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Division I
State of Washington

No. 73548-9-I
(consolidated with: 73648-5-I, 73549-7-I, and 73649-3-I)

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

OCWEN LOAN SERVICING, LLC,

Appellant,

vs.

MICHAEL E. and ROCIO BAUMAN, husband and wife,

Respondents/Cross-Appellants.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS BAUMAN

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A. INTRODUCTION

A trial court cannot grant a statutorily-created right of redemption on equitable grounds. The appellant in this matter, Ocwen Loan Servicing, LLC, does not deny that.

B. ARGUMENT IN CROSS-REPLY

The Baumans have cross appealed from the trial court's ruling granting an equitable right of redemption to Ocwen in violation of statute. Br. of Resp'ts/Cross-Appellants at 28-37.

(1) Ocwen Admits that It Has No Statutory Right of Redemption

The Baumans argued that the trial court issuing the original foreclosure order erred in granting the statutory right of redemption described in RCW 35.50.270 to this sale. Br. of Resp'ts/Cross-Appellants at 3-4, 35. They explained that that statute applies only to actions "foreclosing local improvement assessments," which a sewer district lien foreclosure is not. *Id.* They also observed that the tax lien foreclosure statute, which was the statute governing this sale, provides a right of redemption only to minors or incompetent persons. *Id.* at 34.

Ocwen first responds by arguing that the foreclosure was governed by the inapplicable RCW 35.50.270 because the trial court's order said it was. Reply Br. of Appellant/Cross-Resp't at 2.

Ocwen's argument begs the question. The fact that the trial court mistakenly believed that this sale was subject to RCW 35.50.270 is irrelevant when deciding if the statute applies. The Baumans admit that the trial court included RCW 35.50.270 as part of its order; the question was whether that inclusion was legal error. It was.

Because Ocwen does not even attempt to demonstrate how RCW 35.50.270 applies to the present action, and because that statute is inapplicable on its face, it is undisputed that the trial court erred in entering an order stating that the statute was applicable in this matter.

Next, Ocwen perplexingly denies that the tax foreclosure statute, RCW 84.64.080, did not apply to the foreclosure action here. Reply Br. of Appellant/Cross-Resp't at 4-5. This is strange because the trial court's foreclosure order – which Ocwen relies upon in arguing that it has a right of redemption – expressly states that the statute applies. CP 882. It is unclear why the trial court's order must be obeyed when it erroneously grants a non-existent statutory right of redemption, but should be ignored when it states what foreclosure process governs.

There is another reason Ocwen's denial regarding the applicability of RCW 84.64.080 is mystifying. Ocwen claims that RCW 57.08.081, rather than RCW 84.64.080, is the proper foreclosure statute to apply here. Reply Br. of Appellant/Cross-Resp't at 3-4. However, that statute simply

allows the sewer district to bring a civil foreclosure action to recover delinquent charges. RCW 57.08.081(4). It does not provide a mechanism for conducting a foreclosure sale, which is what is provided by the tax lien foreclosure statute, RCW 84.64.080. The two statutes are not contradictory.

Ocwen also claims that RCW 36.94.150, which states that the tax lien statute's foreclosure provision applies to liens for delinquent water services, does not mean that RCW 84.64.080 applies here. Reply Br. of Appellant/Cross-Resp't at 3. Ocwen claims that the Baumans "conspicuously fail to mention" that RCW 36.94.150 applies to counties, and thus is not applicable to the sewer district. *Id.*

What the Baumans did mention is RCW 57.08.005(22), which states that water-sewer districts may "exercise any of the powers *granted to cities and counties* with respect to the acquisition, construction, maintenance, operation of, and fixing rates and charges for waterworks and systems of sewerage and drainage." Br. of Resp'ts/Cross-Appellants at 3-4. Apparently Ocwen thinks that this argument was not "conspicuous" enough, because it has no answer for RCW 57.08.005(22)'s grant of authority does not include the power granted to counties under RCW 36.94.150.

Finally, even assuming RCW 57.08.081 does apply, it does not aid Ocwen's argument regarding a right of redemption. Ocwen admits that the statute it believes *does* apply, RCW ch. 57.08, "makes no mention of the terms for a right of redemption." Reply Br. of Appellant/Cross-Resp't at 4. Thus, Ocwen admits it has no statutory right of redemption in this case.

Ocwen's failure to demonstrate that any right of redemption applies in this case is an admission that the trial court committed legal error in its foreclosure order.

