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Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RESTORE EQUITY, LLC, a limited liability company, Appellant, v. The BANK OF NEW YORK MELLON, as successor in interest, Respondent.	No. 47728-9-II UNPUBLISHED OPINION

SUTTON, J. — Restore Equity, LLC appeals the superior court's order granting summary judgment to the Bank of New York Mellon (NY Mellon), rescinding the foreclosure, and dismissing its claims to quiet title, and for declaratory judgment, accounting, and Consumer Protection Act (CPA)[1] violations. We hold that rescinding the foreclosure is the appropriate remedy. Therefore, we affirm.

FACTS

On December 15, 2003, Ronald and Debra Crowder executed a promissory note to repay NovaStar Mortgage, Inc. a total of $126,000. To secure repayment of the note, the Crowders executed and recorded a Deed of Trust encumbering property located in Elma, which included the following relevant provision:

> If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in

[1] Ch. 19.86 RCW.

> Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument.

Clerk's Papers (CP) at 36.

In December 2009, the Crowders defaulted on the loan. In May 2010, Quality Loan Services Corporation of Washington (QLS), as an agent of NY Mellon,[2] the successor trustee, issued a notice of default to the Crowders.

In October 2010, the Crowders conveyed the property to Restore Equity by quit claim deed, and the conveyance was recorded in November. The Crowders did not obtain permission to transfer their interest in the property as required by the Deed of Trust. The Crowders also assigned to Restore Equity "any and all [of their] claims against NovaStar Mortgage, Inc., its assigns, successors, . . . related to any and all encumbrances against The Property including but not limited to the Deed of Trust . . . to include the underlying note and loan." CP at 49.

In June 2011, NY Mellon appointed QLS, as the successor trustee under the Deed of Trust and recorded the appointment. QLS issued a Notice of Trustee's Sale and set the date of sale for September 30. The notice stated that "[t]the sum owing on the obligation secured by the Deed of Trust is . . . $120,923.65 [plus interest] . . . and such other costs and fees as are provided by statute." CP at 100. The total amount owed on the loan was $150,968.00. QLS posted the Notice of Trustee's Sale on the property and sent a copy of the notice to the Crowders via certified and first class mail, but did not send notice of the sale to Restore Equity, who had a recorded interest in the property.

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[2] The Bank of New York Mellon was the successor trustee to JPMorgan Chase Bank, the trustee for NovaStar Mortgage Funding Trust, Series 2004-1, NovaStar Home Equity Loan Asset-Backed Certificates, Series 2004-1.

In September, the property was sold at a nonjudicial foreclosure sale. NY Mellon was the highest bidder with a total bid of $150,968. On October 5, QLS executed a trustee's Deed of Trust in favor of NY Mellon and recorded the Deed of Trust.

On October 18, Restore Equity sent a letter to QLS informing them that Restore Equity had not received notice of the trustee's sale and that "[it did] not regard the sale as [affecting its] interest in the property." CP at 155. NY Mellon concedes that QLS did not send a Notice of Trustee's Sale to Restore Equity but does not provide any explanation.

In October, Restore Equity filed a claim to quiet title and for declaratory relief against NY Mellon. Restore Equity claimed that its "interests were not extinguished by the Trustee Sale or the Trustee's Deed" and that it was the current and lawful owner of the Elma property. CP at 6-7. Alternatively, Restore Equity alleged an action for accounting under Chapter 61.24 RCW to require that any surplus funds from the sale be distributed to junior lien holders. Restore Equity also alleged that NY Mellon's failure to properly calculate the interest constituted an unfair and deceptive act and requested damages under the CPA. In November, QLS stated that the foreclosure sale would be rescinded and a new foreclosure sale would be initiated.

In April 2015, NY Mellon filed a motion for summary judgment[3] and dismissal of all of Restore Equity's claims. Restore Equity opposed the motion and argued that the trustee's sale did not terminate its interests in the property under RCW 61.24.040(7) and that the trustee is not entitled to rescind the foreclosure and initiate a new foreclosure.

[3] The motion for summary judgment was filed on behalf of NY Mellon and the other trustees.

