "The trustee of a deed of trust under this chapter shall be: (a) Any domestic corporation or domestic limited liability corporation incorporated under Title 23B, 25, *30, 31, 32 or 33 RCW of which at least one officer is a Washington resident;"
[3] Mr. Lawson's firm and personal information was provided.

Court of Appeals were required to accept as true under CR 12(b)(6).[4]

U.S. Bank joined the Motion and **exclusively** argued that *res judicata* prohibited Mr. Miller's claims because he raised some of the same issues in an eviction proceeding. It reiterated that position in its Reply and the same is true of Peak and Asset. All of Mr. Miller's well pled facts were ignored in Defendants' briefing and by the Court of Appeals. Op. 2-3.[5] Those well pled facts and the documents cited therein supported Mr. Miller's assertion that Asset could not act as a "trustee" under Washington law and that Peak did nothing more than call the sale. RCW 61.24.010(1).

Mr. Miller opposed those motions by filing two Responses (CP 264-289 and 290-295) and referenced the Facts in his Complaint (CP 1-18), which must be construed in his favor. *Haberman v. WPPSS,* 109 Wash.2d 107, 120, 744 P.2d 1032 (1987). "Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support a plaintiff's claim." *Bravo v. The Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

Because the Defendants had done so in their Motion and Joinder

[4] Mr. Miller presented documents referenced in his Complaint which were admissible under CR 12(b)(6).

[5] The COA only referred to **US Bank's** response to the Atty. Gen. complaint in its Facts citation, ignoring entirely Mr. Miller's factual allegations and the actual contents of the letter, wherein it admitted Asset was "legal counsel conducting the foreclosure" and Peak was the "trustee charged with conducting the foreclosure sale."

(CP 25-258, fn. 1-11, 15, 16 and CP 259-263), Mr. Miller referenced the documents identified in his Complaint, which were provided to the Court. CP 38-126 and 127-154. Ms. Huelsman also submitted referenced documents available in the public record. CP 296-318. Both Defendants filed a Reply, but U.S. Bank's Reply **only** argued against the relevance of binding authority directly on point which contravened its arguments about the import of the unlawful detainer proceeding. CP 319-323. U.S. Bank absolutely refused to address the relevant case law cited by Mr. Miller relating to the foreclosure sale being void. *Id.* Similarly, Peak asserted only that RCW 61.24.127 prohibited Mr. Miller's claims and refused to address the relevant case law. CP 324-326. Defendants made arguments on appeal, which were accepted by the COA, they did not make below.

At hearing on January 25, 2018, Judge Ruhl first addressed the problems with the Defendants' position that the motion was properly a motion to dismiss, as well as the fact that neither of the Defendants' counsel had addressed the substantive issues raised by Mr. Miller in his Response. TR pp. 4-12. The Court went back and forth with Mr. Wagner, counsel for U.S. Bank, in particular, about the inconsistencies in his position as to the form of the motions. Defendants were vehemently opposed to Judge Ruhl treating the motions as motions for summary judgment. *Id.* Defendants ultimately agreed they would accept all

reasonable assertions made by Mr. Miller in the Complaint as true. The Court heard substantial oral argument and took the matter under advisement. TR pp. 13-55.

The Court issued its Order and treated the matter as a motion for summary judgment in light of the additional documents it considered when making its decision. CP 327-336. But the Court accepted Defendants' agreement, only for purposes of the motions, that Mr. Miller's factual assertions were true. CP 328. Judge Ruhl's Order indicated he had to decide whether or not all four of Mr. Miller's claims were prohibited by the statute of limitations. CP 329, 2:1-10. The Court determined that the "void-sale" claim could not be dismissed because there was no case law directly on point, which properly analyzed the application of RCW 61.24.127 to circumstances such as those presented in this case. Further, the Court held that no claims could be dismissed at this juncture based upon Defendants' arguments about the application of the doctrine of *res judicata*. CP 333-334 The remainder of Mr. Miller's Consumer Protection Act ("CPA") claims were dismissed because they were barred by the statute of limitations in RCW 61.24.127. *Id.*

The COA completely ignored that the Defendants **stipulated** to Mr. Miller's factual assertions, including that neither Asset nor Peak could act as a foreclosing trustee under Washington law. RCW 61.24.010(1). TR

pp. 13-55. Op. 1-5.[6]

Even in briefing, Asset and Peak stipulated that they "lacked authority to serve as Trustee under RCW 61.24.010. CP 328, 2:20-24, RP 12:12-23." Op. Brief, 9. This is consistent with the analysis under CR 12(b)(6). Yet, they and U.S. Bank also made arguments challenging the stipulated facts, which would only apply if the case were being analyzed under the summary judgment standard. *Id.* CR 56. The COA Opinion has allowed the Defendants to have it both ways, while ignoring the stipulated facts which do not support its conclusion. Again, it ignores whether or not the foreclosure was void under Washington law because it was conducted by an entity that could not act as a foreclosing trustee. RCW 61.24.010(1).

