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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' OPENING BRIEF

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INTRODUCTION

This appeal involves a Deed of Trust nonjudicial foreclosure proceeding that was enjoined. Plaintiffs Kelly J. Mellon and Cynthia Mellon (Mellon), 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). Mellon alleges various violations. Mellon 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 Mellon up to the date of the entry of the Order of Dismissal (CP 47-49). Mellon also alleged a violation of the Consumer Protection Act (CP 9-10). The Court dismissed Mellon's Complaint for lack of jurisdiction (CP 678-679).

III. ASSIGNMENTS OF ERROR

Assignment of Error No. 1.

The Court erred in entering the Order Granting Lenders' Motion to Dismiss entered October 9, 2012 (CP 678-679).

Assignment of Error No. 2

The Court erred in entering the Order Denying Mellon's Motion for Reconsideration entered by the Court on January 30, 2013 (CP 862-864).

Assignment of Error No. 3

The Court erred in entering the Order Extending Time to Appeal entered March 25, 2013 (CP 883).

Assignment of Error No. 4

The Court erred in failing to rule on Mellon's Motion to Reinstate on March 30, 2012, and when renoted again for hearing on October 9, 2012 (315-316 (356-388) (514-529).

Assignment of Error No. 5

The Court erred in entering an Order releasing the money held by the Clerk of Court pending foreclosure to the Lender (CP 862-864).

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1.

Did the Court err in holding that the federal law preempted state law in the subject proceedings and in dismissing the Complaint for lack of jurisdiction?

Issue No. 2

Did the Court err in failing to hold that the Complaint did not state a cause of action, including but not limited to, a violation of the Washington State Consumer Protection Act?

Issue No. 3

Did the Court erred in failing to rule on Mellon's Motions to Fix the Unpaid Balance, Reinstate the Promissory Note and Deed of Trust, and to Fix the Amount due on the Loan?

Issue No. 4

Did the Court err in entering the Order Extending Time for Appeal?

Issue No. 5

Did the Court err in releasing the funds held by the Court to the Lender?

V. STATEMENT OF THE CASE

This is an appeal by Kelly and Cynthia Mellon (Mellon) pertaining to a foreclosure proceeding of their personal residence. Mellon alleges that the Court erred in dismissing its Complaint for lack of jurisdiction and in its ruling that federal law pre-empts all state law in a foreclosure proceeding. The Complaint also alleges the continuous and methodical practices of the Defendants' Lender foreclosure practices are in violation of the Consumer Protection Act.

VI. STATEMENT OF THE FACTS

On May 5, 2011, Mellon filed a Complaint for (1) Specific Performance and Injunctions and (2) Violation of the CPA (CP 1-32). The reason for filing the Complaint was to stop the Lender from foreclosing upon their home without first having specifically complied with Washington law. The Complaint alleged the fact that the Lender makes a practice of continuously and methodically conducting a trade or commerce within Washington State that is unfair, deceptive, that impacted the public interest, and was likely to reoccur (CP 1-32). The allegations also provide that the practices have the capacity to deceive a substantial portion of the public, including Mellon, if allowed to continue (CP 9-10).

In order to preserve costs and attorney's fees Mellon, by Stipulation and Order, dismissed Regional Trustee Services Corporation. Mellon solely focused on the beneficiaries, IndyMac Mortgage Service and One West Bank, FSB (herein referred to as "Lender") (CP 54-57).

The Complaint alleged that IndyMac Mortgage Services and One West Bank, FSB, were doing business in the County of Spokane, State of Washington, and that IndyMac Services was a division of One West Bank, FSB (CP 4). The Complaint further alleged that on October 25, 2007, Kelly Mellon, and wife, as Grantors, executed a Deed of Trust in favor of Indy Mac Bank, FSB (CP 4). IndyMac is a division of One West Bank. Mellon executed a Deed of Trust in favor of Mortgage Electronic Registration Systems, Inc. and nominee for Indy Mac Bank FSB (CP 13-28). The beneficial interest is presently held by One West Bank FSB covering property known as 11610 N. Monroe Court, Spokane, Washington, 99218. The property is legally described as Lot 13, Block 4, Fairwood Crest No. 2, according to plat recorded in Volume 10 of Plats, page 6, in Spokane County, Washington (CP 1-32).

