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Court of Appeals No. 74772-0-1

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COURT OF APPEALS

THE STATE OF WASHINGTON DIVISION I

Woodside Homeowners Association,

Plaintiff/Appellant,

v.

Tammy Fouts,

Defendant/Respondent.

**APPELLANT WOODSIDE HOMEOWNERS
ASSOCIATION'S OPENING BRIEF**

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler

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I. INTRODUCTION

Appellant Woodside Homeowners Association (“Woodside”) appeals the Trial Court’s Order denying Woodside’s motion to confirm redemption, denying Woodside’s motion to order Sheriff to issue Sheriff’s Deed to Plaintiff, denying fees and granting motion of extension of redemption period of Defendant/Respondent Tammy Fouts (“Fouts”).

While the Trial Court recognized that RCW 6.23.030 requires that the Notice of Expiration of Redemption Period need only substantially comply with the form set forth in the Statute, the Trial Court erred in imposing strict compliance with the statutory form. Washington Courts have repeatedly recognized that the substantial compliance doctrine applies to statutes which are remedial in nature, and that remedial statutes relate to practice, procedure, or remedies and do not affect a substantive or vested right. Moreover, the substantial compliance doctrine requires that where a party in exercising its redemption right commits a technical, but harmless procedural error, a forfeiture required is not only unjust, but inconsistent with the very purpose of the Statute. A remedial provision is simply a procedural step necessary to enforce a claimant’s right to recover.

See GESA Federal Credit Union v. Mutual Life Insurance Company of New York, 105 Wash.2d 248, 713 P.2d 728 (1986).

The clear purpose of RCW 6.23.030 is to provide notice of the expiration of the pending redemption period. The Statute is fundamentally remedial in nature and is simply a procedural step necessary before Woodside as the purchaser acquires the right to the issuance of the Sheriff's Deed.

The actual language of RCW 6.23.030 includes the term "substantially" and by the use of such term, the Legislature was providing its clear intent that compliance be based upon substantial compliance not strict compliance.

The Trial Court in imposing strict compliance ruled that the failure to provide a redemption amount within such notice was a fatal flaw, notwithstanding that the notice directed Fouts to contact the Sheriff of King County for the specific amount necessary to redeem. As Fouts was required to contact the King County Sheriff directly to ascertain the exact amount necessary to redeem prior to the expiration of the redemption period pursuant to RCW 6.23.080(1), the Trial Court imposed strict compliance without any evidence of prejudice to Fouts arising from the form of the notice provided.

II. ASSIGNMENT OF ERROR

- A. The Trial Court erred in entering its Order of January 29, 2016 denying Woodside's Motion to Confirm Redemption Period and granting Fouts' Motion of Extension of Redemption Period.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Whether RCW 6.23.030 requiring the purchaser to provide a notice of expiration of redemption period substantially in the form set forth in such statute is a remedial statute and is simply a procedural step to be completed prior to the issuance of the Sheriff's Deed upon expiration of the redemption period?
- B. Whether Woodside's failure to include a payoff of the redemption amount within its notice, but including instruction for Fouts to contact the King County Sheriff to ascertain the exact amount necessary to redeem was a technical, and harmless procedural error, such that the Court should have ruled that the Notice substantially complied with the form set forth in the Statute?
- C. Whether Fouts sustained any prejudice by the failure to include a payoff in the Notice, when the Notice directed her to contact the King County Sheriff to ascertain the exact amount necessary to

redeem pursuant to RCW 6.23.080(1)?

- D. Whether the Trial Court erred in ruling that the Notice of Expiration of Redemption Period provided by Woodside was defective, such that the notice requirement set forth in RCW 6.23.030 was not properly given, and the failure of which operated to extend the redemption period an additional six months?

IV. STATEMENT OF CASE

Fouts fell behind in her assessments and Woodside filed suit to recover judgment and an order of foreclosure in 2007. Judgment was entered by this Court on October 24, 2008. *CP 15-16; CP 24-27*. Contemporaneously with Fouts' failure to pay her assessments, Fouts failed to pay her mortgage payments and consequently a Notice of Trustee's Sale was recorded on April 28, 2009 noting a Trustee's Sale for July 31, 2009. At that time, the Trustee noted the failure to pay monthly payments totaling \$52,319.40. *CP 16; CP 28-31*.

