No. 73951-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2,

Petitioner/Plaintiff,

v.

CAROL A. WERELIUS AND JAY L. WERELIUS,

Respondent/Defendants.

ANSWERING BRIEF OF RESPONDENT WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2

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I. INTRODUCTION

The Petition for Review before this Court arises out of a judicial foreclosure action brought by Wilmington Trust National Association (the "Trust")[1] after borrowers Carol and Jay Werelius defaulted on a promissory note and deed of trust held by the Trust. The Wereliuses have never argued they were appropriately paying on the Note or the Note is not in default. Instead, they petition this Court on the grounds that, essentially, both the trial court and Court of Appeals are in collusion with the Trust and are failing to follow the law in allowing the judgment. (Petition at 5-6.) The Wereliuses argue the Court of Appeals "failed to review the record and make its own findings of fact or conclusions of law... .[and] instead, only mimicked what the appellee's attorneys stated during the proceeding." (Petition at 5.)

These arguments are frivolous and this Court should deny the Petition for Review. A review of the record in the proceedings below documents there was no impropriety, and the Court of Appeals agreed with the legal arguments set forth in the Trust's Answering Brief because they contained a correct analysis of the law. In short, the Trust proved on summary judgment it was in possession of the original Note, and therefore

[1] Respondent's complete name is Wilmington Trust National Association, as Successor Trustee to Citibank, N.A., as Trustee for the Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-HE2.

the holder entitled to enforce the Note. The trial court's grant of summary judgment was therefore appropriate and the Court's discretionary review is not warranted. The Petition fails to identify a reason this Court should accept review under any of the Court's criteria, and there is no reason. The Court of Appeals' decision is fact-specific and entirely consistent with settled Washington law, and the Petition should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

1. Is there any basis, as required under the Washington Rules of Appellate Procedure ("RAP"), Rule 13.4(b), for this Court to accept discretionary review of the Court of Appeals' unpublished opinion affirming grant of summary judgment in this routine foreclosure case?

2. Is the Trust entitled to an award of attorney's fees and costs incurred in responding to the Wereliuses' Petition for Review?

III. COUNTERSTATEMENT OF THE CASE

The underlying facts and procedure pertinent to this appeal are as follows:

A. The Wereliuses Obtain a Loan to Purchase Real Property

On or around September 15, 2006, Carol A. Werelius and Jay L. Werelius obtained a loan (the "Loan") from Option One Mortgage Corporation to finance real property (the "Property"). (CP 3, ¶ 4.1; CP

156-162.) The Loan is evidenced by a promissory note ("Note") signed by the Wereliuses in favor of Option One Mortgage Corporation in the original principal amount of $498,750.00. (*Id.*) The Note was secured by a deed of trust ("Deed of Trust") on the Property. (CP 3, ¶ 4.2; CP 164-175.) On December 1, 2010, the Wereliuses executed a Loan Modification Agreement, increasing the principal balance to $617,326.86. (CP 4, ¶ 4.4; CP 183-187.)

Respondent, Wilmington Trust National Association, as Successor Trustee to Citibank, N.A., as Trustee for the Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-HE2 (the "Trust"), eventually became the beneficiary of the Note and Deed of Trust, as documented by an Assignment of Deed of Trust recorded on June 7, 2013. (CP 4, ¶ 4.7; CP 181.)

B. The Wereliuses Default on the Loan and the Trust Forecloses

The Wereliuses failed to make the monthly payment due on January 11, 2011, and failed to make any payments on the Loan thereafter. (CP 152, ¶ 11.) On February 18, 2011, the Wereliuses were provided written notice they were in default and, to avoid foreclosure, they should bring their payments current by March 25, 2011. (CP 152, ¶ 11; CP 189.) The Wereliuses failed to cure the default. (CP 152-153, ¶ 11.)

Consequently, on July 11, 2014, the Trust filed a complaint in King County Superior Court seeking (1) to reform the Deed of Trust by correcting an error within the legal description and (2) to foreclose on the Property securing the Loan. (CP 1-11.)

