

71228-4

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No. 71228-4-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

JPMORGAN CHASE BANK, N.A., Plaintiff/Respondent,

v.

THE CONDO GROUP, LLC, Defendant,
And
ZION SERVICES LLC, Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 FEB 27 PM 3:20

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR.....	4
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	4
IV.	STATEMENT OF THE CASE.....	5
	A. The Sheriff's Sale	5
	B. Zion Services, LLC Redeemed The Property	6
	C. JPMorgan Attempted To Redeem The Property.....	8
	1. The JPMorgan Deed of Trust.....	8
	2. JPMorgan's Attempted Redemption.....	9
V.	ARGUMENT AND AUTHORITY	11
	A. Standard Of Review.....	11
	B. The Superior Court Erred In Holding That The Condo Group Could Compel Zion to Accept Its Offer To Satisfy The Asia Judgment	12
	1. Washington Law Does Not Generally Permit Third Parties To Satisfy Debts Of Others	13
	2. The Redemption Statute Does Not Give The Purchaser At The Sherriff's Sale The Authority To Short Circuit Redemption By Offering To Satisfy Judgments	15
	3. Colorado Courts Have Adopted Zion's Position	19
	C. JPMorgan Was Not A Proper Redemptioner.....	23
	1. The Amendment Is Not Retroactive	25
	2. JPMorgan Cannot Benefit From Prospective Application of 5541.SL.....	29
	3. Summary	31
VI.	CONCLUSION.....	32

TABLE OF AUTHORITIES

Cases

<u>Atherton Condo. Apartment–Owners Assoc. Bd. of Dirs. v. Blume Dev. Co.</u> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	11
<u>BAC Home Loans Servicing, LP v. Fulbright</u> , 174 Wn. App. 352, 298 P.3d 779 (2013).....	24
<u>Davis Mfg. and Supply Co. v. Coonskin Properties</u> , 646 P.2d 940 (Colo. 1982).....	passim
<u>Densley v. Department of Retirement Systems</u> , 162 Wn.2d 210, 173 P.3d 885 (2007).....	25, 26, 27
<u>Fidelity Mutual v. Mark</u> , 112 Wn.2d 47, 767 P.2d 1382 (1989).....	28
<u>GESA Federal Credit Union v. Mutual Life Ins. Co. of NY</u> , 105 Wn.2d 248, 713 P.2d 728 (1986).....	28
<u>Hisle v. Todd Pac. Shipyards Corp.</u> , 151 Wn.2d 853, 93 P.3d 108 (2004).....	11
<u>In re F.D. Processing</u> , 119 Wn.2d 452, 832 P.2d 1303 (1992).....	27, 28
<u>King v. Riveland</u> , 125 Wn.2d 500, 886 P.2d 160 (1994).....	14
<u>Lilly v. Lynch</u> , 88 Wn. App. 306, 945 P.2d 727 (1997).....	11
<u>Millay v. Cam</u> , 135 Wn.2d 193, 955 P.2d 791 (1998).....	12
<u>Morin v. Harrell</u> , 161 Wn.2d 226, 164 P.3d 495 (2007).....	11
<u>Plute v. Schick</u> , 101 Colo. 159 (Colo. 1937)	19, 20, 21, 22

<u>State v. T.K.</u>	
139 Wn.2d 320, 987 P.2d 63 (1999).....	25
<u>Summerhill Village Homeowners Ass’n v. Roughly</u> ,	
--- Wn. App. ---, 289 P.3d 645 (2012).....	15, 24, 27, 31
<u>WYSE Financial Services, Inc. v. Nat. Real Estate Inv.</u> ,	
92 P.3d 918 (Colo. 2004).....	22, 23

Statutes

RCW 6.21.080	26
RCW 6.23.010	passim
RCW 6.23.010(1)(b).....	10, 25, 27
RCW 6.23.010(1)(b) (2012)	10
RCW 6.23.010(a)(2)	2, 5
RCW 6.23.020(2)(c)	18
RCW 6.23.050	16
RCW 6.23.060	16, 17
RCW 6.23.070	15
RCW 6.23.080	12, 16
RCW 6.23.080(1).....	16, 17
RCW 6.23.080(1)-(2).....	16, 17
RCW 6.23.090	16
RCW 6.24.130	28

Other Authorities

5541.SL, 63rd Leg., 2013 Regular Session (July 28, 2013 effective date).....	passim
---	--------

Rules

CR 56(c).....	11
---------------	----

I. INTRODUCTION

This case presents two questions related to the redemption statute. First, does the redemption statute give a third-party the right to interfere in the relationship between a creditor and debtor for the purpose of eliminating the creditor's redemption rights? Second, does the July 28, 2013 amendment to the redemption statute give mortgage lenders the right to redeem from sales that occurred before the amendment? In both cases, the answer is no.

