

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

No. ~~705920~~ 71618-2

BONITA LYON, a married woman, as her separate property,
Appellant,

vs.

QUALITY LOAN SERVICES OF WASHINGTON; ET AL.,
Respondents

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

REPLY BRIEF OF APPELLANT

BONITA LYON, Appellant Pro se
16652 - 19TH PL. SE
RENTON, WA 98058
(425) 985-8731

COURT OF APPEALS
DIVISION I
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[Signature]

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I ARGUMENT

According to decades-old decisions of both the Supreme Court of Washington and the United States Supreme Court, Respondents Citibank NA (“Citibank”) and Quality Loan Services of Washington’s (“Quality’s”) decision to “voluntarily” discontinue the foreclosure proceeding that is the subject of this litigation (“FP2”) did not “moot” the preliminary injunction that had earlier been granted by the trial court. Therefore, the trial court’s ruling notwithstanding, the preliminary injunction should have remained in force after Respondents discontinued FP2, and summary judgment in favor of Respondents should have been denied.

A. *Rabon v. City of Seattle*, 135 Wn.2d 278 (1998).

In deciding whether to grant, deny or dissolve a preliminary injunction, the trial court necessarily must decide the merits of the purely legal issues in the case, whether or not the court simultaneously decides the case on its merits. *Rabon v. City of Seattle*, 135 Wn.2d 278, 285-86 (1998). Similarly, in reviewing a trial court’s decision, the reviewing court must *independently* decide the purely legal issues in the case. *Id.*

Whether the preliminary injunction issued by the trial court in this case became moot as a result of Respondents Quality and Citibank’s decision to discontinue FP2 is a purely legal issue. Thus, this court has the right to independently determine whether the

preliminary injunction issued by the trial court became moot as a result of Respondents' discontinuance of FP2. *Id.* at 301.

B. *State v. Ralph Williams' Northwest Chrysler*, 82 Wn.2d 265, 510 P.2d 233 (1973).

In *State v. Ralph Williams' Northwest Chrysler*, 82 Wn.2d 265, 510 P.2d 233 (1973) ("*Williams*"), the Washington Supreme Court analyzed the "mootness" issue under a set of facts and circumstances that were much more favorable to the *Williams* defendants than the facts and circumstances of this case are to Respondents.

First, in *Williams*, a preliminary injunction never issued. Defendants went out of business in Washington *before* the *Williams* trial court decided the issue. On motion of defendants, before taking any testimony in the case, the trial court dismissed the case and, in pertinent part, held: "(1) the state's action was moot because North West was 'an inactive, defunct, corporate shell'; and (2) issuance of an injunction would not be appropriate because defendants were unlikely to return to business in the state. . . ." *Id.* at 268. The Supreme Court disagreed. It found the trial court still had authority to issue a preliminary injunction and should have done so. *Id.*

In the case before this court, by contrast, the preliminary injunction *had been in place for almost four months* before Respondents "voluntarily" discontinued FP2. Yet, the trial court, without giving the slightest consideration to the primary factors – enumerated and discussed below -- mandated by *Williams*, summarily found it lacked authority to maintain the preliminary injunction in place.

Second, because Ralph Williams Northwest Chrysler ("*Williams Chrysler*") had gone out of business prior to issuance of the preliminary injunction, the activities

complained against by the Attorney General (“AG”) were no longer being conducted in Washington by Williams Chrysler. The trial court specifically found there was very little chance the activities complained against could ever be repeated. *Id.* at 270.

In the case before this court, on the other hand, Respondent’s Citibank and Quality are active corporations in Washington and have been continuously conducting business in the state for many years. Not only are Respondents capable of repeating the conduct complained against, but, given their statements before the lower court that the conduct was lawful under the Washington Deed of Trust Act, they are very likely to repeat it.

In *Williams*, after thoroughly reviewing the lower court proceedings, the Washington Supreme Court reversed the trial court on all grounds and remanded the case for trial. *Id.* In reversing, the Court referred liberally and with unqualified approval to earlier US Supreme Court decisions that initially established and subsequently confirmed, repeatedly, the three prime factors that must be considered in determining whether a request for preliminary injunction has been mooted, or an existing preliminary injunction must be dissolved, under federal law.¹ The Court made clear that the same factors control determination of these questions in Washington. *Id.* at 271 – 272.

a. Voluntary cessation does not moot a preliminary injunction because there is a likelihood of repetition.

