

**FILED  
Court of Appeals  
Division II  
State of Washington  
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No. 53827-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

GARY McGREAL and JESSICA McGREAL, Appellants,

v.

PEAK FORECLOSURE SERVICES, INC. (A California Corporation), PEAK FORECLOSURE SERVICES OF WASHINGTON, INC., NEW PENN FINANCIAL dba SHELLPOINT MORTGAGE SERVICING, THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK, as TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE CWALT, INC. ALTERNATIVE LOAN TRUST 2006-40T1 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-40T1  
Respondents.

BRIEF OF APPELLANT

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85 Wn. 2d 154 (1975) [Referenced p. 10]

## Statutes

RCW 61.24.31(1) [Referenced pp. 4 and 9]

RCW 61.24.31(5) [Referenced pp. 3,4,5,6,7, and 8]

### A. (Assignments of error 1)

1. The trial court erred and committed an abuse of discretion in entering the order denying appellants' motion to vacate the final judgment when the Defendants' had failed their burden of truth requirements by failing to supply uncontroverted facts demonstrating that they had met the due diligence requirements of RCW 61.24.031(5).

## Issues Pertaining to Assignments of Error

1. Can a trustee, beneficiary or authorized agent issue a notice of default without satisfying the due diligence requirements of RCW 61.24.031(5)?  
(Assignment of error 1)

2. The letter described in RCW 61.24.031(1)(c)(i) says "You must respond within thirty days of the date of this letter". If the letter is not dated how long does the homeowner have to respond? (Assignment of error 1)
3. If the letter described in RCW 61.24.031(1)(c) has an address in a field titled "property description" does that need to be the current address? (Assignment of error 1)
4. If the letter described in RCW 61.24.031(1)(c) has an address in a field titled "property description" and the property consists of two separate tax parcels, do the current addresses of both properties need to be in the property description? (Assignment of error 1)
5. The due diligence requirements of RCW 61.24.031(5)(a) state, "A beneficiary or authorized agent shall first attempt to contact a borrower by sending, by both first-class and either registered or certified mail, return receipt requested, a letter to the address in the beneficiary's records for sending account statements to the borrower and to the address of the property encumbered by the deed of trust. Is it valid to assume that the "return receipt" must be kept to demonstrate letter was sent and received? (Assignment of error 1)
6. Property tax bills include phone number of homeowner. RCW 61.24.031(5)(b)(iii) states: "A beneficiary or authorized agent satisfies the telephone contact requirements of this subsection (5)(b) if the beneficiary or authorized agent determines, after attempting contact under this subsection (5)(b), that the borrower's primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected or are not good contact numbers for the borrower." Do the property tax bill homeowners phone

numbers constitute “numbers on file” under this statute when the lender is receiving the tax bills”? (Assignment of error 1)

7. RCW 61.24.031(5)(c) states, “If the borrower does not respond within fourteen days after the telephone call requirements of (b) of this subsection have been satisfied, the beneficiary or authorized agent shall send a certified letter, with return receipt requested, to the borrower at the address in the beneficiary's records for sending account statements to the borrower and to the address of the property encumbered by the deed of trust. The letter must include the information described in (e)(i) through (iv) of this subsection.” . Is it valid to assume that the “return receipt” must be kept to demonstrate letter was sent and received? (Assignment of error 1)
8. If it is determined that a trustee, beneficiary or authorized agent issued a notice of default without satisfying the due diligence requirements of RCW 61.24.031(5) must they stop the foreclosure and restart the process? (Assignment of error 1)
9. The “Notice of Default” contains an address field. Does this have to be the current address? (Assignment of error 1)

#### B. Statement of the Case

Lenders representatives appear to have not issued pre-foreclosure letter as required under RCW 61.24.031(5). When borrowers Foreclosure Consultant asked for a copy it was not forthcoming. Eventually the Washing State’s Attorney Generals Office was called in. The Defendants were not able to produce the letter for them either.

After the Foreclosure Consultant sent the lenders agents a sample document so they could restart the foreclosure process, lender instead produced a document that was

undated, had an incorrect address in the “property description” field. This document should have been sent by certified or registered mail with a return receipt. Lender’s agents could not produce these documents.

After it became clear to all parties that the foreclosure had not been started legally Lender’s agents continued to sell the property causing extensive damages to borrowers.

Judge committed an error of discretion overlooking these problems and the Motion for Final Judgment should be vacated and the case remanded for trial.

### C. Argument

The lender representatives did not meet the requirements for due diligence per under RCW 61.24.032(5). Specifically they did not meet the requirement to send borrowers the pre-foreclosure due diligence letter (hereinafter “NOPFO”) per RCW 61.24.032(5)(a):

(a) A beneficiary or authorized agent shall first attempt to contact a borrower by sending, by both first-class and either registered or certified mail, return receipt requested, a letter to the address in the beneficiary's records for sending account statements to the borrower and to the address of the property encumbered by the deed of trust. The letter must be the letter described in subsection (1)(c) of this section.

