NO. 477289-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION 2 AT TACOMA

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STATE OF WASHINGTON
BY DEPUTY

RESTORE EQUITY, LLC, a limited liability company,

Appellant (Plaintiff below),

vs.

The BANK OF NEW YORK MELLON, as trustee,

Appellee (Defendant below).

APPELLANT RESTORE EQUITY, LLC'S OPENNING BRIEF

Appeal from a decision granting summary judgment and dismissing the case made by the Honorable Judge Edwards of the Grays Harbor Superior Court in the matter of *Restore Equity, LLC v. the Bank of New York Mellon, as trustee*, case number No. 11-2-01446-7.

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I. ASSIGNMENT OF ERROR

This action arises from a non-judicial foreclosure of a deed of trust under the Washington Deed of Trust Act, RCW 61.24 et seq. The issues raised by this appeal relate to the legal effect of a trustee's sale of property when the trustee fails to give notice of the trustee's sale to the property's owner whose ownership interest was a matter of public record and duly recorded in the county's real property records. After concluding that the sale did not extinguish the Appellant Restore Equity, LLC's ownership of the property the lower court erred by authorizing the Appellee Bank of New York Mellon[1] to "redo" the foreclosure.

It also dismissed Restore's alternative claim for excess proceeds under RCW 61.24.070) and 61.24.080 and violation of the Consumer Protection Act (RCW 19.86 et seq.). The alternative claims related to the Appellee Bank of New York Mellon's bid at the trustee's sale which was predicated on the assessment of interest at a rate in excess of that allowed under the adjustable rate Promissory Note. These claims were rendered moot by the lower court's determination that the sale did not extinguish its ownership of the property, but may become issues in later proceeding.

The Appellant, Restore Equity, LLC assigns error to the lower court granting the Appellee Bank of New York Mellon's Motion For Summary Judgment to the extent it also authorizes the re-foreclosure of the Note and Deed of Trust.

[1] The Bank of New York Mellon is a party in this action in its trustee capacity, as Successor Trustee to JP Morgan Chase Bank, as trustee for Novastar Mortgage Funding Trust, Series 20014-1, Novastar Home Equity Asset Backed Certificates, Series 2004-1.

The Appellant Restore Equity, LLC also assigns error to the lower court's findings that the Appellee Bank of New York Mellon's erroneous assessment of interest (which had been computed using a rate in excess of that allowed by the adjustable rate Promissory Note) was not a violation of Washington Consumer Protection Act.

Appellant's Consumer Protection Act claim and underlying claim to excess proceeds were alternative claims arising from the trustee's sale winning bid, arise if Restore's ownership had been extinguished by the sale. At issue in this appeal is lower court's superfluous findings to the effect that overcharging of interest does not affect the public interest. Restore takes exception to these findings since the crucial question is why this occurred and whether this was a simple error (not a CPA violation) or institutionalized error or practice remained a question of fact.

II. INTRODUCTION

The Appellee Bank of New York Mellon is the successor beneficiary of a deed of trust against property owned by Restore Equity, LLC. *(DOT at CP (28-43, Assignment at CP 45, Restore's Deed at CP 47-48.)*

In June, 2011 the Bank of New York Mellon instructed the trustee to commence a non-judicial foreclosure of the deed of trust. (*Notice of Sale, CP 99-101)* On September 30, 2011 the trustee foreclosed and sold the property without prior notice of the trustee's sale to Restore. The Bank of New York Mellon was the successful buyer of the property at the trustee's sale. (*Trustee's deed, CP 108-109)*

The Bank of New York Mellon made a credit bid to buy the property. Its' bid actually exceeded the Adjustable Mortgage Rate Note ("ARM Note") payoff due to repetitive over charging of interest by the prior holder of the Note (Novastar Mortgage Trust). The Bank of New York Mellon's declaration of the amount owed was not supported by loan records or consideration of the fluctuations in the LIBOR index which controls the interest rates being assessed under the ARM Note. Seemingly both the Appellee Bank of New York Mellon and the trustee blindly accepted a prior loan servicer's, OCWEN, naked statement of the balance due and the computation of interest without review of any supporting records. (*OCWEN statement of balance, CP 88-89, Promissory Note CP 83-86, capped paragraph 4 CP 83, LIBOR index rates CP 157-163*)

After the sale the Bank of Mellon sought possession of the property and Restore brought this lawsuit to quiet title, or in the alternative, to recover the excess sale proceeds under RCW 61.24.070, RCW 61.24.080. (*Complaint CP 1-11)* Restore's claim for excess proceeds and related Consumer Protection Act Claim centered on the bank's credit bid which was based on the overcharging of interest due.

The trial court granted Appellee's Motion for Summary Judgment to dismiss this action. (*Order Granting, CP 196-198)* Pursuant to RCW 61.24.040(7) the trial court correctly held that the trustee's sale was not effective to terminate Restore's ownership of the property due to failure of notice. However, the lower court then went on to conclude that the sale could be "redone" since the lack of notice was due to a "mistake" by the trustee. The court's decision that the sale did not terminate Restore's ownership rendered its alternative claim for excess sale proceeds moot.

What constitutes an "excusable mistake" for purposes of allowing a "re-do" of a trustee's sale is the primary issue in this case. The trustee's ignorance of Restore's ownership was founded on his failure to investigate the property's title. The trustee did not obtain a current title report nor updates to a report issued over a year before. The trustee's explanation of "why" he failed to give notice of the trustee's sale to Restore is simply that it was "ignorant" of it. Of import is that the trustee's declaration also indicates that it learned of Restore's ownership of the property sometime "after" the issuance of the Notice of Trustee's Sale. CP The trustee did not claim that it was "ignorant" of Restore's ownership of the property at the time of the trustee's sale. *(CP 93, paragraph 9)*

To be fair trusted claims that it learned of Restore's interest after the notice of sale when it obtained a date down endorsement. *(CP 93, paragraphs 8-10).* The date this was obtained was not stated. It could be before or after the date of the trustee's sale. If before the sale, then the trustee had was fully aware that it had failed to give notice of the sale to Restore who was, and had been, the owner of the property long prior to the date the Notice of Sale was give. If the date down endorsement was received after the sale, then the question is why had the trustee proceeded prior to obtaining this type of update? There is no explanation.

The trustee's error (failure to investigate title) could ALSO have been easily remedied if the Bank of New York Mellon, itself, as the bidder and buyer of the property, had exercised common sense and due diligence by itself ordering a title report and comparing it to the trustee's Notice of Sale to verify that notice was given to those having a record interest in the property, such as Restore. This simple act was

not done by anyone and it has now led to four separate lawsuits relating to the title and ownership of this property.

