No. 72016-3-1

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

SANDRA SHELLEY JACKSON, a single woman,

Appellant-Plaintiff,

v.

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

Respondents-Defendants.

RESPONDENTS U.S. BANK, N.A., JPMORGAN CHASE BANK, N.A., AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S SUPPLEMENTAL RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION AND SUMMARY OF RESPONSE

Respondents JPMorgan Chase Bank, N.A., U.S. Bank, N.A., and Mortgage Electronic Registration Systems, Inc. (the "Chase Defendants") ask the Court to disregard Plaintiff's October 28, 2014 Supplemental Brief ("SB") because it ***violates the court's order***, improperly citing and arguing cases decided before her Opening Brief ("OB"). Plaintiff misrepresents the cases she cites and improperly attempts to argue issues not raised in her appellate briefing (and thus waived). In particular, Plaintiff failed to appeal dismissal of her CPA claim and cannot revive that claim now. Cases decided since briefing closed refute Plaintiff's arguments—with multiple courts dismissing identical arguments by the same counsel—and affirm the trial court's dismissal of Plaintiff's Complaint.

II. ARGUMENT

A. Plaintiff Violates This Court's Order by Citing Authority Published Prior to May 27, 2014.

Plaintiff ***violates court orders for the third time*** by filing a supplemental brief arguing cases decided before her OB was filed. In April 2014, the Washington Supreme Court ordered Plaintiff to file one reply brief as allowed under the rules and the Court's scheduling letter. Nevertheless, Plaintiff filed a second reply brief. The Court granted her leave to withdraw her original reply brief and for an extension to file a consolidated reply brief. Then, despite having been warned not to file additional briefing, Plaintiff ignored that warning, Plaintiff filing a Motion (instead of a RAP 10.8 statement of additional authorities) on September 30, 2014, improperly raising new arguments and misstating case holdings. Chase Defendants opposed Plaintiff's Motion. On October 14, 2014,

Commissioner Mary Neel struck Plaintiff's Motion as "improperly includ[ing] argument" but ordered "Appellant may file a supplemental brief of no more than 7 pages addressing any relevant case law that was decided ***after her reply brief was filed***."

Plaintiff's SB openly and unapologetically ***violates the Court's orders for the third time***. Much of Plaintiffs' SB (and all of section 2) discusses cases decided ***before*** Plaintiff's OB was filed and ***well before*** briefing was completed on May 28, 2014, including *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294 (Aug. 5, 2013), *overruled in part*, *Frias v. Asset Foreclosure Servs., Inc.*, --- Wn.2d ---, 334 P.3d 529 (Sep. 18, 2014), *Bavand v. One West Bank, FSB*, 176 Wn. App. 475 (Sep. 9, 2013), *overruled in part by Frias*, 334 P.3d 529 (2014), *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1 (Oct. 3, 2013), and *Frizzell v. Murray*, 179 Wn.2d 301 (Dec. 5, 2013).[1] The Court should disregard Plaintiffs' SB for violating the Court's Order.

B. Plaintiff's Analysis of New Authority is Erroneous.

Plaintiff Concedes US Bank Holds The Note. In Section 1 of Plaintiff's SB, Plaintiff again confuses whether the securitized Trust or its investors are Note holder. In her Complaint, Plaintiff argued that the

[1] Other cases cited in Plaintiffs' SB decided before her OB include: *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560 (2012); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 110 (2012); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396 (1936); *Cox v. Helenius*, 103 Wn.2d 383 (1985); *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771 (2013); *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264 (2009); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 111 Wn.2d 94 (2013); *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636 (1989); *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 173 Wn.2d 608 (2012). On December 27, 2013, Plaintiff filed a Statement of Additional Authorities citing *In re Marriage of Buecking*, 179 Wn.2d 438 (2013). Finally, *Schroeder v. Weighall*, 179 Wn.2d 566 (Jan. 16, 2014) was decided ***before*** Plaintiff's reply brief.

