

No .42265-4-II

87927-3

SUPREME COURT OF THE STATE OF WASHINGTON

TAMARA FRIZZELL,

Appellant,

v.

BARBARA MURRAY and GREGORY MURRAY,

Respondents.

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STATE OF WASHINGTON

PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF PETITIONER.....1

II. CITATION TO COURT OF APPEALS DECISION1

III. ISSUES PRESENTED FOR REVIEW1

IV. STATEMENT OF THE CASE2

A. FACTUAL HISTORY2

B. PROCEDURAL HISTORY.....6

V. ARGUMENT8

A. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE SUPREME COURT’S DECISION IN *PLEIN* IN THAT IT DENIES APPLICATION OF THE *PLEIN* AND RCW 61.24.040(1)(f)(IX) WAIVER RULE DESPITE THE FAILURE OF THE PLAINTIFF TO ACTUALLY OBTAIN RESTRAINT OF THE TRUSTEE’S SALE.....8

B. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE SUPREME COURT’S DECISION IN *PLEIN*, OR OTHERWISE INVOLVING AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST, IN THAT IT EXEMPTS, WITHOUT LIMITATION, CLAIMS BASED ON A LACK OF CAPACITY TO CONTRACT FROM THE *PLEIN* AND RCW 61.24.040(1)(f)(IX) WAIVER RULE.....19

VI. CONCLUSION20

APPENDIX

A. PUBLISHED OPINION, AUGUST 28, 2012

B. ORDER AMENDING OPINION, SEPTEMBER 25, 2012

C. *PLEIN V. LACKEY*, 149 WASH.2D 214 (2003)

D. STATUTE AND COURT RULES EXCERPTS

TABLE OF AUTHORITIES

CASES

Albice v. Premier Mortg. Services of Washington, Inc., 174 Wash.2d 560,
276 P.3d 1277 (2012)-----17-19

Brown v. Household Realty Corp., 146 Wash. App. 157
(Div. 1, 2008)----- 9-10, 19

Cox v. Helenius, 103 Wash.2d 383, 693 P.2d 683 (1985)----- 9

Evar, Inc. v. Kurbitz, 77 Wash. 2d 948, 468 P.2d 677 (1970)----- 14

Plein v. Lackey, 149 Wash.2d 214, 67 P.3d 1061 (2003)----- 8-12, 15-20

Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dept., 120 Wash. 2d
394, 842 P.2d 938 (1992) ----- 16

STATUTES

RCW 7.40.080 -----9, 12-15, 17-18, 20

RCW 61.24 ----- 9

RCW 61.24.040(1)(f)(IX)----- 8, 10, 12, 17-20

RCW 61.24.127-----16-17, 19

RCW 61.24.130(1) -----9, 12-15, 17-18, 20

RCW 19.146 ----- 20

RCW 61.24 -----13, 19

RCW 61.24.127-----1, 10, 13, 19

RCW 61.24.130----- 14, 15, 16, 17, 18

RCW 61.24.040----- 14

RULES

CR 65(c) -----9, 12-15, 17-18, 20

LEGISLATIVE MATERIALS

S.B. 5810, 60th Leg. § 6 (2009) -----9, 12-15, 17-18, 20

I. IDENTITY OF PETITIONER

Petitioners are Barbara Murray and Gregory Murray (the “Murrays”), and were the Respondents at the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

The Murray respectfully request that this Court review the decision of the Court of Appeals, Division II, in *Frizzell v. Murray*, No. 42265-4-II (Wash. Ct. App. Aug. 28, 2012), which reversed an award of summary judgment against the Plaintiff, Tamara Frizzell, and remanded the case to the trial court for further action.¹

III. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate where the decision of the Court of Appeals is in conflict with the Supreme Court’s decision in *Plein v. Lackey*² and involves an issue of substantial public interest, as it denies application of the waiver rule as stated in *Plein* and RCW 61.24.040(1)(f)(IX) where the Plaintiff never actually obtained restraint of the sale due to her failure to comply with the mandatory security provisions of RCW 61.24.130(1), RCW 7.40.080, CR 65(c)? Yes.

2. Is review appropriate where the decision of the Court of Appeals is in conflict with the Supreme Court’s decision in *Plein* and

¹ Appendix, A. The decision was amended on September 25, 2012. Appendix, B.

² 149 Wash.2d 214, 67 P.3d 1061 (2003).

involves an issue of substantial public interest, as it exempts, without limitation, claims based on a lack of capacity to contract from the waiver rule stated in *Plein* and RCW 61.24.040(1)(f)? Yes.

IV. STATEMENT OF THE CASE

A. FACTUAL HISTORY

In mid August 2008, Douglas Baer, the Plaintiff's live-in boyfriend, contacted Gregory Murray regarding obtaining a loan on behalf of the Plaintiff, Tamara Frizzell.³ He claimed to be acting on behalf of Ms. Frizzell through a power of attorney.⁴

At no point did Mr. Baer indicate or even suggest that Ms. Frizzell was incompetent or lacked the capacity to understand or execute a contract.⁵ To the contrary, he claimed her execution of the power of attorney, signed August 12, 2008, granted him full authority to handle her financial affairs, to include obtaining a loan for \$100,000.⁶

Although Mr. Baer initially asked to proceed solely based on the authority granted to him by the Power of Attorney, Mr. and Mrs. Murray were uncomfortable extending such a large loan without the direct involvement of the only borrower.⁷ As such, they insisted that Ms.

³ CP: 88-89, ¶ 3; CP: 145-46, ¶ 3.

⁴ CP: 88-89, ¶ 3; CP: 146, ¶ 4.

⁵ CP: 88-89, ¶ 3.

⁶ CP: 88-89, ¶ 3; CP: 95-98 (Exhibit A - General Power of Attorney); CP: 146, ¶ 4.

⁷ CP: 89, ¶ 4; CP: 146, ¶ 5.

Frizzell sign the documents on her own behalf.⁸

Mr. Baer stated that Ms. Frizzell needed the funds to start a new business selling wheelchairs and scooters.⁹ Mr. Murray clearly and emphatically explained that the Murrays only offered loans for business purposes, and that they did not offer loans for personal uses.¹⁰ As part of that disclosure process, Mr. Murray obtained numerous documents signed by Ms. Frizzell regarding the commercial nature of the loan.¹¹ Ms. Frizzell testified at a deposition in this case on May 10, 2011. During her deposition, Ms. Frizzell admitted several times that the purpose of the loan was to start a wheelchair and scooter business.¹²

Mr. Murray provided Ms. Frizzell with a disclosure dated August 27, 2008, which explained the costs and fees associated with the loan, and that Ms. Frizzell would receive a net payment of \$87,882.02.¹³ Ms. Frizzell signed the disclosure form, and dated it August 28, 2008.¹⁴ The August 27, 2008 disclosure form states “the borrower is encouraged to seek there [sic] own legal advice in all matters with regard to this loan

⁸ CP: 89, ¶ 4; CP: 146, ¶ 5.

⁹ CP: 89, ¶ 5; CP: 146, ¶ 6.

¹⁰ CP: 89, ¶ 7.

¹¹ CP: 89, ¶¶ 8-14; CP: 99-107 (Exhibit B – Business Real Estate Loan Application); CP: 149-51 (Defendants’ Requests for Admissions Nos. 3-9); CP: 179 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions Nos. 3-9).

¹² CP: 241, ll. 2-8; CP: 243, ll. 12-23; CP: 252, ll. 20-23; CP: 260, ll. 18-22; CP: 274, ll. 12-14.

¹³ CP: 90, ¶ 15; CP: 109.

¹⁴ CP: 149-52 (Defendants’ Requests for Admissions Nos. 10 and 11); CP: 179 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions Nos. 10 and 11).

prior to signing.”¹⁵ Ms. Frizzell signed immediately below that warning.¹⁶

The loan closed on August 28, 2008.¹⁷ Ms. Frizzell appeared, and executed each of the documents.¹⁸ Mr. Murray did not observe anything in her behavior or questions that indicated that she did not understand the documents being executed or the purposes of the loan closing.¹⁹ She was given an opportunity to review each document before she signed, and executed all of the required documents without issue.²⁰

As part of closing, Ms. Frizzell executed both a Promissory Note²¹ and a Deed of Trust, which granted Mrs. Murray a security interest in the 128th St. Property.²² The Deed of Trust clearly states that the document is for a loan of \$100,000, and the 128th St. Property is security for the loan.²³

Ms. Frizzell received \$87,882.02 from Mrs. Murray on August 28, 2008 via wire transfer to an account of Ms. Frizzell’s choosing.²⁴ Ms. Frizzell made the first three regularly scheduled payments under the Note

¹⁵ CP: 90, ¶ 16; CP: 109.

¹⁶ CP: 90, ¶ 16; CP: 109.

¹⁷ CP: 90-91, ¶ 17.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ CP: 91, ¶ 18; CP: 111-13; CP: 149-52 (Defendants’ Requests for Admissions Nos. 12-14); CP: 180 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions Nos. 12-14).

²² CP: 91, ¶ 20; CP: 115-18; CP: 149-53 (Defendants’ Requests for Admissions Nos. 15-16); CP: 180 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions Nos. 15-16).

²³ CP: 91, ¶ 20; CP: 115-18.

²⁴ CP: 149-53 (Defendants’ Requests for Admissions No. 17); CP: 180 (Plaintiff’s Responses to Defendants’ First Set of Requests for Admissions No. 17).

in the total amount of \$3,000, and the last payment was received on December 3, 2008.²⁵ Since that time she has failed to make any payments towards the Note.²⁶ Following Ms. Frizzell's default, Mrs. Murray instituted the non-judicial foreclosure of the Deed of Trust.