The Deed of Trust Act, RCW 61.24 does not expressly authorize a "re-do" of a trustee's sale or elucidate the circumstances, if any, when the sale can be re-done. However, it does explain the remedy. The remedy for a failure to give notice is to render the trustee's sale as "ineffective" to affect the rights of any person who was not given notice. RCW 61.24.040(7). A potential ambiguity in the statue arises since it goes on to specify that "such omitted person <u>shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding</u>." There are no Washington cases interpreting this aspect of the statute.

A single Washington decision has authorized the "re-do" of a judicial foreclosure on the basis of a mistake arising from a court clerk's indexing error which resulted in the failure to name a junior judgment lienholder as a defendant. *U.S. Bank of Washington v. Hursey*, 116 Wn. 2nd 522, 806 P.2d 245 (1991). Because of the indexing error the junior lienholder creditor's judgment lien was not a matter of public record.

Whether the interest in the property is a matter of public record is the critical fact in Hursey and a later decisions. Under Washington law a buyer at a lien foreclosure, and presumably the agent conducting it, is held to have constructive knowledge of all matters of public record. *Sixty-01 Ass'n of Apartment Owners v. Parsons*, 178 Wn.App. 228, 232-233, 314 P.3d 1121 (Div. 1 2013) (aff'd 181 Wn. 2nd 316, 335 P.3d 933).

Since *Hursey, Id.* one court, in dicta, has considered whether a judicial foreclosure may be "re-done" when a junior lienholder was not named a defendant in the action despite his lien being a matter of public record. *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, 949 N.E.2d 1195 (Ind. 2011). The Indiana Supreme Court did not deem the failure to give notice to a junior lienholder whose interest was of public record as being adequate equitable grounds to authorize the sale to be redone.

The Washington Supreme Court has weighed in on a similar issue of whether lack of knowledge of a deed of trust excuses a buyer of the property at a sheriff's sale from his purchase obligation. The Supreme Court rejected this argument since the deed of trust was a matter of public record and concluded that a court in equity should not excuse a buyer, such as the Bank of New York Mellon, from its obligations or the consequences of the sale when he fails to exercise due diligence in investigating the record title of the property. *Sixty-01 Association of Apartment Owners v. Parsons*, 181 Wn. 2nd 316, 335 P.3d 933 (2014).

Whether a trustee's sale can be "re-done" when there is a failure to give notice to a junior lienholder whose interest was a matter of public record, when there is also failure by both the buyer at the sale and a trustee who each failed to exercise due diligence to investigate time is an important question of first impression. The answer to this question has ramifications which go well beyond the interests of the parties to this appeal. A "re-do" of a trustee's sale presupposes that there is no merger of either the debt and/or deed of trust into the trustee's deed and, correspondingly, that the deed

of trust continues as a mortgage lien against the property after the sale which can be foreclosed "a second time."

The effect of the continuation of the deed of trust as a mortgage lien against the property after foreclosure creates uncertainty in the chain of title, may render title unmarketable, lend itself to potential manipulation, and contravenes the purpose of the Deed of Trust Act to promote an efficient cost effective means to foreclose a deed of trust. *Cox v. Helenius*, 103 Wn.2d 383,387, 693 P.2d 683 (1985). A "re-do" opens a Pandora's box of complications relating to the effect of the sale on the rights of junior lienholders whose interests were extinguished. What happens to related or subsequent litigation which may have been commenced as a result of the sale, or bankruptcies, or post trustee sale judgments against the new property owner for liability on a junior position lien extinguished by the sale, or the liability of a guarantor, or successive foreclosures of additional collateral securing the original Note?

It is anticipated that the Appellee, Bank of New York Mellon, will argue that a "re-do" of the trustee's foreclosure sale is appropriate to avoid a potential wind-fall to an omitted lienholder whose public record interest is not extinguished by sale. This concern has some merit but must be balanced by full consideration of why the omission occurred. In the context of the present case, this litigation could have been avoided if the trustee had obtained a title report or if the Bank of New York Mellon itself had been a prudent bidder at the sale, obtained one, and then cross checked it against the Notice of Trustee's Sale and/or conferred with the trustee to verify to whom notice was given before it purchased the property. Obtaining a title report or investigating public records to determine who has a record interest is a very small

inconvenience compared to the complications, litigation, attorney fees, and uncertainties of "re-doing" foreclosures. "Re-dos" undermine the very purposes of the Deed of Trust Act. The legislature has considered the possibility of errors and mistakes in the trustee sales process. The legislature placed a time limit of 11 days after the trustee's sale for either the trustee or beneficiary to declare the sale void and an additional 4 days (15 days after the sale) to rescind it. RCW 61.24.050(2). This remedy must be timely asserted. When it is not timely asserted the sale becomes "final." RCW 61.24.050(1). Neither the Bank of New York Mellon nor the trustee timely declared the sale void, nor gave notice of recission. The complications of a "re-do" are real and are exemplified by three other lawsuits now filed by the Bank of New York Mellon against Restore and others relating to this property. This could have been avoided had either the trustee or Bank of Mellon exercised due diligence by taking the few moments it takes to investigate title. *Sixty-01 Association of Apartment Owners v. Parsons*, 181 Wn. 2nd 316, 335 P.3d 933 (2014).

III. STATEMENT OF ISSUES

A. Whether a deed of trust foreclosure is effective to affect the rights of the owner of the property when the owner is not given notice of the sale.

B. Whether a trustee's failure to give notice of a trustee's sale is excusable error when (i) the trustee failed to order a title report to ascertain who is entitled to notice of the trustee's sale and (ii) the buyer of the property also failed to use due diligence to investigate title and evaluate the legal effect of the sale when notice is not given to a party having a record interest in the property.

C. Whether a deed of trust and/or the debt secured by it (up to the amount of the bid) merge or are extinguished by the trustee's sale and recording of the trustee's deed conveying the property to the successful bidder at the trustee's sale.

D. Whether a beneficiary of a deed of trust violates the Consumer Protection Act by systematically overcharging interest or fails to confirm the amount owed at the time of sale this presents a question of fact.

III. STATEMENT OF THE CASE

In October 2010 Ronald and Debra Crowder sold the subject property to the Appellant Restore Equity, LLC ("Restore"). The Crowders' deed conveying the property to Restore was duly recorded in Grays Harbor recorder's office under recording number 2010-111160032. (*CP 47-48*). The property was sold subject to a deed of trust securing the Crowders' obligations to Novastar Mortgage Trust (*Note CP 83-86, Deed of Trust CP 28-43*) Novastar assigned the Note and Deed of Trust to the Bank of New York Mellon in May, 2011. (*Assignment CP 45, Note CP 83-86, Deed of Trust CP 28-43*)

On September 30, 2011 the trustee of the deed of trust, Quality Loan Services Corporation, (the "trustee") foreclosed the deed of trust by conducting a trustee's sale of the property. (*Dec. Herbert West, CP 91-110, Notice of Trustee's Sale, CP 99-101*) No notice of the sale was given to Restore. The Appellee Bank of New York Mellon ("Bank of New York Mellon") was the successful bidder at the trustee's sale and purchased the property for $150,968. *(trustee's deed, CP 108-109)* This sum exceeded

the amount actually owed under the note. *(Dec. Weigelt, CP 134-136, supporting exhibits LIBOR rates, CP 157-163*)

After the trustee's sale, the Bank of New York Mellon then commenced an unlawful detainer action and Restore commenced the present action to quiet title. *(Complaint, CP 1-11)* Restore's complaint also raised two secondary causes of action for violation of the Consumer Protection Act centered on the overcharging of interest and a claim against the excess trustee sale proceeds. The Bank of New York Mellon's unlawful detainer was dismissed and the litigation continued in the context of the present case.