Appellant, Zion Services, LLC ("Zion"), and Respondents, The Condo Group, LLC ("Condo Group") and JPMorgan Chase Bank, N.A. ("JPMorgan"), all dispute the effect of successive redemption attempts by Zion and JPMorgan against a property on which Condo Group was the high bidder at Sheriff's sale. On summary judgment, the King County Superior Court (the "superior court") held Zion's redemption ineffective and held JPMorgan's redemption effective. Both of these holdings were in error.¹

¹ Condo Group has also appealed the decision of the superior court in related Appeal No. 71227-6-I. For purposes of maintaining separate briefing schedules, this Court declined to consolidate the two appeals, but ordered that the two appeals would be argued together before the same panel.

This dispute arises from a suit by the Onyx Owners Association (“Onyx”) against Hai Poon, Jane Doe Poon, and JPMorgan to foreclose a lien for past due condominium assessments. Onyx obtained a default judgment, resulting in a Sheriff’s sale of the property. Condo Group was the high bidder at that sale and received a certificate of sale, subject to a one-year redemption period.

Zion is the holder of a judgment against Poon that, at the time of the Sheriff’s sale, was subsequent in time to that on which the property was sold. Zion’s judgment lien gave it redemption rights under RCW 6.23.010(a)(2), and Zion exercised those rights and tendered a redemption payment before expiration of the redemption period.

After it received notice of the redemption, Condo Group attempted to prevent redemption by offering to pay Zion’s judgment. Zion rejected Condo Group’s offer, and completed redemption. Condo Group objected on the grounds that Washington law compels Zion to accept Condo Group’s voluntary payment and that by tendering payment, Condo Group extinguished Zion’s redemption rights. Condo Group is incorrect. Only the debtor has the right to force a creditor to accept a payment; a stranger to a debt has no such right, and the redemption statute does not create any

such right. Zion properly rejected Condo Group's offer of payment. The superior court erred in holding that Zion could not redeem.

Following Zion's redemption, JPMorgan attempted to redeem the property based on a 2006 deed of trust. The redemption law in effect at the time of the Sheriff's sale provided that a redemptioner must have a lien that is "subsequent in time" to that on which the property is sold. JPMorgan's lien was prior in time and it was not a redemptioner at the time of the sale. On July 28, 2013, the legislature amended the redemption statute to read "subsequent in priority" rather than subsequent in time. JPMorgan argues that it is a redemptioner under the amended statute. Whether it would be a redemptioner under that amendment is immaterial; JPMorgan was not a redemptioner under the statute in effect at the time of the sale, and the amendment to the statute is not retroactive.

For these reasons, Zion respectfully requests that this Court reverse the decision of the superior court granting summary judgment in favor of Condo Group and in favor of JPMorgan. Because the facts are undisputed, Zion also requests that the case be remanded with instructions to enter judgment in favor of Zion.

II. ASSIGNMENTS OF ERROR

1. The superior court's Order on Cross-Motions for Summary Judgment of the Plaintiff, JPMorgan Chase Bank, N.A., the Defendant, The Condo Group, LLC, and the Defendant, Zion Services, LLC granting Condo Group's motion for summary judgment against Zion was in error.

2. The superior court's Order on Cross-Motions for Summary Judgment of the Plaintiff, JPMorgan Chase Bank, N.A., the Defendant, The Condo Group, LLC, and the Defendant, Zion Services, LLC denying Zion's motion for summary judgment against Condo Group and JPMorgan was in error.

3. The superior court's Order on Cross-Motions for Summary Judgment of the Plaintiff, JPMorgan Chase Bank, N.A., the Defendant, The Condo Group, LLC, and the Defendant, Zion Services, LLC granting JPMorgan's motion for summary judgment was in error.

4. The superior court's Order Granting JPMorgan Chase Bank, N.A. Summary Judgment was in error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As a third-party, did Condo Group have the authority to compel Zion to accept its offer to pay Poon's debt, thereby eliminating Zion's lien and terminating Zion's redemption rights?

2. Did the superior court err in finding that JPMorgan was a redemptioner because:

a. JPMorgan was not a redemptioner under the pre-amendment version of RCW 6.23.010(a)(2);

b. The amendment to RCW 6.23.010(a)(2) does not apply retroactively; and

c. JPMorgan was not a redemptioner under the amended redemption statute because its lien was extinguished before the amended statute became effective?

IV. STATEMENT OF THE CASE

A. The Sheriff's Sale

On March 14, 2012, Onyx brought suit against Mr. and Mrs. Poon (collectively, "Poon"), and against JPMorgan, seeking judicial foreclosure of a lien against the following real property:

UNIT 310, ONYX CONDOMINIUMS, A
CONDOMINIUM, ACCORDING TO THE
CONDOMINIUM DECLARATION
RECORDED UNDER RECORDING
NUMBER 20060608000615, AND
AMENDMENTS THERETO, IF ANY,
AND IN VOLUME 218 OF
CONDOMINIUMS, PAGE(S) 21
THROUGH 31, INCLUSIVE, IN KING
COUNTY WASHINGTON.

(The “Property”). Onyx’s lien arose out of unpaid condominium assessments, including assessments for common expenses. CP 347-350.