The Trustee Sale did not occur in July of 2009 and the Trustee issued a new Notice of Trustee's Sale and recorded the same on March 18, 2010. At that time the Trustee indicated a failure to pay monthly amounts due in the amount of \$109,870.74. *CP 16; CP 32-35*.

Fouts thwarted attempts at collection and foreclosure by filing 6 bankruptcies since 2010. The first 5 bankruptcies were dismissed. *CP 16; CP 36-44* The last bankruptcy proceeding was filed of record in December of 2014 immediately prior to Woodside's scheduled Sheriff's Sale. Prior to Fouts filing her 6th bankruptcy, Fouts received notice of Woodside's date for sheriff's sale to be held in mid-December 2014. Fouts contacted Woodside's legal counsel and requested a payoff after receiving notice of that scheduled sale. Woodside's legal counsel forwarded a payoff of the total indebtedness owed including all amounts accruing on the old judgment, plus all additional attorney fees and assessments accruing after October 2008 by email to Fouts per her request. *CP 17; CP 45-52*. In response to that payoff, Fouts sent an email inquiring whether she could propose a payment plan on the original judgment with a substantial write off of legal fees and costs, late fees, and interest accruing on the old judgment with the threat that if she was unable to work out a suitable plan she would file bankruptcy. *CP 17*.

Upon filing the 6th bankruptcy, Woodside immediately filed a Motion for Relief from Stay with the Bankruptcy Court and continued the Sheriff's Sale to January 2, 2015. *CP 17*.

Fouts failed to file required documents with the Bankruptcy Court and therefore the Bankruptcy Court entered an Order of Dismissal of the

bankruptcy proceeding on December 31, 2014. As the bankruptcy proceeding had been dismissed, the Sheriff's Sale took place on January 2, 2015 and Woodside's credit bid was the highest bid on the property. *CP 17.*

Thereafter Fouts filed the required documents with the Bankruptcy Court and the bankruptcy proceeding was reopened. *CP 18.* A hearing was held on Woodside's Motion for Relief From Stay and the Court granted such relief from the Stay effective to the date of the original dismissal, specifically December 31, 2014. *CP 18; CP 53-54.*

Having obtained relief from the stay, retroactive to December 31, 2014, Woodside's Sheriff's Sale was confirmed to be valid and Woodside moved for confirmation of such sale on February 2, 2015. The Superior Court issued that Order Confirming Sale on February 2, 2015. *CP 18.*

As Fouts stated a notice of intent to surrender the property in her bankruptcy filing, Woodside filed a motion for writ of assistance with the Superior Court set for April 3, 2015. The declaration included the Order Confirming Sale as Exhibit A, which Order confirmed that Woodside was the winning bidder with a credit bid of \$7,566.70. *CP 18; CP 55-77.*

That motion for writ of restitution was mailed to not only the Fouts at the property, but also to her bankruptcy attorney. Accordingly, Fouts had notice of not only the entire amount due as of November 2014,

including all amounts due on the original judgment, but also had notice of the winning credit bid in March 2015. *CP 18*.

Fouts' bankruptcy attorney, Raymond Gessel, contacted Woodside's legal counsel and demanded that the motion for writ of assistance be struck on the basis that his client was claiming a homestead in the property, notwithstanding the election to surrender the property in bankruptcy. Based upon the assertion of a homestead and the right of possession under RCW 6.23.110(4), Woodside withdrew that motion. Contemporaneously with striking the motion, Woodside's legal counsel and Fouts' bankruptcy counsel discussed potential defenses that Fouts could raise as against her lender and the potential of Fouts making payments during the redemption period, so that she could redeem the property prior to the expiration of the redemption period on January 2, 2016. *CP 19*.

