NO. 46333-4-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

FRANCES DU JU,

Appellant,

v.

JPMORGAN CHASE BANK, N.A., and BISHOP, MARSHALL & WEIBEL, P.S. f/k/a BISHOP, WHITE, MARSHALL & WEIBEL, P.S.

Respondents.

Appeal from Clark County Superior Court

The Honorable David E. Gregerson, Case No. 13-2-02571-3

RESPONDENT JPMORGAN CHASE BANK, N.A.'S RESPONSE BRIEF

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I. INTRODUCTION

This appeal arises from the sale of Appellant's residence at a trustee's sale as part of the non-judicial foreclosure of Respondent JPMorgan Chase Bank, N.A.'s ("Chase") deed of trust lien. Chase foreclosed the lien after Appellant stopped making her loan payments and failed to cure her default. The residence was purchased at the trustee's sale by a third party ("O'Neill"). When O'Neill asked Appellant to vacate the residence, she refused, forcing O'Neill to bring an unlawful detainer action against Appellant. Appellant brought a third party complaint in the unlawful detainer action against Chase, claiming that the sales price at the auction was unreasonably low, that the sale should be voided due to alleged irregularities in the manner in which it was conducted, and that the trustee had unreasonably delayed depositing the surplus funds from the sale with the Superior Court for the State of Washington.

Appellant appeals from a Judgment in Chase's favor, following an Order granting Chase summary judgment and dismissing all of her claims with prejudice. The Court should affirm the Judgment in Chase's favor. The Superior Court correctly concluded, based on the undisputed facts in the record, that the property was sold for an amount far in excess of what Washington law considers adequate at a trustee's sale. It correctly found that Appellant had produced no evidence of irregularities in the sale.

Since the trustee conducted the sale and handled the surplus funds from the sale, and because there was no evidence that Chase had any involvement in the conduct of the sale, the alleged irregularities, or the handling of the surplus funds, Chase would not be liable to Appellant even if her allegations regarding those matters were correct. The Court should thus affirm the Superior Court.

II. STATEMENT OF ISSUES

1. O'Neill purchased the Property at the trustee's sale for $172,500, which was 66% of its fair market value of $258,811 and 81% of its tax assessed value of $211,951. After Chase's lien was paid off, there was a surplus of $75,819.46, which the trustee deposited with the Superior Court. Given these uncontested facts, was the Superior Court correct in concluding that the sales price was adequate?

2. At the trustee's sale, Chase made a credit bid in the amount of $95,798.49. Chase ultimately received $95,814.82 from the sale of the Property to satisfy its lien. The Deed of Trust Act specifically allows a beneficiary to place an offset credit bid for all or some of the amount that the debtor is in default. The Deed of Trust Act also only allows a beneficiary, its agent, or the trustee to void a trustee's sale because of an erroneous opening bid. Under these circumstances, was the Superior Court correct in dismissing Appellant's challenge to the trustee's sale on

the basis that the credit bid amount was $16.33 less than the amount ultimately received by Chase?

3. Appellant argued that an unidentified man yelled out "Wow! Wow! Wow! Stop! Stop!" at the trustee's sale, and that this alleged conduct somehow affected the sales price. Appellant did not support this claim with an affidavit or other evidence, and never alleged that Chase was colluding with the unidentified man or was responsible for his actions. Did the Superior Court correctly dismiss Appellant's claims against Chase based on these unproven allegations?

4. Appellant argues, for the first time on appeal, that Superior Court Judge Gregerson should have recused himself for bias. In doing so she cites no credible evidence to support her claim of bias. Should this Court refuse to consider an unsupported bias argument made for the first time on appeal?

5. Was the Superior Court correct in entering final judgment in Chase's favor under CR 54(b) when all claims against Chase had been dismissed and all of CR 54(b)'s requirements for entry of final judgment were met?

III. STATEMENT OF THE CASE

This case began in the Clark County Superior Court as an unlawful detainer action against Appellant. O'Neill, the Plaintiff in the action

below, purchased Appellant's former Clark County residence located at 13000 SE Angus Street, Vancouver, Washington 98683 ("the Property") at a trustee's sale conducted as part of a non-judicial foreclosure of Chase's deed of trust lien against the Property. (CP 244).

A. The Non-Judicial Foreclosure Of Chase's Deed Of Trust Lien.

Chase held the note secured by the Deed of Trust against the Property. (CP 275, at ¶ 2). On January 18, 2013, Chase appointed Bishop, White, Marshall & Weibel ("BMW")[1] as successor trustee under the Deed of Trust. (CP 275, at ¶ 4). The appointment of BMW was duly recorded at the Clark County Recorder's office on February 5, 2013. (CP 284). On February 14, 2013, BMW, acting as the successor trustee, recorded a Notice of Trustee's Sale ("NOTS") for the Property and mailed a copy of the NOTS to Appellant. (CP 275, at ¶ 5). The NOTS stated that the Property would be sold at a trustee's sale on June 21, 2013, unless Appellant cured her default and identified BMW as "successor trustee." (CP 275, at ¶ 6). The address and telephone number of BMW were included in the NOTS. (CP 275, at ¶ 6).

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[1] Respondent has since changed its name to Bishop, Marshall & Weibel, P.S., hence "BMW."

The NOTS recited that Appellant had missed eight monthly payments between July 1, 2012, and February 1, 2013, for a total default amount of $9,157.72. (CP 289–94). Appellant has admitted that she defaulted on her loan. (CP 3, at ¶ 3.5). Appellant did not bring an action seeking a temporary restraining order or preliminary injunction preventing the trustee's sale.

