FILED
SUPREME COURT
STATE OF WASHINGTON
1/3/2023 3:41 PM
BY ERIN L. LENNON
CLERK

No. 100918-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COPPER CREEK (MARYSVILLE) HOMEOWNERS ASSOCIATION,
a Washington nonprofit corporation,

Petitioner,

v.

SHAWN A. KURTZ and STEPHANIE A. KURTZ, *husband and wife and the marital or quasi marital community composed thereof;* QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, *a Washington corporation,*

Respondent.

WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a/ CHRISTIANA TRUST, *not individually but as trustee from Pretium Mortgage Acquisition Trust, Selene Finance LP,*

Respondent.

AMICUS BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE CAI WASHINGTON CHAPTER

Erin A. Maloney, Esq. (California SBN 155485) FIORE, RACOBS & POWERS, *A Professional Law Corporation* 6820 Indiana Ave., Suite 140 Riverside, CA 92506 Tel.: (951) 369-6300 Fax: (951) 369-6355 *emaloney@fiorelaw.com*	In Association with: Anthony L. Rafel (WSBA No. 13194) RAFEL LAW GROUP PLLC 4126 E. Madison St., Ste. 202 Seattle, WA 98112 Main 206.838.2660 Fax 206.838.2661

TABLE OF CONTENTS

I. INTRODUCTION 1

II. EFFECT OF THE BANKRUPTCY DISCHARGES 2

A. The Note is Discharged, but the Security Interest is Not 2

B. Unlike Assessments, Post-Petition Installments Under a Deed of Trust are Discharged 5

III. EFFECT OF SURRENDER OF THE PROPERTY 7

IV. STATUTE OF LIMITATIONS BARS ENFORCEMENT AFTER SIX YEARS FROM DATE OF DISCHARGE 9

V. RESPONDENTS' INEQUITABLE CONDUCT ALSO BARS THEM FROM FORECLOSING 12

VI. CONCLUSION 14

CERTIFICATE OF COMPLIANCE 16

TABLE OF AUTHORITIES

Cases

Farrey v. Sanderfoot, 500 U.S. 291, 297, 111 S.Ct. 1825, 1829, 114 L.Ed.2d 337 (1991) 4

Long v. Bullard, 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004 (1886) 3

In re Biggar, 110 F.3d 685, 687 (9th Cir. 1997), as amended (May 6, 1997) 5,6

In re Fristoe, No. 10-32887, 2012 WL 4483891 (Bankr. D. Utah Sept. 27, 2012) 9

In re Heirholzer, 170 B.R. 938, 940 (Bankr. N.D. Ohio 1994) 5

In re Huth, 643 B.R. 177, 189 (Bankr. W.D. Tex. 2022) 4

Johnson v. Home State Bank, 501 U.S. 78, 82–83, 111 S. Ct. 2150, 2153, 115 L. Ed. 2d 66 (1991) 3,5

Owen v. Owen, 500 U.S. 305, 308–309, 111 S.Ct. 1833, 1835–1836, 114 L.Ed.2d 350 (1991) 4

Pigg v. BAC Home Loans Servicing, L.P. (In re Pigg), 453 B.R. 728 (Bankr. M.D. Tenn. 2011) 9

Prime Lending II, LLC v. Buerge (In re Buerge), No. BAP KS-12-074, 2014 WL 1309694 (B.A.P. 10th Cir. Apr. 2, 2014) 8

Seattle First Nat. Bank, N.A. v. Siebol, 64 Wn. App. 401, 407, 824 P.2d 1252 (1992) 13

Statutes

11 U.S.C. §363 8

11 U.S.C. §501 2

11 U.S.C. §502 2

11 U.S.C. §521(a)(2)(A) 7

11 U.S.C. §521(a)(4) ... 7

11 U.S.C. §522(c)(2) ... 3

11 U.S.C. §523 ... 2,5

11 U.S.C. §523(a) ... 5

11 U.S.C. §523(A)(16) ... 6,7,15

11 U.S.C. §524 ... 2,3

11 U.S.C. §524(a)(1) ... 3

11 U.S.C. §524(a)(2) ... 2

11 U.S.C. §524(c) ... 3

11 U.S.C. §554 ... 8

11 U.S.C. §724 ... 8

11 U.S.C. §725 ... 8

11 U.S.C. §727 ... 1,2,3,5,6

11 U.S.C. §727(b) ... 2

Other Authorities

59A C.J.S. Mortgages §891 ... 13

Jeffrey S. Adams, *Rewriting 11 U.S.C. § 523 (a)(16): The Problems of Delayed Foreclosure and Judicial Activism*, 30 Emory Bankr. Dev. J. 347 (2014) 8

3 R. Powell, The Law of Real Property ¶ 467 (1990)................ 3

I.

