

NO. 34960-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT E. BENOIT,

APPELLANT,

Vs.

SHARON CARLSON,

RESPONDENT.

Appellant's Reply Brief

SUBMITTED BY:

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I. REPLY TO RESPONDENT'S ARGUMENTS

- A. THE LEGISLATURE DID NOT INTEND FOR THE RECFA TO OPERATE AS THE EXCLUSIVE AND FINAL REMEDY FOR RELIEF FROM ANY AND ALL POSSIBLE BREACHES OF REAL ESTATE CONTRACTS.

The Respondent seems to argue that the plain language of the Real Estate Contract Forfeiture Act ("RECFA") mandates that a purchaser of real estate must successfully institute equitable proceedings to enjoin a non-judicial foreclosure of the subject property, before the purchaser can obtain any relief for any and all possible breaches of the real estate contract by the seller. (Resp. Br. 8)

The Respondent begins by arguing that the plain language of the RECFA is clear and unambiguous, and hence this court need not *"...examine sources beyond the statute and apply the rules of statutory construction."* (Resp. Br. 9) Ms. Carlson then proceeds with a lengthy and detailed analysis of the legislative history and case law pertaining to the Deed of Trust Act,

Chapter 61.24 RCW, and the mortgage foreclosure statutes, Chapter 61.12 RCW. (Resp. Br. 10)

The very fact that the Respondent's could not find a single court opinion to assist this court in applying the "plain language" of the RECFA to the facts of this case is telling. Instead, the Respondent suggests that this court "*...look at the legislative history of the RECFA and the similarity in purpose between Chapter 61.30 RCW and Chapters 61.24, and 61.12 RCW.*" (Resp. Br. 10)

The respondent urges this court to apply a recent decision by Division Three in *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 157 Wn. App. 415 (2007). (Resp. Br. 11). The Appellant does not dispute that the RECFA may have similarities in purpose or intent with the deed of trust act, Chapter 61.24 RCW or the mortgage foreclosure statutes, chapter 61.12 RCW.

Regardless of whether and to what extent the cases interpreting Chapters 61.24 RCW and 61.12

RCW may be helpful to ascertain the “plain language” of the RECFA, the Respondent has not cited a single court opinion directly on point with the facts of this case.

The question presented in this case is whether the RECFA prohibits a purchaser from filing an action at law for breach of contract against the seller, after the purchaser’s temporary restraining order enjoining foreclosure of the subject property was dismissed for failure to post a security bond. In *CHD*,

Virginia Boyles sought a nonjudicial foreclosure on a trust deed granted by CHD, Inc., to secure a promissory note. After receiving notice but before the trustee sale, CHD brought a declaratory action to contest the underlying debt based on a statute of limitations defense. CHD did not attempt to enjoin the sale. Ms. Boyles proceeded with the trust sale. Both parties filed summary judgment motions. The trial court granted Ms. Boyles' motion for summary dismissal.

CHD, 138 Wn. App. at 134. The court went on to explain that:

CHD does not dispute that it failed to attempt to enjoin the sale under RCW 61.24.130. CHD's declaratory action does not seek to postpone the sale in any manner. It requests “[a] declaratory judgment stating that the present non-judicial action is barred by the statute of limitations as allowed by RCW 7.24.020 [the declaratory judgment statute].” Clerk's Papers (CP) at 5. The lis pendens warns of a purported pending action “to postpone the trustee sale and for declaratory relief.” CP at 25. Our Supreme

Court has held that a complaint for a permanent injunction was insufficient under the statute. *Plein*, 149 Wn.2d at 226-27. CHD employed inadequate methods to restrain the sale by filing its declaratory action and lis pendens.

CHD, 138 Wn. App. at 138 (footnotes omitted).

The facts of *CHD* are clearly distinguishable from the instant case in three respects. First, the aggrieved purchaser in *CHD* filed a declaratory judgment action against the seller to contest the foreclosure proceedings due to a statute of limitations defense. *CHD*, 138 Wn. App. at 134. This was clearly a suit in equity to restrain foreclosure of the subject property.

The claims at issue in this appeal arose from summary dismissal of Mr. Benoit's action at law, in which Mr. Benoit requested only monetary damages for Ms. Carlson's numerous breaches of the real estate contract. (CP 6-8) As outlined in Appellant's opening Brief, Mr. Benoit's pleadings filed under Pierce County Cause No. 05-2-14225-7 did not request any type of equitable or declaratory relief, nor did Benoit's pleadings request that Ms. Carlson's foreclosure

proceedings be enjoined or vacated, as in *CHD*.

Secondly, the *CHD* court held that the aggrieved purchaser was barred from stopping the sale through a declaratory judgment action because *CHD* failed to utilize the pre-sale equitable remedies of RCW 61.24.130. *CHD*, 138 Wn. App. at 134. In the instant case, Mr. Benoit was unable to obtain a temporary restraining order to stop the non-judicial foreclosure under RCW 61.30.110 simply because he couldn't post a security bond, a subject not addressed by the *CHD* court. In the instant case no court ever ruled on the merits of Mr. Benoit's pre-sale (equitable) claims filed under Cause No. 05-2-08170-3, an issue not raised in the *CHD* opinion.