On June 21, 2013, pursuant to the NOTS, BMW, acting as successor trustee under the Deed of Trust, conducted a public sale of Appellant's home to foreclose the Deed of Trust. (CP 275, at ¶ 7). At the time of the trustee's sale, the obligation secured by the Deed of Trust amounted to $95,814.82. (CP 275). Chase bid the amount of $95,798.49 as a credit offset bid at the trustee's sale.[2] (CP 36). O'Neill was the successful purchaser of the Property at the trustee's sale. (CP 275, at ¶ 9). O'Neill purchased the Property for $172,500.00. (CP 275, at ¶ 9). According to a real estate broker's opinion, the fair market value of the

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[2] As discussed *infra* at page 26, the Affidavit of David A. Weibel filed on September 9, 2013, stated that the amount of the credit offset bid was $95,814.82. However, in a subsequent declaration by Mr. Weibel, filed on March 4, 2014, he clarified that the amount of Chase's credit offset bid was $95,798.49. The $95,814.82 figure represents the amount that Chase received from the sales proceeds to satisfy Appellant's total outstanding loan obligation to Chase.

Property at the time of the trustee's sale was $258,811. (CP 275, at ¶ 10).[3] Clark County records reflect that the 2011 assessed value of the Property for 2012 taxes was $211,951. (CP 275, at ¶ 10). The surplus funds from the sale totaled $75,819.46. (CP 275, at ¶ 11). BMW deposited these funds with this Clark County Superior Court in Case No. 13-2-02832-1 on August 7, 2013. (CP 275, at ¶ 11). A Trustee's Deed dated June 8, 2013, was prepared, issued, recorded, and delivered to O'Neill conveying legal title to the Property to O'Neill. (CP 36, at ¶12).

B. O'Neill Commences Unlawful Detainer Action Against Appellant.

Appellant refused O'Neill's demands that she vacate the Property. On July 22, 2013, O'Neill filed an unlawful detainer action against Appellant in the Superior Court for the State of Washington in Clark County in order to obtain a writ of restitution to compel Appellant to vacate the property. (CP 244–48) ("the Litigation").

C. Appellant Files Cross-Claim And Third-Party Claims.

On July 29, 2013, Appellant filed a cross-claim in the Litigation against her former husband, Chwen-Jye Ju, alleging he breached an agreement to provide her with funds to pay her living expenses. (CP 261–

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[3] Appellant offered no evidence of the fair market value of the Property, and never disputed the broker's estimate of its value.

62). Appellant never filed proof that her cross-claim had been served on Chwen-Jye Ju, and he never appeared in the Litigation.

Appellant also brought a third-party complaint against JPMorgan Chase & Co. ("JPMC") on July 29, 2013. JPMC is the holding company that owns Chase. (CP 263–64). JPMC had no involvement in the non-judicial foreclosure of Chase's lien.

In her third party complaint against JPMC, Appellant alleged that (1) the foreclosure violated Washington law because "the opening bid price was below the debt that Third Party Plaintiff owed to JPMorgan Chase Bank"; and (2) the allegedly "mistakenly low bid price resulted in or contributed to a grossly inadequate sales price." (CP 263–64).

D. Third-Party Defendant JPMC Is Dismissed From The Action.

On September 9, 2013, JPMC moved for summary judgment. (CP 331). In addition to arguing that it was not involved in the non-judicial foreclosure against the Property, JPMC's motion attacked the substantive merits of Appellant's claims against it related to the conduct of the trustee's sale. The arguments in JPMC's Motion for Summary Judgment are nearly identical to those contained in Chase's Motion for Summary Judgment. (*Compare* CP 331–43 *with* CP 7–21).

On October 18, 2013, the Superior Court granted JPMC's Motion for Summary Judgment, dismissing with prejudice Appellant's claims against it on the basis that it had no role in the non-judicial foreclosure. The Court did not reach JPMC's arguments attacking the merits of Appellant's claims against it. (CP 387–89). On December 6, 2013, the Superior Court entered a "Final Judgment, Less Than All Parties" dismissing Appellant's claims against JPMC. (CP 390–95). Appellant did not timely appeal the final judgment dismissing her claims against JPMC.

E. Appellant Files Amended Third-Party Complaint Naming Chase And BMW As Third-Party Defendants.

On February 19, 2014, Appellant filed an Amended Third-Party Complaint ("ATPC"), which named Chase and BMW as third-party defendants. (CP 1–6). The ATPC alleged that (1) Chase's credit bid at the trustee's sale was "erroneous" in alleged violation of RCW 61.24.050(2)(a)(i); (2) the trustee's sales price was "grossly inadequate"; and (3) that this alleged conduct constituted a violation of Washington's Consumer Protection Act. (CP 2–4).[4]

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[4] Appellant's ATPC also alleged that that Chase had become bound by a settlement agreement that Appellant had provided to O'Neill's former attorney (but not to Chase) because O'Neill's attorney did not file notice of his "unwillingness" with the trial court. (CP 4–5). Appellant has not raised this issue in this appeal, and has thus waived it. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006).

