

66455-7

66455-7

NO. 66455-7-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GMAC MORTGAGE, LLC

Appellant,

v.

SUMMERHILL VILLAGE HOMEOWNERS ASSOCIATION, and
PLUMBLINE MANAGEMENT CORPORATION PROFIT SHARING
PLAN,

Respondents.

RESPONDENT PLUMBLINE MANAGEMENT CORPORATION
PROFIT SHARING PLAN'S BRIEF

APPEAL FROM KING COUNTY SUPERIOR COURT

The Honorable Mary Yu

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I. INTRODUCTION

This appeal concerns redemption rights following the judicial foreclosure of a condominium assessment lien. Respondent Summerhill Village Homeowners Association (“Summerhill”) is a condominium homeowner’s association that judicially foreclosed its lien against a condominium unit (the “Unit”) for unpaid common expense assessments. Appellant GMAC Mortgage, LLC (“GMACM”) represents the current beneficiary of a deed of trust that encumbered the Unit at the time of the foreclosure sale. Respondent Plumblin Management Corporation Profit Sharing Plan (“Plumblin”) purchased the Unit at the foreclosure sale.

The key facts and statutes involved are straightforward and largely undisputed. In November of 2006, GMACM’s predecessor made a \$191,800 loan that was secured by a deed of trust recorded against the Unit (the “2006 Deed of Trust”). The Unit owner stopped paying her monthly condominium assessments in August of 2008 and stopped making payments under the 2006 Deed of Trust loan sometime in 2009.

Under the Washington Condominium Act, condominium associations have a lien for delinquent assessments that arises on the due date of the unpaid assessments. In May of 2010, Summerhill commenced a judicial foreclosure of its lien for the assessment delinquency that commenced in August of 2008. The Washington Condominium Act gives

condominium assessment liens a limited priority over deeds of trust recorded before an assessment lien arises. The priority generally amounts to six months worth of condominium assessments, which is the case here. Because of the limited priority, GMACM's predecessor was included as a defendant in the assessment foreclosure.

GMACM or its predecessor could have satisfied the limited priority with a payment of \$1,122 to the Association. But GMACM and its predecessor failed to respond to the foreclosure action, resulting in a default judgment that included GMACM's predecessor. Because GMACM or its predecessor failed to answer the foreclosure suit and pay the limited priority amount, the 2006 Deed of Trust was extinguished by the resulting Sheriff's sale. Plumline purchased the Unit at the Sheriff's sale on December 18, 2010, with a high bid of \$10,301.84.

The default judgment that lead to the foreclosure sale provided for a one-year redemption period. Redemption rights after a Sheriff's sale are strictly statutory, not equitable. The language of the applicable statute is clear and unambiguous. The Washington statute only grants redemption rights to the owner and persons with deeds of trust and other liens or encumbrances that are "subsequent in time" to the lien foreclosed upon. Because the 2006 Deed of Trust is not "subsequent in time" to the lien

foreclosed at the Sherriff's sale (Summerhill's 2008 assessment lien), GMACM is not authorized to redeem from the Sheriff's sale.

In order to avoid the consequences of failing to respond to the foreclosure action and pay the limited priority amount before the Sheriff's sale, GMACM is asking this Court to grant it a redemption right not otherwise granted by the plain and unambiguous language of the applicable statute. GMACM is also asking this Court to excuse its failure to comply with the statutory notice requirement to exercise redemption rights, even though that matter has not been addressed by the trial court. Neither Washington case law nor policy considerations warrant ignoring the plain language of the applicable statutes to relieve GMACM from the consequences of failing to respond to the foreclosure suit. This Court of Appeals should affirm Judge Yu's order denying GMACM's claim to redemption rights.

II. ASSIGNMENTS OF ERROR

Plumblin accepts Judge Yu's order in this case. Plumblin does not make any assignments of error.

III. STATEMENT OF THE CASE

A. Pre-foreclosure Ownership, Encumbrance & Bankruptcy.

Respondent Summerhill is the homeowner's association for Summerhill Village, a Condominium. CP 3. Defendant Dawn M. Roughley ("Roughley") was the owner of Condominium Unit 21-5 (the "Unit"). CP 3-4. In November of 2006, Homecomings Financial, LLC ("Homecomings") originated a loan to Roughley in the amount of \$191,800. CP 188. The loan was secured by a deed of trust recorded against the Unit on November 20, 2006 (the "2006 Deed of Trust"). CP 315-44. The 2006 Deed of Trust indicates that Homecomings was the original "Lender", but chose to have Mortgage Electronic Registration Systems, Inc. ("MERS") designated as the record beneficiary of the 2006 Deed of Trust. CP 315-16.

Under the Washington Condominium Act, delinquent condominium association assessments are a lien against the condominium unit from the time of delinquency, and such lien has priority over deeds of trust recorded before the lien arises, to the extent of six months of assessments. RCW §§64.34.364(1), (2), (3). Commencing in August of 2008, Defendant Roughly defaulted in the payment of Unit assessments. CP 33.

Defendant Roughley defaulted in making her loan payments under the 2006 Deed of Trust sometime in 2009. CP 189.

On January 8, 2009, Roughley filed a petition under Chapter 7 of U.S. Bankruptcy Code. CP 28. On May 12, 2009, Summerhill obtained an order from the Bankruptcy Court granting Summerhill relief from the bankruptcy stay to foreclose its lien against the Unit. CP 9-11. Defendant Roughley obtained a discharge order on April 28, 2009. CP 28.

B. Summerhill Foreclosure & Sheriff's Sale.

Summerhill filed this action to foreclose its assessment lien on May 28, 2009. CP 1. As the record beneficiary of the 2006 Deed of Trust and because Summerhill's lien had priority, MERS was included as a defendant in this action. CP 4. The registered agent for MERS was served with the summons and complaint on July 23, 2009. CP 17. A Lis Pendens for this action was recorded on July 23, 2009. CP 239. When none of the defendants responded to this action, Summerhill obtained an Order of Default against all defendants on September 24, 2009 (the "Default Order"). CP 20-21. A Default Judgment, Order and Foreclosure Decree (the "Default Judgment") was entered against all defendants, including MERS, on October 6, 2009. CP 51-55.