investors of a securitized trust—rather than the Trustee of the Trust holding the Note—were Note holders. *See* CP 86 ¶ 2.6 ("investors of WAMU Mortgage Pass Through Certificate For WMALT 2006-AR4" are "entitled to payments from plaintiff homeowner ... because they are a 'note holder' as that term is defined in [the Note]."). The Washington Supreme Court rejected that argument in *Cashmere*, which Plaintiff argues somehow supports her. *Cashmere* holds that the ultimate investor in a security is ***not*** the Note holder and confirms that whoever holds the Note is note holder. *Cashmere Valley Bank v. State, Dep't of Revenue*, 334 P.3d 1100, 1106 (2014). Plaintiff's Complaint thus conceded factually (and Plaintiff now concedes legally) that U.S. Bank as Trustee holds the Note.

Plaintiff also argues *Cashmere*'s analysis of the word "secured" under Washington's tax-deduction statute (RCW 82.94.4292) is somehow "significant" but does not explain how this perceived significance benefits her appeal, since she concedes her loan is secured. *See* SB at 2. Regardless, Plaintiff waived these arguments by failing to raise them in her OB. *See* Section D, infra.

Foreclosure under the DTA does not involve a judicial inquiry. Section 3 of Plaintiff's SB argues this Court should decline to follow *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 501 (2014) (modified Nov. 3, 2014) and instead re-write the DTA so as to forbid a Trustee from relying on a beneficiary declaration without further "judicial inquiry." SB at 4-5. Plaintiff cites no case law supporting her position (despite the fact

that her brief was intended to present additional authority). Courts have followed *Trujillo* in finding that absent conflicting evidence, a Trustee may take as true a beneficiary declaration. *Id.* at 496; *see* § C, *infra.*

C. Recent Case Law Supports Dismissal.

Plaintiff's constitutional challenge fails procedurally and substantively. Multiple courts have rejected Plaintiff's constitutional challenge (raised by the same counsel). *Knecht v. Fid. Nat. Title Ins. Co.*, 2014 WL 4057148, *11 (W.D. Wash. 2014) (plaintiff asking "the court to rewrite [DTA], not to interpret it"); *Galyean v. Nw. Tr. Servs. Inc.*, 2014 WL 3360241, *6 (W.D. Wash. July 9, 2014) (same); *Robertson v. GMAC Mortg. LLC*, 2014 WL 2207505, *3 (W.D. Wash. May 28, 2014) (same).[2]

The beneficiary's status as *Note holder* is sufficient to foreclose. Recent case law supports Chase Defendants' argument that the holder of a promissory note need not also be the ultimate owner of the right to loan proceeds to foreclose under the DTA. *See Trujillo*, 181 Wn. App. at 501 (stating in part: "[w]e must conclude that the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note."); *Bavand v. OneWest Bank, FSB,* 2014 WL 5317145, *1 (9th Cir. Oct. 20, 2014) ("[t]he relevant question under Washington law is therefore not, as Bavand asserts, whether OneWest is the note's owner; instead, the key question is whether OneWest is the note's holder." (citing *Bain*)); *Coble v. Suntrust Mortgage, Inc.*, 2014 WL 4436926, *3 (W.D. Wash. Sept. 9, 2014) (same); *see also Mickelson v. Chase Home Fin. LLC*,

[2] Defendants cited *Robertson* in a Statement of Additional Authority on May 30, 2014.

2014 WL 2750133, *1 (9th Cir. June 18, 2014) (an inadequate beneficiary declaration could not prejudice plaintiffs because Chase held the promissory note during the relevant period); *Lyons v. U.S. Bank, N.A.*, 2014 WL 5490400, *6 (Wash. Oct. 30, 2014), (recognizing that "a holder of the applicable note" may seek to foreclose under the DTA). And *In re Butler*, 512 B.R. 643 (Bankr. W.D. Wash. July 9, 2014), holds that one may possess a note physically, or through an agent. *Id.* at 652–53.

