No. 47395-0-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Todd Baker and Theresa Baker, Appellants. vs. PennyMac Loan Services, LLC, Northwest Trustee Services, Inc, Respondents	NO. 11-2-01437-5

REPLY BRIEF OF APPELLANT TO BOTH RESPONDENTS' BRIEFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Law Review Articles

Other Authorities

I. INTRODUCTION

The trial court abused its discretion when it denied the Bakers relief from judgment. The United States Supreme Court unanimously held in *Jesinoski v. Countrywide Home Loans, Inc.* that the Truth in Lending Act (TILA) never required borrowers to file suit to effectively rescind their mortgage loans. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015). In other words, *Jesinoski* did not change the law, but rather confirmed that the statute was clear from the start. In light of the clear mandate from the Supreme Court in *Jesinoski*, it would be inequitable to apply the underlying judgment in this case prospectively as it acknowledges a mortgage loan that was effectively and properly rescinded under TILA. Furthermore, extraordinary circumstances exist warranting relief, including the issuance of *Jesinoski* and its connection to this case, the recent nonjudicial foreclosure, and the parties' interests therein. As such, this Court should reverse the decision of the trial court and grant the Bakers relief from judgment.

II. ARGUMENT

A. The Bakers are entitled to relief under CR 60(b)(6) because it would be inequitable to apply the judgment prospectively.

The trial court abused its discretion when it denied the Motion for Relief from Order & Judgment Pursuant to CR 60 ("Motion") because it is

inequitable to apply the judgment prospectively under CR 60(b)(6) when the judgment preserves a mortgage loan that has been validly rescinded under TILA. Neither Northwest Trustee Services (NWTS) nor PennyMac have cited any authority which prohibits relief from judgment after clarification of the law by the United State Supreme Court.

Respondent NWTS argues that a change in law does not warrant relief from prospective application of a judgment. Respondent NWTS's Brief, at 5. However, there was no change in TILA itself, and the cases cited by Respondent NWTS for this proposition are also distinguishable. *Pac. Tel. & Tel. Co. v. Henneford*, 199 Wash. 462, 92 P.2d 214 (1939) (denying relief from judgment when a state supreme court judgment was decided on two grounds, only one of which was overturned by the United States Supreme Court); *Matter of Marriage of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982) (finding it would be inequitable to allow a change in law to reopen divorce decrees based on the totality of the circumstances of the divorce).

Respondent PennyMac argues that the Bakers are not entitled to relief because the underlying judgment does not have prospective application. Respondent PennyMac's Brief, at 6. While every court action can have some continuing consequences or "at least some reverberations into the future," the procedural context of nonjudicial

foreclosures gives the underlying judgment prospective application. *Id.* at 7 (quoting *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995)).

Judgments ordering the sale of real property have prospective application. *See Pacific Sec. Companies v. Tanglewood, Inc.*, 57 Wn. App. 817, 790 P.2d 643 (1990). In *Tanglewood*, a decree of foreclosure was entered, ordering a sheriff's sale of the property. *Id.* at 819. After the lender's interest in the property changed, the borrowers sought relief from judgment under CR 60(b)(6). *Id.* The trial court denied the motion, finding that relief should be sought in a separate action. *Id.* at 820. The appellate court reversed and held that the trial court had power to grant relief as the decree had prospective application. *Id.* at 821. It stated that "the court has a similar inherent power to supervise the execution of judgments, particularly those involving the sale of property to prevent an inequitable result." *Id.*

Here, Respondent PennyMac argues that the judgment does not have prospective application, but it fails to acknowledge the judgment's relationship to the validity of the nonjudicial foreclosure. Respondent PennyMac's Brief at 8. Both cases cited by Respondent PennyMac for its proposition that the judgment lacks prospective application are distinguishable. *Maraziti v. Thorpe*, 52 F.3d 252 (9th Cir. 1995) (finding dismissal of a party had no prospective application); *Gibbs v. Maxwell*

House, 738 F.2d 1153 (11th Cir. 1984) (refusing to grant relief from a judgment dismissing case for failure to comply with discovery orders).