As in federal cases, state courts are required to review “all of the facts and circumstances” before denying an injunction request, or dissolving an existing

¹ *United States v. Oregon State Medical Soc’y*, 343 U.S. 326, 96 L. Ed. 978, 72 S. Ct. 690 (1952) (“It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption”); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 4 L. Ed. 2d 505, 805 Ct. 503 (1960) (“A trial court’s wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit.”).

preliminary injunction, on grounds of voluntary discontinuance of the illegal practices.

Id. The facts and circumstances given the most consideration are: (1) the timing of cessation of the illegal practices complained against; (2) the degree to which the facts and circumstances indicate defendant voluntarily discontinued the illegal practices; and (3) the general attitude of defendant about cessation of the practices. *Id.* at 272-273.

The *Williams* court ruled that “mootness” exists only where the facts and circumstances clearly establish that the “wrongful behavior could not reasonably be expected to recur;” stating, “voluntary cessation of allegedly illegal conduct *does not moot a case* because there is still a likelihood of the illegal conduct recurring.” *Id.* at 272. Additionally, the Court stated that parties claiming voluntary abandonment of illegal practices *subsequent to* institution of a lawsuit have a heavier burden of proof than those who claim to have voluntarily abandoned such practices *prior to* the institution of a lawsuit. *Id.* Because the *Williams* defendants, barring issuance of an injunction, could not have been prevented from reentering the state and resuming the identical business practices, the court found the fact defendants were currently out of business in the state *did not* moot the AG’s preliminary injunction request. *Id.* at 272-273.

b. The three primary decisional factors.

The holding in *Williams* is controlling in this case. Consequently, to properly determine whether the preliminary injunction became moot as a result of Respondents’ discontinuance of FP2, the trial court was required to consider: (1) the timing of Respondents’ discontinuance of FP2; (2) the degree to which the facts and circumstances of the case indicate Respondents voluntarily discontinued FP2; and (3) the general attitude of Respondents about discontinuance of FP2.

The trial court did not give a moment's consideration to any one of these three factors. This fact, standing alone, is sufficient basis for reversal of the trial court's summary judgment ruling on the preliminary injunction issue. But the appropriateness of reversing the trial court's ruling becomes even more apparent when the three factors are actually applied to the facts and circumstances of this case.

c. Application of three primary decisional factors to this case.

1. Timing of Quality's discontinuance of FP2.

In a letter dated April 5, 2013, Appellant provided Respondents a very detailed explanation of the reasons why FP2 was illegal. The heading of the letter read, **"URGENT!!! GET THIS LETTER TO YOUR LAWYERS AS SOON AS POSSIBLE!!!"** The body of the message, spelled out, in great detail, the illegality of commencing FP2 while the initial foreclosure proceeding was still active. It included the following passage, "Quality has no legal basis to continue this sale. If I am wrong, please provide that legal basis in a return correspondence by Tuesday, April 9, 2013 at 5:00 pm, *and I will not sue.*" I practically begged Respondent Quality to discontinue the sale.

Respondent Quality did not afford me the courtesy of a response to the letter. Accordingly, on April 10, 2013, as promised, I sued. Four months later, Respondent Quality discontinued FP2. Other than filing the lawsuit, nothing occurred between April 10, 2013 and August 1, 2013 that made discontinuing FP2 on August 1, 2013 any more justifiable than discontinuing FP2 on April 9, 2013 would have been. The only reasonable explanation for Respondents' discontinuance of FP2 on August 1st, is the

rapid approach of trial and the consequent inevitability of a determination on the merits of Appellant's request for a permanent injunction.

As the first paragraph in this section indicates, Respondents were given every opportunity to prevent the filing of this lawsuit simply by discontinuing FP2. Instead, Respondents waited until nearly four months after the lawsuit had been filed to "voluntarily" discontinue FP2. Then, after explaining that I had gotten all of the relief I requested, and ridiculing me for refusing to walk away thankful, the trial court granted Respondents' summary judgment motion.

2. Respondents' did not "voluntarily" discontinue the foreclosure.

In *Williams*, the Supreme Court clearly states that a respondent who abandons illegal activity *after* commencement of a lawsuit has a heavier burden of proof concerning the "voluntariness" of his actions than a respondent who abandons such activity *before* commencement of suit. If abandonment occurs after commencement of suit, respondent must provide facts and circumstances that support the benignity of his abandonment of the illegal activity. Even then, if the illegal activity is capable of repetition, an injunction request is not moot and should be granted, or an existing injunction should be continued in force.

In the case before this court, Respondents offered no explanation for refusing to discontinue FP2 *before* Appellant filed suit. Nor did Respondents offer any explanation for waiting almost four months after the lawsuit was initiated to discontinue FP2. Under these circumstances, the only reasonable explanation for Respondents' discontinuance of FP2 is the pressure of this lawsuit.

