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STATE OF WASHINGTON
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NO. 70604-7-I
COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

TOWNE OWNERS ASSOCIATION, Plaintiff,

v.

BRIAN D. BECKMANN, et al., Defendants.

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CLERK OF THE COURT
STATE OF WASHINGTON
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DCR SERVICES, LLC,
Third-Party Plaintiff/Appellant,

v.

THE CONDO GROUP, LLC, et al.,
Third-Party Defendants/Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
The Honorable Monica Benton, Case No. 11-2-08939-8 SEA

ANSWER TO PETITIONER'S PETITION FOR REVIEW

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 ORIGINAL

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III. STATUTES

RCW 6.238

RCW 6.23.040(1)11, 12

I. IDENTITY OF RESPONDENT

The Respondent is The Condo Group LLC, Third-Party Defendant/Respondent (hereinafter “Condo Group”).

II. COURT OF APPEALS DECISION

The citation of the decision by the Petitioner Glacier Real Estate Investments, LLC (hereinafter “Glacier”) was accurate.

III. INTRODUCTION

The premise by which Glacier attempts to obtain review of the Court of Appeals decision is faulty. Glacier argues that the Court of Appeals directly conflicts with prior decisions of the Supreme Court and other decisions by the Court of Appeals in different Divisions. *See* Glacier Brief, Pgs. 5-6 (citations omitted).

In essence, Glacier argues that the rights retained by a Judgment Debtor after a Foreclosure Sale are somehow jeopardized by the Court of Appeals decision. In actuality, the Court of Appeals solely addressed the priority and status of the lien obtained by Glacier’s predecessor.¹ In fact, the Court did not address the underlying basis for the lien. Indeed, the defective nature of the underlying lien could serve an alternative basis

¹ DCR Services, LLC was the entity which purchased the Judgment Debtor’s rights and allegedly loaned money to the Judgment Debtor. Glacier obtained DCR’s rights. DCR Services, LLC will merely be referred to in this briefing as Glacier’s predecessor.

upon which to confirm the Court of Appeals.

In short, there is absolutely no rationale in the Court of Appeals decision which challenged the existence of the lien. By creating this false issue, Glacier is merely attempting to provide a basis upon which the Supreme Court should accept review. The Petition For Review should be rejected.

IV. ANSWER TO GLACIER'S ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals actually addressed any issue challenging the Judgment Debtor's ability to create a lien on the interest remaining after a Foreclosure Sale, let alone evaluate or opine on the issue.
2. Whether Glacier's predecessor had the right to redeem its "alleged lien" when that lien was not foreclosed upon and indeed was not in existence at the time of the Sale.
- 3, Whether Glacier has the right to redeem its "alleged lien" when that lien constitutes nothing more than a naked assignment of the right to redeem.

V. STATEMENT OF THE CASE.

Generally, Condo Group accepts the Statement of The Case presented by the Court of Appeals and Glacier as set forth in its Petition For Review. However, it is important to expand upon the nature of the transaction by which Glacier's predecessor obtained the alleged mortgage lien.

At the time of the subject Sheriff's Sale, Glacier's predecessor did not even exist as an entity. CP 139. The Limited Liability Company was not registered until March 28, 2012. CP 139.

The rights obtained by Glacier's predecessor arose eight months after the Sheriff's Sale. CP 78. At that time, Glacier's predecessor allegedly entered into a loan transaction with the Judgment Debtor by utilizing three documents, a Deed of Trust, Non-Recourse Note and Quit Claim Agreement. CP 174.

In essence, Glacier alleges that this transaction created a lien against the Judgment Debtor's interest. Supposedly, the transaction was a loan. However, at the time the loan took place, Glacier's predecessor owned the property. Thus, in the event of default, Glacier could only recover on the Non-Recourse loan by executing on property that it already owned!

In other words, the loan never existed. This alleged lien is the basis upon which Glacier is attempting to exercise the right of redemption. CP 201, CP 583. There is no evidence that the redemption was intended to be based upon the ownership rights conveyed by the Judgment Debtor to Glacier's predecessor. Indeed, Glacier's predecessor was careful to assert that the redemption was not based on the Judgment Debtor's

ownership interest, but solely on the lien arising from the loan. CP 201. CP 583.

VI. ARGUMENT

A. **The Court Should Not Accept This Appeal.**

1. The Court of Appeals Properly Applied The Supreme Court Decision In *BAC Home Loans vs. Fulbright*.

There is no dispute that at the time of the Sale, Glacier's predecessor did not own a lien interest. CP 78-79. Thus, the foreclosure could not and did not eliminate any rights held by Glacier's predecessor.

The Supreme Court has often recognized that the right of redemption is available only to those parties extinguished by the Foreclosure Sale. *Millay vs. Cam*, 135 Wn.2d 193, 198 955 P.2d 791 (1998). *Millay vs. Cam* specifically provides:

When a mortgage is foreclosed and the property sold under execution, junior lien creditors **whose liens have been extinguished by the sale** have the statutory right to redeem the property from the purchaser. (Emphasis added).