INTRODUCTION

CAI's interest in this case is focused on issues arising from the Court of Appeals' misinterpretation of bankruptcy law, and the potential impact the published opinion of the Court of Appeals could have on future cases. For policy reasons, allowing a lender to unreasonably delay foreclosure in order to avoid payment of assessments to a community association, and wait until after a third party has improved the property thereby raising the value thereof, all to the detriment of the other members of the community, would allow an inequitable result.

II.

EFFECT OF THE BANKRUPTCY DISCHARGES

According to public records, Stephanie Kurtz filed a chapter 7 bankruptcy in the Eastern District of California as Case No. 10-24411 on February 24, 2010, and received a discharge therein pursuant to 11 U.S.C. §727 on June 14, 2010. Her bankruptcy case was closed on June 18, 2010.

Public records also reflect that Shawn Kurtz filed a chapter 7 bankruptcy in the Western District of Washington on February 25, 2011, as Case No. 11-13421-KAO, and received a discharge pursuant to 11 U.S.C. §727 on July 13, 2011. His case was closed on July 18, 2011.

A. The Note is Discharged, but the Security Interest is Not

11 U.S.C. §727(b) sets forth the extent of a bankruptcy discharge in a chapter 7 case. That section provides as follows:

> **Except as provided in section 523 of this title**, a discharge under subsection (a) of this section discharges the debtor from all debts that **arose before the date of the order for relief under this chapter**, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title. (Emphasis added.)

11 U.S.C. §524(a)(2) provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor,

whether or not discharge of such debt is waived." Section 524(c) permits reaffirmation of debts which would otherwise be discharged if the reaffirmation agreement complies with the requirements of §524.

In *Johnson v. Home State Bank*, 501 U.S. 78, 82–83, 111 S. Ct. 2150, 2153, 115 L. Ed. 2d 66 (1991), the United States Supreme Court summarized the effect of a discharge on a mortgage as follows:

> A mortgage is an interest in real property that secures a creditor's right to repayment. But unless the debtor and creditor have provided otherwise, the creditor ordinarily is not limited to foreclosure on the mortgaged property should the debtor default on his obligation; rather, the creditor may in addition sue to establish the debtor's *in personam* liability for any deficiency on the debt and may enforce any judgment against the debtor's assets generally. See 3 R. Powell, The Law of Real Property ¶ 467 (1990). A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. See 11 U.S.C. § 727. However, **such a discharge extinguishes only "the personal liability of the debtor**." 11 U.S.C. § 524(a)(1). Codifying the rule of *Long v. Bullard*, 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004 (1886), the Code provides that **a creditor's right to foreclose on the mortgage survives or passes**

> **through the bankruptcy**. See 11 U.S.C. § 522(c)(2); *Owen v. Owen*, 500 U.S. 305, 308–309, 111 S.Ct. 1833, 1835–1836, 114 L.Ed.2d 350 (1991); *Farrey v. Sanderfoot*, 500 U.S. 291, 297, 111 S.Ct. 1825, 1829, 114 L.Ed.2d 337 (1991); H.R.Rep. No. 95–595, supra, at 361. (Emphasis added.)

Under the Bankruptcy Code, a bankruptcy discharge does not extinguish debt. Instead, a bankruptcy discharge removes any personal liability of the debtor to the creditor while leaving intact any liens that secures such debt. *In re Huth*, 643 B.R. 177, 189 (Bankr. W.D. Tex. 2022)

A promissory note, which **is not recorded**, is not a lien. Rather, it is the agreement setting for the obligor's duty to pay in accordance with the terms thereof. A mortgage or deed of trust, which **is recorded**, creates a lien which secures the amounts owed pursuant to a promissory note. A note which is executed prior to the commencement of a bankruptcy, including the note executed by the Kurtzes in favor of Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as trustee from Pretium Mortgage Acquisition Trust, Selene

Finance LP ("Respondents") ("Note") is dischargeable (See *In re Heirholzer*, 170 B.R. 938, 940 (Bankr. N.D. Ohio 1994)), but the lien securing the Note (the "Deed of Trust") is not. *Johnson v. Home State Bank, supra* at 83.