Despite the assertion that the funds were going to be used for the wheelchair/scooter business, Ms. Frizzell used nearly \$60,000²⁷ of the \$87,882.02²⁸ she received from Mrs. Murray to invest in the stock market, and claims to have lost nearly all of the funds through those investments. No evidence was presented by Ms. Frizzell, aside from her own testimony, corroborating her claimed use of the loan funds or otherwise verifying that the loan funds were exhausted.

The original trustee's sale regarding Ms. Frizzell's property was scheduled to occur on October 23, 2009, but it was stayed by Ms. Frizzell filing a Chapter 13 bankruptcy petition *pro se* on October 13, 2009.²⁹ Ms. Tamara Frizzell, while proceeding *pro se*, filed nine separate pleadings with the court over a three week period, to include her Chapter 13 bankruptcy petition, her bankruptcy schedules, a first Chapter 13 plan, an amended Chapter 13 plan, and other pleadings.³⁰ Her bankruptcy petition was dismissed on February 4, 2010, and the sale was continued to February 19, 2010.³¹ At no point during the bankruptcy did Ms. Frizzell

²⁵ CP: 91, ¶ 21.

²⁶ *Id.*

²⁷ CP: 268-71.

²⁸ CP: 267, ll. 3-10.

²⁹ CP: 33-34, ¶ 3; CP: 36-87 (Exhibits A, B, C, and D).

³⁰ CP: 33-34, ¶ 3.

³¹ *Id.*

dispute the validity of the Note or Deed of Trust³², nor did she allege a lack of capacity to contract.³³

B. PROCEDURAL HISTORY

After the bankruptcy was dismissed, a Trustee's Sale was scheduled for February 19, 2010. Ms. Frizzell filed this action on February 12, 2010 along with a motion in this action seeking the restraint of the sale.³⁴

Following a hearing held before Judge Lisa Worswick on February 18, 2010, the court entered an Order restraining the Trustee's Sale, conditioned on payment by Ms. Frizzell of \$15,000, representing the arrearages on the deed of trust, into the registry of the court and the filing of a bond with the court in the amount of \$10,000 on or before February 19, 2010 at 9:45 a.m.³⁵ Ms. Frizzell neither appealed the Order nor requested reconsideration. Ms. Frizzell also made no argument seeking a reduction of or excuse from the trial court's security requirements.

Ms. Frizzell failed to comply with the imposed conditions, and the Trustee's Sale proceeded on February 19, 2010.³⁶ Mrs. Murray was the successful bidder at the sale, and purchased the 128th St. Property.³⁷

Plaintiff's Complaint does not dispute the procedural validity of the Trustee's Sale, nor does it dispute the propriety of the security

³² CP: 34, ¶ 9.

³³ CP: 34, ¶ 8.

³⁴ CP: 1-9 (Complaint); CP: 12-16 (Motion to Enjoin Trustee's Sale); CP: 17-18 (Note for Judges' Motion Calendar).

³⁵ CP: 124-125.

³⁶ CP: 142, ¶ 5; CP: 181-184 (Trustee's Deed).

³⁷ CP: 142, ¶ 5; CP: 181-184 (Trustee's Deed).

conditions imposed by the trial court's Order. All of the Plaintiff's allegations instead refer to the execution of the Note and Deed of Trust.³⁸

Despite the pendency of this action, Mrs. Murray filed a separate action for unlawful detainer against Ms. Frizzell on April 19, 2010 under Pierce County Superior Court Cause No. 10-2-08455-5.³⁹ By the stipulation of the parties, a Writ of Restitution was issued on June 3, 2010, directing the Sheriff of Pierce County to restore possession of the 128th St. Property to Mrs. Murray.⁴⁰

On April 22, 2011, the Respondents' filed their Motion for Summary Judgment, which requested dismissal of the Plaintiff's Complaint based the commercial nature of the loan and the Plaintiff's failure to actually restrain the trustee's sale.⁴¹

The Motion was granted by Judge Elizabeth Martin on May 20, 2011.⁴² Judge Martin held that Respondents' "Motion for Summary Judgment is granted based on the Plaintiff's failure to obtain pre-sale injunctive relief. Accordingly, all of Plaintiff's claims are denied."⁴³ Although Judge Martin's Order did not specifically address the commercial nature of the transaction, it was implicitly acknowledged

³⁸ CP: 1-9.

³⁹ CP: 142, ¶ 6.

⁴⁰ *Id.*

⁴¹ CP: 137-138.

⁴² CP: 304-05.

⁴³ CP: 305 (emphasis added).

based on the denial of the post-sale actions permitted for non-commercial transactions under RCW 61.24.127, which was argued by the parties.⁴⁴

Plaintiff timely sought review of Judge Martin's Order. Division II of the Court of Appeals reversed Judge Martin's Order, and remanded the case to the trial court for further proceedings. The Murrays now seek discretionary review by the Supreme Court.

V. ARGUMENT

A. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *PLEIN* IN THAT IT DENIES APPLICATION OF THE *PLEIN* AND RCW 61.24.040(1)(f)(IX) WAIVER RULE DESPITE THE FAILURE OF THE PLAINTIFF TO ACTUALLY OBTAIN RESTRAINT OF THE TRUSTEE'S SALE

1. THE COMPLETE DISMISSAL BY THE COURT OF APPEALS OF THE LEGISLATIVELY MANDATED SECURITY PROVISIONS OF RCW 61.24.130(1), RCW 7.40.080, AND CR 65(c) IS IN DIRECT CONFLICT WITH THE EXPRESS REQUIREMENT OF ACTUALLY "OBTAINING" A RESTRAINING ORDER UNDER *PLEIN*.

The Court of Appeals departed from the Supreme Court's decision in *Plein* when it denied application of the waiver rule, as stated in RCW 61.24.040(1)(f)(IX) and the *Plein* case, despite the Plaintiff's failure to actually obtain restraint of the subject trustee's sale. The Court of Appeals held that the issuance of a conditional injunction, despite the fact that it never took effect, constitutes "obtaining" an injunction, as that word

⁴⁴ See CP: 138, ll. 12-15; CP: 191-192.

is used in *Plein*, thus preserving presale relief.⁴⁵ This holding excuses, without explanation or qualification, Ms. Frizzell's compliance with the mandatory security requirements for injunctions under RCW 61.24.130(1), RCW 7.40.080, and CR 65(c).⁴⁶ As such, it has the practical effect of allowing litigants to disrupt the nonjudicial foreclosure process without requiring any attempt to comply with the legislature's mandatory security statutes. Due to this significant departure from the *Plein* case's express language, and its resulting effect of undermining the stated goals of the Washington Deed of Trust Act,⁴⁷ review is appropriate.

As stated in *Plein*, the three goals of the Washington Deed of Trust Act are to: (i) provide an efficient and inexpensive nonjudicial foreclosure process; (ii) provide adequate opportunities for interested parties to prevent wrongful foreclosure; and (iii) promote stability of land titles.⁴⁸ As part of those goals, the Deed of Trust Act provides the only means by which a grantor may preclude a sale once foreclosure has begun.⁴⁹ The statutory Notice of Trustee's Sale states:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to

⁴⁵ Appendix A, 8-9.

⁴⁶ The Court of Appeals decision offers no discussion or analysis whatsoever of these mandatory security requirements.

⁴⁷ Chapter 61.24 RCW.

⁴⁸ 149 Wash.2d at 225 (2003) (citing *Cox v. Helenius*, 103 Wash.2d 383, 387, 693 P.2d 683, 686 (1985)).

⁴⁹ *Cox*, 103 Wash.2d at 388; *Brown v. Household Realty Corp.*, 146 Wash.App. 157, 163, 146 Wash.App. 157, 235-36 (Div. 1, 2008); see also RCW 61.24.130.

RCW 61.24.130. *Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.*⁵⁰

A party who (i) receives notice of the right to enjoin a sale, and (ii) has actual or constructive knowledge of a defense to foreclosure prior to the sale, waives the right to postsale remedies where the party fails to bring an action to “*obtain*” a court order enjoining the sale.⁵¹ This waiver applies to *all claims* arising out of the obligations underlying the subject deed of trust, to include claims based on fraud and consumer protection statutes.⁵² Even if a suit is brought prior to the sale and requests injunctive relief, the failure to *actually* obtain a preliminary injunction restraining the trustee’s sale constitutes a waiver of presale remedies.⁵³ The Supreme Court in *Plein* focused on the requirement to “obtain” a preliminary injunction, as to do otherwise would render the requirements and procedures of RCW 61.24.130 meaningless.⁵⁴ This waiver of claims is seen as serving all three goals of the Deed of Trust Act.⁵⁵

⁵⁰ RCW 61.24.040(1)(f)(IX) (emphasis added).

⁵¹ *Plein*, 149 Wash.2d at 227-29 (2003) (citing *Cox*, 103 Wash.2d at 388).

⁵² *Brown*, 146 Wash.App. at 171 (holding that the trustee’s sale terminated the financial relationship between the lender and borrower, leaving each from any further claim by the other arising out of their loan transactions).

⁵³ *Plein*, 149 Wash.2d at 229 (2003) (despite filing an action for injunctive relief, “by failing to obtain a preliminary injunction or other restraining order regarding the trustee’s sale, as contemplated by RCW 61.24.130, [the grantor] waived any objections to the foreclosure proceedings.”).

⁵⁴ *Id.* at 227 (“[I]t would render the requirements of RCW 61.24.130 meaningless because it would be unnecessary to obtain an actual order restraining the sale or to provide five days’ notice to the trustee and payment of amounts due on the obligation.”).

⁵⁵ *Plein*, 149 Wash.2d at 227-28 (“The waiver doctrine applied in this context serves all three goals of the deed of trust act. Adequate remedies to prevent wrongful foreclosure exist in the presale remedies, and finding waiver in these circumstances furthers the goals of providing an efficient

There is no doubt that Ms. Frizzell had notice of the pending nonjudicial foreclosure, as Ms. Frizzell filed a Motion to Enjoin the Trustee's Sale.⁵⁶ However, she failed to comply with the conditions imposed by the Court, and thus did not avail herself of her statutory presale remedy. The Court required Ms. Frizzell to deposit \$15,000 into the registry of the court and to file a bond in the amount of \$10,000 on or before February 19, 2010, which was the day of the Trustee's Sale.⁵⁷ As Ms. Frizzell never deposited the required funds, the restraining order never went into effect.