Neither Poon nor JPMorgan answered the lawsuit, and the superior court entered a default judgment on May24, 2012. CP 352-354. Among other relief, the superior court ordered that: Onyx could foreclose its lien and cause the Property to be sold at Sheriff’s sale; that the rights of Poon and JPMorgan, and of any person claiming through them, would be forever foreclosed by the Sheriff’s sale; and that the property would be subject to a one-year redemption period. CP 352-354. On June 20, 2012, the superior court entered an order of sale commanding the Sheriff to seize and sell the Property. CP 352-359.

The Sheriff conducted the sale on August 17, 2012. Condo Group was the high bidder at the sale, bidding \$35,000. CP 358-359.

B. Zion Services, LLC Redeemed The Property

Separate from the Onyx foreclosure proceedings, another condominium association, the Asia Homeowners Association (“Asia Association”), obtained a judgment against Poon on April 20, 2012 (the “Asia Judgment”). CP 361-364. The Asia judgment is subsequent in time to the lien on which Onyx foreclosed – it was obtained in April 2012, the

Onyx lien arose before March 2012. As discussed below, the holder of the Asia Judgment was a “redemptioneer” under Washington law.

The Asia Association assigned its judgment to DCR Services, LLC (“DCR”), and, shortly thereafter, DCR assigned the judgment to Zion. CP 286 and 291-294. On June 10, 2013, Zion gave notice to the King County Sheriff that it intended to redeem the Property pursuant to the Asia Judgment. CP 286-287 and 296-304. The redemption letter enclosed a copy of the Asia Judgment, a declaration from Gary DeBoer stating the amount due on the judgment, and a check for the Sheriff’s fee. Id. On June 14, 2013, Condo Group received a “Notice to Purchaser” from Deputy Esparza, along with Zion’s June 10 letter, informing Condo Group of Zion’s redemption. CP 287 and 306.

Rather than cooperate in redemption, Condo Group attempted to short circuit the redemption process. On June 17, 2013, it offered to pay the Asia Judgment and tendered a check to Zion purporting to be in satisfaction of the Asia Judgment. CP 287 and 306-07. Condo Group was not the debtor under the Asia Judgment, and was not acting as an agent of the debtor – it made the offer as a third-party stranger. Zion rejected Condo Group’s offer and instead opted to complete redemption. CP 287 and 367-368.

Zion tendered \$38,624.66 in redemption funds on June 28, 2013. CP 287 and 367-368. Because Condo Group refused to cooperate in redemption, Zion calculated this amount based on what it could reasonably determine would be due, the amount of Condo Group's bid plus calculated interest. Id. The tender of redemption funds completed all acts necessary for Zion to redeem. The Sheriff recognized the dispute between Zion and Condo Group and tendered the redemption funds to the Clerk of the King County Superior Court pending resolution of the dispute. CP 287 and 367-381.

C. JPMorgan Attempted To Redeem The Property

1. The JPMorgan Deed of Trust

In August 2006, well before the Onyx foreclosure, Poon executed a deed of trust against the Property in favor of Washington Mutual Bank, FA ("WaMu") securing repayment of an adjustable rate note. CP 383-405. JPMorgan is the successor-in-interest to the WaMu deed of trust as the purchaser of WaMu's loans and other assets from the Federal Deposit Insurance Corporation.

When Onyx brought suit to foreclose its lien for condominium assessments, it named JPMorgan as a defendant and sought extinguishment of JPMorgan's deed of trust. Either through a conscious

decision or its own negligence, JPMorgan failed to answer the complaint. The superior court entered a default judgment against JPMorgan and extinguished its lien against the Property. CP 352-354.

In most foreclosure cases, JPMorgan's deed of trust would not have been extinguished under these circumstances. Washington is generally follows the rule of "first in time is first in right," meaning that earlier liens usually have priority over later liens. But Washington law creates an exception for certain condominium liens. Condominium assessments for common area expenses incurred in the six months before the Sheriff's sale have "super priority" over mortgage lenders' deeds of trust. Therefore, when Onyx foreclosed its lien, it extinguished JPMorgan's earlier deed of trust.

2. JPMorgan's Attempted Redemption

On August 9, 2013, JPMorgan delivered notice to the Sheriff of its intent to redeem the Property pursuant to its deed of trust. CP 309-343. Condo Group opposed JPMorgan's redemption because JPMorgan is not a proper redemptioner, and Zion opposed the redemption for the same reason.

JPMorgan's deed of trust is from 2006, and is therefore prior in time to the lien on which the Property was sold. Under the redemption

statute as it existed at the time of the Sheriff's sale, a redemptioner was defined as "[a] creditor having a lien by . . . deed of trust . . . on any portion of the property . . . subsequent in time to that on which the property was sold.:" RCW 6.23.010(1)(b) (2012) (emphasis added). As discussed below, this statute excluded redemption by mortgage lenders such as JPMorgan because it referred to time, not priority. This was the rule in place at the time of the Sheriff's sale.

