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Supreme Court Case No. 96659-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ADDAI INVESTMENT GROUP, LLC,

Petitioner,

v.

DITECH FINANCIAL LLC,

Respondent.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUE PRESENTED FOR REVIEW.....	3
III.	COUNTER-STATEMENT OF THE CASE.....	3
	A. Ditech’s Trust Deed.....	3
	B. Lien Foreclosure Lawsuit.....	4
	C. Sheriff’s Sale to AIG.....	4
	D. AIG’s Sale to Third-Party Purchaser.....	5
IV.	PETITION FOR REVIEW SHOULD BE DENIED.....	5
	A. Standard of Review.....	5
	B. The Court of Appeals' Unpublished Decision is Not in Conflict with a Decision of the Supreme Court or the Court of Appeals.....	6
	1. “Proper Notification Law”.....	8
	2. Notice of Sheriff’s Sale.....	10
	a. Redemption Rights.....	11
	3. Case Does Not Present a Significant Question of Law Under the Constitution of the State of Washington or of the United States.....	12
	4. Petition Does Not Involve an Issue of Substantial Public Interest.....	13
	a. Court of Appeals Unpublished Decision has No Effect Outside of this Case.....	13
	b. No Issues of Substantial Public Interest.....	14
V.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>Brost v. Land, Inc.</i> 37 Wn. App. 372, 680 P.2d 453 (1984).....	9
<i>Camp Finance v. Brazington</i> 133 Wn. App. 156, 135 P.3d 946 (2006).....	11, 12
<i>MB Const. Co. v. O'Brien Commerce Ctr. Assocs.</i> 63 Wn. App. 151, 816 P.2d 1274 (1991).....	7
<i>State v. Watson</i> 122 P. 3d. 903, 155 Wash.2d 574 (2005)	13
<i>Summerhill Village Homeowners Ass'n v. Roughley</i> 166 Wn. App. 625, 289 P.3d 645 (2012).....	11, 12
<i>U.S. Bank of Wash. v. Hursey</i> 116 Wn.2d 522, 806 P.2d 245 (1991)	7
<i>Valentine v. Portland Timber & Land Holding Co.</i> 15 Wn. App. 124, 547 P.2d 912 (1976).....	7, 9

Statutes

RCW 6.21.030	12
RCW 6.23.010	8
RCW 6.23.030	12
RCW 64.34.364	8, 9

Rules

RAP 13.4(b)	5, 6, 7, 8, 10, 14
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I. INTRODUCTION

This petition for review arises out of a lawsuit filed by Appellant Addai Investment Group, LLC (“AIG”) seeking to recover money paid by a non-party title company to Respondent Ditech Financial LLC (“Ditech”). AIG purchased a condominium at a Sheriff’s Sale following a condominium association’s successful lawsuit to foreclose its lien for condominium assessments owed by the owner of the condominium (“Lien Foreclosure Lawsuit”). At the time of the Lien Foreclosure Lawsuit and the subsequent Sheriff’s Sale, Ditech held a first-position Deed of Trust recorded against the condominium. Nonetheless, Ditech was not a party to the Lien Foreclosure Lawsuit, did not have notice of the Lien Foreclosure Lawsuit, and no judgment foreclosing Ditech’s Deed of Trust was entered in the Lien Foreclosure Lawsuit.

After the expiration of the redemption period following the Sheriff’s Sale, AIG sold the condominium to a third-party and, at closing, the title company paid Ditech \$101,235.95 to satisfy the obligation secured by Ditech’s first-position Deed of Trust. AIG’s lawsuit sought to recover the sale proceeds paid to Ditech on the grounds that the condominium super priority statute operated to render Ditech’s first position Deed of Trust junior to the

condominium's lien, with the result that: Ditech was not entitled to notice of the Sheriff's Sale; Ditech did not have redemption rights after the sale; and Ditech's Deed of Trust should not have been satisfied upon AIG's sale of the condominium.

AIG and Ditech filed motions for summary judgment in the Superior Court. The Superior Court denied AIG's motion and granted Ditech's motion, dismissing AIG's claims with prejudice. On appeal, the Court of Appeals properly found that because Ditech was not a party to, and had no notice of, the Lien Foreclosure Lawsuit, Ditech's first position Deed of Trust was not foreclosed by the Lien Foreclosure Lawsuit and, therefore, remained in place after the judgment of foreclosure was entered in the Lien Foreclosure Lawsuit. Thus, Ditech's first position Deed of Trust was a valid, existing encumbrance against the condominium when AIG purchased it at the Sheriff's Sale, as well as when AIG ultimately sold the condominium to a third party. Based on the foregoing undisputed facts, the Superior Court held, and the Court of Appeals affirmed, that AIG had no right to recover the proceeds that Ditech received from AIG's sale of the condominium to satisfy its senior trust deed.