Through its opinion, the Court of Appeals attempts to distinguish the Supreme Court's ruling in *Plein* by expanding the meaning of the word "obtain". In *Plein*, the foreclosed party, prior to the trustee's sale, filed an action for a permanent injunction against the trustee and beneficiary.⁵⁸ The action alleged a lack of default and a declaration that the foreclosure was void. The foreclosed party even filed a motion for summary judgment three days prior to the scheduled sale. The Supreme Court ruled that merely filing an action contesting a foreclosure does not have the effect of restraining a trustee's sale.⁵⁹

and inexpensive foreclosure process and promoting the stability of land titles."); *Peoples Nat. Bank of Wash. V. Ostrander*, 6 Wash.App. 28, 32 (Div. 3, 1971) ("To allow one to delay asserting a defense [until after the sale] would be to defeat the spirit and intent of the trust deed act").

⁵⁶ CP: 1-8 (Complaint); CP: 12-16 (Motion for Order Enjoining Trustee's Sale).

⁵⁷ CP: 124-25.

⁵⁸ *Plein*, 149 Wash. At 220.

⁵⁹ *Id.* at 227.

We hold that by failing to obtain a preliminary injunction or other restraining order restraining the trustee's sale, as contemplated by RCW 61.24.130, [the foreclosed party] waived any objections to the foreclosure proceedings.⁶⁰

Under *Plein*, the failure to obtain a preliminary injunction or other order restraining the sale under the provisions of RCW 61.24.130 results in waiver of the foreclosed party's objections to the foreclosure proceedings.

The Court of Appeals stretches the word "obtain" from *Plein* to include a restraining order that never went into effect due to the failure of the requesting party to comply with the trial court's statutorily mandated security conditions.⁶¹ The trial court entered an order restraining the sale conditioned on Ms. Frizzell posting adequate security,⁶² as required by RCW 61.24.130(1), RCW 7.40.080, and CR 65(c). By failing to post the required security (or seeking appropriate relief from the order via appeal or reconsideration), Ms. Frizzell failed to obtain a preliminary injunction.

As a condition of obtaining injunctive relief, the trial court property required Ms. Frizzell to provide security as required by RCW 61.24.130(1), RCW 7.40.080, and CR 65(c). The Court required Ms.

⁶⁰ *Id.* at 229 (emphasis added).

⁶¹ It is important to note that the Court of Appeals refers to the injunction as though it actually went into effect, but subsequently lapsed. "The injunction lapsed when Frizzell failed to remit the \$15,000 and post the bond by the following morning" (emphasis added). Appendix A, 5. That description is incorrect. The posting of security was a condition of the order taking effect. As stated in RCW 61.24.130(1), RCW 7.40.080, and CR 65(c), a restraining order shall not be issued or granted until the requesting party provides adequate security, as determined by the court. At no point was the Trustee's Sale actually restrained, as the order never went into effect.

⁶² CP: 124-125.

Frizzell to deposit \$15,000 into the registry of the court and to file a bond in the amount of \$10,000 on or before February 19, 2010, which was the day of the Trustee's Sale.⁶³

Ms. Frizzell simply failed to comply with the trial court's reasonable security requirements. Despite receiving \$87,882.02 in funds from the Respondents nineteen months earlier, Ms. Frizzell claims, without corroboration or explanation, that she did not have funds available to comply with the trial court's Order Enjoining Trustee Sale. By failing to appeal the Order Enjoining Trustee Sale or seek reconsideration, Ms. Frizzell was bound by its terms.⁶⁴ Instead, she and her attorney elected to disregard the Order Enjoining Trustee Sale altogether. As Ms. Frizzell never deposited the required funds, the restraining order never went into effect.

As stated in RCW 61.24.130, RCW 7.40.080, and CR 65(c), the trial court was required to condition the requested injunction on the payment of adequate security. RCW 61.24.130(1) states in part:

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic

⁶³ CP: 124-25.

⁶⁴ Even on appeal Ms. Frizzell did not argue the propriety of those conditions.

payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

...

*In addition, the court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction. The court may consider, upon proper showing, the grantor's equity in the property in determining the amount of said security.*⁶⁵

The requirement for security is echoed in the general injunction statute, RCW 7.40.080:

*No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order....*⁶⁶

Case law further states that this requirement for security is mandatory.⁶⁷

Finally, the Court Rule on injunctions also incorporates these statutory security requirements:

Except as otherwise provided by statute, *no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper....*⁶⁸

As such, the trial court's restrictions were mandatory under the applicable

⁶⁵ RCW 61.24.130(1) (emphasis added).

⁶⁶ RCW 7.40.080 (emphasis added).

⁶⁷ *Evar, Inc. v. Kurbitz*, 77 Wash. 2d 948, 951, 468 P.2d 677, 678 (1970) (posting a bond is mandatory under RCW 7.40.080) (citing *Irwin v. Estes*, 77 Wash.2d 286, 461 P.2d 875 (1969)).

⁶⁸ RCW 7.40.080 (emphasis added).

law. As Ms. Frizzell has not appealed the trial court's discretionary determination of adequate security under those statutes and the court rule, Ms. Frizzell admits that those requirements were proper. Thus she failed to comply with the valid conditions of obtaining the requested injunctive relief.

By unreasonably expanding the word "obtain" to include Ms. Frizzell's failed effort to restrain the Trustee's Sale, the Court of Appeals decision is in conflict with the Supreme Court's decision in *Plein*. The expansion also nullifies and renders meaningless the security requirements of RCW 61.24.130(1), RCW 7.40.080, and CR 65(c), which in turn undermines the goals of the Washington Deed of Trust Act by allowing postsale remedies without the counterbalance of reasonable security. Given the current frequency of foreclosures and the likely disruption to the finality of nonjudicial foreclosures following the decision of the Court of Appeals, this matter also involves an issue of substantial public interest warranting review.

2. THE LEGISLATURE ALREADY AMENDED THE WASHINGTON DEED OF TRUST ACT IN LIGHT OF *PLEIN*, AND DID NOT INCLUDE ANY EXEMPTION FROM THE STATUTORY SECURITY REQUIREMENTS OF RCW 61.24.130.

The Legislature already amended the Washington Deed of Trust Act in a manner that acknowledges *Plein*, but did not establish any exception to the statutorily mandated security requirements of RCW 61.24.130(1). As such, the Court of Appeals' expansion of postsale relief is unwarranted and inappropriate.

Plein was decided in 2003. The waiver rule stated in *Plein* is absolute in that it does not (i) distinguish between types of deeds of trust, such as deeds of trust securing commercial versus noncommercial obligations, nor does it (ii) preserve any specific types of postsale claims.

In response to the *Plein* decision and other economic circumstances, in 2009 the Legislature enacted RCW 61.24.127, which created various exemptions to the waiver rule stated in *Plein*.⁶⁹ RCW 61.24.127 preserves certain limited claims, to include fraud, violations of Title 19 RCW, or the failure of the trustee to materially comply with the provisions of Chapter 61.24 RCW.⁷⁰ The preserved claims do not apply, though, to the foreclosure of a deed of trust securing a non-commercial loan.⁷¹

Interestingly, the newly preserved claims under RCW 61.24.127 still serve the goals of the Washington Deed of Trust Act in that the preserved claims are limited to actions for monetary damages. The claimant is not permitted to take any action to affect the validity or finality of the foreclosure sale.⁷²

When enacting statutes, the Legislature is presumed to be familiar with court interpretations of statutes, such as the *Plein* decision.⁷³ At a

⁶⁹ S.B. 5810, 60th Leg. § 6 (2009).

⁷⁰ RCW 61.24.127(1)

⁷¹ RCW 61.24.127(5).

⁷² RCW 61.24.127(2)(b) and (c).

⁷³ *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dept.*, 120 Wash. 2d 394, 408, 842 P.2d 938, 946 (1992).

point where the Legislature was clearly amending the Washington Deed of Trust Act in light of the *Plein* decision through enacting RCW 61.24.127, it took no action to invalidate or limit the statutory security requirements of RCW 61.24.130(1) and RCW 7.40.080. As such, the Court of Appeals decision to broaden the meaning of the word “obtain” in a fashion that nullifies and renders meaningless those statutes is unwarranted and inappropriate.

3. THE ALBICE DECISION DOES NOT SUPPORT THE COURT OF APPEALS’ BROAD EXPANSION OF THE WAIVER RULE AS STATED IN PLEIN AND RCW 61.24.040(1)(f)(IX).

The decision of the Court of Appeals relies heavily on the recent Supreme Court case of *Albice v. Premier Mortg. Services of Washington, Inc.*⁷⁴ for authority to preserve Ms. Frizzell’s postsale remedies. Unlike *Albice*, Ms. Frizzell does not argue that the trustee’s actions were in violation of the Washington Deed of Trust Act, nor does she argue that the trial court’s determination of adequate security was an abuse of discretion. As it was actually Ms. Frizzell that failed, without excuse, to comply with the security requirements of RCW 61.24.130(1), RCW 7.40.080, or CR 65(c), equity does not support the preservation of her postsale claims.

In *Albice*, the Supreme Court refused to apply the waiver rule as stated in *Plein* and RCW 61.24.040(1)(f)(IX) based on equitable grounds.⁷⁵ It was undisputed that the trustee failed to strictly comply with

⁷⁴ 174 Wash.2d 560, 276 P.3d 1277 (2012).