V. ARGUMENT

While the COA properly rejected the Appellants' argument that Mr. Miller was automatically precluded from arguing that the foreclosure sale was void *ab initio*. Op. 6-11. Its analysis of the case law regarding the interplay between the restrictions of RCW 61.24.127 and the waiver doctrine as clearly articulated in *Plein v. Lackey,* 149 Wn.2d 214, 67 P.3d 1061 (2003) and affirmed in other decisions, makes sense. It is consistent with Supreme Court guidance on how to analyze the DTA and its intention to protect both property owners and beneficiaries in a process which is

[6] There is **zero** mention of that stipulation in the Opinion and no analysis whatsoever of the role of Asset and Peak and their stipulated non-compliance with the DTA.

outside the court system. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986); *Bain v. Metropolitan Mrtg. Group,* 175 Wn.2d 83, 98-110 (2012).

1. Mr. Miller's Actions were Reasonable in Light of the History of Repeatedly Discontinued Foreclosures.

The first place where the COA failed in this case, which will likely have an impact upon other future litigants, is in its refusal to accept as true the well pled Facts in the Complaint, which it was required to do under these circumstances, wherein Mr. Miller made clear that he relied upon the past actions of the Defendants is continuing and then discontinuing previously noticed non-judicial foreclosures because he was engaged in a loan modification review process. CP 42-43. He was not merely "thinking" that the foreclosure would not happen without plenty of experience in that being precisely what had happened in the past. *Id.*; Op. 11. There are many other homeowners who face these repeated attempts at non-judicial foreclosure that are continued, stopped and then started again, and if they are required to initiate litigation every single time in order to preserve their rights, the courts will be flooded with litigation that will be started, dismissed and a new case started again. And over again. This is not a reasonable standard, especially since the COA did not even address the prior discontinued efforts in its analysis. *Id.*

2. The Opinion Ignores Entirely Whether There was a Compliant Trustee Who Could Foreclose Under Washington Law.

The COA's focus was exclusively on what Mr. Miller allegedly knew about Peak and Asset (that they were operating out of California) and contends that Washington law supports the position that because he knew of that fact, he therefore had knowledge that this was improper in Washington, which is the **only** reason that fact would matter in any way. The Court relied upon *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d. 761, 733 P.2d 530 (1987) and *Adcox v. Children's Orthodpedic Hosp.*, 123 Wn.2d. 15, 864 P.2d 921 (1993) in support of its position, but these cases bear no relationship whatsoever to Mr. Miller's knowledge and claims made in this case. The claims related to whether Peak and Asset could act as trustees under Washington are entirely related to knowledge of the relevant statutes. The *Reichelt* and *Adcox* cases involved medical issues and plaintiffs' knowledge that they were ill (or likely to be ill in the future) and/or received inadequate medical treatment. It makes sense in those contexts to ask that plaintiffs, who have reason to know (and did know in those cases) that there they had already been harmed and likely to be harmed further in the future to pursue their claims in a timely fashion given that knowledge. Here, Mr. Miller would not have reason to know nor would any layperson that Asset and Peak operating out of California

was improper under Washington law. Op. 11-13.

The COA then, in effect, rejected this Court's analysis in *Albice v. Premier Mortg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012) as to whether a non-judicial foreclosure sale can be "valid" if it is done in express contravention of the requirements of the DTA. Irrespective of the facts of *Albice* (which are actually somewhat analogous to Mr. Miller's in that he reasonably believed that the sale would be continued due to his actions), this Court held that where parties purporting to conduct a nonjudicial foreclosure sale of residential real property fail to conform to the requirements of the DTA, their actions are without legal effect and the sale is invalid. "Without statutory authority, any action taken is invalid." *Id.* at 568. Here, because Peak and Asset stipulated that they were not authorized to act as foreclosing trustees under Washington law, irrespective of any waiver analysis, this Court cannot let the foreclosure sale stand. *See also, Rucker v. Novastar, Inc.*, 177 Wn.App. 1, 16-17 (2013) ("[T]he vacation of a foreclosure sale *is required* where a trustee has conducted the sale without statutory authority"); *id*. ("[i]f the failure of a properly-appointed trustee to follow statutory procedures can result in the vacation of a sale, *this remedy is equally appropriate where an entity conducts a trustee sale in the complete absence of authority*"). (Emphasis added). "Such actions by the improperly appointed trustee, we

have explained, constitute 'material violations of the DTA.'" *Rucker,* 177 Wn.App. 1, 15-17, (citing to *Walker*); *Barrus v. ReconTrust Co.*, No. 11-1578-KAO, Dkt. No. 114, *13-15 (Bkrtcy. W.D. Wash., May 6, 2013).