The Complaint further alleges that Paragraph 20 of said Deed of Trust provides that said Note and Deed of Trust can be sold one or more times without prior notice to Mellon (CP 5). Mellon alleged upon information and belief that the Deed of Trust was sold and assigned to

One West Bank, FSB, and they failed to comply with the disclosure as required by RCW 19.148 subjecting the bank to reasonable attorney's fees pursuant to RCW 19.148.030(3)(CP 5), effective January 1, 1990.

The Complaint further alleges that the Deed of Trust provides at Paragraph 20, that the Borrower cannot commence any judicial action without Borrower notifying Lender and affording Lender a reasonable period to take corrective action as provided in Paragraph 5 (CP 5). The Complaint further alleges that the Lender was given that notice under letter dated May 2, 2011, a copy of which is attached to the Complaint as Exhibit "B" (CP 5) CP 30-32).

Paragraph V of the Complaint alleges that prior to the commencement of the action, the Lender's Agent solicited from Mellon a compromise of the default (CP 6). The terms of the compromise submitted by the Lender were impossible to perform (CP 6-7). Mellon advised the Lender that he was unemployed and without sufficient funds to make the monthly payments (CP 6). Nevertheless, the Lender submitted and insisted on a proposal that the Borrower could not meet (CP 7). Mellon alleges that this conduct does not comply with the recent Amendment to RCW 61.24, as amended, and particularly RCW 61.24.031. This statute expired on December 31, 2012 (CP 7). Mellon further alleges that the Lender failed to act in good faith and had a

financial gain not to cooperate and to foreclose the aforesaid obligation. The foreclosure would produce a higher financial gain to the Lender than complying with RCW 61.24.031 (CP 7-8)..

The Complaint further alleges that an equitable payment should be fixed by the Court each month as provided in the Deed of Trust not to exceed the regular payment of \$1,523.89 per month (CP 6-7, 658-659). The Deed of Trust should be reinstated fixing the payments of \$1,523.89 per month, with credit being allowed for the balloon payment of \$10,004.89 paid by Mellon in February 2011 (CP 6-7).

The First Cause of Action seeks specific performance and injunction (CP 7-9). Under Paragraph II of the First Cause of Action Mellon seeks to have the original Note and Deed of Trust reinstated pursuant to RCW 61.24 (CP 7). The Beneficiary and its authorized Agent should be required to follow RCW 61.24.031 and to deal with Mellon in good faith (CP 7).

Paragraph III of the First Cause of Action alleges that the regular payment due under the aforesaid foreclosure is in the sum of \$1,523.89, as provided in the Note and Deed of Trust (CP 7). Mellon seeks to have the Court enforce the provisions of RCW 61.24.031 (CP 7). The Complaint alleges the proposals by the Lender were unreasonable and impossible for Mellon to perform due to the fact that he was unemployed (CP 6-7).

Mellon further seeks to enjoin the default and fix the payments as provided in the Mortgage and Note at \$1,523.89 per month (CP 6-7).

Paragraph IV of the Complaint alleges that Mellon performed under the Modification Agreement and made all payments under Option #2, to March 31, 2011 (CP 4-5). Mellon further alleged that they would make the April 2011 payment within ten days of filing the Summons and Complaint by tendering said amount into the Clerk of the Superior Court for Spokane County (CP 8).

Paragraph V of the First Cause of Action alleges that Mellon seeks to enjoin Lender from foreclosing on the real estate pending the trial, pursuant to RCW 61.24.130 (CP 8). Borrower also sought and obtained a Restraining Order restraining the Trustee's sale pursuant to RCW 61.24.130 (CP 8). Mellon made all monthly payments due on the loan by paying them into the Court from the date of the Restraining Order (CP 659).

Paragraph VI of Mellon's Complaint alleges Mellon seeks to recover attorney's fees and costs under Paragraph 19 of the Deed of Trust and under RCW 4.84.330 (CP 8-9).