⁷⁵ *Id.* at 572.

its statutory obligations.⁷⁶ Specifically, the trustee conducted its trustee's sale more than 161 days after the original date set in the trustee's notice of trustee's sale, which was beyond the statutory limit of 120 days.⁷⁷

However, the significant issue in *Albice* was the lack of knowledge of the borrower of any presale defense, which is a requirement under *Plein*.⁷⁸

[H]ere, when [the borrowers] received the notice, they had no grounds to challenge the underlying debt.... Further, unlike in *Plein*, where the borrower had a defense almost two months prior to the sale, here, [the borrowers] had no knowledge of their alleged breach in time to restrain the sale.⁷⁹

The equitable concerns at issue in *Albice* are absent in this case.

There is no allegation that the trustee or the lender violated the Washington Deed of Trust Act, and Ms. Frizzell does not dispute the propriety of the trial court's conditional security requirements. Ms. Frizzell received timely notice of the sale, and she had actual knowledge of her presale remedies. The element at issue is whether Ms. Frizzell obtained the required preliminary injunction. As it was Ms. Frizzell that failed to comply with the statutory requirements of RCW 61.24.130(1) and RCW 7.40.080 (along with CR 65(c)), there is simply no equitable basis to exempt her from the waiver rule as stated in *Plein* and RCW

⁷⁶ *Id.* at 569.

⁷⁷ *Id.* at 567.

⁷⁸ As stated above, the waiver rule as stated in *Plein* only applies where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Plein*, 149 Wash.2d at 227.

⁷⁹ *Albice*, 174 Wash.2d at 571.

61.24.040(1)(f)(IX). Tellingly, in its analysis of the equities, the Court of Appeals does not discuss whatsoever the failure of Ms. Frizzell to comply with the security requirements of RCW 61.24.130(1), RCW 7.40.080, or CR 65(c). Instead, the Court of Appeals appears to disregard those requirements entirely.

B. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *PLEIN*, OR OTHERWISE INVOLVING AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST, IN THAT IT EXEMPTS, WITHOUT LIMITATION, CLAIMS BASED ON A LACK OF CAPACITY TO CONTRACT FROM THE *PLEIN* AND RCW 61.24.040(1)(f)(IX) WAIVER RULE.

In a brief footnote the Court of Appeals also states that “if [Ms. Frizzell] lacked the capacity to contract, it would be inequitable to conclude that she voluntarily relinquished known rights related to that contract.”⁸⁰ The Supreme Court stated in *Plein* that “any objection to the trustee’s sale is waived where presale remedies are not pursued.”⁸¹ As noted in *Brown*, the legislature has reviewed Chapter 61.24 RCW since the *Plein* decision, but has yet to modify the application of the waiver doctrine in the context of commercial loans.⁸² There is simply no legal basis for the assertion that any claims on a commercial loan survive a trustee’s sale where the borrower knowingly failed to obtain presale relief.

⁸⁰ Appendix, A at n. 5.

⁸¹ 149 Wash.2d at 229 (emphasis added).

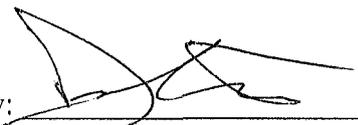
⁸² 146 Wash.App. at 170-71. RCW 61.24.127 does include certain exceptions to the waiver rule, but it only applies to non-commercial transactions. RCW 61.24.127(4) (“This section does not apply to the foreclosure of a deed of trust used to secure a commercial loan.”).

VI. CONCLUSION

The Murrays respectfully request that Supreme Court accept discretionary review of this case to clarify the scope of the waiver rules as stated in *Plein* at RCW 61.24.130(1)(f)(IX). The decision of the Court of Appeals significantly broadens the waiver rule by exempting (i) the failure of a requesting party to comply with the security requirements of RCW 61.24.130(1), RCW 7.40.080, and CR 65(c), and (ii) specifically exempting claims based on a lack of capacity to contract, even where such claims were known presale. These changes contradict the express language of *Plein* and are of a substantial public interest considering their likely impact on the finality of nonjudicial foreclosures.

RESPECTFULLY SUBMITTED this 27th day of September, 2012.

EISENHOWER & CARLSON, PLLC

By: 

Darren R. Krattli, WSBA # 39128
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2012, I caused all parties hereto to be served with the *Petition for Review* and this *Certificate of Service* by directing delivery to the following persons by the means stated:

By U.S. first-class mail and by e-mail on September 27, to Attorney for Appellant:

Dan Robert Young
Attorney at Law
1000 2nd Ave. Ste. 3310
Seattle WA 98104
and
danryoung@netzero.net

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 27 PM 3:37
STATE OF WASHINGTON
BY _____
DEPUTY

By ABC Legal Messenger for delivery on or before September 27, 2012, to:

Clerk of the Court
Washington State Court of Appeals, Division II
950 Broadway, #300
Tacoma, WA 98402

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of September, 2012, at Tacoma, Washington.



Gayle Herrmann, Legal Assistant

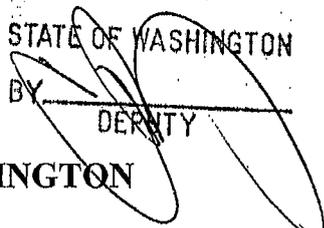
APPENDIX A

PUBLISHED OPINION
August 28, 2012

FILED
COURT OF APPEALS
DIVISION II

2012 AUG 28 AM 9:08

STATE OF WASHINGTON

BY 
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TAMARA FRIZZELL,

Appellant,

v.

BARBARA MURRAY and GREGORY
MURRAY, wife and husband, d/b/a SOUND
BROKERS,

Respondents.

No. 42265-4-II

PUBLISHED OPINION

JOHANSON, A.C.J. — Despite her relatively low income, Tamara Frizzell received a loan secured by her home from lenders Gregory and Barbara Murray.¹ She quickly defaulted and the Murrays foreclosed on her home. But before the trustee's sale, Frizzell sought and obtained an order restraining the sale, conditioned on Frizzell depositing a \$15,000 payment and \$10,000 bond into the court registry by the following morning. Frizzell failed to meet this condition, and a trustee sold her home the next day. Frizzell then sued the Murrays on various common law and statutory grounds, but the trial court granted the Murrays' summary judgment motion, reasoning that Frizzell waived her right to post-sale relief because she failed to actually restrain the

¹ For clarity, we refer to Gregory Murray as "Gregory" and Barbara Murray as "Barbara."

No. 42265-4-II

trustee's sale. On appeal, Frizzell claims that the trial court erred in granting summary judgment because (1) she did not waive her right to post-sale relief, and (2) genuine issues of material fact existed in her original complaint regarding (a) her capacity to contract, (b) the loan's purpose, (c) whether the loan amounted to a de facto sale, and (d) other statutory-based claims. We reverse the trial court's summary judgment order because Frizzell did not waive her right to post-sale relief, and we do not reach Frizzell's other claims.

FACTS

Frizzell owned real estate, and her friend, Douglas Baer, had a power of attorney signed by Frizzell authorizing him to engage in financial transactions on her behalf.² In 2008, Frizzell told Baer that she wanted a \$20,000 loan to pay some past-due bills. Baer called a phone number from a newspaper advertisement for a business that loans money against real estate and spoke with Gregory about a \$20,000 loan. Gregory offered Baer a better interest rate on a larger loan, and, according to Baer, "[t]he amount of the loan increased over time," to \$100,000. Clerk's Papers (CP) at 146.

Though Frizzell and Baer agreed that Baer would control the money, and though Baer presented to Gregory and Barbara his power of attorney to act on Frizzell's behalf, Barbara refused to loan the money to Baer and, instead, desired to loan the money directly to Frizzell. Frizzell had no involvement in the loan negotiation or lending process, but she did meet with Barbara for a half hour to sign the final loan papers, securing the loan with a deed of trust on her house.

² Baer believed Frizzell's property—a house with a fish pond, front deck, fruit trees, and a yard—was worth roughly \$250,000. The property value had been assessed at \$225,000, and Frizzell estimated its market value at \$300,000.

No. 42265-4-II

The \$100,000 loan required Frizzell to pay a \$1,000 monthly payment, which covered the interest only—and full repayment was due in three years. Gregory also explained to Baer that the Murrays only offered loans for “business purposes” and not for personal uses. CP at 89. He provided Baer loan paperwork and explained that Frizzell needed to complete it before the issuance of any loan. Frizzell had no business to operate, but Baer stored between 40 and 50 wheelchairs and scooters at Frizzell’s house and suggested they start a wheelchair and scooter business. Neither Frizzell nor Baer had business experience or business knowledge generally, but the Murrays never requested that Frizzell supply them a business plan or business proformas. Barbara did note Baer’s collection of wheelchairs and scooters, and she understood that Baer “was good at fixing things” and “had a connection in Bellevue or Redmond” with whom he planned to do business. CP at 207. Barbara did not ask how, specifically, Frizzell and Baer would use the loan proceeds.

On August 26, 2008, Frizzell submitted to the Murrays a completed “Business Real Estate Loan Application,” a declaration of purpose, and other paperwork. CP at 255. In her completed application, Frizzell explained that the loan would be used for a “wheelchair/scooter business,” and, when prompted to list any liabilities, Frizzell wrote “Hard Cash Loan[.] This Info. Should Not Matter.” CP at 100, 101 (some capitalization omitted). She listed the loan’s uses on the declaration of purpose as “wheelchair + scooter business.” CP at 105 (some capitalization omitted). Frizzell also signed a disclosure form that warned, “the borrower is encouraged to seek there [sic] own legal advice in all maters [sic] with regard to this loan prior to signing.” CP at 109.

After the Murrays subtracted the loan's fees, Frizzell received just under \$88,000. Frizzell used the loan to pay bills, and then she bought roughly \$60,000 in oil industry stocks on eTrade—stocks that plummeted, and Frizzell lost her investment. Frizzell made the first three scheduled \$1,000 payments, and the Murrays received the last payment on December 3, 2008. Then, Frizzell stopped making any payments. Barbara initiated the foreclosure process on Frizzell's home through a non-judicial sale under the deed of trust, and a trustee's sale was scheduled for February 19, 2010.

