IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROGER A. LEE and ELIZABETH LEE, his wife, Appellants, v. JON PARKER, Trustee; TIMBERLAND BANK, a corporation, Respondents.	No. 39611-4-II ORDER DENYING MOTION FOR RECONSIDERATION; ORDER AMENDING OPINION

The unpublished opinion in this case was filed on August 17, 2010. The appellants filed a motion for reconsideration. After review by the court, it is hereby

ORDERED that the motion for reconsideration is hereby denied. It is further

ORDERED that the opinion filed on August 17, 2010 shall be amended as follows:

On page 5, line 1, the following footnote is inserted after the cite to RCW 61.24.130:

> The Lees argue that requiring them to pay the amounts that would have been due absent foreclosure under RCW 61.24.130 violates the Due Process Clause of the Fourteenth Amendment by depriving them of the equity in their home without proper notice and an opportunity to be heard. But even if we found that RCW 61.24.130 is unconstitutional, the Lees have still failed to comply with other mandatory statutory procedures for setting aside a trustee's sale, such as seeking an injunction prior to the sale in the county where the sale will be held. RCW 61.24.040, .130. The Lees had an opportunity to seek such an injunction after the King County Superior Court granted Parker's and Timberland's motion to change venue, but chose not to file an amended complaint in Grays Harbor County until after the trustee's sale.

IT IS SO ORDERED.

DATED this _____ day of _____, 2010.

Armstrong, J.

We concur:

Penoyar, C.J.

Worswick, J.

No. 39611-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ROGER A. LEE and ELIZABETH LEE, his wife, Appellants, v. JON PARKER, Trustee; TIMBERLAND BANK, a corporation, Respondents.	No. 39611-4-II UNPUBLISHED OPINION

Armstrong, J. — After Roger and Elizabeth Lee defaulted on a loan from Timberland Bank, which was secured by a deed of trust, the trustee sold the Lees' property to pay off the loan. The Lees sued the trustee and Timberland to set aside the sale and to obtain damages against the trustee for breach of a fiduciary duty. They moved to join the Federal Home Mortgage Corporation (Freddie Mac), but the trial court denied their motion. The Lees appeal, arguing that Freddie Mac is a necessary party and that the denial of their joinder motion effectively dismissed their claims. We affirm.

FACTS

The Lees borrowed $350,000 from Timberland, secured by a promissory note and deed of trust, to purchase a home in Grays Harbor County. When the Lees failed to make the required monthly payments for September and October 2008, Jon Parker, the trustee, sent them a notice of default. The Lees failed to cure the default, and Parker sent them a notice of foreclosure and sale on December 4, 2008, informing them that they must cure the default or he would sell the

property at auction on April 24, 2009.

In March 2009, the Lees contacted Parker and asked to examine the original promissory note and deed of trust. Parker informed them that Freddie Mac had the original note because Timberland had sold the loan to Freddie Mac but retained the servicing rights and responsibilities under the deed of trust. Parker apparently provided a copy of the note instead. On March 31, 2009, the Lees sued Parker and Timberland in King County Superior Court, requesting that the court stay the trustee's sale until Parker produced the original promissory note. Parker moved to change venue to Grays Harbor County under RCW 61.24.040, which requires that actions contesting a trustee's sale be brought in the county where the sale will be held. The trial court granted the motion, awarding attorney fees to Parker and Timberland.

Parker held the sale as scheduled on April 24, 2009, and Freddie Mac purchased the property for $363,932.53. On June 17, 2009, the Lees filed an amended complaint in Grays Harbor County Superior Court seeking (1) an order voiding the foreclosure sale, because the trustee had not produced the original promissory note, and (2) damages against the trustee for breach of a fiduciary duty. The Lees also moved to join Freddie Mac as a necessary party. Parker opposed the motion on the ground that the Lees' claims were moot because they failed to comply with the mandatory statutory procedures for contesting a trustee's sale. The trial court ruled that Freddie Mac was not a necessary party, denied the motion, and awarded Parker and Timberland attorney fees.

ANALYSIS

The Lees assign error to the trial court's denial of their motion to join Freddie Mac,

arguing that the denial of their motion "in effect, ended any opportunity to present the merits of the case" and was "tantamount to a dismissal with prejudice." Br. of Appellant at 9, 11. We generally review only final judgments from the superior court. RAP 2.2(a)(1). A final judgment is "a court's last action that settles the rights of the parties and disposes of all issues in controversy." *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009) (quoting Black's Law Dictionary at 859 (8th ed. 2004)). The record does not show that the Grays Harbor County Superior Court has entered a final judgment disposing of all the issues raised in the Lees' complaint. But we may also review any superior court decision that "in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). We consider, therefore, whether the trial court's denial of the Lees' motion to join Freddie Mac prevents a final judgment or discontinues the action.

I. Motion to Join a Necessary Party

The Lees argue that Freddie Mac is a necessary party under CR 19 because Freddie Mac owns their original promissory note. We review a trial court's ruling under CR 19 for an abuse of discretion. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). A party is necessary if its absence from the proceedings would prevent the court from affording complete relief to the existing parties, impair the party's ability to protect an interest related to the subject of the action, or subject an existing party to inconsistent or multiple liabilities. CR 19(a); *Cordova v. Holwegner*, 93 Wn. App. 955, 961-62, 971 P.2d 531 (1999).

