RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 10, 2014, 11:52 am
BY RONALD R. CARPENTER
CLERK

E CDF
RECEIVED BY E-MAIL

SUPREME COURT NO. 89610-1

COURT OF APPEALS NO. 68545-7-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTOPHER L. SHORT,

Petitioner,

v.

BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AR11 TRUST,

Respondent.

ANSWER BY RESPONDENT BANK OF AMERICA, N.A. TO CHRISTOPHER L. SHORT'S PETITION FOR REVIEW TO THE SUPREME COURT OF WASHINGTON

Ann T. Marshall WSBA No. 23533
Barbara L. Bollero, WSBA No. 28906
BISHOP, MARSHALL & WEIBEL, P.S.
720 Olive Way, Suite 1201
Seattle, Washington 98101-1801
(206) 622-5306, Exts. 5915 and 5918
amarshall@bwmlegal.com
bbollero@bwmlegal.com

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. STATEMENT OF THE CASE 3

A. Mr. Short Makes Note and Grants Deed of Trust to WaMu 3

B. Mr. Short's Loan is Securitized, Beneficial Interest in the Deed of Trust is Assigned to the Loan Owner's Trustee, and Servicing Rights to Mr. Short's Loan are Acquired by Chase. 3

C. Mr. Short Defaults on Note and BOA Institutes Foreclosure. 4

D. BOA's Summary Judgment Motion is Granted. 5

1. BOA's Summary Judgment Motion and Evidence 5

2. Mr. Short's Opposition and Supporting Evidence. 5

3. BOA's Reply and Additional Supporting Evidence. 6

4. Oral Argument for Summary Judgment and Entry of Judgment. 7

E. Mr. Short's Motion for Reconsideration of BOA's Summary Judgment is Denied. 8

F. Contested Presentation of Foreclosure Judgment. 8

G. Mr. Short's Motion to Vacate Summary Judgment is Denied. 9

H. Summary Judgment is Affirmed on Appeal. 9

IV. ARGUMENT 10

A. Summary Judgment Awards are Reviewed *De Novo*. 10

B. Appellant has Failed to Carry his Burden of Showing Appropriate Grounds for Review.......11

1. No Conflicting Supreme or Appellate Court Decisions are Identified.......11

2. No Significant Question of Constitutional Law is Identified.. 13

3. No Issue of Substantial Public Interest is Identified. 16

C. The Judgment and Affirmation are Correct.......18

V. CONCLUSION.......19

TABLE OF AUTHORITIES

Cases

Bain v. Metro. Mortgage Grp., Inc., 175 Wn.2d 83, 285 P.3d 34 (2012) .19

Del Guzzi Constr. Co. v. Global Northwest Ltd., 105 Wn.2d 878,719 P.2d 120 (1986)..10, 11

Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902)..14

Hart v. Dep't. of Soc. & Health Servs., 111 Wn.2d 445, 759 P.2d 1206 (1988)...16

Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985)..................................11

Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 837 P.2d 618 (1992)...........12

Hudson v. Alaska Airlines, Inc., 43 Wn.2d 71, 260 P.2d 321 (1953) 13

In re Brandon v. Webb, 23 Wn.2d 155, 160 P.2d 529 (1945)...................14

In re Cross, 99 Wn.2d 373, 377, 662 P.2d 828 (1983)..............................16

LaMon v. Butler, 112 Wn.2d 193, 770 P.2d 1027 (1989).........................15

Nave v. City of Seattle, 68 Wn.2d 721, 415 P.2d 93 (1966)..............14, 15

Sorenson v. Bellingham, 80 Wn.2d at 558, 496 P.2d 512 (1972).............16

State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999).........11, 16, 18

Sun Mountain Productions, Inc. v. Pierre, 84 Wn. App. 608, 929 P.2d 494 (1997)...20

United States v. Stangland, 242 F.2d 843 (1957).....................................14