Procedural History

Before the trustee's sale, Frizzell filed a civil action against the Murrays. Her complaint alleged a number of legal and equitable grounds for relief that would provide a basis for restraining the trustee's sale, and she sought relief in the form of money damages for statutory violations, invalidation of the promissory note and deed of trust, and an injunction "barring enforcement of the deed of trust through foreclosure sale." CP at 8.

During her deposition, Frizzell explained that she did not understand what the "business loan" meant, expressing, "I can't say, because I don't understand what went on." CP at 259 (emphasis omitted). When asked if she understood that she was "borrowing [the] funds from the Murrays[,]," Frizzell responded, "I'm not sure." CP at 262 (emphasis omitted). Baer opined that offering a loan to Frizzell "was like giving the money to a small child who had no conception of how to spend the money, what would be required to pay it back, and what would happen if it were not paid back." CP at 146. Frizzell acknowledged that she suffered from a learning disability, and a clinical psychologist, Dr. Mark Whitehill, stated that, after observing and testing Frizzell, he believed she "is characterologically disposed to conform to what she believes others

No. 42265-4-II

want, and to keep her own feelings suppressed. Had she believed that the Murrays wanted her to sign the loan agreement, in all likelihood she would have felt compelled to do so.” CP at 197. He added that Frizzell suffers severe memory deficits, strongly suggestive of “incipient dementia” that affects her ability to remember what she would have been told about the “nature, effect, and terms” of the loan, as well as the ability to make rational decisions based on that memory. CP at 197. Ultimately, he expressed significant concerns about Frizzell’s capacity to contract.

Frizzell also sought to enjoin the trustee’s sale, and on February 18, 2010, the trial court entered an order enjoining the trustee’s sale scheduled for the following day, “conditioned upon plaintiff’s payment into the registry of the court the sum of \$15,000 representing arrearages on the deed of trust and a bond in the sum of \$10,000 on or before February 19, 2010 at 9:45 a.m.” CP at 125. The injunction lapsed when Frizzell failed to remit the \$15,000 and post the bond by the following morning. The trustee foreclosed on the home, and Barbara purchased the property at the sale and ejected Frizzell from the property. Following discovery, the Murrays moved to dismiss all of Frizzell’s claims on summary judgment. First, the Murrays moved that the trial court dismiss Frizzell’s claim on summary judgment because she failed to restrain the trustee’s sale and thus waived all claims and defenses relating to the deed of trust and promissory note. Second, in the alternative, the Murrays moved that the trial court enter partial summary judgment regarding Frizzell’s competency to contract, as well as the propriety of the transaction under various state statutes. The trial court granted the Murray’s motion for summary judgment on all of Frizzell’s claims “based on the Plaintiff’s failure to obtain pre-sale injunctive relief.” CP at 305. Frizzell timely appeals.

ANALYSIS

We review summary judgment orders de novo. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008). Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981, *cert. dismissed*, 129 S. Ct. 24 (2008).

Frizzell argues that the trial court erred in granting summary judgment because she did not waive her right to seek post-sale relief when she sought and obtained an order restraining the trustee's sale. We agree. Waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of relinquishment of such right, and it may result from an express agreement or may be inferred from circumstances indicating an intent to waive. *Lande v. S. Kitsap Sch. Dist. No. 402*, 2 Wn. App. 468, 474, 469 P.2d 982 (1970) (citing *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)). Waiver is also an equitable principle that defeats someone's legal rights where the facts support an argument that a party relinquished its rights by delaying in asserting or failing to assert an otherwise available adequate remedy. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012).

The three goals of Washington's Deed of Trust Act (WDTA)³ are (1) to provide an efficient and inexpensive nonjudicial foreclosure process, (2) to provide adequate opportunities for interested parties to prevent wrongful foreclosures, and (3) to promote stability of land titles. *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003). And the WDTA provides the only

³ Ch. 61.24 RCW.

No. 42265-4-II

means by which a grantor may preclude a sale once foreclosure has begun. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985). Under the WDTA,

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit *may* result in a waiver of any proper grounds for invalidating the Trustee's sale.

RCW 61.24.040(1)(f) (emphasis added). The legislature's use of "may" in this statute neither requires nor intends us to strictly apply waiver rules; so under this statute, we apply waiver only where it is equitable under the circumstances and serves the WDTA's goals. *Albice*, 174 Wn.2d at 570.

The trial court here erred when it found that Frizzell waived her right to post-sale relief and dismissed her claim on summary judgment. For instance, the Murrays cite RCW 61.24.040(1)(f) in their argument that Frizzell's failure to actually enjoin the trustee's sale resulted in her waiving her right to pursue all post-sale relief. But, RCW 61.24.040(1)(f) simply addresses how one may challenge a trustee's sale or seek to invalidate a trustee's sale. It expressly states that failure to bring a lawsuit to restrain a trustee's sale may result in waiving the right to invalidate the trustee's sale. Frizzell's claims, however, extend beyond her attempt to invalidate the trustee's sale. Here, Frizzell alleged a Consumer Protection Act violation and monetary damages, claims that are distinct from the trustee's sale, and forms of relief that RCW 61.24.040(1)(f) does not portend to preclude seeking post-sale relief by failing to bring a lawsuit restraining a trustee's sale.

Next, the Murrays cite *Plein and Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (2008), *review denied*, 165 Wn.2d 1023 (2009), to support their argument that

Frizzell's failure to actually obtain injunctive relief waived her right to any post-sale claims. These cases, though, are distinguishable from the present matter.

Plein involved a corporate officer who brought an action for nonjudicial foreclosure on a deed of trust on real property after the corporation defaulted on a promissory note. *Plein*, 149 Wn.2d at 220. A junior lienholder, Plein, brought his own action against the corporate officer seeking to permanently enjoin the trustee's sale and to obtain a declaration voiding the deed of trust. *Plein*, 149 Wn.2d at 220. But the trial court dismissed Plein's complaint on summary judgment, and the Supreme Court affirmed the trial court, holding that Plein had waived his right to contest nonjudicial foreclosure and the trustee's sale because he did not seek a preliminary injunction or any other order to restrain the sale. *Plein*, 149 Wn.2d at 229. The Supreme Court stated, "We hold that by failing to obtain a preliminary injunction or other restraining order restraining the trustee's sale, as contemplated by RCW 61.24.130, Plein waived any objections to the foreclosure proceedings." *Plein*, 149 Wn.2d at 229. Here, unlike Plein, Frizzell not only sought a preliminary injunction to restrain the trustee's sale, but she also obtained a restraining order.⁴ Accordingly, *Plein* is distinguishable from the present matter.

In *Brown*, the borrowers under deeds of trust, the Browns, brought an action against their lender, Household Realty, two years after a foreclosure on the Browns' property, alleging multiple common law and statutory claims. *Brown*, 146 Wn. App. at 160. The trial court granted summary judgment in Household's favor and Division One of this court affirmed,

⁴ Frizzell did not restrain the looming trustee's sale because the trial court conditioned its restraining order on Frizzell's paying \$15,000 in arrearages and a \$10,000 bond into the court registry by the following morning. Frizzell did not meet these conditions.

No. 42265-4-II

holding that the Browns waived their claims by failing to request a preliminary injunction or restraining order enjoining the sale under the WDTA. *Brown*, 146 Wn. App. at 171.

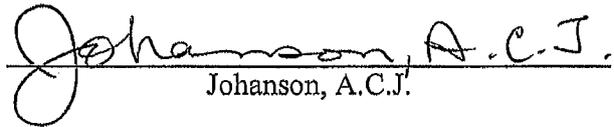
Again, *Brown* is distinguishable. There, Division One held that a borrower waives claims against a lender by failing to timely request a preliminary injunction or restraining order enjoining nonjudicial foreclosure sale at least five days before the sale date. *Brown*, 146 Wn. App. at 163, 170. But the court left unanswered whether “a party who files a lawsuit after the initiation of the foreclosure process and unsuccessfully attempts to obtain a preliminary injunction restraining the sale could prevail at trial yet be barred from obtaining relief.” *Brown*, 146 Wn. App. at 170. Unlike the Browns, Frizzell filed a complaint seven days before the sale seeking an injunction barring enforcement of the deed of trust through the trustee’s sale, as well as a motion to enjoin the trustee sale three days before the scheduled foreclosure; and the trial court enjoined the trustee sale, provided that Frizzell post a bond and pay arrearages. Therefore, *Brown* differs from the present matter.

Moreover, in *Albice* the Supreme Court clarified how waiver applies under the WDTA. The court held that we should not rigidly apply the WDTA’s waiver rule but instead apply it as an equitable tool only where, for example, the facts support an argument that a party relinquished its rights by delaying in asserting or failing to assert an otherwise available adequate remedy. *See Albice*, 174 Wn.2d at 570. And, ultimately, a party must intentionally or voluntarily waive its legal rights to effectuate a valid waiver; but here, Frizzell never intended or volunteered to relinquish her right to raise claims against the Murrays. Unlike the borrowers in *Plein* and *Brown*, Frizzell pursued her claims before the trustee’s sale and actually obtained an order restraining the trustee’s sale, though on the condition that she pay a sizeable sum of money and

No. 42265-4-II

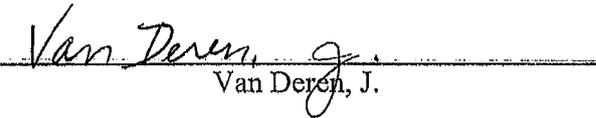
bond by the following morning. *Albice* dictates that waiver applies only when equitable where, for example, the facts support an argument that Frizzell relinquished her rights by delaying in asserting or failing to assert an otherwise available adequate remedy. *See Albice*, 174 Wn.2d at 570. Such was not the case here.

