No. 93211-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BLAIR LA MOTHE,

Petitioner

v.

U.S. BANK N.A., AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE THORNBURG MORTGAGE SECURITIES TRUST 2005-4 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-4 ITS SUCCESSORS IN INTEREST AND/OR ASSIGNS

Respondent

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Blair La Mothe
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TABLE OF AUTHORITIES

Statutes

Rules

A. INTRODUCTION

Petitioner replies to Respondent's Answer to Petition for Review as follows.

U.S. Bank's Answer concludes with these statements:

> ... the admission of business records in this foreclosure case was proper, and presents no issue of substantial public interest. Likewise, enforcement of an original note and deed of trust by the party who submits the original note and deed of trust to the trial court against a borrower... is unremarkable and presents no issue of substantial public interest.

U.S. Bank's conclusory statements and the analysis they are based on are incorrect here as we have two improper and incomplete David Recksiek declarations before the Court and U.S. Bank did not prove it held the Note on the day it filed the complaint; these are matters of substantial public interest.

Thornburg was the original servicer of La Mothe's loan when Liberty Financial Group held the Note from late 2005 through December 2009. Select Portfolio Servicing became the servicer for the Thornburg Trust loans in late 2009 after it successfully obtained the servicing rights from TMST Home Loans, Inc.'s bankruptcy trustee.

From late 2005 through early 2013, the La Mothe Deed of Trust was assigned several times by various alleged Note holders and the timing

of the assignments is informative. The process shows the La Mothe Note was not in the Thornburg Trust until at least late 2012 or early 2013.

Despite Select Portfolio Servicing not having authority to service La Mothe's loan until arguably December 1, 2012, the date TMST, as holder of the Note assigned the Deed of Trust to the Thornburg Trust, it represented itself as having the authority to service Appellant's loan as early as 2010.

Select should not have been trying to service La Mothe's loan for the Trust when the Trust was not holding the Note. Select obtained servicing rights for the Trust in late 2009 yet the Trust did not "arguably" obtain possession of the La Mothe Note until December 2012. The Appellate court missed this most basic fact.

A defunct company (Liberty) assigned the DOT to a bankrupt company, who then allegedly assigned the DOT to the Thornburg Trust (without having the authority of the bankruptcy trustee) seven years after the Trust's closing date. After these several questionable assignments, U.S. Bank somehow ends up with the Deed of trust.

B. DAVID RECKSIEK DECLARATIONS

Recksiek's declaration testimony contains hearsay as it is not based upon his personal knowledge but upon what he could see from computer screens and he never saw nor inspected the original Note or

Deed of Trust, nor did anyone at Select. So how could he know whether the copies he described in his declarations were true and correct copies of the originals? The Court should not have allow inadmissible "evidence."

CR 56 and RCW 5.45.20 require declarations to comport as follows: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith", and, "A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Recksiek's two declarations clearly did not comply with the above requirements. How could they with the amount of information he left out? Recksiek, an employee of the second alleged servicer, Select, could not identify who the original servicer of La Mothe's loan was, who had actual custody of the original Note, who allegedly sent the original Note to U.S. Bank's counsel and who had custody of the original Note in the first place

and who sent the "alleged" original Note. His declarations should not have been allowed.

C. RESPONDENT NOT IN POSSESSON OF NOTE AT TIME COMPLAINT FILED

The Bank never proved it held the Note as of March 2013 and therefore had no authority to initiate the lawsuit in March 2013.

When the complaint was filed on March 11, 2013 the copy of the Note attached to the complaint did not match the alleged original Note. If the Respondent would have had the original note, they would have used a copy of the original not some scanned in version with a MERS identifier number.

Who was holding the Note when the complaint was filed? Not the Trust. The question should have been answered at the summary judgment hearing.

D. CONCLUSIONS

In the final analysis, the facts and circumstances in the matter are remarkable. Recksiek's declarations are insufficient to establish key facts a records custodian for a servicer should have known and U.S. Bank has failed to show it was holding the Note on the day it filed the underlying complaint. Appellant respectfully requests this matter be remanded to the trial court.

DATED this 23 day of June, 2016

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I hand delivered a true and accurate copy of the Appellant's Reply to Respondent's Answer to Petition for Review, Supreme Court of the State of Washington No. 93211-5, to the following party:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: June 23, 2016 at Seattle, Washington.

Larry C. Nelson (printed name)