The COA in this case acknowledged that: "The *Albice* court declined to apply waiver because the borrowers did not have presale knowledge of a defense to foreclosure. **The court did suggest that courts may also decline to apply waiver where doing so would not serve the goals of the DTA**- for example, when a borrower does not have an adequate opportunity to prevent wrongful foreclosure. *Albice*, 174 Wn.2d at 570." Op. 14 (emphasis added). This Court, when noting that applying the waiver analysis may sometimes interfere with serving the goals of the DTA and that this approach should be disfavored. *Id.* This is such an instance.

The actions of Asset dating back to 2009 make clear that it knows what it is doing. It is acting intentionally to evade the requirements of the DTA (RCW 61.24.010(1)) and continues to do so by using Peak and a sham "officer" appointment of some outside attorney. There is no case law which supports the notion that an illegally conducted non-judicial foreclosure by two entities who are entirely without authority to do so under Washington law. It is particularly true in this case given its posture and history, and the fact that Mr. Miller was deprived of any opportunity

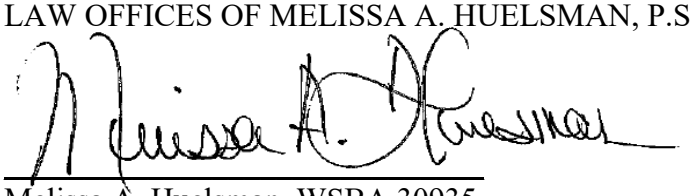
to conduct discovery or otherwise present more evidence that would ordinarily be available before he faced a motion for summary judgment.

V. CONCLUSION

For these reasons, Mr. Miller maintains that it is imperative for this Court to review the Court of Appeal's decision in this case as it undercuts and in important aspects of it is inconsistent with this Court's decisions that seek to make certain that the non-judicial foreclosure process continues to be adhered to in Washington state.

Respectfully submitted this November 26, 2019

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.



Melissa A. Huelsman, WSBA 30935
Attorney for Respondent Henry Miller
705 Second Avenue, Suite 601
Seattle, WA 98104
Telephone: (206) 447-0103
Facsimile: (206) 673-8220
Email: mhuelsman@predatorylendinglaw.com

CERTIFICATE OF SERVICE

I declare under penalty of perjury of laws of the state of Washington that on August 27, 2018, I caused to be served in the manner indicated below a true and accurate copy of the foregoing document upon the following:

Aaron A. Wagner, WSBA, No. 51905 LOCKE LORD, LLP Terminus 200, Suite 1200 3333 Piedmont Road, NE Atlanta, Georgia 30305 Phone: (404) 870-4681 Fax: (404) 806-5620 Email: aaron.wagner@lockelord.com Attorney for Appellant U.S. Bank National Association	[X] By Email [ ] Legal Messenger [By Facsimile [ ] By Air Courier
Kimberly Hood, WSBA No. 42903 ALDRIDGE PITE, LLP 9311 SE 36th Street, #100 Mercer Island, Washington 98164 Phone: (206) 707-9603 Fax: (206) 232-2655 Email: Khood@aldridgepite.com Attorney for Asset Foreclosure Services, Inc. and Peak Foreclosure Services of Washington, Inc.	[X] By Email [ ] Legal Messenger [By Facsimile [ ] By Air Courier

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

Dated November 26, 2019, at Seattle, Washington.

Tony Dondero, Paralegal

FILED
10/28/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HENRY MILLER, Respondent, v. U.S. BANK, N.A.; ASSET FORECLOSURE SERVICES, INC.; PEAK FORECLOSURE SERVICES OF WASHINGTON, INC., Appellants, and DOE DEFENDANTS 1-20, Defendants.	No. 78044-1-I DIVISION ONE UNPUBLISHED OPINION FILED: October 28, 2019

SMITH, J. — U.S. Bank N.A., Asset Foreclosure Services Inc., and Peak Foreclosure Services of Washington Inc. (collectively the Bank Parties) appeal from the trial court's denial of their motion to dismiss Henry Miller's claim for equitable relief to set aside a foreclosure sale. Because Miller failed to raise a genuine issue of material fact as to whether he waived that claim,[1] we reverse and remand to the trial court with instructions to enter summary judgment in favor of the Bank Parties on Miller's claim for equitable relief.