Pursuant to the Default Judgment, the Unit was sold at a Sheriff's sale on December 18, 2009, and Plumblin was the high bidder at such

sale. CP 103-04. The sale to Plumblin was confirmed by court order on February 8, 2010. CP 104.

C. Post-Foreclosure Actions by Homecomings, Deutsche Bank, GMACM & Plumblin.

On January 29, 2010, an assignment of the 2006 Deed of Trust was recorded, pursuant to which MERS interest as beneficiary was assigned to Deutsche Bank Trust Companies Americas as Trustee for RALI 2007QS1 (“Deutsche Bank”). CP 240. Immediately thereafter, an instrument was recorded appointing LSI Title Agency, Inc. (“LSI”) as the new trustee under the 2006 Deed of Trust. CP 241. Both instruments were returnable to Executive Services, LLC after recording. CP 240-41. By letter dated February 18, 2010, Plumblin notified both LSI and Executive Services, LLC about the Sheriff’s sale and requested information about their intentions, but never received any response. CP 195, 208.

Although the Sheriff’s sale was brought to the trustee’s attention in February, this matter was not referred to present counsel for GMACM until sometime in July of 2010. CP 121. The first lender response to this action or the Sheriff’s sale was when present counsel for GMACM (David Weibel, Esq.) notified the Sheriff that Homecomings intended to redeem from the Sheriff’s sale in a letter dated September 15, 2010 (the “Homecomings Redemption Notice”). CP 242. The Homecomings

Redemption Notice included a copy of the 2006 Deed of Trust, but makes no mention of or reference to GMACM or Deutsche Bank. CP 242, 244. Counsel for Plumblin responded by letter to the Sheriff dated September 24, 2010 (the “Redemption Response Letter”). CP 244-45. After referencing the January 2010 assignment to Deutsche Bank, the response stated Plumblin’s belief that the beneficiary of the 2006 Deed of Trust was not legally entitled to redeem, but that Homecomings certainly had no standing to redeem. CP 244.

On December 9, 2010, nearly a year after the Sheriff’s sale, GMACM filed a motion (1) to intervene on behalf of Deutsche Bank, (2) to vacate the Default Order and amend the Default Judgment, and (3) for declaratory relief and an order requiring Plumblin to issue a redemption quote to GMACM. CP 38-39. On December 16, 2010, Judge Yu entered an order which granted GMACM’s motion to intervene and denied all of the other aspects of GMACM’s motion, including GMACM’s requests for a determination that Deutsche Bank had a right to redeem or that the 2006 Deed of Trust was not extinguished by the Sheriff’s sale. CP 353-54.

On December 16, 2011, a new redemption letter (the “December Redemption Notice”) from GMACM’s counsel was delivered to the King County Sheriff (dated December 15th, but not delivered to the Sheriff until December 16th). CP 356-57. The December Redemption Notice was the

first letter to the Sheriff containing any mention of or reference to GMACM or Deutsche Bank. CP 362-363. Plumblin objected to the December Redemption Notice on the basis that neither GMACM nor Deutsche Bank had standing to redeem under Judge Yu's order, and because the December Redemption Notice was not timely. CP 449-50.

On December 20, 2011, GMACM filed a Notice of Appeal indicating appeal from all aspects of Judge Yu's order, other than the portion granting GMACM's motion to intervene. CP 406-07. GMACM has since elected to limit its appeal to a single issue; Judge Yu's determination that Deutsche Bank did not have the right to redeem from the Sheriff's sale in this matter. *Opening Brief*, p. 1, n. 1.

D. Issuance of Sheriff's Deed to Plumblin.

Since GMACM'S Notice of Appeal was filed on December 20, 2010, the automatic stay under CR 62(a) expired on December 30, 2010. CP 406. Since GMACM had failed to take any action to stay enforcement of Judge Yu's ruling after the automatic stay expired, Plumblin requested issuance of the Sheriff's deed for the Unit on February 2, 2010. CP 491-92. By letter of February 4, 2011, GMACM attempted to interfere with issuance of the Sheriff's deed even though it had failed to take any proper action to stay enforcement of Judge Yu's order for over a month after the automatic stay expired. CP 493-94. By letter dated February 4, 2011,

Plumblin reasserted its request for the Sheriff's deed and disagreed with an unfounded claim that it had waived its earlier objection to the timeliness of GMACM's redemption notice. CP 495-96. The Sheriff's office agreed with Plumblin that the Sheriff's deed should be issued without delay. CP 497. On February 8, 2010, Plumblin obtained and recorded the Sheriff's deed for the Unit. CP 498-50. On February 25, 2011, GMACM finally made a supersedeas deposit under RAP 8.1. CP 483-84.

IV. ARGUMENT

GMACM contends that two issues arise from its single assignment of error: (1) whether the beneficiary of the 2006 Deed of Trust is entitled to redeem from the sheriff's sale; and (2) whether the Sheriff is required to issue a deed to GMACM based upon events not previously addressed by Judge Yu and not properly before the Court of Appeals. *Opening Brief*, pp. 1-2.

A. GMACM Not Authorized to Redeem.

Plumblin agrees with GMACM that the facts relevant to GMACM's standing to redeem are largely uncontested and that the interpretation of the relevant statutes is a question of law, subject to *de novo* review by this Court. *Opening Brief*, pp. 12-13.

1. Although Subsequent in Time, Summerhill's Assessment Lien had Priority Over the 2006 Deed of Trust.

It is undisputed that the lien of the 2006 Deed of Trust attached to the Unit and was perfected in November of 2006, when it was recorded.

Opening Brief, pp. 5-6. It is also undisputed that the assessment delinquency that resulted in the Sheriff's sale in this matter began in August of 2008, almost two years later. CP 33, 193, *Opening Brief*, p. 6.

RCW §64.34.364(1) states:

- (1) The association has a lien on a unit for any unpaid assessments levied against a unit *from the time the assessment is due*.

