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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY
DEPUTY

NO. 43103-3-II

COURT OF APPEALS DIVISION TWO
OF THE STATE OF WASHINGTON

SHARIN R. METCALF and BRYAN BOOREN

Appellants,

v.

CFA/NW MORTGAGE PROFESSIONALS, CFA FINANCIAL
SERVICES, INC., and BANK OF AMERICA, N.A.

Respondents,

APPEAL FROM SUPERIOR COURT FOR CLALLAM COUNTY
CAUSE NO. 10-2-00675-6

REPLY TO BRIEF OF BANK OF AMERICA, N.A.

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11/15/12

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I. INTRODUCTION

COMES NOW Appellants Booren and Metcalf, by and through their attorney and reply to Brief of Respondent Bank of America, N.A. (“Response Brief”). In reply, the Opening Brief is directed at certain aspect of the trial court’s order not the vacatur itself. Specifically:

The Bank of America shall cease and desist from non-judicial foreclosure unless and until such is authorized by the Court or this matter is no longer pending provided that Plaintiffs pay the monthly mortgage payment due under the terms of the note commencing with the February 2012 payment.

CP 17. As Respondents concede, Booren and Metcalf complaint sought relief related to the origination and servicing of their mortgage including predatory lending practices, fraud and misrepresentation, failure to verify debt, elder abuse, etc.... CP 246-260; *see also*, Response Brief at 14 (Metcalf and Booren’s claims all pivot on allegations regarding the origination of their loan). The complaint did not allege pending foreclosure or default. *See Id.* While the Trial Court has broad powers to exercise equity, it exceeded its purview in deciding issues of default and foreclosure. Respondents invite this court to join in such excesses by examining the bond requirement under RCW 61.24.130. Taking such an invitation invites subsequent preclusion arguments against Booren and Metcalf from, e.g., seeking relief from default or foreclosure.

II. AUTHORITY AND ARGUMENT

A. Reply to Metcalf and Booren Did Not Challenge The Vacation Of The Order.

(See Response Brief at 10-18.)

Metcalf and Booren concede that when an Appellate court reviews a trial court's disposition of a subsection (b) motion for abuse of discretion; an abuse of discretion occurs only where it can be said no reasonable person would take the view adopted by the trial court. *Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 934 P.2d 715 (1997), *aff'd in part*, 135 Wn.2d 894, 959 P.2d 1052 (1998). Here, the Court applied the standard for vacatur and found arguably viable meritorious defense and that the default resulted from mistake, inadvertence, surprise or excusable neglect. See CP 16 (emphasis supplied). Thus respondent is correct that vacating default is not the primary issue.

But in conceding, the Court should not be tempted to confuse this proceeding with a motion to dismiss, as Appellant's former counsel recognized the desire to challenge the defenses. VROP at 12:13-13:1 (“[***] I’m going to dispute every one of those [***].”); see also, VROP 15:10-15. However, the possibility of these defenses cannot be denied, only disputed on their merits. The trial court properly recognized that

when the time comes Booren and Metcalf would be afforded the proper proceedings and procedures to adjudicate their suit. VROP 14:5-6.

B. Reply to Trial Court's Disposition on Injunctive Relief.
(See Response Brief at 19-22)

Similarly, Booren and Metcalf must be afforded an opportunity to seek relief against a party foreclosing upon them, either through amendment of existing complaint or filing of a new action. See VROP 15:12-15. In responding to these issues and errors on appeal, the Respondents failed to address two sections raised by the appellant. First, that the order is ambiguous and lacks clarity. *Compare*, Opening Brief at 14-15; *with*, generally, Response Brief at 19-21. Secondly, the order would cause Booren and Metcalf prejudice. *Compare*, Opening Brief at 12-13; *with*, generally, Response Brief at 19-21; *see also*, Opening Brief at 13-14 (what is just and equitable is placing the parties in a position prior to the default). The response does address the authority of the Court to require posting of bond for injunctive relief. However, as discussed below, injunctive relief was not proper under the circumstance, or was it ripe. This may be based on the erroneous or unsupported interpretation that Bank of America was in fact the creditor and the Court need to preclude it from foreclosing.