F. Chase's Motion For Summary Judgment Is Granted.

Chase filed a Motion for Summary Judgment on February 24, 2014, seeking dismissal of Appellant's claims against it. (CP 7–21). Chase's Motion for Summary Judgment demonstrated that the non-judicial foreclosure was both properly noticed and properly conducted by BMW as lawful successor trustee. (CP 9–10). Chase's Motion for Summary Judgment next argued that (1) Appellant's contentions that Chase's opening credit bid in the amount of Appellant's default was either too low or somehow erroneous was baseless; (2) the trustee's sale price of $172,500 was sufficient as a matter of law; (3) Chase, as beneficiary, was not legally responsible for any allegedly inadequate sales price; (4) Chase had no role in the handling of surplus funds; and (5) Appellant waived her claims when she failed to enjoin the trustee's sale. (CP 12–19).

Chase's Motion for Summary Judgment was supported by the Affidavit of David Weibel, an attorney who works with BMW and who was involved in the trustee's sale. (CP 274–330). Weibel's Affidavit, which had originally been filed in support of JPMC's Motion for Summary Judgment in September 2013, demonstrated that (1) on February 5, 2013, BMW was appointed the successor trustee under the deed of trust; (2) Chase was the lawful beneficiary under the deed of trust; (3) BMW recorded a Notice of Trustee Sale on February 14, 2013, which was

also mailed to Appellant; (4) on June 21, 2013, BMW conducted the trustee's sale pursuant to that Notice of Trustee's Sale; (5) Chase placed a credit bid in the amount of Appellant's outstanding debt; (6) O'Neill purchased the Property at the trustee's sale for $172,500; (7) the Property's fair market value was assessed at $258,811; (8) the Property's tax-assessed value was $211,951; and (9) BMW deposited $75,819.46 in surplus funds from the trustee's sale with the Clark County Superior Court on August 7, 2013. (CP 274–330).

Appellant filed her Opposition to Chase's Motion for Summary Judgment on March 24, 2014. (CP 150–68). Appellant also filed her own Declaration in which she set out facts in Opposition to Chase's Motion for Summary Judgment ("Ju Declaration"). (CP 144–49).

The Ju Declaration did not contain a single factual assertion regarding the conduct of the trustee's sale; nor did the Ju Declaration contain a single factual assertion regarding Chase. (CP 144–49). Instead, the Ju Declaration contained Appellant's assertions that (1) O'Neill did not provide her with certain written notices; (2) O'Neill did not serve her ex-husband with the evictions summons or complaint; (3) "O'Neill does not care about the statutes of the State of Washington and the Washington State Superior Court Rules"; (4) BMW, as successor trustee, failed to timely file surplus funds from the trustee's sale; and (5) O'Neill's former

attorney obtained a writ of restitution without filing a proper motion. (CP 144–46).

At the April 4, 2014, hearing on Chase's Motion for Summary Judgment, Appellant claimed that "a guy" present at the trustee's sale told people attending to stop bidding. (RP 4/4/14, 17:17–21). When pressed by the Superior Court for any evidence supporting this claim, Appellant admitted that she had no affidavits or other evidence, but then claimed that her daughter was at the sale and could provide an affidavit. (RP 4/4/14, 17:22–18:6).

The Court granted Chase's Motion for Summary Judgment. (CP 410–12). In the course of issuing his ruling that Appellant failed to raise a genuine issue of material fact, Judge Gregerson noted that Appellant never requested a continuance under CR 56(f): "Again, the time for bringing that information to this Court and putting up enough evidence to get to trial would have been today. There's been ample opportunity. There was no formal request for additional time." (RP 4/4/14, 30:22–25).

Other than Appellants vague, inadmissible claim that "a guy" told people to stop bidding at the trustee's sale, which Appellant did not attend and thus could not have witnessed, Appellant offered no evidence in support of this implausible story.

After the Court granted Chase's Motion for Summary Judgment, Appellant did not seek reconsideration supported by the affidavit she says would have supported her allegations of misconduct at the trustee's sale. In her brief to this Court, she does not explain what the affidavit she did not file would have said, or how, had she presented it, it would have resulted in a different outcome.

G. Chase's Motion For Final Judgment Under CR 54(b) Is Granted.

On May 2, 2014, Judge Gregerson also granted Chase's motion for entry of final judgment. (CP 485–91). The order granting Chase's motion for final judgment under CR 54(b) contained an express determination that there was no just reason for delay; (2) written findings supporting the determination that there is no just reason for delay; and (3) an express direction for entry of the judgment. (CP 485–91).

H. Appellant Timely Appeals.

On May 30, 2014, Appellant timely filed her Notice of Appeal to the Court of Appeals. (CP 215–17). That Notice of Appeal states that the basis for the appeal is that "Plaintiff Mr. John O'Neill committed a per se violation of RCW 61.24.135(1) at the June 21, 2013, Trustee's Sale . . . ." (CP 216).

IV. ARGUMENT

A. Standard of Review.

Review of an order granting summary judgment is de novo, which requires the appellate court to engage in the same inquiry as the trial court under CR 56. *Mielke v. Yellowstone Pipeline Co.*,73 Wn. App. 621, 624, 870 P.2d 1005 (1994)(citing *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982)). Under RAP 9.12, the appellate court considers only the evidence and issues called to the attention of the trial court. *Id.* "An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record." *Davies v. Holy Family Hosp.,*144 Wn. App. 483, 491,183 P.3d 283 (2008).