In response to the Complaint, the Wereliuses filed a Verified Motion to Dismiss Complaint ("Motion to Dismiss") on August 29, 2014. (CP 76.) The Motion to Dismiss essentially made three arguments. First, the Wereliuses argued the Note was non-negotiable, and could not have been transferred by mere endorsement. (*Id.*) Second, they argued the "note and mortgage were bifurcated the moment the mortgage was recorded as it names Mortgage Electronic Registration Systems, Inc., as nominee." (*Id.*) Lastly, the Wereliuses claimed the Note did not exist, as it had either been "lost, stolen, mutilated, destroyed or spent or exchanged for other value or consideration." (*Id.*) The Wereliuses also stated they had "destroyed or disposed of the note." (CP 76-77.) Though the Wereliuses filed the Motion to Dismiss, they did not note the matter for a hearing in 2014. Consequently, the matter was not considered by the Court that year.

On October 30, 2014, the Trust filed a Motion for Order of Default against the Wereliuses and other remaining defendants[2], noting the hearing

[2] In addition to the Wereliuses, the Complaint identified the Internal Revenue Service and All Persons or Parties Unknown Claiming any Right, Title, Lien, or

for November 10, 2014. (CP 84-85; CP 108-109.) The Wereliuses filed a Motion for Enlargement of Time, requesting additional time to "evaluate this claim, retain legal representation, continue their attempt to work out a Loan Modification...and file an appropriate response, or counterclaim." (CP 110-111.) In addition, the Wereliuses filed a Motion to Set Aside Entry of Default. (CP 116.) On November 10, 2014, the trial court granted an Order of Default against all remaining parties except the Wereliuses.[3]

The Trust, through counsel, later confirmed the Wereliuses were being considered for a loan modification and, in fact, were offered a loan modification. (CP 199, ¶ 6.) However, the Wereliuses did not accept the loan modification and, in June 2015, the Trust chose to move forward with litigation by filing and serving a Motion for Summary Judgment. (CP 198-200.)

C. The Trust Moves for Summary Judgment

On June 10, 2015, the Trust filed a Motion for Summary Judgment ("MSJ"). (CP 285, 291-298.) The motion was supported by the sworn affidavit of Andres Fernandez, the Contract Management Coordinator of

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Interest in the Property Described in the Complaint, as defendants in this action. (CP 1).

[3] Though the Wereliuses did not file an Answer in this action, the record reflects that the lower court deemed their Motion to Dismiss to be an Answer and accordingly denied the Trust's Motion for Default as to the Wereliuses only. (CP 199, ¶ 4).

Ocwen Loan Servicing, LLC, the loan servicer for the Trust ("Fernandez Affidavit"). (CP 299-302.) In the affidavit, Fernandez authenticated a copy of the original Note, which was attached to the Affidavit. (CP 300, ¶¶ 2-3, 5, CP 304-311.) The evidence showed the Note had been duly endorsed, and delivered to the Trust. (CP 300, ¶ 5; CP 311.) Consequently, the Fernandez Affidavit established the Trust was the "holder" of the Note pursuant to RCW 62A. 1-201(b)(21)(A).[4]

In addition to the Fernandez Affidavit, the Trust's counsel, Tiffany Owens, filed a declaration in support of the MSJ ("Owens Declaration") stating the Trust had forwarded to counsel its original collateral file containing the original Note, and the original Note would be available for the trial court's inspection at the summary judgment hearing. (CP 290, ¶¶ 2, 3.)

The Wereliuses filed an opposition to the MSJ. On June 18, 2015, the Trust filed and served its MSJ, noting the matter for oral argument on

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[4] The statute provides:

> (21) "Holder" with respect to a negotiable instrument, means:
> (A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
> (B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
> (C) The person in control of a negotiable electronic document of title.

August 13, 2015, fifty-six days later. (CP 285, 287-288.) On August 10, 2015, the Wereliuses finally noted their Motion to Dismiss for a hearing on the same date as the MSJ, three days later. (CP 343.)

D. The Court Grants the Trust's Motion for Summary Judgment

On August 13, 2015, the trial court heard oral argument on the Trust's MSJ. (CP 345.) During the course of the hearing, the Trust's counsel presented the original Note for the court's consideration. (VT 3:1-6.) The court reviewed the original Note and commented that a copy of the Note had previously been provided as plaintiff's Exhibit A. (VT 5:8-12.)