Next, while *Tanglewood* analyzes the role of CR 60(b)(6) in the judicial foreclosure context, its principles are applicable here. Nonjudicial foreclosure is a process whose procedures are strictly prescribed by the Washington Deed of Trust Act. *Albice v. Premier Mortg. Servs. of Wash.*, Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (noting that the nonjudicial foreclosure "dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor."). In a nonjudicial foreclosure, there is no decree of foreclosure or order of sale from a court. *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 788, 295 P.3d 1179 (2012). A borrower must affirmatively seek an injunction if there is a defense to the sale. *See generally Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 110-13, 297 P.3d 677 (2013). A borrower may also bring suit post-foreclosure to challenge the legality of the sale. *See, e.g., Bavand v. OneWest Bank*, 176 Wn. App. 475, 309 P.3d 636 (2013).

Here, in the underlying action, the Bakers obtained a preliminary injunction to enjoin the then-pending nonjudicial foreclosure on the property and made every payment into the court registry as required.

Then, summary judgment dissolved the injunction. Applying the principles in *Tanglewood* here, the judgment has prospective application because it allowed the nonjudicial foreclosure to continue, which was indeed conducted on June 26, 2015, well after this appeal was initiated. Respondents knew then that the requisites of the Deed of Trust Act had not been met. Additionally, the judgment may affect the Bakers' rights to challenge the legality of the sale post-foreclosure under the Deed of Trust Act. *See generally* David Leen, *Wrongful Foreclosures in Washington*, 49 Gonz. L. Rev. 331, 352-55 (2014). For both of these reasons, the judgment has prospective application.

Finally, Respondent NWTS argues that it would be inequitable based on the goals of the Deed of Trust Act to permit rescission of a "secured instrument that was properly foreclosed upon." Respondent NWTS's Brief, at 8. The Deed of Trust Act is construed in favor of homeowners, and a goal of the Deed of Trust Act is to prevent wrongful foreclosures. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).

Respondent NWTS is incorrect that there was a "secured instrument" because the deed of trust was effectively rescinded, and as there was no valid deed of trust, the foreclosure was improper and thus void. *See* National Consumer Law Center, Truth in Lending (8th ed.

2012), at 659 ("by operation of law, the security interest *automatically* becomes void..."); 15 U.S.C. § 1635(b). Respondent NWTS is also incorrect that the Bakers waived their right to challenge the foreclosure sale by failing to enjoin the foreclosure before the sale. *See Bavand,* 176 Wn. App. at 492 ("the supreme court...reinforced the principal that waiver does not occur where the trustee's actions in a nonjudicial foreclosure are unlawful."); *see also Albice v. Premier Mortg. Servs. of Wash., Inc.,* 174 Wn.2d 560, 276 P.3d 1277 (2012) (finding that "waiver [is applied] only where it is equitable under the circumstances and where it serves the goals of the act.").

Furthermore, Respondent NWTS's argument that the Bakers should have attempted to enjoin the recent trustee's sale is disingenuous. It would have been inconsistent with the Bakers' position in this appeal to enjoin the sale, because by effectively rescinding the deed of trust, no valid foreclosure sale could have occurred. Respondent NWTS, fully aware of this appeal and the fact that the deed of trust had been rescinded as confirmed in *Jesinoski*, conducted the trustee's sale at its own risk. Also, the trial court had lifted the injunction when it granted summary judgment and later denied the Bakers' motion to vacate; any attempt to get another injunction would have been pointless and possibly sanctionable.

As it would be inequitable under the circumstances to apply the judgment prospectively, relief from judgment should be granted under CR 60(b)(6).

B. The Bakers are entitled to relief under CR 60(b)(11) because extraordinary circumstances exist.

The trial court abused its discretion when it denied the Motion for Relief because extraordinary circumstances exist warranting relief under CR 60(b)(11). The Bakers are entitled to relief from judgment because: (1) the issuance of *Jesinoski* and its application to the underlying judgment and subsequent nonjudicial foreclosure; (2) PennyMac is not a proper party to the judgment; (3) finality is not offended as the nonjudicial foreclosure is still subject to challenge and lis pendens was timely recorded; and (4) relief from judgment will serve the ends of justice.

1. *Jesinoski*, with its application to this case and the validity of the nonjudicial foreclosure proceedings, constitutes extraordinary circumstances.