Freddie Mac is not a necessary party for adjudicating the Lees' claim for setting aside the trustee's sale because that claim is moot. Washington's deed of trust act provides the sole

method for restraining a trustee's sale once the grantor has received notice of sale and foreclosure. Ch. 61.24 RCW; *Plein v. Lackey*, 149 Wn.2d 214, 226, 67 P.3d 1061 (2003); *Cox v Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985). The grantor may bring a court action to restrain the sale "on any proper ground." RCW 61.24.130(1). The trial court may not grant an injunction unless the grantor has given the trustee five days' notice of the hearing and paid to the clerk of court the "sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed." RCW 61.24.130(1); *Plein*, 149 Wn.2d at 225-26.

The deed of trust act makes no provision for setting aside a sale once it has occurred. *Plein*, 149 Wn.2d at 228. Moreover, the Supreme Court of Washington has held that a party waives "any objection to the trustee's sale . . . where presale remedies are not pursued." *Plein*, 149 Wn.2d at 229. In *Plein*, the grantor received notice of foreclosure and sale and was properly advised of his right to seek an injunction to restrain the sale. *Plein*, 149 Wn.2d at 226. Although the grantor brought a complaint seeking a permanent injunction, he never sought a preliminary injunction or any other order to halt the sale as RCW 61.24.130 requires. *Plein*, 149 Wn.2d at 226. Our Supreme Court held that the RCW 61.24.130 procedures are mandatory; simply bringing an action to enjoin the sale without following the specific statutory procedures will not forestall the sale. *Plein*, 149 Wn.2d at 227; *see also Cox*, 103 Wn.2d at 388 ("[A]n action contesting the default, filed after notice of sale and foreclosure has been received, does not have the effect of restraining the sale.").

Similar to *Plein*, the Lees received notice of foreclosure and sale and were properly advised of their right to seek an injunction restraining the sale under RCW 61.24.130. Although

the Lees sued to contest the sale, they failed to comply with the venue requirement, failed to seek a preliminary injunction to restrain the sale, and failed to pay the amount due on the obligation to the clerk of court, as required under RCW 61.24.040 and RCW 61.24.130. The Lees have therefore waived any objection to the foreclosure proceeding and are precluded from now seeking to set aside the sale. *See Plein*, 149 Wn.2d at 229. Accordingly, it was not necessary to join Freddie Mac because the claim is moot.

But the Lees have a remaining claim for damages against Parker, the trustee. They asserted in their complaint, as they do on appeal, that Parker breached a fiduciary duty by failing to produce the original promissory note and by failing to continue the sale while their superior court action was pending. The Lees offer neither argument nor authority for their proposition that without Freddie Mac, the trial court cannot afford them full relief on their damages claim. Furthermore, the Lees fail to explain why they cannot obtain, or at least view, the original promissory note through customary discovery procedures. Thus, they have not established that Freddie Mac is a necessary party for the adjudication of their damages claim either. The trial court did not err by denying the Lees' joinder motion.

II. Attorney Fees

The Lees also assign error to the trial court's award of attorney fees to Parker and Timberland,[1] arguing that the trial court cannot award attorney fees under the deed of trust after it was extinguished by foreclosure and sale. We review an award of attorney fees for abuse of discretion. *Dice v. City of Montesano*, 131 Wn. App. 675, 688, 128 P.3d 1253 (2006).

[1] The King County Superior Court also awarded attorney fees after granting Parker and Timberland's motion to change venue. The Lees do not assign error to this award.

The deed of trust provides for reasonable attorney fees "in any action or proceeding to construe or enforce any term" of the deed of trust. Clerk's Papers at 55. RCW 4.84.330 provides that in "any action on a contract," including an attorney fee provision, the prevailing party shall be entitled to reasonable attorney fees. Based on this statute, courts have held that when a party successfully defends an action based on a contract by arguing that the contract is void, the party is nevertheless entitled to attorney fees under the contract. *See Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003) (en banc). In *Herzog Aluminum, Inc. v. General American Window Corp*., 39 Wn. App. 188, 197, 692 P.2d 867 (1984), Division One of our court held that even though the parties failed to form a valid contract, the prevailing party was entitled to attorney fees because "the broad language '[i]n any action on a contract' found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract." Our Supreme Court relied on *Herzog* in *Mt. Hood Beverage Co.*, 149 Wn.2d at 121-22, reasoning that a significant factor when determining an award of attorney fees under an invalidated contract or statute is whether the other party would be entitled to attorney fees if it had prevailed.

If the Lees had prevailed in setting aside the trustee's sale, they would have been entitled to attorney fees under the deed of trust and RCW 4.84.330. Accordingly, Parker and Timberland are entitled to attorney fees for successfully defending the trustee's sale. *See Mt. Hood Beverage Co.*, 149 Wn.2d at 121-22. The trial court did not abuse its discretion by awarding attorney fees under the deed of trust and RCW 4.84.330.

III. Attorney Fees on Appeal

Parker and Timberland also request attorney fees on appeal under the attorney fee clause in the deed of trust. As Parker and Timberland prevailed on the issue before this court—whether the trial court abused its discretion by denying the motion to join Freddie Mac—they are entitled to attorney fees on appeal.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Penoyar, C.J.

Worswick, J.