Case No. 47395-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TODD AND THERESA BAKER

Appellants,

v.

PENNYMAC LOAN SERVICES, LLC;
NORTHWEST TRUSTEE SERVICES, INC.,

Respondents.

RESPONDENT NORTHWEST TRUSTEE SERVICES, INC.'S OPENING BRIEF

Submitted By:
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I. STATEMENT OF THE CASE

A. Factual History.

On or about May 31, 2006, Appellants Todd and Theresa Baker executed a promissory note (the "Note") in the amount of $344,000.00, payable to Wilmington Finance, Inc. ("Wilmington"). *Baker v. NWTS et al.*, Case No. 11-2-01437-5 (Clark Co. Supr. Ct.), Dkt. No. 49 at Ex. 1 (Note attached to Motion for Summary Judgment).[1] At that time, the Bakers each received a Notice of Right to Cancel their loan transaction. *Id.* at Ex. 3.

The Bakers secured repayment of the Note with a Deed of Trust. *Id.*, Ex. 2. On June 7, 2006, the Deed of Trust was recorded, encumbering real property commonly known as 106 Northwest 381st Street, La Center, Washington 98629 (the "Property"). *Id.*

On or about December 1, 2009, the Bakers defaulted on the terms of the secured Note when they failed to make any further required loan payments. *Id.*, Ex. 5.

On October 15, 2010, an Assignment of Deed of Trust was

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[1] Although the Bakers did not designate the exhibits to NWTS' Motion for Summary Judgment as part of the record, the Court "may take judicial notice of the record in the case presently before us...." *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003), *quoting Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 240 P.2d 560 (1952).

recorded with the Clark County Auditor in favor of PennyMac Loan Services, LLC ("PennyMac"). *Id.*, Ex. 7; *see also* Clark County Auditor's No. 4707492. That same date, upon recordation of the Appointment of Successor Trustee, Northwest Trustee Services, Inc. ("NWTS") became vested with the powers of the original trustee under the Deed of Trust. *Id.*, Ex. 8; *see also* Clark County Auditor's No. 4704793.

On December 13, 2010, a Notice of Trustee's Sale was recorded with the Clark County Auditor, setting a sale date for the Property of March 18, 2011. *Id.*, Ex. 8; *see also* Clark County Auditor's No. 4725484.

B. Procedural History.

On April 8, 2011, the Bakers sued PennyMac and NWTS in the Clark County Superior Court. Case No. 11-2-01437-5, *supra.* The Bakers alleged a claim for rescission under the Truth-in-Lending Act ("TILA"), a "Breach of Good Faith and Fair Dealing in the Contract," and "Unfair Business Practices." CP 130-143. The Bakers did not ascribe liability to NWTS in the latter two causes of action. CP 140-141.

On May 13, 2011, the trustee's sale – which had been postponed from the original date – was restrained from occurring during the pendency of the case. Case No. 11-2-01437-5, *supra.*, Dkt. No. 18.

Both PennyMac and NWTS moved for summary judgment, and on

November 27, 2012, the Hon. Judge Barbara Johnson advised the parties that those motions would be granted. *Id.*, Dkt. No. 61. On December 21, 2012, the Court entered a summary judgment order. *Id.*, Dkt. No. 70. The Bakers chose not to appeal this order.

On or about February 11, 2015, the Bakers sought to resurrect their lawsuit, arguing for relief from judgment under CR 60(b) before Judge Johnson. On March 10, 2015, the Bakers' motion was denied. *Id.*, Dkt. No. 89. On March 26, 2015, the instant appeal followed. *Id.*, Dkt. No. 90.

On June 26, 2015, without any legal impediment, the Property was finally sold at a trustee's sale to a third-party purchaser.[2]

II. RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not err in denying the Bakers' Motion for Relief pursuant to CR 60(b). Thus, that decision should be affirmed.

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[2] *See* Clark County Auditor's Nos. 5149521 (Notice of Sale); 5192034 (Trustee's Deed). The Court may take notice of these public records, which are not intended as new evidence, but instead referenced to refute the Bakers' contention that "the nonjudicial foreclosure has not been completed." Brief of Appellants at 18; *see also Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977); ER 201(f).

III. RESPONSE ARGUMENT

A. Standard of Review.

A denial of a motion to vacate under CR 60(b) will generally not be disturbed unless the trial court manifestly abused its discretion. *Haley v. Highland,* 142 Wn.2d 135, 156, 12 P.3d 119 (2000).

