No. 72016-3-1

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

SANDRA SHELLEY JACKSON, an individual

Appellant;

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, et. al.,

Respondents.

RESPONDENTS QUALITY LOAN SERVICE CORPORATION OF WASHINGTON AND McCARTHY & HOLTHUS, LLP'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION AND SUMMARY OF RESPONSE

Contrary to this court's prior order, Plaintiff's Supplemental Brief ("SB") improperly cites and argues cases which were decided before Plaintiff's Opening Brief ("OB"). Additionally, Plaintiff's SB argues issues, including Plaintiff's dismissed CPA claims, which were waived because they were not raised in her OB. The SB also misrepresents the cases cited and attempts to include novel arguments and assertions not previously briefed by Plaintiff. Respondents Quality Loan Service Corporation of Washington and McCarthy & Holthus, LLP (collectively the "Quality Defendants") urge this court to decline to consider Plaintiff's SB in its entirety.

II. ARGUMENT

A. Plaintiff's Brief Impermissibly Focuses on Cases Decided Before Her OB.

Plaintiff's authorization to file an SB was expressly limited to "no more than seven pages addressing any relevant case law that was decided after her reply brief was filed." This order came after Plaintiff had been warned not to file additional briefing, and after Plaintiff filed, and withdrew, previous briefing. Plaintiff was given more opportunities than most to argue relevant case law in a timely fashion, and she failed to do so.

Despite the warning not to file additional briefing, on September 30, 2014, Plaintiff filed a Motion requesting supplemental briefing, rather than the more appropriate RAP 10.8 statement of

additional authorities. Similarly to the SB, Plaintiff's Motion improperly raised new arguments and misstated case holdings. All Defendants opposed Plaintiff's Motion. Thereafter, the court struck Plaintiff's Motion as improper but allowed Appellant to "file a supplemental brief of no more than seven pages addressing any relevant case law that was decided after her reply brief was filed."[1]

However, rather than comply with this court's order, Plaintiff filed an SB that focuses on cases decided well before she filed her reply briefing. While Plaintiff's foray into case law reaches as far back as 1936, nearly one third of her brief focuses on the decisions in *Walker v. Quality Loan Serv, Corp. of Wash.*, 176 Wn.App. 294, 308 P.3d 716 (Aug. 5, 2013), *overruled in part, Frias v. Asset Foreclosure Servs., Inc.*, ___ Wn.2d ___, 334 P.3d 529, Slip Op. 89343-8, 2014 Wash. LEXIS 763 (2014); *Bavand v. OneWest Bank, FSB,* 176 Wn.App. 475, 309 P.3d 636 (Sep. 9, 2013), *overruled in part by Frias*, 334 P.3d 529; *Rucker v. NovaStar Mortg., Inc.*, 177 Wn.App. 1, 311 P.3d 31 (Oct. 3, 2013); and *Frizzell v. Murray*, 179 Wn.2d 301, 313 P.3d 1171 (2013). All four of these cases were decided in 2013, well before Plaintiff's OB was filed.

B. Plaintiff Incorrectly Analyses the New Authority She Cites.

Plaintiff's citation to and arguments about *Cashmere Valley Bank v. State, Dep't of Revenue,* ___ Wn.2d ___, ___ P.3d ___, 2014

[1] Plaintiff's Consolidated Reply to MERS and Quality Loan brief was filed on May 27, 2014.

Wash. LEXIS 769 (2014) are perplexing. In *Cashmere*, the Washington Supreme Court held that the ultimate investor in a securitized trust is not the holder of the promissory note, and instead whoever holds the note is the note holder. The Supreme Court's holding is entirely contrary with the arguments put forth by Plaintiff below, as Plaintiff alleges that the investors are the note holders. Plaintiff attempts to sidestep the Court's ruling by arguing that the Washington Supreme Court focused on only part of RCW 61.24.050(2), and the Supreme Court has yet to construe the meaning of the second and third "criteria" of that statute. This analysis leads nowhere, as Plaintiff does not identify of what significance these criteria might be, or how they might benefit her appeal, or why she is entitled to raise these arguments now, given that she did not raise them in her OB.

Plaintiff's SB also cites (and criticizes) this court's decision in *Trujillo*, suggesting that *Trujillo* potentially violates separation of powers. *See Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn.App. 484, 326 P.3d 768 (2014), *modified in part by Trujillo v. Nw.Tr. Servcs., Inc.*, ___ Wn.App. ___, ___ P.3d ___, 2014 Wash. App. LEXIS 2604 (Nov. 3, 2014). Indeed, Plaintiff's SB goes so far as to proffer an "alternative" interpretation of Trujillo to render it constitutional (i.e., the DTA should be construed to forbid a trustee from relying on a beneficiary declaration without further "judicial inquiry"). SB at 4-5. Plaintiff's SB is devoid of any case law in support of this alternative construction and, in fact, as noted below, recent courts have followed *Trujillo* in finding that absent

conflicting evidence, a trustee may rely on a beneficiary declaration. *Trujillo*, 181 Wn.App. at 501.

C. Plaintiff Fails to Cite the Recent Authorities that Support Dismissal.

While the purported purpose of Plaintiff's additional briefing was to present additional authority decided after briefing closed, Plaintiff fails to acknowledge, much less cite to, the multiple cases where courts have rejected the very constitutional arguments that she advances as the primary basis of her appeal. *E.g., Knecht v. Fid. Nat'l Title Ins. Co.*, 2014 U.S. Dist. LEXIS 113131, *31 (W.D. Wash. Aug. 14, 2014) (plaintiff asking "the court to rewrite [DTA], not to interpret it"); *Galyean v. Nw. Tr. Servs., Inc.*, 2014 U.S. Dist. LEXIS 93392, *15 (W.D. Wash. July 9, 2014) (same); *Robertson v. GMAC Mortg. LLC*, 2014 U.S. Dist. LEXIS 73129, *6 (W.D. Wash. May 28, 2014) (same).