Millay vs. Cam, 135 Wn.2d supra at 198; *Accord DeYoung vs. Cenex Ltd.*, 100 Wash.App. 885 at 895, 1 P.3d 587 (2000).

The rationale behind this rule is clear and straightforward. It provides junior lienholders an opportunity to salvage their interest in the event that the liens have been extinguished by foreclosure. *Summerhill*

Village Homeowners Association vs. Roughley, 289 P.3d 645 at 648 (2012) (correcting and superseding 166 Wash.App. 625).

In other words, if a subsequent lienholder in Glacier's position, post foreclosure, decides to purchase a tenuous interest, it has that right. However, there is no need to protect an entity placing itself voluntarily in harm's way by providing it the right of redemption. The Court of Appeals properly recognized the rule established by *BAC Home Loans vs. Fulbright* and its predecessors.

2. The Court of Appeals Decision Does Not Conflict With Prior Decisions Of The Supreme Court.

As seen above, the Court of Appeals decision focused solely on the rights of redemptioner for voluntary liens created after the time of the Foreclosure Sale. The Court of Appeals did not even address the particular rights or abilities of the Judgment Debtor to create additional liens.

Despite this fact, Glacier argues that the Court of Appeals somehow "... [G]ives the impression that the foreclosure sale is the sheriff's auction, and that it forecloses the judgment debtor's and lienholder's interest in the property, and all they have left is their statutory redemption rights." See Glacier Brief, Pg. 6. Somehow, this interpretation leads the Court to a repudiation of the decision in *Hardy vs.*

Herriott, 11 Wash. 460, 39 Pac. 958 (1895). However, there is absolutely no logical link between the Court's decision and its so-called repudiation of the prior case. The argument that the *Hardy vs. Herriott* case was actually repudiated should be rejected. See *Knipe vs. Austin*, 13 Wash. 189, 43 Pac. 25 (1895). The case cited by Glacier to establish the *Hardy vs. Herriott* repudiation specifically provides:

But after renewed examination of the authorities and of the statute, enlightened by an earnest and intelligent discussion, **we are unable to find any escape from the conclusions reached in *Hardy vs. Herriott***. (Emphasis added).

Knipe vs. Austin, 13 Wash. at 189.

Ultimately, there is absolutely no explanation for Glacier's claims that the Court made any assumptions regarding the nature of its lien or the actual interest to which it attached. See Glacier's Brief, Pg. 5. No assumptions were necessary. The Court of Appeals merely followed longstanding law by precluding redemption for those whose rights were not eliminated by the foreclosure.

3. Out-Of-State Cases Addressing This Issue Are Distinguishable.

Glacier's attempt to rely on out-of-state cases is misplaced. Those cases are distinguishable.

One line of cases involve judgments taken against the debtor. *See Curtis vs. Millard*, 14 Iowa 128 (1862); *see also McMillan vs. Richards*, 9 Cal. 365 (1858). Unlike those cases, this matter does not involve a subsequent judgment based on established obligations. In this case, the alleged lien was voluntarily created. This loan was merely an attempt to transfer the “naked” right to redeem.

Likewise, other cases relied upon by Glacier give no indication that the loan transaction at issue was a sham. Actual loans were made with recourse to property not already owned by the so-called lender. *See, e.g., Bovey vs. DeLaittre Lumber Co.*, 48 Minn. 223, 50 N.W. 1038 (1892). As indicated in Glacier’s briefing, the Court in *Bovey*, clearly indicated that a mortgage could be granted as long as the Judgment Debtor owned the property. In this case, the debtor had transferred the property along with the loan.

The California cases cited by Glacier involved redemptioners who were attempting to exercise rights obtained through the grant of Deeds by the Judgment Debtor. E.g. *Phillips vs. Hagart*, 113 Cal. 552, 45 Pac. 843, 896; *See also Fry vs. Bihr*, 6 Cal.App. 3d, 248, 85 Cal. Rptr. 742 (1970). In fact, these California cases are more in line with Washington law prohibiting the transfer of a Judgment Debtor’s rights solely for purposes

of transferring the “naked” assignment of the right to redemption. *Fidelity Mutual Savings Bank vs. Mark*, 112 Wn.2d 47 at 52, 767 P.2d 1382 (1989).

Glacier’s argument may have been more appropriate if it had actually attempted to redeem the Judgment Debtor’s ownership interest, rather than solely by redeeming pursuant to a suspect lien. The California cases cited above support this position.

4. The Interest Of The Judgment Debtor In This Case Is Irrelevant.

Glacier also seems to argue that because the Judgment Debtor could convey its interest, it has the right to mortgage the interest. *See* Petition For Review, Pgs. 16-17. However, Glacier fails in any way, shape or form to define the nature of the Judgment Debtor’s post-foreclosure interest or what has actually been conveyed. Certainly, nothing within the statute creates the type of interest which allows the Judgment Debtor to unconditionally create a Deed of Trust after the Foreclosure Sale to allow for redemption. RCW 6.23, *et seq.* In terms of time, taken to its logical conclusion, Glacier’s position would allow a Judgment Debtor to create a lien allowing for redemption even after the redemption period has ended. This result is absurd.