Homeowners had not received the NOPFO and raised the issue with their foreclosure consultant Donna Loitz. Donna contacted Shellpoint requesting a copy of this letter. Shellpoint faxed Donna a number of documents on 11/10/14 but none of them was the pre-foreclosure due diligence letter. (CP 103, Attachment 8, p. 1) (RP p. 3 and 20)

On November 13, 2014 Donna Loitz notified Peak Foreclosures of the lack of a NOPFO letter. (CP 103, Attachment 8, p. 3)

On December 17, 2014 Donna Loitz notified borrowers that Peak was being unresponsive.

On January 5, 2015 Peak had still not responded and foreclosure consultant requested Peak to produce the NOPFO or cancel the foreclosure and restart the process. Donna Loitz gave borrowers contact information to file a complaint with the Washington State's Attorney General's Office (hereinafter "AGO") (CP 103, Attachment 8, p.5) (RP 7, 21)

On January 9, 2015 the AGO received the complaint filed by borrowers outlining the problem of never receiving the NOPFO, nor being able to get a copy from Resurgence/Shellpoint the loan processor (CP 103, Attachment 10)

On February 18, 2015, over three months after Donna Loitz requested documentation of the NOPFO, Shellpoint/Resurgence responds to the AGO. They do not enclose a copy of the NOPFO because they obviously don't have the document suggesting it had been sent "on or about July 26, 2013" (CP 103, Attachment 9, p. 1, paragraph 3), nor do they have the registered mail, certified mail or return receipt as required by RCW 61.24.032(5)(a). (RP p. 22)

At this point it is long past when Peak should have stopped the foreclosure proceedings. The Judge indicates they should have stopped. (RP p. 22) Instead the foreclosure proceedings proceed like clockwork.

On April 16, 2015 borrowers file a lawsuit and injunction which is served on the trustee's. (CP 5). Defendants ignore the injunction and proceed to sell the property at auction 4 days later.

Because there is no Judge in a Deed of Trust foreclosure the courts have established there is a requirement to strictly construe the law:

Albice v. Premier Mortgage Services of Washington, Inc. 174 Wn. 2d 560, 568, 276 P.3d 1277 (2012) - "The trustee in foreclosure must strictly comply with the statutory requirements.

Further, the courts argue that the statutes must be construed in borrower's favor.

Amresco Independence Funding, Inc., v. SPS Properties, LLC, No. 31683-8-II. (9-13-2005) - "Must strictly construe the statutes in the borrowers favor."

RCW 61.24.31(1)(a) makes it clear that the due diligence requirements must be satisfied **before** a notice of default can be issued:

(1)(a) A trustee, beneficiary, or authorized agent may not issue a notice of default under RCW 61.24.030(8) until: (i) Thirty days after satisfying the due diligence requirements as described in subsection (5) of this section and the borrower has not responded; or (ii) if the borrower responds to the initial contact, ninety days after the initial contact with the borrower was initiated.

The Judge tries to argue that if borrowers got in contact with a foreclosure consultant then the intention of the statute was met. The judge ignores that the NOPFO is the first in a series of steps and gives borrowers access to a face-to-face and an additional time period where the buyer can refinance, sell the property or negotiate a work-out with lender. Further, that a notice of default may not be issued until after the due diligence requirements have been met. (RP 11 paragraph 2)

The Judges casual interpretation of the law is refuted by Koegel v. Prudential Mutual Savings Bank, 51 Wash.App. 108, 111-12, 752 P.2d 385 (1988):

Under a Deed of Trust, the trustee holds a power of sale permitting him to sell the property out of court with no necessity of judicial action. The Deed of Trust statutes thus strip borrowers of many of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower.”

Defendant’s argue a waiver was established because borrowers did not execute a TRU. Borrowers believed the lawsuit and injunction they filed should stop the proceedings. In *Bavand v. OneWest Bank*, the court found:

The supreme court reinforced a basic statement of law that it originally had made in *Cox v. Helenius*: Even where a party fails to timely enjoin a trustee sale under RCW 61.24.130, if a trustee's actions are unlawful, the sale is void. In such cases, there is no waiver of the right to seek and obtain relief." *Bavand* at 492

Similarly in *Klem v. Washington Mutual Bank* 176 Wn.2d 771, 295 p.3d 1179 (2013):

However, in no case that we can identify has waiver been applied, as here, to bar a grantor's post-sale action against a trustee for damages based on allegations of how the trustee conducted the foreclosure process, up to and including the day of the sale.

The burden of proving that no issue of material facts exist is on the moving party

*LaPlante v. State*, 85 Wn. 2d 154 (1975):

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. If, however, there is a genuine issue of material fact a trial is necessary. It is the trial court's function to determine whether such a genuine issue exists. The burden of proving, by uncontroverted facts, that no genuine issue exists is upon the moving party.

The Defendants’ failed completely to show there were “no genuine issue of any material facts”.

The Judge committed an overt err of discretion in failing to reject Defendants’ arguments for Summary Judgment

D. Conclusion

The Final Judgment should be vacated and the case remanded for trial.

March 2, 2020

Respectfully submitted,



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**Transmittal Information**

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**Appellate Court Case Title:** Gary and Jessica McGreal, Appellants v. The Bank of New York Mellon, et al,  
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