"The decision to enter a judgment under CR 54(b) is reviewed for abuse of discretion." *Gull Indus., Inc. v. State Farm Fire & Cas. Co.*, 181 Wn. App. 463, 481, 326 P.3d 782, (2014). "A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

B. The Superior Court Correctly Granted Chase's Motion For Summary Judgment.

The Superior Court correctly granted Chase's Motion for Summary Judgment. In the Court below, Appellant never denied that she was in default. Nor did she attempt to enjoin the trustee's sale of the Property.

Instead, Appellant complained about alleged irregularities in the trustee's sale, that the amount for which the Property was sold was inadequate, and that BMW delayed in depositing the surplus sales proceeds with the Superior Court. (CP 1–6). However, Appellant offered no evidence to support her claim of irregularities in the conduct of the trustee's sale. Even if such irregularities had occurred, her remedy would be against the persons involved in the irregularities, not against Chase. Moreover, under settled Washington law the sales price was not inadequate and Chase had no involvement in the handling of the surplus funds. Consequently, the Superior Court correctly granted summary judgment in Chase's favor.

C. Summary Judgment Was Appropriate Because Appellant's First Cause Of Action Was Legally And Factually Baseless

1. Appellant's Contention that the Trustee's Sale Price was Grossly Inadequate Has No Basis In Washington Law.

Appellant's claim to have the trustee's sale set aside fails because the undisputed material facts demonstrated that the sales price was $172,500.00, and that amount was adequate as a matter of law. (CP 276, at ¶ 9). The Property was sold for 66 percent of its fair market value ($258,811.00) and 81 percent of its tax-assessed value ($211,951.00). (CP 275, at ¶5, 6). Appellant did not dispute the sales price, the fair market value, or the tax-assessed value before the trial court.

Appellant's argument that the $172,500.00 final sales price was inadequate runs against the current of Washington authority. Washington courts will rule that the price obtained at a trustee's sale is inadequate only when it is 20 percent or less of the fair market value:

> In general, Washington courts have found the purchase price inadequate when it is less than 10 percent of the fair market value. *See, e.g., Miebach*, 102 Wn.2d at 177-79 (sale for less than 2 percent of the fair market value was a grossly inadequate sales price); *Cox*, 103 Wn.2d at 387-88 (purchase price between 3.9 and 5.9 percent of the fair market value was grossly inadequate); *Casa del Rey*, 110 Wn.2d at 72 (purchase for 4.9 percent of the fair market value was inadequate). The Restatement (Third) of Property states that a court is generally warranted in invalidating a sale where the price is less than 20 percent of fair market value. Restatement (Third) of Property: Mortgages § 8.3 cmt. b [933] (1997). As noted above, Dickinson purchased the property for between 13 and 18 percent of its fair market value.

Albice v. Premier Mortgage Servs. of Wash., Inc., 157 Wn. App. 912, 932–933, 239 P.3d 1148 (2010).

The $172,500.00 sales price in this case was ***66 percent*** of the $258,811.00 fair market value of the Property and ***81 percent*** of the value as assessed by the County. (CP 275, at ¶5, 6). This is more than ***three times*** the threshold at which courts ***even begin*** to scrutinize the fairness of

a trustee's sales. The $172,000.00 sales price was adequate as a matter of law, and Appellant's claim to the contrary is baseless. Further, Appellant's contention that "Mr. O'Neill sold the premises at $282,000 on April 1, 2014," while legally insignificant in light of the above, is unsupported by any evidence that was submitted to the trial court. (Appellant's Br. at 43).[5]

Further, Appellant never demonstrated any procedural impropriety in the trustee's sale. Under Washington law, the plaintiff must demonstrate ***both*** an inadequate price ***and*** unfair procedures.

> Inadequacy of price alone, however, is generally insufficient to set aside a nonjudicial foreclosure sale. But a grossly inadequate purchase price together with circumstances of other unfair procedures may provide equitable grounds to set aside a sale.

Albice, 157 Wn. App. at 932–33 (2010).

An oft-cited example of the kind of unfairness required is *Cox v. Helenius*, where the trustee knew the borrowers erroneously believed their lawsuit against the lender had suspended foreclosure proceedings, but

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[5] Even using Appellant's $282,000 figure, the trustee's sales price would be 61% percent of that figure and thus sufficient as a matter of law. *See MHM&F, LLC v. Pryor*, 168 Wn. App. 451, 461 n. 17, 277 P.3d 61 (2012)("In general, Washington courts have found the purchase price inadequate when it is less than 10 percent of the fair market value. Here the stock was sold for over 45 percent of what Pryor Junior claims is the fair market value.")(citing *Albice*, 157 Wn. App. at 932).

nevertheless sold the property at foreclosure for 4–6 percent of fair market value. *Cox v. Helenius*, 103 Wn.2d 383, 386 (Wash. 1985). Without unfair circumstances such as these, a sale will not be rescinded solely because of an inadequate sale price, even if the deficiency could be considered "gross." *See Steward v. Good*, 51 Wn. App. 509, 517 (1988) (upholding the non-judicial foreclosure sale of property at price of 8 percent of fair market value when there was no evidence of other prejudice to the borrower).

Appellant has not demonstrated ***any*** unfair procedure in the trustee's sale besides her allegation that the trustee was tardy in filing the surplus funds with the Court ***after*** the sale. Summary judgment was proper because Appellant failed to establish the elements necessary to have the trustee's sale set aside.

