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Supreme Court No. 95654-5
Court of Appeals No. 75665-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHELLE MERCERI, a single woman,

Petitioner,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, a national
banking association, as trustee for holders of the BCAP LLC Trust
2007-AA2, et al,

Respondent.

**DEUTSCHE BANK NATIONAL TRUST COMPANY, a
national banking association, as trustee for holders of the BCAP
LLC Trust 2007-AA2'S ANSWER TO *AMICUS CURIAE*
MEMORANDUM OF THE NORTHWEST JUSTICE
PROJECT IN SUPPORT OF PETITION TO REVIEW**

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Trust 2007-AA2

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RULES

RAP 13.4(b)1

I. IDENTITY OF ANSWERING PARTY

Deutsche Bank National Trust Company, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2, et al, (“Deutsche”) respectfully submits this Answer to the *Amicus Curiae* Memorandum of the Northwest Justice Project (“NWJP”) in Support of Petition to Review of a decision of the Court of Appeals, Division One, dated January 22, 2018, in *Merceri v. Deutsche Bank*, No. 75665-6-I.

II. STATEMENT OF ANSWER

The Court of Appeals’ decision does not conflict with published appellate decisions, and NWJP’s *Amicus Curiae* memorandum fails to satisfy the criteria for review under RAP 13.4(b).

III. ARGUMENT

A. *The Court of Appeals’ decision does not conflict with any published appellate decisions.*

The trial court in this case certified the following question to the Court of Appeals:

Even though 11 U.S.C. § 108(c)(1) does not, itself, toll a state statute of limitations, is RCW 4.16.230 a state statute incorporated into section 108(c)(1) to toll the

statute of limitations during a bankruptcy stay? *Cf. Hazel v. Van Beek*, 135 Wn.2d 45, 64-66, 954 P.2d 1301 (1998).

The Court of Appeals answered, and held:

The bankruptcy code stays all acts to exercise control over property of the bankruptcy estate. 11 U.S.C. §362(a)(3). The bankruptcy stay thus prohibits or forbids the commencement of a foreclosure action. The relief from stay provision emphasizes this meaning. If a creditor must move for relief in order to bring an action, the creditor is otherwise prohibited from bringing the action. And, contrary to *Merceri's* position that a statutory prohibition must be permanent and complete, the tolling statute expressly applies when an action is “stayed.” Under the plain language of RCW 4.16.230, the statute of limitations is tolled during the bankruptcy stay.

Merceri v. Deutsche Bank AG, 2 Wn.App.2d 143, 151, 408P.3d 1140 (Div. 1, Jan. 22, 2018). The court determined that “the bankruptcy stay is a ‘statutory prohibition’ within the meaning of RCW 4.16.230.” *Id.* at 154.

The Court of Appeals never held that a nonjudicial foreclosure was not an “action,” or that tolling could only apply if no action had ever been commenced. The court’s ruling does not rely upon any such an assumption—the argument was simply never raised or addressed. *Amici Curiae* are not permitted to raise an issue

never asserted by the parties. See generally *Gallo v. Labor & Indus.*, 155 Wn.2d 470, 495 n.12, 120 P.3d 564, 576 (2005) (declining to address issue raised by *amici* to the Supreme Court because the issue had not been advocated by either party). Accordingly, NWJP's assertion that the decision conflicts with either *Walcker v. Benson*, 79 Wn.App. 739, 904 P.2d 1176 (1995), or *Olsen v. Pesark*, 118 Wn.App. 688, 77 P.3d 385 (2003), is erroneous.

In *Walcker v. Benson*, 79 Wn.App. 739, 904 P.2d 1176 (1995), the court held that the statute of limitations for written agreements applied to demand notes. *Id.* at 741. The court then held that a creditor on a demand note must initiate foreclosure within a six-year period or the foreclosure would be barred. The court in *Walcker* did not address bankruptcy, statutory prohibitions, or tolling. *Walcker* is irrelevant, and nothing in the Court of Appeals' decision conflicts with it.

The court in *Olsen v. Pesarik*, 118 Wn.App. 688, 77 P.3d 385 (2003), also does not address tolling under RCW 4.16.230. In *Olsen*, the borrowers raised a defense to a nonjudicial foreclosure by filing a lawsuit to restrain the sale asserting defenses to the foreclosure.

The court found that, despite being asserted as a plaintiff, the claims were not time-barred because the only way they could be raised under the RCW 61.24.040(1)(f) was by filing a lawsuit to restrain the sale. *Id.* at 694. The court did not consider the issue of statutory prohibition, injunction, or tolling. Nothing in the Court of Appeals’ decision in *Merceri* conflicts with this decision.