This Court's discretionary review is not warranted. The Court of Appeals' unpublished decision is fact-specific, entirely consistent with settled Washington law, and establishes no precedent. AIG provides no reasonable argument to support its contention that the issues in this case present a conflict with existing law or statutes, or any other valid basis for review pursuant to Rule 13.4(b) of the Washington Rules of Appellate Procedure. Accordingly, this Court should deny review.

II. ISSUE PRESENTED FOR REVIEW

Is there any basis, as required under the Washington Rules of Appellate Procedure ("RAP") Rule 13.4(b), for this Court to accept discretionary review of this matter?

III. COUNTER-STATEMENT OF THE CASE

A. Ditech's Trust Deed

In October 2007, Jeanette Zimmerman borrowed \$88,000 from Catlin Capital, Inc. ("Loan"). The Loan was secured by a Deed of Trust ("2007 Deed of Trust") against 6347 137th Ave NE, Unit 276, Redmond, WA ("Property"), which was duly recorded in King County, Washington (Document No. 20071003001553). CP, pp. 92-106. On February 12, 2013, Catlin Capital, Inc. assigned its interest in the 2007 Deed of Trust to Green Tree Servicing LLC

("Green Tree"), Ditech's predecessor by merger. (Recorded in King County, Washington as Document No. 2013021200191.) CP, pp. 82-85, 107. Green Tree/Ditech has been the beneficiary of the 2007 Deed of Trust since February 12, 2013. *Id.*

B. Lien Foreclosure Lawsuit

On September 10, 2014, Sixty-01 Association of Apartment Owners ("Association") filed the Lien Foreclosure Lawsuit against Zimmerman in King County Superior Court. CP, pp. 108-114. The Association alleged that Zimmerman had failed to pay monthly assessments on the Property, as required by the Association. *Id.* Prior to filing the Lien Foreclosure Lawsuit, the Association recorded a Notice of Claim of Lien against the Property in King County, Washington (Document No. 20140623001178) ("Lien"). CP, p. 117. The Association did not name Green Tree as a party to the Lien Foreclosure Lawsuit, nor did it provide Green Tree with any notice of the pendency of the Lien. CP, pp. 82-85.

C. Sheriff's Sale to AIG

On December 31, 2014, a judgment was entered in favor of the Association and against Zimmerman in the Lien Foreclosure Lawsuit. CP, pp. 115-116. Thereafter, the Association obtained an Order of Sale against the Property, and on April 3, 2015, a Sheriff's

Sale of the Property was held by the King County Sheriff. CP, pp. 118-119. AIG purchased the Property at the Sheriff's Sale. CP, pp. 123-124.

D. AIG's Sale to Third-Party Purchaser

One year after purchasing the Property at the Sheriff's Sale, following the expiration of the one-year redemption period, AIG received title to the Property and then sold the property to a third party ("2016 Sale"). CP, pp. 128-134. AIG alleged that "after the sale of the Subject Property [Ditech] was wrongfully given \$101,235.95 of [AIG's] proceeds from the sale...." CP, pp. 1-9. AIG's Complaint also alleged that an "Escrow Company" was responsible for making this payment to Ditech. *Id.* AIG did not name the "Escrow Company" as a party to its lawsuit in Superior Court.

IV. PETITION FOR REVIEW SHOULD BE DENIED

A. Standard of Review

Under RAP 13.4(b), a petition for review will be granted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

AIG erroneously contends that review is warranted because the Superior Court's Order (and Court of Appeals' affirmance thereof) is "in conflict with current precedent, because the Court failed to apply the proper notification law" and because the Superior Court failed to "apply the Condo Act." AIG Petition for Appeal to Supreme Court ("Petition"), p. 10. AIG also wrongly asserts that review is warranted because AIG and other investors will be harmed if the "Courts rule one way on the Eastern part of the state and another way on the Western part of the state." Petition, p. 13. As discussed below, AIG is incorrect – Supreme Court review is not appropriate under any of the criteria set forth in RAP 13.4(b).

B. The Court of Appeals' Unpublished Decision is Not in Conflict with a Decision of the Supreme Court or the Court of Appeals

The Washington Court of Appeals' unpublished decision in this matter does not conflict with any prior decision of any court of this State. The Court of Appeals found that: "because Ditech was not a party to the underlying foreclosure action, its deed of trust was unaffected by the foreclosure and Ditech was entitled to proceeds from AIG's later sale of the Property." The Court of

Appeals Unpublished Decision, No. 77240-6-1/2, is attached to the Petition as Exhibit C.