Wash. St. Dept. of L.&I. v. Kantor, 94 Wn. App. 764, 973 P.2d 30 (1999).13

Young v. Key Pharmaceuticals, 112 Wn.2d 216, 770 P.2d 182 (1989)....19

Rules

CR 25(c) 10, 20

CR 56 8

CR 59 8

CR 60 9

RAP 2.5(a) 15, 16

RAP 2.5(a)(3) 15

RAP 13.4(b) 11, 13, 16

RAP 13.4(b)(1) 13

RAP 13.4(b)(2) 13

RAP 13.4(b)(4) 16

WCCR 54(c) 9, 10, 17

Regulations

UCC 19

Statutes

RCW 61.24.005 6

I. INTRODUCTION

Christopher Short appealed the summary judgment of judicial foreclosure awarded to Respondent Bank of America, N.A., in its capacity as former Trustee of a securitized mortgage loan trust ("BOA"). That Judgment was affirmed by Division I, and remanded with instructions that BOA file the original promissory Note.[1]

Mr. Short's arguments on review address the weight, not the admissibility, of BOA's summary judgment evidence. The WaMu Mortgage Pass-Through Certificates Series 2006-ARIl Trust owned the debt and BOA, as its then-Trustee, was also assignee of the Deed of Trust's beneficial interest, pre-suit and through entry of summary judgment. The foreclosure litigation was prosecuted by BOA's servicing agent JPMorgan Chase Bank, N.A. ("Chase"), holder of the Note.

As BOA's servicing agent, Chase submitted sufficient admissible evidence proving its possession of the Note and entitlement to foreclose. Mr. Short admitted his payment default, did not controvert Chase's evidence, and submitted additional evidence supporting BOA's summary judgment entitlement. Given the absence of any dispositive disputed facts,

---

[1] Due to Mr. Short's Petition for Review, no Mandate has yet issued to the trial court so that BOA may file the original Note.

the trial court properly awarded summary judgment to BOA, and Division I properly affirmed the Judgment.

Consequently, Mr. Short's Petition for Review should be denied.

II. ASSIGNMENTS OF ERROR

BOA makes no assignments of error, inasmuch as the Judgment below and Division I's affirmation were correct. Therefore, BOA restates the issues pertaining to Appellant's assignments of error as follows:

1. The appellate court properly concluded that the uncontroverted, competent, admissible evidence proving the promissory Note and Deed of Trust terms, Mr. Short's default, Chase's possession of the original Note, its servicing agency, and authority to foreclose, entitled BOA to judgment of judicial foreclosure as a matter of law.

2. The appellate court properly concluded that Mr. Short was not entitled to a jury trial because he did not prove the existence of any triable fact issue in opposing BOA's summary judgment motion.

3. The appellate court properly concluded that the Trustee of an express trust may properly file suit in its own name when the Trust was the real party in interest at both the time of filing and judgment entry.

4. The appellate court properly concluded that after it is no longer Trustee, the Trustee of an express trust may properly continue a suit filed in its own name when (a) no motion to substitute the new Trustee

is made and the Trust remains the real party in interest; and (b) there is no prejudice from entry of judgment in the former Trustee's name.

III. STATEMENT OF THE CASE

A. Mr. Short Makes Note and Grants Deed of Trust to WaMu.

In June of 2006, Mr. Short borrowed $294,000.00 from Washington Mutual Bank, FA ("WaMu"). He executed a promissory note payable to WaMu's order (the "Note"). (CP 112, ¶6; CP 117-22.) The Note was secured by a Deed of Trust (CP 112, ¶7; CP 124-44), which was recorded on June 13, 2006, in Whatcom County (the "Deed of Trust"). (CP 113, ¶8; CP 124.) The Deed of Trust is against real property owned by Mr. Short (CP 304, ¶3; CP 551, ¶3), commonly known as 2736 Valley Highway, Deming, Washington (the "Property"). (CP 112, ¶7; CP 126.)