The "[r]eview of a denial of a CR 60(b) motion is generally limited to the propriety of the denial, and is not a review of the original judgment." *In re Marriage of Maxfield*, 47 Wn. App. 699, 703, 737 P.2d 671 (1987). This is because "[t]he exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion." *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451, 618 P.2d 533 (1980), *citing De Filippis v. United States*, 567 F.2d 341, 342 (7th Cir. 1977). Moreover, "[e]rrors of law are not grounds for vacation under CR 60(b)." *Id.*, *citing Burlingame v. Consolidated Mines & Smelting Co., Ltd.,* 106 Wn.2d 328, 722 P.2d 67 (1986); *see also State ex rel. Green v. Superior Court for King Cnty.*, 58 Wn.2d 162, 165, 361 P.2d 643 (1961) ("That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari according to the case, but it is no ground for setting aside the judgment on motion.").

Here, the Bakers failed to appeal the December 21, 2012 summary judgment order in favor of all defendants. The trial court did not abuse its discretion in denying the Bakers an opportunity to re-litigate the case over two years later via a motion for relief from judgment.

B. The Alleged Effect of a Subsequent Decision Should Not Permit Re-Commencing Litigation that was Concluded With a Final Unchallenged Order.

The Bakers contend that the United States Supreme Court's holding in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015) should have retroactive application and allow them to re-open allegations of rescission under the Truth-in-Lending Act ("TILA"). Brief of Appellants at 11, *inter alia.*

But the relevant question on appeal is not whether *Jesinoski* could have changed the original summary judgment outcome, as a ruling predicated on purported legal error is not subject to vacation. *See Bjurstrom, supra.*; *cf.* Brief of Appellant at 14-15 (claiming *Jesinoski* had "identical" facts). Rather, the question is whether the trial court appropriately denied relief to the Bakers under CR 60(b).

The answer is that the Bakers' argument fails because Washington State precedent has long refused to accept the notion that a "final judgment of a court... [can be] altered because of a changed judicial

interpretation of the law in a subsequent case." *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 822, 576 P.2d 62 (1978).

The State Supreme Court explained this principle in-depth in *Pac. Tel. & Tel. Co. v. Henneford*, citing multiple cases where a misapplication of the law presented no grounds for later vacating a judgment. 199 Wash. 462, 470, 92 P.2d 214 (1939), *citing Goodwin v. Am. Sur. Co. of New York*, 190 Wash. 457, 473, 68 P.2d 619 (1937); *In re Jones' Estate*, 116 Wash. 424, 199 P. 734 (1921).

Indeed, the Supreme Court identified and disagreed with the very basis of the Bakers' argument:

> '[t]he rule of conclusiveness to this extent is one of the most inflexible principles of the law; insomuch that even if it were subsequently held by the courts that the decision in the particular case was erroneous, such holding would not authorize the reopening of the old controversy in order that the final conclusion might be applied thereto.'

Id. at 469, *quoting* 1 Cooley's Constitutional Limitations, 8th ed., 108-110.

Presciently, the Supreme Court further held:

> [t]his court cannot grant leave to move against the judgment here in question before the superior court simply because after its rendition the supreme court [*sic*] of the United States has handed down certain decisions embodying a ruling contrary to that theretofore declared by this court.

Id. at 471.[3]

In *Matter of Marriage of Brown*, the State Supreme Court again reaffirmed favoring "finality rather than validity" of judgments facing collateral attack under CR 60(b). 98 Wn.2d 46, 50, 653 P.2d 602 (1982). The Court applied a three-factor test to analyze whether subsequent case law should be given retroactive effect:

> [f]irst, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed ... Second, it has been stressed that 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' ... Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'

Id. at 50-51, *quoting Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439,

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[3] The Court observed that the circumstances surrounding Henneford's appeal were quite similar to the facts at bar:

> [e]ssentially, the relief prayed for is not demanded because of any extrinsic facts unavailable when the case was originally submitted, but is based, first, upon the fact that this court, after the filing of the opinion in the case at bar, changed its view of the law on one phase of the question presented; second, because the legislature, after the filing of the opinion, enacted a new law; and third, because the supreme court of the United States subsequently rendered two decisions laying down a rule contrary to the view expressed by this court....

Id. at 473. The Court concluded, "[t]he decree in the case at bar is not subject to attack on any of the grounds urged by appellants, and their petition is accordingly denied." *Id.*

546 P.2d 81 (1976).

Brown rejected the Appellants' retroactivity arguments, finding that the trial court's orders were not appealed, and the injustice of hardship from retroactively applying a change in the law would far exceed the same harm "which might occur from prospective application." *Id.* at 52.