The Wereliuses argued the MSJ was premature because the court had not ruled on their Motion to Dismiss. (VT 7:12-14, 8:11-13.) They further argued it was improper to consider the original Note at the hearing. (VT 9:7-9.) The trial court informed the Wereliuses the Motion to Dismiss had not been properly noted for hearing, but that the court would consider it as a response to the Trust's MSJ. (VT 8:5-8.)

At the conclusion of oral argument, the trial court granted the Trust's MSJ and denied the Wereliuses' Motion to Dismiss. (CP 345, 499.) On August 25, 2015 – twelve days after the trial court's ruling – the Wereliuses filed a Motion to Set Aside or Vacate Summary Judgment.

(CP 406.) On October 12, 2015, the trial court entered a Judgment and Decree of Foreclosure in favor of the Trust. (CP 484-488.)

E. The Wereliuses Appeal

The Wereliuses filed a Notice of Appeal on October 26, 2015. (CP 496.) On appeal, the Wereliuses raised only three issues with the trial court's judgment. First, they argued the trial court improperly allowed presentation of the original Note during the August 13, 2015 hearing on the Trust's summary judgment motion. (Opening Br. at 6.) The Wereliuses argued the original Note constituted new evidence not previously disclosed, and should not have been considered. Second, the Wereliuses argued the Trust's MSJ was improper because the trial court had not ruled on their Motion to Dismiss. (*Id.* at 11.) Finally, the Wereliuses claimed the Trust did not provide proper notice of the MSJ hearing. (*Id.* at 14.) Their brief focused exclusively on these procedural arguments. The Wereliuses failed to point to any evidence documenting a material issue of fact and failed to even argue that specific material issues of fact existed.

In an unpublished decision, the Court of Appeals rejected each of the Wereliuses' procedural arguments. *Washington Trust Nat'l Ass'n v. Werelius*, 197 Wash. App. 1033 (2017). The Court concluded the original Note presented at the summary judgment hearing was not new evidence

because it had previously been attached to an affidavit from the Trust's loan servicer. *Id.* The Court also rejected the Wereliuses' other arguments, finding the Motion to Dismiss had been considered at the time it was noted for hearing and concluding the Wereliuses had received proper notice of the MSJ. *Id.*

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard for Review

Pursuant to the Washington Rules of Appellate Procedure, Rule 13.4(b), a petition for review to the Washington Supreme Court is accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). The Wereliuses fail to reference these criteria or make a coherent argument regarding any of the criteria. As discussed below, their Petition fails to satisfy this Court's standard for accepting review.

B. The Wereliuses' Petition for Review is Unsupported by Authority and Raises No Legitimate Legal Issue

Notably, the Wereliuses fail to provide a single authority in their Petition for Review. A brief review of the Washington Court of Appeals'

decision shows it involved a straightforward application of settled law to undisputed facts. The Court of Appeals correctly determined the trial court did not err in reviewing the original Note; did not improperly refuse to consider the Wereliuses' Motion to Dismiss; and did not err in finding the Wereliuses had notice of the summary judgment proceeding.

1. Consideration of the original Note at oral argument was proper because the Trust had previously disclosed a true and correct copy through sworn affidavit

On appeal, the Wereliuses argued the original Note tendered to the Court at the summary judgment hearing should not have been reviewed by the Court because it was new evidence. Tendering an original Note at a summary judgment hearing in order to confirm possession is a common practice. *See, e.g., Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 175, 367 P.3d 600 (2016) (noting that bank presented the original note at the hearing on summary judgment and "[t]his was sufficient to prove the bank's status as holder of [the defendant's] delinquent note."); *Deutsche Bank National Trust Company as Trustee, v. Erickson, et al.*, 197 Wn. App. 1068 (2017) ("Because DBNTC presented an original, signed, endorsed in blank note at the summary judgment hearing, it was entitled to summary judgment and to enforce the note against the Ericksons.")