The trustee in this case complied with its legal obligation to take reasonable and appropriate steps to sell the Property for a price well within the bounds of fairness, and that is all the law requires: "A trustee is not required to obtain the best possible price for the trust property; nonetheless, a trustee must take reasonable and appropriate steps to avoid sacrificing the debtor's interest in the property." *Albice*,157 Wn. App. at 934 (citation omitted).

2. Appellant's Claim Against Chase Under Washington's Consumer Protection Act is Both Legally And Factually Meritless.

Summary judgment was appropriate because Appellant's claim that "Chase . . . did not address the issue of the per se violation of RCW 61.24.135(1)" was not supported by any evidence or cogent legal argument. RCW 61.24.135(1) provides, in relevant part, that is a per se unfair or deceptive act under Washington's CPA

> for any person, acting alone or in concert with others, to offer, or offer to accept or accept from another, any consideration of any type not to bid, or to reduce a bid, at a sale of property conducted pursuant to a power of sale in a deed of trust.

Appellant claims that "Chase and Bishop did not challenge the facts that a man kept yelling, 'Wow! Wow! Wow! Stop! Stop' and made Mr. O'Neill the successful purchaser at the June 21, 2013, Trustee's Sale." (Appellant's Br. at 7).

Appellant's contention is legally meritless because (1) Plaintiff does not allege that Chase colluded to affect the bid price; and (2) the statute does not require deed of trust beneficiaries to remedy any collusion. The statute would only provide Appellant with a cause of action for damages under the CPA against the persons allegedly engaged in the collusion. Appellant made no allegation that Chase, any Chase agent, or BMW attempted to interrupt the trustee's sale. Moreover, the

statute does not require a trustee to void a trustee's sale even if such collusive activity occurs, instead stating only that "[t]he trustee *may* decline to complete a sale or deliver the trustee's deed . . . if it appears that the bidding has been collusive or defective, or that the sale might have been void." RCW 61.24.135(1)(emphasis added). If Appellant has a claim against the unidentified person Appellant claims attempted to interrupt the trustee's sale, she should pursue a CPA claim against that party, but her allegations do not implicate Chase.

Notwithstanding that Appellant's claim is legally meritless, Appellant presented no evidence to the trial court regarding her inadmissible claim that somebody at the trustee's sale kept yelling "Wow! Wow! Wow!" To the contrary, the declaration Appellant submitted in opposition of Chase's Motion for Summary Judgment says nothing about the trustee's sale. (CP 144–46). Moreover, even if it were true that an unidentified man yelled for persons to stop bidding at the trustee's sale, there is no evidence that the man was in anyway associated or affiliated with Chase. Thus, there was no evidence of any sort that the unidentified man was an agent of Chase, or that Chase was in collusion with him. Chase had no interest in the sales price as long as exceeded the amount that it was owed. Summary judgment was thus appropriate as to this claim.

3. Appellant's Contention that ER 103, 601, and 901 Required Judge Gregerson To Permit Appellant to Obtain Additional Declarations is Meritless.

Appellant contends that under ER 103(a)(2), ER 601, and ER 901(b)(A), "Judge Gregerson should have allowed Frances Ju to tell her daughter to write an affidavit." (Appellant's Br. at 37). Appellant's contention is misguided, as there was no evidence to which the court was being asked to apply the rules of evidence.

CR 56(c) and (e) required Appellant to submit affidavits or declarations supporting her opposition to Chase's Motion for Summary Judgment 11 calendar days before the hearing. Indeed, Appellant did submit a declaration to support her Opposition. That declaration simply failed to "set forth specific facts showing that there is a genuine issue for trial," and therefore summary judgment was appropriate. CR 56(e).

Moreover, Appellant was free to bring a motion, supported by affidavit or declaration, requesting a continuance under CR 56(f). Appellant, however, simply failed to do so prior to the hearing. Even if Appellant's statement that "I can ask my daughter to write an affidavit" constituted a request under CR 56(f), which it did not because it was not supported by affidavit, Appellant made no showing whatsoever as to why that evidence was not obtained prior to the hearing: "CR 56(f) provides a

remedy for parties who know of the existence of a material witness ***and show good reason why they cannot obtain the witness' affidavits in time for the summary judgment proceeding***." *Turner v. Kohler*, 54 Wn. App. 688, 693,775 P.2d 474 (1989).

Therefore, the trial court would have been justified in denying such a motion even if it was properly before the court:

> The trial court may, however, deny a motion for continuance where: (1) ***the requesting party does not offer a good reason for the delay in obtaining the desired evidence***; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) ***the desired evidence will not raise a genuine issue of material fact***. The trial court's grant or denial of a motion for continuance ***will not be disturbed absent a showing of manifest abuse of discretion***.

Id. (citations and quotations omitted)(emphasis added).

Appellant did not move for a continuance under CR 56(f). Appellant does not contest on appeal that she was entitled to a continuance pursuant to CR 56(f). Instead, Appellant argues that the evidence (which was never offered) was admissible under the Evidence Rules. Because the evidence was never offered, the Court cannot address whether it was admissible.

Appellant did not explain why she was previously unable to obtain a declaration from her daughter. She filed her third-party complaint against JPMC alleging irregularities in the sale in July 2013. JPMC attacked the merits of her claims in its Motion for Summary Judgment filed in September 2013. She refiled her third party claims against Chase and BMW in February 2014, and opposed motions for summary judgment filed by both BMW and Chase. Certainly, if Appellant's daughter had admissible evidence bearing on the validity of the trustee's sale, the Appellant would have obtained a statement from her daughter before May 2014 when she appeared at the hearing on the motions for summary judgment against her.

