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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 315703

Superior Court No. 2011-02-01912-2

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

KELLY J. MELLON and CYNTHIA L. MELLON,
husband and wife

Appellants,

v.

REGIONAL TRUSTEE SERVICES CORPORATION,
Trustee; INDYMAC MORTGAGE SERVICES, A
DIVISION OF ONE WEST BANK, FSB; and ONE
WEST BANK, FSB,

Respondents.

APPELLANTS' REPLY BRIEF

Joseph P. Delay
WSBA No. 02044
Delay Curran Thompson Pontarolo & Walker, P.S.
W. 601 Main Avenue, Suite 1212
Spokane, Washington 99201-0684
(509) 455-9500
Attorneys for Appellant

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I. INTRODUCTION

This appeal involves a Deed of Trust nonjudicial foreclosure proceeding that was enjoined. Plaintiffs Kelly J. Mellon and Cynthia Mellon (Mellons), husband and wife, filed a Complaint against Defendants Regional Trustee Services Corporation, Trustee; IndyMac Mortgage Services, a Division of One West Bank, FSB; and One West Bank, FSB (Lender) for specific performance and injunctions and violation of CPA and to enjoin the nonjudicial foreclosure sale (CP 1-32). Kelly J. Mellon was Grantor under a Deed of Trust and IndyMac Mortgage Services, a Division of One West Bank, FSB, and One West Bank were beneficiaries under the Deed of Trust (CP 14-29). Mellons allege various violations. Mellons sought reinstatement of the original Note and Deed of Trust (CP 5-10). The foreclosure was enjoined pursuant to RCW 61.24.130. Monthly payments were paid into Court by Mellons up to the date of the entry of the Order of Dismissal (CP 47-49). Mellons also alleged a violation of the Consumer Protection Act (CP 9-10). The Court dismissed Mellons' Complaint for lack of jurisdiction (CP 678-679). Mellons appealed the Order of Dismissal.

II. ARGUMENT

1. PREEMPTION PRESUMPTION & JURISDICTION

Lender contends that Mellons did not file a written opposition to Defendants' Motion to Dismiss and that for the first time in their Motion for Reconsideration raised new issues. (Brief, Page 13). The issue in this case is, and has always been alleged, whether Federal Law preempts State Law in a foreclosure proceeding of a federally insured mortgage. Mellons' contention is that it does not entirely preempt. *Gibson v. World Savings*, 128 Cal. Rptr.2d 19 (2002). The issues addressed in the Motion for Reconsideration, mainly jurisdiction and preemption, have always been at the heart of the case. Whether the issues are authored in the Complaint, alleging a violation of the CPA and RCW 61.24.130, or whether it was communicated on the record in the court proceedings of October 9, 2012. There is clear proof and preservation of the record that the issue is preemption and jurisdiction. (CP 736 – 767).

Mellons are under no requirement to file a written response to a Motion to Dismiss. RAP 2.5(a)(1). Mellons chose to file a Motion for Reconsideration after the Trial Court granted the Motion to Dismiss, which was signed at a hearing set by the Mellons. At that hearing and after

the Motion to Dismiss was granted, the Trial Court invited the parties to brief the issue of who should be entitled to the \$18,300 held by the Court. (CP 762). The record is clear that no new issues were raised and only jurisdiction was raised by the Lender. No response is necessary. RAP 2.5(a), *P.E. Systems LLC v. PI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012).

“Issues raised in a motion for reconsideration must not be dependent upon new facts and must be closely related to already raised allegations.” *Newcomer v. Masini*, 45 Wash.App. 284, 287, 724 P.2d 1122 (1986). At CP 762, the Trial Court said in part:

The Court: So, do you want to do that by written Briefs or do you want to set it for hearing? Keeping in mind, I am only here until the end of the month, until I am gone for two months.

Ms. Bahner: You are saying we can submit a written Brief and you make the decision without oral argument or whether we want both?

The Court: I am asking you how you want me to do it. I offer you that option, because I know you have to come over here.

Ms. Bahner: Right. We're fine each submitting a Brief and having you make a decision.

The Court: To decide what happens to the \$18,000 on written submissions.

Mr. Delay: I have no problem submitting a written Brief, your Honor, but there are no – there is no law on the books. I am pro bono in this case.

The Court: I know.

Pertaining to preemption, Mortgage Company relies upon *Silvas v. E*Trade Mortgage Corporation*, 514 F. 3d, 1001, (9th Cir. 2008) for its preemption argument. The *Silvas* case involved a lock in fee, and the lock in fee was specifically preempted or specifically preempted state laws under 12 C.F.R. §560.2(b). However, it is Mellons' contention that the foreclosure procedure falls under 12 C.F.R. §560.2(c), which provides that state laws of general applicability only incidentally affecting Federal Savings Associations are not preempt. HOLA does not apply to procedural foreclosures of Federal Deeds of Trust, because they fall under 12 C.F.R. §560.2(c). 12 C.F.R. Sec. 560.2(c) is on point. The Trial Court had jurisdiction.

The Mellons contend that HOLA does not eclipse all Washington State foreclosure procedures as pertaining to federally insured loans.

2. CPA VIOLATION

The Mortgage Company argues that the Complaint does not state a cause of action. The Complaint realleges Plaintiffs' Preamble and Plaintiffs' First Cause of Action and then alleges five additional

paragraphs on violation of the Consumer Protection Act. (CP 3-11)

Pursuant to CR 8, the Complaint contains:

- (1) A short and plain statement of the claim, showing that the pleader is entitled to relief; and
- (2) A demand for judgment for relief to which he deems himself entitled.