Ultimately, as seen above, a Judgment Debtor cannot create or grant more rights than it owns. *Singly vs. Warren*, 18 Wash. 434 supra at 434-437. *See also Sofie vs. Kang*, 32 Wash.App. 889, 895, 650 P.2d 1124 (1892). Thus, if a redemption takes place by the Judgment Debtor, the lien on the Judgment Debtor's property is worthless. For the lien to have any value whatsoever, there must be a redemption prior to execution on the lien. Otherwise, no rights have been granted.

B. This Decision Does Not Conflict With Other Decisions On The Court Of Appeals.

Glacier also argues that the Court of Appeals decision contradicts other decisions in different divisions of the Court of Appeals. *See* Glacier's Petition, Pgs. 17-18, citing *Capital Investment Corp. of Washington vs. King County*, 112 Wash.App. 216, 47 P.3d 161 (2002). In fact, the *Capital Investment Corp.* decision provides another basis upon which the Court of Appeals may be affirmed. As seen above, the underlying transaction by Glacier's predecessor was nothing more than a transfer of a "naked" right of redemption. This transaction involved a non-recourse loan on property already owned by Glacier's predecessor. Thus, there was no real loan.

The parties merely attempted to assign a "naked" redemption right. Those naked rights of redemption are prohibited. *Fidelity Mutual Savings*

Bank vs. Mark, 112 Wn.2d. 47 at 53, 767 P.2d 1382 (1989). The case relied upon by Glacier highlights this prohibition:

According to all five of these cases, the right to redeem cannot be severed from the interest that underlies it and neither a judgment debtor nor a redemptioner can effectively transfer “the naked right to redeem” without also transferring the interest that underlies such right ...

Capital Investment Corp. of Washington, 216 supra at 228.

As seen above, in an attempt to avoid the rights of other creditors whose interest would reattach if the debtor was the actual redemptioner, Glacier’s predecessor created a naked right of redemption upon which it attempted to redeem the property. The mere assignment of this debtor’s lien constitutes a naked assignment of a redemption right. *Capital Investment Corp. of Washington vs. King County*, 112 Wash.App. 216 supra at 229. As in *Capital Investment Corp.*, this Court should reject the attempt by a party to merely allow speculation in the avoidance of sale to the purchase of redemption rights for a nominal price. *Id.* at 228, 229.

In other words, Glacier is attempting to redeem a right severed from the ownership interest. This attempt has been specifically rejected by the Division II Court of Appeals upon which Glacier is attempting to rely.

Therefore, we agree with the trial court that our statutory scheme does not permit the right of redemption to be severed from the property interest it serves. *Id.*

The Court of Appeals recognized this situation.

C. Public Interest Should Prohibit Glacier's Right To Redeem.

Allowing Glacier the right to redeem would defeat the public policy regarding the “maintenance of civility of land titles, either by rule or decision or by statute, is highly desirable”. *Graves vs. Elliott*, 69 Wn.2d 652 (1966) (overruled on other grounds by *GESA Federal Credit Union vs. Mutual Life Insurance of New York*, 105 Wn.2d 248, 713 P.2d 728 (1986)). To allow this Deed of Trust to create a right of redemption would create uncertainty as to whom could potentially redeem property purchased at a Sheriff's Sale and cloud title for years. Under Glacier's approach, any party could potentially “swoop in” and obtain title to the property by purchasing redemption rights during the redemption period. The result would be uncertainly well beyond the one-year period beyond the Sheriff's Sale. Redemption adds another 60 days to the right to redeem thereafter. RCW 6.23.040(1).

Ultimately, the Judgment Debtor could create unlimited post-sale Deeds of Trust under which each successive Deed of Trust holder could

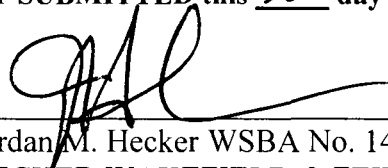
redeem the property. Title to the property would remain in chaos for years. RCW 6.23.040(1).

Moreover, instead of benefitting Judgment Debtors or their creditors, allowing redemption of this nature would stifle and not increase possible bid prices. The number of bidders available to bid would be driven down if the Judgment Debtor could create additional redemptioners at its whim and caprice. Purchasers would be less willing to buy property which could be immediately encumbered with additional liens after the Foreclosure Sale. At the very least, bids would be reduced if rights were created and littered with unexpected lien rights.

VII. CONCLUSION

This Court should reject Petitioner's Request For Review. The Court of Appeals decision did not conflict with any Supreme Court ruling or other decisions in other Court of Appeals divisions. Likewise, there is no confusion. Indeed, even if the Petition For Review is granted, there are alternative bases upon which to confirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 30th day of October, 2014.



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