On May 26, 2015, while some discovery was still outstanding, the Honorable Judge Edwards of the Grays Harbor Superior Court granted the Bank of New York Mellon's Motion For Summary Judgment to dismiss the case. *(Mo. S.J., CP 56-76 Order Granting Motion CP 194-197)*. In doing so Judge Edwards held that the trustee's sale did not affect Restore's ownership of the property nor extinguish the Bank of New York Mellon's deed of trust. (*Order Granting Motion at CP 196, conclusion 2, 3 and 7*) He then authorized the Bank of New York Mellon to re-foreclose the deed of trust, i.e., to "re-do" the foreclosure sale. (*Order Granting Motion at CP 196, conclusion 4 and 7*) He also dismissed Restore' alternative claims to excess proceeds (relevant if the sale had been effective to terminate its ownership) and violation of the Consumer Protection Act. These claims were rendered moot by his decision that the sale did not affect Restore's ownership, but are potentially still relevant in later litigation filed by Bank of New York Mellon.

On June 22, 2015 Restore timely filed this appeal pursuant to RAP 5.2 (*CP 198-203, Notice of Appeal*). Since this appeal was filed, Bank of New York Mellon has commenced two new lawsuits: First, a judicial foreclosure of the Note and Deed of Trust (Bank of New York Mellon v. Crowder, Grays Harbor Superior Court case number15-2-00542-8) and second, more recently an unlawful detainer action seeking possession of the property on the basis of its being "the owner of the property" under the trustee's deed, (Bank of New York Mellon v. Crowder, Grays Harbor Superior Court case number 15-2-00784-6.

IV. *STATEMENT OF FACTS*.

1. 2003 Crowder Loan. In December 2003 Ronald and Debra Crowder borrowed $126,000 from Novastar Mortgage Funding Trust ("Novastar"). The loan is evidenced by an adjustable rate Promissory Note (*Dec. Ortworth,* CP 77-90, Note at CP 83-96). The obligations under the Note were secured by the subject Deed of Trust against the subject property. (*Deed of Trust at CP 24-25*)

The Note's interest rate was tied to the LIBOR Rate Index which varied significantly during the term of the Note. *(Note at CP 83-86, paragraph 4(B) re index at CP 83, and rate cap at paragraph 4 (D) at CP 83*) Novastar, however, failed to reduce the adjustable rate when the index rate declined which resulted in very significant interest overcharges. (*generally CP 134-163, Dec. Weigelt, at 135, and LIBOR index rates CP 157-163),* Unable to pay the disputed interest charged by Novastar, the Crowders defaulted on the Note. (*CP 135*)

In early April, 2010 Novastar (the Bank of Mellon's predecessor) retained Quality Loan Service Corporation ("trustee") to commence a non-judicial foreclosure

of the Deed of the Trust. *(Dec. Herbert West, at CP 92, Appointment of Successor Trustee, at CP 96).*

On April 5, 2010 the trustee ordered a title report entitled Trustee Sale Guarantee. *(Dec. Weigelt, at CP 135, title report/Trustee's Guarantee at CP 138-146).* This was the only title report ever ordered by the trustee.

2 *October 2010 Sale of Property To Restore.* In October 2010 Restore purchased the subject property from the Crowders. The deed reflecting Restore's purchase and ownership interest of the property was recorded on November 16, 2010 in the real property records of Grays Harbor County. (Deed at CP 47-48) The deed clearly and correctly stated Restore's address. (Deed at 47) This is also a matter of public record with the Secretary of State's office.

4. May to June 2011. Novastar assigned the Note and Deed of Trust to the Bank of New York Mellon in May, 2011. (*Assignment CP 45, Note CP 83-86, Deed of Trust CP 28-43*). Like Novastar before it, the Bank of New York Mellon retained the trustee (Quality Loan Services Corporation) as its agent to give a Notice of Default declaring the Crowder Note and Deed of Trust in default. This was not given to Restore. (*Order Granting Motion, findings 5 at 195, and conclusion 2 at CP 196*)

There is no evidence that either the Bank or the trustee reviewed the Novastar loan file to determine if the interest calculations, and hence the interest charged, were correct. The Bank of New York Mellon did not produce a loan history, notices of interest rate changes, or rate adjustments. (*CP 135*). The interest rate was variable and was to be increased and decreased based on the LIBOR index. (*Note terms paragraph 4 at CP 83*) Over the course of the loan the interest rate was increased when the LIBOR

index went up, but apparently did not decrease when it declined. The only supporting record of the debt was a bald statement made by another loan server, OCWEN. (*CP 88-89*). The rate exceeded the loan cap.

There is no evidence that the trustee ordered a new title report or conducted any title investigation or reviewed the amount claimed due by the Bank or that the Bank provided any evidence to the trustee beyond OCWEN's unsupported statement.

On June 28, 2011 the trustee commenced a non-judicial foreclosure of the Note and Deed of Trust by the recording of a Notice of Trustee's Sale. (CP 99-101, *Notice of Trustee's Sale*) The sale was set for September 30, 2011. The trustee did not give or attempt to give the "Notice of Trustee's Sale" to Restore. (*Order Granting Motion Summary Judgment, finding 5, CP 198-199)* Notice was given to the Crowders. The Notice of Trustee's Sale does not indicate that the trustee made any effort to provide this notice to Restore.

5 *June 2011--Trustee's Failure To Give Notice.* At the time the trustee issued the Notice of Trustee's Sale, the trustee claims that it did not know of Restore's ownership in the property and "first learned" of Restore's interest through a date down endorsement to its title policy "received after the Notice of Trustees Sale was issued" (CP 93, Dec. *Herbert West. at paragraph 9*).

There is no explanation as to why the trustee lacked this information before it issued the Notice of Trustee's Sale, nor why it did not take any action when it learned of Restore's interest through "the title policy date down endorsement." *(CP 93, paragraph 9)* There is no indication of when this endorsement was received by the

trustee, thus leaving open the factual question whether it knew of Restore's ownership before the trustee's sale itself.

It appears that the trustee did not order a new title report before issuing the Notice of Sale and instead relied on the report (Trustee Sale Guarantee) issued the year before. The "date down endorsement" was not produced in discovery and its date is unknown. (CP 134-163, *Dec. Weigelt)* Obtaining current title information is fundamental to complying with the Deed of Trust Act's notice requirements.