Appellant has had to spend a tremendous amount of time, effort, and financial resources to stop a foreclosure that Respondents were given every opportunity to stop, and that should have been stopped, before the lawsuit commenced. Moreover, in the absence of the issuance of a permanent injunction, Respondents are free to continue these nefarious practices, unobserved by the court, against other ordinary people who are ignorant of the WDTA's requirements.

3. Attitude of Respondents upon discontinuing the conduct.

Respondents have insisted from the outset of this litigation that their conduct is legal:

The thrust of Plaintiff's Complaint is that Quality was advancing a foreclosure sale under the Second Notice of Sale while the First Notice of Sale was still pending and that therefore, the second sale should have been enjoined.

As a matter of law, the sale under the First Notice of Sale lapsed and Quality was only advancing the sale under the Second Notice of Sale. A sale which never occurred and which was never continued under a Notice of Trustee's Sale terminates by operation of law under RCW §61.24.040(6) which specifies the precise methods for continuing a sale if it is not conducted on the noticed sale date. If, as in the instant case, the sale is neither conducted on the noticed date nor continued pursuant to the provisions of RCW §61.24.040(6), it is terminated as a matter of law. Furthermore, a sale under a notice of sale must be conducted within 120 days of the initial sale date. The notice expires, by operation of law after the 120th day. *Id.*

Here the sale was neither conducted nor continued under the First Notice of Sale on the initial sale date of December 7, 2012 at which point it terminated as a matter of law. There was no requirement that it be discontinued under RCW 61.24.090(6). With the termination of the December 7th sale under the First Notice of Sale, Quality recorded the Second, December 18th, Notice of Sale. Consequently, only one sale was being advanced at one time, the First Sale under the First Notice of Sale until December 7, 2012 and the Second Sale under the Second Notice of Sale as of December 18, 2012.

Thus, Plaintiff's assertions that Quality was advancing two sales at the same time are not supported by fact.

Quality's Motion for Summary Judgment at 7: 4 – 23.

The above-quoted position conveniently ignores the fact that, in a non-owner-occupied residential foreclosure, the transmission of a new notice of default (“NOD”) is the first step in the foreclosure proceeding (RCW 61.24.030(8)), not the recording of a new notice of trustee’s sale (“NOTS”). In this case, the NOD that was the antecedent of the second NOTS, and that marked the commencement of FP2, was transmitted on October 4, 2012, less than three months *after* the first NOTS was filed and two months *before* the sale date set by the first NOTS.

The quote also evidences Respondent’s belief in the legality of its conduct in this matter. Since Respondent believes the conduct is legal, why, in the absence of court restraint, would it not repeat the conduct?

Despite Respondent’s “voluntary” discontinuance of the foreclosure proceeding, the preliminary injunction was not moot and should have remained in place.

C. Walker v. Quality Loan Service Corp. of Washington

As Appellant was preparing this Reply, the existence of this court’s decision in *Walker v. Quality Loan Service Corporation of Washington*, No. 65975-8-I (2014) was brought to Appellant’s attention for the first time. The following very reasonable statement is found in *Walker*:

Only a lawful beneficiary has the power to appoint a successor trustee, and only a lawfully appointed successor trustee has the authority to issue a notice of trustee’s sale. Accordingly, when an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale.

Walker at 7.

And this Court goes on to state:

Walker alleges that MERS never held his note and, therefore, never had authority to act as beneficiary under the DTA. He further alleges that Select derived its authority to act from MERS's assignment and Quality derived its authority to foreclose from Select. Thus, he argues that Select had no authority to proceed with a nonjudicial foreclosure and violated the DTA by starting one. He also claims that Select violated the DTA by appointing Quality as successor trustee and by recording an appointment before MERS purported to assign his note to Select. For purposes of this appeal, we must accept Walker's factual allegations as true. *If proved, these allegations would establish material violations of the DTA.*

Id., at 10.

In the case before this Court, MERS assigned Appellant's note and deed of trust to Respondent Citibank. A true and correct copy of the Corporate Assignment of Deed of Trust is attached hereto as Appendix A and is incorporated herein by this reference. Respondent Citibank in turn appointed Respondent Quality the successor trustee. A true and correct copy of the Appointment of Successor Trustee is attached hereto as Appendix B and is incorporated herein by this reference.

When applied to this case, the holding in *Walker* indicates MERS had no legal authority to assign Appellant's note and deed of trust to Citibank because MERS never held Appellant's note and therefore was never the beneficiary of Appellant's deed of trust. Accordingly, Respondent Citibank never obtained lawfully authority to appoint Respondent Quality the successor trustee; and, consequently, Quality never obtained lawful authority to record a notice of trustee's sale. For this independent reason, the foreclosure was unlawful from the start and should have been discontinued at Appellant's request. This entire lawsuit has been completely unnecessary.

