

Supreme Court No. 94051-7

Court of Appeals No. 47779-3-II

---

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

CYRIL J. WORM

Appellant,

v.

BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK  
AS TRUSTEE FOR THE HOLDERS OF CWALT, INC.,  
ALTERNATIVE LOAN TRUST 2004-J12, MORTGAGE PASS-  
THROUGH CERTIFICATES, SERIES 2004-J12; RESIDENTIAL  
CREDIT SOLUTIONS, INC.; NORTHWEST TRUSTEE SERVICES OF  
WASHINGTON; MORTGAGE REGISTRATION SYSTEMS, INC.; and  
JOHN DOES 1-20

Respondents.

---

**ANSWER OF RESPONDENTS  
TO PETITION FOR REVIEW**

Submitted By:  
Joshua S. Schaer, WSBA No. 31491  
RCO LEGAL, P.S.  
13555 S.E. 36<sup>th</sup> St., Suite 300  
Bellevue, WA 98006  
(425) 457-7810

**TABLE OF CONTENTS**

**I. Identity of Answering Parties** .....1

**II. Statement of Relief Sought**.....1

**III. Summary of Argument**.....1

**IV. Relevant Facts** .....2

    A. Origination of the Loan.....2

    B. Mr. Worm Modifies the Loan and Then Defaults.....3

    C. Bank of New York, as the Beneficiary, Proceeds With Non-Judicial Foreclosure of the Property .....3

**V. Response to Issues Presented** .....3

**VI. Argument** .....4

    A. Standard for Review .....5

    B. Mr. Worm Fails to Show that *Brown* Was Wrongly Decided ...5

    C. The Denial of Attorneys’ Fees is Not an Issue That Requires Additional Consideration.....8

**VII. Conclusion** .....9

**TABLE OF AUTHORITIES**

**Case Law**

*Bavand v. OneWest Bank*, 196 Wn. App. 813, 385 P.3d 233 (2016),  
*as modified* (Dec. 15, 2016).....7

*Brown v. Wash. Dep’t of Commerce*, 184 Wn.2d 509,  
359 P.3d 771 (2015)..... 1, *passim*

|  |         |
|--|---------|
| <i>Cummings v. NWTS et al.</i> , 2016 WL 6952623 (Div. 1, Nov. 28, 2016)<br>(unpublished) .....  | 7       |
| <i>Deutsche Bank Nat. Trust Co. v. Slotke</i> , 192 Wn. App. 166,<br>367 P.3d 600 (2016).....  | 6       |
| <i>In re Veal</i> , 450 B.R. 897 (B.A.P. 9th Cir. 2011).....   | 6       |
| <i>Leonard v. Recontrust Co., N.A.</i> , 2016 WL 304802<br>(W.D. Wash. Jan. 26, 2016).....   | 7       |
| <i>McAfee v. Select Portfolio Serv., Inc.</i> , 193 Wn. App. 220,<br>370 P.3d 25 (2016).....   | 8       |
| <i>Trujillo v. NWTS</i> , 181 Wn. App. 484, 326 P.3d 768 (2014), <i>as modified</i><br>(Nov. 3, 2014), <i>rev'd on other grounds</i> , 183 Wn.2d 820, 355 P.3d 1100<br>(2015)..... | 6       |
| <i>Walton v. Severson</i> , 100 Wn.2d 446, 670 P.2d 639 (1983) .....   | 8       |
| <i>Worm v. NWTS et al.</i> , 2016 WL 6885907 (Div. 2, Nov. 22, 2016)<br>(unpublished) .....  | 1, 6, 8 |
| <b>Court Rules</b>   |         |
| CR 12(b)(6).....   | 7       |
| R.A.P. 13.4(b).....  | 5, 9    |
| <b>Supreme Court Pending Cases</b>   |         |
| <i>Cummings v. NWTS et al.</i> , No. 94093-2 .....   | 1       |

## **I. IDENTITY OF ANSWERING PARTIES**

Respondent Bank of New York Mellon fka The Bank of New York as Trustee for the Holders of CWALT, Inc., Alternative Loan Trust 2004-J12, Mortgage Pass-through Certificates, Series 2004-J12 (“Bank of New York”), Residential Credit Solutions, Inc. (“RCS”), Mortgage Electronic Registration Systems, Inc. (“MERS”), and Northwest Trustee Services, Inc. (“NWTS”) hereby jointly answer the Petition for Review of Appellant Cyril Worm (“Petition for Review”) as follows below.