(2) The Trial Court Was Without Authority to Grant an Equitable Right of Redemption Where None Existed in Statute

The Baumans have argued that although courts may waive procedural and other administrative foreclosure statutes in the name of "equity," it may not cite on equitable grounds to *grant* a substantive right of redemption not conferred in the statute. Br. of Resp'ts/Cross-Appellants at 28-34.

Ocwen responds that courts have authority to grant substantive statutory redemption rights on equitable grounds. Reply Br. of Appellant/Cross-Resp't at 4-7. Ocwen cites RCW 84.64.080 and *Chelan Cty. v. Fellers*, 65 Wn.2d 943, 400 P.2d 609 (1965).

Neither RCW 84.64.080 nor *Fellers* supports the argument that courts have equitable authority to grant substantive statutory rights of redemption in post-sale proceedings. In *Fellers*, the trial court ordered that only portions of a parcel be sold, rather than the entire parcel. *Fellers*, 65 Wn.2d at 946. The trial court that crafted the order for sale included the partial property sale provision intentionally, noting that including the provision was just to the property owner. *Id.* Our Supreme Court held that RCW 84.64.080 expressly contemplated selling only a portion of a property, because it referred to “the purchaser of any *piece or parcel* of a land tax deed.” *Id.* (emphasis added). The Court also noted that the trial court had authority to craft foreclosure orders or judgments “as in the law or equity may be just.” *Id.*

The reason *Fellers* and RCW 84.64.080 are unavailing for Ocwen is threefold. First, the order in which equitable powers were exercised here was not the original order of sale, as it was in *Fellers*, but the summary judgment orders and the judgments in the redemption actions. CP 7, 1537. Here, there is no evidence that the trial court ordered the sale exercised any equitable powers available under RCW 84.64.080 to include an inapplicable statutory right of redemption. In fact, Ocwen points out that including the right of redemption would affect the sale price at auction. Reply Br. of Appellant/Cross-Resp’t at 6. The trial court

ordering the sale included the provision not out of a sense of justice or “equity.” CP 4. As the trial court in the present action noted, reference to the redemption period under RCW 35.50.270 was a simple mistake of law. *Id.*

The second reason *Fellers* and RCW 84.64.080 are inapplicable here is that the equitable powers mentioned in RCW 84.64.080 are available to a court crafting an order of sale. The “equitable” power exercised here was not in crafting the order of sale, but in a summary judgment motion in the present redemption action, filed *after* the sale. The statutory power to “make such other order or judgment as in law or equity may be just” in an order of sale, at issue in *Fellers*, does not apply to the trial court in the present redemption action. RCW 84.64.080(3).

The third reason *Fellers* is inapposite is that it does not speak to the issue in this case: whether equitable powers may be used to grant or deny substantive statutory rights of redemption. *Compare Fid. Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 51, 767 P.2d 1382 (1989); *P.H.T.S., LLC v. Vantage Capital, LLC*, 186 Wn. App. 281, 292, 345 P.3d 20 (2015). *Fellers* instead falls into the category of “procedural” matters, in which trial courts are permitted to waive strict adherence to statutory provisions on equitable grounds. *See, e.g., GESA Fed. Credit Union v. Mut. Life Ins. Co. of New York*, 105 Wn.2d 248, 254, 713 P.2d 728 (1986).

The Baumans cited and extensively analyzed *Mark, P.H.T.S.*, and *GESA* in their brief on cross appeal but Ocwen fails to respond to or distinguish them. Br. of Resp'ts/Cross-Appellants at 28-33. As explained in that briefing, those cases unequivocally distinguish between procedural foreclosure provisions and substantive rights of redemption, and make clear that substantive statutory rights cannot be conferred in equity. *Id.*

Given Ocwen's failure to address any of the controlling authorities raised in the Bauman's cross-appeal argument, it is strange that Ocwen states that the Baumans' argument "rel[ies]" on *Burdick v. Kimball*, 53 Wash. 198, 202, 101 P. 845 (1909). Reply Br. of Appellant/Cross-Resp't at 6. Although the Baumans cited *Burdick* as part of their response argument regarding Ocwen's claim of standing, br. of resp'ts/cross-appellants at 10-11, it is not cited in their brief section on the cross-appeal issue of statutory redemption rights and equity. Br. of Resp'ts/Cross-Appellants at 28-34.