The Second Cause of Action alleges violation of the Consumer Protection Act (CP 9-10). Mellon realleges the Preamble and the First Cause of Action (CP 9). Mellon also alleges that the Lender's conduct

occurred in trade or commerce and was unfair, deceptive, impacted the public interest, and was likely to reoccur (CP 9). The allegations also provide that practices have the capacity to deceive a substantial portion of the public, including Mellon (CP 9).

Paragraph III of the Second Cause of Action alleges unfair and deceptive acts and practices resulting in injury to Mellon, including damage to their credit and foreclosure of their real property (CP 9).

Paragraph IV of the Second Cause of Action alleges Lender's conduct constitutes unfair and deceptive acts and practices and is the proximate cause of harm (CP 9-10).

Paragraph V of the Second Cause of Action seeks reasonable attorney's fees and treble damages as provided in RCW 19.86.140 as determined at the time of trial by trial amendment (CP 10).

The Complaint seeks specific performance under RCW 61.24.031 (CP 9). It also seeks to fix the monthly payment under the Deed of Trust at \$1,523.89; treble damages for violation of the Consumer Protection Act; attorney's fees pursuant to RCW 4.84.330 and 19.148.030(3) and the Consumer Protection Act RCW 19.86 (CP 10). The Complaint also seeks other and further relief as the Court may seem just and proper (CP 10). Attached to the Complaint was the recorded Deed of Trust (CP 13-28);

and a letter dated May 2, 2011, from Mellon's attorney to the Trustee and the Lender (CP 31-32).

Mellon paid all monthly payments due on the Deed of Trust up to the hearing, which were held by the Clerk of Superior Court, (except for a couple which were agreed to). The Court granted the Lender's Order Dismissing the Complaint. Those monthly payments total the sum of \$18,300.00 (CP 863, 658-659). These payments are held by the Clerk of Spokane County Superior Court. In the Order Denying Mellon's Motion for Reconsideration, the Court ordered the Clerk of Superior Court to disburse the funds it held as security for preliminary injunction in the amount of \$18,300.00 to the Lender (CP 658, 863). The Lender sought attorney's fees in a substantial amount, but did not incorporate the amount sought in its Order of Dismissal (CP 678-679). The Lender was represented by two law firms. One in Seattle, Washington, and one in San Diego, California, and incurred substantial attorney's fees in connection with this litigation (CP 52, 874).

Mellon served the Lender with Interrogatories and Requests for Production (CP 65-77). Lender's first Answers to Mellon's Interrogatories were evasive (CP 65-77). On March 2, 2012, under a Motion to Compel, the Court entered an Order to Compel Lender to answer the Interrogatories (CP 303-305). The Lender answered the

Interrogatories following the Order to Compel entered by the above-entitled Court in a timely fashion.

The Motion to Dismiss came on for hearing on October 9, 2012 (CP 438-448). The Lender argued that federal law pre-empted the state law and the Court did not have jurisdiction (CP 441-446). The Lender further argued that the Court's only authority was to dismiss Mellon's Complaint. Mellon argued that although federal law may pre-empt servicing of federally backed loans, however the Superior Court had concurrent jurisdiction of Mellon's foreclosure proceedings (CP 704-718). The action for Consumer Protection Violations is governed by the state law, thus the Superior Court maintains jurisdiction (CP 707-710). The Court found the Lender's argument persuasive and granted the Motion to Dismiss (CP 678-679).

Mellon timely filed a Motion for Reconsideration on October 17, 2012 (CP 719-720). As previously planned the Court was going to take leave of the Court from October 8, 2012 thru January 2, 2013, (CP 860). The Court made the parties aware that a decision would not be reached before the first of the year, 2013 (CP 763). In January 2013, the Court gave notice to both parties that the Court would soon have a final decision on the Motion for Reconsideration (CP 860). On January 30, 2013, the Court denied Mellon's Motion for Reconsideration (CP 862-864). The

notice of that decision was never given to Mellon or his counsel (CP 865-866). As a result of not being given notice, Mellon missed the 30 day window to appeal. After Mellon moved the Court to Vacate the Order Denying the Motion for Reconsideration, because notice was never given to Mellon's counsel, the Court entered an Order Extending the Time to Appeal for 30 Days on March 25, 2013 (CP 883). Mellon timely filed a Notice of Appeal (CP 885-886).