Third, the purchaser in *CHD* was seeking to "...contest the underlying debt based on a statute of limitations defense". *CHD*, 138 Wn. App. at 134 (emphasis added). The instant case does not involve any claims by Mr. Benoit to challenge any "underlying debt" obligations assessed by Ms.

Carlson, unlike the claims raised in *CHD*¹. This case arose because Ms. Carlson refused to provide Mr. Benoit with a payoff figure, preventing him from keeping the payments current. See Amended Complaint, ¶11 filed under Cause No. 05-2-08170-3. (CP 89)

Mr. Benoit filed suit in the first instance not to contest any underlying debt obligations, but rather to prevent Ms. Carlson from stealing property that was rightfully his and to allow him to remit the proper payment amounts due under the real estate contract by giving him a payoff figure. *Id.*

A review of this record clearly shows the parties have set forth many disputed facts, both as to Mr. Benoit's claims and Ms. Carlson's

¹This does not include Mr. Benoit's responsive pleadings which vigorously contest and dispute the allegations surrounding Ms. Carlson's counterclaims for Mr. Benoit's purported waste and contamination of the subject property. Mr. Benoit's responsive pleadings in opposition to Ms. Carlson's summary judgment motion on her waste counterclaims were found by Judge Fleming to raise sufficient disputed material facts as to both liability and damage issues to defeat summary judgment and necessitate a jury trial. (5/12/06 Tr., 16:23-24)

counter-claims. Thus, both parties are entitled to present their claims before a jury to affect a final resolution of their disputes. At the summary judgment hearing on 5/12/06, Ms.

Carlson's trial counsel argued that:

. . . this summary judgment motion was an opportunity for Mr. Benoit to provide any factual basis whatsoever that this lawsuit has any validity, and his affidavit set forth, and as their response paper set forth, there is absolutely no factual basis even if there were [sic] cause of action to support the claim that Mr. Benoit breached the contract.

(5/12/06 Tr., 8:6-12) As mentioned in the Appellant's opening Brief, Judge Fleming clearly rejected these arguments by affirmatively crossing out several sentences proposed by Ms. Carlson's counsel and adding handwritten language into the final summary judgment order. (App. opening Br., 24-26) A careful review of the claims and facts asserted by the parties in the record before this court demonstrate that the facts and legal issues of the *CHD* opinion are inapplicable and in-opposite to the instant case.

**B. JUDGE CULPEPPER'S ORDER DISMISSING THE
EQUITABLE ACTION EXPRESSLY PERMITTED MR.**

BENOIT TO FILE A SUBSEQUENT LAWSUIT FOR
BREACH OF CONTRACT

The record in this case does not support the Respondent's contention that Mr. Benoit was barred from filing a breach of contract action due to res judicata. Rather, Judge Culpepper's handwritten language inserted into the order of November 4th, 2005 made abundantly clear that Judge Culpepper was only dismissing Mr. Benoit's equitable claims for a temporary restraining order, and that Mr. Benoit "is not prejudiced from starting a new lawsuit for breach of contract". (11/4/05 order, CP 155) Mr. Benoit's counsel could only find one reported decision addressing the specific questions presented in this appeal². In *Stewart v. Guaranty Bank and Trust Co.*, 596 So.2d 870 (Miss., 1992) the Mississippi Supreme Court was asked to decide, inter alia,

²The Respondent's counsel, an experienced practitioner of real estate law, has provided no case directly on point with the central questions raised in this appeal.

Whether a Chancery Court's order dismissing a temporary restraining order, which prevented the non-judicial foreclosure on a deed of trust on the Stewart's home, could operate as res judicata. *Stewart*, 596 So.2d at 871. The *Stewart* court

found that:

Additionally, in a prior action the Chancery Court temporarily restrained the non-judicial foreclosure on the Stewart's home. This order was dismissed with prejudice, because the Stewart's failed to post a bond, as required by the temporary restraining order, and the foreclosure sale proceeded, which rendered the order moot. There is no indication from the record that in this prior proceeding the Chancery Court issued any judgment considering the merits of the Stewarts' claim, which was that the Bank had not actually advanced the entire amount it claimed the Stewart's borrowed, and the Stewarts had repaid more of the amounts borrowed than the Bank contended had been repaid. Nevertheless, the Chancery Court in the case *sub judice* found the prior Chancery Court action constituted a prior litigation from which *res judicata* applied to bar the Stewart's action to set aside the non-judicial foreclosure. As previously discussed, in order for *res judicata* to apply there must have been a previous, final adjudication of the claim asserted in a subsequent litigation. *Walton v. Bourgeois*, 512 So.2d at 701; *Dunaway v. W.H. Hopper and Associates, Inc.* 422 So.2d at 751. Rather than being an adjudication on the merits, an interlocutory injunction operates to preserve the status quo of a case so that a final judgment can constitute an adequate remedy. *Rochelle v. State*, 222 Miss. 83, 87, 75 So.2d 268 (1954). *See also, Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Furthermore, we have previously held that where a previous action had enjoined a foreclosure, the issue as to whether the party who initiated the foreclosure did so wrongfully or fraudulently was not barred by collateral estoppel, because the issue of whether the foreclosure was wrongful was not necessary to the judgment granting the injunction. *Southern Land & Resources Co., Inc. v. Dobbs*, 467 So.2d 652, 655-657 (Miss. 1985). *See also, Bush v. City of Laurel*, 234 Miss. 93, 101-102, 105 So.2d 562 (1958)(holding a suit for trespass was not barred by *res judicata* where the plaintiff had previously litigated the granting of an injunction). Thus, a previous suit in which a foreclosure was

