IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTA L. ALBICE, a married woman, and BART A. TECCA and KAREN L. TECCA, husband and wife, Respondents, v. PREMIER MORTGAGE SERVICES OF WASHINGTON, INC., a Washington corporation; OPTION ONE MORTGAGE CORPORATION, a California corporation, Defendants, RON DICKINSON and "JANE DOE") DICKINSON, husband and wife, Petitioners.	)	No. 85260-0 En Banc Filed May 24, 2012

C. JOHNSON, J.—This case involves interpretation of the deeds of trust act, chapter 61.24 RCW, and the statutory procedural requirements for nonjudicially foreclosing on an owner's interest. This case also involves whether, under the facts here, the property owner waived the right to challenge the sale and whether the purchaser of the nonjudicial foreclosure sale statutorily qualifies as a bona fide

purchaser (BFP).

The trial court ruled that despite procedural noncompliance, the purchaser was a BFP under the statute and quieted title in the purchaser. The Court of Appeals reversed, holding that failure to comply with the statutory requirements was reason to set the sale aside and that factually, the purchaser did not qualify as a BFP. We affirm the Court of Appeals.

FACTS

Christa Albice and Karen Tecca (hereinafter Tecca) inherited the property at issue here. In 2003, Tecca borrowed $115,500 against the property. Clerk's Papers (CP) at 305. The property was appraised at $607,000 in 2003 (CP at 1038) and at $950,000 in 2007. CP at 394. The loan was serviced by Option One Mortgage Corporation (Option One), and Premier Mortgage Services of Washington (Premier) acted as the trustee. Option One and Premier shared databases, having access to the same loan information, and everyone who worked for Premier was an employee of Option One.

In 2006, Tecca defaulted on the loan and received a notice of trustee's sale, setting the foreclosure sale for September 8, 2006. CP at 460. Tecca then, in July 2006, negotiated and entered into a forbearance agreement to cure the default. The

total reinstatement amount was for $5,126.97, which included $1,733.79 for estimated foreclosure fees and costs. CP at 471. Under the agreement, payments were due the 16th of each month, ending January 16, 2007. CP at 472. Although Tecca tendered each payment late, Option One accepted each payment, except for the last. The last payment was sent on February 2, 2007, but was rejected by Option One. During a deposition, Premier's representative, an Option One employee, testified that the last late payment was the only breach of the Forbearance Agreement. CP at 259. Tecca learned the final payment was rejected on February 10, 2007, and the payment was refunded on February 16, 2007. Although the Forbearance Agreement provided that upon breach, a 10-day written notice would be sent, Tecca never received this notice. CP at 468, 454.

The trustee's sale originally set for September 8, 2006 was continued six times. Each continuance was tied to the payments Tecca made under the Forbearance Agreement. The foreclosure sale took place on February 16, 2007. CP at 352-59. Through an agent, the petitioner, Ron Dickinson, successfully bid $130,000 for the property.[1]

Dickinson has purchased about 9 of his 13 properties at nonjudicial

[1] Although four or five bidders showed up at the original sale date, only two bidders, one being Dickinson's agent, appeared at the February 16 sale. CP at 360, 426.

foreclosure sales. CP at 418-19. Dickinson buys and sells houses as a business. He has familiarized himself with foreclosure law to some extent to keep himself out of "trouble." CP at 428. When Dickinson learned that the Tecca property was for sale, he researched the property and obtained a copy of the notice of trustee's sale, which listed the amount in arrears as $1,228.03. CP at 526, 530. About a week before the originally scheduled sale, Dickinson visited Karen Tecca's home and offered to buy the property. She refused and told him the sale would not happen. CP at 421. Dickinson attended the first scheduled sale, kept track of postponements, and phoned Premier to determine the next sale date. He was surprised when the property did finally come up for sale.

Tecca first learned the property was sold when Dickinson told Tecca they no longer owned it and needed to leave. Dickinson then filed an unlawful detainer action and sought to quiet title. Tecca countersued, seeking to quiet title in an action to set aside the nonjudicial sale. Tecca also brought suit against Option One and Premier, but the trial court dismissed the action based on an arbitration clause. Tecca's and Dickinson's actions were consolidated. Dickinson cross-claimed against Option One and Premier, but he voluntarily dismissed those claims.