The superior court ruled that Restore Equity's interest in the property was not affected by the trustee's foreclosure sale of the property to NY Mellon and ordered that the foreclosure sale be rescinded. The superior court also ruled that Restore Equity was not entitled to any surplus funds under RCW 61.24.080,[4] and that Restore Equity could not establish the elements for a CPA violation. The superior court granted summary judgment to NY Mellon, rescinded the foreclosure, and dismissed Restore Equity's claims. Restore Equity appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review summary judgment orders de novo and perform the same inquiry as the superior court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts are considered in the light most favorable to the nonmoving party. *Hisle*, 151 Wn.2d at 860. The moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The nonmoving party may not rely on argumentative assertions that unresolved factual issues remain. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823,

[4] RCW 61.24.080(3) provides that any surplus "shall be deposited . . . with the clerk of the superior court of the county in which the [trustee's] sale took place" and that "[a] party seeking disbursement of the surplus funds shall file a motion requesting disbursement in the superior court for the county in which the surplus funds are deposited."

848, 92 P.3d 243 (2004). "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." *Atherton*, 115 Wn.2d at 516.

II. Summary Judgment

A. Rescinding the Foreclosure

Restore Equity argues that the superior court erred when it granted summary judgment to NY Mellon, rescinded the foreclosure, and dismissed its claims for quiet title and declaratory relief because genuine issues of material fact exist.[5] We disagree.

The Deed of Trust Act, chapter 61.24 RCW, was enacted by the legislature to further three objectives for the nonjudicial foreclosure process so that the process (1) is efficient and inexpensive, (2) provides an adequate opportunity for interested parties to prevent wrongful foreclosure, and (3) promotes the stability of land titles. Chapter 61.24 RCW; *Jackson v. Quality Loan Serv. Corp. of Wash.*, 186 Wn. App. 838, 848, 347 P.3d 487 (2015), *review denied*, 184 Wn.2d 1011.

RCW 61.24.040(1)(b) provides that "[t]o the extent the trustee elects to foreclose its lien or interest . . . against a borrower or grantor . . . and if their addresses are stated in a recorded instrument evidencing their interest . . . [the trustee shall] cause a copy of the notice of sale . . . to be transmitted by both first-class and either certified or registered mail." "[The trustee's sale] shall not affect the lien or interest of any person entitled to notice . . . if the trustee fails to give the required notice to such person." RCW 61.24.040(7). A party is not an omitted lienholder in a

[5] Restore Equity also argues that NY Mellon was required to raise the error in the foreclosure sale within 11 days of the sale under RCW 61.24.050(2). Br. of Appellant at 32. Restore Equity failed to raise this issue at the superior court, and we decline to review the issue. RAP 2.5(a).

nonjudicial foreclosure unless they have a recorded interest in the property. *See* RCW 61.24.040(1)(b).

Rescinding a foreclosure is the proper remedy when a junior lienholder has been mistakenly omitted from a foreclosure action. *U.S. Bank of Wash. v. Hursey*, 116 Wn.2d 522, 526, 806 P.2d 245 (1991).[6] In *Hursey*, the foreclosing mortgagee failed to join the junior lienholder because it was unaware of the lien because the county court clerk had mistakenly reversed the names when the junior lienholder's judgment was entered and, thus, the junior lienholder was not listed in the court records as the judgment creditor. *Hursey*, 116 Wn.2d at 524.

Restore Equity argues that *Hursey* does not apply because NY Mellon was at fault by failing to exercise due diligence,[7] failing to provide proper notice to Restore Equity of the trustee's sale as required, and its mistake was not an excusable mistake because Restore Equity's interest

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[6] Restore Equity relies on *Spokane Sav. & Loan Soc'y v. Liliopoulos*, 160 Wn. 71, 294 P. 561 (1930) and *Valentine v. Portland Timber & Land Holding Co.*, 15 Wn. App. 124, 547 P.2d 912 (1976) to support its argument that the naming of all parties having an interest in the property is the "plaintiff's concern" and that the failure to notify the holder of a junior interest "does not excuse a foreclosing mortgagee from [joining them as a party] to [the] suit." *Liliopoulos*, 160 Wn. at 74; *Valentine*, 15 Wn. App at 128 (quoting G. OSBORNE MORTGAGES s 322 (2d ed. 1970) at 671). However, Restore Equity's reliance is misplaced because both *Liliopoulos* and *Valentine* further specifically state that, although failure to notify or join an interested party renders its interest unaffected by the foreclosure, the foreclosing mortgagee *is not required* to join the party to the action.