(Emphasis added.) Since the earliest assessment delinquency included in the lien that was foreclosed at the Sheriff's sale did not occur until August of 2008, it is undeniable that the 2006 Deed of Trust is prior in time, not "subsequent in time".

As a general rule in Washington, the priority of competing lien claims is based upon the relative times when the competing claims attach to the subject property, subject to perfection in accordance with recording requirements. See *Homann v. Huber*, 38 Wn.2d 190, 198, 228 P.2nd 466, 470 (1951); *Hollenbeck v. City of Seattle*, 136 Wn. 508, 514, 240 P. 916 (1925); and *Malm v. Griffith*, 109 Wash. 30, 36, 186 P. 647, 649 (1919).

But there are exceptions to the general rule, including RCW §64.34.364, which provides in relevant part as follows:

(2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real property taxes and other governmental assessments or charges against the unit. ...

(3) Except as provided in subsections (4) and (5) of this section, the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW §64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, ...

Under RCW §64.34.020(27), the term "mortgage" includes a deed of trust.

The circumstances described in subsections (4) and (5) of RCW §64.34.364 are not present or at issue in this case. As noted by GMACM, condominium assessment liens are not the only Washington exceptions to the general priority rule; mechanics' and materialmen's liens, tax liens, and an attorney's lien. *Opening Brief*, p. 14. GMACM refers to all these exceptions as "super priority liens".

Simply put, a condominium association's assessment lien has a limited priority over deeds of trust recorded before the assessment lien arises. In this case, Summerhill's assessment lien had a limited priority over the 2006 Deed of Trust, even though the 2006 Deed of Trust was prior in time to the Summerhill's assessment lien, which did not arise

before August of 2008. Because GMACM's predecessor was included in the foreclosure action and did not pay the limited priority portion of the assessment lien prior to the Sheriff's sale, the Sheriff's sale extinguished the lien of the 2006 Deed of Trust. Although GMACM originally contested whether the 2006 Deed of Trust was extinguished by the Sheriff's sale, it now concedes the point. *Opening Brief*, pp. 1, 24-25.

2. Statutory Redemption Rights are Limited and Do Not Extend to GMACM or Deutsche Bank.

Redemptions from a Sheriff's sale are governed by RCW Ch. 6.23.

RCW §6.23.010 provides:

(1) Real property sold subject to redemption, as provided in RCW §6.21.080, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:

(a) The judgment debtor, in whole or any part of the property separately sold.

(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage on any portion of the property, or any portion or any part thereof, separately sold, *subsequent in time* to that on which the property was sold. The persons mentioned in this subsection are termed redemptioners.

(2) As used in this chapter, the terms "judgment debtor", "redemptioner," and "purchaser," refer also to their respective successors in interest.

(Emphasis added.) RCW §6.23.010 is not just a definition section, it establishes the redemption right itself for certain persons. But for this section, there is no redemption right for anyone from a Sheriff's sale.

Although Summerhill's assessment lien had a statutory super priority over the 2006 Deed of Trust, the 2006 Deed of Trust was not "subsequent in time" to the August 2008 assessment lien. GMACM would have this Court simply disregard the "subsequent in time" requirement of RCW §6.23.010(b). *Opening Brief*, pp. 5, 24, 27, 30 and 37.

But doing so would run afoul of the basic principles of statutory construction. As summarized in *Lake v. Woodcreek Homeowners Ass'n*:

Statutory interpretation begins with the statute's plain meaning. Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009). While we look to the broader statutory context for guidance, we "must not add words where the legislature has chosen not to include them," and we must "construe statutes such that all of the language is given effect." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003). If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007).

168 Wn.2d 694, 704, 229 P.3d 791, 796 (2010). GMACM is not an authorized "redemptioneer" under the plain meaning of RCW §6.23.010(1)(b). The 2006 Deed of Trust is not "subsequent in time" to Summerhill's 2008 assessment lien.

As noted in *Gesa Federal Credit Union v. Mutual Life Ins. Co. of New York*, 105 Wash.2d 248, 252, 713 P.2d 728,730 (1986):

The right to redeem property sold under statute depends on the provisions of the statute creating the right. *Graves v. Elliot*, 69 Wash.2d 652, 419 P.2d 1008 (1966); *Kuper v. Stojack*, 57 Wash.2d 482, 358 P.2d 132 (1960). Where the language of the statute is plain, unambiguous, and certain, there is no room for judicial construction because the meaning will be discovered from the wording of the statute itself. *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n.*, 101 Wash.2d 425, 679 P.2d 1922 (1984). Accord, *Rhoad v. McLean Trucking Co.*, 102 Wash.2d 422, 686 P.2d 483 (1984).

The right to redeem is a substantive right governed strictly by the terms of the statute. *Fidelity Mutual v. Mark*, 112 Wash.2d 47, 55, 767 P.2d 1382, 1386 (1989). It is not procedural or remedial in nature.

The Washington courts have consistently refused to extend the right of redemption to parties not expressly authorized by statute. In *Fidelity Mutual v. Mark*, the court did not allow a party with an express assignment of an owner's right of redemption to redeem; the assignee was not a successor in interest to the owner because the title interest of the owner was not conveyed to the assignee. *Id* at 53, 1385. In *Graves v. Elliot* the court specifically found that the holder of a mortgage recorded prior to the lien foreclosed upon at a sheriff's sale was not entitled to redeem from such sale on his own behalf or on behalf of the owner or judgment debtor. 69 Wn.2d 652, 655 & 657, 419 P.2d 1008, 1010-11. (1966). In *Capital Investment Corp. of Washington v. King County*, the Court held that the naked assignment of a redemptioner's redemption

right, without an assignment of the judgment and judgment lien giving rise to the redemption right, did not give the assignee the status or rights of a redemptioner. 112 Wn.App. 216, 228, 47 P.3d 161, 167 (2002). See also *Seelye v. North Pacific Mortgage Co.*, 189 Wash. 297, 65 P.2d 218 (1937).