The out of date April 5, 2010 Trustee Sale Guarantee provided for multiple title updates upon request. *(Dec. Weigelt, Trustee Guarantee at CP143, paragraphs 2 and 3)*. The records produced in discovery, or more properly "the lack of records", show that no effort was made to identify persons who may have an interest in the property and be entitled to notice. (*Dec. Weigelt at CP 136)*. The following types of records were NOT produced.

A. No records relating to the ordering of a title report after April, 2010.

B. No records requesting an update of the April 2010 Trustee Sale Guarantee.

C. No records showing communication with a title company regarding updated title information.

D. No records evidencing any title investigation other than the April 2010 title report itself.

E. No records indicating any title search, judgment search, or lien search.

F. No update or search of judgment records or tax liens.

G. No request for title report updates, or the "date down endorsement."

There is reason to believe that the trustee had knowledge of Restore's interest prior to conducting the sale itself. The trustee's affidavit filed in support of the Bank

of New York Mellon's Motion For Summary Judgment is couched in very precise wording. The trustee indicates that it learned of Restore's ownership "after" issuance of the Notice of Trustee's Sale. *(see CP 93, paragraph 9, trustee dec.)* This notice was issued more than 90 days before the sale itself. Significantly, the trustee did not claim that it learned of Restore's interest after the trustee's sale itself. The trustee did not claim that it was ignorant of Restore's ownership at the time of sale.

6. *September 2011-- The Sale.* The Trustee's Sale was conducted on September 30, 2011. (Trustee's Deed, CP 108-109) Prior to the sale the Bank of New York Mellon gave the trustee instructions as to the amount of the bid. There were no records showing the interest rate adjustments or basis of the adjustment. The trustee complied with the Bank of New York Mellon's instructions without question and bid $150,968.00 at time of sale. This was a credit bid, and no monies were collected from the Bank by the trustee.

The precise amount due under the Note is uncertain since the Bank failed to produce the payment records, a payment ledger, notices of rate adjustments, statements or invoices, or other records relating to the computation of the interest and debt. (*CP 135*) Under the Note the interest rate was tied to the LIBOR index and capped. Based on reverse engineering to compute the rate of interest charged, the rate was increased when the LIBOR index went up, but not reduced when it declined. Moreover, the Note does not provide for any rate adjustments without prior written notice of the change. There is no evidence produced by the Bank of New York Mellon that any notices of rate changes were ever given to anyone. *(CP 135-136)*

7. October 2011-- Trustee's Deed. The Trustee's Deed was recorded on October 7, 2011. *(CP 108-109)* The Trustee's Deed does not reference any facts indicating that any notice of any type was given to Restore or even attempted. The Bank then claimed ownership of the property and promptly commenced an unlawful detainer action to obtain possession. This action was non-suited when Restore Equity commenced the present lawsuit to quiet title.

8. *Summary Judgment.* The Bank of New York Mellon moved for Summary Judgment to dismiss Restore's lawsuit and for declaratory relief that it could re-foreclose the deed of trust due to the trustee's failure to give notice to Restore. The Bank of New York Mellon acknowledged that no Notice of the Trustee's Sale was given to Restore and that the sale was not effective to terminate its interest in the property. *(Motion for Summary Judgment, CP 60 and CP 63)* The Bank of New York Mellon argued that the trustee's failure to give notice was "a mistake" and excusable inadvertence.

V. ARGUMENT

A. Standard of Review

This case raises questions of law and statutory interpretation on appeal from summary judgment. The court's review is de novo. *Lamtec Corp. v. Dep't Revenue*, 170 Wn.2d 838,842, 246 P.3d 788 (2011) (citing *Dreiling v. Jain*, 151 Wn.2d 900,908, 93 P.3d 861 (2004); *Albice v. Premier Mortgage Services of Washington, Inc.*, Wn.2d (2012).

The statute at issue is the Washington Deed of Trust Act, RCW 61.24 et. seq. (the "Act") and in particular RCW 61.24.040(7). Other sections of the Act which are relevant include RCW 61.24.050 which creates an 11 day window for the trustee or beneficiary to declare an error and invalidate the sale, and for the finality of the trustee's sale thereafter.

The standard of review for a motion for summary judgment is whether there is a genuine issue of material fact which may be relevant to the outcome. The mere assertion that an issue of facts exists without any showing of evidence is not sufficient to defeat the motion. *Reed v. Streib,* 65 Wn.2d 700, 707 (1965); *Bates v. Grace United Methodist Church,* 12 Wn.App. 111, 115, 529 P.2d 466 (1974).

Likewise, a factual dispute not relevant to the issue before the court will not defeat an otherwise properly supported motion for summary judgment since the requirement is that there must be no genuine issue of "material" fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986). A fact is material only if it might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 247-48.

The trustee and Bank of New York Mellon characterize the trustee's ignorance as a "mistake." Under Washington law, the validity of the excuse presents a mixed question of law and fact, which must be reviewed de novo under the "error of law" standard on appeal. *Department of Revenue v. Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975). *See also* Rasmussen v. Employment Sec. Dept., 98 Wn. 2d 846, 658 P.2d 1240 (1983) and *In Rasmussen v. Employment Sec. Dept.*, 30 Wn.App. 671 (Div. 3 1981).

B. The Deed of Trust Foreclosure Did Not Extinguish Restore Equity's Interest in the Property.

The Washington Deed of Trust Act, RCW 61.24 creates a three-party mortgage system allowing lenders to non-judicially foreclose by a trustee's sale when there is a default in payment. The foreclosure procedure is strictly governed by this statute. The act furthers three goals: (1) that the non-judicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383,387, 693 P.2d 683 (1985).

One of the key legislative objectives of the Deed of Trust Acts is that it should promote stability of land titles. This is central to the Deed of Trust Act's provisions addressing the legal effect of a failure to give notice of the sale. RCW 61.24.040(7) explains that the effect of the failure to give notice to a person entitled to receive notice is that the sale does not affect his interest. The statute does not say that the sale is "void" or that the sale must be "re-done", rather, it specifies that the sale "shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section." The plain language of RCW 61.24.040(7) is neither ambiguous nor inchoate. To avoid any misunderstanding the operative words "shall not affect" are repeated in this statute and create a clear rule of law that the trustee's sale and trustee's deed:

> ... shall not affect the lien or interest of any person entitled to notice under subsection (1) of this section, if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or

> interest and was omitted as a party defendant in a judicial foreclosure proceeding;

The statute's mandate that the sale shall not affect the interest of the omitted person is in accord with the long standing rule of law followed by Washington Courts since 1930 that the omitted junior lienholder's rights were not foreclosed, i.e., that the foreclosure decree was not effective to terminate the omitted lienholder's interest in the property. *Spokane Sav. and Loan Ass'n v. Lilopoulos, 160 Wash. 71, 73-74, (1930).* In this decision the court also noted that the naming of all persons having an interest in the property as parties to the action was the "plaintiffs' concern."