The Court of Appeals' decision that a foreclosure will not extinguish a security interest where the holder of that interest is not a party to the foreclosure and has no notice of the foreclosure does not conflict with any decision of this Court or the Court of Appeals. To the contrary, the decision is based on settled authority holding that a "mortgagee's interest cannot be affected by a lien foreclosure unless the foreclosing party joins the mortgagee as a party to the foreclosure action." *MB Const. Co. v. O'Brien Commerce Ctr. Assocs.*, 63 Wn. App. 151, 158, 816 P.2d 1274 (1991); see also *Valentine v. Portland Timber & Land Holding Co.*, 15 Wn. App. 124, 128, 547 P.2d 912 (1976) ("joinder of any person having an interest in the property is essential in that, if not joined, his interest will not be affected by the foreclosure"). "[A] decree of foreclosure does not affect the interest of a junior who was not joined in the foreclosure action." *U.S. Bank of Wash. v. Hursey*, 116 Wn.2d 522, 526, 806 P.2d 245 (1991) (citing *Spokane Say. & Loan Soc. v. Liliopoulos*, 160 Wash. 71, 73-74, 294 P. 561 (1930)). Based on this authority, review of the Court of Appeals decision is not warranted pursuant to RAP 13.4(b)(1) or (2).

The Court of Appeals decision is also not in conflict with “Proper Notification Law” or the Condominium Act. AIG asserted in the Superior Court and in the Court of Appeals, that Ditech’s deed of trust was rendered junior to the Association’s lien by the super priority provisions of the Condominium Act, and therefore, notice of the Association’s lien foreclosure was not required. RCW 64.34.364(2)(b) & (3). AIG also argued that Ditech was not entitled to notice of the sheriff’s sale because only the judgment debtor is entitled to notice of those actions and Ditech had no right to redeem the Property, because only a junior creditor may redeem pursuant to RCW 6.23.010.

1. “Proper Notification Law”

The Court of Appeals decision with respect to the application of the condominium super-priority statute does not conflict with any decision of the Court of Appeals or this Court to justify review under RAP 13.4(b).

Ditech presented undisputed facts to establish that the 2007 Deed of Trust was not foreclosed by the Association in the Lien Foreclosure Lawsuit. The Court of Appeals then found that, even if in the abstract, a condominium’s lien for assessments could have priority over a prior recorded deed of trust, that priority did not

extinguish Ditech's interest because Ditech was not joined as a party in the Lien Foreclosure Lawsuit. Petition, Ex. C. This finding is supported by *Valentine v. Portland Timber & Land Holding Co.*, 15 Wn. App. 124, 547 P.2d 912 (1976), which holds that "[j]oinder of **any** person having an interest in the property is essential in that, if not joined, his interest will not be affected by the foreclosure." (Emphasis added.) See also, *Brost v. Land, Inc.*, 37 Wn. App. 372, 680 P.2d 453 (1984), "Before a court can extinguish a person's duly recorded interest in property in a mortgage foreclosure action, due process requires that the person be joined as a party in the action." AIG cites no authority to the contrary. As a result, a review of the Court of Appeals decision is not warranted.

Review is also not required based on AIG's assertion that "there is no requirement of notice for super priority to be effective in the language of the Condo Act." Petition, p. 6. The Superior Court and Court of Appeals acknowledged that, pursuant to RCW 64.34.364, six months of condominium assessments can have "super priority" over all other liens against the Property. However, both courts also recognized that the existence of a lien and the enforcement thereof are two different things, and that, when a lien is foreclosed judicially, the foreclosure will only extinguish the

interests of parties to the foreclosure lawsuit. As the Court of Appeals explained: “Even assuming that the association's lien did have priority over Ditech's deed of trust, that priority does not work to extinguish Ditech's interest on foreclosure. As explained above, ‘a decree of foreclosure does not affect the interest of a junior who was not joined in the foreclosure action.’” Petition, Ex. C, p. 4.

2. Notice of Sheriff’s Sale

AIG argues that the “The Superior Court committed clear and obvious error by requiring notice to Ditech of foreclosure to extinguish its junior interest in the Subject Property when no notice was required.” Petition, p. 10. This is not the proper standard for this Court to evaluate a Petition for Review. Moreover, applying the proper standard in RAP 13.4(b), the Court of Appeals’ decision with respect to AIG’s arguments about notice of sale and redemption rights does not conflict with existing precedent so as to support a decision to grant review by this Court.

