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No. 68545-7-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

BANK OF AMERICA, NA as successor by merger to LASALLE BANK NA, as trustee to WaMu Mortgage Pass-Through Certificates Series 2006-AR11 Trust, Plaintiff / *Respondent*

vs.

CHRISTOPHER L. SHORT, et al., Defendants / *Appellant*

FIRST AMENDED RESPONDENT'S BRIEF[1]

Ann T. Marshall, WSBA No. 23533
Barbara L. Bollero, WSBA No. 28906
Bishop, White, Marshall & Weibel, P.S.
Attorneys for Bank of America, NA
Respondent

720 Olive Way, Suite 1201
Seattle, WA 98101-1801
Telephone: (206) 622-5306

[1] The only amendments to this brief are the insertion of citations to Supplemental Clerk's Papers at pages 4, 6 and 11.

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I. INTRODUCTION

The borrower, Christopher Short, appeals the summary judgment granting judicial foreclosure of his property located in Whatcom County.[1] In arguing that his original promissory note must be filed with the trial court before a foreclosure judgment is entered, Mr. Short's appeal manifests a fundamental misunderstanding of the difference between a suit on a promissory note and judicial foreclosure of the Deed of Trust securing that note. He also confuses Whatcom County Local Rule ("WCCR") 54(c)'s requirement for prosecuting a suit on the note by filing the original note, with evidentiary requirements for supporting a summary judgment motion in an action to enforce a Deed of Trust. Appellant's other arguments go to the weight, but not the admissibility, of the foreclosing Plaintiff's summary judgment evidence.

Respondent Bank of America ("BOA"), as Trustee of WaMu Mortgage Pass-Through Certificates Series 2006-ARll Trust, owned the debt when the foreclosure suit on appeal was filed on its behalf by its servicing agent JPMorgan Chase Bank, N.A. ("Chase") and through entry of summary judgment. BOA was also the assignee of the beneficial

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[1] Although the Deed of Trust describes the secured real property as non-agricultural (CP 137, ¶25), Appellant asserts it is in fact agricultural realty (Appellant's Brief, p. 4). For purposes of this appeal, Respondent does not dispute that assertion.

interest in the Deed of Trust before suit was filed. The trial court properly recognized BOA's suit as one for judicial foreclosure of the trust deed, and not a "suit on the note" requiring the original note be filed with the court under WCCR 54(c). Chase, as BOA's servicing agent, provided sufficient admissible evidence to the trial court proving its possession of the note and entitlement to foreclose. The borrower admitted his payment default. Given the absence of any dispute of the dispositive facts for a foreclosure action, the trial court properly awarded summary judgment to BOA.

Consequently, the trial court's award of summary judgment of foreclosure, and denial of Plaintiff's Motions for Reconsideration and to Vacate the Judgment, should be affirmed on appeal.

II. ASSIGNMENTS OF ERROR

BOA makes no assignments of error, inasmuch as the judgment below was correct. Therefore, BOA restates the issues pertaining to Appellant's assignments of error as follows:

1. The trial court correctly held that WCCR 54(c) did not apply to a foreclosure action, and therefore that the plaintiff moving party need not file the original promissory note to prevail on summary judgment of judicial foreclosure of real property.

2. The trial court correctly declined to require plaintiff bank to produce the original promissory note to establish entitlement to summary judgment of judicial foreclosure of real property.

3. The trial court properly concluded that the uncontroverted, competent, admissible evidence proving the promissory note and Deed of Trust terms, borrower's default, location of the original promissory note, identity of the note holder, servicing agency, and authority to foreclose, entitled plaintiff to judgment of judicial foreclosure as a matter of law.

4. The trial court correctly awarded summary judgment of judicial foreclosure to the named plaintiff Trustee when: (a) at both the time suit was commenced and judgment entered, the named plaintiff Trust was the real party in interest; (b) the defendant did not move to substitute the new Trustee, where the Trust remained the real party in interest; and (c) the defendant borrower suffered no prejudice from judgment being entered in the name of the Trust's former Trustee.

III. STATEMENT OF THE CASE

A. Mr. Short Draws Note and Grants Deed of Trust to WaMu.

In June of 2006, Appellant Christopher L. Short borrowed $294,000.00 from Washington Mutual Bank, FA ("WaMu"). He executed a promissory note dated June 7, 2005, in that principal amount payable to the order of WaMu (the "Note"). (CP 112, ¶6; CP 117-22.) The Note was

secured by a Deed of Trust encumbering certain real property located in Deming, Washington. (CP 112, ¶7; CP 124-44.) The Deed of Trust was dated June 7, 2006, and recorded on June 13, 2006, under Whatcom County Auditor's Instrument No. 2060602184 (the "Deed of Trust"). (CP 113, ¶8; CP 124.) The Deed of Trust is against real property owned by Mr. Short (CP 304, ¶3; CP 551, ¶3), commonly known as 2736 Valley Highway, Deming, Whatcom County, Washington (the "Property"). (CP 112, ¶7; CP 126.)

B. Mr. Short's Loan is Securitized, Beneficial Interest in the Deed of Trust is Assigned to the Loan Owner's Trustee, and Servicing Rights to Mr. Short's Loan are Acquired by Chase.

The ownership interest in Mr. Short's loan was assigned to a securitized mortgage loan trust named "WaMu Mortgage Pass-Through Certificates Series 2006-ARll Trust" (the "WaMu Trust"). (CP 245-46.) Originally the Trustee of the WaMu Trust was LaSalle Bank NA, to which Bank of America, NA succeeded as Trustee as a result of merger ("BOA"). (CP 246.) An Assignment reflecting the transfer of interest to BOA as then-Trustee of the WaMu Trust, dated March 23, 2010, was recorded on March 26, 2010 – prior to commencement of the judicial foreclosure action – under Whatcom County Auditor's Instrument No. 2100303059 (the "Assignment"). (CP 295-98.)