[7] NY Mellon argues that Restore Equity failed to raise this argument at the superior court and that we are precluded from reaching this issue under RAP 2.5(a). However, Restore Equity argued in its opposition to summary judgment that NY Mellon had a "duty to determine whose interest is being affected." CP at 124.

in the property was publicly recorded.[8] The *Hursey* court did not impose a general due diligence requirement[9] on the foreclosing mortgagee or limit its holding to apply only to cases where the foreclosing mortgagee was not at fault when it failed to join a junior lienholder.[10] *Hursey*, 116 Wn.2d at 526-27.

QLS inadvertently failed to provide Restore Equity with the Notice of Trustee's Sale as required by RCW 61.24.040(1)(b)(ii). Because Restore Equity was an omitted party in the foreclosure sale, Restore Equity's interest in the property was not extinguished by the nonjudicial foreclosure of the property pursuant to RCW 61.24.040(7).

Rescinding the foreclosure here does not deny Restore Equity any rights that it possessed before the foreclosure, and rescinding the foreclosure puts the parties in the same position they were in before the foreclosure. *Hursey*, 116 Wn.2d at 528. Thus, we hold that the superior court

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[8] NY Mellon argues that Restore Equity failed to raise this argument at the superior court and that we are precluded from reaching this issue under RAP 2.5(a). However, Restore Equity argued in its opposition to summary judgment that "no effort was made to identify persons who may have an interest in the property and entitled to notice." CP at 116.

[9] Restore Equity argues that when a junior lienholder possesses an interest that is a matter of public record, the failure of the foreclosing mortgagee to join the junior lienholder cannot be a mistake that warrants rescinding the foreclosure under *Hursey*, citing *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, 949 N.E.2d 1195, 1201 (Ind. 2011). However, *Citizens* is an opinion issued by the Indiana Supreme Court and is not mandatory authority. Restore Equity does not provide sufficient argument to warrant deviation from the broader holding by our own Supreme Court in *Hursey*.

[10] Restore Equity relies on *Rasmussen v. Emp't Sec. Dep't*, 98 Wn.2d 846, 658 P.2d 1240 (1983). Restore Equity's reliance is misplaced because *Rasmussen* discusses the adequacy of excuses when filing an appeal with the court and does not discuss omitted parties in foreclosure proceedings at all.

did not err when it granted summary judgment to NY Mellon, rescinded the foreclosure, and dismissed Restore Equity's claims.

B. MERGER OF INTERESTS

Restore Equity argues that even if rescinding the foreclosure is the appropriate remedy, NY Mellon cannot rescind the foreclosure because the trustee's sale and the trustee's Deed of Trust conveying the property to NY Mellon merged and extinguished its Deed of Trust, citing *In re Trustee's Sale of Real Property of Ball*, 179 Wn. App. 559, 319 P.3d 844 (2014). We decline to reach this argument.

We do not review "issues for which inadequate argument has been briefed or only passing treatment has been made." *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004); RAP 10.3(a)(6). Restore Equity provides no argument that merger applies to merge a debt secured by a Deed of Trust with a trustee's deed, that NY Mellon held these two interests at the same time, or that NY Mellon intended for these interests to unite. Thus, we do not address this argument.

CONCLUSION

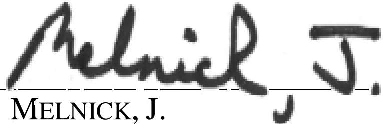
We hold that rescinding the foreclosure is the appropriate remedy, and we affirm the superior court's order granting NY Mellon's motion for summary judgment, rescinding the foreclosure, and dismissing Restore Equity's claims.[11]

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 in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:

LEE, P.J.



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[11] Because Restore Equity's alternative claims were based on the assumption that its rights were extinguished by the foreclosure sale, and we are affirming the superior court's order rescinding the foreclosure, we do not address the alternative claims.