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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 296334

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EXCELSIOR MORTGAGE EQUITY FUND II, LLC,
an Oregon limited liability co.,
Plaintiff-Respondent,
v.
STEVEN F. SCHROEDER,
Defendant-Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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I. Introduction

This Court gave the Plaintiff everything it wanted in this case, case number 296334, and two related cases, case number 290352 and case number 291324.

In the two related cases, the Supreme Court accepted Mr. Schroeder's petitions for review, reversed this Court, and remanded the case for the trial court to enter findings on the status of Mr. Schroeder's 200 acre farm.

In this case, the Supreme Court accepted Mr. Schroeder's petition for review and remanded this case to this Court for consideration in light of the Supreme Court's reversal of this Court in the two related cases.

This Court should stay the proceedings in this case until the trial court addresses whether to vacate the trustee's sale on the foreclosed farm.

II. Statement of the Case

This Court affirmed the trial court's decision in this matter on January 24, 2012. Although Mr. Schroeder denied that the trial court or this Court had jurisdiction without notice under

RCW 59.12.030, this Court constructed jurisdiction on the basis of the nonjudicial foreclosure. Opinion, page 5.

On February 28, 2013, the Supreme Court addressed the nonjudicial foreclosure in two related cases. Schroeder v. Excelsior Mgmt. Grp., 177 Wn.2d 94 (2013).

In Schroeder, the Supreme Court reversed this Court and the trial court on numerous bases and found that the trial court had abused its discretion three times, by dissolving the temporary restraining order, prematurely denying Mr. Schroeder's motion for partial relief, and by denying Mr. Schroeder's motion for continuance. Id.

III. Argument

A. The trial court's vacating the trustee's sale will require reversal in this case.

1. This Court's earlier opinion depends on the validity of the trustee's sale.

Without notice under RCW 59.12.030, this Court based constructed jurisdiction on the nonjudicial foreclosure. Opinion, page 5. The nonjudicial foreclosure is a mandatory condition precedent to this Court's opinion.

The trial court's vacating the trustee's sale will require this Court to reverse the trial court's summary judgment order in this case as well as the trial court's order evicting Mr. Schroeder.

2. The Plaintiff agrees that this case depends on the trustee's sale.

If "the trial court rules that the property was principally used for agricultural purposes, then the trustee's sale was void and the trial court's order evicting Schroeder was void." Respondent's Supplemental Brief, page 2.

This same reasoning would also apply to the trial court's vacating the trustee's sale on some basis other than the property's principally use for agricultural purposes.

If the trial court vacates the trustee's sale on the basis of the improper conduct of the trustee's sale or on the basis of challenges to the underlying debt or Mr. Schroeder's counterclaims, the trial court's order granting summary judgment and its order evicting Mr. Schroeder are both void.

//

B. A trial court may vacate a trustee's sale on the basis of the inapplicability of the Deed of Trusts Act, on the basis of the improper conduct of a trustee's sale, and on the basis of challenges to the underlying debt or counterclaims of the borrower.

1. A trial court must vacate a trustee's sale because the Deed of Trust Act does not allow a nonjudicial foreclosure of agricultural property, especially if the borrower raises the issue before the trustee's sale (otherwise, possibly waived).

If a deed of trust on land states that "the land was not used principally for agricultural purposes" and that "statement was false on the day the deed was granted and false on the day of the trustee's sale," "one of the requisites for a trustee's sale" is missing. Schroeder, 177 Wn.2d at 105-106.

A party may not contractually waive this requirement. Id. at 107. A party's failure to restrain a trustee's sale may not waive this requirement either. Id. at 112. A party should raise this requirement before the trustee's sale occurs. Id. at 113.

When a party adequately raises this requirement, the trial court must "make specific factual findings on whether in fact the land was agricultural as meant by the deed of trust act." Id. at 113 (footnote omitted).

If a property securing a deed of trust was foreclosed nonjudicially but “was primarily agricultural at relevant times,” “the nonjudicial foreclosure sale shall be vacated.” Id. at 115.