Moreover, even if Appellant had moved for a continuance under CR 56(f), Judge Gregerson would have been correct in denying that continuance. Appellant did not explain to the Superior Court what her daughter's affidavit would have said; nor did Appellant explain how that affidavit would have presented an issue of material fact as to her claims against Chase. Her claim that a man yelled "wow, wow, wow" or something else at the sale, even if true, would not be enough to sustain a claim against Chase. Appellant never alleged that Chase had any connection at all with the unidentified man, or that Chase was legally responsible for the man's alleged conduct.

Further, Appellant never provided the affidavit to the Superior Court before or at the hearing on Chase's summary judgment motion. Nor did she bring a motion for reconsideration with the affidavit attached. Appellant did not present the affidavit at the hearing on Chase's motion for entry of final judgment. In her appeal to this Court, Appellant has never said what her daughter's affidavit would have said, except that an unidentified man yelled out at the trustee's sale. Again, that assertion alone would not state a claim against Chase, which did not conduct the sale and was not even present at the sale. Judge Gregerson properly declined to consider evidence that was never presented to the Superior Court. Appellant's argument that "Judge Gregerson's Granting of Motions for Summary Judgment was in violation of the Rules of Evidence" is baseless. (Appellant's Br. at 35). Summary judgment was appropriate.

4. Appellant Has No Statutory Cause of Action To Void the Trustee's Sale Under Washington's Deed of Trust Act.

Summary judgment was appropriate because Appellant's claim under RCW 61.24.050(2) lacks legal merit. Appellant contends that "Chase and Bishop committed a per se violation of RCW 61.24.050(2)(a)(i) . . . ." (Appellant's Br. at 4, 6).

That provision states that

> Up to the eleventh day following the trustee's sale, ***the trustee, beneficiary, or authorized agent for the beneficiary*** may declare the trustee's sale and trustee's deed void for the following reasons:
>
> []The ***trustee, beneficiary, or authorized agent for the beneficiary*** assert that there was an error with the trustee foreclosure sale process including, but not limited to, an erroneous opening bid amount made by or on behalf of the foreclosing beneficiary at the trustee's sale . . . .

RCW 61.24.050(2)(a)(i) (emphasis added).

Appellant states that "the opening bid price at the June 21, 2013, Trustee' Sale was $95,798.49." (Appellant's Br. 18). Appellant appears to argue that there was a "per se violation" of RCW 61.24.050(2)(a)(i) because of some apparent confusion on the part of David A. Weibel, who stated in his declaration dated September 6 that "JPMorgan Chase Bank credit bid $95,814.82" while he corrected in a declaration dated March 4, 2014, that "Bishop caused a credit bid for Chase to be made in the amount of $95,798.49." (CP 36, 276).

Notwithstanding that Mr. Weibel clarified this statement in the March 4, 2014, Declaration when he explained that the $95,814.82 was actually the figure that Chase was entitled to receive in satisfaction of its first-priority lien (CP 36), summary judgment was appropriate because this is not a material fact and Chase was entitled to judgment as a matter

of law. The amount of Chase's credit bid has no bearing upon this action. This is especially true because Chase did not even purchase the property; O'Neill was the high bidder at the trustee's sale with a bid of $172,500.

Moreover, Washington law does not obligate the beneficiary of a deed of trust to make *any bid at* all.[6] Chase was in full compliance with the Deed of Trust Act when it placed a credit bid for almost the full amount of debt outstanding on the Deed of Trust: "The trustee shall, at the request of the beneficiary, credit toward the beneficiary's bid *all or any part* of the monetary obligations secured by the deed of trust." RCW 61.24.070 (emphasis added). The Act permitted Chase to place this bid; it did not require that a bid be placed at all or in any specific amount.

Even assuming for the sake of argument there was a $16.33 error in Chase's opening bid, the statute Appellant cites provides only the "***trustee, beneficiary, or the beneficiary's authorized agent***" with the power to declare the trustee's sale void upon a bidding error; it does not provide any rights to a deed of trust grantor such as Appellant. RCW 61.24.050(2)(a)(i) (emphasis added).[7] Appellant, therefore, has no

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[6] "The trustee may not bid at the trustee's sale. Any other person, including the beneficiary, *may* bid at the trustee's sale." RCW 61.24.070(1) (emphasis added).

[7] "*Expressio unius est exclusio alterius*, a common maxim of statutory construction, also aids our decision. The maxim holds that [w]here a statute specifically designates the

standing to assert a cause of action under the statute. Summary judgment was appropriate because Appellant's claim fails as a matter of law.

5. Appellant's Claims That There Were Irregularities at the Trustee's Sale Fails Because The Trustee's Deed Was Conclusive Evidence That the Sale was Proper.

Appellant's claim that there were problems with the trustee's sale fail because Washington's Deed of Trust Act states that

> The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and ***conclusive evidence*** thereof in favor of bona fide purchasers.

RCW 61.24.040(7)(emphasis added).

Here, the Trustee's Deed issued to O'Neill states that "All legal requirements and all provisions of said Deed of Trust have been complied with, as to the acts to be performed and notices given, as provided in Chapter 61.24 RCW." (CP 103–06). The Trustee's Deed also recites the facts supporting that conclusion. (CP 103–06). The Trustee's Deed,

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things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature." *State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343, (2003)(citations and quotations omitted).

therefore, is conclusive evidence that the trustee's sale was conducted according to Washington law. *See Glidden v. Mun. Auth. of Tacoma*, 111 Wn.2d 341, 347, 758 P.2d 487 (1998).