The Bakers are entitled to relief under CR 60(b)(11) because the issuance of *Jesinoski* constitutes extraordinary circumstances. Respondents argue that a change in law does not warrant relief from judgment. Respondent PennyMac's Brief, at 9; Respondent NWTS's Brief, at 11. Nonetheless, both Washington and federal courts have found changes in law, when combined with other factors, constitute extraordinary circumstances warranting relief from judgment. *See, e.g.*,

Flannagan v. Flannagan, 42 Wn. App. 214, 709 P.2d 1247 (1985); *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). Moreover, there was not a mere change in law here, but rather confirmation of the plain language meaning of TILA by the Supreme Court in *Jesinoski*. The Bakers fall into this category due to the issuance of *Jesinoski* and the particular circumstances of this case.

a. Washington courts have found changes in law to constitute extraordinary circumstances.

Respondent PennyMac cites *Columbia Rentals* as an example where the Washington Supreme Court refused to reopen judgments based on a subsequent change in law. *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 576 P.2d 62 (1978). However, *Columbia Rentals* did not refuse to reopen a set of judgments *solely* because there was a change in law—the court denied relief from judgment after determining that equitable considerations did not favor those movants. *Id.* at 823. ("[W]e cannot find such 'manifest injustice' as would warrant abandoning the doctrine of res judicata."). The court found there were no extraordinary circumstances because the movants purchased their property after the boundaries were judicially established by the very judgments they sought to reopen. *Id* at 822. The movants "knew precisely what they were getting" when they purchased the property. *Id.* Such facts are readily

distinguishable from the Bakers' case as they did not take the property knowing their rescission rights would be obstructed. And while *Columbia Rentals* warned against reopening judgments because the courts "might never see the end of litigation" if cases are continually reopened as the law evolves, such a warning is inapplicable here. *Id.* at 823. *Jesinoski* was decided unanimously, and the language of the opinion makes it unlikely that the judicial interpretation will change soon because the Court held the plain language of TILA meant exactly what it said. *Jesinoski*, 135 S. Ct. at 792. ("The language [of the TILA] *leaves no doubt* that rescission is effected when the borrower notifies the creditor of his intention to rescind.") (emphasis added). Also, the Bakers are in a unique position as the foreclosure sale was only recently conducted by Respondent NWTS, in the somewhat brazen face of this appeal and the recorded lis pendens.

Next, although Washington has applied CR 60(b)(11) selectively, the principles from those cases are readily applied here. *See, e.g., Flannagan v. Flannagan,* 42 Wn. App. 214, 709 P.2d 1247 (1985); *In re Marriage of Parks*, 48 Wn. App. 166, 737 P.2d 1316 (1987); *In re Giroux*, 41 Wn. App. 315, 704 P.2d 160 (1985) [hereinafter "the USFSPA cases"]. The USFSPA cases found persuasive the clear congressional intent to apply the law retroactively, the anomalies of the judgments made due to

the changes in law, and the limited number of final decrees that were not appealed. *Id.*

While there is no indication of congressional intent applicable here, "[w]hen [the United States Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events." *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).[1] Here, the Supreme Court held that TILA imposed no requirement of filing suit to effect a rescission, and that ruling should be given full retroactive effect to the Bakers' rescission event.

There would also be anomalies in the decisions made pre- and post-*Jesinoski* for borrowers who rescinded at the exact same time. The Bakers may have been in a better legal position, in that *Jesinoski* would be applied, if they had waited until the eve of foreclosure to enforce the rescission. Furthermore, *Flannagan* noted "the limited number of decrees that were final and not appealed" during that period of time in which the law was different. 42 Wn. App. at 222. Here, it is unlikely that granting the Bakers relief from judgment will open the floodgates of ancient TILA

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[1] *See also* National Consumer Law Center, Truth in Lending (8th ed. 2012), at 901; *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 2d 820 (1995).

litigation as Respondent NWTS suggests. *See* Respondent NWTS's Brief, at 10. There is not a shred of authority in its brief to support this theory. The Bakers are in a unique position in that the foreclosure proceedings have spanned both pre- and post-*Jesinoski* time period, lis pendens was timely recorded, and the foreclosure was conducted in face of this appeal. This is distinguishable from the case cited by Respondents—*Martin v. Martin*—where retroactive application of a new rule could have reopened every divorce decree in the state involving a military pension. 20 Wn. App. 686, 581 P.2d 1085 (1978) (also refusing to grant relief from judgment because doing so would produce "substantial inequitable results.").