Frizzell did not delay or fail to assert an available adequate remedy. Accordingly, it would be inequitable to apply waiver under these facts.⁵ We hold that the trial court erred in determining that Frizzell waived her right to relief by failing to obtain pre-sale relief and in granting the Murray's summary judgment motion. Therefore, we remand to the trial court for action consistent with our decision.


Johanson, A.C.J.

We concur:


Quinn-Brintnall, J.


Van Deren, J.

⁵ In addition, we also agree with Frizzell that if she lacked the capacity to contract, it would be inequitable to conclude that she voluntarily relinquished known rights related to that contract. But the trial court did not reach Frizzell's other issues because it granted summary judgment on an alternative ground.

APPENDIX B

ORDER AMENDING OPINION
September 25, 2012

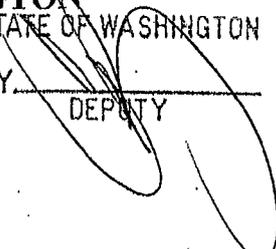
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COURT OF APPEALS
DIVISION II

2012 SEP 25 AM 8:47

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION II

BY  DEPUTY

TAMARA FRIZZELL,

No. 42265-4-II

Appellant,

v.

BARBARA MURRAY and GREGORY
MURRAY, wife and husband, d/b/a SOUND
BROKERS,

ORDER AMENDING OPINION

Respondents.

This court issued its published opinion On August 28, 2012, in the above entitled matter.

The Court is amending the opinion as follows:

As reported at 2012 WL 3686090, in ¶ 13, the fifth sentence that currently reads:

Here, Frizzell alleged a Consumer Protection Act violation and monetary damages, claims that are distinct from the trustee's sale, and forms of relief that RCW 61.24.040(1)(f) does not portend to preclude seeking post-sale relief by failing to bring a lawsuit restraining a trustee's sale.

is deleted. The following language is inserted in its place:

Here, Frizzell alleged a Consumer Protection Act violation and sought monetary damages. RCW 61.24.040(1)(f) does not preclude these forms of relief.

IT IS SO ORDERED.

DATED this 25TH day of SEPTEMBER, 2012.

Johanson, A.C.J.
Quinn-Lushell, J.
Van Deren, J.

Herrmann, Gayle L.

From: Boardman, Catherine [Catherine.Boardman@courts.wa.gov]
Sent: Tuesday, August 28, 2012 11:08 AM
To: 'danryoung@netzero.net'; Krattli, Darren R.
Cc: Boardman, Catherine
Subject: D2 42265-4-II PUBLISHED OPINION SERVICE
Importance: High
Attachments: D2 42265-4-II PUBLISHED OPINION.pdf

To Counsel and Interested Parties:

Attached is a Published Opinion filed today, 8/28/2012.

This will be the only notice you will receive from the court.

Please contact the court at (253) 593-2970 if you have any questions or comments.

Thank you.

Catherine Boardman
Judicial Administrative Assistant

9/27/2012

APPENDIX C

Plein v. Lackey, 149 Wash.2d 214 (2003)
67 P.3d 1061, 50UCC Rep.Serv.2d 234

149 Wash.2d 214
Supreme Court of Washington,
En Banc.

Paul PLEIN, Respondent,
v.

Chester LACKEY and Lee Cameron, Jane Doe
Cameron, and their marital community, Petitioners.

No. 72560-8. | Argued Feb. 13, 2003.
| Decided April 17, 2003. | As Amended
on Denial of Reconsideration June 6, 2003.

After paying amount due under promissory notes issued by real estate investment corporation, corporate officer brought action for nonjudicial foreclosure of deed of trust on real property after corporation defaulted on note. Junior lienholder brought action against corporate officer and his attorney seeking to permanently enjoin trustee's sale, and seeking declaration that deed of trust was void. The Pierce County Superior Court, Frederick Hayes, J., summary judgment for corporate officer and dismissed complaint. Lienholder appealed, and Court of Appeals, 111 Wash.App. 143, 43 P.3d 1268, reversed. Upon grant of petition for review, the Supreme Court, Madsen, J., held that: (1) corporate officer signed note as accommodation party, and, as such, was entitled to enforce deed of trust, and (2) junior lienholder waived right to contest nonjudicial foreclosure and trustee's sale.

Court of Appeals reversed.

West Headnotes (8)

[1] **Appeal and Error**

⚡ Grounds for Sustaining Decision Not Considered

Corporate officer could raise claim that he signed promissory note as accommodation party, even though he did not argue accommodation status to trial court and raised claim for first time on appeal from summary judgment, where there was not material issue of fact as to officer's status as accommodation party, and Uniform Commercial Code provision relating to accommodation status provided appropriate ground for resolution of case. West's RCWA 62A.3-419; RAP 2.5(a).

3 Cases that cite this headnote

[2] **Appeal and Error**

⚡ Grounds for Sustaining Decision Not Considered

An appellate court generally may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof.

3 Cases that cite this headnote

[3] **Appeal and Error**

⚡ Grounds for Sustaining Decision Not Considered

While the general rule is that parties may not raise a new issue for the first time in a petition for review, a party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. RAP 2.5(a).

4 Cases that cite this headnote

[4] **Mortgages**

⚡ Under Trust Deed

Corporate officer who signed promissory note was accommodation party, and, as such, after paying off note, was entitled to enforce note as well as beneficiary's rights in deed of trust securing note, where direct beneficiary of loan was corporation, officer received no proceeds from, and no direct benefit from loan, and lender would not have made loan to corporation, which had no assets, absent officer's signature on note. West's RCWA 62A.3-419.

5 Cases that cite this headnote

[5] **Mortgages**

⚡ Restraining Exercise of Power

Junior lienholder waived right to contest nonjudicial foreclosure and trustee's sale when he failed to obtain preliminary injunction or other order restraining sale, where lienholder was given notice of trustee's sale and foreclosure, was

properly advised of his right to seek injunction or restraining order restraining sale, never sought a preliminary injunction or any order that would have halted the sale, and accordingly did not comply with other requirements for enjoining sale, such as providing trustee with five days' notice of any attempt to seek such an order. West's RCWA 61.24.130(1, 2).

32 Cases that cite this headnote

[6] **Mortgages**

⚡ Statutory Provisions

Three goals of the Washington deed of trust act are: (1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles. West's RCWA 61.24.130(1).

23 Cases that cite this headnote

[7] **Mortgages**

⚡ Restraining Exercise of Power

Statutory procedure for obtaining restraining order or injunction to restrain a trustee's sale is the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure. West's RCWA 61.24.130(1, 2).

19 Cases that cite this headnote

[8] **Statutes**

⚡ Giving Effect to Entire Statute

A statute must not be judicially construed in a manner that renders any part of the statute meaningless or superfluous.

Attorneys and Law Firms

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Opinion

***218** MADSEN, J.

Lee Cameron signed a promissory note both in his corporate capacity and individually, secured by a deed of trust, to purchase property from Sunset Investments for his corporation, Alpen Group, Inc. Later, Cameron paid off the Sunset note. He then sought to enforce the instrument and foreclose the deed of trust when Alpen defaulted. He claims he signed the note as an accommodation party and was therefore entitled to foreclose. We agree. We also agree that the plaintiffs' failure to obtain a preliminary injunction or restraining order barring the nonjudicial foreclosure sale waived any right to contest the validity of the foreclosure. We reverse the Court of Appeals and reinstate the trial court's grant of summary judgment in favor of Cameron.

Facts

In 1997, Paul Plein, Bruce White, and Lee Cameron formed Alpen Group Inc. to buy and sell real estate (the group formerly operated as a partnership). In April 1997, Alpen purchased a lot from Sunset Investments, issuing a promissory note for \$75,000 to Sunset with the promise to pay stated: "For value received, ALPEN GROUP, INC., A WASHINGTON CORPORATION, promise(s) to pay to SUNSET INVESTMENTS...." The note was secured by a deed of trust naming Sunset as the beneficiary and Alpen as the grantor. It was signed by Cameron as "Secretary/Treasurer" and by White as "Vice-President". Cameron, his wife, Plein (who was president), and his wife each signed "individually."

Alpen also borrowed \$136,500 from Columbia State Bank, executing a promissory note also secured by a deed of trust. Columbia loaned the money in part on Sunset's agreement to subordinate its interest in the property to Columbia's. Alpen commenced constructing a log home on the lot. However, more funds were needed, and Cameron advanced \$30,000. The money was still insufficient to complete the project and trade creditors were owed an additional \$45,000. Cameron declined to loan any more ***219** money to Alpen. The parties state that Plein, as president of Alpen, issued deeds of trust against the log home to secure the debt to the trade creditors.

At some point thereafter, Plein was ousted and Cameron became president. Alpen issued a promissory note for the \$30,000 that Cameron had advanced to Alpen, secured by another deed of trust on the property. Then, one of the trade creditors sued Alpen in Thurston County Superior Court. The record does not contain any information about that suit beyond the parties' brief descriptions, but it evidently involved a number of claims and cross-claims resulting in payment to the creditor who sued and a judgment entered against Alpen in favor of Plein for \$45,000, which Plein recorded. In addition, Cameron received all the stock in Alpen.

At this point, the creditors, in order of their secured interests in the log home property, were (1) Columbia, (2) Sunset, (3) the unpaid trade creditors, (4) Cameron, and (5) Plein. Any equity remaining in the property would be that of Alpen.

According to plaintiffs, "around the time the Thurston County suit was being litigated," the note to Columbia Bank came due and Columbia refused to extend the loan. Clerk's Papers (CP) at 105. In October 1998, Cameron paid the amount due to Columbia with his personal funds and Columbia endorsed the note to Cameron. In addition, Columbia assigned the beneficial interest in **1063 its deed of trust to Cameron. Then, in December 1998, the pivotal transaction in this case occurred. Cameron paid the amount due Sunset, Sunset endorsed the promissory note for this loan to Cameron, and Sunset assigned its beneficial interest in its deed of trust to Cameron.