Nearly a year after the Sheriff's sale, on July 28, 2013, 5541.SL took effect, amending RCW 6.23.010(1)(b) to change ". . . subsequent in time. . ." to ". . .subsequent in priority. . ." 5541.SL, 63rd Leg., 2013 Regular Session (July 28, 2013 effective date) (emphasis added) ("5541.SL"). Because JPMorgan's lien is not subsequent in time, but is subsequent in priority, it bases its redemption primarily on this amendment. 5541.SL benefits JPMorgan only if it either a) applies retroactively, or b) if JPMorgan satisfied the definition of a redemptioner on July 28, 2013. JPMorgan did not satisfy the definition of a redemptioner on July 28, 2013, because the definition requires JPMorgan to be a creditor "having a lien by . . . deed of trust." JPMorgan had a lien by deed of trust, but that lien was extinguished on August 17, 2012.

When the new statute took effect, JPMorgan did not meet the definition of redemptioner.

V. ARGUMENT AND AUTHORITY

A. Standard Of Review

The Court reviews summary judgment orders de novo, performing the same inquiry as the superior court. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The superior court grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Morin v. Harrell, 161 Wn.2d 226, 230, 164 P.3d 495 (2007) (citing CR 56(c)).

It is the moving party's burden to demonstrate that summary judgment is proper. Atherton Condo. Apartment-Owners Assoc. Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The Court will consider all the facts submitted and the reasonable inferences from them in the light most favorable to the nonmoving party. Id. "Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion." Lilly v. Lynch, 88 Wn. App. 306, 312, 945 P.2d 727 (1997).

B. The Superior Court Erred In Holding That The Condo Group Could Compel Zion to Accept Its Offer To Satisfy The Asia Judgment

The issue presented by the dispute between Zion and Condo Group is straightforward – is a creditor required to accept an offer to satisfy a judgment from an entity that is not a party to the judgment and is not acting as the agent of the debtor? Condo Group claims the answer is yes. Even though it was not a party to the Asia Judgment and was not acting as the agent of the debtor, Condo Group claims it could compel Zion to accept its offer to satisfy the Asia Judgment, and the very fact of the offer, even though rejected, eliminated Zion’s redemption rights.

No dispute exists as to the material facts, or that Zion would be a redemptioner absent Condo Group’s attempted intervention. Zion provided notice of its intent to redeem before expiration of the redemption period, and provided all supporting documents required by RCW 6.23.080. Condo Group refused to provide a statement of the amounts due in redemption, so Zion tendered \$38,624.66 to the Sheriff – the \$35,000 paid at the Sheriff’s sale plus statutory interest. Zion satisfied the redemption statute by tendering the amount it could determine was due to redeem. See, e.g., Millay v. Cam, 135 Wn.2d 193, 199-204, 955 P.2d 791 (1998) (discussing generally the rule that one may not toll the redemption

period without delivering funds to the Sheriff, but that if the purchaser will not cooperate in redemption, the redemptioner need only tender the amounts that it can determine would be due). Zion completed all steps necessary to redeem and was entitled to a certificate of redemption unless Condo Group's offer to satisfy the Asia Judgment extinguished Zion's redemption rights.

If Condo Group is correct, it must be either because its position is true as a general matter of Washington law, or because the redemption statute confers this power on the purchaser at a Sheriff's sale, but neither is the case.

1. Washington Law Does Not Generally Permit Third Parties To Satisfy Debts Of Others

No Washington authority supports the position that a stranger to the creditor-debtor relationship can always force a creditor to accept an offer to satisfy a debt. Indeed, Condo Group did not advance such a general argument in the superior court. See, e.g., CP 448-455 and 88-90 (showing that Condo Group based its argument on the redemption statute). Providing such a power to a stranger to a transaction would make little sense.

In general, if one person gives another a gift, the recipient is free to accept or reject that gift. Had Condo Group offered \$4,500 to Zion without any conditions, Zion would unquestionably have had the right to accept the gift or reject it. By placing conditions on the acceptance of the gift – that Zion apply it in satisfaction of Poon’s debt – Condo Group’s offer becomes a contract proposal. It offers consideration of \$4,500 in exchange for the promise to apply the \$4,500 toward satisfying the Asia Judgment. See King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994) (discussing a contract as the bargained for exchange of consideration).

Zion, or any creditor, would certainly be free to accept such an offer, but it would also be free to reject such an offer. The contrary position borders on the absurd; a creditor would free to reject an unconditional gift, but forced to enter into a contract with someone who put the proper conditions on what would otherwise be a gift.

Because a stranger to a debt has no general authority to force a creditor to accept satisfaction of the debt, Condo Group’s claimed authority must come from the redemption statute. That statute, however, contains no such power.

2. The Redemption Statute Does Not Give The Purchaser At The Sherriff's Sale The Authority To Short Circuit Redemption By Offering To Satisfy Judgments

Condo Group acknowledges that the redemption statute does not expressly confer the right to eliminate redemption rights by offering to satisfy judgment liens against the Property. CP 448. The natural conclusion should be that if the statute does not create such a right, no such right exists. Condo Group instead argues that the statute's silence merely means this is "an issue of first impression in Washington" and that the Court is therefore free to read such a right into the statute. CP 449.