## **II. STATEMENT OF RELIEF SOUGHT**

Respondents request that the Washington Supreme Court decline to accept discretionary review of the unpublished decision in *Worm v. NWTS et al.*, 2016 WL 6885907 (Div. 2, Nov. 22, 2016).

## **III. SUMMARY OF ARGUMENT**

The Supreme Court is considering a Petition for Review on virtually identical issues in *Cummings v. NWTS et al.*, No. 94093-2. Respondents in that matter have likewise asked the Court to deny the Cummings’ Petition.

First, *Brown v. Wash. Dep’t of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), was correctly decided because holder status, and not ownership, is dispositive to non-judicial enforcement of a secured loan.

Second, the Court of Appeals' denial of attorneys' fees to Bank of New York is not a critical ruling that should necessitate higher review.

#### **IV. RELEVANT FACTS**

##### **A. Origination of the Loan.**

On or about October 28, 2004, in consideration for a mortgage loan, Appellant Worm executed a promissory note (the "Note") in the amount of \$367,250.00. CP 36-39. In the Note, Mr. Worm agreed that if he did "not pay the full amount of each monthly payment on the date it is due," he would be in default. *Id.*, ¶ 6(B).

Mr. Worm also executed a Deed of Trust securing the Note. CP 41-57. The recorded Deed of Trust encumbers a piece of real property commonly known as NE 6551 North Shore Road, Belfair, WA 98528 (the "Property"). *Id.* Mr. Worm agreed the Note and Deed of Trust could be sold one or more times without prior notice to him. *Id.* at 51, ¶ 20.

On June 11, 2010, October 1, 2012, and February 4, 2014, respectively, Assignments of the Deed of Trust were publicly recorded. CP 59-62. These documents identify Bank of New York as the most recent assignee in the public record. *Id.*

//

//

B. Mr. Worm Modifies the Loan and Then Defaults.

On November 16, 2011, a loan modification agreement between Mr. Worm and BAC Home Loans Servicing, LP<sup>1</sup> was recorded with the Mason County Auditor. CP 64-70.<sup>2</sup> In that document, Mr. Worm renewed his commitment to repaying the loan. *Id.*

On or about December 1, 2012, despite Mr. Worm's assurance of repayment, he became delinquent on his monthly loan installments. *See* CP 76-79 (Notice of Default); *see also* CP 139 (Compl., ¶ 3.24).

C. Bank of New York, as the Beneficiary, Proceeds With Non-Judicial Foreclosure of the Property.

On January 13, 2014, Bank of New York, through RCS as its Attorney-in-Fact, executed an unambiguous declaration evidencing Bank of New York's status as Note holder. CP 72; *cf.* CP 137 (Compl., ¶ 3.11, alleging the trust has no interest in the loan); CP 140 (Compl., ¶ 4.2, alleging the same). The record shows that all actions taken in furtherance of foreclosure occurred *after* this sworn averment.

On February 4, 2014, an Appointment of Successor Trustee, naming NWTS as Successor Trustee and vesting NWTS with the powers

---

<sup>1</sup> BAC Home Loans was not a party to the action. CP 133 (Complaint caption).  
<sup>2</sup> Mr. Worm apparently had no problem with a representative of MERS, acting as nominee for Bank of America, executing the modification agreement. *Id.*

of the original trustee, was recorded with the Mason County Auditor. CP 74.