VII. STANDARD OF REVIEW

The Standard of Review for a CR 12(b)(6) motion is for "failure of the pleading to state a claim upon which relief can be granted." "On a CR 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless there are no facts alleged which plaintiff could prove, consistent with the complaint, that would entitle the plaintiff to relief on the claim." *Halvorson v. Dahl*, 89 Wash.2d 673, 674, 574 P.2d 1190 (1978). "This weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." *McCurry v. Chew Chase Bank, F.S.B.*, 169 Wash.2d 96, 101, 233 P.3d 861 (2010). The Appellate Court reviews *de novo* the propriety of a trial court's dismissal of an action under CR 12(b)(6). *Burton v. Lehman*, 153 Wash.2d 416, 422, 103 P.3d 1230 (2005), *Outsource Service v. Bus. Corp.*, 172 Wn.App. 799

____ P.3d. ____ (2013), a challenge to the existence of jurisdiction as a question of law is reviewed *de novo* by the Appellate Court. In these proceedings the review was *de novo*.

VIII. ARGUMENT

Issue No. 1. Did the Court err in holding that federal law preempts state law and thus the Court lacks jurisdiction?

This issue involves Assignments of Error Numbers 1, 2, 3, & 6.

“Whether federal law preempts state law depends upon whether that was the intent of Congress.” *Fid. Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). There are three recognized ways where federal regulations preempts state regulations.

First, Congress may preempt state law by so stating in express terms. Second, preemption may be inferred when federal regulation in a particular field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. In such cases of field preemption, the mere volume and complexity of federal regulations demonstrate an implicit congressional intent to displace all state law. Third, preemption may be implied when state law actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress....”*Bank of Am. v. City and County of S.F.*, 309 F.3d 551, 558 (9th

Cir.2002) in *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008).

The Trial Court found that the Home Owner's Loan Act (HOLA) of 1933 preempts all state foreclosure law. Mellon contends this to be an incorrect interpretation of HOLA. There is no dispute that HOLA preempts certain areas of the law within the servicing arena of federally backed loans. Whether this confusing, unclear, and disjunctive area of preemption pertains or not is the cornerstone of this appeal and one that is ripe for decision.

The key determination in a case in which a plaintiff uses state law claims to challenge the actions of a federal savings association is whether the state law claim infringes on the federal regulatory power over the federal savings association. *Campidoglio LLC v. Wells Fargo & Co.*, C12-949 TSZ, 2012 WL 4514333 (W.D. Wash. Oct. 2, 2012). In *Campidoglio LLC v. Wells Fargo & Co.* the plaintiff brought an action against Wells Fargo FSB for breach of contract, breach of the duty of good faith and fair dealing, violations of the Washington Consumer Protection Act (CPA) and unjust enrichment. The pertinent part of this case outlines where preemption occurs under 12 C.F.R, which the defendant in the current case relied upon in being granted their Motion for Dismissal. The outline for preemptions set out in *Campidoglio* states in part:

As outlined by the Ninth Circuit and OTS, the first step is to determine if any of the Plaintiffs' state law claims, "as applied," are the "type[s] of state law contemplated in the list under paragraph (b) of 12 C.F.R. § 560.2." *Id.* Laws within that list are preempted. Laws not within paragraph (b) of § 560.2 will then be analyzed for their effect on federal savings associations as described in paragraph (c). *Campidoglio LLC v. Wells Fargo & Co.*, C12-949 TSZ, 2012 WL 4514333 (W.D. Wash. Oct. 2, 2012).

Nowhere in 12 C.F.R. Sec. 560.2 does the word 'foreclosure' or any variation of said word appear. Although the Lender in this case feels this is a weak argument, it is an argument none the less considering the basis for this litigation is 'foreclosure'. If preemption that the Lender is relying upon, precludes the word foreclosure, it is fair to leave it to the Court to interpret if that preclusion in fact precludes the issue in this case. Whether the entire foreclosure statute in the state of Washington is preempted by federal law is the issue. Mellon contends it is not.