2. A trial court has the authority to vacate a trustee’s sale if the person conducting the trustee’s sale did so improperly.

If the trustee conducts a trustee’s sale improperly, a trial court has the authority to vacate the trustee’s sale. Compare Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 911 (2007) (procedural irregularities may void a nonjudicial foreclosure sale).

3. A trial court may vacate a trustee’s sale based on challenges to the underlying debt or counterclaims of the borrower, especially if the borrower raises them before the trustee’s sale (otherwise, possibly waived).

A court may restrain a trustee’s sale on the basis of alleged violations of the Criminal Profiteering Act, Ch. 9A.82 RCW. Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311 (1999).

C. Mr. Schroeder has preserved all three of the above bases to ask the trial court to vacate the trustee's sale.

1. Mr. Schroeder may properly ask the trial court to vacate the trustee's sale because the Deed of Trust Act does not allow a nonjudicial foreclosure of agricultural property.

If the trial court finds that the 200 acre farm securing the plaintiff's deed of trust was agricultural under RCW 61.24.030(2), the trial court shall vacate the nonjudicial foreclosure sale. Schroeder, 177 Wn.2d at 115. In vacating the trustee's sale, the trial court must "make specific factual findings on whether in fact the land was agricultural as meant by the deed of trust act." Id. at 113 (footnote omitted).

2. Mr. Schroeder may properly ask the trial court to vacate the trustee's sale if the person conducting the trustee's sale did so improperly.

Mr. Schroeder is investigating whether the person conducting the trustee's sale conducted it improperly.

In Schroeder v. Excelsior Mgmt. Grp., Supreme Court does not limit the bases for Mr. Schroeder to ask the trial court to vacate the trustee's sale.

For this reason, when this Court stays this case for the trial court to address whether to vacate the trustee's sale on the

foreclosed farm, this Court should not limit the trial court's bases for vacating the trustee's sale to the specific agricultural basis on which the Schroeder court focused.

3. Mr. Schroeder may properly ask the trial court to vacate the trustee's sale based on challenges to the underlying debt or counterclaims of the borrower.

When Mr. Schroeder asked the trial court to restrain the trustee's sale, he cited the Consumer Protection Act, Chapter 19.86 RCW, for authority. At first, the trial court granted Mr. Schroeder the temporary restraining order, but later dissolved it. Schroeder, 177 Wn.2d at 103.¹

Additionally, the Supreme Court vacated the trial court's order dissolving the temporary restraining order (which was issued on the basis of the Consumer Protection Act). Id. at 113.

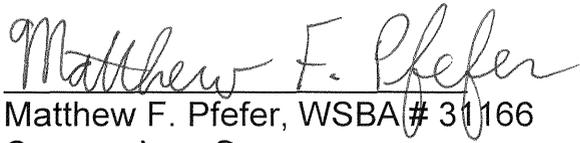
IV. Conclusion

For the above reasons, this Court should stay this appeal until the trial court addresses whether to vacate the trustee's

¹ Even if Mr. Schroeder paid not funds into the court registry, the trial court dissolved the order and the trustee's sale occurred. Id. at 110 n. 10. For both of these reasons, any missing payment would evidently not be pertinent. Id.

sale on the foreclosed farm. Compare Respondent's Supplemental Brief, page 3 (stating that this "Court should therefore hold this appeal in abeyance until the [trial] court can resolve the companion cases").

Respectfully submitted this 9th day of December 2013.



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DECLARATION OF SERVICE

Pursuant to GR 13, I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am the Appellant's attorney of record, am competent to testify, and have personal knowledge of these facts.
2. I mailed a copy of this document to Bradley W. Andersen of Landerholm, P.S., as co-counsel for Respondent, at P.O. Box 1086, Vancouver, WA 98666.
3. I have a written agreement with Phillip J. Haberthur as attorney for Respondent allowing service by email.
4. I served the attached document on this date via email to PHaberthur@schwabe.com, HDumont@schwabe.com, RHigbie@schwabe.com, and CRussillo@schwabe.com.

Signed December 9, 2013 in Spokane, Washington.


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