In September of 2008 all WaMu assets, including all loans debts due to WaMu and its servicing rights, were acquired by Chase under the terms of a Purchase and Assumption Agreement between the Federal Deposit Insurance Corporation as Receiver for WaMu and Chase (the "WaMu Agreement"). (CP 167-210.) Accordingly, on September 25, 2008, Chase became the servicing agent for Mr. Short's loan in the place of WaMu. (CP 246.)[2]

On February 11, 2011, U.S. Bank National Association ("USBank") purchased all of BOA's mortgage trust business, inclusive of the subject loan, and was substituted as successor Trustee of the WaMu Trust. (CP 246.)

C. Mr. Short Defaults on Note and BOA Institutes Foreclosure.

Beginning with the payment due on February 1, 2009, and continuing for the nearly four years thereafter, Mr. Short failed to make any of the monthly payments due on his Note. (CP 258, ¶11.) BOA accelerated the debt in accordance with the loan documents and declared the entire unpaid balance immediately due and payable. (CP 258, ¶11.)

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[2] An Affidavit of FDIC-R attesting to the WaMu asset transfer to Chase, dated October 2, 2008, was recorded on October 3, 2008, under King County Auditor's Instrument No. 20081003000790 (the "FDIC-R Affidavit"). (CP 158-61.)

BOA retained counsel to institute suit to judicially foreclosure the Property, and BOA's foreclosure Complaint was filed in the Whatcom County Superior Court on April 28, 2010. (CP 303-08.) The Complaint included as exhibits the Note, Deed of Trust, FDIC-R Affidavit, and Assignment. (CP 309-44.) Mr. Short answered the Complaint, *pro se,* admitting that he owned the Property. (CP 304, ¶3; CP 551, ¶3.)

D. <u>BOA's Summary Judgment Motion is Granted</u>.

1. BOA's Summary Judgment Motion and Evidence.

On October 14, 2011, BOA filed the subject Motion for Summary Judgment. (CP 565-70.) The motion was supported by the Declaration of a Chase employee, Araceli Urquidi, dated September 21, 2011. (CP 256-98.) The four exhibits to Ms. Urquidi's Declaration were the same as the exhibits attached to BOA's Complaint, the Note, Deed of Trust, FDIC-R Affidavit, and Assignment. (*Compare,* CP 260-98 to CP 309-44.)

2. Mr. Short's Opposition and Supporting Evidence.

On January 20, 2012, Mr. Short filed his opposition to BOA's summary judgment motion. (CP 221-35.) He contended:

1. BOA's supporting declarations contradicted its discovery responses (CP 221, 223, 227);

2. BOA's supporting declarations were "defective" in form (CP 221, 229);

3. BOA was "deliberately misleading" the trial court as to the true Plaintiff's identity (CP 221); and

4. BOA failed to deliver the original Note to the trial court, and prove it was entitled to foreclose (CP 224-226, 229-30).

The only evidence Mr. Short filed supporting his opposition was his Declaration, to which he attached BOA's discovery responses (CP 243-51) and other exhibits. (CP 236-55.) Mr. Short did not provide any evidence disputing the authenticity of the Note or Deed of Trust in support of the motion or the fact of his default – nor did his briefing address any of those issues. (CP 221-55.) All of the bases Mr. Short argued for denial of the motion were immaterial and non-dispositive and, as such, could not defeat the well-supported motion.

3. BOA's Reply and Additional Supporting Evidence.

In reply, BOA nonetheless responded to Mr. Short's contentions, pointing out he did not dispute either the Note terms or his default. (CP 212, ¶3; CP 212-14; CP 216-17.) Citing its own discovery responses, BOA argued that Mr. Short's loan servicer, Chase, possessed his Note with the power to foreclose under RCW 61.24.005. (CP 217-19.) Because the WaMu Trust owned Mr. Short's loan, the servicer requested judicial notice of the Pooling and Servicing Agreement ("Servicing

Agreement") governing the WaMu Trust terms, among other documents. (CP 162-210, 217-18.)

Supporting its reply, BOA presented Declarations of both its counsel, Albert H. Lin (CP 155-56), and Ms. Urquidi (CP 111-54).[3] Mr. Lin's Declaration was a Request for Judicial Notice of three documents concerning Chase's acquisition of WaMu's assets. (CP 157-210.)

Ms. Urquidi's reply Declaration, which was otherwise virtually identical to her previous Declaration, specified the arrangements by which Chase was authorized as the servicing agent for Mr. Short's loan, was in possession of his original Note, and had authority to foreclose under the Servicing Agreement. (CP 113, ¶14 – CP 115, ¶16.)

4. Oral Argument of Summary Judgment Motion, and Entry of Judgment.

At oral argument of Plaintiff's summary judgment motion on February 3, 2012, Mr. Short acknowledged drawing the Note to WaMu. (RP 02/03/12, P. 4, ll. 19-24.) Judge Mura rejected Mr. Short's arguments that only the party holding the Note could foreclose. He ruled that "whoever is the beneficial holder of the promissory note can sue ... to foreclose on the security ...," finding that BOA proved it held the

[3] Both Declarations have the same titles as the Declarations filed with the moving papers; however, Mr. Lin's reply Declaration is dated November 10, 2011 (CP 155-56), and Ms. Urquidi's reply Declaration is dated January 19, 2012 (CP 111-15).

beneficial interest in the Deed of Trust. (RP 02/03/12, p. 9, ll. 11-23.) The court also noted, "[s]o they're not suing on the note, sir. They're just suing to realize on the security for the note," finding that WCCR 54(c) applies only to suits on notes, not suits for foreclosure. (RP 02/03/12, p. 10, ll. 18-22; p. 11, ll. 1-5 and ll. 19-22.)

At the hearing, Judge Mura entered the WaMu Trust's proposed Order granting it summary judgment. (RP 02/03/12, p. 11, ll. 6-23; CP 108-10.) On April 27, 2012, he entered the Judgment of Foreclosure. (CP 414-18.)

