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Division III
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Case No. 366111

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR
NEWCASTLE INVESTMENT TRUST 2014-MHI,

Appellant,

vs.

OKANOGAN COUNTY and CHRISTINA VALDOVINOS and EDILBERTO
VALDOVINOS,

Respondents.

APPELLANT'S REPLY BRIEF

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I. REPLY

A. County Failed to Comply, Even Substantially, With the Statutory Mailing Requirement.

The County did not “substantially” comply with the statutory mailing to lienholder requirement, as is argued in the response brief. There was zero compliance with the requirement. The County’s *attempt* to mail to the lienholder, which address the County knew was mistaken because *it was not a real address*, is obviously not a mailing. As no mailing by the County was made to an address for the lienholder, there was no compliance by the County with the applicable requirement. This cannot be overlooked or swept-aside.

B. Mailing Obligation Not Excused.

The County appears to argue the title company’s error excused the County of its statutory and due process mailing to lienholder obligation. There is no authority for the proposition. This argument is additionally undermined by the fact the County knew the lienholder address from the title report was in error because *it was not a real address*, and yet the County took no corrective action.

The County appears to alternatively argue, and for the first time, that no mailing was required because WAMU had ceased to exist, having merged with Chase. This argument is belied by the fact the County did attempt to mail to WAMU, not Chase.

Furthermore, there is no authority for the proposition that no mailing is required when a lienholder dissolves or merges. A company's dissolution or merger does not eliminate the lien asset. Following dissolution or merger, there always is a successor lienholder (and often-times the successor is receiving correspondences directed to its predecessor, particularly in a merger situation). The County is always obligated, by statute and due process, to give "reasonably calculated notice," to each lien, which *at the least* requires a mailing to the lien address.

C. County Failed Its Obligation to Give "Reasonably Calculated" Notice.

The County clearly failed to comply with its overarching statutory and due process obligation to give "reasonably calculated" notice as to the lien. When the mailing was returned because the address was *not a real address*, minimal inquiry by the County would have disclosed at least one actual address for the lien. For example, and as set forth in the opening brief:

- The County could have inquired with the title company about the erroneous address from the title report, which would have resulted in the title company correcting its error.
- The County, itself, could have reviewed the recorded lien, which contained an address.
- The County could have Googled "Washington Mutual Bank," which search would have immediately returned hundreds of thousands of results

discussing the asset sale to Chase in 2008. And there are dozens of Chase addresses in this State capable of receiving service or mail, including a Chase branch in the County, in the City of Omak.

In its response brief, the County does not address why none of the above corrective actions were taken in this case. The County seems to suggest, without support, that the above corrective actions would be “impracticable,” and that the County is being asked to take “heroic efforts.” Yet, the County’s attorney conceded that the County does take corrective actions when mailings fail, including internet research:

THE COURT: So when, what action did the County take when they got the letter back that said no such address?

MR. GECAS: Well, they did post it at that point, and they don’t have like a written process, but they do typically do some internet work just, if it’s a human being, for example, to see if they can find an additional address, but, you know —¹

While it defies belief that the County is unaware of WAMU’s failure (biggest bank failure in U.S. history) and subsequent merger with Chase, even if that were true, the merger would have been immediately disclosed through the internet research the County concedes it does on other cases, and which the County does not object to as impracticable or unduly burdensome. In this case, the County

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essentially decided, and for undisclosed reasons, that no internet research or other corrective action would be taken, and no lienholder mailing would be made. That is what this case is about. This case is not about the advocated corrective measures being impractical, or placing an undue burden on the County.

D. Finding for the County Would Set Bad Precedent.

Finding for the County would not only be contrary to the law, but it would set bad precedent. The County admits it typically researches addresses when mailings fail, consistent with its statutory and due process obligation to give “reasonably calculated” notice, but the County also admits that in this case, and without explanation, it attempted *no corrective action*. To find for the County in this case would be to tell this and other counties that, when a mailing fails, no corrective action is ever required, even when the failed mailing was the result of a known error from the title report. Accordingly, every county could robotically mail according to their title report and thereby conclusively discharge their statutory and due process notice obligations. This County and others would no longer have any incentive to attempt corrective action when mailings fail, which corrective action the County admits is typical and not unduly burdensome.

E. Foreclosure Judgment Must Be Vacated as to the Lien.

Once the court concludes that the County failed to properly join the lien to the foreclosure action, it follows that the foreclosure judgment, to the extent it purports to affect the lien, is *void*. *United States Bank of Wash. v. Hursey*, 116

Wn.2d 522, 526 (1991) (foreclosure judgment cannot affect a lien not joined to the action). And void judgments must be vacated when the lack of jurisdiction comes to light. *Allied Fid. Ins. Co. v. Ruth*, 57 Wn. App. 783, 790 (1990). The duty to vacate is non-discretionary. *Leen v. Demopolis*, 62 Wn. App. 473, 478 (1991).