Mellon's original Complaint alleges that the Lender did not foreclose the property according to state statute (CP 3-10). The Lender relied upon using a federal preemption argument to have the case dismissed. The Lender contended that state law does not apply to the foreclosure proceedings (CP 438-448). Clearly this is untrue. Preemption pertains to the loaning, servicing, and fees of a loan from a Federal Savings Bank. Preemption does not apply to a loan in foreclosure.

Preemption did not apply under the current factual pattern. It is Mellon's contention that at the very least concurrent jurisdiction is created.

In a 1996 case of *Stevedoring Services of America, Inc. v. Edward G. Eggert, et al.* 129 Wn.2d 17, 914 P.2d 737 (1996), when a stevedore company sought to recoup from an employee an overpayment made under the Federal Longshore and Harbor Workmen's Compensation Act (33 U.S.C. §918) (Federal Act), a Federal Administrative Law Judge had found the worker had misrepresented his income and his condition. The employee had lied during testimony. The Court credited the stevedore company for seven years worth of benefits it had previously paid to the employee. In that case the Superior Court entered a Summary Judgment in favor of the stevedore company. The Court of Appeals reversed the judgment, holding that the act was preempted by state law concerning remedies for overpayment. The Washington Supreme Court reversed and affirmed the Superior Court's Summary Judgment ruling, holding that the Federal Act did not preempt the stevedore's company state law action to recoup the overpayments. The primary issue presented in that case is whether the Federal Act preempted state law remedies for recovery of overpayment made under the Federal Act. In *Stevedoring Services*, the Washington Supreme Court stated at page 23:

Preemption may occur if (1) Congress passes a statute that expressly preempts State Law, (2) Congress occupies the entire field of regulation, or (3) State Law conflicts with Federal Law, making compliance with both an impossibility, or State Law presents an obstacle to the accomplishment of the Federal purpose. *Citing Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 265, 884 P.2d 592, (1994).

It is important to note that the *Stevedoring Services* case at page 32, concluded that the Court had concurrent jurisdiction. Mellon contends there is concurrent jurisdiction in this case. The Court went on to say that Congress did not intend to preempt the state law by occupying the field of employer or employee remedies, which were not in conflict with the exclusivity provision of the Federal Act.

Mellon contends that the foreclosure remedy provided for under Washington law is not preempted, or at least there is concurrent jurisdiction with the Federal Act. In foreclosure remedies in the State of Washington. Congress has not clearly stated that all federal law precludes state law in the foreclosure of a federal savings bank loan.

If a party has a federally backed mortgage from a Federal Savings Bank (FSB), does this mean that all state foreclosure proceeding are preempted? Mellon contends that it does not. It would be counter intuitive and against public policy to preempt an entire body of law, that has recently

been amended by our state legislature, to address and preempt the issue of foreclosures within the state.

Mellon contends that there is concurrent jurisdiction. Under concurrent jurisdiction a state right would give rise to a state remedy. Under federal preemption theory, as the Lender alleges, there still would be jurisdiction of the state court as Mellon states a claim under state law. The Consumer Protection Act gives rise to a state remedy creating jurisdiction. For the foregoing reasons Mellon contends that under state law there is a state remedy including a CPA violation thus granting a CR 12(b)(6) motion to dismiss was in error. The CPA issue is argued hereinafter in the next issue.

Issue No. 2. Did the Court err in failing to hold the Complaint did not state a cause of action for violations of the Washington State Consumer Protection Act?

This issue involves Assignments of Error Numbers 1, 2, 3 & 6.

RCW 61.24.135(2) provides for consumer protection in a foreclosure proceeding. Lender acted in bad faith by offering a loan modification to Mellon who was unemployed, and the Lender's proposal required higher payments than those originally defaulted upon, plus a balloon payment of over \$10,000.00 (CP 658-659). These unconscionable terms were unfair and deceptive in nature. That conduct was a standard practice for the Lender.