The redemption procedure "is a highly technical statutory scheme;" Summerhill Village Homeowners Ass'n v. Roughly, --- Wn. App. ---, 289 P.3d 645, 650 (2012) (published opinion for which the Wn. App. citation is not yet available) ("Summerhill"); and the statute speaks on the rights of purchasers, the redemption procedure, and the satisfaction of certain liens by the purchaser. In all of that, it does not mention any ability of a purchaser to prevent redemption by forcing a creditor to accept satisfaction of its lien.

As to the rights of purchasers, if a party redeems from the sale, the purchaser is entitled to receive the redemption amounts. RCW 6.23.070.

If a party files a notice of redemption, the purchaser is entitled to file documents substantiating the amount that should be paid in redemption. RCW 6.23.050, 080, and 090. If nobody redeems, the purchaser is entitled to receive a Sheriff's Deed to the property. RCW 6.23.060. Had the legislature wished to give the purchaser the right to eliminate redemption rights by satisfying the liens of redemptioners, it could have done so. It did not.

The statute also provides a detailed procedure for redemption:

- The person seeking to redeem gives at least five days' notice to the Sheriff along with evidence of the right to redeem – RCW 6.23.080(1)-(2);
- The Sheriff delivers notice of the intent to redeem to the purchaser – RCW 6.23.080(1);
- The purchaser has the opportunity to file or record any statements required to substantiate amounts due, and is obligated to provide an accounting of rents and expenses if one is requested – RCW 6.23.050, RCW 6.23.080, and RCW 6.23.090;

- Once the notice period expires, “the person seeking to redeem may do so by paying to the sheriff the sum required” – RCW 6.23.080(1);

- Once payment is made, “[t]he sheriff shall give the person redeeming a certificate stating the sum paid on redemption, from whom redeemed, the date thereof, and a description of the property redeemed” – RCW 6.23.080(1);

- Once the certificate of redemption is issued, the redemption period may be extended to allow successive redemptions – RCW 6.23.040(1) and (2);

- If no other individual redeems, the Sheriff issues a Sheriff’s Deed to the redemptioner – RCW 6.23.060.

The legislature could have included a step in the procedure for the purchaser to prevent redemption by satisfying the lien of the redemptioner. It did not.

Most importantly, in addressing the amount to be paid in redemption, the statute expressly notes the purchaser’s ability to pay certain liens. “The person who redeems from the purchaser must pay . . . any sum paid by the purchaser on a prior lien or obligation secured by an

interest in the property to the extent the payment was necessary for the protection of the interest of the judgment debtor or a redemptioner . . .”

RCW 6.23.020(2)(c). The statute expressly discusses payment of prior liens to protect judgment debtors or redemptioners, but is conspicuously silent as to payments made on subsequent liens to protect the interests of the purchaser.

One of the primary roles of the redemption statute is to define who may redeem and to define the rights and responsibilities of parties in a redemption. That the statute meant to confer upon the purchaser to eliminate the redemption rights of creditors, but completely failed to mention such a right, strains credulity.

Once Zion delivered the notice of intent to redeem to the Sheriff, it initiated the redemption procedure. Condo Group had a number of rights under the redemption statute, but eliminating Zion’s redemption rights by offering to satisfy Zion’s lien was not among those rights. The statute’s silence on the matter should not be seen as an invitation to invent such a right, but an expression that the legislature did not intend to create such a right.

3. Colorado Courts Have Adopted Zion's Position

Although very few states have addressed involuntary termination of redemption rights in any detail, Colorado has extensively addressed the issue. Through three cases, Colorado has adopted the rule that a purchaser at a Sheriff's sale generally "has no such interest in the property as would entitle it to pay off a subsequent judgment without the consent of the judgment creditor." Davis Mfg. and Supply Co. v. Coonskin Properties, 646 P.2d 940, 944 (Colo. 1982) ("Davis"). The one exception to this rule is when a purchaser at a Sheriff's sale obtains a quit claim deed from the original owner before satisfying liens. In that case, the quit claim deed makes "the purchaser the owner even before issuance of the public trustee's deed" and there is no question that the owner of property may satisfy liens against the property. Id. The Colorado rule, and its exception, is developed through three primary cases.

First, in Plute v. Schick, 101 Colo. 159, 161 (Colo. 1937), a case relied on by Condo Group, Schick purchased property at Sheriff's sale, and then obtained a quit claim deed from the judgment debtor/owner. Id. at 160-61. The plaintiff attempted to redeem the property based on a judgment, and Schick attempted to prevent redemption by tendering

\$101.20 in satisfaction of the judgment. The court concluded that Schick had the right to prevent redemption by satisfying the judgment. Id. at 162.