On or about February 14, 2014, as a result of Mr. Worm's default, NWTS sent him a Notice of Default. CP 76-79; *see also* CP 139 (Compl., ¶ 3.24).

On March 25, 2014, a Notice of Trustee's Sale was recorded with the Mason County Auditor, setting a sale date of August 1, 2014 for the Property. CP 81-85. The sale date itself was later discontinued, with this fact publicly recorded in a Notice of Discontinuance. CP 87.

On September 24, 2014, after Mr. Worm dismissed a prior lawsuit in Federal Court, NWTS recorded a new Notice of Trustee's Sale with the Mason County Auditor, setting a sale date of January 23, 2015 for the Property. CP 89-94.

On or about January 6, 2015, Mr. Worm wrote to NWTS demanding a discontinuance of the pending trustee's sale within 48 hours of his correspondence, or else he would commence a class-action lawsuit. CP 96; *see also* CP 139 (Compl., ¶ 3.31). On January 12, 2015, before any response could reasonably be made, Mr. Worm initiated a lawsuit.

On June 8, 2015, the Hon. Judge Daniel L. Goodell granted Respondents' joint Motion to Dismiss. CP 8-9. Mr. Worm then appealed.

On November 22, 2016, the Court of Appeals, Division Two, affirmed the trial court's decision. *Worm v. NWTS et al.*, 2016 WL 6885907 (Div. 2, Nov. 22, 2016) (unpublished).

## **V. RESPONSE TO ISSUES PRESENTED**

1. The Supreme Court's decision in *Brown* was neither erroneous nor unconstitutional.

2. Although the Court of Appeals should have granted attorneys' fees to Bank of New York, their refusal to do so is not a significant question of law or issue of substantial public interest.

## **VI. ARGUMENT**

### **A. Standard of Review.**

The discretionary acceptance of a decision terminating review may only be granted based on the criteria set forth in R.A.P. 13.4(b). Mr. Worm contends there is a "significant question of law" and "issue of substantial public interest." Petition for Review at 5. However, the record does not support either basis.

### **B. Mr. Worm Fails to Show that *Brown* Was Wrongly Decided.**

Mr. Worm contends that this Court's unanimous decision in *Brown, supra.*, was incorrect. Petition for Review at 8, *inter alia.*

However, the right to foreclose is strictly vested with a note's



*holder* because Washington law recognizes the general principle that a security instrument (Deed of Trust) follows the debt (Note) with or without formal assignment. *See, e.g., Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 177, 367 P.3d 600 (2016) (“Washington courts have long recognized that the security instrument follows the note that it secures.”).<sup>3</sup>

*Brown* accurately states a holder – and not an owner – is entitled to enforce a note through non-judicial foreclosure of property that secures repayment of the note as collateral. 184 Wn.2d at 543. Under the Deed of Trust Act (“DTA”), “[o]wnership of the note is not dispositive.” *Trujillo v. NWTs*, 181 Wn. App. 484, 498, 326 P.3d 768 (2014), *as modified* (Nov. 3, 2014), *rev’d on other grounds*, 183 Wn.2d 820, 355 P.3d 1100 (2015); *see also In re Veal*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011).

In the wake of *Brown*, courts have applied its holding to reject

---

<sup>3</sup> To the extent that Mr. Worm attacked the Assignments of record, the Court of Appeals properly found,

[w]hen MERS assigned the Deed of Trust on October 1, 2012, MERS had been identified as the agent for BAC, who was the beneficiary under the Note. Therefore, MERS’s assignment of the Deed of Trust was valid because the assignment complied with Washington agency law and complied with the provisions of the Note, Deed of Trust, and LMA [Loan Modification Agreement]. Thus, Worm fails to state a claim upon which relief can be granted because MERS’s assignments of the Deeds of Trust were valid.