B. Unlike Assessments, Post-Petition Installments Under a Deed of Trust are Discharged

The issue of whether post-petition installments owed pursuant to an agreement executed prior to the filing of a bankruptcy is not new. The Ninth Circuit considered this issue in the context of an installment contract for pre-petition legal services, which called for all fee payments to be made post-petition in *In re Biggar*, 110 F.3d 685, 687 (9th Cir. 1997), as amended (May 6, 1997). That court held as follows:

> Section 727 provides a general rule for determining when it is appropriate to discharge the debtor's pre-petition debts. 11 U.S.C. § 727. Section 523 lists eighteen types of debts that are not discharged, even if a discharge is appropriate under § 727. 11 U.S.C. § 523(a). Nowhere in § 523 is there a provision that excepts debts for attorneys' fees incurred in preparing bankruptcy petitions.

> The plain language of the discharge provisions thus is clear. All of the debtor's pre-petition debts, save those listed in § 523, are discharged in a Chapter 7 proceeding. Section 523 does not except pre-petition attorneys' fees from discharge.

A discharge does not relieve a debtor of the obligation to pay post-petition assessments to a homeowners association because community associations enjoy an exception to discharge pursuant to 11 U.S.C. §523(A)(16). That section provides that in the event of a discharge pursuant to 11 U.S.C. §727, post-petition assessments owed to a condominium or homeowners association are exempt from discharge "for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit." This exception is necessary to ensure that *someone* remains on the hook for payment of assessments after an owner files for bankruptcy relief.

There is no corresponding exception to discharge for post-petition installments owed pursuant to a promissory note secured by a deed of trust. Because the Note is an agreement which arose

prior to the filing of the bankruptcies, the entire Note was discharged.

Conversely, the Deed of Trust is a security interest which was not affected by the bankruptcy discharges. The Respondents could have pursued foreclosure of the Deed of Trust at any time after the automatic stay was lifted, up through the time that the appropriate statute of limitations ran.

III.

EFFECT OF SURRENDER OF THE PROPERTY

If a Chapter 7 debtor lists in his schedules a debt secured by property of the estate, 11 U.S.C. §521(a)(2)(A) requires the debtor to file a "statement of his intention with respect to the retention or surrender" of that property. If a debtor wishes to retain title to property through a bankruptcy, he or she must reaffirm the debt owed pursuant to a note, or else the lender would be able to pursue enforcement of its security interest (deed of trust) by foreclosing. In this case, both of the Kurtzes surrendered the property. When property is surrendered, it is

surrendered to the bankruptcy trustee, and becomes an asset of the estate. 11 U.S.C. §521(a)(4)

A chapter 7 trustee has several choices in administering the assets: sell the property pursuant to 11 U.S.C. §363, abandon it pursuant to §554, or dispose of it pursuant to §§724 or 725. *Prime Lending II, LLC v. Buerge (In re Buerge)*, No. BAP KS-12-074, 2014 WL 1309694 (B.A.P. 10th Cir. Apr. 2, 2014). If the property is over-encumbered, the trustee will abandon it back to the debtor. The debtors thereafter regain title to the property subject to any liens that exist. It is expected that the lender, who is no longer being paid, will promptly foreclose.

In spite of the Kurtzes' surrender of the property, and the bankruptcy trustee's subsequent abandonment, the Respondents did not take steps to foreclose for more than eight years. This resulted in a situation which occurred fairly often during and after the Great Recession, to wit, owners who no longer reside in their home must nevertheless pay assessments to their community association. (*See* Jeffrey S. Adams, *Rewriting 11*

U.S.C. § 523 (a)(16): The Problems of Delayed Foreclosure and Judicial Activism, 30 Emory Bankr. Dev. J. 347 (2014).)