This conduct invokes a Consumer Protection Act violation. Furthermore, the deceptive practice of the Lender's bundling of attorneys' fees and inspection fees into 'loan-related fees and services' totaling \$53,295.46 also warrants a claim for Consumer Protection Act violation (CP 658-659). A violation of RCW 61.24.163 and 174 constitutes a CPA violation. RCW 61.24.030 was enacted to protect the borrower, Mellon. The beneficiary is required to prove compliance with each requirement. Here there is no proof.

The recent case of *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861 (2010) involved the borrower's class action against the home loan lender for charging fax and notary fees as a result of the payoff of the loan, which held the conduct was in violation of the Washington Consumer Protection Act (CPA). There the Lender asserted that the CPA was preempted by the federal regulation as does the Lender in the current case.

With reference to the preemption question, the Washington State Supreme Court in *McCurry* said:

The McCurry's CPA unfair and deceptive practice claim also survives preemption to the extent it is a misrepresentation stemming from the contract. The McCurrys alleged Chevy Chase fraudulently represented that reconveyance of title was only possible under the terms of the Deed of Trust, if the fax and

notary fees were paid. A State Law that precludes a party from misrepresenting the terms of its contract, is one of general applicability, having only an incidental effect on the loan operations and is not preempted. *See Lopez*, 105 Cal. App. 4th at 741, 130 Cal. Repr. 2d 42.

In the Complaint it is alleged that the Lender was advised that Mellon was unemployed and without sufficient funds to make the proposed monthly payments (CP 8). Nevertheless, the Lender submitted a proposal, namely Option #2, wherein Mellon paid cash of \$10,004.89 in February 2011, and \$2,951.00 in March of 2011 (CP 6). Mellon was financially unable to make the April 2011 payment of \$2,951.00 and the remaining payments through and including July of 2011 (CP 6-7, 658-659). Mellon alleges that the options were unreasonable and impossible to perform (CP 6) and that the Lender failed to act in good faith, had a financial gain not to cooperate and to foreclose the obligation. The foreclosure would produce a higher financial gain to the Lender than complying with RCW 61.24.031 (CP 6). The loan amount is federally guaranteed with any deficiency or foreclosure being reimbursed under the guaranty.

Mellon alleges that Lenders' conduct occurred in trade and/or commerce and was unfair (CP 9). These deceptive acts and/or practices impacted the public interest and were more likely to reoccur (CP 9). It is alleged that all of said acts violated the CPA (CP 9-10). Mellon contends

they have alleged a valid cause of action of a CPA violation and are entitled to be heard under *McCurry v. Chevy Chase Bank, supra*. Furthermore, because there is a state right to claim a CPA violation there is a state remedy to the right, thus giving rise to the jurisdictional issue at the heart of this litigation. Because there is a state right, there is a state remedy. There is jurisdiction. The court erred in dismissing Mellon's CPA claim because of lack of jurisdiction (CP 678-679).

Issue No. 3. Did the Court err in failing to rule on Mellon's Motions to Fix the Unpaid Balance, Reinstate the Promissory Note and Deed of Trust and to Fix the Amount of the Loan?

This issue involves Assignments of Error Numbers 1, 2, 3, & 4.

The Court failed to rule on October 9, 2012, on Mellon's Order to Show Cause and Motions which were noted for hearing on that date, which motions were:

(a) Order to Show Cause and Motion to Fix the Unpaid Balance of the Promissory Note and Deed of Trust (CP 391-393, 356-388, 514-529);

(b) Motion to Reinstate the Promissory Note and Deed of Trust (CP 315-316, 514-529);

(c) Order to Show Cause to Fix the Amount of Loan Balance, which was in dispute (CP 391-393, 514-529).

The Court reasoned since it did not have jurisdiction, it could not rule on the motions.

Without a final Order on the aforesaid motions, there is no appealable Order. RAP 2.2(13).