3. Judge Yu's Decision is Consistent with the Policy and Purpose of the Washington Condominium Act.

As noted when the super priority for condominium assessments was established, "As a practical matter, the mortgage lenders will most likely pay the assessments demanded by the association which are prior to its mortgage rather than having the association foreclose on the unit and eliminate the lender's mortgage lien." RCW §64.34.364, Official Comments, cmt, 3. The quoted language makes clear that the legislature expected the lenders to pay the lien priority before the sheriff's sale occurs, not to delay payment for up to an additional year. Enforcing the Washington redemption statutes as written will encourage that. Relieving GMACM from the statutory consequences of its failure to do so will not.

In fact, the Washington legislature did not give lenders any reason to assume there would be any redemption period following the foreclosure of a condominium assessment lien. RCW §64.34.364(9) authorizes assessment lien foreclosures in the same manner as a mortgage under RCW Ch. 6.12. Under RCW §61.12.093, a property which has been

abandoned by the owner for six months or more can be sold free of any redemption rights under RCW Ch. 6.23. Lender's who neglect to respond to a condominium association's judicial foreclosure action do so at their own peril.

The overall statutory scheme in this case has both positive and negative aspects for deed of trust lenders. They benefit by having the assessment lien priority limited to just six months of assessments. That's all they have to pay before the Sheriff's sale in order to avoid the affect of the sale. In this case, the priority amount was \$1,122 (\$187 per month x 6), while the entire lien amount was \$10,201.84. CP 30, 74. The negative aspect is the extinguishment of the deed of trust, without redemption rights, when they fail to do so.

Payment of the priority amount before the Sheriff's sale is a simple requirement to satisfy. If a lender has a valid legal reason for not responding to a condominium association's judicial foreclosure action, the recourse is a motion to have the default judgment set aside under the applicable Civil Rules. GMACM tried but was unable to satisfy those requirements. Judge Yu denied GMACM's motion to set aside or modify the default judgment against Deutsche Bank's predecessor. Ignoring the plain language of RCW §6.21.020(2) for the benefit of a lender, like

GMACM, that fails to respond to an assessment foreclosure action, without a valid legal excuse, is not warranted.

4. The Lack of “Subsequent in Time” in Other Sections of RCW Ch. 6.23 Does not Support Ignoring It in RCW §6.23.010(1)(b).

GMACM argues that the lack of “subsequent in time” text in RCW §§6.23.070 and 080(3) supports ignoring that language in RCW §6.23.010(1)(b). GMACM’s *Opening Brief*, pages 25-26. RCW §6.23.070 governs situations where multiple redemptioners attempt to redeem through the Sheriff at the same time. RCW §6.23.080(3) concerns the documentation required when one creditor is redeeming from another creditor. There is nothing inherent in either of these provisions that requires ignoring the “subsequent in time” text in RCW §6.23.010(1)(b). A creditor does not even get to these other sections unless it is a qualified redemptioner, which requires satisfying the “subsequent in time” requirement.

RCW §6.23.010(1)(b) confers redemption rights on certain persons described therein, not everyone. It does not address the relative priorities among multiple parties otherwise eligible to redeem. The determination of such priorities is not before this Court and will not be dictated or controlled by the outcome of this case. The lack of more specific text in RCW §§6.23.070 and 080(3) does not warrant ignoring the more specific,

plain text in RCW §6.23.010(1)(b). Statutes should be construed in a manner that gives effect to all the language in them. *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 704, 229 P.3d 791, 796 (2010).

5. Judicially Extending Statutory Redemption Rights is Not Necessary to Protect the Owner.

This case does not involve an owner's redemption rights in any way. If an owner has any assets to preserve or protect, the owner can avoid this situation altogether by paying his or her condominium assessments on time and avoiding the foreclosure altogether, or by exercising the owner's statutory redemption rights within any applicable redemption period. This case will in no way limit an owner's redemption rights under RCW §6.23.010.

If an owner does not have the resources to avoid an assessment foreclosure or redeem from one, any remaining liability on an extinguished deed of trust is just theoretical, and subject to discharge in bankruptcy. GMACM's assertion that Defendant Roughley will remain liable on the note secured by the 2006 Deed of Trust (*Opening Brief*, pp. 28-29) ignores the bankruptcy discharge previously obtained by Defendant Roughley. The outcome of this case will not affect Defendant Roughley.

6. Expanding Redemption Rights to Lender's Prior in Time Would Chill Bidding, Not Enhance It.

GMACM cites both general case law and secondary authority for the proposition that the purpose of redemption rights is to encourage higher bids at foreclosure sales. *Opening Brief*, pp. 20-21. The logic behind this premise is questionable at best, and especially so in this context. The Ninth Circuit rejected this premise when considering whether to incorporate state redemption laws into federal foreclosures.

We do not find the policy arguments presented by California convincing. First, it is argued that the purpose of the redemption statutes is to force the mortgagee and others to bid the full market price at the sale. We assume that this is the purpose; we are not convinced that the statutes accomplish it. What third party would bid and pay the full market value, knowing that he cannot have the property to do with as he wishes until a set period has gone by, and that at the end of the period he may not get it, but instead may be forced to accept a payment which may or may not fully reimburse him for his outlays? ...

Our doubts as to whether the statutes accomplish the purpose is reinforced by the fact that in many states, partly because of those statutes, real estate financing is almost exclusively secured by trust deeds with power of sale. ... One is tempted to inquire why, if public policy so strongly favors a post-sale period of redemption, the legislature has not applied it to sales under trust deeds? Perhaps it is because the redemption statute has, in some states, made the use of mortgages almost a dead letter.

U.S. v. Stadium Apts., Inc., 425 F.2d 358, 365-66 (9th Cir 1970).

If redemption rights encourage higher bidding at all, granting them to the owner serves that purpose. There is no reason to presume that

expanding the class of redemptioners beyond the terms of the statute would otherwise enhance the bidding. In fact, it would more likely reduce the interest of third-party bidders. This would typically leave the condominium association as the only bidder at such sales and exacerbate the lack of assessment payments to the association. This would not further the purpose behind giving condominium association's a limited super priority lien. In this case, Summerhill's judgment was paid in full by Plumline following confirmation of the Sheriff's sale, and Plumline has been paying the ongoing assessments since the Sheriff's sale. CP 111-14.