CONCLUSION

Because Appellant's note has never been lawfully assigned to Respondent Citibank, upon remand, the trial court, among other requirements, should be ordered to: (1) summarily determine that Respondent Citibank is not the note holder; (2) order the funds that were placed in the registry of the court returned to Appellant; (3) issue a permanent injunction preventing Respondents from conducting simultaneous foreclosures ever again; and (4) order the case to proceed to trial on the issue of damages.

Respectfully submitted,



By: Bonifa Lyon, Pro Se

APPENDIX A

When Recorded Return To:
CHASE
P.O. BOX 8000
MONROE, LA 71203

10692375 CORPORATE ASSIGNMENT OF DEED OF TRUST

Loan #: 0015542921

--- CONTACT JPMORGAN CHASE BANK, N.A. FOR THIS INSTRUMENT 780 KANSAS LANE, SUITE A, MONROE, LA 71203, TELEPHONE # (866) 756-8747, WHICH IS RESPONSIBLE FOR RECEIVING PAYMENTS.

FOR GOOD AND VALUABLE CONSIDERATION, the sufficiency of which is hereby acknowledged, the undersigned, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") AS NOMINEE FOR PACIFIC COMMUNITY MORTGAGE, INC., ITS SUCCESSORS AND ASSIGNS, (ASSIGNOR), (MERS Address: P.O. Box 2026, Flint, Michigan 48501-2026) by these presents does convey, grant, sell, assign, transfer and set over the described deed of trust together with the certain note(s) described therein together with all interest secured thereby, all liens, and any rights due or to become due thereon to CITIBANK, N.A. AS TRUSTEE FOR BEAR STEARNS ALT-A TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-5, WHOSE ADDRESS IS 700 KANSAS LANE, MC 8000, MONROE, LA 71203 (866)756-8747, ITS SUCCESSORS OR ASSIGNS, (ASSIGNEE)

Said Deed of Trust is dated 06/07/2006 and executed by BONITA D. LYON and recorded in Book n/a page n/a and/or Instrument# 20060614002058 in the office of the Recorder of KING County, WA.

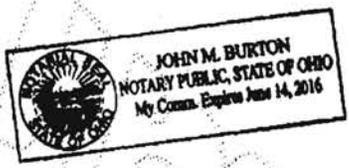
Dated on 10/25/2011 (MM/DD/YYYY)
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") AS NOMINEE FOR PACIFIC COMMUNITY MORTGAGE, INC., ITS SUCCESSORS AND ASSIGNS

By: *Tonia Y. McFaction-Williams*
Tonia Y. McFaction-Williams
Assistant Secretary

STATE OF OHIO COUNTY OF FRANKLIN

The foregoing instrument was acknowledged before me on 10/25/2011 (MM/DD/YYYY) by Tonia Y. McFaction-Williams as Assistant Secretary of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") AS NOMINEE FOR PACIFIC COMMUNITY MORTGAGE, INC., ITS SUCCESSORS AND ASSIGNS, who, being authorized to do so, executed the foregoing instrument for the purposes therein contained. He/she/they is (are) personally known to me.

John M. Burton
John M. Burton
Notary Public - State of OHIO
Commission expires: 06/14/2016



Document Prepared By:
E. Lance/NTC, 2100 Alt. 19
North, Palm Harbor, FL
34683 (800)346-9152

JPCFA 14936446 -- EMC DP3327886 MIN 100121700060504393 MERS PHONE 1-888-679-MERS
FRMWA1



APPENDIX B

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WHEN RECORDED RETURN TO:

**QUALITY LOAN SERVICE CORP.
2141 5TH AVENUE
SAN DIEGO, CA 92101**

ORDER NO: 110185843

APPOINTMENT OF SUCCESSOR TRUSTEE

GRANTOR: BONITA D LYON

**GRANTEE: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE
FOR PACIFIC COMMUNITY MORTGAGE, INC. A CALIFORNIA CORPORATION**

APPOINTMENT TRUSTEE: QUALITY LOAN SERVICE CORPORATION OF WASHINGTON

ABBREVIATED LEGAL: LOT 12 BLK 2 VIOLA RIGBY ADD, VOL. 56 PG. 77

APN: 7318000140

DEED OF TRUST: 20060614002058

FILE NO: WA-10-402492-SH

LOAN# N/A

AND WHEN RECORDED MAIL TO:

Quality Loan Service Corp
19735 10th Avenue NE
Suite N-200
Poulsbo, WA 98370

Appointment of Successor Trustee

File No. 0015542921

Commonwealth Land Title Co of Puget Sound, LLC
CB

BONITA D. LYON is/are the grantor(s). ~~COMMONWEALTH TITLE OF PUGET SOUND LLC~~ is the trustee and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR PACIFIC COMMUNITY MORTGAGE, INC. is the beneficiary under that certain deed of trust dated June 7, 2006 and recorded on June 14, 2006 under King County, Washington Auditor's File No. 20060614002058.