E. Mr. Short's Motion for Reconsideration of BOA's Summary Judgment is Denied.

Mr. Short filed a reconsideration motion under CR 56 and CR 59,[4] on eight alleged bases, all of which he had the opportunity to raise in response to summary judgment, but elected not to do so, presumably for strategic reasons. (CP 97-107.) Even so, none of the new assertions, which challenged the trial court's acceptance of evidence supporting the summary judgment motion, presented any facts that would change the

[4] Although the motion challenges "the January 27, 2012 order and judgment of Judge Steven J. Mura granting Plaintiff's Motion for Summary Judgment" (CP 97), it is apparent that Mr. Short meant to reference the Order granting BOA's summary judgment motion dated February 3, 2012 (CP 108-10).

result of the motion. In short, Mr. Short failed to carry his burden to place any of the dispositive facts in dispute.

At oral argument of Mr. Short's reconsideration motion on March 2, 2012, Mr. Short specifically acknowledged his default on the Note, stating, "my arguments were never about whether the money was owed." (RP 03/02/12, p. 5, ll. 5-6.)

Judge Mura reviewed Mr. Short's summary judgment opposition materials (RP 03/02/12, p. 1, l. 10 – p. 2, l. 21) and considered the parties' arguments. Reiterating his previous comments that Mr. Short had not submitted any competent controverting summary judgment evidence, Judge Mura denied the reconsideration motion (RP 03/02/12, p. 5, ll. 9-17), and entered the Order Denying Defendant's Motion for Reconsideration the same day. (CP 16-17.)

Mr. Short filed his Notice of Appeal on March 22, 2012, designating only the summary judgment order entered February 2, 2012. (CP 10-15.)

F. <u>Contested Presentation of Foreclosure Judgment</u>.

In accordance with the trial court's disposition of the matter, on April 27, 2012, BOA presented its Judgment of Foreclosure. (CP 419-69.) In response, Mr. Short requested the Court judicially notice the Washington State Attorney General's *amicus* brief filed in *Bain v.*

Metropolitan Mtg. Group, Inc., 175 Wn.2d 83, 285 P.3d 34 (2012), which concerns the authority of a non-party to this action, Mortgage Electronic Registrations Systems, Inc., to foreclose. (CP 470-99.) He also filed opposition, again raising the arguments that had been considered, heard, and rejected. (CP 500-01.)

At the judgment presentation, Mr. Short returned to his earlier arguments concerning WCCR 54(c) (RP 04/27/12, p. 3, ll. 18-23), and the "incorrect" Plaintiff (RP 04/07/12, p. 3, l. 22 – p. 4, l. 10). After hearing argument and deleting Mr. Short's confidential information from the proposed judgment, the trial court entered the Judgment of Foreclosure in the form presented. (RP 04/27/12, p. 5, l. 20 – p. 6, l. 7; CP 414-18.)

G. Mr. Short's Motion to Vacate Summary Judgment is Denied.

Still unwilling to accept the trial court's judgment, on August 7, 2012, Mr. Short filed a CR 60 Motion to Vacate Summary Judgment, again urging the failure to file the original Note in compliance with WCCR 54(c) was fatal to BOA's summary judgment award, among other arguments. (CP 571-74.) BOA opposed the vacation motion. (CP 616-24.)

Mr. Short's Motion to Vacate Summary Judgment was heard on September 21, 2012, and denied. The denial Order was entered on October 4, 2012. (CP 677-78.)

The Notice of Appeal was not amended to incorporate the trial court's subsequent rulings.

IV. ARGUMENT

A. Summary Judgment Awards are Reviewed *De Novo*.

The relevant facts considered by the trial court are uncontested. Consequently, the appellate standard of review for the summary judgment order is *de novo*, with the reviewing court performing the same inquiry as the trial court. *Del Guzzi Constr. Co. v. Global Northwest Ltd.,* 105 Wash.2d 878, 882, 719 P.2d 120 (1986); *Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Evidence not presented before the trial court is not considered on appeal. *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 390, 715 P.2d 1133 (1986); *Herron v. Tribune Pub. Co., Inc.,* 108 Wn.2d 162, 169, 736 P.2d 249, 255 (1987).

B. The Trial Court did Not Err by Holding WCCR 54(c) did Not Apply and that a Foreclosing Entity Therefore Need Not File the Original Note as a Prerequisite to Judgment of Judicial Foreclosure.

Mr. Short's primary and repeated contention is that the trial court erred in not requiring compliance with WCCR 54(c) before entering summary judgment. The rule provides, in full:

> No judgment shall be taken upon a negotiable instrument until the original instrument has been filed.

WCCR 54(c). However, Mr. Short fails to understand that Plaintiff sued for

judgment foreclosing the Deed of Trust, not for a money judgment on the Note; accordingly, WCCR 54(c) does not apply to this action. The trial court's holding that the rule does not apply is fully supported by its plain text.

It is black letter law and has long been recognized in Washington that, "[i]n transactions involving both notes and mortgages, the notes represent the debts, the mortgages security for payment of the debts. Either may be the basis of an action." *Am. Fed. Savings & Loan v. McCaffrey*, 107 Wn.2d 181, 189, 728 P.2d 155 (1986) (internal citations omitted). Indeed, "Washington case law makes clear that ... the holder of the real property security interest has the option to sue on the note, obtain a judgment, and later foreclose the security interest to satisfy any unpaid obligation of the borrower on the note." *Boeing Employees' Credit Union v. Burns,* 167 Wn.App. 265, 274, 272 P.3d 908 (2012).

Under RCW 61.12, *et seq.,* there is no bar to suing first to foreclose and bringing an action on the note thereafter; however, bringing a "suit on the note" concurrent with a foreclosure action is expressly forbidden:

> The plaintiff shall not proceed to foreclose his or her mortgage while he or she is prosecuting any other action for the same debt or matter which is secured by the mortgage, ...; nor shall he or she prosecute any other action for the same matter while

> he or she is foreclosing his or her mortgage or prosecuting a judgment of foreclosure.