7. None of the Cases Cited by GMACM are on Point.

GMACM cites a number of Washington cases and cases from other jurisdictions for general statements or general points about lien priorities and redemptions in general. Only a few of the cases cited by GMACM concern or address super liens in any fashion. Those cases are cited on pages 13, 14, and 22 of GMACM's *Opening Brief*, and consist of the following: *Homann v. Huber*, 38 Wn.2d 190, 228 P.2d 466 (1951); *Hollenbeck v. City of Seattle*, 136 Wash. 508, 240 P. 916 (1925); *A.R.R. Testing Laboratory, Inc. v. New Hope Baptist Church*, 112 Wn. App. 442, 448, 50 P.3d 650 (2002); *Seattle Mtg. Co., Inc. v. Unknown Heirs*, 133 Wn. App. 479, 495, n. 6, 136 P.3d 776 (2006); *Carstens & Earles v. City*

of Seattle, 84 Wn. 88, 96, 146 P. 381 (1917); and *Rustad Htg. & Plbg Co. v. Waldt*, 91 Wn.2d 372, 588 P.2d 1153 (1979 (*en banc*)).

None of these cases concern the application of RCW §6.23.010(1)(b) to a super lien foreclosure. The first two touch on priority matters not at issue here. The last one concerned whether the term “mortgage” included deeds of trust under a prior version of the redemption statutes, holding that deeds of trust were a subspecies of mortgages. *Rustad Htg. & Plbg Co. v. Waldt*, *supra* at 376, 1155. The others are just cited as general examples of the existence of other super priority liens under Washington law. None of them offer any basis for disregarding the “subsequent in time” text in RCW §6.23.010(1)(b).

None of the other Washington cases cited by GMACM on the redemption right issue even concern a super lien, let alone the application of RCW §6.23.010(2) to a super lien foreclosure like that presented here. *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998); *Bank of Am., N.A. v. Prestance Corp*, 160 Wn.2d 560, 160 P.3d 17 (2007); *Pumalite Tualatin, Inc. v. Crumb Leasing, Inc.*, 82 Wn.App. 767, 919 P.2d 1256 (1996); *DeYoung v. Centex*, 100 Wn.App. 885, 1 P.3d 587 (2000); *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wn.App. 403, 399, 828 P.2d 621 (1992); and *Glidden v. Municipal Authority of the City of Tacoma*, 111 Wn.2d. 341, 758 P.2d 487 (1988).

Those cases might have some relevance if RCW §6.23.010(1)(b) were ambiguous or if Plumblin were asking this Court to read language into it that is not already there. See *Seattle Mtg. Co., Inc.*, *supra* at 495. But case law discussions about general rules and policies are not persuasive when a clear exception to those general rules or principals is involved, like a super priority lien. By GMACM's logic, the courts should simply disregard all statutory exceptions adopted by the legislature that run contrary to the general rules or dictum of the courts or secondary sources, no matter how clear the statutory language.

The cases from other jurisdiction are even less relevant than the Washington cases cited by GMACM. *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003); *In re Sims*, 185 B.R. 853 (N.D. Ala. 1995); *In re Nossman*, 22 F.Supp. 645 (D.Kan 1938); *Meyerson v. Werner*, 683F.2d 723 (2d Cir. 1982); *U.S. Stadium Apts., Inc.*, 425 F.2d 358 (9th Cir 1970); *HSBC Bank*, 2005-NMCA-138, 125 P.3d 644; *Brown v. Trujillo*, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881; and *Southeast Ent., Inc. v. Byrd*, 720 So.2d 873 (Ala. 1998). They do not involve statutory language like the Washington statutes and they do not involve super priority liens or redemptions following the foreclosure of super priority liens. Exceptions by their very nature run contrary to general rules.

The language of the Idaho statute may be the most similar in that it says “subsequent” (but not “subsequent in time”), but the lone Idaho case cited by GMACM only tangentially touches on redemption issues and does not concern a super lien situation. *Opening Brief*, pp 29-30; *Eastern Id. Prod. Credit Assoc. v. Placerton, Inc.*, 100 Idaho 863, 606 P.2d 967 (1980).

8. The Secondary Authorities Cited by GMACM are Not Applicable.

GMACM relies heavily on secondary authorities in its *Opening Brief*. The secondary authorities are cited on pages 13-14 and 20-24 of GMACM’S *Opening Brief*. STOEBUCK AND WEAVER, *Real Estate Transactions* 14.8, at 141 (2004); F.C. Hackman, *Statutory Redemption Rights*, 3 Wash.L.Rev. 177, 177 (1925); 12 David A. Thomas, *Thompson on Real Property* §101.07(c)(3) (Thomas ed. 1994); 18 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE, *Real Estate: Transactions* §18.19, at 361-364 (1995); 27 Marjorie D. Rombauer, 27 WA. PRAC. §3.19(a), p 161, §33.19(b), p. 162 (1998); and WASHINGTON REAL PROPERTY DESKBOOK, 3d ed., §46.15(2), §3.19(b), p. 161 (Wash. St. Bar Ass’n 1996).

These secondary authority cites and quotations are from general discussions, based on the general rule applicable to lien priority issues; a

first in time, first in right approach. Super priority liens, like the condominium assessment lien, are an exception to the general rule. None of the secondary sources cited by GMACM address super priority liens or the application of the redemption statutes to super priority liens. Some of the statements lifted from these sources may seem to support GMACM's positions in this case, but that is only because they are taken out of context. Discussions about general rules or principals are not meaningful or relevant when discussing clear exceptions to the general rules, like super priority liens.