The above motions were noted earlier, but were not ruled upon due to a scheduled but never completed mediation, wherein the Lender produced a Modification Agreement indicating the loan balance was approximately \$234,000.00, when the unpaid principal balance was \$182,730.24 (CP 634) (CP 652, 658-659). This figure was set by the Lender without crediting to Mellon the payments paid into the Clerk of Superior Court totaling over \$18,000.00. In addition the Lender added unreasonable attorneys' fees and costs to the sum. Mellon did not accept the Modification Agreement due to the \$53,295.46 increase added to the unpaid loan balance by the Lender (CP 634, 652, 658). The value of the real property was at maximum \$180,000.00 (CP 659).

The Court has discretion on ruling on motions. *Hubenthal v. Spokane & I. Rg. Co.*, 48 Wash. 677, 86 P. 955 (1906).

Mellon is entitled to have their motions ruled upon, either granted or denied, but not left unresolved. Mellon alleges that the Court abused its discretion by not ruling on the motions. The Court should be ordered to rule on the motions. The rationale for such an argument is rooted in the theory that if the case has been dismissed based on a CR 12(b)(6) motion, any

motions left unanswered could lend to an argument where Mellon asserts a claim where relief could be granted.

Mellon asks this Court to rule on the motions or remand to the Trial Court for a ruling. The Court erred in not ruling on the unresolved motions.

Issue No. 4. Did the Court err in releasing the funds held by the Court to the Lender?

This issue involves Assignments of Error Numbers 1, 2, 3, & 5.

The Court released the funds held by the Clerk of the Court pursuant to the Lender's granted motion (CP 862-864). The Court never specifically allocated where these funds were to be applied. The Lender has made no assertion as to their use. If the Lender does not reinstate the loan, the funds should be refunded to Mellon, because equity abhors forfeitures. "Forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial." *Hyrkas v. Knight*, 64 Wash.2d 733, 734, 393 P.2d 943 (1964) (quoting *State ex rel. Foley v. Superior Court*, 57 Wash.2d 571, 574, 358 P.2d 550 (1961), *Pardee v. Jolly*, 163 Wash. 2d 558, 574, 182 P.3d 967, 976 (2008)). Here equity demands that the money paid by Mellon into the Clerk of the Court, totaling over \$18,300.00 should be returned to Mellon (CP 863). The funds should not be forfeited to the Lender if they choose not to reinstate the loan (CP 863). Mellon has asked the Court to reinstate the loan, but

the Lender refused without adding an additional \$53,295.46 to the unpaid balance (CP 634, 652, 658).

If the Court finds that the Lender should reinstate the loan or that the Lender decides to reinstate the loan, the funds in question should be paid towards the principle balance of the loan. These should not apply to any attorneys' fee for this litigation because the Lender has yet to ask for attorney's fees in its Order of Dismissal. The attorney's fees are therefore waived and *res judicata*.

The Court should not have released the funds in question to the Lender because equity abhors forfeitures. The statute makes no provision for disposition of funds paid into Court pending foreclosure where the Court dismisses the action for lack of jurisdiction. There is no precedential ruling case law in Washington on this issue. Furthermore since the Lender did receive the funds the Court again erred in not giving specific instruction as how to apply the funds to the loan principle since no request was made for attorney's fees (CP 678-679, 862-864).

Mellon respectfully asks for the funds to be either returned to him if the loan is not reinstated, or in the alternative to apply the funds to the principle, if the Lender reinstates the loan.

Issue No. 5. Did the Court err in extending the time for appeal?

This issue involves Assignments of Error Numbers 1, 2, 3, & 6.

This issue is only relevant if the Lender or the Appellate Court questions Mellon's right of appeal. Mellon timely filed a Motion for Reconsideration on October 17, 2012 (CP 719-720). As previously stated, the Court was going to take leave from October 8, 2012 through January 2, 2013. The Court made the parties aware that a decision would not be reached before 2013. On January 18, 2013, the Court gave Notice to both parties that the Court would soon have a final decision on the Motion for Reconsideration (CP 860). On January 30, 2013, the Court without argument denied Mellon's Motion for Reconsideration. However, notice of such a decision was never given nor presented to Mellon's counsel (CP 862-864).