* A California Corporation

The present beneficiary under said deed of trust appoints Quality Loan Service Corporation of Washington, a Washington corporation, whose address is 19735 10th Avenue NE, Suite N-200, Poulsbo, WA 98370, as successor trustee under the deed of trust with all powers of the original trustee.

Said deed of trust Encumbers the real property described as:

See attached

*Citibank, N.A. as Trustee for Bear Sterns ALT-A Trust, Mortgage Pass-Through Certificates, Series 2006-5

By *Carmen Burton*
Vice President

STATE OF Ohio)
)ss
COUNTY OF Franklin)

*JPMorgan Chase Bank NA
as Attorney-in-Fact for

I certify that I know or have satisfactory evidence that *Carmen Burton* is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the Vice President of JPMorgan Chase Bank, National Association to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: 11-14-11

Judy M. Kee
Notary Public in and for the State of Ohio
Residing at 370 S. Cleveland Ave Westerville, OH 43081
My appointment expires 4-14-2015

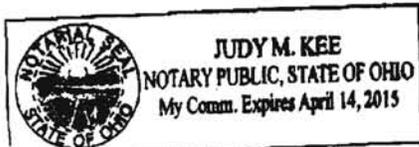


EXHIBIT A

REF.: WA-10-402492-SH

LOT 12 IN BLOCK 2 OF VIOLA RIGBY ADDITION, AS PER PLAT RECORDED IN VOLUME 56 OF PLATS, PAGE 77, RECORDS OF KING COUNTY AUDITOR;

EXCEPT THAT PORTION THEREOF LYING WITHIN OLD MILITARY ROAD AS SAID ROAD EXISTED PRIOR TO IT'S RELOCATION

AND EXCEPT THAT PORTION CONVEYED TO THE CITY OF SEATAC BY INSTRUMENT RECORDED UNDER RECORDING NO. 20060420000644.

SITUATE IN THE CITY OF SEATAC, COUNTY OF KING, STATE OF WASHINGTON.

NOTE FOR INFORMATIONAL PURPOSES ONLY:

THE FOLLOWING MAY BE USED AS AN ABBREVIATED LEGAL DESCRIPTION ON THE DOCUMENTS TO BE RECORDED, PER AMENDED RCW 65.04. SAID ABBREVIATED LEGAL DESCRIPTION IS NOT A SUBSTITUTE FOR A COMPLETE LEGAL DESCRIPTION WITHIN THE BODY OF THE DOCUMENT.

LOT 12 BLK 2 VIOLA RIGBY ADD, VOL. 56 PG. 77

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**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I**

BONITA LYON,
Plaintiff,
vs.
QUALITY LOAN SERVICES OF WA, INC;
ET. AL,
Defendants.

No.: 71618 - 2 -1
PROOF OF SERVICE

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DIVISION ONE
JUL 28 2014

FILED
COURT OF APPEALS
DIVISION ONE
JUL 23 11 30 AM '14

1. My name is Bonita Lyon, the Appellant Pro se in the case before this Court.
2. I am older than 18 years of age.
3. By previous agreement of the parties to this litigation, I served copies of Appellant's Reply Brief on the following parties to this litigation as follows:

I emailed a copy of the referenced pleadings to the following parties at the following email addresses on or about July 28, 2014:

Jensen Mauseth
Keesal, Young & Logan
1301 5th Ave., Ste. 3300
Seattle, WA 98101-2623
Jensen.mauseth@kyl.com

Robert Joseph Bocko
Attorney at Law
1301 5th Ave., Ste. 3300
Seattle, WA 98101-2623
Robert.bocko@kyl.com

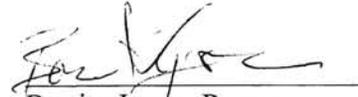
Mary Stearns
McCarthy & Holthus, LLP
19735 - 10th Ave. NE, Ste. N200
Poulsbo, WA 98370 - 7478

mstearns@mccarthholthus.com

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

Dated this 28th Day of July, 2014.

By: BONITA LYON



Bonita Lyon, Pro se
16652 - 159TH PL. SE
Renton, WA 98058
(425) 985-8731