B. GMACM Did Not Comply With The Procedural Requirements To Redeem

1. The Homecoming Redemption Notice does not Fulfill GMACM'S Duty to Provide a Redemption Notice Under RCW §6.23.080(1).

Despite its assertions to the contrary, GMACM failed to satisfy the procedural requirements to redeem from the Sheriff's sale in this case. Under RCW §6.23.080(1), "The person seeking to redeem shall give the sheriff at least five days *written* notice of intention to apply to the sheriff for that purpose." (Emphasis added.) GMACM asserts that the Homecomings Redemption Notice (September 2010) satisfies that requirement. *Opening Brief*, p. 31. The problem with that argument is that the Homecomings Redemption Notice only refers to redemption by

Homecomings. CP 242. A copy of the 2006 Deed of Trust was included with the Homecomings Redemption Notice, but none of the other documentation required by RCW §6.23.080(2) was included. CP 244. At that time, Homecomings did not have even a colorable claim to a redemption right since the beneficiary's interest under the 2006 Deed of Trust was assigned to Deutsche Bank in January of 2010 (approximately 8 1/2 months earlier). CP 240.

The Homecomings Redemption Notice does not contain any mention whatsoever of GMACM or Deutsche Bank. Surely counsel would have named the correct party if counsel had known about Deutsche Bank when issuing the Homecomings Redemption Notice. Yet GMACM now asserts that the Sheriff, Plumblin and the Court should have known the Homecomings Redemption Notice was on behalf of Deutsche Bank or GMACM when even the author did not know that at the time. Mere mind reading would not have sufficed; that would have required clairvoyance.

A redemption notice issued on behalf of Homecomings does not satisfy the requirement that GMACM or Deutsche Bank provide at least five days notice of their intent to redeem.

2. GMACM'S December Redemption Notice was too Late Under RCW §6.23.080(1) and CR 6(a).

The December Redemption Notice does not satisfy RCW §6.23.080(1) because it was not timely. The one-year anniversary of the Sheriff's sale in this case was December 18, 2010, a Saturday. CR 6(a) provides that:

In computing any period of time prescribed or allowed by ... any applicable statute the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which in neither a Saturday, a Sunday nor a legal holiday. ... When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

As GMACM correctly points out, CR 6(a) extends the expiration of the redemption period in this case to December 20, 2010. *Opening Brief*, p. 32.

But GMACM fails to acknowledge that CR 6(a) required delivery of the written redemption notice for GMACM or Deutsche Bank no later than December 13, 2010. Since the minimum notice is less than seven days, intervening weekends and holidays are not counted under CR 6(a). GMACM's "oral" notice was not provided before December 15, 2010, and the written notice and other documentation were not delivered to the Sheriff until December 16, 2010. GMACM seems to think it can rely on

CR 6(a) to extend the expiration of the redemption period, but ignore it in determining the date the redemption notice was required under RCW §6.23.080(1).

Plumblin's Redemption Response Letter (September 24, 2010), put counsel for GMACM on notice that the Homecomings Redemption Notice was not issued on behalf of anyone with a redemption right. APP 2. GMACM simply ignored the five-day notice requirement until after the last day to comply. GMACM's attempts to mischaracterize the Homecomings Redemption Notice and to abuse the accounting request tacitly acknowledges that the Homecomings Redemption Notice did not satisfy the requirements of RCW §6.23.080.

3. GMACM'S Late Request for an Income Accounting did not Cure the Failure to Comply with RCW §6.23.080.

In a classic example of a bootstrap argument, GMAC claims that its request for a verified income statement under RCW §6.23.090(2), which was included in the December Redemption Notice delivered to the Sheriff on December 16th, automatically extends the redemption period, even though GMACM had already failed to satisfy the five-day notice requirement of RCW §6.23.080(1). Allowing RCW §6.23.090(2) to be used in that fashion would render the five-day advance notice requirement in RCW §6.23.080(1) meaningless. A party could always issue such a

notice on the very last day of the redemption period, even when there was in fact no income to verify (as was the case here). CP 441-42. This Court should not condone the manipulation and abuse of RCW §6.23.090(2) in such a blatant manner.

As noted in *G-P Gypsum Corp. v. State of Washington*, “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous”. 169 Wn.2d 304, 309, 237 P.3d 256, 258 (citations omitted, 2010). In order to harmonize RCW §§6.23.080(1) and .090(2), this Court should rule that a request for an income accounting must be made at least five days before the redemption period would otherwise expire.

4. GMACM Does Not Merit Equitable Relief From the Procedural Requirements of RCW Ch. 6.23.

It is true that the case law allows for substantial compliance with some procedural requirements and for equitable tolling of the redemption period in appropriate cases. *Millay v. Cam*, 135 Wn.2d 193, 204 and 206, 955 P.2d 791, 796 and 797 (1998). But failure to deliver any notice to the Sheriff on behalf of GMACM or Deutsche Bank before December 15, 2010 (and oral at that) does not “substantially” comply with RCW §6.23.080(1) since the deadline was December 13, 2010.

Furthermore, GMACM is not entitled to any equitable relief or tolling given the overall course of conduct by GMACM and its predecessor in this matter. GMACM and/or MERS (its predecessor) failed to respond to the legal process in this action before the Sheriff's sale. They had just under five months between the time MERS was served and the Sheriff's sale to simply pay six months of assessments (\$1,122) and avoid the effect of the Sheriff's sale. CP 17, 30. Plumblin brought the Sheriff's sale to the attention of the newly appointed trustee for Deutsche Bank in February of 2010, but they waited until July to even refer the matter to Washington counsel. CP 121. Over two months later, all they could manage was the ill-informed Homecomings Redemption Notice. APP 1. The shortcomings of the Homecomings Redemption Notice were brought to GMACM's attention on September 24, 2010. APP 2. Yet GMACM did not file its motion challenging the redemption standing, among other issues, until December 9, 2010. GMACM did not attempt to notify the Sheriff of GMACM's or Deutsche Bank's intent to redeem before December 15, 2010 (oral notice), and did not deliver written notice until December 16, 2010. APP 3.

In addition to misrepresenting the substance of the Homecomings Redemption Notice, GMACM attempted to further cloud the issue by ignoring the fact that CR 6(a) applies to the five day notice requirement of

RCW §6.23.080(1) and attempted to misuse a belated request for an accounting to extend the time for it to comply with RCW §6.23.080(1).