Likewise, the Bakers' position in this case, *i.e.* re-opening litigation to challenge a now-completed foreclosure, seeks to undermine two core goals of the Deed of Trust Act, namely that "the nonjudicial foreclosure process should be efficient and inexpensive," and "the process should promote stability of land titles." *Albice v. Premier Mortg. Servs. of Wash., Inc.,* 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). It would be wholly inequitable and unjust to permit the Bakers an opportunity to allege rescission of a security instrument that was properly foreclosed upon, resulting in sale of the Property to a bonafide third-party purchaser.[4]

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[4] To the extent that the Bakers might rely on the third goal of the Deed of Trust Act, "that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure," it is important to note they *did not attempt* to restrain the June 26, 2015 sale from occurring and consequently, they cannot now affect the sale's outcome. *See, e.g., Frizzell v. Murray,* 179 Wn.2d 301, 306-07, 313 P.3d 1171 (2013); *Plein v. Lackey,* 149 Wn.2d 214, 227, 67 P.3d 1061 (2003); *Cox v. Helenius,* 103 Wn.2d 383, 388, 693 P.2d 683 (1985); *Merry v. Nw. Tr. Servs., Inc.*, -- Wn. App. --, 352 P.3d 830 (2015); *CHD, Inc. v. Boyles,* 138 Wn. App. 131, 157 P.3d 415 (2007); *see also* RCW 61.24.127(2)(b)&(c); *cf.* Brief of Appellants at 11, 12, 15 (suggesting otherwise).

Reversing the trial court's CR 60(b) ruling cannot allow the "Bakers' enforcement of their rescission rights....;" instead, it would drag the prior lender and prior trustee back into lengthy proceedings – three years after they first ended – to assess if the Bakers *might have* invoked TILA rescission. *Cf.* Brief of Appellants at 11.

As to NWTS, remand would also be fruitless because NWTS *cannot be liable* for alleged violations of TILA, as it had no involvement in closing the loan. *See* 15 U.S.C. §1640(a), 15 U.S.C. §1641(a) (liability for TILA violations can accrue only to "creditors" and assignees of creditors).[5] The ambit of CR 60(b)(6) does not favor the Bakers, and the trial court correctly denied their request to vacate the December 2012 summary judgment order.

C. CR60(b)(11) Also Does Not Afford a Remedy to the Bakers.

The Bakers next claim that *Jesinoski* created an "extraordinary circumstance" justifying relief from summary judgment pursuant to CR 60(b)(11). Brief of Appellants at 12.

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[5] *See Bunag v. Aegis Wholesale Corp.*, 2009 WL 2245688 (N.D. Cal., July 27, 2009) (dismissing disclosure claims against a loan servicer because "Plaintiff cannot articulate how, as the servicer of the loan, [servicer defendant] can be liable for claims relating to any acts or omissions that plaintiff alleges occurred during the loan origination process.") A trustee has even fewer contacts with a borrower than a loan servicer.

The Bakers' reliance on *Flannagan v. Flannagan*, 42 Wn. App. 214, 217, 709 P.2d 1247 (1985) is misplaced. *Flannagan* addressed the application of a federal law, enacted in response to a United States Supreme Court decision, to dissolution decrees that were not previously appealed. *Id.* at 215. Both this Court and Division Two agreed that the federal law could apply retroactively based on Congressional intent. *Id.* at 218, *citing In Re Marriage of Giroux,* 41 Wn. App. 315, 322, 704 P.2d 160 (1985).

While *Jesinoski* interprets TILA, nothing in its holding suggests retroactivity insofar as already-resolved actions that invoked related arguments. The Bakers' position will unleash "the specter of countless similar petitions" and undermine the finality of every TILA-based challenge raised prior to *Jesinoski*. *See Martin v. Martin*, 20 Wn. App. 686, 690, 581 P.2d 1085 (1978).

Looking to Fed. R. Civ. P. 60(b)(6), as urged by the Bakers[6], federal case law finds that "it ordinarily is not permissible to use a Rule 60(b)(6) motion to remedy a failure to take an appeal." Other Reasons Justifying Relief, 11 Fed. Prac. & Proc. Civ. § 2864 (3d ed.); *accord*

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[6] Brief of Appellants at 12.

Budget Blinds, Inc. v. White, 536 F.3d 244, 258 (3d Cir. 2008) ("deliberate choice" to not contest a judgment did not create a "hardship"); *Molinary v. Powell Mtn. Coal Co.*, 76 F. Supp. 2d 695, 705 (W.D. Va. 1999), *citing Schwartz v. United States,* 976 F.2d 213, 218 (4th Cir.1992) ("decisions made during the course of litigation provide no basis for relief under 60(b)(6), even though with hindsight they appear wrong.").

Numerous federal courts have also denied Fed. R. Civ. P. 60(b) motions, and affirmed such denials, when they were brought based on a later change in the law. *See, e.g., Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) ("a change in decisional law... is 'not the kind of extraordinary circumstance that warrants relief under Rule 60(b)(6)'...."); *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007) ("[w]e should deny relief to parties that, without justification, do not even present the {ultimately successful} argument on appeal."); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 231 (D.D.C. 2011), *citing Twist v. Ashcroft,* 329 F.Supp.2d 50 (D.D.C.2004) ("[I]f a change in law after a judgment was rendered was grounds to vacate a final judgment, final judgments would cease to exist."); *Adams v. Fid. & Cas. Co. of New York,* 147 F.R.D. 265, 268 (S.D. Fla. 1993) ("[t]he fact that a statute invalidates pre-existing case law does not justify relief from final judgment.").