temporarily enjoined does not operate as *res judicata* to a subsequent suit which asserts a foreclosure should be set aside on the grounds that the amount claimed by the lender to have been owed was, in fact, not the correct amount due. This is so because the two suits do not share an identical claim; that is, the claim in an action for a temporary injunction is whether the status quo must be preserved to effectuate an adequate remedy, and the claim in an action to set aside a foreclosure is the propriety of the foreclosure. Therefore, the Chancery Court erred in finding the claim in the in the case sub judice was barred by the previous action in which the foreclosure was temporarily restrained.

Stewart, 596 So.2d at 873 (emphasis

added) (footnotes omitted). The *Stewart* court specifically held that the chancery courts ruling dismissing with prejudice a temporary restraining order for non-judicial foreclosure proceedings solely for failure to post a security bond did not bar the subsequent suit due to *res judicata*, namely because:

There is no indication from the record that in this prior proceeding the Chancery Court issued any judgment considering the merits of the Stewarts' claim, which was that the Bank had not actually advanced the entire amount it claimed the Stewart's borrowed, and the Stewarts had repaid more of the amounts borrowed than the Bank contended had been repaid.

Stewart, 596 So.2d at 873. The Appellant

respectfully requests this court consider the *Stewart* court's holding to guide its decision in the instant case. Although *Stewart* is not a Washington opinion, it is never the less an

opinion from Mississippi's highest court, and is the only reported opinion provided by either party applicable to the unique facts of this case³.

II. CONCLUSION

The Respondent's have not provided a single case to provide any support for the sole basis upon which Judge Fleming made his decision, nor was the issue briefed by the parties in the court below⁴. Judge Fleming's decision directly contradicted and overruled the plain language of an earlier order issued by another sitting Superior Court Judge of the same court. For all of the reasons stated above, this court should reverse Judge Fleming's decision of May 12th, 2006 granting

³ The Appellant's counsel could only find two reported cases that even cite or mention the *Stewart* case. Those two opinions were issued by Mississippi's intermediary appellate court and were inapplicable to the issues presented here. There are apparently no reported opinions issued by any State or Federal jurisdiction which interpret or analyze the above-referenced portions of the *Stewart* opinion.

⁴ See 5/12/06 Tr., 6:16

summary Judgment to Ms. Carlson on Mr. Benoit's
claims and remand for trial.

Respectfully submitted this 26th day of September
2007.



Thomas S. Olmstead, WSBA# 8170
Attorney for Appellant

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**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO**

ROBERT E. BENOIT,)	COA# 34960-4-II
)	Case No. 05-2-14225-7
Appellant,)	
V.)	DECLARATION OF SERVICE RE:
SHARON CARLSON, a married individual)	APPELLANT'S REPLY BRIEF
in her separate capacity,)	
Respondent.)	

I, Nathan A. Randall, declare as follows:

1. I am over the age of 21 and competent to testify to the facts alleged herein.
2. I am employed as a paralegal at the Law Office of Thomas S. Olmstead, 20319 Bond Road NE, Poulsbo, WA 98370.
3. On September 26th, 2007 I caused service of true and correct copies of the documents listed below:
 - i. Appellant's Reply brief
 - ii. Declaration of Service RE: Appellants Reply Brief

to the following parties via the method indicated below:

DECLARATION OF SERVICE RE: APPELLANT'S REPLY BRIEF- 1	Law Office of Thomas S. Olmstead 20319 Bond Road NE Poulsbo, WA 98370 Phone (360) 779-8980 Facsimile (360) 779-8983
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1 Via facsimile to (253) 572-3052 and First class mail:

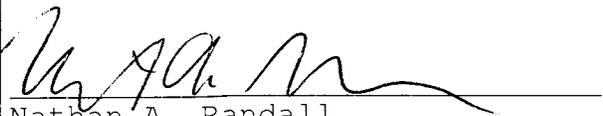
2 **Brian M. King**
3 **Davies Pearson PC**
4 **PO Box 1657**
5 **Tacoma, WA 98401-1657**

6 Via first class mail:

7 **Washington State Court of Appeals**
8 **Division Two**
9 **950 Broadway, Suite 300**
10 **Tacoma, WA 98402**

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

13 Executed this 26th day of September 2007 at Poulsbo, Washington.

14
15 
16 Nathan A. Randall