From the overall course of conduct, it is obvious that GMACM knew it did not comply with RCW §6.23.080(1). Rather than admit the shortcoming and ask for equitable relief, GMACM attempted to get by with misdirection and abuse of an accounting request. GMACM does not merit equitable relief.

5. GMACM'S Failure to Meet the Procedural Redemption Requirements was not Presented to or Addressed by Judge Yu.

Moreover, the adequacy of GMACM's belated redemption efforts has not been addressed or ruled upon by the trial court. Although the undisputed facts in this case might be sufficient to provide an alternate basis for this appellate Court to rule against GMACM, they do not provide adequate grounds for this Court to grant the relief requested by GMACM. At most, the matter should be remanded for further proceedings if the Court should rule that GMACM or Deutsche Bank are otherwise eligible to redeem.

V. CONCLUSION

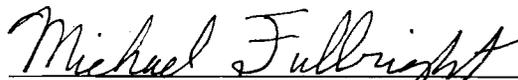
Despite GMACM's aspersions otherwise, Plumline has done nothing wrong or inequitable in this matter. Plumline purchased the Unit at a public, judicial foreclosure sale in accordance with all applicable law.

Plumline is not in any way responsible for the failure of GMACM to do what was required under RCW §62.34.364 to avoid the effects of the sheriff's sale, *i.e.*, pay the six-month priority amount. They had almost five months to do so. They have no one to blame but themselves for allowing the Sheriff's sale to extinguish the 2006 Deed of Trust. This Court should affirm Judge Yu's application of RCW §6.23.010(1)(b) in accordance with its plain and unambiguous meaning. The 2006 Deed of Trust is not "subsequent in time" to Summerhill's 2008 assessment lien.

If this Court should find that GMACM is a redemptioner under RCW §6.23.010(1)(b), this case should be remanded for determination of whether GMACM otherwise satisfied the legal requirements to redeem from the Sheriff's sale, and for such additional relief, if any, that the trial court deems appropriate.

RESPECTFULLY SUBMITTED this 8th day of June, 2011.

LAW OFFICE OF MICHAEL FULBRIGHT


Michael Fulbright, WSBA #11821
11820 Northup Way, Suite E200
Bellevue, WA 98005
(425) 284-3081

DECLARATION OF SERVICE

I certify that on this 8th day of June, 2011, I personally delivered a true and correct copy of the foregoing Brief by Respondent Plumblin Management Corporation Profit Sharing Plan, together with the Appendix thereto, to the follow parties, at the following addresses:

Counsel for Appellant GMACM:

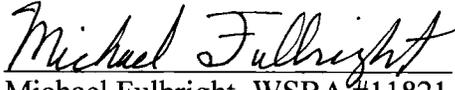
David A. Weibel & Barbara L. Bollero
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720 Olive Way, Suite 1201
Seattle, WA 98101

Counsel for Respondent Summerhill:

Patrick M. McDonald
Pody and McDonald, PLLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington, on June 8, 2011.


Michael Fulbright, WSBA #11821

No. 66455-7-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

GMAC MORTGAGE, LLC

Appellant,

v.

SUMMERHILL VILLAGE HOMEOWNERS ASSOCIATION, and
PLUMBLINE MANAGEMENT CORPORATION PROFIT SHARING
PLAN,

Respondents.

APPENDIX TO BRIEF OF RESPONDENT

PLUMBLINE MANAGEMENT CORPORATION PROFIT SHARING
PLAN

1. September 15, 2010 Letter to Sheriff
(Homecomings Redemption Notice)
2. September 24, 2010 Letter to Sheriff
(Redemption Response Letter)
3. December 15, 2010 Letter to Sheriff
(December Redemption Notice)
4. December 16, 2010 Letter to Sheriff

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COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

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Bishop, White, Marshall & Weibel, P.S.

ATTORNEYS AT LAW

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September 15, 2010

Via Legal Messenger

King County Sheriff
Civil Unit, Attn: Eva
516 Third Avenue
Seattle, WA 98104

RE: Summerhill Village Homeowners Association v. Roughley
5220 236th Place SE, Issaquah, Washington
Date of Sheriff's Sale: December 18, 2009

Dear Eva:

This office represents Homecomings Financial and by virtue of a deed of trust recorded against the subject property on November 20, 2006, under King County Auditor's File NO. 20061120001533, Homecomings is entitled to redeem pursuant to RCW 6.23.010(b). This letter is to request a redemption quote for the above property as provided for by RCW 6.23.020. Homecomings plans to redeem by October 31, 2010. Please provide a redemption quote at your earliest convenience. A check is enclosed for your fee in providing same. Please contact me if you require any additional information.

Very truly yours,

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.

David A. Weibel

DAW/lyn
Enclosures

Law Office
of
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September 24, 2010

King County Sheriff's Office
Civil Process Unit
Attn: Ms. Eva Cunio
516 Third Avenue
Seattle, WA 98104

Re: Summerhill Village Homeowners Association v. Dawn M. Roughly, et. al.
Cause No. 09-2-20589-2 SEA

Dear Ms. Cunio:

I represent Plumblin Management Corporation Profit Sharing Plan ("Plumblin"), the purchaser at the Sheriff's sale in the above-referenced action. Please direct all future communications in this matter to my attention.

I have a copy of your Notice to Purchaser regarding a purported redemption by Homecomings Financial, as well as their attorney's letter and accompanying Deed of Trust (Recording No. 20061120001533).

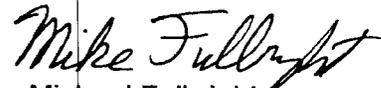
The Deed of Trust names Homecomings Financial, LLC as the "Lender", but Mortgage Electronic Registration Systems, Inc. is the Beneficiary, acting as "nominee for Lender and Lender's successors and assigns." See Paragraph E near the top of page 2 of the Deed of Trust. Pursuant to an Assignment of Deed of Trust recorded under Recording Number 20100129001549 (copy enclosed), the beneficial interest under the Deed of Trust was assigned to Deutsche Bank Trust Company Americas as Trustee for RALI 2007QS1.