Respondents finally argue that the Bakers waived their right to relief from judgment by failing to appeal the underlying judgment. Respondent NWTS's Brief, at 10. However, Washington courts have held that failure to appeal does not waive the right to relief from judgment. *See Flannagan*, 42 Wn. App. at 224. Furthermore, the cases from other circuits cited by Defendant NWTS found a lack of appeal as *one consideration* in refusing to grant relief from judgment. *See Budget Blinds, Inc. v. White*, 536 F.3d 244 (3d Cir. 2008). With Ninth Circuit case law supporting Respondents' position at the time (and Washington

courts following the Ninth Circuit's erroneous lead), an appeal would have likely been useless and may have been deemed frivolous.

b. Federal courts have found a change in law to constitute extraordinary circumstances.

Respondents argue that federal courts have found that a change in law is not an extraordinary circumstance. Respondent PennyMac's Brief, at 13-14; Respondent NWTS's Brief, at 11. Respondent PennyMac cites *Title v. United States* as an example where the Ninth Circuit refused the appellant's request to have a less stringent standard apply to Fed. R. Civ. P. 60(b)(5)—the federal equivalent to CR 60(b)(11)—in denaturalization cases. 263 F.2d 98 (9th Cir. 1959). However, there was no discussion of the inequities or other extraordinary circumstances presented by the appellant in *Title*, if any. *Id.*

The Ninth Circuit held in *Phelps, supra,* that a case-by-case approach is appropriate in the Fed. R. Civ. P. 60(b)(5) context. 569 F.3d at 1133. *Phelps* looked at a variety of factors from multiple cases including: (1) the relationship between the underlying judgment and "the subsequent decision embodying the change in law"; (2) the diligence in filing a motion for relief from judgment; (3) interests of finality; and (4) nature of the change in law. *Id.* at 1135-41.

Here, the underlying judgment was based *McOmie-Gray v. Bank of America Home Loans*, a Ninth Circuit case which held that a borrower must file suit to enforce a rescission under TILA. 667 F.3d 1325 (9th Cir. 2012). Respondent PennyMac argues that *Jesinoski* did not directly review *McOmie-Gray*. Respondent PennyMac's Brief, at 17. However, there is no requirement that the overturning case needs to directly review or reference the case on which the underlying judgment rests. *Phelps*, 569 F.3d 1120. Nonetheless, the Supreme Court was alerted to *McOmie-Gray* by the briefing in *Jesinoski*. *See, e.g.*, Brief for Respondent at 22, 32, *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015), (No. 13-684), 2014 WL 4631960.

Respondent PennyMac next suggests that it is irrelevant that the Bakers immediately filed a motion for relief from judgment after *Jesinoski* was decided. Respondent PennyMac's Brief, at 17. In *Phelps*, the Ninth Circuit considered the "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief." 569 F.3d at 1138. Because Motion was based on the issuance of *Jesinoski* and the circumstances of the Bakers' case, the Bakers fail to see how filing a motion a few weeks sooner would have been significant. Overall, *Phelps* promotes timeliness of seeking redress, and the Bakers filed the Motion as soon as it was appropriate and well before Respondents decided to foreclose on the Bakers' home.

While Respondents argue that finality is a factor that should be considered, it is not offended here. "The mere recitation of [Fed. R. Civ. P. 60(b)(5)] shows why we give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision [Fed. R. Civ. P. 60(b)(5)] whose whole purpose is to make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005).

Respondent PennyMac claims that finality will protect "the interests of PennyMac, Northwest Trustee, and the third-party purchaser of the property." Respondent PennyMac's Brief, at 18. By going forward with a sale in the face of this appeal, it is hard to credit Respondents' calls to the virtues of finality. Respondents had notice of this appeal well before the foreclosure sale, and all three parties had constructive notice of lis pendens. Respondents would be unjustly enriched if allowed to reap the proceeds of an invalid foreclosure sale based on a rescinded deed of trust. Indeed, Respondent NWTS just recently conducted the foreclosure sale and submitted the Trustee's Deed in these proceedings presumably so it could argue that the foreclosure was truly final and the third party purchaser would suffer hardship. This is a problem created by Respondent NWTS.