Although the court in Plute did not address the quit claim deed, in Davis, a subsequent case, the Colorado Supreme Court limited Plute to situations involving quit claim deeds or similar conveyances from the debtor to the purchaser. In Davis, that court held that once the purchaser obtained a quit claim deed, it “made the purchaser the owner even before issuance of the public trustee’s deed.” Davis, 646 P.2d at 944. Because the purchaser in Plute became the owner of the property, there was no question that he could satisfy judgment liens against the property. Because Condo Group did not obtain a quit claim deed, Plute is not applicable here.

Davis, on the other hand, is almost identical to the instant case. In Davis, RETAserv purchased property at a Sheriff’s sale. Davis, 646 P.2d 940, 942. On the final day of the redemption period, Mayer, a judgment creditor, filed his notice of intent to redeem. Id. After Mayer delivered notice, but before he paid the redemption amount, RETAserv tendered funds in an attempt to satisfy Mayer’s judgment and prevent redemption. Id. Mayer refused the tender and asked the court for an order permitting

its redemption. Id. Unlike in Plute, RETAserv did not obtain a quit claim deed from the judgment debtor.

The court held that the purchaser at the Sheriff's sale has no ability to prevent redemption by satisfying the judgments of third parties. It noted that "[T]he holder of a certificate of purchase on an execution sale acquires only the alternative rights to receive the redemption money, in case of a redemption, or a deed for the land after the time for redemption has expired." Id. at 944. "Therefore, RETAserv had no such interest in the property as would entitle it to pay off a subsequent judgment without the consent of the judgment creditor. It had no right to prevent a judgment creditor from exercising his right of redemption." Id. (Emphasis added, internal quotations omitted). It distinguished Davis from Plute on the grounds that obtaining a quit claim deed in Plute made the purchaser the owner, and the owner always has the right to satisfy liens against his property.

Davis presents the same situation as the instant case. Condo Group purchased the Property at Sheriff's sale. After Zion delivered notice of intent to redeem, but before it tendered redemption funds, Condo Group attempted to prevent redemption by satisfying the judgment. Zion rejected

Condo Group's tender. The result should be the same – Condo Group had no right to prevent Zion from exercising its right of redemption.

Finally, Colorado recently addressed a situation that combined elements of Plute and Davis in WYSE Financial Services, Inc. v. Nat. Real Estate Inv., 92 P.3d 918 (Colo. 2004) (“WYSE”). In WYSE, the purchaser at the Sheriff's sale, Realamerica, received authority to act as the agent for the original judgment debtor, and then attempted to prevent redemption by satisfying a redemptioner's lien. However, the purchaser did not attempt to satisfy the judgment until after the judgment creditor had already tendered redemption funds. WYSE, 92 P.3d at 919. The court held that once redemption funds had been tendered, the judgment creditor's right to a certificate of redemption is “necessarily unaffected by Realamerica's later attempts to satisfy the judgment, however successful.” Id. at 923. This decision further limits Plute, as it held that even when a purchaser has authority to act on behalf of the judgment debtor, as in Plute, it cannot unwind a redemption that is already final.

Taken together, Colorado courts have addressed three scenarios in which the purchaser attempts to prevent redemption by satisfying a judgment. Plute – a purchaser may prevent redemption by satisfying judgments if it first obtains a quit claim deed from the original judgment

debtor. Davis – a purchaser may not prevent redemption by satisfying judgments after delivery of a notice of redemption if it has not first obtained a quit claim deed. WYSE – a purchaser may not prevent redemption by satisfying a judgment after redemption is complete, even if the purchaser had authority to act on behalf of the original judgment debtor.

Colorado has created a comprehensive and rational scheme for addressing attempts by purchasers to preempt redemption. Zion encourages this Court to follow Colorado's lead and adopt the same rule.

Zion gave notice of its intent to redeem. After Zion gave notice, but before it tendered the redemption funds, Condo Group attempted to prevent redemption by satisfying Zion's judgment. Condo Group did not first obtain a quit claim deed from the original judgment debtor. This case is therefore analogous to Davis, and Condo Group's attempt to preempt redemption should fail. Because the superior court entered judgment in favor of Condo Group on this point, Zion respectfully requests that this Court reverse that decision.

C. JPMorgan Was Not A Proper Redemptioner

In addition to holding that Zion could not redeem, the superior court erred in holding that JPMorgan was a proper redemptioner. Because

JPMorgan's redemption rights affect Zion's right of redemption, it is necessary to address the superior court's decision with respect to JPMorgan as well.

JPMorgan bases its redemption on its 2006 Deed of Trust. There is no dispute that under the law as it existed on August 17, 2012, the date of the Sheriff's sale, JPMorgan was not a redemptioner. At that time, the statute defined a redemptioner as a creditor having a lien that is "subsequent in time" to the lien on which the property was sold. Because the Deed of Trust is dated 2006, and the lien for condominium assessments arose in 2012, the Deed of Trust was not "subsequent in time" and JPMorgan was not a redemptioner. See, e.g., Summerhill, 289 P.3d 645 (holding that the language of the redemption statute is unambiguous, that subsequent in time refers to the respective dates of the liens, not to priority, and that a lender whose prior lien is foreclosed does not have redemption rights); see also, BAC Home Loans Servicing, LP v. Fulbright, 174 Wn. App. 352, 298 P.3d 779 (2013) ("Fulbright").²

Instead, JPMorgan argues that it has redemption rights based on an amendment to the redemption statute that took effect on July 28, 2013,

² This issue is currently on appeal to the Supreme Court in Fulbright, but as of the date of this brief, no decision has been made reversing the appellate court's decision.