The precepts of Spokane decision were more recently re-affirmed when the Supreme Court was asked to invalidate a judicial sale because the foreclosing lienholder claimed a "mistake" of "not being aware" of a junior lien against the property. This was the issue in *Valentine v. Portland Timber & Land Holding Co.*,15 Wn.App. 124, 547 P.2d 912 (1976). In this case the court basically concluded that ignorance was not an excuse and commented that: "lack of knowledge or notice of the subordinate interest of another person in the mortgaged land does not excuse a foreclosing mortgagee from making such person a party to his suit." *Id. at 127.*

The consequence of not making a lienholder a party to the foreclosure action was explained: '[i]f he fails to do so, the subordinate interest, regardless of whether it be legal or equitable and one of ownership or lien, is not subject to the decree." *Id.*at 127 (paraphrasing G. Osborne, Mortgages § 322 (2d ed. 1970) at page 672). The sale cannot extinguish the rights and interests of a junior lien holder who was not made a

proper party to the proceeding by its purchase of the property. *Northern Comm'l Co. v E.J. Hermann Co.,* 22Wn. App. 983, 971, 593 P.2d 1332 (1979).

In view of the plain language of the Deed of Trust Act, and the decisions involving omitted defendants in a judicial foreclosure, the trial court correctly held that the trustee's sale did not "affect" or terminate Restore's ownership of the property. The lower court's error arises in the context of its authorizing a "re-do" of the sale.

C. Neither The Deed of Trust Act Nor Equity Authorize A "Re-Do" of a Trustee's Sale Due to Lack of Notice When The Interest of The Person Who Was Not Given Notice Was A Matter of Public Record and Easily Discoverable By Due Diligence

The trial court erred by authoring the deed of trust to be re-foreclosed. This remedy is not provided for by the Deed of Trust Act. The Act specifies that the available remedy is simply that sale shall not affect the rights of the person who was not given notice. No other remedy is provided. However, RCW 61.24.040(7) also states that "such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding." On the basis of this language the lower court concluded, and the Bank of New York Mellon will argue, that the sale may be redone due to a "mistake." The primary authority for this argument is *U.S. Bank of Washington v. Hursey*, 116 Wn. 2nd 522, 806 P.2d 245 (1991). This decision, however, is not compelling authority nor should it be followed in the context of the present case where the trustee and Bank of New York Mellon both failed to exercise due diligence.

In *Hursey* the Supreme Court carved out a very limited equitable exception allowing a judicial foreclosure action to be redone on the basis of a mistake when the plaintiff was not at fault and the mistake was based on failure to join a junior lienholder to the proceeding due the court's own error, and not the fault of either party or their counsel. This exception was adopted to address the extraordinary facts in the case. The court clerk's indexing error had resulted in the omitted lienholder's interest NOT being a matter of public record. Since it was not a matter of public record the failure to name a defendant was not the plaintiff's fault.

The application of the Hursey exception to a case involving an omitted junior lienholder in a judicial foreclose *whose interest was a matter of public record* was considered in dicta and rejected by the Indiana Supreme Court in its decision of *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, 949 N.E.2d 1195 (Ind. 2011). The court deemed the Hursey exception as being limited to the facts of that case since it involved an innocent mistake by the court itself. The court did not believe that the Hursey holding should be extended to the case before it in which the plaintiff had failed to name a defendant whose interest in the property was of public record.

Recently the Hursey decision was not followed (albeit argued in the parties' briefing but not even mentioned in the court's decision) in a case by the purchaser at a sheriff's sale contesting confirmation of the sale (thus leading to a re-do) and seeking relief from the obligation to purchase the property at the accepted bid price. The purchaser had been ignorant of record interests against the property which were

material to his bid and purchase price. *Sixty-01 Association of Apartment Owners v. Parsons*, 181 Wn. 2nd 316, 335 P.3d 933 (2014)

In that case, the buyer of the property sought to be relieved from his purchase obligation to purchase property he had bought at a sheriff's sale. The buyer opined that he was ignorant of deeds of trust which were not extinguished by the sale. The buyer, Pashniak, argued that he is entitled to withdraw his bid because the default judgments obtained against both Parsons and Mallarino stated that Sixty-01's lien was superior to any other lien, thus misleading him about the existence of properly recorded deeds of trust and last minute filing of stipulations between beneficiary of the deeds of trust (Bank of America) and Sixty-01. Under the stipulations the Sixty-01's judgments had no effect on the priority of the previously recorded deeds of trust until after the sheriffs sale. The Supreme Court's and the Court of Appeal's rejection of these arguments warrant review.

Initially, Court of Appeals was not convinced that Pashniak's ignorance justified vacating the sale since he had failed to exercise due diligence relating to matters of public record. The court commented: "But whether or not Pashniak had notice of the stipulation with BOA is of no consequence. Had Pashniak exercised due diligence, he would have discovered the duly recorded liens on both properties." Id. at 232. It continued:

> Pashniak, as a purchaser at a mortgage foreclosure sale, should not be relieved of his purchase simply because of his mistaken belief as to the title that he would receive where he failed to seek the information by examination or inquiry. A recorded deed constitutes constructive notice of the interest acquired to all subsequent purchasers.

Sixty-01 Ass'n of Apartment Owners v. Parsons, 178 Wn.App. 228, 232-233, 314 P.3d 1121 (Div. 1 2013) (aff'd 181 Wn. 2nd 316, 335 P.3d 933) .

The Supreme Court adopted a similar analysis and affirmed the Court of Appeals. The Supreme Court commented further on why ignorance is not an excuse and why equitable considerations are not at play when founded on lack of due diligence relating to a matter of public record:

> We do not have a situation here requiring the court to use its equitable authority. Here, a third party purchaser bought two condominiums at a foreclosure sale but did not adequately research the property to learn they were encumbered by significant mortgages. *Id.* 327

The court went on to explain that the courts must be extremely careful in exercising these extraordinary equitable powers. *Id.* at 327. It then concluded that the trial court had abused its discretion by vacating the sheriff's sale. The Supreme Court noted:

> The facts in this case do not support such an equitable intervention. The trial court abused its discretion when it overturned the Mallarino sale based on equitable considerations. *Id.at 327.*

The analysis in *the Sixty-01* decisions are in accord with both the Spokane and Valentine decisions. In these prior decisions the courts noted that: it is "plaintiff's concern" to name as defendants those who have an interest in the property (Spokane) and the "lack of knowledge of an interest is not an excuse for failure to bring such persons before the court." (Valentine). The Sixty-01 decisions, Spokane and Valentine, thus each support the proposition that a court in equity will not excuse a purported "mistake" which centers on a party's lack of due diligence in the first place. Ignorance is not an excuse.