6. Appellant Did Not Support Her Claim That Chase Was Engaged In "False Notarization" With Any Evidence.

Appellant's contention that "Frances Ju showed the Superior Court that it was likely that Chase and Bishop conducted false notarization of the documents" is baseless. (Appellant's Br. at 3). Appellant apparently argues that there were issues with the recorded Appointment of Successor Trustee appointing BMW as deed of trust trustee. (CP 284–87). There is no evidence that the Appointment was not properly and lawfully executed. Appellant only offers speculative statements to support her claim that the Appointment is invalid. (Appellant's Br. 32–35). The Appointment was properly notarized, and included a proper Certificate of Acknowledgement, which is prima facie evidence of the facts recited in the instrument. RCW 64.08.050; (CP 284–87). The Appointment was notarized on January 18, 2013 by Sarah Mattison, whose commission did not expire until May 2013. (CP 285).

Appellant seems to mistake the August 2013 verification that the copy of the Appointment of Successor Trustee was a true and correct one for some post-recordation certification of the Appointment's validity.

(Appellant's Br. at 34). Appellant also believes that an "emergency nonstandard recording" is suspicious and somehow detracts from the validity of the Appointment. (Appellant's Br. at 34). These beliefs are incorrect, as the Appointment itself clearly demonstrates. Appellant also appears to mistakenly believe that either Chase or BMW was required to provide her with notice of the appointment of successor trustee; however, RCW 61.24.010(2), which governs such appointments, does not require that any such notice be provided.[8] Appellant failed to present any facts that create a genuine issue of material fact as to the validity of the Appointment, and summary judgment was properly granted.

D. Appellant's Claims Regarding The Alleged Late Deposit Of Surplus Funds Are Misdirected Against Chase.

Appellant's claims against Chase relating to the handling of the surplus funds from the sale of her home are misdirected. Chase never had possession of the surplus funds and was not involved with the handling of the surplus funds. The Deed of Trust Act requires the purchase price to be paid to the trustee. RCW 61.24.070(2). The trustee is responsible for applying the proceeds of the funds to cover the expense of the sale, then to

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[8] Irrespective of both the legal and factual baselessness of these allegations, Appellant waived any such claim when she failed to obtain an order either enjoining or restraining the trustee's sale prior to its occurrence. *Frizzell v. Murray*, 179 Wn.2d 301, 312–13, 313 P.3d 1171 2013); (CP 17–19).

satisfy the obligation secured by the deed of trust, and then to deposit any surplus with the court. RCW 61.24.080. The trustee in this case performed those tasks and deposited the surplus funds with the Superior Court. Chase owed Appellant no legal duties relating to the surplus funds, never had possession of the surplus funds, and did not direct the trustee with respect to the handling of those funds. Thus, Appellant's claims relating to the handling of surplus funds in this matter, to the extent they are directed against Chase, are without merit and were properly disposed of upon summary judgment.

E. Appellant's Allegations Of Judicial Bias Should Be Rejected Because It Is Being Raised For The First Time On Appeal And Is Meritless.

The Court should reject Appellant's claims regarding Judge Gregerson's alleged bias because, in addition to being baseless, Appellant failed to raise the issue to the trial court.

Appellant does not claim, nor does the record reflect, that she ever submitted an affidavit of prejudice or otherwise brought a motion seeking Judge Gregerson's recusal. Appellant's contention that Judge Gregerson somehow acted inappropriately, brought for the first time on appeal, is very similar to that rejected in *Henriksen v. Lyons*, 33 Wn. App. 123, 128, 652 P.2d 18 (1982).

In *Henriksen*, the court of appeals rejected a contention that the appellant had been "denied due process of law because the trial judge failed to disqualify himself sua sponte because of alleged implied bias." *Id.* After noting that the appellant failed to seek the judge's recusal before the trial court, the court stated that "[w]e have recently held that even constitutional rights can be waived by failing to utilize the machinery available for asserting them. Consequently, [appellant] waived this issue by failing to bring the facts before the trial judge and to seek his recusal." *Id.* Indeed, "Recusal decisions lie within the sound discretion ***of the trial court***." *Tatham v. Rogers*,170 Wn. App. 76, 87, 283 P.3d 583 (2012)(emphasis added)

Here, Appellant apparently contends that she became aware of Judge Gregerson's alleged bias against her on September 5, 2013, when he allegedly "walked past where she sat at least twice and looked at her." (Appellant's Br. at 5). Appellant was free to file an affidavit of prejudice pursuant to RCW 4.12.050 because Judge Gregerson had not yet made any rulings in the matter. Moreover, Appellant could have subsequently brought a motion for recusal if she believed there was a basis. *See State v. Rocha*, 181 Wn. App. 833, 842, 327 P.3d 711 (2014).

Appellant also apparently contends that Judge Gregerson demonstrated his bias against her on numerous occasions before the April

4, 2014, hearing on Chase's Motion for Summary Judgment, including October 18, 2013, (Appellant's Br. at 31, 39), February 2, 2014, (Appellant's Br. at 13–14), and February 7, 2014 (Appellant's Br. at 15, 41). Yet Appellant never moved for recusal, and therefore the issue is not properly before this Court. The citations to the record Appellant makes regarding Judge Gregerson in her attempts to demonstrate his bias merely reflect that he politely suggested that Appellant obtain legal counsel on several different occasions. (Appellant's Br. at 12–13, 14).