5541.SL. The legislature amended RCW 6.23.010 to define a redemptioner as a creditor having a lien “subsequent in priority” rather than “subsequent in time.” JPMorgan argues that it satisfies this definition, and that it should be allowed to redeem under the amended statute, either because the amendment is retroactive, or because it did not attempt to redeem until after the effective date of the amendment and the amendment applies to the unexpired portion of the redemption period. Both arguments fail.

1. The Amendment Is Not Retroactive

After the Sheriff’s sale, but before JPMorgan’s attempted redemption, the legislature passed 5541.SL, amending RCW 6.23.010(1)(b) to define a redemptioner as “[a] creditor having a lien by . . . deed of trust . . . subsequent in priority to that on which the property was sold.” 5541.SL took effect on July 28, 2013.

Washington has a strong policy against retroactive application of new laws. “As a general proposition, courts disfavor retroactivity.” Densley v. Department of Retirement Systems, 162 Wn.2d 210, 223, 173 P.3d 885 (2007). “A statute is presumed to operate prospectively unless the Legislature indicates that it is to operate retroactively.” State v. T.K., 139 Wn.2d 320, 329, 987 P.2d 63 (1999). The presumption against

retroactivity “can only be overcome if (1) the Legislature explicitly provides for retroactivity; (2) the amendment is curative; or (3) the statute is remedial.” Densley, 162 Wn.2d at 223 (internal quotations and citations omitted) (emphasis added). None of these exceptions apply here.

a. The Legislature Did Not Expressly Provide For Retroactivity

In its entirety, 5541.SL reads as follows:

Sec. 1. RCW 6.23.010 and 1987 c 442 s 701 are each amended to read as follows:

- (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 the 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 on any portion of any part thereof, separately sold, subsequent in ~~((time))~~ priority 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.

The first Densley exception requires an explicit statement by the legislature that the statute is retroactive. Densley, 162 Wn.2d at 223. No such statement exists in 5541.SL.

b. The Amendment Is Not Curative

“An amendment is curative only if it clarifies or technically corrects an ambiguous statute.” In re F.D. Processing, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). Where the statutory language is unambiguous “the court presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied.” Id. at 462.

5541.SL is not curative because, before the legislature adopted the amendment, the courts had already held that “the language of [RCW 6.23.010(1)(b)] is unambiguous.” Summerhill, 289 P.3d at 649 (emphasis added). Because the statute was not ambiguous, the amendment cannot be curative.

Further, the change cannot be curative because even if the term “time” was ambiguous, the amendment did not clarify the meaning of the word time, it replaced it with an entirely new standard – priority. Although priority and time are frequently related, that relation is not necessary, it is merely incidental. The legislature could adopt new lien

priority rules that used a standard completely independent from time, with the result being that the redemption statute would also become completely independent from time. Whether “time” was ambiguous or not, the old statute was completely dependent on time, the new statute is not.

Changing the meaning of a statute is not a clarification and cannot be curative.

c. The Amendment Is Not Remedial

A remedial amendment is one that “relates to practice, procedure, or remedies, and does not affect a substantive or vested right.” In re F.D. Processing, 119 Wn.2d at 462-63. The amendment to the redemption statute is not remedial because RCW 6.23.010 confers substantive rights.

The Supreme Court has addressed the substantive nature of RCW 6.23.010, holding that “[t]he redemption statute involves a number of provisions, some of which confer a statutory right, e.g., RCW 6.24.130 [now codified as RCW 6.23.010] and some of which establish a procedure by which that right is perfected.” GESA Federal Credit Union v. Mutual Life Ins. Co. of NY, 105 Wn.2d 248, 254-55, 713 P.2d 728 (1986); see also, Fidelity Mutual v. Mark, 112 Wn.2d 47, 55, 767 P.2d 1382 (1989) (holding that the right to redeem is a substantive right).

Because the Supreme Court held that the right to redeem conferred by RCW 6.23.010 is a substantive right, amendments that affect the right to redeem cannot be remedial.

The amendment to the redemption statute does not explicitly provide for retroactivity, is not curative, and is not remedial. The amendment does not apply retroactively.

2. JPMorgan Cannot Benefit From Prospective Application of 5541.SL

Because 5541.SL does not apply retroactively, JPMorgan instead must rely on prospective application. The amendment took effect on July 28, 2013, and JPMorgan did not attempt to redeem until after the amendment took effect. Under this argument, retroactive application is unnecessary, because JPMorgan was a redemptioner at the time it redeemed.