In the context of the present case, the Bank of New York Mellon as purchaser did not do its due diligence. Had it researched the title and crossed check the Notice of Sale against a current title report it would have known that Restore had not been given notice of the sale. (The notice of sale recites to whom notice was given). A simple phone call to the trustee could have confirmed this and then potentially corrected the trustee's failure to give notice. However, instead of a simple solution to a potential problem, the Bank of New York Mellon proceeded to buy the property with constructive knowledge of Restore's interest. In doing so, it elected to buy the property knowing that under RCW 61.24.040(7) the sale would not affect Restore's rights. Under the Deed of Trust Act, the sale became final 11 days the sale date and when the trustee's deed was recorded and accepted by the bank. RCW 61.24.050

The trustee's ignorance also centered on its failure to do due diligence prior to issuing the Notice of Trustee's Sale, a repeated failure during the foreclosure process by a failure to order or obtain common title updates, or examine the county's real property records. It is important to recognize that the trustee may have had actual knowledge of Restore's ownership. This may be inferred by the trustee's carefully crafted statement that it learned of Restore's interest after the Notice of Sale was sent. The trustee did not claim or imply that it was ignorant of Restore's interest at the time of the trustee's sale itself. If the trustee was aware of Restore's interest, then it is conceivable that the trustee informed the Bank of New York Mellon of Restore's ownership of the property and sought instructions.

The failure to give notice to Restore also falls on the trustee's failure to exercise due diligence as to the property's title. The trustee has duties to the Bank of

New York Mellon to ensure that proper notice is given. The Bank of New York Mellon appoints the trustee, can fire the trustee, pays the trustee, and has the ability review its work. For all intents and purposes the trustee is the Bank of New York Mellon's agent to administer the foreclosure.

While a trustee owes duties to all parties to the deed of trust, he is accountable to the beneficiary. The Bank of New York Mellon's recourse is not a "re-do" of the sale but to be insistent that its trustees do their jobs and exercise due diligence. However, it should go without saying that the Bank of New York Mellon should also have done its own due diligence to review the title of the property and investigate who was given notice. This is a very simple matter—order a title report and ask the trustee for a copy of service list indicating to whom notice was given. Neither the trustee nor the Bank of New York Mellon should be excused for their proceeding blindly without taking basic common sense steps to make sure notice was properly given. As in Sixty-01, the buyer at the sale is held to have constructive knowledge of the public real property records and should not be excused from doing its due diligence before buying the property.

D. There Is No Debt or Deed of Trust to Re-foreclose.

Underlying the ability to "re-do" a sale is the assumption that there is an interest in the property held by the foreclosing party that can be re-foreclosed. The foreclosure of a deed of trust and issuance of a trustee's deed raises the issue of merger and/or extinguishment of the underlying deed of trust and/or the debt secured by it up to the amount of the bid. The Bank of New York Mellon cannot "re-do" the foreclosure of its deed of trust because its deed of trust merged into the trustee's deed,

and as importantly, the debt owed was satisfied by the amount of its bid—which actually exceeded the debt.

To allow a "re-do" of a sale is inconsistent with a recent holding in Division 2 that the foreclosure process extinguishes deeds of trusts and they cease to be a mortgage lien against the property at the moment of sale. *In re Trustee's Sale of Real Prop. of Ball*, 179 Wash. App. 559 319 P.3d 844, (Div. 2 2014). It is also inconsistent with the Deed of Trust Act which gave the Bank of New York Mellon and the trustee to "rescind" the sale within 11 days of the sale date, and makes the sale "final" thereafter if not rescinded within that time and a notice of recession being given within 15 days after the sale. RCW 61.24.050.

In Ball the foreclosing lienholder (Chase) held both the first and a second position deeds of trust. The property was also subject to a third position lien. Chase foreclosed the first deed of trust. It was also the successful bidder. Chase's bid at the sale was more than the debt owed on the first deed of trust thus creating excess proceeds. Under RCW 61.24.070 and .080 excess proceeds become payable to the junior lienholders in accordance with the priority of their interests. After the sale the third position lienholder claimed the excess proceeds were payable to it on the basis of the merger of Chase's second position deed of trust into the trustee's deed. Merger is a long standing doctrine that merger occurs when a party with a lesser interest in property, such as a mortgage or an easement, acquires a fee interest. The lesser interest "merges" into title and ceases to exist.

In reaching its' decision the Court of Appeals did not dwell on the issue of merger since it first concluded there could be no merger due to the legal effect of the

trustee's sale. The legal effect of the sale was to extinguish the deeds of trusts and since these were extinguished by the trustee's sale there was no deed of trust mortgage lien to merge into the trustee's deed. Essentially the court held that the judicial doctrine of merger did not apply when the mortgage lien is a deed of trust which is non-judicially foreclosed by a trustee's sale. In this instance, the deeds of trust, or at least those of the junior lienholders, are extinguished by the sale. As such there are no interests left which merge into the title created by the trustee's deed. *Id.* 565.

The ramification of the Ball decision is that the trustee's sale and the trustee's deed conveying the property to Bank of New York Mellon extinguished its deed of trust. The Bank of New York Mellon's interest is now based on the trustee's deed and not the deed of trust which was foreclosed on. The deed of trust was terminated by the sale, and the buyer of the property takes title free of lienholders who were given notice as required by law and subject to those having a recorded interest in the property but not given notice. This conclusion is further supported by the legal effect of a lienholder's bid at the trustee's sale. The lienholder is authorized to do a credit bid up to the amount owed. The amount of the bid is credited to the debt, and interests of the junior lienholders are converted to claims against the excess proceeds, if any.

The Ball decision reflects the legislative intent that a non-judicial foreclosure be efficient and final. The sale extinguishes the deed of trust. There are no provisions in the Act for resurrection of the deed of trust in order to do "re-dos", and unlike judicial sales, there are no motions for reconsideration, appeals, motions to vacate or to modify. The debt secured by the deed of trust then merges into the sale proceeds or trustee's deed, at least up to the amount of the bid/proceeds.

E. The Failure to Give Notice To Restore
Was Not An Excusable Mistake.

The "mistake" claimed in the present case arises in the context of the trustee claiming to be ignorant of Restore's ownership of the property due to its' own failure to do due diligence. The trustee claims to have been ignorant of Restore's ownership. The trustee failed to obtain a current title report to determine who owned the property or had an interest in it, however, there is no explanation as to why this occurred. The claim of mistake is not sufficient because there is no information or details of why this occurred, and in the absence of this level of detail, it is not an "excuseable mistake" which can be recognized by the court, or at minimum, presents a question of fact for a jury to decide.