On March 31, 2015 Woodside's legal counsel sent an email to Mr. Gessel outlining the facts regarding the Notices of Trustee's Sale and further stating:

Tammy clearly has an interest in paying the Assn to avoid the running of the redemption period. Where r we on getting a proposal to the Assn. *CP 19; CP 78*.

Notwithstanding Mr. Gessel's reference to the fact his client had begun working, Fouts never made any payments during the redemption period. Accordingly, pursuant to statute, Woodside issued a Notice of Expiration of Redemption Period in a form in substantial compliance with the form set forth within RCW 6.23.030. *CP 20*.

The form did not include an itemization of the redemption amount owed, but included the following necessary language:

**YOU MAY REDEEM THE PROPERTY BY 4:30
PM ON OR BEFORE JANUARY 2, 2016, BY
PAYING THE AMOUNTS SET FORTH ABOVE
AND SUCH OTHER AMOUNTS AS MAY BE
REQUIRED BY LAW. PAYMENT MUST BE IN
THE FULL AMOUNT AND IN CASH, CERTIFIED
CHECK, OR CASHIER'S CHECK. BECAUSE
SUCH OTHER AMOUNTS AS MAY BE
REQUIRED BY LAW TO REDEEM MAY
INCLUDE PRESENTLY UNKNOWN
EXPENDITURES REQUIRED TO OPERATE,
PRESERVE, PROTECT, OR INSURE THE
PROPERTY, OR THE AMOUNT TO COMPLY
WITH STATE OR LOCAL LAWS, OR THE
AMOUNTS OF PRIOR LIENS, WITH INTEREST,**

**HELD BY THE PURCHASER OR A
REDEMPTIONER, IT WILL BE NECESSARY
FOR YOU TO CONTACT THE...COUNTY
SHERIFF AT THE ADDRESS STATED BELOW
PRIOR TO THE TIME YOU TENDER THE
REDEMPTION AMOUNT SO THAT YOU MAY
BE INFORMED EXACTLY HOW MUCH YOU
WILL HAVE TO PAY TO REDEEM THE
PROPERTY.** (Emphasis Added) *CP 20-21; CP 80.*

Thereafter the Notice provided the King County Sheriff's Office's address. CP 21; CP 80.

The mailing went to not only Fouts at the property, but also to another address at which Fouts at some point noted as an address, as well as Fouts' attorney Raymond Gessel. That notice was mailed on November 10, 2015, 53 days before the date of expiration. Since the date of expiration was technically a Saturday, by operation of law, if Fouts tendered the amounts owed to the Sheriff's Office by January 4, 2016 she could redeem the property. Applying the January 4, 2016 date, the Notice was sent fifty-five (55) days before the expiration of the redemption period which remained in compliance with RCW 6.23.030, which Statute requires the notice be sent at least 40, but not more than 60 days before the expiration of the redemption period. The notice was sent both certified mail and first class postage prepaid. *CP 21; CP 82-83.*

Notwithstanding the fact that Fouts and her attorney were provided the Notice of Expiration directing her to contact the Sheriff for amounts due to redeem, neither she nor her attorney contacted Woodside's legal counsel and/or the Sheriff between the receipt of the Notice and December 31, 2015. At any time during such period, if Woodside's legal counsel was contacted as was done in November 2014, an itemized payoff would have been provided. *CP 21.*

In addition, when contacted by an Owner indicating a desire to redeem, the King County Sheriff's Office, previously had contacted Woodside's legal counsel to request a payoff amount together with a Statement of Purchaser pursuant to RCW 6.23.050 and RCW 6.23.080. *CP 22.*

On December 31, 2015, Fouts contacted the King County Sheriff's Office and provided a notice of intention to redeem indicating that as there was no itemization of amounts due, that she presumed that she would not be required to make any payments and/or in the alternative, because there was no itemization of amounts due that she was entitled to an additional 6 month extension, pursuant to RCW 6.23.030. *CP 22; CP 86-88.*