RCW 61.12.120; WASHINGTON REAL PROPERTY DESKBOOK, 3d ed. (Wash. State Bar Ass'n. 1996), §48.2(2), p. 48-5; *also see,* Rombauer, WASHINGTON PRACTICE: Creditors' Remedies – Debtors' Relief, (West 1998), §3.5, p. 141.

There can be no real dispute that the Complaint here was for judicial foreclosure, removing it from the scope of the cited rule. The Complaint asserted the "interests of ... Defendants in the Property shall be eliminated at the time of the foreclosure sale by Plaintiff." (CP 306, ¶13.) As required by RCW 61.12.120, the Complaint makes clear that "[n]o other suit or action has been instituted or is now pending upon said Note or to foreclose the Deed of Trust." (CP 306, ¶15.) Further, the Complaint specifically prays for foreclosure of Mr. Short's Property, determination of the priorities of interests in that Property, and issuance of a Sheriff's Deed. (CP 303-05, ¶¶2, 4, 8.) Thus, BOA chose to foreclose the Deed of Trust, not file suit on a negotiable instrument.

Judge Mura granted Plaintiff the Judgment of Foreclosure that it sought – no more and no less. Indeed, the form of Judgment which was entered is titled "Judgment of Foreclosure." (CP 414, 418.) Judge Mura

indicated his understanding that the Plaintiff's action was for foreclosure and not a suit on the Note by the following exchange:

> THE COURT: Yeah. So they're not suing on the note, sir. They're just suing to realize on the security for the note.
>
> MR. SHORT: My – my reading of the local court rule WCCR 54C is that because it's their paper, they're – they're required to provide a live copy of that to the – to the Court, which I don't believe they've done.
>
> THE COURT: If they're suing on the note, you're correct. They're not suing on the note. They're not seeking a judgment against you personally. They're seeking to foreclose on the security which secures the note. There's not a judgment against you personally.
>
> ...
>
> THE COURT: Well, they're not suing on the note. ... They're not suing on the note. ... I think their motion is well-taken and I'm going to sign their order.

(RP 02/03/12, p. 10, l. 11 – p. 11, l. 9.)

Analysis of Mr. Short's primary assertion of error – one for which he cites no authority other than WCCR 54(c) itself – reveals the express statutory authority and requirement that when a plaintiff proceeds with a judicial foreclosure action, it must do so *without* suing on the underlying obligation. BOA did not seek "judgment on a negotiable instrument" under WCCR 54(c), *i.e.,* its action was *not* a suit on the Note.

Accordingly, WCCR 54(c) did not apply to require filing of the original Note in the trial court prior to entry of judgment.

Consequently, the trial court did not err in awarding summary judgment to BOA in the absence of Plaintiff filing the original Note.

C. The Trial Court Properly Granted Summary Judgment of Judicial Foreclosure Based on Plaintiff's Uncontroverted Evidence.

1. Ms. Urquidi's Declarations are Not Contradictory.

Mr. Short assigns error to the trial court's award of summary judgment on the basis of ostensibly conflicting supporting evidence which showed "two mutually exclusive accounts of the material facts regarding the chain of title of [his] promissory note." (Appellant's Brief, p. 22.) This claimed error is specifically confined to the two supporting Declarations of Araceli Urquidi. (*Id.*, p. 16 ("[O]nly the competency of the new witness Araceli Urquidi, who provided declarations for Trust's second motion for summary judgment, will be addressed.") (citation and footnote omitted).)

Nothing about the two Declarations is contradictory, much less mutually exclusive. Ms. Urquidi's original summary judgment declaration (CP 256-298) ("Urquidi Original Declaration"), and her reply declaration (CP 111-154) ("Urquidi Reply Declaration"), are virtually word-for-word identical, and both attach the same four exhibits, the Note, Deed of Trust, WaMu Affidavit, and Assignment. (CP 116-154, 260-298.)

The sole substantive difference is that the Urquidi Reply Declaration contains three additional paragraphs, numbered 14-16. (CP 113-115.) Those paragraphs are essentially identical to BOA's discovery responses. (CP 245-250.) They provide specific details concerning the precise authority, agency and agreements under which Chase acts for WaMuTrust, as the Note owner, and by which Chase has authority to foreclose the Deed of Trust.[5] (CP 113-115.)

Mr. Short ascribes "mutually exclusive" meaning to the following two statements by Ms. Urquidi (Appellant's Brief, pp. 21-22):

1. "On September 25, 2008, the Note and Deed of Trust was assigned by [WaMu] to [Chase] by operation of law pursuant to the terms and conditions of [the WaMu Agreement] which included all loans and loan commitments of [WaMu]." (CP 113, ¶9; CP 256, ¶9.)

2. "The subject loan, ... in favor of ... WaMu, ... was securitized into a mortgage-backed security identified as the WaMu Mortgage Pass-Through Certificates Series 2006-AR11 Trust .... As such, the owners of the Loan are the Trust and its investors. .... The Trust is

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[5] The trial court has the discretion to accept affidavits filed any time before issuing its final summary judgment order. *Brown v. Peoples Mortgage Co.*, 48 Wn.App. 554, 559-60, 739 P.2d 1188 (1987); CR 6(b). Mr. Short did not and has not argued that the trial court abused its discretion in considering the Urquidi Reply Declaration.

governed by a Pooling and Servicing Agreement ... which governs all aspects of the Trust. ... When Chase acquired the assets of WaMu, it stood in the shoes of WaMu and became the servicer of loans that comprise the Trust's assets." (CP 113-114, ¶14.)

