73951-4

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

FROM THE SUPERIOR COURT OF KING COUNTY

WERELIUS v. 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

APPEALS NO. 73951-4-I

CASE NO. 14-2-19177-4

APPELLANTS' OPENING BRIEF

Jay L. and Carol A. Werelius, Appellants

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Case Law

Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)

Zobrist v. Culp, 18 Wash. App. 622, 637, 570 P.2d 147 (1977)

Regulations and Rules

Rules of Civil Procedure, CR 56

ASSIGNMENTS OF ERROR

No. 1 Summary judgment hearings are not the time to take new evidence.

No. 2 An attorney cannot introduce evidence at a summary judgment hearing.

Issues Pertaining to Assignments of Error

Assignment of Error 1.

"Is it the purpose of summary judgment to take new evidence at the hearing on a party's motion for summary judgment?"

Assignment of Error 2.

"Can the attorney representing the moving party in its motion for summary judgment proffer evidence at the hearing?"

STATEMENT OF THE CASE

This is an appeal from a foreclosure complaint that was commenced by the appellee on the date of July 8th 2014.

The appellants were served with the summons and complaint on the date of August 11th, 2014.

The complaint alleged that the appellee was the holder and owner of a promissory note and trust deed to which the appellants were in default and indebted to the appellee.

The appellants filed a timely motion to dismiss on the date of August 29th 2014.

The appellee attempted to obtain a default judgment against the defendants and it was denied by the court on November 10th 2014.

No action was undertaken by the appellee to move the case forward until it filed its motion for summary judgment some time in June, 2015, which was heard on the date of August 13th 2015.

The appellants served notice that their motion to dismiss would also be heard on that date, but it was ignored and no ruling was made by the court.

In response to the appellee's motion for summary judgment, the appellants filed an opposition with supporting affidavits on or about the date of June 20th 2015.

The court held a hearing on the date of August 13th 2015, at which time it granted the motion and a final entry of the judgment was entered on September 28th 2015.

The appellants filed a motion to set aside the August 13th order granting summary judgment and the court refused to schedule any hearing on it and the motion was never heard or ruled upon by the court.

The appellants filed a timely notice of appeal with the appropriate filing fees and this appeals brief is now filed within the time limits imposed by the court.

SUMMARY OF ARGUMENT

A summary judgment hearing is not appropriate for presenting evidence. At the hearing on appellees' motion for summary judgment, the plaintiff's attorney brought a piece of paper with words on it, claiming that it was the note but without anyone to authenticate the paper or bring it into evidence and no note has ever been taken into evidence in this proceeding. He stated it to be "the actual written note in this case". (Ref page 3, paragraph1 of the Verbatim Transcript.)

The court is limited to reviewing only the record as it existed at the time the motion for summary judgment was filed.

ARGUMENT

This appeals court has jurisdiction to hear this appeal as a matter of right under Rule 2.1a(1) and Rule 2.2a(1).

The trial court incorrectly or in error, granted summary judgment based upon the plaintiff's attorney's claims of having new evidence that had not yet been entered into the record at that point, and still has not been entered into the record, and while the attorney was not a witness, ignoring the appellants' objections. The attorney claimed to have the original note, yet it was not the time to introduce evidence and there was no witness to enter the evidence, yet this attorney did not even bother to bring the purported trust deed to the hearing.

Unsworn statements made by an attorney cannot be used by the court to make determinations of fact, and the defendants have objected to the same. The attorney who appeared at the hearing was not of record. He brought with himself new papers that were never entered into evidence and informed the court that these papers were the original note and that this somehow entitled his client to a judgment without any discovery and without any evidence

and without any trial. This is not supported by any laws in this state as demonstrated within the following memorandum of law.

This conduct violates not only the rules of civil procedure, but public policy and the purpose for which a court system was created in the first place. The defendants were unfairly denied any opportunity to cross examine any witnesses or evidence.

The motion for summary judgment, in the first place, was untimely.

Appellants objected to the motion for summary judgment because it was filed at a time when the moving party was not entitled to summary judgment as a matter of law and the facts alleged in the complaint conflicted with the exhibits. (Ref page 8, paragraph 5 of the Verbatim Transcript.) The appellee had not undertaken any actions to advance the complaint and had not responded to the appellants' motion to dismiss that was still pending.

There were and are genuine issues of material fact in dispute and the appellee was not entitled to judgment as a matter of law.