This argument fails because it overlooks the actual language of the redemption statute and the amendment. JPMorgan wants the statute to define a redemptioner as “a creditor who, at the time of the sheriff’s sale, had a lien by deed of trust against the property that is subsequent in priority to the lien on which the property was sold.” In that case, JPMorgan could argue that this definition should apply to the remainder of

the redemption period, and that it met this definition at the time it redeemed.

That is not, however, what the amended redemption statute actually says. The amended statute defines a redemptioner as “[a] creditor having a lien by . . . deed of trust . . . on any portion of the property . . . subsequent in priority to that on which the property was sold.” RCW 6.23.010 (emphasis added). Under the amended statute, it does not matter whether JPMorgan had a deed of trust against the Property at the time of the Sheriff’s sale; it matters whether JPMorgan has a deed of trust against the Property at the time its redemption rights are determined.

The difference between having a deed of trust and having had a deed of trust is usually not material under the redemption statute; everyone’s liens get extinguished at the Sheriff’s sale and are simultaneously replaced by a right of redemption. In this case, however, because the amendment is not retroactive, JPMorgan cannot rely on the definition of redemptioner at the time of the Sheriff’s sale, it must look to the effective date of the amendment to determine its redemption rights.

There is no dispute that on July 28, 2013, JPMorgan was not “[a] creditor having a lien by . . . deed of trust.” JPMorgan was named as a defendant in the underlying lawsuit. It failed to answer the lawsuit, either

willfully or through its own negligence, and the superior court entered a default judgment. The superior court ordered the Property sold at Sheriff's sale, and ordered that JPMorgan's lien was inferior to the lien of foreclosure. The Sheriff's sale therefore extinguished JPMorgan's lien. See, e.g., Summerhill, 289 P.3d at 648 (holding that ". . . under the statute, Summerhill's 2008 assessment lien had priority over the 2006 Deed of Trust to the extent of Summerhill's assessments for common expenses . . . The sale extinguished the 2006 deed of trust.").

JPMorgan's lien was extinguished on August 17, 2012. The redemption statute was amended on July 28, 2013. Even if the amended definition applies to the remainder of the redemption period, JPMorgan did not satisfy that definition at any point after the amendment took effect. JPMorgan is not a redemptioner under the amended statute.

3. Summary

JPMorgan was not a redemptioner under the pre-amendment version of RCW 6.23.010. The amendment to RCW 6.23.010 is not retroactive. When the amendment to RCW 6.23.010 did take effect, JPMorgan no longer met the definition of a redemptioner. JPMorgan was not a proper redemptioner, and the superior court erred in granting summary judgment in its favor.

VI. CONCLUSION

Zion was a proper redemptioner and completed all steps necessary to redeem. Condo Group had no ability to eliminate Zion's redemption rights by offering to satisfy the Asia Judgment. Zion was entitled to receive a certificate of redemption.

JPMorgan was not a proper redemptioner. It was not a redemptioner under the pre-amendment version of RCW 6.23.010, the amendment does not apply retroactively, and JPMorgan did not meet the definition of a redemptioner after the amendment took effect. JPMorgan should not have been permitted to redeem.

For these reasons, Zion respectfully requests that:

1. This Court reverse the superior court's Order on Cross-Motions for Summary Judgment of the Plaintiff, JPMorgan Chase Bank, N.A., the Defendant, The Condo Group, LLC, and the Defendant, Zion Services, LLC granting Condo Group's motion for summary judgment against Zion;

2. This Court reverse the superior court's Order on Cross-Motions for Summary Judgment of the Plaintiff, JPMorgan Chase Bank, N.A., the Defendant, The Condo Group, LLC, and the Defendant, Zion

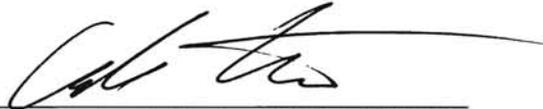
Services, LLC denying Zion's motion for summary judgment against Condo Group and JPMorgan;

3. This Court reverse the superior court's Order on Cross-Motions for Summary Judgment of the Plaintiff, JPMorgan Chase Bank, N.A., the Defendant, The Condo Group, LLC, and the Defendant, Zion Services, LLC granting JPMorgan's motion for summary judgment; and

4. This Court reverse the superior court's Order Granting JPMorgan Chase Bank, N.A. Summary Judgment.

DATED this 27th day of February, 2014.

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CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 27th day of February, 2014, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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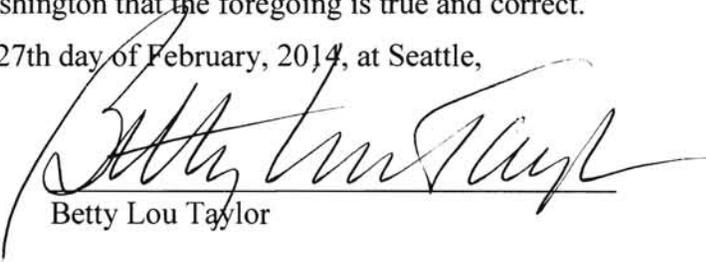
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 27th day of February, 2014, at Seattle, Washington.


Betty Lou Taylor