Mr. Short argues that because his Note was "not part of the [WaMu] asset pool seized by the FDIC ... [it] could not have been assigned to [Chase] ..., and therefore all ... subsequent assignments of [the Note and Deed of Trust] ... would be of necessity a nullity[.]" (Appellant's Brief, pp. 21-22.) However, he conveniently overlooks that Chase, as successor to WaMu's servicing rights, at all times had authority to foreclose, irrespective of what entity owned the Note. The fact that Mr. Short's loan was securitized does not alter that authority. He further ignores that, at the time the foreclosure action was commenced, the WaMu Trust was the beneficiary of the Deed of Trust through the Assignment, and thus entitled to foreclose on that Deed of Trust. (CP 295-298.)

The bottom line, as stated elsewhere in the Urquidi Reply Declaration, is that:

1. "[Chase] 'shall have full power and authority to ... bring actions and defend the Mortgage Pool Assets on behalf of the Trust in order to enforce the terms of the Mortgage Notes'" (CP 114, ll. 17-21);

2. "[Chase has] the ability to initiate a foreclosure" (CP 114, ll. 21-22); and

3. "The original promissory note evidencing Mr. Short's loan is in the possession of Chase's loan record department, and is physically located in Chase's secure warehouse in Monroe, Louisiana." (CP 115, ll. 8-10.)

Try as Mr. Short might to contort the meaning of the Urquidi Original Declaration and Urquidi Reply Declaration, the documents speak for themselves, and there are no contradictory factual averments.

2. No "Show Me the Note" Requirement Exists to Obtain Judicial Foreclosure.

Second, although Mr. Short correctly recognizes that the "holder" of a promissory note is entitled to foreclose on the obligation secured by the Deed of Trust under RCW 61.24.005(2) (Appellant's Brief, p. 4, n. 1),[6] he ignores that the holder is not doing so on the basis of the Note here. He asserts, devoid of citation to any authority, that "[t]o prove one is the holder/person in possession of a promissory note in a judicial proceeding one simply needs to file the original promissory note with the court." (*Id.*, p. 5.)

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[6] Despite recognizing that the Note holder is authorized to foreclose, Mr. Short claims as error that, "[n]o document assigning the Note was submitted as evidence." (CP 101.) As recognized elsewhere in Appellant's brief, a note is transferred by negotiation, if payable to order, or by possession, if endorsed in blank – not by assignment. RCW 62A.3-201(b); Appellant's Brief, p. 13.

As discussed above, by its express terms WCCR 54(c) requires such filing only for a suit on the note, not for a judicial foreclosure as here. Significantly, Mr. Short's claim that the original note must be produced for a foreclosure action has been soundly and repeatedly rejected by innumerable courts.

> In her complaint, [plaintiff] contends that the Uniform Commercial Code (UCC) §3-309 was violated because it was not proven that the foreclosure trustee possessed the original note and deed of trust. ... However, as this Court has concluded before, courts "have routinely held that [the plaintiff's] so called 'show me the note' argument lacks merit." *Freeston v. Bishop, White & Marshall, P.S.,* 2010 WL 1186276 (W.D.Wash., 2010) (*quoting, Diessner v. Mortgage Electronic Registration Systems,* 618 F.Supp.2d 1184, 1187 (D.Ariz. 2009) (collecting cases)). The Court finds that [plaintiff] has failed to state a plausible claim for relief based on Defendants' alleged failure to produce the original promissory note.

Wallis v. Indymac Fed., 717 F.Supp.2d 1195, 1200 (W.D.Wash. 2010); *accord, Vawter v. Quality Loan Svc. Corp. of Wash.,* 707 F.Supp.2d 1115, 1127 (W.D.Wash. 2010). No Washington authority requires that a lender or servicer exhibit the original note to be awarded judicial foreclosure, and Mr. Short has cited none.

Notably, in a recent federal case Judge Coughenour granted summary judgment against a borrower making precisely the same claim as Mr. Short that the original Note must be produced, and a Declaration

regarding its whereabouts in a secure vault as insufficient proof of holder status. There, the court reasoned:

> The sole basis for [the borrower's] claim is his allegation that Defendant Wells Fargo is not the beneficiary of the deed of trust because it does not hold the promissory note, and, therefore, that Defendant Wells Fargo could not initiate foreclosure proceedings. The only disputed issue is whether Defendant Wells Fargo holds the promissory note. As proof that it holds the promissory note, Defendant Wells Fargo submitted a declaration from its assistant custodian of records, Roy Gissendanner. ... In his declaration, Mr. Gissendanner attests that the original promissory note, with Plaintiff's original signature, is located in a secure storage vault in Wachovia Mortgage's service center in San Antonio, Texas. ... Mr. Gissendanner further attests that Exhibit A, the exhibit attached to his declaration, is a true and correct copy of the original promissory note.
>
> Plaintiff presents no evidence that Defendant Wells Fargo does not hold the promissory note. Plaintiff instead argues that the Court should disregard Mr. Gissendanner's declaration as hearsay, ... Mr. Gissendanner's declaration provides an adequate basis for this Court to find that Defendant Wells Fargo holds the promissory note.
>
> The Court finds there to be no genuine issue of material fact. Wachovia, a division of Defendant Wells Fargo, holds the promissory note. ... Accordingly, the Court grants Defendant's motion for summary judgment

Theros v. First Am. Tit. Ins. Co., 2011 WL 462564, *1-2 (W.D.Wash. Feb. 3, 2011).

No law supports Appellant's claimed error that an original Note must be produced as evidence that the Plaintiff has authority to foreclose. The trial court did not err in awarding summary judgment of judicial foreclosure on the basis of Plaintiff's evidence, without filing of the original Note.

3. The Note Holder may Foreclose by Agents.

As a matter of pure contract, appellant is wrong that *only* the entity that actually holds the Note may prosecute a foreclosure action and must do so in its *own* name. (*See,* Appellant's Brief, p. 4, n. 1 ("The holder is the only party that has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."); *id.,* p. 10 ("[The] Trust was not the holder of the promissory note"); *id.,* p. 11 ("[T]he deed of trust was improperly assigned ....").)