The causes of action the Mellons allege in their well plead Complaint are two fold and are evidenced in the pleadings. (CP 3-11).

3. THE MORTGAGE COMPANY AND COURT FAILED TO FIX THE UNPAID MORTGAGE BALANCE

One of the main reasons this case is being appealed and was not settled in arbitration is that at no point was there a clear accounting or unpaid balance presented. (CP 759-762). Upon several requests the Trial Court failed to fix the unpaid balance, which was requested by Mellons. In fact the Mellons presented a Motion on October 9, 2012, to set the unpaid balance. The Trial Court never ruled on the Motion and instead granted the Motion to Dismiss. The purpose of fixing the unpaid balance is to grant Mellons an opportunity to determine whether or not they could resume payment at the monthly payment provided in the Note and Deed of Trust and/or refinance. Mellons did not ask the Court to rewrite the terms of the mortgage, they merely asked the Court to determine the amount of

unpaid principal and interest that was due and owing, together with any additional fees and costs. The Mortgage Company had at one time requested in excess of \$50,000 in fees and costs. Mellons' purpose of requesting the Court to 'fix' the balance was to enable the Mellons to refinance or enter into a valid contract of assumption. The Court erred in not fixing the unpaid balance of the encumbrance.

4. FUNDS HELD IN THE REGISTRY OF THE COURT

Mellons had paid in \$18,300 into the Clerk of Court in monthly payments on the Note and Deed of Trust (CP 47-49). These payments were made pursuant to the statute and conditioned upon the Note and Mortgage being reinstated. There is no law, nor statute, providing what disposition of the proceeds should occur in the event that the Deed of Trust is not reinstated, as in this case. This issue is an issue of first impression in Washington.

Mellons asked the Court to fix the unpaid balance of the mortgage to determine if the default could be cured for a reasonable figure. The amount of the unpaid balance was necessary to determine if the encumbrance could be refinanced. The amount of the unpaid balance was never fixed by the Court. In the event that Mellons should refinance the property, they would be entitled to the proceeds in Court upon paying off the encumbrance in full. Until the Court fixes the unpaid balance, it

would be premature to disburse the funds to the mortgage company. The Court erred in ordering the disbursement of the funds to the lender.

5. MOTION FOR ATTORNEY'S FEES ON APPEAL

The Mortgage Company is requesting attorney's fees on appeal. The Deed of Trust does provide for reasonable attorney's fees. The Mortgage Company did not ask for attorney's fees at the lower Court level, and did not cross appeal. Consequently, the Mortgage Company is bound by the Order Dismissing the Complaint, insofar as attorney's fees and costs are concerned. "Reasonable attorneys fees are recoverable on appeal if allowed by statute, rule or contract, and the request is made pursuant to appellate rules governing attorneys fees and expenses." RAP 18.1(a); *Pierce Country v. State*, 159 Wn.2d 16, 50, 148 P.3d 1002 (2006).

The issue in the Court of Appeals on attorney's fees on the appeal is res judicata. The Mortgage Company should have cross-appealed to preserve its request for attorney's fees on appeal. The Mortgage Company did not file a cross-appeal, as required by RAP 5.1(d). It is therefore precluded from asking for any affirmative relief on appeal. The Appellate Court has inherent jurisdiction to fix attorney's fees for services on appeal when allowable by contract or statute. *Johnston v. Beneficial Mgmt. Corp. of America*, 96 Wn.2d 708, 638 P.2d 1201 (1982). Here the Deed of Trust at Page 12, Paragraph 22, provides for certain notice with conditions

precedent as a condition of payment of attorney's fees. The lender here did not prove that it complied with all conditions precedent as required in Section 22, Page 12 of the Deed of Trust (CP 13-28). The Mortgage Company is not entitled to attorney's fees under the written provisions of its Deed of Trust. It also is precluded due to the issue being res judicata.

III. CONCLUSION

The federal law does not preempt the state law on a violation of the Consumer Protection Act. *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96 (2010).

In *McCurry* our Courts have held that fax and notary fees charged as a result of payoff on a loan violated the Washington State Consumer Protection Act. The Borrower has asked the Trial Court to fix the unpaid balance of his loan on several occasions. The Trial Court failed, neglected and refused. The Borrower in these proceedings is entitled to have the loan balance fixed by the Trial Court. Finally, the release of funds deposited with the Clerk of the Court is not provided for in the statute. Equity dictates that the funds should be returned to the Borrower, if the Borrower does not reinstate the loan as forfeitures are abhorred in the State of Washington. "It is elementary law in this jurisdiction that forfeitures are not favored and never enforced in equity unless the right

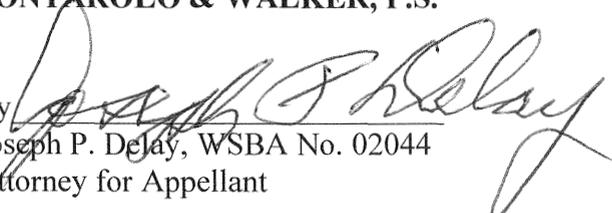
thereto is so clear as to permit no denial,” *Shoemaker v. Shaug*, 4 Wash.App. 700, 490 P.2d 439 (1971).

Finally, the Mortgage Company waived attorney’s fees in not seeking them at the lower Court level and not cross appealing from the judgment that was entered in the lower Court. Judgment of Dismissal should be reversed.

Dated this 20th day of November, 2013.

Respectfully submitted,

**DELAY, CURRAN, THOMPSON,
PONTAROLO & WALKER, P.S.**

By 
Joseph P. Delay, WSBA No. 02044
Attorney for Appellant