The above rule is not altered by *In re Proceedings of King Cty. for Foreclosure of Liens*, 117 Wn.2d 77, 85 (1991) and *Clallam Cty. v. Folk (In re Clallam Cty.)*, 130 Wn.2d 142, 158 (1996) as the County suggests. Nothing from those cases requires the Court to engage in an extensive “standing” analysis before vacating a foreclosure judgment as to a lien that was not properly joined. Furthermore, Wilmington is not attempting to cancel the County’s tax deed to the purchaser, and thus Wilmington is not bound by any statutory or case law limitation as to that type of relief, which relief appears to have been the focus of the language cited by the County from *In re Proceedings of King Cty* and *In re Clallam Cty*.

F. Wilmington Sufficiently Demonstrated a Present Lien Interest.

Even if there was a “standing” prerequisite to vacate a void judgment, for the purposes of the motion to vacate, the record sufficiently demonstrated Wilmington is the successor lienholder with standing to challenge the purported lien loss.

The record before the Superior Court on the motion to vacate contained a sworn records custodian declaration from Wilmington’s servicing agent confirming that Wilmington acquired and owns the loan secured by the lien. The testifying

records custodian was not required to testify from personal knowledge; he was permitted to testify based on his review of business records kept in the ordinary course of the servicing agent. RCW 5.45.020; *Bavand v. OneWest Bank, FSB*, 196 Wn. App. 813, 829-30 (2016); *Beverick v. Landmark Bldg. & Dev. Inc.*, No. 74210-8-I, 2017 Wash. App. LEXIS 1541, at *15-16 (Ct. App. July 3, 2017); *Conner v. Everhome Mortg. Co.*, No. 74050-4-I, 2016 Wash. App. LEXIS 2799, at *6 (Ct. App. Nov. 21, 2016). There is no reason to believe Wilmington's servicing agent would falsify his testimony. *State v. Fleming*, 155 Wn. App. 489, 499 (2010) (business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify).

In response, the County provided zero rebuttal to the records custodian's testimony. The County did not assert, and with proof, a current lienholder *other* than Wilmington. The County's challenge to Wilmington's acquisition of the lien is without factual basis, and was meant to distract from the obvious jurisdictional defects.

Furthermore, if the Court did not believe the declaration sufficiently demonstrated Wilmington's lien acquisition, at the least, it should have proceeded with an evidentiary hearing. The proffered declaration should not have been summarily rejected and without the opportunity to supplement and present the evidence in open court.

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G. Wilmington Has Standing to Vacate / Appeal.

Wilmington, as current lienholder, holds all lien rights, including those of its predecessors. *Podbielancik v. LPP Mortg. Ltd.*, 191 Wn. App. 662, 673 (2015) (lien successor acquires all rights and obligations thereunder). This includes the right to challenge the foreclosure judgment, to the extent it purports to affect the lien, as void for lack of jurisdiction. Wilmington is the real-party-interest within the meaning of CR 17(a). And Wilmington was certainly “aggrieved,” within the meaning of RAP 3.1, by the Superior Court’s refusal to vacate, as it results in a lien loss.

H. Wilmington Was Not Required to Intervene.

The County improperly argues, for the first time on appeal, that Wilmington was required to intervene before bringing its motion to vacate. *Heg v. Alldredge*, 157 Wn.2d 154, 162 (2006) (appellate court does not address issues raised for the first time on appeal).

In any event, intervention by Wilmington was not required. The foreclosure was *in rem* against the various parcels, and the County was attempting to foreclose the subject parcel and its lien, making the property owner and lienholder interested parties. RCW 84.64.050(4); *In re Proceedings of King Cty.*, at 92 (beneficiary of a deed of trust has a substantial interest in the property which will be affected by a tax sale). Furthermore, formal substitution of parties is not required when there is a transfer of interest. CR 25(c).

The County cites *In re Clallam Cty*, at 158 for the proposition intervention was required, but that case is distinguishable. In that case, intervention was denied as to a tenant-in-common whose undivided interest was not being foreclosed.

I. Facts Pertaining to the Purchaser are Irrelevant.

As it did to the Superior Court, the County attempts to sway this Court by invoking sympathy for the purchaser, whose property would be encumbered by the lien if Wilmington's relief was granted. As a threshold matter, the facts pertaining to the purchaser are irrelevant to the legal issues before the Court. But even if they were relevant, there should be no sympathy for the purchaser. The purchaser purchased at a non-warranty tax sale, where properties are sold at significant discount. The risk that tax deed did not convey clear title was assumed by the purchaser, and that risk was reflected in her discounted purchase price.

II. CONCLUSION

The County failed to obtain jurisdiction over the lien. The judgment, to the extent it purports to affect the lien, is void. It was legal error for the Superior Court not to vacate the judgment as to the lien, and the Superior Court should be reversed.

DATED August 12, 2019



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MCCARTHY & HOLTHUS, LLP

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