Dickinson moved for summary judgment to establish that he was a BFP and

entitled to quiet title. Tecca also moved for summary judgment, arguing the foreclosure sale should be set aside because the sale occurred after the statutory deadline and Premier was not a qualified trustee with authority to conduct the sale. The trial court granted Dickinson's motion, ruling that Dickinson was a BFP and despite procedural noncompliance by the trustee, the recitations in the trustee's deed were conclusive evidence of statutory compliance in favor of BFPs. The issue of whether Premier was a qualified trustee was left for trial. Following trial, the court concluded Premier was authorized to act as the trustee,[2] quieted title in Dickinson, and awarded Dickinson damages.

Tecca appealed. The Court of Appeals reversed, setting the sale aside. It reversed the trial court's award of damages and instead awarded Tecca costs and fees as the prevailing party under RCW 4.84.010. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 157 Wn. App. 912, 923-25, 928, 935, 239 P.3d 1148 (2010).

Dickinson petitioned for review. We granted review. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 170 Wn.2d 1029, 249 P.3d 623 (2011).

ISSUES

[2] The trial court concluded Premier had statutory authority to act as a trustee under RCW 61.24.010, determining Premier was qualified based on its internal records rather than annual reports filed with the Secretary of State. We do not reach this issue.

1. Whether a trustee's sale taking place beyond the 120 days permitted by RCW 61.24.040(6) warrants invalidating the sale.
2. Whether, under the circumstances of this case, a borrower waives the right to bring a postsale challenge for failing to utilize the presale remedies under RCW 61.24.130.
3. Whether a bona fide purchaser can prevail despite an otherwise invalid sale.

ANALYSIS

This case raises questions of law and statutory interpretation on appeal from summary judgment. Our review is de novo. *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 842, 246 P.3d 788 (2011) (citing *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004)).

The deeds of trust act, chapter 61.24 RCW,[3] creates a three-party mortgage system allowing lenders, when payment default occurs, to nonjudicially foreclose by trustee's sale. The act furthers three goals: (1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103

[3] This chapter was revised in 2009 and 2012. No changes affect any of the statutes at issue here; thus, the current version is cited.

Wn.2d 383, 387, 693 P.2d 683 (1985). Because the act 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. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988). The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. *Udall*, 159 Wn.2d at 911.

1. *Procedural Irregularities*

Throughout the proceedings, Tecca has argued that the trustee's failure to comply with certain statutory requirements renders the sale invalid. These procedural irregularities or defects include that Premier had no authority to conduct the sale 161 days after the original sale date under RCW 61.24.040(6), that Premier violated RCW 61.24.090(1) by failing to discontinue the sale after they cured default more than 11 days before the actual sale date, and that the recitals contained in the trustee's deed were inadequate under RCW 61.24.040(7). Regarding the recitals, the Court of Appeals agreed with Tecca, concluding that because the deed

of trust failed to recite *any facts* triggering the protections of RCW 61.24.040(7), Dickinson was not protected from the undisputed defects in the sale. The Court of Appeals then set the sale aside based on its conclusion that Premier had no statutory authority to sell the property when it continued the sale past the 120 days permitted by the act. We agree with the Court of Appeals' holding that Premier lost statutory authority after it continued the sale past 120 days from the original sale date and that the sale was invalid. We need not address or resolve any further issues regarding other procedural irregularities.

RCW 61.24.040(1)(f), (2) provides the requirements for a deed of trust foreclosure, including the notice requirements for the trustee's sale and foreclosure. Under RCW 61.24.040(6), a trustee may continue a sale "for any cause the trustee deems advantageous . . . for a period or periods *not exceeding a total of one hundred twenty days*" (emphasis added). A plain reading of this provision permits a trustee to continue a sale once or more than once but unambiguously limits the trustee from continuing the sale past 120 days.