The Deed of Trust Act specifically allows the beneficiary *or* its "authorized agent" to commence foreclosure. *See, e.g.,* RCW 61.24.031(1)(a)-(c) and (2). In addition, the Washington Supreme Court recently held with regard to a foreclosure challenge similar to Mr. Short's that, "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note." *Bain, supra,* 175 Wn.2d at 106.

Accordingly, foreclosure litigation may be pursued by a loan servicing agent that possesses the note and is empowered to act on behalf of

the loan owner – precisely the circumstances that exist here. A recent federal opinion succinctly summarizes the analysis defeating Mr. Short's arguments:

> [The borrower's] claims arise from a fundamental misunderstanding of the law. U. S. Bank is the beneficiary of the deed [of trust] because it holds Plaintiff's note, not because MERS assigned it the deed [of trust]. Under Washington law, a beneficiary is ***by definition*** the party holding the note: .... This rule, however, is merely the codification of the longstanding principle that "the deed follows the debt." ... The Washington Supreme Court reiterated this principle in *Bain* ..., stating "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." *In sum, possession of the note makes U. S. Bank the beneficiary;* the assignment merely publicly records that fact. *Because U. S. Bank is the proper beneficiary, it is empowered to initiate foreclosure following Plaintiff's default.*
>
> ...
>
> Lastly, Plaintiff argues that Chase improperly issued foreclosure notices because it has "no recorded interest" in the property. But, *it is abundantly clear that Chase was acting as an agent for U. S. Bank, the proper beneficiary. The Washington Deed of Trust Act expressly authorizes the use of agents.* ... Chase thus acted properly as an agent for U. S. Bank.

Lynott v. Mtg. Elec. Reg. Sys., Inc., et al, Slip Op., No. 3:12-cv-05572-RBL. (W.D.Wash. Nov. 30, 2012) (original bold emphasis; italicized emphasis supplied).

Similarly here, the *only* evidence before the trial court was that Chase was in possession of the Note, holding the instrument at Chase's secure

warehouse. (CP 115, ¶16; CP 249-250.) There was also uncontroverted evidence that Chase is the servicing agent for the Note owner, empowered and authorized to act on its behalf in instituting foreclosure proceedings. (CP 113-115, ¶14; CP 245-247.) Although given the opportunity to do so, Mr. Short *never* disputed that information by providing controverting evidence.

Accordingly, the trial court did not err in awarding summary judgment of foreclosure on the basis of Plaintiff's supporting evidence, and without the original Note being filed.

D. The Trial Court did Not Err by Considering Evidence within the Two Declarations of Araceli Urquidi.

1. Admission of Summary Judgment Evidence is Reviewed Under Abuse of Discretion Standard.

The balance of Mr. Short's asserted errors are challenges to the admissibility and weight of the Urquidi Original Declaration and Urquidi Reply Declaration. Trial court rulings on admissibility of evidence are generally reviewed under an abuse of discretion standard. *Brouillet v. Cowles Pub'g. Co.,* 114 Wn.2d 788, 801, 791 P.2d 526 (1990); *McKee v. American Home Prods.,* 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *In re Marriage of Kovacs,*

121 Wn.2d 795, 801, 854 P.2d 629 (1993); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435, 441 (1994).

A party may object to an affidavit filed in support of a motion for summary judgment if it sets forth facts that would not be admissible in evidence. *Smith v. Showalter,* 47 Wn.App. 245, 248, 734 P.2d 928 (1987) (*citing, State v. The (1972) Dan Evans Campaign Comm.,* 86 Wn.2d 503, 506, 546 P.2d 85 (1976)). If a party fails to object or bring a motion to strike deficiencies in affidavits or other documents in support of a motion for summary judgment, as occurred here, the party waives any defects. *Smith,* 47 Wn.App. at 248 (*citing, Lamon v. McDonnell Douglas, Co.,* 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); *Greer v. Nw. Nat'l. Ins. Co.,* 36 Wn.App. 330, 338, 674 P.2d 1257 (1984)).

2. If this Court Entertains the Waived Evidentiary Objections, It Should Still Affirm in the Absence of Controverting Facts.

Mr. Short objected to Ms. Urquidi's Declarations on several grounds. Mr. Short did not move to strike any portion of either the Urquidi Original Declaration or Reply Declaration.

Mr. Short's arguments are no substitute for countervailing proof. Although the trial court did not expressly rule on Mr. Short's evidentiary objections, it implicitly overruled them. The court specifically noted that Mr. Short offered *no* controverting evidence on the material issues:

> THE COURT: ... [M]y recollection of reviewing the documents at the time of the summary judgment the court was satisfied that [Plaintiff] had submitted sufficient materials and *there wasn't any competent evidence that was submitted,* other than by way of argument from [Defendant], *that allowed me to do anything but enter that judgment.*

(RP 03/02/12, p. 6, ll. 10-16 (emphasis supplied).)

a. The Declarations were adequately founded.

Each of Ms. Urquidi's Declarations contained at least three paragraphs concerning the foundation of her personal knowledge to testify. (CP 111-112, ¶¶1-3; CP 256-257, ¶¶1-3.) They described the fact that she had personal knowledge, and was an authorized agent and signatory for both the named Plaintiff, BOA, and its servicing agent, Chase. (CP 111, ¶¶1-2; CP 256, ¶¶1-2.)

Both Declarations stated that Ms. Urquidi was duly authorized and empowered to provide each specific Declarations that she made. (CP 111, ¶2; CP 256, ¶2.) Both also provided the background of Ms. Urquidi's knowledge as to the manner in which loan records are obtained, prepared, and maintained. (CP 112, ¶3; CP 257, ¶3.) Ms. Urquidi specifically stated that she personally reviewed Mr. Short's loan records in preparation for making her Declarations. (CP 112, ¶3; CP 257, ¶3.)