Pursuant to the Sheriff's Request, Woodside's legal counsel forwarded to the Sheriff's Office the amount necessary to redeem, together with the Statement of Purchaser, the next business day after the email from the Sheriff's Office. Thereafter, Fouts retained new legal counsel who filed a motion noted before the Chief Civil Judge without oral argument requesting an order from the Court directing the Sheriff not to issue the Sheriff's Deed to Woodside and further requesting the Court either rule in the alternative that the property had been

redeemed, or the period for redemption had been extended by 6 months. *CP 22-23; CP 94-112.*

After an attempt to resolve the dispute between counsel, Woodside's legal counsel advised Fouts' attorney that Woodside would be moving for an Order Granting Writ of Assistance and further requesting that the Defendant re-note Fouts' Motion to January 22, 2016, or as soon thereafter as possible. *CP 23.*

The Trial Court denied Woodside's motion to confirm expiration of redemption period, directing Sheriff to issue Sheriff's Deed and granting order for writ of assistance by Order dated January 29, 2016. *CP 137-139.*

The Trial Court ruled that Woodside's notice of expiration of redemption period did not substantially comply with the form set forth in RCW 6.23.030 and therefore proper notice was not provided to Fouts between 40 days and 60 days prior to the expiration of the redemption period. It further ruled that the redemption period was extended. The Order went on to find that the 6 month extension began on February 1, 2016, and that Woodside was required to serve upon Fouts' legal counsel a notice in substantial compliance with RCW 6.23.030. This requirement was imposed notwithstanding the fact that after an extension, no further notice is required under the Statute, and that such extension amounted to a 7th month extension, rather than the 6 month extension imposed by the Statute. *CP 137-139.*

Woodside moved the Trial Court to reconsider its ruling imposing those additional requirements above and beyond those set forth in RCW 6.23.030. The

Trial Court recognizing its error granted Woodside's motion to reconsider. *CP 140-158; CP 159-160.*

Thereafter Woodside filed its notice of appeal, and this Court ruled that the Order of the Trial Court was a final Order from which an appeal may be taken and directed Woodside to file its Appellant's Brief by June 10, 2016. See Commissioner's ruling dated May 10, 2016.

IV. ARGUMENT

A. **RCW 6.23.030 Is Remedial In Nature, Requiring Only Substantial Compliance With The Form Of The Notice Set Forth Therein, Rather Than Strict Compliance.**

RCW 6.23.030 requires the Purchaser at a Sheriff's Sale of property subject to a homestead to provide notice of the expiration of the redemption period at least 40, but not more than 60 days before the expiration of the judgment debtor's redemption period. Subsection (3) of such Statute provides that the notice and affidavit of mailing required by subsection (1) of the Statute be in "**substantially the following form...**"

Woodside provided Fouts the required notice within the applicable time period prior to the expiration of the redemption period. The actual form of the notice was virtually identical to the form set forth in the Statute, with the exception that the notice did not include an itemization of the amount required to redeem the property to date. *CP 20-21; CP 80.*

The notice did provide, however, the following:

**YOU MAY REDEEM THE PROPERTY BY 4:30
PM ON OR BEFORE JANUARY 2, 2016, BY
PAYING THE AMOUNTS SET FORTH ABOVE
AND SUCH OTHER AMOUNTS AS MAY BE
REQUIRED BY LAW. PAYMENT MUST BE IN
THE FULL AMOUNT AND IN CASH, CERTIFIED
CHECK, OR CASHIER'S CHECK. BECAUSE
SUCH OTHER AMOUNTS AS MAY BE
REQUIRED BY LAW TO REDEEM MAY
INCLUDE PRESENTLY UNKNOWN
EXPENDITURES REQUIRED TO OPERATE,
PRESERVE, PROTECT, OR INSURE THE
PROPERTY, OR THE AMOUNT TO COMPLY
WITH STATE OR LOCAL LAWS, OR THE
AMOUNTS OF PRIOR LIENS, WITH INTEREST,
HELD BY THE PURCHASER OR A
REDEMPTIONER, IT WILL BE NECESSARY
FOR YOU TO CONTACT THE...COUNTY
SHERIFF AT THE ADDRESS STATED BELOW
PRIOR TO THE TIME YOU TENDER THE
REDEMPTION AMOUNT SO THAT YOU MAY
BE INFORMED EXACTLY HOW MUCH YOU**

WILL HAVE TO PAY TO REDEEM THE

PROPERTY. (Emphasis Added) *CP 20-21; CP 80.*

Thereafter the Notice also provided the King County Sheriff's Office's address. CP 21; CP 80.