[1] The trial court converted the Bank Parties' motion to dismiss to a motion for summary judgment.

FACTS

In June 2008, Miller obtained a $393,820 home mortgage loan from U.S. Bank. In connection with the loan, Miller signed a promissory note and a deed of trust encumbering his home in Seattle. Shortly after obtaining the loan, Miller's business began to struggle, and Miller fell behind on his loan payments. In August 2009, Chicago Title Company of Washington, LSI Division, as successor trustee, recorded a notice of trustee's sale for Miller's home. That sale never occurred and in September 2009, U.S. Bank offered Miller a forbearance. In October 2010, the parties entered into a loan modification agreement.

Miller's business continued to struggle, and Miller again fell behind on his loan payments. In May 2012, Asset, as "Agent for the Trustee and/or Agent for the Beneficiary," sent Miller a notice of default. Miller responded to the notice by trying to get another loan modification. His efforts ultimately were unsuccessful.

In August 2012, Miller received a notice of trustee's sale from Peak, as successor trustee. That sale also did not occur as scheduled, though the record is not entirely clear as to why. It appears, however, that the reason may have been that Miller made a complaint to the Washington State Attorney General's Office (AGO), which made an inquiry of U.S. Bank on Miller's behalf. Although the inquiry itself is not in the record, U.S. Bank's response indicates that Miller raised a concern that U.S. Bank's foreclosing trustee was not a domestic corporation with at least one Washington officer, as required under Washington's deeds of trust act (DTA), chapter 61.24 RCW. Specifically, U.S. Bank clarified in its letter that although its legal counsel, Asset, did reside in California, the

trustee, Peak, resides in the State of Washington.

In May 2013, Miller received another notice of trustee's sale from Peak. After receiving this notice, Miller contacted a housing counselor, who requested a foreclosure mediation. In September 2013, while the mediation process was pending, Miller also filed suit against U.S. Bank and Mortgage Electronic Registration Systems Inc. (MERS) to enjoin the foreclosure sale. Ultimately, that sale also did not occur, and Miller dismissed his lawsuit against U.S. Bank and MERS under a confidential settlement agreement.

In February 2014, Peak again issued a notice of trustee's sale, setting a sale date of June 27, 2014. The notice refers to a notice of default transmitted to Miller on January 10, 2014. Miller asserts that he is "not sure" if he received the January 2014 notice of default, and his declaration is silent as to whether he received the notice of trustee's sale. But he states that he was "unaware that the foreclosure was going to actually happen because [he] had been in regular communication with U.S. Bank about foreclosure avoidance options." The foreclosure nevertheless did occur on October 10, 2014. U.S. Bank was the successful bidder, and a trustee's deed was recorded on October 24, 2014. After he was notified that the sale had occurred, Miller contacted attorney David Leen. Leen sent a letter to U.S. Bank in November 2014, stating that he believed the sale was void for a number of reasons and demanding "that the Trustee's deed be recalled and that no efforts be taken to evict [Miller]."

In August 2015, U.S. Bank sent Miller a notice to vacate. Leen responded on Miller's behalf, again asserting that the foreclosure sale was defective.

According to Miller, "[w]hat followed was silence by U.S. Bank until late in December 2016 when [Miller] was served with a Summons and Complaint in an eviction case." On March 10, 2017, the court entered a writ of restitution against Miller and his family, requiring them to be removed from the property.

That same day, Miller filed the present lawsuit against the Bank Parties. He alleged four causes of action: (1) equitable relief to set aside the sale (void-sale claim), (2) misrepresentation, (3) breach of the duty of good faith and other DTA requirements, and (4) violation of the Washington Consumer Protection Act, chapter 19.86 RCW. Miller also moved for a preliminary injunction "to prevent the transfer of title to his home." The motion was supported by declarations from Miller and from his counsel. The record does not reflect the outcome of the motion.