The simple solution is not as respondents suggest (Response Brief at 23), but remand this matter with instructions to order vacation without any reference to non-judicial foreclosure, collection of payments, or status of parties while vacating a default order. This will allow the matter to proceed to the merits of claims and defenses (including amendment of complaint to add claims); and not interfere with other properly framed suits to call into question a party's standing to commence a trustee sale, should one become scheduled.

1. Reply to Injunctive Relief

Based on the reply, the threshold question on appeal appears to be whether injunctive relief was proper under the circumstances. *See* Response Brief at 20 (by keeping the injunction prohibiting foreclosure in place).¹ Here, the request for injunctive relief is found only in the July 20, 2011, order granting default judgment. CP 222:4-6. Nothing in the complaint, which deals with origination issues; or in the motion for default judgment, explains the legal or factual basis for obtaining injunctive relief against a foreclosure. CP 234-236, CP 246-260.

¹ As argued, and not addressed by the Respondent, such relief may prejudice Metcalf and Booren by subjecting them to issue or claim preclusion in concurrent or future judicial or nonjudicial settings when matter is remanded to Superior Court, e.g., contesting a claim of a lien, not permitting amendment of complaint, or properly brought restraint of sale. *See* Opening Brief at 12-13.

Further, the Order states that the defendants will take no action “unless and until this default judgment is vacated or quashed.” CP 222:5-6. The order was in fact, vacated. CP 17. It is axiomatic as to why the Trial Court ordered injunctive relief in the first place (when such had not been requested in complaint or motion) and further, why such relief should be granted where a foreclosure had not been commenced. Finally, Bank of America’s invitations to submit payments to registry (*see* Response Brief at Note 3) does not assist this court in determining the equities in providing such relief.²

2. Reply To Posting of Bond

When issuing injunctive relief, Respondents argue that the trial court was required to direct Metcalf and Booren to resume making those payments [i.e., mortgage payments] and “nowhere” does Metcalf and Booren discuss the requirements of RCW 61.24.130.” *See* Response Brief at 21; *but see*, Opening Brief at 12-13 (discussing how such order effectively decides matters not before the court and prejudices the Plaintiff). Washington Supreme Court recognized at least three pre-sale claims under its Deed of Trust Act:

² Further, Commissioner Bearse Nov. 13, 2012, order granting additional evidence is off the mark, the evidence is not being offered to show that disputed payments are being made into court registry; but rather that the option had been presented to Metcalf and Booren after the appeal had been filed. This has little to do with the issue on appeal, i.e., the motion to vacate.

If the grantor chooses not to cure, the grantor may take one or more of the following actions. The grantor may contest the default, RCW 61.24.030(6)(j), RCW 61.24.040(2); restrain the sale, RCW 61.24.130; or contest the sale, RCW 61.24.040(2).

See Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). A discussion of RCW 61.24.130 is not ripe as there is no pending nonjudicial foreclosure in the record (i.e., no Notice of Default is in the record). Arguably, such relief, including restraint of sale, is not available as the condition precedent, i.e., a non-judicial foreclosure resulting in a “trustee’s sale”, has not been commenced (through the notice and filing of documents). *Id.*; *See generally*, Ch. 61.24 RCW. Further, a party may judicially foreclosure on real estate pursuant to Ch. 61.12 RCW. Here no party with a lien has elected their remedy to a default.

3. Reply to Finding of Creditor. (*See* Response Brief at 21)

Even if the Court recognizes that such a right may be lost through subsequent transfer, it was not proper for the Court to determine that the Defendants remain a creditor of the Plaintiffs under the terms of the mortgage. *See* Opening Brief (at 10-11) (finding such determines a right, at the time, to commence a foreclosure).

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III. CONCLUSION

For the aforementioned reasons this Court should not preserve those portions of the order which find that Bank of America is a creditor, require that mortgage payments be made to forestall foreclosure.

Respectfully Submitted, this 13th day of November, 2012.

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DECLARATION OF SERVICE

I, Lili Cervantes-Patel, declare under the penalty of perjury that I served a copy of Appellant's Reply to Brief of Bank of America, N.A. on Respondent's attorneys by giving a true and correct copy of said document by depositing into the U.S. Mail to the following individuals:

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