Although some owners have attempted to compel their lenders to foreclose following a bankruptcy discharge, most courts have held that there are no valid grounds to do so. (*See, e.g., Pigg v. BAC Home Loans Servicing, L.P. (In re Pigg),* 453 B.R. 728 (Bankr. M.D. Tenn. 2011); *In re Fristoe,* No. 10-32887, 2012 WL 4483891 (Bankr. D. Utah Sept. 27, 2012).) Thus, Respondents were legally able to sit on their rights and delay foreclosure to avoid taking title to property which was under water and which was subject to assessments. However, such a tactic is not without risk. The applicable statute of limitations does apply to bar foreclosure after six years of sitting on those rights and, as discussed below, the practice is profoundly inequitable.

IV.

STATUTE OF LIMITATIONS BARS ENFORCEMENT AFTER SIX YEARS FROM DATE OF DISCHARGE

Because the Note was executed prior to the filing of the bankruptcy petitions, and no exception to discharge applies, all post-petition installments owed pursuant to the Note were discharged. Respondents could not seek to enforce the Note against the Kurtzes following their surrender of the property and subsequent discharges. Rather, Respondents were limited to enforcement of their security interest in the form of their Deed of Trust against the property *in rem*.

It is the Note which established the opportunity to pay the secured debt in installments; the deed of trust secured the **entirety of the debt**. The Court of Appeals' opinion that the statute of limitations started anew with each installment is in error. Because Respondents are limited to *in rem* relief by

foreclosing the Deed of Trust, they can only foreclose the entire Deed of Trust, not just some installments secured thereby.

The appropriate trigger date for the running of the statute of limitations is the date that the second bankruptcy discharge was entered: July 13, 2011, because that is when neither of the Kurtzes were liable for any installments under the Note. The six-year statute of limitations ran on July 12, 2017. Respondents' untimely efforts to commence foreclosure in 2019 were therefore barred by the statute of limitations.

If the statute is interpreted as the Court of Appeal opined, then the statute of limitations is effectively extended to 30 years when the last installment under the discharged Note would be due, plus six additional years for the statute of limitations to run on that last installment. Clearly, such an interpretation would cause chaos in situations like this one where the lender does not undertake any effort to foreclose for an unreasonable period of time.

V.

RESPONDENTS' INEQUITABLE CONDUCT ALSO BARS THEM FROM FORECLOSING

The Court of Appeals' opinion describes an appalling set of facts demonstrating that Respondents acted in bad faith. Respondents were aware that they delayed their foreclosure beyond the applicable statute of limitations. In May 2020, before commencing foreclosure proceedings, Respondents reached out to the Kurtzes to request that they execute a waiver of the statute of limitations. The Kurtzes did not execute the requested waiver, but Respondents proceeded with their foreclosure anyway, with the knowledge that the statute of limitations had run.

Respondents waited until after the home was repaired at the expense of the Association, and after it was leased to a tenant to initiate foreclosure. Moreover, the Court of Appeals' opinion recites that the Respondents engaged in bad faith and misconduct throughout the case, resulting in monetary and non-monetary sanctions against them. Respondents' hands are not clean in this

case. and their inequitable conduct is properly considered. *See, e.g., Seattle First Nat. Bank, N.A. v. Siebol*, 64 Wn. App. 401, 407, 824 P.2d 1252 (1992); 59A C.J.S. Mortgages §891.

Aside from the Respondents acting in bad faith, broader policy issues are at play as well. Homeowners associations rely upon all members to pay assessments for their share of the community's expenses, including maintenance and repairs of all amenities and common areas; landscaping; insurance; management; and legal and accounting expenses. It is of vital importance for every member to bear their fair share of the common expenses by paying their assessments, which are spent to benefit all members and their respective properties.

Here, the former owners vacated the home, and ceased paying assessments to the Association. The property had been surrendered by the Kurtzes and abandoned by the bankruptcy trustee. The Respondents were expected to foreclose, but they delayed foreclosure so that they would not have to bear the burdens of ownership, including payment of assessments.

While Respondents were benefitting from the Association's repairs to the property and upkeep of the common areas, their unreasonable delays caused significant expenses to the Association and its individual members. Because the property was not maintained after it was surrendered, it became a blight on the community. The Association was forced to step in to repair damage caused by the lack of maintenance. The monetary burden resulting from the Respondents' choice to carry the property without foreclosing rested upon the innocent, paying members of the Association.