In December 2017, Peak and Asset moved under CR 12(b)(6) to dismiss Miller's claims, arguing that they were time barred under RCW 61.24.127, which lists certain claims that a borrower does not waive even if he fails to bring an action to enjoin a nonjudicial foreclosure sale—but that nonetheless must be brought within the time limits set forth in that statute. U.S. Bank joined the motion and argued further that Miller's claims were barred by res judicata and collateral estoppel as a result of arguments that Miller made during the eviction proceeding. Miller opposed the Bank Parties' motion, arguing among other things that RCW 61.24.127 does not apply because Asset and Peak never had the authority to foreclose. Specifically, Miller argued that Asset (which is located in California) was the entity actually acting as the foreclosing trustee, and "was

using the sham identification of . . . Peak as the trustee to try to give the false impression" that Asset and Peak were in compliance with Washington law.

The trial court treated the Bank Parties' motion as a summary judgment motion and granted it, in part. Specifically, except for the void-sale claim, the court dismissed Miller's claims as time barred by RCW 61.24.127. The court concluded that the void-sale claim was not barred by RCW 61.24.127 because that claim was "not included among the types of claims listed in RCW 61.24.127(1)." It ruled that "[t]he void-sale claim should be allowed to proceed to trial to determine whether, after considering all of the facts and circumstances, [Miller] should be deemed to have waived his right to assert that claim" and "whether [Miller] 'promptly' brought his claim, or 'slept on his rights.'" We granted the Bank Parties' motion for discretionary review of the court's decision not to dismiss the void-sale claim.

ANALYSIS

Void-Sale Claim

The Bank Parties argue that the trial court erred by not dismissing Miller's void-sale claim. We agree.

We review summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "[S]ummary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012) (second alteration in original) (quoting CR 56(c)). "In a summary judgment motion, the moving party bears the

initial burden of showing the absence of an issue of material fact." Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). To that end, in the DTA context, the recitals in the trustee's deed stating that the sale was conducted in compliance with the DTA "shall be prima facie evidence of such compliance." Former RCW 61.24.040(7) (2012);[2] RCW 61.24.040(11); Plein v. Lackey, 149 Wn.2d 214, 228, 67 P.3d 1061 (2003).

If the moving party satisfies its initial burden, the burden shifts to the nonmoving party to bring forth specific facts to rebut the moving party's contentions. Elcon Constr., 174 Wn.2d at 169. "The nonmoving party may not rely on speculation, argumentative assertions, 'or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.'" Becker v. Wash. State Univ., 165 Wn. App. 235, 245-46, 266 P.3d 893 (2011) (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). Although the evidence is viewed in the light most favorable to the nonmoving party, if that party is the plaintiff and he fails to make a factual showing sufficient to establish an element essential to his case, summary judgment is warranted. Young, 112 Wn.2d at 225.

Here, and as further discussed below, the Bank Parties met their initial burden to establish the absence of any material fact as to whether Miller waived his void-sale claim, and Miller failed to set forth specific facts to disclose the

[2] This language now appears in RCW 61.24.040(11).

existence of a genuine issue of material fact as to waiver. Therefore, the trial court erred by not dismissing Miller's void-sale claim.

The DTA "creates a three-party mortgage system allowing lenders, when payment default occurs, to nonjudicially foreclose by trustee's sale." Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). The DTA has three goals: an efficient and inexpensive process, adequate opportunities for parties to prevent wrongful foreclosure, and stability of land titles. Albice, 174 Wn.2d at 567. In furtherance of these goals, the DTA specifies a procedure for stopping a trustee's sale. Plein, 149 Wn.2d at 225. That procedure is set forth in RCW 61.24.130, and failure to follow the specified procedure "*may* result in a waiver of any proper grounds for invalidating the Trustee's sale." Former RCW 61.24.040(1)(f)(IX) (2012) (emphasis added).[3]

Here, it is undisputed that Miller did not follow the procedure set forth in RCW 61.24.130 to stop the trustee's sale of his home. Therefore, the only questions before us are (1) whether Miller waived his void-sale claim and (2) if not, whether that claim is nonetheless time barred.

Courts may apply waiver where it "is equitable under the circumstances and . . . serves the goals of the [DTA]." Albice, 174 Wn.2d at 570. To that end, in Plein, our Supreme Court held that under the DTA, a borrower waives postsale challenges to a foreclosure sale if he "(1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the

[3] This language now appears in RCW 61.24.040(2)(d)(IX). See LAWS OF 2018, ch. 306, § 2.

sale." Plein, 149 Wn.2d at 227, 229. Nevertheless, under RCW 61.24.127(1), which was enacted post Plein, "[t]he failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale . . . may not be deemed a waiver" of claims asserting: (a) common law fraud or misrepresentation, (b) a violation of Title 19 RCW, (c) the trustee's failure to materially comply with the DTA, or (d) a violation of RCW 61.24.026 (pertaining to short sales). These claims must, however, still satisfy certain requirements to be nonwaivable under RCW 61.24.127. As relevant here, they must: (a) be asserted within the earlier of two years from the date of the foreclosure sale or the expiration of the applicable statute of limitations, (b) not seek any remedy other than monetary damages, and (c) not affect the validity or finality of the foreclosure sale. RCW 61.24.127(2)(a)-(c).