By these two transactions, Cameron, as beneficiary of the two deeds of trust originally issued to Columbia Bank and Sunset, claimed secured interests in the property superior to all other secured interests. He also continued to have a secured interest junior to the trade creditors based on his loan of \$30,000 to Alpen.

*220 In October 1999, Cameron, as assignee of the Sunset note, hired attorney Chester Lackey to begin nonjudicial foreclosure proceedings as a result of Alpen's default on the Sunset note. All of the secured creditors received notice of the foreclosure informing them that the trustee's sale of the property would be held on March 31, 2000.

On February 7, 2000, Plein and the trade creditors (hereafter Plein) brought this suit against Cameron and Lackey (hereafter Cameron), seeking a permanent injunction barring the trustee's sale and a declaration that the deed of trust was void because the underlying debt had been paid, i.e., there

was no default on the underlying debt. Plein did not seek a preliminary injunction or any other order restraining the sale. On March 28, three days before the scheduled sale, Plein filed a motion for summary judgment, claiming that undisputed facts showed that Cameron paid off the Sunset note on behalf of Alpen, thus extinguishing the debt. Plein further claimed that he was entitled to an order declaring that his and the trade creditors security interests were superior to Cameron's and that the foreclosure proceedings were void.

Plein did not obtain a preliminary injunction or restraining order restraining the sale, and on March 31, the trustee's sale occurred. Cameron, the only bidder, bought the property for \$245,312.35 (approximately the total of the Columbia, Sunset, and Cameron notes).

On May 1, 2000, Cameron filed a cross-motion for summary judgment. He argued there was no evidence supporting Plein's motion for summary judgment because Mr. Plein's declaration, the only material submitted by Plein, was not made on personal knowledge. Cameron also argued he was entitled to summary judgment because the evidence indisputably established that Cameron purchased the Sunset and Columbia notes and obtained valid assignments of the promissory notes and deeds of trust for his personal benefit, rather than paying on behalf of Alpen. Cameron also argued that Plein failed to timely and properly object to the sale, pointing out Plein did not seek a preliminary *221 injunction or a restraining order in time to restrain the trustee's sale.

The trial court granted Cameron's motion and dismissed Plein's complaint. Plein appealed and the Court of Appeals reversed. That court reasoned that where a person is individually liable on a note and pays it, the individual cannot also foreclose because the debt has been extinguished. The court held that there are disputed facts regarding Cameron's personal liability on the Sunset note that preclude summary judgment. In addition, the Court of Appeals reasoned that if Cameron was personally liable on the note, then Plein's failure to obtain an order restraining the foreclosure sale would make no difference because the debt would have been extinguished, Cameron would have nothing on which to foreclose, and the trustee's sale would be null and void. *Plein v. Lackey*, 111 Wash.App. 143, 43 P.3d 1268, review granted, 147 Wash.2d 1020, 60 P.3d 93 (2002).

Cameron petitioned for review by this court; his petition was granted. For the first time, he specifically relies on RCW 62A.3-419, a provision in the Uniform Commercial Code, to argue that he signed the Sunset note as an accommodation

party, and that as such he had the right, once he paid the note, to enforce the instrument against Alpen and to foreclose the deed of trust.¹ The Washington Land Title Association was granted leave to file an amicus curiae brief in support of the petition for review. Amicus is primarily concerned that the Court of Appeals' decision validates postsale challenges **1064 to trustees' sales based upon defenses to default, leading to instability in land titles where there is a trustee's deed in the chain of title.

Analysis

[1] Application of RCW 62A.3-419 resolves the first issue in this case, whether Cameron signed the Sunset note as an accommodation party. However, before turning to the substantive argument, the initial question is whether Cameron may raise the issue of accommodation status when he (1) *222 did not argue accommodation status under Uniform Commercial Code provision RCW 62A.3-419 (hereafter section .3-419) to the trial court, and (2) he raises the argument for the first time in this court.

[2] [3] The trial court granted summary judgment in favor of Cameron. Generally, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof. *Int'l Bhd. of Elec. Workers v. Trig Elec. Constr. Co.*, 142 Wash.2d 431, 435, 13 P.3d 622 (2000); *Wendle v. Farrow*, 102 Wash.2d 380, 382, 686 P.2d 480 (1984); cf. *Ertman v. City of Olympia*, 95 Wash.2d 105, 108, 621 P.2d 724 (1980) (a superior court decision will not be reversed where the reason given is erroneous if the judgment or order is correct). The parties must have had a full and fair opportunity to develop facts relevant to the decision. *Bernal v. Am. Honda Motor Co.*, 87 Wash.2d 406, 414, 553 P.2d 107 (1976). Moreover, while the general rule is that parties may not raise a new issue for the first time in a petition for review, *Fisher v. Allstate Ins. Co.*, 136 Wash.2d 240, 252, 961 P.2d 350 (1998), “[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a).

Here, section .3-419 provides an appropriate ground to resolve this case, and the record is sufficiently developed for purposes of this issue. In fact, the record discloses that there is no material issue of fact as to Cameron's status as an accommodation party. Therefore, we consider the applicability and effect of section .3-419.

[4] Section .3-419(1) provides that

[i]f an instrument is issued for value given for the benefit of a party to the instrument (“accommodated party”) and another party to the instrument (“accommodation party”) signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for *223 the instrument, the instrument is signed by the accommodation party “for accommodation.”

The comments to the statute explain that “[a]n accommodation party is a person who signs an instrument to benefit the accommodated party either by signing at the time value is obtained by the accommodated party or later, and who is not a direct beneficiary of the value obtained.” RCWA 62A.3-419, cmt. 1, at 161. The issue whether a party is an accommodation party is a question of fact, comment 3 to section .3-419, and the party asserting accommodation party status bears the burden of proof. 11 AM.JUR.2D *Bills and Notes* § 85, at 449 (2002).

Comment 1 to section .3-419 gives an example of accommodation party status that parallels the facts of this case:

For example, if X cosigns a note of Corporation that is given for a loan to Corporation, X is an accommodation party if no part of the loan was paid to X or for X's direct benefit. This is true even though X may receive indirect benefit from the loan because X is employed by Corporation or is a stockholder of Corporation, or even if X is the sole stockholder so long as Corporation and X are recognized as separate entities.^[2]

Here, the promissory note states that for value received, *Alpen* promised to repay the borrowed amount. The direct beneficiary of the loan was the corporation. As a stockholder of Alpen, any benefit obtained by **1065 Cameron was derivative and indirect. See Neil B. Cohen, *Suretyship Principles in the New Article 3: Clarifications and Substantive Changes*, 42 ALA. L.REV. 595, 600 (1991).

Thus, Cameron received no proceeds from and no direct benefit from the loan.

In addition to the direct/indirect benefit inquiry, another factor that serves to establish accommodation party status is that the lender would not have made the loan in the absence of the party's signature on the note giving rise to liability. *Hendel v. Medley*, 66 Wash.App. 896, 899, 833 P.2d 448 (1992) (decided under former UCC provisions regarding *224 accommodation parties); 11 AM.JUR.2D *Bills and Notes* § 85 (2002) (two primary factors that indicate accommodation party status are that the party received no direct benefit from the proceeds of the instrument and that the loan would not have been made unless the party signed the instrument). Here, Plein's complaint itself asserts that Sunset would not have loaned the money to Alpen, which had no assets, unless the corporate officers signed individually, thus incurring personal liability. Plein repeats this factual statement in his appellate brief. Appellant's Opening Br. at 4 (“[b]ecause Alpen had virtually no other assets, as is customary in the business, Sunset demanded and obtained the personal guaranties of Alpen's owners”). Plein has repeatedly insisted that Cameron was a personal guarantor of the loan. CP at 63, 101, 105; Verbatim Report of Proceedings (RP) at 10; Appellant's Opening Br. at 10.

Because there are no disputed material questions of fact as to Cameron's status, we conclude as a matter of law that Cameron signed the Sunset note as an accommodation party.³ Cameron obtained no direct benefit from the loan, and Plein has conceded that the loan would not have been made unless the individual stockholders were subject to personal liability on the note.

As an accommodation party who paid off the note, Cameron was entitled to enforce the note: “An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party.” Section .3-419(e). Comment 5 to section .3-419 states that “[s]ince the accommodation party that pays the instrument is entitled to enforce the instrument against the accommodated party, the accommodation party *also obtains rights to* *225 *any security interest or other collateral that secures the payment of the instrument.*” (Emphasis added.) Once he paid the Sunset note, Cameron obtained the beneficiary's right in the deed of trust and was entitled to foreclose it upon default of Alpen.

We hold that Cameron signed the Sunset note as an accommodation party, and that when he paid off the instrument he obtained the right to enforce the note as well as the beneficiary's rights in the deed of trust securing the note.

[5] The next issue is whether Plein waived any right to complain about the foreclosure and trustee's sale. Cameron has maintained throughout this case that Plein waived any right to set aside the trustee's sale when he failed to obtain a preliminary injunction or other order restraining the sale. The Court of Appeals rejected this argument, reasoning that if Cameron was personally liable on the note and paid it, the debt was extinguished and the trustee's sale null and void. Therefore, “waiver is irrelevant.” *Plein*, 111 Wash.App. at 150 n. 9, 43 P.3d 1268. We disagree.