Even if Appellant's claims regarding Judge Gregerson were properly before this Court, which they are not, and even if Appellant supported her allegations against Judge Gregerson with more than her own uncorroborated narrative, which she has not, Appellant's claims would still not rise to the level of constitutional import requiring recusal or reversal.

Appellant claims that Judge Gregerson's alleged partiality implicates the Due Process Clause of the Fourteenth Amendment. (Appellant's Br. 25–30). Washington courts, however, clearly state that there are only three circumstances in which judicial conduct rises to the level of the "extraordinary situation" requiring recusal on constitutional grounds: (1) the judge has a direct or indirect, personal, or substantial pecuniary interest in the case; (2) criminal contempt cases where the judge

was responsible for determining that the defendant should be charged; and (3) where someone with a personal stake in a proceeding had a significant role in placing the judge on the case. *Tatham v. Rogers*, 170 Wn. App. 76, 90, 283 P.3d 583 (2012)(citing *Turner v. Ohio*, 273 U.S. 510, 523, 47 U.S. Ct. 437, 71 L. Ed 749 (1927); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)). As the *Tatham* court stated, "'[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level' and that '[p]ersonal bias or prejudice alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.'" *Id.* (quoting *Massey*, 556 U.S. at 876).

Appellant's contentions regarding Judge Gregerson not only do not fit within these categories, they are unfounded. Appellant contends that Judge Gregerson (1) was prejudiced against Appellant for being unrepresented (Appellant's Br. at 14); (2) "solicit[ed] JPMorgan Chase & Co. and Bishop that he would take care of them" (Appellant's Br. at 31); (3) "scolded Frances and unfairly ruled against Frances Ju on everything . . . ." (Appellant's Br. at 32); (4) was prejudiced against her for being of Chinese decent and non-Caucasian (Appellant's Br. at 39); and (5) had a "goal" of protecting the defendants from Appellant (Appellant's Br. at 40). Appellant cites to nothing in the record that

supports these allegations in any way, and thus her contentions regarding Judge Gregerson are meritless.

F. The Superior Court Properly Granted Chase's Motion For Final Judgment

Appellant's contention that "Chase's and Bishop's Motions [for entry of judgment under CR 54(b)] are actually a dispositive motion in disguise" is meritless. (Appellant's Br. at 47). Appellant claims that Chase's Motion for Summary Judgment somehow failed to dispose of all of Appellant's claims against it because, she contends, her request for "declaratory and other relief" somehow survived the order granting Chase's Motion for Summary Judgment. (Appellant's Br. at 47).

The record unmistakably demonstrates that Appellant's claims against Chase were fully adjudicated. Final judgment may be entered upon a claim under CR 54(b) when that claim is fully adjudicated, *i.e.*, all issues of liability and damages, including costs awarded as damages, have been determined as to that claim. *See Bowing v. Bd. of Trs.*, 85 Wn.2d 300, 303, 534 P.2d 1365 (1975).

Despite the unambiguous language of the trial court's order dismissing with prejudice "***[a]ll claims*** against Third Party Defendant Chase," (CP 410–12), Appellant argues that "[i]n Chase's and Bishop's Motions [for summary judgment], neither addressed Frances Ju's request

for declaratory and other relief. Thus, there are still live claims yet to be adjudicated." (Appellant's Br. at 47). Appellant's argument is devoid of merit. The trial court dismissed ***all*** of Appellant's claims against Chase with prejudice because Plaintiff failed to raise a single issue of material fact as to any of the contentions made in her ATPC and her two causes of action failed as a matter of law.

The following four elements must be met for a trial court to enter a CR 54(b) final judgment: "'(1) more than one claim for relief or more than one party against whom relief is sought; (2) an express determination that there is no just reason for delay; (3) written findings supporting the determination that there is no just reason for delay; and (4) an express direction for entry of the judgment.'" *Hulbert v. Port of Everett*,159 Wn. App. 389, 405–06,245 P.3d 779 (2011)(quoting *Fluor Enters., Inc. v. Walter Constr., Ltd.*, 141 Wn. App. 761, 766-67, 172 P.3d 368 (2007)).

Chase met these four elements. (CP 485–91). Appellant does not dispute that Chase met these four elements. Appellant's position is baseless, and the final judgment dismissing her claims against Chase was not an abuse of discretion.

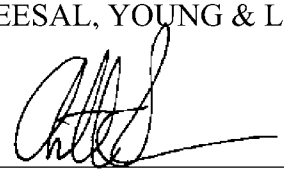
V. CONCLUSION

For the foregoing reasons, the trial court's decisions should be AFFIRMED.

DATED this 15th day of October, 2014.

Respectfully submitted,

KEESAL, YOUNG & LOGAN



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the date given below, she caused to be served a copy of the foregoing JPMORGAN CHASE BANK, N.A.'S RESPONSE TO APPELLANT'S OPENING BRIEF to the court and to the parties to this action as follows:

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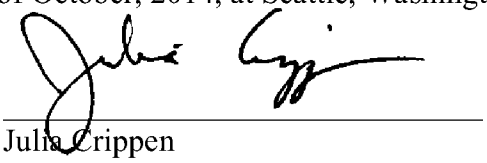
DATED this 15th day of October, 2014, at Seattle, Washington.



Julia Crippen

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