In short, to determine whether a claim is waived under the DTA, the court first applies the Plein test and asks whether the borrower received notice of the right to enjoin the sale, had presale knowledge of a defense, and failed to enjoin the sale. If so, the claim is waived—unless it qualifies as a nonwaivable claim under RCW 61.24.127. See Patrick v. Wells Fargo Bank, N.A., 196 Wn. App. 398, 407, 385 P.3d 165 (2016) ("The legislature's decision to limit [RCW 61.24.127]'s safe harbor to four types of damage claims shows that the legislature did not intend to protect other claims from waiver if the requirements of notice, knowledge of a defense, and failure to enjoin the sale are satisfied."), review denied, 187 Wn.2d 1022 (2017).

To this end, we reject the Bank Parties' argument that if a claim is one of

the types of claims described in RCW 61.24.127(1), then it is categorically waived unless pursued within the time period specified in RCW 61.24.127(2). Specifically, the Bank Parties assert that "*[a]ll claims*—including equitable claims to void a sale—are waived if they are not brought prior to a foreclosure sale, unless they fall within one of the four articulated exceptions" set forth in RCW 61.24.127(1). (Emphasis added.) In other words, the Bank Parties contend that if a claim is not protected from waiver by RCW 61.24.127, then it is waived *regardless whether the Plein waiver requirements of notice, knowledge of a defense, and failure to enjoin the sale are satisfied.*

But the cases on which the Bank Parties rely do not support their argument. Specifically, in both Patrick and Manning v. Mortgage Electronic Registration Systems, Inc. (an unpublished opinion), it was undisputed that the Plein waiver requirements were satisfied. See Patrick, 196 Wn. App. at 407 ("Here, the Patricks concede that they did not use the DTA's procedure to restrain the trustee's sale. And they do not contest that Wells Fargo established the three waiver elements, as the Patricks had notice of the sale, knew of the defenses they now assert, and did not try to enjoin the sale."); Manning v. Mortg. Elec. Registration Sys., Inc., No. 73908-5-I, slip op. at 8 (Wash. Ct. App. Oct. 31, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/739085.pdf ("The Mannings do not contest that they received notice of their right to enjoin the sale, knew of the defenses to foreclosure they now assert, and did not bring an action to stop the sale as authorized by the DTA."). Therefore, the only issue before us in those cases was whether the borrower's postsale claims were nonwaivable

under RCW 61.24.127. And in Frizzell v. Murray, the court applied Plein and concluded that the borrower's claim was waived—but remanded to the trial court to determine whether the claim was nonwaivable under RCW 61.24.127. 179 Wn.2d 301, 312-13, 313 P.3d 1171 (2013). These cases do not, as the Bank Parties contend, support the proposition that Plein no longer applies to claims that are not protected from waiver by RCW 61.24.127. Furthermore, concluding that a claim is not necessarily waived—even if it is not protected from waiver by RCW 61.24.127—would not, as the Bank Parties suggest, "permit borrowers bringing actions to void completed foreclosure sales in perpetuity." Rather, otherwise applicable statutes of limitations would still apply, as would equitable doctrines such as laches.

In short, RCW 61.24.127 merely sets forth the types of postsale claims that cannot be waived *even if* the Plein waiver requirements are satisfied. But the fact that a claim is *not* protected from waiver by RCW 61.24.127 does not necessarily mean that it is waived if not brought prior to the foreclosure sale. Rather, as discussed, waiver under the DTA involves a two-part analysis: The court first applies Plein to determine whether the requirements of waiver have been satisfied. If so, the court also considers whether the claim is nonetheless nonwaivable under RCW 61.24.127. See Patrick, 196 Wn. App. at 407 ("The legislature's decision to limit [RCW 61.24.127]'s safe harbor to four types of damage claims shows that the legislature did not intend to protect other claims from waiver *if the requirements of notice, knowledge of a defense, and failure to enjoin the sale are satisfied.*") (emphasis added). Applying this two-part analysis

here, we conclude that the trial court erred by not dismissing Miller's void-sale claim.