B. Mr. Short's Loan is Securitized, Beneficial Interest in the Deed of Trust is Assigned to the Loan Owner's Trustee, and Servicing Rights to Mr. Short's Loan are Acquired by Chase.

The ownership interest in Mr. Short's loan was assigned to a securitized mortgage loan trust named "WaMu Mortgage Pass-Through Certificates Series 2006-ARll Trust" (the "WaMu Trust"). (CP 245-46.) The original Trustee of the WaMu Trust was LaSalle Bank NA. BOA succeeded as Trustee due to a merger. (CP 246.) Before this judicial foreclosure case was filed, the transfer of interest to BOA as then-Trustee

of the WaMu Trust was recorded on March 26, 2010, in Whatcom County (the "Assignment"). (CP 295-98.)

In September of 2008, certain WaMu assets, including all loans and servicing rights, were acquired by Chase as evidenced by a Purchase and Assumption Agreement between the Federal Deposit Insurance Corporation as Receiver for WaMu ("FDIC-R ") and Chase (the "WaMu Agreement").[2] (CP 167-210.) The FDIC-R's Affidavit attesting to the loan and servicing transfer was recorded on October 3, 2008, in King County ("FDIC-R Affidavit"). (CP 158-61.) Accordingly, on September 25, 2008, Chase became the servicing agent and Note holder for Mr. Short's loan in place of WaMu. (CP 246.)

On February 11, 2011, U.S. Bank National Association ("USBank") replaced BOA as Trustee of the WaMu Trust. (CP 246.)

C. Mr. Short Defaults on Note and BOA Institutes Foreclosure.

Beginning February 1, 2009, and continuing for nearly four years, Mr. Short failed to make any payments on his Note. (CP 258, ¶11.) BOA declared the entire unpaid balance immediately due. (CP 258, ¶11.) BOA

---

[2] The WaMu Agreement provides, "the Assuming Bank [Chase] specifically assumes all mortgage servicing rights and obligations of the Failed Bank [WaMu]" (CP 178), and "the Assuming Bank specifically purchases all mortgage servicing rights and obligations of the Failed Bank" (CP 179).

then filed suit to judicially foreclosure the Property in the Whatcom County Superior Court on April 28, 2010. (CP 303-08.)

The Complaint included the Note, Deed of Trust, FDIC-R Affidavit, and Assignment. (CP 309-44.) Mr. Short answered, *pro se,* admitting that he owned the Property. (CP 304, ¶3; CP 551, ¶3.)

D. <u>BOA's Summary Judgment Motion is Granted.</u>

1. BOA's Summary Judgment Motion and Evidence.

On October 14, 2011, BOA filed its summary judgment motion (CP 565-70), supported by the Declaration of a Chase employee, Araceli Urquidi, dated September 21, 2011 (CP 256-98). The Declaration exhibits were identical to BOA's Complaint exhibits, *i.e.,* the Note, Deed of Trust, FDIC-R Affidavit, and Assignment. (*Compare,* CP 260-98 to CP 309-44.)

2. Mr. Short's Opposition and Supporting Evidence.

In his opposition to BOA's summary judgment motion, filed January 20, 2012 (CP 221-35), Mr. Short contended:

1. BOA's supporting declarations contradicted its discovery responses (CP 221, 223, 227);

2. BOA's supporting declarations were "defective" in form (CP 221, 229);

3. BOA was "deliberately misleading" the trial court as to the true Plaintiff's identity (CP 221); and

4. BOA failed to prove its entitlement to foreclose by delivering the original Note to the trial court (CP 224-226, 229-30).