There can be no dispute that if the trustee or the Bank of New York Mellon had ordered a title report, updates, or done a title investigation then we would not be here (nor would Restore be a defendant in three other lawsuits brought by Bank of New York Mellon on the same issues). Significantly, the trustee's affidavit filed in support of the Bank of New York Mellon's Motion For Summary Judgment is couched in very precise wording and merely recites without details or explanation that the trustee learned of Restore's ownership "after" the issuance of the Notice of Trustee's Sale. *(CP 93, paragraph 9)* This Notice was given 90 days before the sale itself. The trustee did not claim that it was ignorant of Restore's ownership interest at the time of the trustee's sale itself. *(CP 93)*

The trustee's ambiguous statements leaves open the possibility, that its "date down endorsement" was actually received before the date of the trustee's sale. If

before the sale, then the trustee had was fully aware that it had failed to give notice of the sale to Restore who was, and had been, the owner of the property long prior to the date the Notice of Sale was give. If the date down endorsement was received after the sale, then the question is why had the trustee proceeded without obtaining this type of update before the sale? There is no explanation.

The trustee's error (failure to investigate title) could ALSO have been easily remedied if the Bank of New York Mellon, itself, as the bidder and buyer of the property, had exercised common sense and due diligence by itself ordering a title report and comparing it to the trustee's Notice of Sale to verify that notice was given to those having a record interest in the property, such as Restore.

Alleging a "naked" excuse without details is not adequate to support a "re-do" of a foreclosure when there is a failure to give notice to a person whose interest was a matter of public record. The issue was also commented on by the Indiana Supreme Court in *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc. Id.* at 1202-03 when the court observed:

> Were such facts before us [Hursey facts], then the outcome of this case very well may have been different. Instead, the record is clear that Citizen Bank's lien on the property was properly recorded and indexed. Other than essentially declaring mistake or inadvertence Countrywide does not explain why the lien was overlooked. In sum, Countrywide has failed to demonstrate that it is entitled to the remedy of strict foreclosure. *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc. Id.* at 1202-03

As in Citizen State Bank, the Bank of New York Mellon simply declares a "mistake" and fails to explain why this occurred. This is not sufficient. *Rasmussen v. Employment Sec. Dept.*, 30 Wn.App. 671 (Div. 3 1981). In this decision the court considered the adequacy of a naked excuse for filing a late appeal which was not

supported by any details, facts or meaningful information. Rasmussen gave as her reason for a late filing:

> I feel I came in on time to appeal my decision of denial. I thought it was 10 working days and the 4th of July fell during that time and the employment office was closed. I could not come in to appeal when the office was closed.

The Court rejected this excuse because there was no explanation of relevant potential details which included the fact that July 4th was on a Wednesday. The naked statement did not address why the appeal could not have been filed on the 5th or 6th. or why Ms. Rammussen believed the time to file it was in "working days." *Id.* at 673.

Like Rasmussen, neither the Bank of New York Mellon nor the trustee have given any explanation as to why they were ignorant of Restore's ownership of the property which was a matter of public record and clearly noted in the county's land records. They did not explain why they failed to exercise ordinary care by ordering a current title report, or explain why they apparently failed to even get the multiple updates previously offered by the title company. They failed to explain this despite the simple fact that identifying those who are entitled to notice is the most fundamental and arguably the most important of the trustee's duties. They failed to explain why no one checked county tax records, or reviewed real property records, or reviewed online or paper land maps identifying property owners.

It should be noted that even the out of date Trustee's Sale Guarantee obtained by the trustee in April, 2010 contemplated a series of updates during the foreclosure process which apparently were never requested. Generally the updates are provided at varying intervals of 60 days from the date of issuance, and then 30 days before the scheduled trustee's sale, and after the sale. (*CP Dec. Weigelt, 134-136, Trustee's Sale*

Guarantee, rider page 2, at CP 143). The updates are done in order to capture any changes in the condition of title. Of import, are federal tax liens which are determined as of the "30th day before the sale." The updates are provided upon request.

The bottom line is that the Bank of New York Mellon may have claimed a "mistake" but failed to introduce any evidence containing facts or details to support it. It should be rejected. Moreover, the bank's claim of "mistake" was not timely and is effectively barred or waived under the Deed of Trust Act. RCW 61.24.050. This statute may be dispositive of the issues at hand.

The Deed of Trust Act itself contemplates the possibility of a mistake and authorizes the trustee to "rescind" the sale. Under RCW 61.24.050 (1) the trustee's sale becomes "final" and "no person shall have any right by statute or otherwise, to redeem the property sold at the trustee's sale" unless within eleven (11) days of the sale the trustee or the beneficiary (in our case the Bank of New York Mellon, or the agent for the trustee "declares the sale trustee's sale and the trustee's deed void" for the reasons specified in the subsection (2). The trustee AND the beneficiary may declare the sale void for several reasons including a claimed "error with the trustee foreclosure sale process" (RCW 61.24.050(2(a)(i). In relevant part, this statute provides:

> (2)(a) Up to the eleventh day following the trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the trustee's sale and trustee's deed void for the following reasons:
>
> (i) The trustee, beneficiary, or authorized agent for the beneficiary assert that there was an error with the trustee foreclosure sale process including (list of examples omitted).

The import of this statute cannot be understated. It creates an 11 day safe haven after the sale itself to check for mistakes, and if found, to declare the sale void and rescind it. Notice of recession must be given with 15 days. RCW 61.24.050(4). This safe haven gives both the trustee AND the beneficiary additional time to review the sale process, and if found wanting to declare it void. Again due diligence during this additional time would have addressed any issues now before the court. After the expiration of this time, the sale is final. RCW 61.24.050(1). The legislature did not authorize a "redo" of the sale after that time and put an 11 day time limit on a trustee or beneficiary declaring an "error." This is accord with the policy that trustee's sale shall be efficient and final.

Neither the trustee nor the Bank of New York Mellon declared an error in the sale process within 11 days of the sale nor gave notice of recission within 15 days. Bank of Mellon has provided no explanation as to why it did not discover the error either prior to or within 11 days after the trustee's sale. After the sale there was yet another opportunity to review the sale process which a prudent buyer would due in the 11 days following the sale.

The trustee did not claim that it lacked knowledge of Restore's ownership at the time the trustee's deed was recorded. Both the trustee and the bank are held to having constructive knowledge of it. By not declaring an error within 11 days, the Bank of New York Mellon waived any right to object to the process in the future. RCW 61.24.050(1) and (2) collectively make the sale "final" and bar the later untimely assertion of the "error" or mistake in the process.

F. If The Trustee's Sale Is Upheld and Effective To Terminate Restore's Ownership then Restore Is Entitled to An Accounting and Excess Proceeds.