The Ninth Circuit decision in *Phelps v. Alameida*, which the Bakers rely upon, presents markedly different circumstances from this case. *See* Brief of Appellant at 13, *citing* 569 F.3d 1120 (9th Cir. 2009). Phelps' *habeas* petition appeal was assigned to a panel of the Court which reached the opposite conclusion as two other panels; a controlling published opinion was then issued after the appeal became final. *Id.* at 1127. On three separate occasions, the District Court disallowed Phelps' Fed. R. Civ. P. 60(b) motion to review the merits of his *constitutional* claims, despite the fact that he raised a compelling argument at multiple stages of the action while remaining imprisoned for eleven years. *Id.* at 1127, 1141.[7] The Bakers – who stopped paying back a loan they apparently used to acquire and enjoy real property – are clearly not in the same situation as Phelps was, and they assert no issue of constitutional magnitude.

Lastly, the Bakers strangely contend that "it may have been frivolous" to pursue an appeal when they lost on summary judgment in 2012 because the Ninth Circuit adhered to a different outcome than

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[7] The Ninth Circuit has subsequently limited *Phelps* to its extraordinary facts, finding that claims "disguised as a Rule 60(b) motion" brought after such requests for relief were "already fully adjudicated on the merits and denied" is not grounds for re-opening a case. *Jones v. Ryan*, 733 F.3d 825, 840 (9th Cir.) *cert. denied*, 134 S. Ct. 503, 187 L. Ed. 2d 340 (2013).

Jesinoski. Brief of Appellant at 22. But the Bakers would not have appealed to *the Ninth Circuit* as their lawsuit was not in the federal judicial system.

The Bakers do not know what *this Court* might have decided three years ago concerning the underlying merits of their Complaint; however, they did not appeal and it is not proper to engage in *ex post facto* conjecture on that point when analyzing the denial of a CR 60(b) motion. *See State ex rel. Green, supra*. What we do know is that extraordinary circumstances justifying relief from the summary judgment order simply do not exist here. Thus, the trial court acted within its discretion to deny the Bakers' request for leave to re-litigate their claims.

D. NWTS Should be Granted Costs.

Under R.A.P. 14.2, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." Under R.A.P. 14.3(a), certain expenses are allowed as awardable costs.

R.A.P. 18.1(b) requires that a "party must devote a section of its opening brief to the request for the fees or expenses." Thus, in accordance with R.A.P. 14.2, and upon presentation of a cost bill pursuant to R.A.P.

14.4, NWTS requests a cost award if the Court determines that NWTS is the substantially prevailing party on appeal.[8]

IV. CONCLUSION

The Bakers fail to demonstrate that the trial court committed a manifest abuse of discretion when it denied their CR 60(b) motion.

The Bakers voluntarily elected to refrain from appealing a summary judgment order, and only after *Jesinoski* was decided much later did they seek to re-open their action, believing that case would ostensibly have changed the outcome here.

Under both Washington State and federal case law, however, the *Jesinoski* decision did not afford relief to the Bakers by way of either CR 60(b)(6) or CR 60(b)(11). The Court should not permit a second round of litigation against NWTS, especially where NWTS cannot even be liable for the TILA claim as pled. *See* 15 U.S.C. §1640(a), 15 U.S.C. §1641(a), *supra.*; *see also* CP 132 (Complaint).

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[8] Conversely, the Bakers' request for attorneys' fees and costs should be denied, and 15 U.S.C. §1640(a)(3) does not pertain to this appeal in any event.

Consequently, NWTS asks for the ruling below to be affirmed and for costs to be awarded in its favor.

DATED this 17th day of August, 2015.

RCO LEGAL, P.S.

By: /s/ Joshua S. Schaer
Joshua S. Schaer, WSBA #31491
Of Attorneys for Respondent Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On August 18, 2015 I caused a copy of **Respondent Northwest Trustee Services, Inc.'s Opening Brief** to be served to the following in the manner noted below:

David A. Leen Leen & O'Sullivan, PLLC 520 East Denny Way Seattle, WA 98122 Attorneys for Appellants	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile
Claire L. Rootjes Averil Rothrock Schwabe, Williamson & Wyatt, PC 1420 5th Ave., Suite 3400 Seattle, WA 98101-4010 Attorneys for Respondent PennyMac Loan Services, LLC	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 18th day of August, 2015.

Kristine Stephan, Paralegal