When a party's authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6), failure to act within that time violates the statute and divests the party of statutory authority. Without statutory

authority, any action taken is invalid. As we have already mentioned and held, under this statute, strict compliance is required. *Udall*, 159 Wn.2d at 915-16. Therefore, strictly applying the statute as required, we agree with the Court of Appeals and hold that under RCW 61.24.040(6), a trustee is not authorized, at least not without reissuing the statutory notices, to conduct a sale after 120 days from the original sale date, and such a sale is invalid.

Here, Premier issued the notice of trustee's sale listing the sale date as September 8, 2006. Premier held the actual sale on February 16, 2007, 161 days from the original sale date in violation of the statute and divesting its statutory authority to sell. The sale was invalid.

2. *Waiver*

Though undisputed that Premier failed to strictly comply with its statutory obligations, Dickinson nevertheless contends Tecca waived their right to bring a postsale challenge by failing to pursue the presale remedies provided for in RCW 61.24.040(1)(f)(IX). Waiver is an equitable principle that can apply to defeat someone's legal rights where the facts support an argument that the party relinquished their rights by delaying in asserting or failing to assert an otherwise available adequate remedy. Dickinson urges us to find waiver, contending that at

any time after Tecca received notice of their presale rights and before the actual sale, they could have restrained the sale and litigated the issue of the alleged breach of the Forbearance Agreement and underlying debt. He argues that because Tecca failed to use their presale remedies, their postsale challenge is barred. We disagree.

We have found waiver in a foreclosure setting where the facts support its application. In *Plein*, we established that waiver of any postsale challenge occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003) (citing *Cox*, 103 Wn.2d at 388). In that case, the borrower received the notices of foreclosure and trustee's sale, notifying him of his presale right to seek a restraining order. Almost two months before the scheduled sale, the borrower sought a permanent injunction barring the trustee's sale on grounds that there was no default on the underlying debt. In addition, the parties were involved in a lawsuit disputing corporate dealings and other actions. The borrower failed to seek a temporary injunction, which would have halted the sale pending a hearing on the merits of the permanent injunction. As a result, the sale proceeded *as scheduled*, on the date listed in the notices, and the property was

sold before the hearing. *Plein*, 149 Wn.2d at 220-21. Under these circumstances, in finding waiver, we recognized that allowing the borrower to delay asserting a defense until after the sale would have defeated the spirit and intent of the act.[4] *Plein*, 149 Wn.2d at 228 (citing *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971)). Given that the borrower had adequate opportunity to utilize his presale remedies to prevent wrongful foreclosure, we explained that finding waiver under those circumstances furthered the goals of the act. *Plein*, 149 Wn.2d at 228.

Waiver, however, cannot apply to all circumstances or types of postsale challenges. RCW 61.24.040(1)(f)(IX) provides that "[f]ailure to bring . . . a lawsuit *may* result in waiver of any proper grounds for invalidating the Trustee's sale" (emphasis added). The word "may" indicates the legislature neither requires nor intends for courts to strictly apply waiver. Under the statute, we apply waiver only

[4] Similarly, the Court of Appeals has found waiver in cases where the challenging party failed to seek a temporary restraining order even though they knew of proper grounds for such an order well in advance of the sale. *See, e.g.*, *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971) (defendants were barred from asserting a postsale challenge when defendants chose to wait until after the sale, about five months after discovery of the alleged fraud, to assert their claimed defense); *Koegel*, 51 Wn. App. at 116 (borrower waived right to contest the sale because as early as a month prior to the sale, the borrower, more than once, threatened to enjoin the sale, and the borrower's attorney attended the sale but made no continuance request or objection); *County Express Stores, Inc. v. Sims*, 87 Wn. App. 741, 744, 752, 943 P.2d 374 (1997).

where it is equitable under the circumstances and where it serves the goals of the act. Unlike judicial foreclosures, trustee foreclosure sales are conducted with little to no oversight. Still, once a property is sold, the act favors purchasers over property owners and other borrowers by giving preference to the third goal—stability of land titles. It does so by creating, at minimum, a rebuttable presumption that the sale was conducted in compliance with the procedural requirements of the act.[5] Thus, in determining whether waiver applies, the second goal—that the nonjudicial foreclosure process should result in is interested parties having an adequate opportunity to prevent wrongful foreclosure—becomes particularly important.