B. RCW 4.16.230 tolls the statute of limitations because additional nonjudicial foreclosures can be commenced.

RCW 4.16.230 provides that when commencement of an action is stayed, tolling shall apply. NWJP argues that if a non-judicial had already “commenced” before the bankruptcy—and was halted by the automatic stay—then tolling need not, or cannot, apply when a creditor commences a subsequent foreclosure. *Memorandum*, p. 7. This argument fails because the nonjudicial is not an action that is “stayed” during the bankruptcy, and then resumed after the stay terminates like a court case. The nonjudicial instead expires, and subsequent and successive nonjudicial proceedings can be “commenced” after the bankruptcy. *See* RCW 61.24.040 (requirements for and expiration of notices of sale); also generally, *Davis v. Blackstone Corp.*, 2015 Wn. App. LEXIS 466, *5 (Div. 1,

Mar. 2, 2015) (noting intent of creditor to recommence nonjudicial foreclosure after injunction); *Meyers Way v. University Savings*, 80 Wn.App. 655, 671-672, 910 P.2d 1308 (Div. 1, Feb. 20, 1996) (discussion of requirements under Deeds of Trust Act to reinstate nonjudicial foreclosure after bankruptcy).

In *Merceri*, the automatic stay prohibited any and all foreclosure actions from November 17, 2010, to December 4, 2012. CP 125. After the stay terminated, Deutsche commenced a nonjudicial foreclosure, issuing a new Notice of Default on January 20, 2014. CP 213-219. It also subsequently sought to commence a judicial foreclosure, when it requested leave to amend its pleadings to foreclose in 2016. CP 215-319.

“Commencement” of these actions was prohibited during the bankruptcy stay. NWJP’s characterization of the word “commencement” in RCW 4.16.230 is simply an attempt to obtain a significant advantage and reap a windfall for parties who file bankruptcy, in derogation of a creditor’s right to initiate and “commence” a new nonjudicial foreclosure action once a previous foreclosure was thwarted.

Tolling provisions, by nature, exist to assure all persons subject to a particular statute of limitations enjoy the full benefit of the limitation period. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008) (citing *Wright v. Jeckle*, 158 Wn.2d 375, 379, 144 P.3d 301 (2006)). After stating that the Bankruptcy Code does not toll state-based statutes of limitation, NWJP argues that bankruptcy law provides “ample protections” to creditors. *Memorandum*, p. 8. The Washington legislature, however, provided creditors tolling under state law, just as several other states have so provided. RCW 4.16.230. NWJP’s lobbying effort in this regard should be made to the legislature—it provides no basis for this Court to accept review. NWJP’s additional assertion that the DTA itself provides “additional protections” is simply not true.¹ *Memorandum*, p. 8. The DTA does not provide for tolling, it only provides that additional foreclosure actions can be commenced.

C. The Court of Appeals’ decision does not create two separate statutes of limitation for one Note/Deed of Trust.

¹ To the extent NWJP may be arguing that Deutsche could have, without tolling, re-noted the trustee’s sale after the stay was terminated in 2012, based upon the Notice of Default issued in 2010, this is clearly wrong. See *Watson v. Northwest Trustee Services, Inc.*, 180 Wn. App. 8 (2014), and Deutsche’s discussion of the same. Deutsche’s Answer to Petition for Review, pp. 14-15. The court in *Watson* rejected that creditor’s argument that setting the sale after bankruptcy was one continuous proceeding.

The Court of Appeals held that the statute of limitations was tolled for over two years while the bankruptcy stay was in place. *Merceri*, 2 Wn.App.2d at 154. Under RCW 4.16.230, this time is excluded from the time limitation for the commencement of an action. *Id.* It does not create two periods of statutes of limitation, nor does it create any disparate treatment between nonjudicial and judicial foreclosure proceedings.

NWJP argues that the decision tolls the statute of limitations for the judicial foreclosure, but not for the nonjudicial foreclosure. *Memorandum*, pp. 7-8. NWJP's argument in this regard is again based upon its erroneous characterization of the word "commencement" in RCW 4.16.230.

The bankruptcy stay, 11 U.S.C. § 362(a)(3), prohibits all attempts to foreclose consistently, whether that be filing a new judicial foreclosure, continuing with a pending judicial foreclosure, continuing a pending nonjudicial foreclosure, or commencing a new nonjudicial foreclosure. The statute of limitations, RCW 4.16.230, tolls the statute consistently as well. The statute would be tolled for commencing a judicial foreclosure, or commencing a subsequent

nonjudicial foreclosure. No “absurdity” results from the Court of Appeals’ decision, and more critically, NWJP has failed to establish any basis for review.

IV. CONCLUSION

NWJP’s arguments do not address or satisfy any of the requirements for review. The Court of Appeals’ decision is not in conflict with a Supreme Court case or published Court of Appeals opinion, and NWJP does not argue that this case has the requisite Constitutional questions. Finally, there is no argument or even passing reference to “sweeping implications” that justify substantial public interest.² Instead, NWJP requests that this Court accept review in order to obtain substantial changes to existing Washington law. NWJP has presented no basis for this Court to accept review.

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² See generally, *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903, 905 (2005).

Respectfully submitted this 25th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2018, I caused to be delivered the foregoing DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2'S ANSWER TO AMICUS CURIAE MEMORANDUM OF THE NORTHWEST JUSTICE PROJECT IN SUPPORT OF PETITION TO REVIEW to the following parties in the manner indicated below:

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Under the penalty of perjury of the laws of the State of
Washington, the foregoing is true and correct.

Dated this 25th day of June, 2018, at Seattle, Washington.

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