My client does not believe the beneficiary of that Deed of Trust is legally entitled or authorized to redeem. But even if you assume that the beneficiary of that deed of trust is legally entitled to redeem, Homecomings Financial has no apparent standing to claim such a redemption right.

Ms. Eva Cunio
September 24, 2010
Page 2

Please let me know if you have any questions or require any further information from Plumblin.

Very truly yours,


Michael Fulbright

enclosure

cc: David A. Weibel, Esq.



Bishop, White, Marshall & Weibel, p.s.

ATTORNEYS AT LAW

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December 15, 2010

Via Legal Messenger

Ms. Eva Cunio
King County Sheriff
Civil Unit
516 Third Avenue
Seattle, WA 98104

RE: RCW 6.23.090(2) DEMAND FOR WRITTEN AND VERIFIED STATEMENT
Caption: *Summerhill Village Homeowners Association v. Roughley*
Case No.: 09-2-20589-2 SEA
Address 5220 236th Place SE, Issaquah, Washington
Sale Date: December 18, 2009
BWMW File: 1503.1020104

Dear Ms. Cunio:

We wrote you on September 15, 2010, and informed you we represent Homecomings Financial. Homecomings Financial is an operating subsidiary of GMAC Mortgage, LLC ("GMAC"), the servicer for the subject Deed of Trust.

Deutsche Bank Trust Company Americas as Trustee for RALI2007QS1 ("Deutsche Bank") is the current beneficiary and owner of the note secured by the Deed of Trust recorded against the above property on November 20, 2006, under King County Auditor's File No. 20061120001533 in favor of Homecomings Financial (the "Homecomings Deed of Trust"). Pursuant to RCW 61.24.030, enclosed please find a declaration under penalty of perjury concerning Deutsche Bank's interest in the Homecomings Deed of Trust.

The Homecomings loan at issue in this matter was securitized and the beneficial interest in it is now owned by Deutsche Bank. GMAC was the original servicer for the Homecomings loan, and has remained the servicer under the terms of the Pooling and Servicing Agreement governing this loan. GMAC now services the

Homecomings loan on behalf of Deutsche Bank, as owner of the beneficial interests, and GMAC is acting on Deutsche Bank's behalf in this matter.

Please accept this correspondence as GMAC's and Deutsche Bank's demand for a written and verified statement of the amounts of rents and profits received and expenses paid and incurred by the purchaser or current redemptioner of the above-referenced property, pursuant to RCW 6.23.090(2).

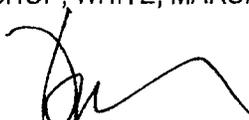
Further, this correspondence confirms that our previous letter to you dated September 15, 2010, was a redemption demand made on behalf of the current beneficiary and owner of the Homecomings Deed of Trust, as indicated therein. This letter reaffirms that redemption demand under RCW 2.23.020(1)(b). Our client intends to redeem on or by December 20, 2010. Please provide a redemption quote as soon as possible.

You acknowledged in your recent conversation with our office prior receipt of the required \$70.00 fee from our office for a redemption quote. You also advised you were not aware of any additional fee being due for the present RCW 6.23.090(2) demand. If you later determine an additional fee is necessary, please advise me and we will forward it immediately.

Thank you for your assistance with this matter. Please contact me should you require any additional information.

Very truly yours,

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.



David A. Weibel

DAW/ait

cc: Michael Fulbright
Patrick M. McDonald

Law Office
of
MICHAEL FULBRIGHT

11820 Northup Way, Suite E200
Bellevue, WA 98005
(425) 284-3081
mike@fulbrightlegal.com

Via Email

December 16, 2010

King County Sheriff
Civil Process Unit
Attn: Ms. Eva Cunio
516 Third Avenue
Seattle, WA 98104

Re: Summerhill Village Homeowners Association v. Dawn M. Roughly, et. al.
Cause No. 09-2-20589-2 SEA

Dear Ms. Cunio:

As you may recall, I represent Plumblin Management Corporation Profit Sharing Plan ("Plumblin"), the purchaser at the Sheriff's sale in the above-referenced action. This letter is in response to yesterday's letter on this matter from David A. Weibel, Esq.

To begin, I would like to point out what I believe to be an inaccuracy in his letter. At the beginning of the second full paragraph on page 2 of his letter, he states:

Further, this correspondence confirms that our previous letter to you dated September 15, 2010 was a redemption demand made on behalf of the current beneficiary and owner of the Homecomings Deed of Trust, as indicated therein.

In actuality, the September 15th letter clearly stated it was on behalf of Homecomings. As pointed out in my letter of September 24, 2010, the deed of trust had already been assigned to Deutsche Bank. Mr. Weibel's September 15th letter makes no reference to Deutsche Bank or GMAC.

Also, it is also our position that yesterday's letter would be too late for a December 20th redemption, since it was less than five working days before the expiration of the redemption period. See CR 6.

Even more significantly, we were in before Judge Mary Yu this morning on GMAC's motions to have the previous judgment vacated, or for declaratory relief that

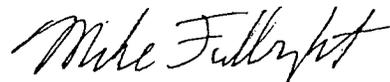
Ms. Eva Cunio
September 24, 2010
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GMAC or Deutsche Bank was entitled to redeem from your previous sale and to a redemption quote. The judge rejected both requests, thereby affirming our position that GMAC/Deutsche Bank does not have standing to redeem. A copy of the Judge's Order is attached.

Nonetheless, a copy of a verified statement under RCW 6.23.090(2) is included to avoid some sort of bootstrap argument that failure to do so somehow extends the redemption period. Providing this statement should not be viewed as a change in our position that they are not entitled to redeem, as confirmed by Judge Yu. It's being provided out of an abundance of caution and because we have nothing to hide. The original will be delivered to your office by Plumblin tomorrow.

Please let me know if you have any questions or require any further information.

Very truly yours,

A handwritten signature in black ink that reads "Mike Fulbright". The signature is written in a cursive, slightly slanted style.

Michael Fulbright

Enclosures

cc: David A. Weibel, Esq.
Patrick McDonald, Esq.