Under the facts of this case, we conclude waiver cannot be equitably established. Dickinson seemingly argues that Tecca's presale remedies were triggered the moment they received notice of the trustee's sale. Yet this argument assumes the borrower can challenge the underlying debt. Although this was correct in *Plein*, because the borrower believed the debt had been paid, here, when Tecca

[5] RCW 61.24.040(7) provides that the deed's recital of statutory compliance constitutes "prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value."

received the notice, they had no grounds to challenge the underlying debt. In fact, by entering into the Forbearance Agreement, they were acknowledging default on their loan payment. This postponed the foreclosure sale, and tendering each monthly payment gave them additional time to cure the default. While making these payments, Tecca had no reason to seek an order restraining a sale that may not even proceed.[6]

Further, unlike in *Plein*, where the borrower had a defense almost two months prior to the sale, here, Tecca had no knowledge of their alleged breach in time to restrain the sale. Tecca tendered all payments, albeit late, under the Forbearance Agreement. Option One accepted all of those late payments and permitted Premier to continue the sale each time, except for the last. By repeatedly accepting the prior late payments, Option One created expectancy in Tecca that their last late payment would also be accepted. Tecca could not have known Option One would consider their last late payment a breach of the agreement having never done so before. They reasonably believed their last payment cured the default. While the Forbearance Agreement stated they would receive a 10-day written notice upon breach, Tecca

[6] Unlike in *Plein*, where the sale proceeded as scheduled on the date in the notices, the sale here was continued six times.

never received this notice.[7] They rightly assumed the sale would be canceled after they tendered their last payment.[8] And after learning their property had been sold, Tecca promptly brought their countersuit, showing no intention of "sleeping on" their rights.

Additionally, and equally important, to ensure trustees strictly comply with the requirements of the act, courts must be able to review postsale challenges where, like here, the claims are promptly asserted. Although Dickinson contends this defeats the third goal, the goal is to *promote* the stability of land titles. *Cox*, 103 Wn.2d at 387. Enforcing statutory compliance encourages trustees to conduct procedurally sound sales. When trustees strictly comply with their legal obligations under the act, interested parties will have no claim for postsale relief, thereby

[7] Dickinson argues that Option One notified Tecca of the breach by sending a letter on January 31, 2007. Karen Tecca, however, testified at her deposition that she did not receive the purported letter, and while Option One produced an internal electronic copy of the letter, it produced no proof of service. We view the facts in the light most favorable to Tecca as the nonmoving party on summary judgment.

[8] As Tecca contends, Premier was required to discontinue the sale under RCW 61.24.090(1) as they submitted final payment curing the default more than 11 days prior to the actual sale date. Although under the Forbearance Agreement Tecca tendered payments to Option One, as the Court of Appeals noted, *Albice*, 157 Wn. App. at 934 n.16, it would be disingenuous to suggest Premier had no notice of Tecca's final payment. Option One and Premier were closely affiliated, if not the same company. The two companies shared databases, that is, had access to the same loan information, and everyone who worked for Premier was an employee of Option One.

promoting stable land titles overall. Under the facts here, we hold that Tecca did not waive their rights.

3. *Bona Fide Purchaser*

Despite the trustee's failure to strictly comply with the statutory requirements and in addition to the waiver argument, Dickinson contends he is a BFP and should receive title. While the trial court concluded that Dickinson was a BFP, the Court of Appeals disagreed. We agree with the Court of Appeals.