- (3) Even Assuming the Trial Court Here Had Equitable Powers to Grant Statutory Redemption Rights, It Is not Inequitable to Deny Redemption after the Sale When the Baumans Have Paid Tens of Thousands of Dollars in Legal Fees Challenging the Erroneous Redemption Provision

In their cross-appeal brief, the Baumans argued that even if equitable powers were available to the trial court to grant an inapplicable

statutory right of redemption, equity does not favor that result. Br. of Resp'ts/Cross-Appellants at 35-37.

Ocwen incorrectly claims that the Baumans did not challenge the equity of the trial court's decision here in their cross-appeal brief. Reply Br. of Appellant/Cross-Resp't at 5-6 ("The Baumans correctly do not challenge the equity of the superior court's decision").¹ Ocwen also claims that a ruling in the Baumans' favor would result in a windfall for the Baumans. *Id.* at 6. Ocwen also claims that the redemption provision reduced the sale price by 85%. *Id.* Ocwen cites no basis in the record for these claims. *Id.*

Ocwen apparently reaches the conclusion that the Baumans purchased the properties at an "85% discount" by comparing the Baumans' successful bid to the properties' fair market value. In its opening brief to this Court, Ocwen claimed that the Baumans purchased the Turner property for "about 17% of the original principal amount of the Turner loan" and the Bonvicini property for "about 12.5% of the amount of the initial principal amount of the Bonvicini Loan." Br. of Appellant/Cross Resp't at 6, 8. The "initial principal amount" borrowed to purchase the properties would approximate the fair market value of the

¹ Ocwen's repeated confusion about what the Baumans actually argued in their brief is befuddling.

properties, as opposed to their foreclosure auction value, or the amount actually owed to creditors.

Ocwen's claim that the properties here would have sold for fair market value at a foreclosure sale if the redemption provision had not been included is false. Property that must be sold at foreclosure auction "is simply worth less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 539, 14 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). Market value cannot be the criterion of equivalence in the foreclosure-sale context. *Id.* at 538. Paying less than market value was not an irregularity, and the Baumans did not pay a grossly inadequate price for the property, considering it was encumbered with an improper redemption provision.

Ocwen's unsubstantiated claim that the property would have sold for fair market value if the erroneous redemption provision had not been included is nonsense, and does not support its equitable argument.

Ocwen cites *Metro. Fed. Sav. & Loan Ass'n v. Roberts*, 72 Wn. App. 104, 863 P.2d 615 (1993), *amended* (Jan. 12, 1994), *amended* (Jan. 18, 1994), 869 P.2d 404 (1994), in support of its equitable argument.

Metro is unhelpful to Ocwen. *Metro* involves a simple matter of statutory interpretation and application, not the exercise of equitable

powers. *Metro*, 72 Wn. App. at 111. Also, in *Metro*, there was no question that at the time of the order of sale and foreclosure judgment were entered, there did exist a valid, statutory right of redemption in the law. *Id.* The question was whether after the sale, the purchaser could try to prove facts to support a statutory claim of abandonment, when the debtors had not tried to do so before the sale. *Id.* at 112.

In relying on *Metro*, Ocwen also claims that the property went to foreclosure with an erroneous redemption provision that was “unbeknownst to the world.” Reply Br. of Appellant/Cross-Resp’t at 6.

Ocwen’s claim that no one looking at the order of sale could have known the provision was invalid is insupportable. The granting of a right of redemption under RCW 35.50.270 in the order of sale and foreclosure judgment was, on its face, erroneous as a matter of law. Unlike the purchaser in *Metro*, the Baumans and every other bidder would have been on notice that purchasing the property would involve either the risk that a right of redemption would be exercised, or a court battle to invalidate the erroneous provision. The Baumans, who had no part in creating the erroneous order of sale, elected to take this risk, and have in fact incurred tens of thousands of dollars in legal fees challenging the erroneous provision.

Put simply, the equities to be balanced here are different than the equities to be balanced in *Metro*. Ocwen, with holdings so vast it cannot even produce documentary evidence of its claim, and that were likely purchased at a massive discount, should not be allowed to benefit from a trial court's legal error at the expense of bona fide bidders who took on the risk of legal action over an erroneously included redemption provision.

C. CONCLUSION

Although the trial court reached the right result, the grant of an equitable right of redemption was an error of law that should be corrected. The trial court in this matter did not have the power to grant an equitable right of redemption where none existed in statute, simply because the court ordering the sale made a mistake.

DATED this 4th day of March, 2016.

Respectfully submitted,



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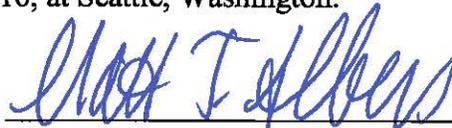
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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