To remedy this lack of notice issue, the court extended the time for appeal (CP 883). It is Mellon's contention that the Superior Court cannot alter Rule of Appellant procedure and therefore the court erred in extending the time. RAP 18.8. *State v. Pilon*, 23 Wn.App. 609, 596 P.2d 664 (1979).

While this issue is not relevant unless challenged by the Appellate Court or by the Lender, the Court should have vacated the order, thus vacating the Order Granting the Motion for Reconsideration and then re-entered the Order (CP 865-866). This may simply be a technicality, but it is also an issue that must be preserved and brought to the Court's attention.

IX. CONCLUSION

From the outset of this litigation Mellon has attempted to work with the Lender to keep their home while ensure the Lender is made whole. The Lender has acted unfairly and in bad faith. The Lender was disinterested in trying to come to a reasonable solution to this problem. In repeated attempts Mellon has come to the table asking for the Court to set a reasonable payment plan, or to reinstate the mortgage, but the Lender has created an impasse at each discussion.

The Court erred in finding that the federal law preempts all state law, when federally backed mortgages are at issue in a state foreclosure proceeding. This gives the Lender carte blanche to foreclose however they deem reasonable. The legislature enacted RCW 61.24.031 in 2011 to protect Mellon. The Lender failed to prove compliance. Mellon contends

that Congress in 1933 did not preempt the state foreclosure laws by enacting HOLA.

Mellon asks the Court to reverse the Trial Court's Motion to Dismiss based on lack of jurisdiction and remand to rule on Mellon's motions to reinstate the loan and fix the amount due on the loan.

X. MOTION FOR ATTORNEY'S FEES

There was no request by the Lender for attorneys fees in the CR 12(b)(6) Order. It would be *res-judicata* for the Lender to ask and receive them now.

Mellon moves the Court for reasonable attorney fees in handling this appeal and in the Trial Court in the event that they are successful in getting a reversal.

Paragraph 14 of the Deed of Trust provides, in part:

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with the Borrower's default, for the purpose of protecting Lender's interest in the property and rights under this security instrument, including, but not limited to, attorney's fees, property inspection and valuation fees. . . . (c) pays all expenses incurred in enforcing this security agreement including, but not limited to, reasonable attorney's fees, property inspection and valuation fees and other fees incurred for the purpose of protecting Lender's interests in the property. . . ."

RCW 4.84.330 as amended provides as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is a party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements . . .

As used in this section 'prevailing party' means a party in whose favor final judgment is rendered.

The applicability of the statute providing for prevailing attorney's fees, in action on contract or lease which contains unilateral or attorney's fees provision, is a question of law, which is reviewed *de novo*. *Wachovia S.B.A. Lending v. Kraft*, 138 Wn.App. 854, 158 P.3d 1271 (2007), *affirmed* 165 Wn.2d 481, 200 P.3d 683, 200 P.3d 683 (2009).

A party is considered to have prevailed for purposes of the attorney's fees statute if the party obtains relief on a significant issue. *Hebert v. Wash. State Public Disclosure Com'n.*, 136 Wn.App. 249, 148 P.3d 1102 (2006).

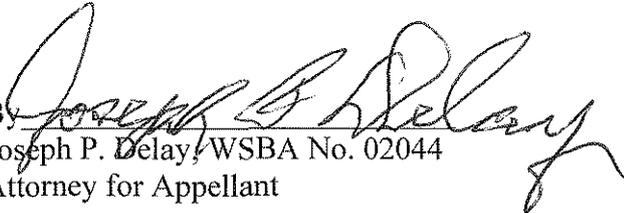
Mellon contends under the above interpretation if this proceeding is resolved in his favor, then he should be awarded his attorney's fees. The significant issue in this case is jurisdiction.

Mellon also seeks attorney's fees under RCW 19.148.030(3) and RAP 18.1. Contractual and statutory provisions for award of attorney's fees at trial supports award of attorney's fees on appeal. *Reeves v. McClain*, 56 Wn.App. 301, 783 P.2d 606 (1989).

Dated this 22 day of July, 2013.

Respectfully submitted,

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