The Court of Appeals found that even if the statutes regulating sheriff sales and redemption rights only require a judgment creditor to give notice to the judgment debtor, these statutory processes do not “address the notice required for the original foreclosure action [and] are not relevant to the issue of

whether Ditech's deed of trust was extinguished by the foreclosure action." Petition, Ex. C, p. 5. AIG does not point to any decision or statute to the contrary. As a result, review of the Court of Appeals' decision is not warranted.

a. Redemption Rights

The Court of Appeals' conclusion that the 2007 Deed of Trust was not extinguished because Ditech failed to redeem its interest within the one year redemption period is also not in conflict with the holding in *Summerhill Village Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 289 P.3d 645 (2012), or *Camp Finance v. Brazington*, 133 Wn. App. 156, 135 P.3d 946 (2006).

In *Summerhill Village*, the mortgagor was named as a defendant in the original lien foreclosure lawsuit and failed to answer or appear – with the result that its deed of trust was extinguished by the foreclosure. When the mortgagor later sought to redeem the property, the court found the mortgagor was not a qualified redemptioner (because its lien had been extinguished). As the Court of Appeals pointed out when affirming summary judgment for Ditech in this case, *Summerhill Village* is different from this case because the mortgagor “had both notice and opportunity to protect its interests and failed to do so.” Petition, Ex. C, p. 6.

Accordingly, because the Court of Appeals decision on AIG's argument regarding Ditech's right of redemption does not conflict with *Summerhill Village*, AIG's Petition should be denied.

There is also no basis to find that the Court of Appeals decision conflicts with *Camp Finance v. Brazington*, 133 Wn. App. 156, 135 P.3d 946 (2006). In *Camp Finance*, the Court of Appeals held that RCW 6.21.030(1) and RCW 6.23.030(1) did not require notice to junior lienholders of a sheriff's sale or of redemption rights.

The Court of Appeals found that these statutes and the holding in *Camp Finance* were not relevant to this case:

But the sheriff's sale and redemption period both occur after the foreclosure action is reduced to judgment and the statutes governing these later processes do not address the notice required for the original foreclosure action. As such, they are not relevant to the issue of whether Ditech's deed of trust was extinguished by the foreclosure action.

Petition, Ex. C, p. 5. Therefore, there is no basis to grant review of the Court of Appeals' decision based on an alleged conflict with *Camp Finance*.

3. Case Does Not Present a Significant Question of Law Under the Constitution of the State of Washington or of the United States

AIG does not argue how the Court of Appeals decision presents a significant question of law under the Washington or

United States Constitutions. Therefore, review should not be granted on this basis.

4. Petition Does Not Involve an Issue of Substantial Public Interest

a. Court of Appeals Unpublished Decision has No Effect Outside of this Case

AIG contends that review is warranted in this case because the Court of Appeals' decision "has an immediate effect outside of the courtroom beyond the scope of the pending litigation." Petition, p. 15. AIG does not bother to describe how the decision will have an effect beyond this litigation. Regardless, AIG's contention is without merit. The Court of Appeals' opinion is unpublished and will not affect other litigants as the opinion cannot be cited for precedent. Moreover, the only harm described in the Petition is direct monetary damage allegedly suffered by AIG, which is certainly not grounds to find that the Court of Appeals' decision will have any effect beyond the scope of the pending litigation. Cf., *State v. Watson*, 122 P. 3d. 903, 155 Wash.2d 574 (2005) (Petition for Review granted where Court of Appeals' holding, while affecting parties to the proceeding, also had the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a specific criminal sentence was or is at issue).

b. No Issues of Substantial Public Interest

AIG does not address how the Court of Appeals unpublished decision “involves an issue of substantial public interest.” That is because the decision has no impact on any party other than AIG. AIG admits that it seeks review because without review “AIG is left with no recourse to get back the monies it is rightfully entitled to.” Petition, p. 11. AIG does not present any facts to suggest that other buyers of foreclosed property will be harmed by the Court of Appeals’ unpublished decision. As a result, RAP 13.4(b)(4) does not support review in this case.

V. CONCLUSION

For all of the reasons set forth above, AIG’s Petition for Review of the Court of Appeals unpublished decision in this case should be denied.

Dated this 3rd day of January, 2019.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the attached Answer to Petition for Review on January 3, 2019, using the electronic filing function of the court's eFiling system.

I further certify that, on the same date, I served a copy of this Answer upon the following attorney, via email and first class mail, postage prepaid:

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