Similar foundation and Declarations of Chase's HL Senior Research Specialists – the same job title as Ms. Urquidi's (CP 115; CP 259) – have been found sufficient to carry a party's evidentiary burden. *See, e.g., Agin v. Mtg. Elec. Reg. Sys., Inc., et al (In Re Bower),* 462 B.R. 347, 349, n. 6 (Bankr. E.D.Mass. 2012) ("According to the Declaration of Shari Middlebrooks, the *HL Senior Research Specialist with JPMorgan Chase Bank, N.A.,* '[o]n or about June 30, 2006, the Bank entered into a Pooling and Servicing Agreement ("PSA"') whereby it became the trustee for the certificateholders of Structured Asset Mortgage Investments II Trust 2006–AR4 Mortgage Pass–Through Certificate Series 2006–AR4 ("Trust"). The mortgage and note of the ... Loan was conveyed and assigned to the Bank as trustee under the terms of the PSA as of the closing date of the Trust.'") (emphasis supplied); *Knopp v. JPMorgan Chase Bank*, 2012 WL 4056785 (E.D.Cal. Sept. 14, 2012) at *4 ("Finally, the declaration of one of *Chase's HL Senior Research Specialist*, Roberto Silva, states that Chase acquired its interest in the subject loan through the [Agreement]. ... Silva also declares that Chase holds the original note in its possession at a designated confidential location and that Chase is the designated beneficiary under the deed of trust.") (emphasis supplied).

Accordingly, the trial court did not err in implicitly overruling foundation objections to Ms. Urquidi's Declarations.

b. The exhibits were appropriately authenticated, and judicially noticeable.

Mr. Short objected to the Urquidi Declarations because they were not supported by attachment of sworn or certified documents under CR 56(e). (CP 100-102.) Appellant reads too much into the "sworn or certified copy" requirement of CR 56(e). As to each of the four identical exhibits attached to each of her two Declarations, Ms. Urquidi *swore* that they were true and correct copies of the original documents. (CP 112-113, ¶¶6-10; CP 257-258, ¶¶6-10.) Accordingly, the CR56(e) requisite of providing the trial court with sworn documents was satisfied.[7]

Further, even was the exhibit authentication insufficient – which Plaintiff expressly disputes – three of the documents, the Deed of Trust, WaMu Affidavit, and Chase Assignment, were recorded public records and thus are judicially noticeable under ER 201(b)(2) (authorizing the trial court to take judicial notice of a fact that is "not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). *Rodriguez v. Loudeye Corp.,* 144 Wn.App. 709, 725-26, 189 P.3d 168 (2008).

In addition, contrary to Mr. Short's claim, a declarant's personal knowledge of averments is not necessarily required. "Authentication is a

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[7] Further no "assignment" of the Note – as demanded by Appellant – exists. *See,* n. 6, *supra.*

threshold requirement designed to assure that evidence is what it purports to be." *State v. Payne,* 117 Wn.App. 99, 106, 69 P.3d 889 (2003). "CR 56(e) allows an [affidavit] to [be] base[d] on documents properly before the court. And this includes documents already in the court files, as well as additional documents presented by the parties in a motion for summary judgment." *Int'l. Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.,* 122 Wn.App. 736, 745, 87 P.3d 774 (2004). CR 56(e)'s "requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact finder to find in favor of authenticity." *Id.,* at 746; ER 901(a) (authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). If the challenged documents "are properly authenticated [under ER 901 or 902] and are not excluded because of hearsay, then [a party] may rely on them in a summary judgment motion regardless of any lack of personal knowledge." *Int'l. Ultimate, supra,* at 746.

The trial court committed no error in considering the exhibits to Ms. Urquidi's Declarations.

c. The Note was appropriately authenticated, and has not been disputed.

As to the fourth exhibit, the Note, Mr. Short's objections are similarly unavailing. First, foundation was laid for Ms. Urquidi's knowledge of the loan documents, and the Note is obviously one such document. (CP 112, ¶3; CP 257, ¶3.) Second, Ms. Urquidi provided sworn testimony as to the location of the original Note. (CP 258, ¶13.) Third, the whereabouts of the original Note was also established in Plaintiff's discovery responses. (CP 249-250.) And finally, although having multiple opportunities to do so, Mr. Short never once questioned the authenticity of the Note, copies of which were attached to and authenticated by the Complaint and two supporting Declarations. (CP 112, ¶6; CP 116-122; CP 257, ¶6; CP 260-266; CP 304, ¶4; CP 309-315.)

Accordingly, there is no true issue of fact that Chase, as Plaintiff's authorized agent, possessed Mr. Short's original Note.

E. If the Trial Court Erred by Considering the Two Urquidi Declarations, the Error was Harmless.

For all the reasons stated above, the trial court did not err in considering the two Declarations of Araceli Urquidi and their attachments. Even should overruling Mr. Short's evidentiary objections be found an abuse of the trial court's discretion, however, such error was harmless.

The last three paragraphs of the Urquidi Reply Declaration (CP 113-115, ¶¶14-16) were virtually identical to Plaintiff's written discovery

responses (CP 245-250). Under CR 56(e), "[t]he court may permit affidavits to be supplemented ... by ... answers to interrogatories." Mr. Short himself placed BOA's discovery responses into evidence in connection with the summary judgment hearing. (CP 238, ¶4; CP 245-250.) Consequently if the trial court erred in overruling the objections to the two Urquidi Declarations, the error was harmless, as the identical uncontroverted facts were already in the summary judgment record.

Mr. Short also claims error because, "BOA submitted no document evidencing a payment default." (CP 105.) But both of Ms. Urquidi's Declarations swore to that default. (CP 113, ¶11; CP 258; ¶11.) No further documentation was necessary to prove it. In addition, Mr. Short himself admitted that, "my arguments were never about whether the money was owed" (RP 03/02/12, p. 5, ll. 5-6), thereby acknowledging his default in the payment terms. Consequently, any claimed error in admitting Ms. Urquidi's Declarations of default were cured by Mr. Short's admission.