Finally, the nature in the change of law warrants relief. *Jesinoski* went firmly against the rule applied in *McOmie-Gray* and the rule applied in the Bakers' underlying judgment. *Jesinoski* held that the language of the statute was clear. 135 S. Ct. 790. While *Phelps* involved a more unsettled question of law, the circuits were split when *Jesinoski* was decided. Respondent PennyMac cites *Gonzalez* to support its proposition that the nature of the change in law here does not warrant relief, but *Gonzalez* is distinguishable as the court found the "only ground" that the petitioner presented "for reopening judgment...is that our decision in *Artuz* showed the error of the District Court's statute-of-limitations ruling." *Gonzalez v. Crosby,* 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005).

Respondents consistently argue throughout their brief that a change in law cannot warrant relief from judgment. Both Washington and federal courts have held otherwise when extraordinary circumstances, such as those present here, are considered. *Phelps* considered a combination of factors in deciding to grant relief from judgment, and here, it is the combination of factors that which warrant granting the Bakers relief from judgment.

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2. Extraordinary circumstances exist because PennyMac did not obtain a judgment in its favor as the proper and correct party to the proceeding brought by the Bakers.

The Bakers are entitled to relief from judgment because Respondent PennyMac did not obtain a judgment in its favor as the proper and correct party to the proceeding. When the lawsuit was first filed, it was unclear based on PennyMac's assertions what PennyMac's interest in the deed of trust was. The Sciumbato Declaration, which was provided during the summary judgment stage, indicated that PennyMac was the servicer, not the owner of the loan. CP 84 at Paragraph 6. As such, it prevented the Bakers from naming the real party in interest in the underlying suit. As the underlying judgment is not for the real party in interest, the Bakers are entitled to relief from judgment.

3. Extraordinary circumstances exist because relief from judgment does not affect finality.

The Bakers are entitled to relief from judgment because granting relief would not offend the principles of finality. Although a foreclosure sale has been conducted, it was done so in face of this appeal and the recorded lis pendens. Any third party purchaser would have constructive notice of the recorded lis pendens, and Respondent NWTS owed a duty to the purchaser to not mislead them. *See McPherson v. Purdue*, 21 Wn. App. 450, 453-54, 585 P.2d 830 (1978). Furthermore, the Bakers

maintain the right to challenge the legality of the sale post-foreclosure. Respondents would be unjustly enriched if allowed to reap the proceeds of an invalid foreclosure sale of a rescinded deed of trust. As such, finality does not preclude granting of relief.

4. Extraordinary circumstances exist because relief from judgment in this case serves the ends of justice.

The Bakers are entitled to relief from judgment because it serves the ends of justice. CR 60(b)(11) allows courts to vacate judgments "whenever such action is appropriate to accomplish justice." *State v. Carter*, 56 Wn. App. 217, 223, 783 P.2d 589 (1989) (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 93 L. Ed. 266, 69 S. Ct. 384 (1949)).

The Bakers properly rescinded their mortgage loan under TILA—there is no dispute about that. There cannot be a valid foreclosure if the mortgage loan was rescinded. All parties to the foreclosure proceeding had notice of the Bakers' interest due to the recording of lis pendens. As such, the foreclosure sale was conducted at Respondents' own risk. As the mortgage was validly rescinded and the foreclosure void, it would be inequitable for the judgment to stand, and as such, relief is warranted under CR 60(b)(11).

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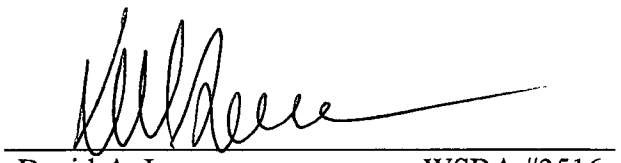
III. CONCLUSION

For the reasons set out above, the Bakers respectfully request that the Court of Appeals reverse the trial court and remand with instructions to enter the relief from judgment and award the Bakers attorney fees and costs under 15 U.S.C. § 1640(a)(3).

Respectfully submitted this 18th day of September 2015.



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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Todd Baker and Theresa Baker, Appellants, vs. PennyMac Loan Services, LLC and Northwest Trustee Services, Inc., Respondents. Appeals No. 47395-0-II	NO. 11-2-01437-5 DECLARATION OF SERVICE

I, Shannon Schulz, , hereby certify that on the date indicated below, I caused to be served true and correct copies of the following: 1) Reply Brief of Appellant to Both Respondents' Briefs and 2) this Declaration of Service, upon the following at the addresses stated below, via the method of service as indicated.

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