Respondents should not be allowed to freeload upon the Association for years, and then swoop in to attempt to reap the rewards of the Association's repairs to, and rental of the property.

VI.

CONCLUSION

Because the Kurtzes surrendered their property in their bankruptcies, and the bankruptcy trustees subsequently abandoned it, the property was put in a state of limbo. The

Kurtzes retained record title to the property, but did not reside there. They were obligated to pay ongoing post-petition assessments to the Association because of 11 U.S.C. §523(A)(16), but they were not liable for post-petition mortgage payments because no exception to discharge of post-petition installments under a deed of trust or mortgage exists.

Respondents retained only one remedy after discharges: the right to pursue foreclosure of their Deed of Trust. However, they could not be forced to exercise that remedy. A lender can elect not to foreclose, but it cannot change its mind after the statute of limitations has run to attempt to reap the benefits of a the property's increased value. Respondents were required to commence foreclosure prior to July 12, 2017.

Respondents' choice to hold the property in limbo without foreclosing was done in bad faith, to the detriment of the paying members of the Association. Respondents initiated their foreclosure only after they watched the Association pour money into the property to the point where the value increased such that

the property had sufficient equity to make foreclosure profitable for Respondents. To make matters worse, Respondents then engaged in misconduct during the course of the lawsuit. The Respondents should not be rewarded for their bad faith actions.

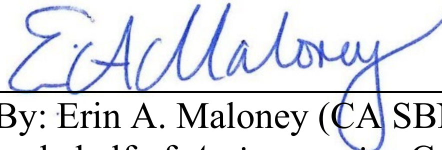
The decision of the Court of Appeals should be reversed and the judgment of the trial court reinstated.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document contains 2616 words and is in compliance with RAP 18.17.

January 3, 2023

FIORE, RACOBS & POWERS
A Professional Law Corporation



By: Erin A. Maloney (CA SBN 155485)
on behalf of *Amicus curiae* Community Associations Institute, Washington Chapter

January 3, 2023

RAFEL LAW GROUP PLLC

By: *s/ Anthony L. Rafel*
Anthony L. Rafel, WSBA #13194
On behalf of *Amicus curiae* Washington State Community Associations Institute (WSCAI)

CERTIFICATE OF SERVICE

I certify that on January 3, 2023, I caused true and correct copies of (1) Amicus Brief of Community Association Institute CAI Washington Chapter and (2) Petition to File Amicus Brief of Community Association Institute CAI Washington Chapter to be served on all counsel of record via the Court's E-Filing System.

DATED: January 3, 2023.

s/ Anthony L. Rafel
Anthony L. Rafel, WSBA #13194

RAFEL LAW GROUP

January 03, 2023 - 3:41 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,918-6
Appellate Court Case Title:	Copper Creek Homeowners Association v. Wilmington Savings Fund Society et al.
Superior Court Case Number:	19-2-00052-8

The following documents have been uploaded:

- 1009186_Briefs_20230103153102SC513732_3157.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was COPPER CREEK-CAI AMICUS BRIEF.pdf
- 1009186_Motion_20230103153102SC513732_4196.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was COPPER CREEK-CAI PETITION TO FILE AMICUS BRIEF.pdf

A copy of the uploaded files will be sent to:

- Amanda@nwclc.org
- Cate.Schur@nwjustice.org
- Nate.King@arnoldporter.com
- Sbrown@barkermartin.com
- amy.edwards@stoel.com
- anne.dorshimer@stoel.com
- arafel@rafellaw.com
- chenry@HDM-legal.com
- cherie.ferreira@stoel.com
- jacobd@hdm-legal.com
- lisav@nwjustice.org
- mainline@hdm-legal.com
- malaika.thompson@stoel.com
- mfries@barkermartin.com
- mhawkins@barkermartin.com
- nathanaking1@gmail.com
- pknight@rafellawgroup.com
- sadhikari@BarkerMartin.com
- tomm@nwjustice.org

Comments:

Sender Name: Peyton Knight - Email: pknight@rafellawgroup.com
Filing on Behalf of: Anthony L. Rafel - Email: arafel@rafellawgroup.com (Alternate Email:)

Address:
4126 E. Madison St.

Suite 202
Seattle, WA, 98112
Phone: (206) 838-2660

Note: The Filing Id is 20230103153102SC513732