It is without question that the Legislature by including the term "substantially" within RCW 6.23.030(3) recognized that the Statute was remedial in nature, and required substantial not strict compliance. This is consistent with Washington State Supreme Court's holding in Miebach v. Colasurdo, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984), wherein the Court ruled that the former Statute which was replaced by RCW 6.23.030 was remedial in nature.

In GESA Federal Credit Union v. Mutual Life Insurance Company of New York, 105 Wash.2d 248, 713 P.2d 728 (1986), the Court recognized that adoption of the equitable rule of "substantial compliance" may foment litigation and occasionally delay title determinations after foreclosure. However the Court went on to state:

The Court may be asked to consider "the nature and extent of the deviation from the statutory plan," the degree to which the statutory purpose has been fulfilled, and the amount of prejudice the junior creditor has suffered. *Id* at 254. (Emphasis Added).

Moreover, the Court also recognized the following:

...The redemption statute involves a number of provisions, some of which confer a statutory right, *e.g.*, RCW 6.24.130, and some of which establish a procedure by which that right is perfected, *e.g.*, RCW 6.24.145¹. “A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right... [citations omitted]... Moreover, it has long been the practice in this state to liberally construe remedial legislation to accomplish legislative purpose”. *Id* at 254-255.

In the instant case, it is clear that the purpose of RCW 6.23.030 is to provide notice of the expiration of the redemption. Timely notice of the expiration was provided to Fouts, and thus the notice accomplished the purpose of the Statute.

The omission of the itemization of the redemption amount was non-prejudicial as the notice specifically directed, as required by the Statute, that Fouts contact the King County Sheriff to ascertain the exact amount owed necessary to redeem the property. Indeed it is mandatory for

¹ The former Statute to RCW 6.23.030.

a judgment debtor to provide the Sheriff the notice of intent to redeem in writing at least 5 days prior to redemption. See RCW 6.23.080(1).

RCW 6.23.080(1) further requires the Sheriff to notify the Purchaser of the receipt of such notice and RCW 6.23.080(4) further requires the Purchaser to submit to the Sheriff an affidavit showing the amount paid on any prior lien or obligation. This of course is consistent with the requirements of RCW 6.23.020(2), which Statute requires the judgment debtor to pay the amount of the bid with interest thereon at the rate provided in the judgment to the time of the redemption, together with the amount of any assessment or taxes which the purchaser paid thereon after purchase and like interest on such amount from time of payment to time of redemption, together with any sum paid by the purchaser on a prior lien or obligation secured by an interest in the property...

Accordingly, Fouts at any time after receipt of the notice of expiration of redemption period not only had the right to contact the Sheriff to ascertain the exact amount necessary to redeem, but under RCW 6.23.080(1) had the requirement to do so no later than 5 days prior to the date of redemption.

In short, the omission of an itemization of the amount to redeem within the notice of expiration of redemption period had no prejudice upon Fouts.

As stated in GESA Federal Credit Union v. Mutual Life Insurance Company of New York, 105 Wash.2d 248 at 256, 713 P.2d 728 (1986):

Where a party in exercising its redemption right commits a technical but harmless procedural error, a forfeiture requirement is not only unjust, but inconsistent with the very purpose of the statute.

Notwithstanding Washington Case law, and the remedial nature of RCW 6.23.030 and the clear language of the statute, the Trial Court imposed a strict compliance standard, finding that the omission of the itemization was fatal error thereby invalidating the notice, and automatically extending the redemption period by 6 months. The Court stated in its Order:

RCW 6.23.030 requires that the notice in question substantially comply with the form set forth in the statute. It is not a suggested form. The legislature chose to require that the form include the amount owed... Plaintiff correctly argues that Defendant was at least on inquiry notice of the amount owed...The legislature clearly expected that the notice include the amount owed, regardless of the fact that it is not actually the amount owed. While the Defendant has been involved in gamesmanship for years, the Court must

conclude that the form set forth in the statute is not a mere matter of form. *CP 137-138*.

