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

CASE NO. 14-2-19177-4

COA No. 73951-4-1

APPELLANTS' RESPONSIVE BRIEF TO APPELEE'S ANSWER BRIEF

Jay L. and Carol A. Werelius, Appellants

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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 (pages 1 - 54).

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 (pages 76 - 79).

The appellee attempted to obtain a default judgment against the defendants and it was denied by the court on November 10th 2014 (pages 108 - 109).

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 (pages 431 – 433; 339 – 340 & 259 - 260), which was heard on the date of August 13th 2015 (page 118).

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 (pages 261 – 268; 269 – 276; 27 - 284).

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 (page 346 - 347).

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 (pages 411 - 417).

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.

The clerk of the court attempted to frustrate the appellants' efforts to file the appeal and finally the appellants sent a notice to

the individual judges of the appeals court explaining the problem and the appeal was then docketed.

The appellee has asked for and been given two extensions of time to file an answer brief, in which it finally did. The contents of the brief did not warrant the extra time, but the appellants filed a response to this answer anyway.

The clerk responded with some cryptic message regarding the reply that did not appear to relate to anything. Then on October 4th the appellate court sent another letter stating that the appellants' reply had not been filed and that it would dismiss the appeal if it was not filed. This is a lie, and a rouse concocted by the court to evade having to make a ruling on the merits of this appeal.

There is no way that a foreclosure can be permitted in this court system when the foreclosing party files forged and counterfeit documents, and then never answers a motion to dismiss and then nearly a year later files a motion for summary judgment which is quickly granted by the court, while ignoring the pending motion to dismiss and then the appeals court frustrates the appeal and acts to illegally evade doing is job of reviewing the appeal on the merits

by making up schemes as in this example... unless our court system has been hijacked by the banking system and it is in fact not a court system any longer but is a function of the banking system that does nothing except transfer titles of real estate for the benefit of the banking system so that the fake economic system can be perpetuated through the elections cycle.

SUMMARY OF ARGUMENT

A summary judgment hearing is not appropriate for presenting evidence. At the hearing on appellees' motion for summary judgment, the court requested the note and trust deed from the plaintiff's attorney and he stated it "was probably back at the office somewhere" and instead of the note, the 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.

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

ARGUMENT

The appellants previously filed their reply brief to the appellee's answer and the court has since sent two letters stating that the responsive brief has not been filed by the appellants. This appears to be a trick that the appeals court intends to use in order to evade making a ruling on the merits of the appeal and will not be tolerated. This court will make a ruling on the merits of this appeal with a complete findings of fact and conclusions of law.

Once again, why did the appellee require so much more time to file its reply brief?

The transcript of August 13th 2015 was altered by the trial court judge to conceal objections and material statements made by the appellants (page 345 & transcript). Please see the attached affidavits of James and Judith Jenkins in which both witnesses, who attended the August 13th summary judgment hearing in 2015, restate the statements made at that hearing to demonstrate that these statements were deliberately excluded from the transcript by the judge. The court reporter was chosen by an approved list and the judge instructed the court reporter to remove these certain

statements from the transcript so that she could illegally alter the record and help the plaintiff and illegally deceive the appeals court.

Summary judgment was created several hundred years ago and it has always been viewed with reluctance, as a drastic measure to be used only sparingly. Today, attorneys appear to believe that their clients are entitled to summary judgment in every case and that this process is a way to save money and escape a trial on the merits, even though it means unfairly denying the defendants of their day in court when their home is at risk of being taken by strangers who offer no proof whatsoever, and who do not even exist (as in this case).

Today, courts very easily permit summary judgment, everyone knows that *if the plaintiff will just ask, the court will grant it.* Look at the records of this court, or any court for that matter. You will see that this is the current method of practice and one has to ask why the judge's pension funds are so heavily invested within the banking community and the same securities in which the plaintiffs that come before them have created. Summary judgment has become a way for the court system to help the banking system prop up the stock market and the pension funds of their officers, it

no longer has anything to do with justice or equity. This is easily demonstrated in not only this case but every foreclosure in this court since 2008. Compare those numbers with those of the previous 7 or 14 years.

Contrary to what the appellee claims, no evidence was ever taken in this case, a complaint was filed, a motion to dismiss was filed in response, no answer was given and a motion for summary judgment was granted, and not one word of evidence was ever taken. The fact that *papers with words on them* were filed by the appellee, does not constitute evidence, and none had any evidentiary value and summary judgment hearings are not a means to present evidence, that's the purpose for which the "trial" court has "trials".

Taking someone's house is not the same as a traffic ticket, especially when the process is contested and the jurisdictional challenge has been ignored by the court and the foreclosing party as in this case.

In review of what the appellants previously stated:

A summary judgment hearing is not appropriate for presenting evidence. At the hearing on appellees' motion for summary judgment, the court requested the note and trust deed from the plaintiff's attorney and he stated it "was probably back at the office somewhere" and instead of the note, the 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.

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

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, and informed the court "... *it's probably at my office*".

No evidence was taken at the summary judgment hearing or prior to the hearing at any time. No witnesses were named, no preparation was made for taking evidence, no evidence file was even opened and no witnesses were able to be cross-examined.

The appellee provided affidavits that its attorneys had written and some people who were never produced for cross-examination had their signatures witnessed by a notary.

The appellants provided controverting affidavits that were ignored by the court and were uncontested by the appellee.

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 trust deed 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.

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, while no evidence was ever produced.

The motion for summary judgment, in the first place, was untimely, but it was abusive and did not lend itself to justice or equity.

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, and the jurisdictional challenge had not been answered or met. 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 had 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.

Using summary judgment in this case was abusive and unfairly denied the appellants their day in court. Why should the appellee be permitted to take the property of the appellants without once scintilla of evidence, above the objections of the appellants? It should not, in fact, the appellee is not even bonded or authorized to engage in business within this state. In fact, the appelle does not exist in any known system of records within this state or the United States and it accountable to no one. The appellee has no legal rights that can be discovered at this time. Why is it being permitted to appear in this court? Would a Washington corporation be permitted to appear in an English court or a French court just the same? No, but here we have an appellee that is from an unknown foreign jurisdiction, having posted no bond, and being permitted to take property without one scintilla of evidence.

The use of summary judgment by the appellee and the trial court was an abuse of discretion and abuses the purpose for which the summary judgment process was created.

Again, judges have always viewed summary judgment with reluctance and have always determined that it should be used only sparingly.

Imagine a stranger filing a claim against a judge's house? Would that stranger be permitted to foreclose with no evidence and without first proving it had any rights to even appear in the state court? I don't think so. Why has this case proceeded to an appeal then? Why wouldn't the same protections be available to the appellants and why aren't the same rules being applied here?

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, and informed the court "... *it's probably at my office*".

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 trust deed 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. 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 25th day of October 2016.

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.

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

APPELLE

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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 Owens, by first class mail to: 710 Second Avenue, Suite 710, Seattle, WA 98104, and Jonathan A. Burky, 1601 Fifth Ave. Ste 850, Seattle WA 98101, on this 21st day of October, 2016.

By: Carol A. Werelius