

SUPREME COURT NO. 94093-2

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

Robert and Doris Cummings, husband and wife,

Appellants,

v.

Northwest Trustee Services of Washington, Mortgage Electronic
Registration Systems, Inc., and Deutsche Bank National Trust Co., as
Trustee for the Registered Certificate Holders of First Franklin Mortgage
Loan Trust, Asset-Backed Securities Series 2006-FF8,

Respondents.

**RESPONDENTS' REPLY IN SUPPORT OF MOTION TO STRIKE
CUMMINGS' REPLY BRIEF**

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TABLE OF AUTHORITIES

Page(s)

Cases

Coleman v. BAC Servicing,
104 So. 3d 195 (Ala. Civ. App. 2012)2

Edwards v. Deutsche Bank Nat'l Tr. Co. (In re Edwards),
No. 11-23195, 2011 Bankr. LEXIS 5065 (Bankr. E.D.
Wis. Dec. 23, 2011)2, 3

Tidioute Sav. Bank v. Libbey,
101 Wis. 193, 77 N.W. 182 (1898).....3

Statutes

U.C.C. § 3-203 (1995)1, 2

Rules

RAP 13.4(d)1, 4

RPC 3.31

Other Authorities

Restatement, Second, Contracts § 316.....1

Restatement (Third) of Property (Mortgages) § 5.4(a)
(1997).....2, 3

Respondents¹ file this reply in support of their motion to strike the Cummings' Reply to Answer. The Cummings do not even attempt to argue that their reply to Respondents' Answer is proper under RAP 13.4(d). Instead, the Cummings invent a new excuse: the Cummings have an obligation to file an answer under RPC 3.3 and its comments.

The Cummings argument is nonsense. Neither RAP 13.4(d) nor RPC 3.3 provides such authorization or exception. Moreover, Respondents' arguments are correct on the merits. The Cummings argue that the security *only* follows the transfer of *ownership* of a note, and that negotiation of a note therefore fails to bring with it the security.² As Respondents' Answer pointed out, the authorities hold that the security follows a transfer of the note *either* by assignment or by negotiation.

Ownership of a contractual obligation can generally be transferred by a document of assignment; see Restatement, Second, Contracts § 316. However, if the obligation is embodied in a negotiable instrument, a transfer of the right to enforce must be made by delivery of the instrument; see U.C.C. § 3-203 (1995). The principle of this subsection, that the mortgage follows the note, applies to either form of transfer of the note.

¹ Mortgage Electronic Registration Systems, Inc., and Deutsche Bank National Trust Co., as Trustee for the Registered Certificate Holders of First Franklin Mortgage Loan Trust, Asset-Backed Securities Series 2006-FF8.

² The arguments of the parties are set forth in the Cummings' Petition and Respondents' Answer and will not be set forth in full here.

Restatement (Third) of Property (Mortgages) § 5.4(a) cmt. b (1997)
(emphasis added).

If the mortgage obligation is a negotiable note, Uniform Commercial Code § 3-203 (1995) is generally understood to make the right of enforcement of the note transferrable only by delivery of the instrument itself to the transferee.

Id. at cmt. c.

The debt is the principal thing, to which the security instrument is an incident thereof ... Under this view, long established in Wisconsin law, the Mortgage is equitably assigned when the Note is endorsed and negotiated to its current holder.

Edwards v. Deutsche Bank Nat'l Tr. Co. (In re Edwards), No. 11-23195, 2011 Bankr. LEXIS 5065, at *22-23 (Bankr. E.D. Wis. Dec. 23, 2011) (citations omitted, emphasis added); *Coleman v. BAC Servicing*, 104 So. 3d 195, (Ala. Civ. App. 2012).

The rule that the security follows the debt is explained in the Restatement in the context of a transfer of the “right of enforcement,” not “ownership” as asserted by the Cummings.

The essential premise of this section is that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same person. This is so because separating the obligation from the mortgage results in a practical loss of efficacy of the mortgage; *see* Subsection (c) of this section. When the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter, unsecured. This result is economically wasteful and confers an unwarranted windfall on the mortgagor.

Restatement (Third) of Property (Mortgages) § 5.4(a) cmt. a (1997)

(emphasis added).

The transfer of these notes ... carried with it, by operation of law, all securities for their payment. The debt is the principal thing, and the securities are only an incident. The transfer of the former, therefore, carries with it the right to the securities, and amounts to an equitable assignment of them. No matter what the form of the security is, whether a real-estate or chattel mortgage, or a pledge of collateral notes, bonds, or other personal property, the purchaser of the principal takes with it the right to resort to these securities; and this is so, although the assignment or transfer does not mention them. The reason of this rule, within all the authorities, seems to be that when the mortgagee transfers the debt, without assigning the mortgage or other security, he becomes a trustee, and holds the security for the benefit of the owner of the note, and the latter may enforce the trust. The debtor is in no wise injured by such rule. He has agreed that the security shall stand for the payment of the debt, and it is of no consequence to him to whom it is paid. He has to pay it but once.

Tidioute Sav. Bank v. Libbey, 101 Wis. 193, 77 N.W. 182, 183 (1898) ...

Edwards at *23-24 (emphasis added).

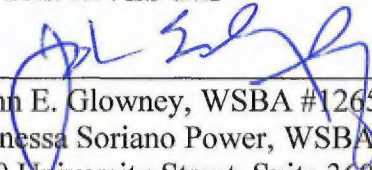
The Cummings' arguments below and in this Court failed to address this settled authority. Contrary to the Cummings' arguments, a transfer of the "right of enforcement" carries with it the security. The Cummings' purported limitation of the rule only to transfers of "ownership" is contrary to established authority. Despite pages and pages of argument, the Cummings have submitted no case that holds that the

security follow the note *only* when it is assigned, but not when the right of enforcement is transferred by negotiation. The Cummings' purported limitation is contrary to established authority and their pretext for filing an unauthorized reply to an answer is baseless.

The Cummings' Reply to Respondents' Answer is not authorized under RAP 13.4(d) and should be stricken.

Respectfully submitted this 10th day of April 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I caused **RESPONDENTS' REPLY IN SUPPORT OF MOTION TO STRIKE CUMMINGS' REPLY BRIEF** to be filed with the Supreme Court and caused a true and correct copy of same to be served upon the party listed below by email/pdf and via U.S. mail:

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