In view of the court's decision that the trustee's sale was not effective to extinguish Restore's interest in the property, Restore's alternative claim to excess proceeds became moot. Should the Court of Appeals conclude that the trustee's sale extinguished Restore's interest in the property then a claim for excess proceeds arises since the amount of the bid was in excess of the debt owed. RCW 61.24.070(2). This claim was not waived by failure to bring a lawsuit prior to the foreclosure since fundamentally the claim does not arise until the bid was made. *Walker v. Quality Loan Service Corp.*, 176 Wash. App. 294 308 P.3d 716, (Wash.App. Div. 1 2013). A borrower or grantor does not waive certain claims for damages by failing to bring a civil action to enjoin a foreclosure sale. *Id.* The claims not waived include the "[f]ailure of the trustee to materially comply with the provisions of this chapter." *Id.*; RCW 61.24.127(1)(c).

G. The Bank of New York Mellon or its Predecessor Violated the Washington Consumer Protection Act.

The trial court also dismissed Appellant's Consumer Protection Act claims. In view of the court's decision that the sale did not extinguish Appellant's ownership of the property, Restore was not injured by the Bank of New York Mellon's overcharging interest and bid in excess of the debt. In this context Restore is not claiming that the court's decision was in error.

However, in the event the prior sale extinguished or a "re-do" of the sale extinguishes Restore's interest in the property, then the Bank's overcharging interest is fully at issue and overcharging is deceptive or unfair act and may meet the elements of a cause of action for violation of the Consumer Protection Act. *Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn. 2nd 778(1986); Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2nd 83 (2012).

Unfortunately the Bank of New York Mellon withheld information in discovery of how interest was computed, (*CP 135, para. 3, CP 136, para. 8*) and then moved for summary judgment. There were no supporting records relating to how it computed interest. This remains a factual issue which may be relevant in later litigation. In this regard, the court's dismissal of Restore's claim for violation of the Consumer Protection Act should not be deemed a final determination of that issue.

VI. CONCLUSION AND RELIEF REQUESTED

At the heart of this case is whether a trustee's sale can be "re-done", and if so, the reasons why. Whether a trustee's sale can be "re-done" due to failure to give notice to a junior lienholder and/or owner due to a trustee's breach of duty is an important question of first impression because the answer has ramifications which go well beyond the interests of the parties to this appeal. The issue is rendered more problematic due to the Bank of New York Mellon's, as purchaser at the sale, own failure to do due diligence and seeking equitable relief for its own negligence.

A "re-do" of a trustee's sale presupposes that there is no merger of the debt and/or deed of trust into the trustee's deed, extinguishment of a deed of trust by a

trustee's sale, but conversely and that the deed of trust continues as a mortgage lien against the property after the sale which can be foreclosed "a second time."

The effect of the continuation of the deed of trust as a mortgage lien against the property after foreclosure creates uncertainty in the chain of title, may render unmarketable title and contravenes the purposes of the Deed of Trust Act to promote an efficient cost effective means to foreclose a deed of trust. *Cox v. Helenius*, Id., (1985). An extension of the Hursey exception would undermine the Act's objectives to promote title stability as evident by it stating only one remedy for failure to comply with the Act to wit: the deed of trust foreclosure does not affect or extinguish the rights of an omitted junior lienholder who was not given notice. To conclude otherwise creates uncertainty in title and opens up a Pandora's box of potential manipulation of the sale process.

Here, a "redo" of the sale would ignore the holding and implications of *Sixty-01 Association of Apartment Owners v. Parsons*, *Id.* that buyers of the property are held to know the effect of a sale and whether it clears title or not. Moreover, a "redo" puts in question the effect of a sale and whether a deed of trust is continuing after the trustees sale which would be inconsistent with *In re Trustee's Sale of Real Prop. of Ball, Id.*

At the end of the day, the finality under the Deed of Trust Act reflects an allocation of risk placing the risk of notice errors on the foreclosing lienholder and buyer. It is easy for the trustee and Bank of New York Mellion to do their homework and do it right. The foreclosing lienholder and the trustee can easily comply with the notice requirements of the Act, and can easily do due diligence of investigating title.

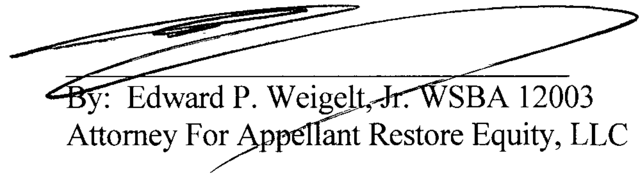
In contrast to unwind a sale is not easy, not efficient and not justified. To balance the risks the Act placed the risk of not giving notice on the foreclosing lienholder and buyer who effectively assume the risk that the sale would not extinguish the rights of an omitted lienholder entitled to notice. This risk is more theoretical than real since both the trustee and buyer can take a few moments to investigate title. Failure to do so is not excusable nor grounds to redo either a deed of trustee foreclosure or a judicial sale.

Material to this case is the need for finality of deed of trustee foreclosures. The legislature has considered the possibility of errors and mistakes in the trustee sales process. The legislature placed a time limit of 11 days after the trustee's sale for either the trustee or beneficiary to declare the sale void and an additional 4 days (15 days after the sale) to rescind it. RCW 61.24.050(2). This remedy must be timely asserted. When it is not timely asserted the sale becomes "final." RCW 61.24.050(1). Neither the Bank of New York Mellon nor the trustee timely declared the sale void, nor gave notice of recission. Under the law their later attempt to do so is improper. The claim was waived and/or is forever barred by the aforementioned statutes.

Restore respect fully requests that the Court of Appeals to reverse the trial court's order authorizing a "redo" of the sale. If the Court of Appeals affirms the lower court's decision, then Restore requests that the low court's findings regarding the Consumer Protection Act be stricken, so that this issue, may if and as appropriate, be considered in the context of the a proceeding to "redo" the sale.

DATED this 23rd day of November, 2015.

Law Offices of Edward P. Weigelt, Jr.



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DIVISION II AT TACOMA
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RESTORE EQUITY, LLC, Appellant/Plaintiff, vs The BANK OF NEW YORK MELLON, as successor in interest, Appellee/Defendant.	No. 477289-II CERTIFICATE OF SERVICE APPELLANTS OPENNING BRIEF

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CERTIFICATE OF SERVICE

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14 I hereby certify under penalty of perjury that I served or caused to be served upon the Defendant/Appellee a copy of the APPELLANT'S OPENNING BRIEF by service upon its attorney by U.S. first class mail and electronically on November 24, 2015:

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18 Sakae Sakai
Houser and Allison, PC
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Sakae S. Sakai (ssakai@houser-law.com)

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20 And upon the Clerk of the Court of Appeals by messenger for service by November 24 2015.

21 November 24, 2015 at Everett, Washington.

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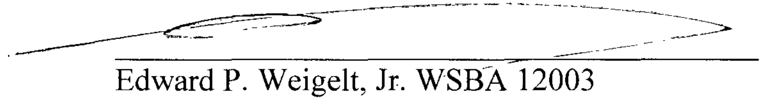

23 Edward P. Weigelt, Jr. WSBA 12003

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