A trustee may rely on a beneficiary declaration as proof of a beneficiary's right to foreclose. *Trujillo* also holds 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 WL 5335419, at *1 (9th Cir. Oct. 21, 2014) (same); *Bavand,* 2014 WL 5317145, at *1 ("NWTS complied with its obligation under the statute when it relied on OneWest's declaration under penalty of perjury stating that OneWest was the note's beneficiary and holder."); *Mulcahy v. Fed. Home Loan Mortg. Corp.*, 2014 WL 1320144, *3-4 (W.D. Wash. Mar. 28, 2014) (same);[3] *Lyons*, 2014 WL 5490400, at *6 ("unless the trustee has violated a duty of good faith, it is entitled to rely on the beneficiary's declaration when initiating a trustee's sale").

Plaintiff's Complaint alleged the Trustee failed to have "sufficient proof identifying the beneficiary and note owner prior to instigating this private sale[,]" Compl. at 5.10, but not that the Trustee violated its duty of

[3] Chase Defendants filed their Answering Brief March 6, 2014 and did not have the opportunity to cite *Mulcahy*, which was decided on March 28, 2014.

"good faith." Plaintiff also did not allege that she presented the Trustee with any conflicting evidence regarding the identity of the beneficiary. In fact, Plaintiff's Complaint does not dispute that U.S. Bank (as Trustee for WMALT 2006-A4 Trust) possessed her Note (that is the only way the investors for that Trust could be "note holders"). Compl. ¶ 2.6.

D. Plaintiff Waived All Arguments Regarding Any Pre-Foreclosure Sale Relief under the DTA or CPA.

Supplemental authority must actually pertain to "issues argued below and on appeal." *Blewett v. Abbott Labs.*, 86 Wn. App. 782 (1997). Section 5 of Plaintiff's SB raises theories and arguments not argued in her OB. *Compare* SB at Sections 1 and 5 *with* OB. Plaintiff's OB did not challenge dismissal of her breach of contract, CPA, unconscionability, negligence, or quiet title claims as to the Chase Defendants and so she has abandoned those claims and waived her right to challenge their dismissal on appeal. *Ang v. Martin*, 154 Wn.2d 477, 486-87 (2005); RAP 10.3(a).

Section 1 of Plaintiff's SB argues for the first time that the note must be "primarily secured" by the deed of trust —a fact she conceded in her Complaint. *Compare* SB at 1-2 with CP 4, 7. Section 2 of Plaintiff's SB presents the novel argument that a note holder (i.e., beneficiary, RCW 61.24.005(2)) must prove its status to a borrower (rather than a Trustee, as the legislature chose under RCW 61.24.030(7)(a)), before appointing a trustee. SB at 2-4 (citing cases issued before Plaintiff's OB)). Section 4 of Plaintiff's SB argues for the first time that *Frizzell v. Murray*, 179 Wn.2d 301 (2013)—a decision issued ***before*** Plaintiff filed her OB that

she waited to cite for the first time in her Reply Brief—improperly allows superior courts to exercise appellate jurisdiction instead of original jurisdiction under the DTA. *Compare* SB at 5-7 *with* RB at 9, 18.

Finally, Section 5 of Plaintiff's SB argues *Frias* grants her a remedy under the CPA for defendants' alleged "preforeclosure sale DTA violations." SB at 7. 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." Compl. ¶ 7.3.15; *see also* ¶¶ 7.2.1-7.3.22. The trial court dismissed Plaintiff's CPA claim against all defendants with prejudice. CP 167, 211-12, 214, 215-17. *Frias* supports the trial court's decision that Plaintiff has no viable DTA claim given the absence of a completed foreclosure. *Frias*, 334 P.3d 529 at 537. That the Court acknowledged DTA violations may support elements of a CPA claim even in the absence of completed foreclosure sale—as recognized in *Bain*—does not change the state of the law or create a new cause of action. Plaintiff made the strategic decision to limit her arguments on appeal to a select few theories—she may not now start over after briefing is complete.

III. CONCLUSION

Chase Defendants ask this Court to disregard Appellant's Supplemental Brief and affirm the trial court's dismissal.

RESPECTFULLY SUBMITTED this 11th day of November, 2014.

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PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record:

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Dated at Seattle, Washington this 11th day of November, 2014.

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