By the clear language of the Order, while the Court references “substantially”, the Court has imposed a strict compliance without consideration that the notice substantially complied with the requirements of the Statute, that it directed Fouts to the King County Sheriff to ascertain the exact amount owed as required under RCW 6.23.080(1), and that Fouts demonstrated absolutely no prejudice by the form of the notice received.

It is without question that Fouts never contacted Woodside’s legal counsel nor the King County Sheriff prior to December 31, 2015 to ascertain the amount necessary to redeem. *CP 21-22*. When she did send her notice of intent to redeem the property, it was not in compliance with the requirements of RCW 6.23.080(1), but the King County Sheriff did what it always does and specifically requested from Woodside’s legal counsel, the amount necessary to redeem. *CP 22; CP 86-88*. Upon request from the Sheriff to do so, those amounts were provided to the Sheriff for transmittal to Fouts. *CP 22; CP 94-112*. As noted above, Fouts had ample opportunity to contact the Sheriff upon receipt of the notice of expiration of redemption period. However, Fouts had no intention of making any payments and in fact made no payments toward redemption. She knew

who to contact. She had previously requested a payoff amount from Woodside's legal counsel which was provided in November 2014. The notice of expiration was provided not only to her, but to her lawyer Raymond Gessel. *CP 17; CP 45-52.*

As RCW 6.23.030 is remedial in nature, a technical flaw should not have resulted in the forfeiture ordered by the Court based upon strict compliance with the form of the notice set forth in the Statute. The Trial Court erred in denying Woodside's Motion to Confirm the Expiration of the Redemption Period and denying an order directing the King County Sheriff to issue its sheriff's deed. It further erred in extending the redemption period an additional 6 months.

IV. CONCLUSION

RCW 6.23.030 is remedial in nature, the intent of which is clearly to provide the judgment debtor final notice of the expiration of the redemption period. The companion statutes, RCW 6.23.020(2) and RCW 6.23.080(1) provide the amounts necessary to pay in order to redeem and impose the requirement upon the judgment debtor to contact the Sheriff to provide written notice of the intent to redeem no later than 5 days prior to redemption, in order that the Sheriff may contact the Purchaser and ascertain the exact amount necessary to redeem the property.

Fouts was not prejudiced by the form of the notice provided to her, had adequate opportunity and notice of whom to contact to ascertain the amount necessary to redeem, and had no intent to make any payments toward redemption, which is a necessary requirement for redemption.

Accordingly, this Court should reverse the Trial Court and find that the notice of expiration provided was in substantial compliance with the requirements of RCW 6.23.030. It should further find that by virtue of the notice being timely given, the redemption period expired on January 4, 2016, and remand to the Trial Court for entry of an order consistent with its findings and directing the King County Sheriff to immediately issue its Sheriff's deed to Woodside.

Dated this 9 day of June, 2016.

Respectfully Submitted,



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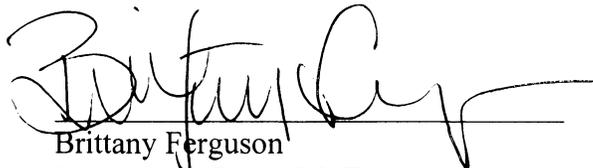
CERTIFICATE OF SERVICE

The undersigned certifies that on the date below she forwarded for filing with the Court of Appeals for the State of Washington, Division I in Seattle, the original and one copy of the foregoing pleading entitled Appellant Woodside Homeowners Association's Opening Brief. Additionally, a true and correct copy of the aforementioned pleading was emailed pdf and forwarded for delivery via ABC Legal Messenger, on this date to the following persons:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 9th day of June, 2016 at Bellevue, Washington.


Brittany Ferguson
Paralegal to David M. Tall

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