Specifically, turning to the first element of waiver: The recitals in the trustee's deed, which are prima facie evidence of compliance with the DTA, state that a notice of trustee's sale was executed and recorded on February 14, 2014, under recording number 20140214000859, and was "transmitted by mail to all persons entitled thereto." That notice contained the required statutory notice of the right to enjoin the sale, stating:

> Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the same pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale.

Miller does not dispute receiving this notice. At most, he claims that he did not think the foreclosure sale "would actually happen" because he had been in communication with U.S. Bank about foreclosure avoidance options. But believing that an impending foreclosure sale will not "actually happen" is not the same as not receiving notice of it in the first place. Therefore, Miller has not raised a genuine issue of material fact as to the first element of waiver, i.e., that he received notice of his right to enjoin the sale.

Miller disagrees, contending that he "testified that he did not receive the notices of the sale nor did he receive notices of continuance." But this is not an accurate characterization of Miller's testimony. He testified that he was "not sure" if he received a notice of *default*. He also testified that he did not receive a "Notice of Pre-Foreclosure Options" or any continuance notices. But his

testimony *does not* set forth specific facts to rebut that he received notice of his right to enjoin the sale. Therefore, his argument is unpersuasive.

Turning next to whether Miller had actual or constructive knowledge of a defense to foreclosure prior to the sale: "[I]n applying the waiver doctrine, a person is not required to have knowledge of the legal basis for his claim, but merely knowledge of the facts sufficient to establish the elements of a claim that could serve as a defense to foreclosure." Brown v. Household Realty Corp., 146 Wn. App. 157, 164-65, 189 P.3d 233 (2008). Here, Miller's void-sale claim is premised on his assertion that Peak and Asset lacked the authority to act as trustees because neither is a domestic corporation with at least one Washington resident officer. But Miller himself testified that when he talked to an AGO investigator, "she also talked to me about Peak Foreclosure and whether it really had an office in Washington." See former RCW 23B.05.010(1)(a) (2002) (requiring domestic corporations to continuously maintain a registered office in Washington). And Miller knew, as early as May 2013, that Asset resided in California, as confirmed by U.S. Bank in its response to the inquiry made by the AGO on Miller's behalf. In other words, Miller had, no later than May 2013, knowledge of facts sufficient to pursue his void-sale claim. Therefore, Miller has not raised a genuine issue of material fact as to the second element of waiver, i.e., that he had presale knowledge of a defense to foreclosure.

Miller again disagrees, asserting that he "had no way to know that Defendants Peak and Asset were not compliant with the requirements of the DTA until after he consulted with Mr. Leen after the foreclosure sale had occurred."

But Miller's assertion amounts to an argument that, notwithstanding any presale knowledge of the *factual* basis for his void-sale claim, he did not know he had a *legal* claim until he saw an attorney. Washington courts have roundly rejected that argument in the discovery rule context, and we do so here as well. See Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 772, 733 P.2d 530 (1987) (The plaintiff "would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer's office and is specifically advised that he or she has a legal cause of action; that is not the law."); see also Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 35, 864 P.2d 921 (1993) ("The key consideration under the discovery rule is the factual, as opposed to the legal, basis of the cause of action.").

Finally, with regard to the third element of waiver, it is undisputed that Miller "'failed to bring an action to obtain a court order enjoining the sale.'" Patrick, 196 Wn. App. at 406 (quoting Plein, 149 Wn.2d at 227).

In sum, because Miller failed to raise a genuine issue of material fact as to any of the three elements of waiver, Miller's void-sale claim is waived unless it qualifies as nonwaivable under RCW 61.24.127. But because Miller asserted his void-sale claim more than two years after the date of the foreclosure sale and seeks not money damages—but rather to void the sale—it does not. RCW 61.24.127(2). Miller waived his void-sale claim, and the trial court erred by not dismissing it.