Moreover, recent case law has confirmed that a trustee may rely on a beneficiary declaration as proof of a beneficiary's right to foreclose. Indeed, *Trujillo* expressly held that "[a]bsent conflicting evidence, the [beneficiary] declaration should be taken as true." *Trujillo*, 181 Wn.App. at 496. *See also Frazer v. Deutsche Bank Nat. Trust Co.*, 2014 U.S. App. LEXIS 20110, at *2 (9th Cir. Oct. 21, 2014) (same); *Bavand v. OneWest Bank, FSB*, 2014 U.S. App. LEXIS 20038, *3 (9th Cir. Oct. 20, 2014) (trustee complied with its statutory obligation when it relied on declaration signed under penalty of perjury that declarant was holder and beneficiary). Compare *Lyons v. U.S. Bank Nat'l Ass'n*, ___

Wn.2d ___, ___ P.3d ___, Slip Op. 89132-0, 2014 Wash. LEXIS 897, *18 (2014) (trustee entitled to rely on beneficiary declaration unless it has violated its duty of good faith).

Importantly, Plaintiff's Complaint alleged that the Trustee failed to have "sufficient proof" of the beneficiary and note holder, Compl. at 5.10, but she did not allege that the Trustee violated its duty of good faith or that she presented the Trustee with conflicting evidence regarding the identity of the beneficiary. Indeed, Plaintiff's allegations acknowledge that US Bank "possessed" her note. *See* Complaint, ¶ 2.6

D. Plaintiff Waived All Arguments Requesting Pre-Foreclosure Sale Relief.

Plaintiff's OB did not challenge dismissal of her breach of contract, CPA, conscionability, negligence, or quiet title claims. Instead, she elected to confine her arguments on appeal to a select few theories. Now that briefing is complete, Plaintiff seeks to do an about-face and focus on claims she abandoned at the trial court. However, Plaintiff has waived the right to challenge dismissal of all but her constitutional claim on appeal. *Ang v. Martin*, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005); RAP 10.3 (a). Indeed supplemental authority must actually pertain to issues argued below and on appeal. *Blewett v. Abbot Labs*, 86 Wn.App. 782, 938 P.2d 842 (1997).

Plaintiff's SB includes an entirely new, and puzzling, argument that RCW 61.24.010(2) requires "proof of a proper beneficiary before any valid appointment of a successor trustee can occur" ... SB at 3.

Plaintiff appears to be confusing RCW 61.24.010(2)[2] with RCW 61.24.030(7)(a) (requiring a Trustee to have proof that "the beneficiary is the owner of any promissory note"). Although Plaintiff presents this novel argument in her SB, she fails to cite any recent case law which supports such a conclusion.

Plaintiff's brief further argues that *Frias v. Asset Foreclosure Servs., Inc.* grants her a remedy under the CPA for Defendants' alleged "pre-foreclosure sale DTA violations." *See Frias*, 334 P.3d 529. The *Frias* court acknowledged that violations of the DTA are potentially actionable under the CPA, even in the absence of a completed foreclosure sale, but the holding did not create a new cause of action or change the law. *Frias* held that a plaintiff has no viable DTA claim in the absence of a completed foreclosure, and thus supports the trial court's decision. *Frias*, 334 P.3d at 537. Moreover, Plaintiff's Complaint alleged a cause of action under the CPA (for an "attempt to initiate a private sale in violation of the DTA and her constitutional rights"), and the trial court dismissed that claim with prejudice. CP 167, 211-212, 214, 215-17. Plaintiff elected not to pursue her CPA claim on appeal, and she should not be allowed to start over now that briefing is complete.

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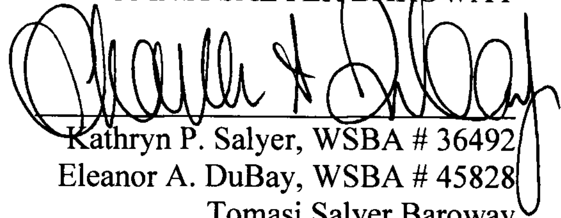
[2] RCW 61.24.010(2) states: "The trustee may resign at its own election or be replaced by the beneficiary.... If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee."

III. CONCLUSION

Quality Defendants respectfully request that this court disregard Appellant's Supplemental Brief in its entirety for failing to comply with the court's order and affirm the trial court's dismissal.

Respectfully submitted this 11th day of November, 2014.

TOMASI SALYER BAROWAY



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CERTIFICATE OF SERVICE

I certify that on November 11, 2014, I served a copy of the foregoing document, described as **RESPONDENTS QUALITY LOAN SERVICE CORPORATION OF WASHINGTON AND McCARTHY & HOLTHUS, LLP'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF** on the following persons by U.S. First Class Mail:

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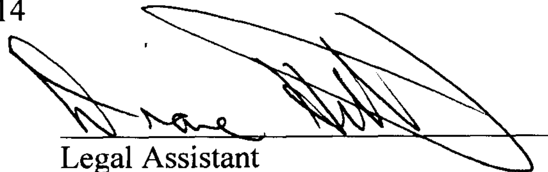
I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct, and that this Declaration was executed in Portland, Oregon.

Dated: November 11, 2014



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