F. Entry of Judgment in BOA's Name in Its Representative Capacity as Trustee is Not Reversible Error Where the Beneficiary of Record Remains the Trust, as Represented by BOA.

1. A Determination of Substitution Due to a Transfer of Interest is Reviewed Under the Abuse of Discretion Standard.

Decisions regarding application of the Civil Rules are reviewed for an abuse of discretion. *See, e.g., Ino Ino, Inc. v. City of Bellevue,* 132 Wn.2d 103, 142, 937 P.2d 154 (1997), *cert. den'd.,* 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998). Specifically, trial court orders involving the application of CR 17(a)'s requirement that every action be prosecuted in the name of the real party in interest are reviewed for abuse of discretion (*Sprague v. Sysco Corp.,* 97 Wn.App. 169, 171, 982 P.2d 1202 (1999)), as are determinations whether to substitute parties under CR 25(c) due to a transfer of interest. *Nw. Land & Inv., Inc. v. New W. Fed. Sav. & Loan Ass'n.,* 64 Wn.App. 938, 946, 827 P.2d 334, 339 (1992).

2. CR 25(c) Allows Continued Prosecution of Suit by the Named Plaintiff After Its Interest is Transferred, as Occurred Here.

CR 25(c) provides:

> In case of any transfer of interest, *the action may be continued by or against the original party unless the court upon motion directs the person to whom the interest is transferred to be substituted* in the action or joined with the original party. Service of the motion shall be made as provided in section (a) of this rule.

CR 25(c) (emphasis supplied). Thus, as long as the plaintiff had an interest in the action when suit was filed, even if that interest is subsequently transferred, the action may continue by the named Plaintiff, unless a motion seeking substitution is granted.

Here, BOA was the Trustee of the WaMu Trust at the time this suit was filed in April of 2010. (CP 114, ¶14; CP 246.) Mr. Short's loan was part of the securitized WaMuTrust. Accordingly, the WaMu Trust owned the loan, and was the real party in interest in seeking foreclosure through the servicing agent for the trust, Chase. (CP 113-115, ¶14; CP 246.)

Several months after suit was filed, USBank became Trustee of the WaMu Trust as successor to BOA. (CP 113-115, ¶¶14-16; CP 246.) Suit continued to be prosecuted in BOA's name in its representative capacity. Judgment was rendered for BOA not as the party in interest, but as representative of the entity in interest.

CR 25(c) specifically allows the action to continue in the original Plaintiff's name *unless* the Court directs substitution "upon motion." Although Mr. Short mentioned to the trial court that Plaintiff had a new Trustee, he never moved for substitution as required by CR 25(c). No substitution motion having been filed here, the trial court cannot be held to have abused its discretion by allowing the action to continue in the name of the former Trustee, BOA, as permitted by CR 25(c). As previously established, Chase as the servicer for the WaMu Trust had authority to foreclose.

To the extent Mr. Short argues that the successor Trustee USBank should have obtained judgment in its name, the error, if any, is harmless.

The WaMu Trust continues to hold the interest that it always has held and the successor Trustee can establish its interest through public records at the point when the WaMu Trust must enforce its judgment and take possession of the subject property.

Further, Mr. Short cannot and does not claim he suffered any prejudice by the supposed error, further supporting a finding of harmless error, if any error indeed occurred. Appellant's loan is in default and his Property is subject to foreclosure regardless whether suit is brought in the name of the former Trustee or current Trustee or Note holder. *See, e.g., Miller v. Campbell,* 164 Wn.2d 529, 538, 192 P.3d 352 (2008) (holding a party is not prejudiced by relation back of substitution when the substitution changes only the representative capacity of the parties, not the nature of the claims which must be defended against).

The trial court did not err by allowing suit to proceed in BOA's name, as former representative of the real party in interest, the WaMu Trust.

V. CONCLUSION

After the moving party shows the absence of material facts, the summary judgment inquiry shifts to the party with the burden of proof at trial. *Young v. Key Pharmaceuticals,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the non-moving party then fails to establish the existence of an

element essential to that party's case, the moving party is entitled to summary judgment as a matter of law. *Id.,* at 225; *Sun Mountain Productions, Inc. v. Pierre,* 84 Wn.App. 608, 616, 929 P.2d 494 (1997).

Here, BOA carried its summary judgment proof by uncontroverted, competent, admissible evidence. Mr. Short did not dispute the validity or terms of the Note and Deed of Trust, and admitted his default. No law, including WCCR 54(c), requires prior filing or production of the original Note for a judicial foreclosure judgment to be entered. Further, continuance of suit in the name of the real party in interest's former representative is expressly allowed by CR 25(c).

Mr. Short's circumstances in defaulting on his mortgage, while unfortunate, do not differ from those of many other real property owners, and do not entitle him to vacate a rightfully granted and supported order of judicial foreclosure. This Court should:

1. Affirm entry of the trial court's Order Granting Plaintiff's Motion for Summary Judgment, dated February 3, 2012;

2. Affirm entry of the trial court's Order Denying Defendant's Motion to Reconsider, dated March 2, 2012;

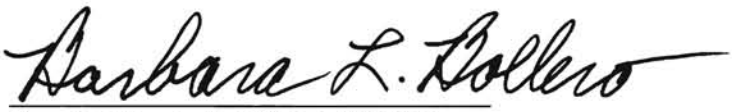
3. Affirm entry of the trial court's Order Denying Defendant's Motion to Vacate, dated October 4, 2012;

4. Dismiss this appeal; and

5. Award BOA its costs on appeal, pursuant to a Cost Bill to be presented after entry of this Court's order.

RESPECTFULLY SUBMITTED this 15th day of February, 2013.

BISHOP, WHITE, MARSHALL
& WEIBEL, P.S.



Ann T. Marshall, WSBA #23533
Barbara L. Bollero, WSBA #28906
Attorneys for Respondent BOA
720 Olive Way, Suite 1201
Seattle, WA 98101