[6] [7] Three goals of the Washington deed of trust act are: (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103 Wash.2d 383, 387, 693 P.2d 683 (1985); **1066 *Country Express Stores, Inc. v. Sims*, 87 Wash.App. 741, 747-48, 943 P.2d 374 (1997); Joseph L. Hoffmann, Comment, *Court Actions Contesting The Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 WASH. L.REV. 323, 330 (1984). The act includes a specific procedure for stopping a trustee's sale so that an action contesting default can take place. RCW 61.24.130(1) provides that junior lien holders may move “to restrain” a trustee's sale “on any proper ground.” However, a court cannot grant a “restraining order or injunction to restrain a trustee's sale” unless the person seeking the order has provided five days' notice to the trustee of the attempt to seek the order and has paid amounts due on the *226 obligation secured by the deed of trust. RCW 61.24.130(1), (2). This statutory procedure is “the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.” *Cox*, 103 Wash.2d at 388, 693 P.2d 683.⁴ Under RCW 61.24.040, and the form it mandates for a notice of trustee's sale, recipients are advised that

[a]nyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

RCW 61.24.040(1)(f)(IX). This statute also includes the form for the notice of foreclosure. That form must explain the right to contest the default by bringing a court action and must advise that a court may grant a restraining order or injunction to restrain a trustee's sale if the five days' notice and payment requirements are satisfied. RCW 61.24.040(2).

[8] Plein was given notice of the trustee's sale and the foreclosure, and was properly advised of his right to seek an injunction or restraining order restraining the sale. Although his complaint sought a permanent injunction and disputed whether there was a default (by alleging the debt had been extinguished), he never sought a preliminary injunction or any order that would have halted the sale, and accordingly did not comply with other requirements such as providing the trustee with five days' notice of any attempt to seek such an order. As one commentator explained,

[t]he injunction action consists of two stages: the temporary injunction and the permanent injunction. The grant of the temporary injunction merely prevents the trustee's sale from taking place until a full hearing on the merits of the permanent injunction can be obtained. The grant or denial of the permanent *227 injunction, on the other hand, constitutes the final resolution of the action.

Hoffmann, 89 WASH. L.REV.. at 327. Simply bringing an action to obtain a permanent injunction will not forestall a trustee's sale that occurs before the end of the action is reached. *Id.* at 334; see 27 Marjorie Dick Rombauer, *Washington Practice: Creditors' Remedies-Debtor's Relief* § 3.61 (1998) (bringing a suit objecting to the alleged default or to the foreclosure proceedings but without obtaining a restraining order does not prevent the sale from going forward). Moreover, if it did, it would render the requirements of RCW 61.24.130 meaningless because it would be unnecessary to obtain an actual order restraining the sale or to provide five days' notice to the trustee and payment of amounts due on the obligation. A statute must not be judicially construed in a manner that renders any part of the statute meaningless or superfluous. *Svendsen v. Stock*, 143 Wash.2d 546, 555, 23 P.3d 455 (2001).

Nor does an action contesting the default satisfy the requirements of RCW 61.24.130. “[A]n action contesting the

default, filed after notice of sale and foreclosure has been received, does not have the effect of restraining the sale.” *Cox*, 103 Wash.2d at 388, 693 P.2d 683.

The failure to take advantage of the presale remedies under the deed of trust act may result in waiver of the right to object to **1067 the sale, as RCW 61.24.040(1)(f)(IX) provides. The Court of Appeals has found waiver in a number of cases involving failure to enjoin the trustee's sale. Specifically, that court has held that waiver of any postsale contest occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Country Express Stores, Inc.*, 87 Wash.App. at 749-51, 943 P.2d 374; *Steward v. Good*, 51 Wash.App. 509, 515-17, 754 P.2d 150 (1988); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wash.App. 108, 114, 752 P.2d 385 (1988); *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wash.App. 28, 491 P.2d 1058 (1971); see Hoffmann, 59 WASH. L.REV.. at 335. The waiver doctrine applied in this context serves all three *228 goals of the deed of trust act. Adequate remedies to prevent wrongful foreclosure exist in the presale remedies, and finding waiver in these circumstances furthers the goals of providing an efficient and inexpensive foreclosure process and promoting the stability of land titles. *Country Express Stores, Inc.*, 87 Wash.App. at 752, 943 P.2d 374; see *Ostrander*, 6 Wash.App. at 32, 491 P.2d 1058 (“[t]o allow one to delay asserting a defense [until after the sale] would be to defeat the spirit and intent of the trust deed act”).⁵

The waiver doctrine is also consistent with the scheme of the act itself:

The Deed of Trust Act discourages the use of postsale remedies in three ways. First, the Act does not expressly provide for any court actions to contest a completed trustee's sale. Second, the Act indicates that the right to contest a completed sale may be waived by a party's failure to bring a presale injunction action. Finally, the Act requires that the trustee's deed issued to the purchaser “recite the facts showing that the sale was conducted in compliance with all of the requirements” of the Act and the particular deed of trust. This recital of statutory compliance is “prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value.” [RCW 61.24.040(7).]

Hoffmann, 59 WASH. L.REV.. at 329 (footnotes omitted).⁶

*229 We agree that the waiver rule applied by the Court of Appeals in *Country Express Stores, Steward, Koegel* and like cases appropriately effectuates the statutory directive that any objection to the trustee's sale is waived where presale remedies are not pursued. See RCW 61.24.040(1)(f)(IX). Applying the waiver doctrine here: Plein received notice of his right to enjoin the sale, had **1068 knowledge of his asserted defense before the sale (that Cameron paid on behalf of Alpen and the debt was extinguished), and failed to obtain a preliminary injunction or other order restraining the sale. We conclude that Plein waived the right to contest the sale.

We hold that by failing to obtain a preliminary injunction or other restraining order restraining the trustee's sale,

as contemplated by RCW 61.24.130, Plein waived any objections to the foreclosure proceedings.

The Court of Appeals is reversed and the trial court's grant of summary judgment in favor of Cameron is reinstated.

ALEXANDER, C.J., and JOHNSON, SANDERS, IRELAND, BRIDGE, CHAMBERS, OWENS, and FAIRHURST, JJ., concur.

Parallel Citations

67 P.3d 1061, 50 UCC Rep.Serv.2d 234

Footnotes

- 1 The attorneys representing Cameron in this court did not represent Cameron in the Court of Appeals or the trial court.
- 2 There is no suggestion in this record or the briefing that Cameron and Alpen Group, Inc., were not separate entities.
- 3 An accommodation party may be a maker, a drawer, an acceptor, or an indorser. Section .3-419(b). He or she is liable on the note in the capacity in which he or she signed, usually as a maker or indorser. Cmt. 4, § .3-419. However, the nature of the liability on the note does not dictate whether Cameron was an accommodation party. Instead, the absence of direct benefit, and the fact that Sunset would not have made the loan without individual liability on the part of the stockholders dictate that he signed as an accommodation party.
- 4 Of course, an interested party can also halt the foreclosure proceedings by curing the default. RCW 61.24.090.
- 5 In this regard, Amicus Curiae Washington Land Title Association is particularly concerned that the stability of land titles is undermined by the Court of Appeals' "implicit[], if not explicit[holding] that where there is a defense to the note, an interested party need not comply with the requirements of RCW 61.24.130." Amicus Curiae Mem. of Washington Land Title Ass'n in Support of Pet. for Review at 4. Amicus maintains that if a trustee's deed can be challenged after the fact, "title insurers will not insure, secured lenders will not lend on, and buyers will not purchase real property with title tracing to a trustee's deed." *Id.* at 8.
- 6 In *Cox*, the Coxes granted a security interest in their home in the form of a deed of trust to secure a loan to build a swimming pool. When the pool system failed, they refused to pay further amounts on the loan because the cost to repair the system and the damage it caused exceeded the amount due. When notified they were in arrears on the note, they brought suit for damages. The trustee on the deed of trust brought foreclosure proceedings, and ultimately the Coxes' home was sold for a fraction of its value. This court recited the principles that an action to enjoin the sale was the only means to preclude a sale once foreclosure proceedings began, and that an action contesting default does not act to enjoin the sale. However, the court also held that the Coxes' action was an action on the obligation. *Cox v. Helenius*, 103 Wash.2d 383, 388, 693 P.2d 683 (1985). Under RCW 61.24.030(4), a trustee may not commence foreclosure proceedings where there is an action pending on the obligation. Thus, the foreclosure sale was invalid on this basis. In addition, the court also found that the extreme disparity between price and value and conduct of the trustee were reasons to set aside the sale. These reasons would not have been known to the Coxes prior to the notice of foreclosure but instead concerned flaws apparent at the trustee's sale itself. *Cox* is an example of a case where post-sale challenges were permitted. It should be noted, however, that the waiver doctrine would not be applicable under the facts in *Cox*, both because it involved an action on the obligation and because of the irregularities at the sale.

APPENDIX D

APPENDIX D

STATUTE EXCERPTS and COURT RULES

RCW 61.24.040(1)(f) (IX).....D-i
RCW 61.24.130(1).....D-ii
RCW 7.40.080.....D-iii
CR 65(c).....D-iv

RCW 61.24.040(1)(f) (IX)

IX.

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

RCW 61.24.130(1)

RCW 61.24.130

Restraint of sale by trustee — conditions — notice.

(1) Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

In the case of default in performance of any nonmonetary obligation secured by the deed of trust, the court shall impose such conditions as it deems just.

In addition, the court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered by any party by reason of the restraining order or injunction. The court may consider, upon proper showing, the grantor's equity in the property in determining the amount of said security.

RCW 7.40.080

RCW 7.40.080 Injunction bond.

No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order, with surety to the satisfaction of the clerk of the superior court, to the adverse party affected thereby, conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order. The sureties shall, if required by the clerk, justify as provided by law, and until they so justify, the clerk shall be responsible for their sufficiency. The court in its sound discretion may waive the required bond in situations in which a person's health or life would be jeopardized.

[1994 c 185 § 5; 1957 c 51 § 9; Code 1881 § 159; 1877 p 33 § 159; 1869 p 39 § 157; 1854 p 153 § 117; RRS § 725.]

Notes:

Rules of court: Cf. CR 65(c).

CR 65(c)

(c) Security. Except as otherwise provided by statute, no order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. Pursuant to RCW 4.92.080 no security shall be required of the State of Washington, municipal corporations or political subdivisions of the State of Washington. The provisions of rule 65.1 apply to a surety upon a bond or undertaking under this rule.