Under RCW 61.24.040(7), the deed's "recital shall be prima facie evidence of [statutory] compliance and conclusive evidence thereof in favor of bona fide purchasers."[9] Whether Dickinson was a BFP is factual and legal inquiry. A BFP is one who purchases property without actual or constructive knowledge of another's

[9] As mentioned, Tecca also contends that the recitals in the deed were inadequate to demonstrate compliance with the statute and cannot protect Dickinson even if he were a BFP. The act requires the deed to "recite *the facts* showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust." RCW 61.24.040(7) (emphasis added). Here, the deed contained conclusory language stating "[a]ll legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in Chapter 61.24 RCW." CP at 824. Although Dickinson argues that the recitals in the deed are almost identical to the form deed in 4 Washington State Bar Association, *Washington Real Property Deskbook* § 47.11(16) (3d ed. Supp. 2001), the party drafting the deed, or any legal document, must still consult the law to ensure compliance. The statute requires the deed to recite "facts" showing statutory compliance. Not only did the deed contain conclusory language stating compliance, the deed also misleadingly listed the sale date in the notice of trustee's sale as February 16, 2007, instead of the original sale date of September 8, 2006. It also incorrectly states that the default was not cured, that is, that final payment was not tendered, 11 days prior to the date of the trustee's sale. It is questionable whether the recitals in the deed satisfied the statute.

claim of right to, or equity in, the property, and who pays valuable consideration. But if the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed. Thus, in considering whether a person is a BFP, we ask (1) whether the surrounding events created a duty of inquiry, and if so, (2) whether the purchaser satisfied that duty. In this determination, we consider the purchaser's knowledge and experience with real estate. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175-76, 685 P.2d 1074 (1984).

The facts pertaining to Dickinson's status are undisputed. We give, as did the Court of Appeals, substantial weight to Dickinson's real estate experience. Dickinson has extensive experience with nonjudicial foreclosure sales, purchasing 9 of his 13 properties at such sales. He familiarized himself with foreclosure law and knew enough about the process to obtain the notice of trustee's sale from a title company.

Dickinson had within his knowledge sufficient facts to put an experienced real estate purchaser, such as himself, on inquiry notice. He had a copy of the notice

of trustee's sale, which listed the amount in arrears as only $1,228.03, suggesting Tecca had substantial equity in the property. CP at 530. Dickinson contacted Tecca, who refused to sell him the property and insisted the sale would not happen. Dickinson kept track of the numerous continuances and was surprised that the property was finally up for sale, five months after the date listed in the notice. The number of continuances, however, chilled the bidding process, contributing to the grossly inadequate purchase price. Although four or five bidders showed up to the original sale, only Dickinson and another bidder showed up at the actual sale. Dickinson was prepared to bid up to $450,000 for the property, showing he knew the property was worth at least that much. The substantial equity coupled with the minor default amount, Tecca's intention to keep the property, and the numerous continuances created a duty of inquiry, which Dickinson failed to satisfy. Given that he had already contacted Tecca once, Dickinson could have contacted Tecca again to determine whether default had been cured. Had Dickinson made a reasonably diligent inquiry, he could have discovered that the numerous continuances were tied to payments under the Forbearance Agreement. Because real estate investment was his livelihood, Dickinson should have taken more care with this purchase in order to claim BFP protection. We agree with the Court of Appeals and hold that Dickinson

was not a BFP.

CONCLUSION

The nonjudicial foreclosure proceedings here were marred by repeated statutory noncompliance. The financial institution acting as the lender also appeared to be acting as the trustee under a different name; the lender repeatedly accepted late payments and, at its sole discretion, rejected only the final late payment that would have cured the default; and the trustee conducted a sale without statutory authority. Equity cannot support waiver given these procedural defects and the purchaser's status as a sophisticated real estate investor or buyer who had constructive knowledge of the defects in the sale.

We conclude the trustee sale was invalid. We affirm the Court of Appeals and remand to the trial court to enter an order declaring the sale invalid and quieting title in Tecca as against Dickinson. We also affirm the Court of Appeals' decision reversing the trial court's judgments for rent, costs, and statutory attorney fees in favor of Dickinson.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

Chief Justice Barbara A. Madsen	Justice James M. Johnson
Justice Tom Chambers	Justice Charles K. Wiggins
Justice Susan Owens	Gerry L. Alexander, Justice Pro Tem.