Miller relies on Albice to defend the trial court's decision not to dismiss his void-sale claim. In Albice, the borrowers entered into a forbearance agreement

with the bank after they received a notice of trustee's sale. 174 Wn.2d at 564. The borrowers tendered all of the payments due under the forbearance agreement but were late making each payment. Albice, 174 Wn.2d at 564. The bank accepted each of the late payments except for the very last one, and it continued the trustee's sale with receipt of each late payment—except for the very last one. Albice, 174 Wn.2d at 564. Additionally, although the forbearance agreement provided that a 10-day written notice would be sent upon a breach, the borrowers never received that notice. Albice, 174 Wn.2d at 564. Under these facts, our Supreme Court concluded that the borrowers did not waive their postsale challenges to the trustee's sale. Albice, 174 Wn.2d at 571. In doing so, it observed that the borrowers "had no knowledge of their alleged breach in time to restrain the sale" and that they never received the 10-day breach notice promised under the forbearance agreement. Albice, 174 Wn.2d at 571-72. Put another way, Albice is consistent with Plein: The Albice court declined to apply waiver because the borrowers did not have presale knowledge of a defense to foreclosure. The court did suggest that courts may also decline to apply waiver where doing so would not serve the goals of the DTA—for example, when a borrower does not have an adequate opportunity to prevent wrongful foreclosure. Albice, 174 Wn.2d at 570. But those are not the circumstances of this case, where Miller knew he was in default on his loan as early as May 2012, had presale knowledge of his defenses to foreclosure and even raised them to U.S. Bank twice after the foreclosure sale was complete—yet did not seek equitable relief until August 2017, more than two years after the foreclosure sale and only

after a writ of restitution had been entered. Miller's reliance on Albice is misplaced.

Miller's reliance on Schroeder v. Excelsior Management Group, LLC, 177 Wn.2d 94, 297 P.3d 677 (2013), is similarly misplaced. In Schroeder, the question was whether a borrower could contractually waive a statutory requirement of the DTA. 177 Wn.2d at 106. Our Supreme Court held that borrowers cannot waive the DTA's procedures by contract. Schroeder, 177 Wn.2d at 107. But the fact that a borrower cannot contractually waive the DTA's procedures does not mean that he cannot, by failing to try to enjoin the sale, waive the right to challenge a completed sale based on an alleged violation of those procedures. Indeed, unlike Miller, the borrower in Schroeder *did* try to stop the sale before it occurred. 177 Wn.2d at 101. Schroeder does not control.

Miller next argues that because the trial court did not conduct a full waiver analysis, deciding only that RCW 61.24.127 does not require his void-sale claim to be asserted within two years, a remand for further proceedings is appropriate given Miller's factual assertions related to the reasons that he did not enjoin the sale. But because, as discussed, Miller's factual assertions do not raise any genuine issue of material fact regarding waiver, further proceedings are not necessary.

As a final matter, the Bank Parties argue that the trial court erred by treating their motion to dismiss as a motion for summary judgment. But because dismissal of Miller's void-sale claim was warranted even under a summary judgment standard, we do not decide whether the trial court erred by converting

the Bank Parties' motion to dismiss to a motion for summary judgment.

Attorney Fees

U.S. Bank argues that it is entitled to an award of attorney fees under RAP 18.1. We agree.

Attorney fees may be awarded on appeal only when authorized by a contract, a statute, or a recognized ground of equity. Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004). Here, the deed of trust provides: "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument." It provides further that "[t]he term 'attorneys' fees,' whenever used in this Security Instrument, shall include without limitation attorneys' fees incurred by Lender . . . on appeal." Under the deed of trust, the term "Lender" means U.S. Bank, and "Security Instrument" refers to the deed of trust. Thus, U.S. Bank is entitled to a fee award because this appeal arises out of Miller's attempts to challenge U.S. Bank's enforcement of the deed of trust. Indeed, Miller does not argue otherwise. Therefore, we award U.S. Bank its reasonable attorney fees subject to its compliance with RAP 18.1.

We reverse and remand to the trial court with instructions to enter summary judgment in favor of the Bank Parties on Miller's void-sale claim.

WE CONCUR:

LAW OFFICES OF MELISSA HUELSMAN

November 26, 2019 - 4:58 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78044-1
Appellate Court Case Title:	U.S. Bank National Assoc., Petitioner v. Henry Miller, Respondent

The following documents have been uploaded:

- 780441_Petition_for_Review_20191126165441D1508980_2708.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Motion for Review Supreme Court.pdf

A copy of the uploaded files will be sent to:

- aaron.wagner@lockelord.com
- khood@aldridgepite.com

Comments:

Sender Name: Tony Dondero - Email: paralegal@predatorylendinglaw.com
Filing on Behalf of: Melissa Ann Huelsman - Email: Mhuelsman@predatorylendinglaw.com (Alternate Email: paralegal@predatorylendinglaw.com)

Address:
705 Second Ave.
Suite 601
Seattle, WA, 98104
Phone: (206) 447-0103

Note: The Filing Id is 20191126165441D1508980