The Court of Appeals correctly ruled the trial court did not err in considering the original Note because a copy of the Note had already been presented with the summary judgment briefing. *Werelius*, 197 Wash. App. 1033. The Trust submitted a true and correct copy of the Note as an exhibit to the Fernandez Affidavit, disclosed in conjunction with the Trust's MSJ. The Fernandez Affidavit and accompanying exhibits complied with CR 56(e) and Washington's business records statute, RCW 5.45.020. Therefore, the Note was not new evidence and the trial court acted well within its discretion in considering the Note. *See, e.g., Barkley v. Greenpoint Mortgage Funding, Inc.*, 190 Wn. App. 58, 67, 358 P.3d 1204 (2015) (holding statements within affidavits, based on review of business records, satisfy the requirements for CR 56(e) if they satisfy Washington's business records statute, RCW 5.45.020.) The Wereliuses never articulated a valid objection to the Fernandez Affidavit, and therefore did not preserve any objection to that evidence. Failure to raise an objection clearly to the trial court precludes a party from raising the objection on appeal. *DeHaven v. Grant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986) (citing *Symes v. Teagle*, 67 Wn.2d 867, 873, 410 P.2d 594 (1966).

Finally, even if consideration of the original Note was not proper, the error was harmless because the evidence was cumulative in nature and

would not have affected the court's ruling. An evidentiary error without prejudice is not a basis for reversal. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) ("Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial.")

2. The Court of Appeals correctly determined the Werelius' Motion to Dismiss was duly considered and denied

The Wereliuses argued on appeal their Motion to Dismiss was still pending and the trial court erred in ruling on the Trust's MSJ before considering their motion. (Opening Br. at 8, 11.) The record did not support the Wereliuses' argument: First, the Wereliuses noted their Motion to Dismiss for a hearing on the same day of the scheduled MSJ hearing. (CP 434.) Second, the trial court told the Wereliuses at the hearing that he would consider their Motion to Dismiss as an opposition to the Trust's MSJ, and provided them an opportunity to argue their Motion to Dismiss. (VT 8:23-25, 9:1.) The Court of Appeals correctly found, therefore, the trial court's grant of MSJ was effectively a denial of the Motion to Dismiss. *Werelius*, 197 Wash. App. 1033. There is no evidence in the record the trial court did not consider the Motion to Dismiss or that he improperly denied it.

3. The Trust properly served and noted its MSJ for hearing.

On appeal, the Wereliuses argued the "appellee's notice of hearing on its motion for summary judgment fails to comply with the notice requirements set forth in Rule 56 and unfairly denies the appellants an opportunity to respond timely as set forth in the rules." (Opening Br. at 14.) The Wereliuses provided no argument to support this claim, nor do they explain themselves in their Petition for Review.

CR 56 provides a moving party must file and serve the "motion and any supporting affidavits, memoranda of law, or other documentation" no later than 28 calendar days before the hearing. CR 56(c). The record reflects the Trust filed and served its MSJ and accompanying affidavit, declaration, and exhibits, on June 18, 2015 – fifty-six calendar days before the hearing. (CP 287-288.) Regardless, the Wereliuses did not raise this claim in the trial court, and they therefore waived any argument they did not receive adequate notice.

C. The Wereliuses' Petition Does Not Satisfy any Requirement for Acceptance of Review

The Wereliuses' Petition is deficient because it provides no legal authority supporting any contention raised. Additionally, the Wereliuses' discussion of this Court's standard for review fails to offer a supportable basis for review. Under the Washington Rules of Appellate Procedure,

this Court will accept review only if the Court of Appeals decision is in conflict with another Washington appellate court or the Washington Supreme Court; involves a significant question of law under the Washington or U.S. Constitution, or involves a matter of substantial public interest. RAP 13.4(b). The Wereliuses fail to establish that any of these bases exist.

First, the Wereliuses argue the "appeals court has ignored the holdings of this court regarding summary judgments and its ruling is in conflict with other rulings of the appeals court as set forth in the attached appeals brief." They fail to attach a brief or provide any authority. Contrary to their argument, the Court of Appeals' decision was consistent with numerous Washington authorities holding an entity is entitled to enforce a note through foreclosure upon proof it is the "holder," of the note, which requires proof only of possession of a note endorsed to the entity or endorsed in blank. *See John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wash. 2d 214, 222-23, 450 P.2d 166 (1969); *Brown*, 184 Wn.2d at 536; *Slotke*, 192 Wn. App. 166. *See also* RCW 62A.3-301.