2016 WL 6885907, at \*6.

borrowers' claims just like the one pled in this case. *See, e.g., Cummings v. NWTS et al.*, 2016 WL 6952623 (Div. 1, Nov. 28, 2016) (unpublished) (“Case authority makes clear that Article 3 controls the right to enforce a note and deed of trust under this statute. Article 9 has no bearing on enforcement of a note and deed of trust.”); *Leonard v. Recontrust Co., N.A.*, 2016 WL 304802, \*6 (W.D. Wash. Jan. 26, 2016) (“To the extent that they assert that the Washington State Supreme Court’s decision in *Brown* was ‘wrongly decided’ and that if properly decided Defendants would not have complied with the statute, their argument is without merit.”).

In the Motion to Dismiss below, Respondents demonstrated that the trustee possessed an unambiguous declaration, as approved of in *Brown*. CP 72.

Given this sufficient proof of Bank of New York’s beneficiary status shown in the factual record of this case, which was within the scope of allegations pled for purposes of CR 12(b)(6), the DTA did not require some other form of documentation prior to recording the Notice of Trustee’s Sale and proceeding accordingly. *See, e.g. Bavand v. OneWest Bank*, 196 Wn. App. 813, 385 P.3d 233 (2016), *as modified* (Dec. 15, 2016) (finding no CPA liability when NWTS possessed an unequivocal

beneficiary declaration); *McAfee v. Select Portfolio Serv., Inc.*, 193 Wn. App. 220, 228, 370 P.3d 25 (2016) (same).

C. The Denial of Attorneys' Fees is Not an Issue That Requires Additional Consideration.

Mr. Worm next argues that the Court of Appeals' decision presents a conflict because it denied attorneys' fees to Bank of New York as the "lender." Petition for Review at 18. Mr. Worm asserts this outcome means Bank of New York could not enforce the Note. *Id.* at 19.

However, the Court of Appeals found that only the "lender," as identified in the initial loan documents or subsequent modification thereof, would be entitled to prevailing party fees under the Deed of Trust. 2016 WL 6885907, at \*8 ("Here, the last identified Lender was BAC, per the LMA.... Rather, Trust 2 [Bank of New York] argues only that it is entitled to attorney fees and costs because it unequivocally held the secured Note during the time relevant to Mr. Worm's allegations.").

Bank of New York maintains this determination was contrary to longstanding case law, and it should have been granted fee recovery on appeal. *See, e.g., Walton v. Severson*, 100 Wn.2d 446, 455, 670 P.2d 639 (1983) (an assignee stands in the shoes of the original contracting party).

Nonetheless, the Court of Appeals' analysis does not change the fact of Bank of New York's beneficiary status during foreclosure, or the

baselessness of Mr. Worm's claims. *Id.* The analysis simply does not present a significant question of law or issue of substantial public interest.

## VII. CONCLUSION

Mr. Worm's Petition for Review does not justify further review of the consistent decisions reached in both the trial and appellate courts, and the Supreme Court should reject an invitation to revisit *Brown*. The necessary grounds found in R.A.P. 13.4(b) are not present in this case.

Therefore, the Supreme Court should decline to accept Mr. Worm's Petition and leave the Court of Appeals' unpublished decision as final.

DATED this 13<sup>th</sup> day of March, 2017.

**RCO LEGAL, P.S.**



By: /s/ Joshua S. Schaer

Joshua S. Schaer, WSBA #31491

Attorneys for Respondents

**Declaration of Service**

The undersigned makes the following declaration:

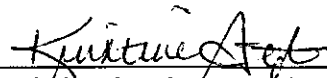
1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On March 13, 2017, I caused a copy of the **Answer of Respondents to Petition for Review** to be served to the following in the manner as noted:

|   |   |
|---|---|
| Cyril J. Worm<br>6551 NE North Shore Road<br>Belfair, WA 98528<br><br><i>Pro Se</i> Appellant | <input checked="" type="checkbox"/> US Mail, Postage Prepaid<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Overnight Mail<br><input type="checkbox"/> VIA ECF Electronic Notice |
|---|---|

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

Signed this 13<sup>th</sup> day of March, 2017.

  
\_\_\_\_\_  
Kristine Stephan, Paralegal