No evidence and no evidentiary material has been taken in this case. The appellee has failed to prosecute or advance its complaint and there was no evidence in the record.

This is a contested foreclosure and should have been set for trial.

"The function of summary judgment is to determine whether there is a genuine issue of material fact requiring a formal trial." Chase v. Daily Record, Inc., 83 Wn.2d 37, 42, 515 P.2d 154 (1973) (quoting Leland v. Frogge, 71 Wn.2d 197, 200, 427 P.2d 724 (1967)). 'Summary judgment is a procedure for testing the existence of a party's evidence.' Cofer v. County of Pierce, 8 Wn. App. 258, 261-62, 505 P.2d 476 (1973). In a summary judgment hearing, "{t}he evidence before the judge is that contained in the pleadings, affidavits, admissions and other material properly presented." Chase, 83 Wn.2d at 42 (quoting Leland, 71 Wn.2d at 200).

Rule CR 56 SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment

may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is

neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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.

The appellants' motion to dismiss is still pending and the appellee has failed to respond in any way. A motion to dismiss does not admit allegations in the complaint that conflict with facts disclosed in the exhibits. Brock v. Anderson Road Ass'n, 287 Ill. App. 3d 16, 21, 677 N.E.2d 985, 989 (1997). The exhibits attached

to the complaint are controlling. Brock, 287 Ill. App. 3d at 21, 677 N.E.2d at 989.

Summary judgment is appropriate if the evidence, viewed in the nonmoving party's favor, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). The court should grant the motion if reasonable persons could reach only one conclusion. Wilson, 98 Wn.2d at 437; see also Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) and Idahosa v. King County (2002).

Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules. See, e.g., American Discount Corp. v. Saratoga West, Inc., 81 Wash. 2d 34, 499 P.2d 869 (1972); Rinke v. Johns-Manville Corp., 47 Wash. App. 222, 225, 734 P.2d 533 (1987). Indeed, our own Court of Appeals has noted the Celotex rule. See Controlled Atmosphere, Inc. v. Branom Instrument Co., 50 Wash. App. 343, 350, 748 P.2d 686 (1988).

The Celotex standard comports with the purpose behind the summary judgment motion: "to examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." Zobrist v. Culp, 18 Wash. App. 622, 637, 570 P.2d 147 (1977).

Summary judgment can be granted only when the pleadings and the evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). A "material fact" is a fact upon which the litigation depends, in whole or in part. Barrie v. Hosts of Am., Inc., 94 Wash. 2d 640, 643, 618 P.2d 96 (1980). Once the moving party has made and supported his motion, the nonmoving party must come forward with specific facts showing that a genuine issue of fact exists for trial. CR 56(e).

The moving defendant may meet the initial burden by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case."

Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

CONCLUSION

This is a contested foreclosure and must be set for hearing. The appeals court should reverse the trial court's decision and remand the matter for further proceedings.

DATED this 21st day of December 2015.

Jay L. Werelius, Appellant

Carol A. Werelius, Appellant

IN THE COURT OF APEALS FOR THE STATE OF WASHINGTON, KING COUNTY

JAY L. AND CAROL A. WERELIUS

APPELLANTS

v.

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APPELLEE

_____/

CERTIFICATE OF SERVICE

I Carol A. Werelius hereby certify that a true and correct copy of the foregoing was served upon the appellee's attorney, Tiffany Archer, by first class mail to: 710 Second Avenue, Suite 710, Seattle, WA 98104, this 3rd day of December, 2015.

By: Carol A. Werelius

IN THE COURT OF APPEALS FOR

THE STATE OF WASHINGTON, KING COUNTY

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CAROL A. WERELIUS
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APPELLEE

CERTIFICATE OF SERVICE

I, Carol A. Werelius hereby certify that a true and correct copy of the foregoing was served upon the appellee's attorney, Emilie Edling, by first class mail to: 9600 SW Oak St, Ste 570, Portland, OR, 97223-6503, this 2nd day of June 2016.

By: Carol A. Werelius

IN THE COURT OF APPEALS FOR

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JAY L. AND
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APPELLEE

CERTIFICATE OF SERVICE

I, Carol A. Werelius hereby certify that a true and correct copy of the foregoing was served upon the King County Superior Court by USPS Priority Mail to: 516 3rd Ave, Room E609, Seattle WA 98104, this 2ND day of June 2016.

By: Carol A. Werelius