The Wereliuses appear to argue their case should have been decided at trial rather than on a motion for summary judgment. However, a motion for summary judgment is appropriately granted when there is no genuine issue as to any material fact and the party opposing the motion

bears the burden of showing a material issue of fact. *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 207, 962 P.2d 839 (1998). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Discover Bank v. Bridges*, 154 Wn. App. 722, 727, 226 P.3d 191 (2010). Here, the Wereliuses fail to point to a legitimate issue of fact that precluded judgment. They argue that "[n]o evidence was taken at any time during the proceeding and the trial court judge tampered with the transcript so he could help the plaintiff and his own pension fund." (Petition at 5.) The accusation is either spurious or simply misunderstands appropriate legal procedure on summary judgment, as the record and docket in this matter confirm that evidence was submitted in support of the Trust's MSJ. (CP 287-288.)

Petitioners also claim "appellee and its attorneys filed false documents with the court and made false claims, and produced counterfeit and forged securities in support of the foreclosure complaint." (Petition at 6.) Petitioners fail to point to any evidence supporting their claims, which amount to mere speculation and unsupported argument. They argue they were improperly denied an opportunity to conduct discovery, but fail to explain why they did not conduct discovery during the time this case was pending or why they failed to file a properly supported motion seeking a

continuance for the purpose of conducting discovery under CR 56(f). Such a motion would undoubtedly have failed due to the fact the Wereliuses had no good reason for their delay in conducting discovery and couldn't identify evidence that would create an issue of fact on further discovery. *See, e.g., Tellevik v. 31641 W. Rutherford St.,* 120 Wn.2d 68, 90, 838 P.2d 111 (1992). However, they have waived the issue by failing to bring the motion. *DeHaven*, 42 Wn. App. at 669.

Finally, the Wereliuses make an unsupported argument the case has a strong public interest, allegedly due to collusion and corruption with trial court judges, who are deciding the cases on summary judgment rather than at trial. The argument has no merit given the Petitioners fail to show a single instance of error in the trial court's grant of summary judgment. Petitioners have shown no abuse in the proceedings, nor are any other property owners prejudiced when they face valid foreclosure proceedings where it is established on summary judgment the property owners are in default and also established the party seeking to foreclose is the party entitled to enforce the note. To the contrary, this Petition and others like it merely present another delay tactic to keep control of property the Petitioners have long since stopped paying for.

VI. ENTITLEMENT TO ATTORNEY FEES

The Washington Rules of Appellate Procedure allow an award of fees where supported by law. RAP 18.1(a). Here, the deed of trust executed by the Wereliuses includes a provision awarding attorney's fees, including appellate fees, to a prevailing party. RCW 4.84.330. Consequently, if this Court denies the Petition, the Trust respectfully requests the Court award reasonable attorney's fees and costs pursuant to RAP 18.1(a) for time spent preparing an Answer to the petition.

VII. CONCLUSION

For the reasons set forth above, the Trust requests this Court deny the Wereliuses' Petition for Review.

RESPECTFULLY SUBMITTED this 6th day of April, 2017.

By Amber Labuague, WSBA #51854
for Emilie Edling, WSBA #45042
E-Mail: eedling@houser-law.com
Of Attorneys for Wilmington Trust National Association, as Successor Trustee to Citibank, N.A., as Trustee for the Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-HE2

CERTIFICATE OF SERVICE

I certify that on the 6th day of April 2017, I caused a true and correct copy of this **ANSWERING BRIEF OF RESPONDENT WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2** to be served on the following via first class mail, postage prepaid:

Carol A. Werelius
14340 93rd Avenue N.E.
Kirkland, WA 98034

Jay L. Werelius
14340 93rd Avenue N.E.
Kirkland, WA 98034

Dated: April 6, 2017

HOUSER & ALLISON, APC

By Sharon Kuger
Sharon Kuger