The only opposing evidence Mr. Short submitted was BOA's discovery responses (CP 243-51), stating:

> The subject loan ... was securitized into a mortgage-backed security ..., the "Trust". As such, the owners of the Loan are the Trust and its investors. ... The Trust is governed by a Pooling and Servicing Agreement (the "PSA") .... The PSA explains ... the Trustee may allow the Trust Servicer ... to hold the subject loans for the benefit of the Trust .... [B]ecause the Notes are endorsed in blank ... the Servicer is the holder of the Note for the benefit of the Trust .... When Chase acquired the ... loan servicing rights of WaMu, [it] became the servicer of ... the subject loan. (CP 246.)

Mr. Short did not submit any evidence disputing the terms of the Note, Deed of Trust, the fact of his default, that the Trust owned his loan, and Chase was the Trust servicer and Note holder – nor did his briefing address any of those issues. (CP 221-55.)

3. BOA's Reply and Additional Supporting Evidence.

BOA's reply pointed out the lack of evidence disputing the contract terms and Mr. Short's default. (CP 212, ¶3; CP 212-14; CP 216-17.) Citing its discovery responses, BOA asserted that Mr. Short's loan servicer, Chase, possessed his Note and, accordingly, had the power to foreclose under RCW 61.24.005. (CP 217-19.)

In addition, BOA filed a second Declaration of Ms. Urquidi. (CP 111-54).[3] Ms. Urquidi's reply Declaration, otherwise virtually identical to her previous Declaration, detailed the arrangements by which Chase was the authorized servicing agent for the loan, possessed the original Note, and had authority to foreclose (CP 113, ¶14 – CP 115, ¶16), stating:

> The subject loan ... was securitized into a mortgage-backed security identified as ... the "Trust". As such, the owners of the Loan are the Trust and its investors. ... The Trust is governed by a Pooling and Servicing Agreement (the "PSA") .... When Chase acquired the assets of WaMu, it stood in the shoes of WaMu and became the servicer of loans that comprise the Trust's assets. ... The PSA also explicitly vests the servicer with the ability to initiate a foreclosure .... The original ... note evidencing Mr. Short's loan is in the possession of Chase[] ... and is physically located in Chase's secure warehouse in Monroe, Louisiana.

(CP 113-15.) Thus, the reply Declaration was the same as the evidence submitted by Mr. Short. (*Compare,* CP 245-47 with CP 113-15.)

4. Oral Argument for Summary Judgment and Entry of Judgment.

At oral argument on February 3, 2012, Mr. Short acknowledged making the Note and defaulting in payments. (RP 02/03/12, p. 4, ll. 19-24.) The trial court ruled that "whoever is the beneficial holder of the

[3] Both Mr. Lin's and Ms. Urquidi's Declarations have the same titles as their Declarations filed with the moving papers; however, Mr. Lin's reply Declaration is dated November 10, 2011 (CP 155-56), and Ms. Urquidi's reply Declaration is dated January 19, 2012 (CP 111-15).

promissory note can sue ... to foreclose on the security ...." (RP 02/03/12, p. 9, ll. 11-23.) The Court entered an order granting BOA summary judgment. (RP 02/03/12, p. 11, ll. 6-23; CP 108-10.)

E. Mr. Short's Motion for Reconsideration of BOA's Summary Judgment is Denied.

Mr. Short filed a reconsideration motion under CR 56 and CR 59,[4] on eight alleged bases, none of which he asserted previously. (CP 97-107.) The motion challenged the summary judgment evidence, but presented no additional evidence. At oral argument on March 2, 2012, Mr. Short again acknowledged his default, stating, "my arguments were never about whether the money was owed." (RP 03/02/12, p. 5, ll. 5-6.)

Reiterating its previous comments that Mr. Short had not submitted any competent controverting summary judgment evidence, the trial court denied the reconsideration motion. (RP 03/02/12, p. 5, ll. 9-17.) It entered an order denying the motion on March 2, 2012. (CP 16-17.)

F. Contested Presentation of Foreclosure Judgment.

BOA presented its Judgment of Foreclosure on April 27, 2012. (CP 419-69.) Mr. Short's opposition (CP 470-501) returned to his earlier

[4] Although the motion challenges "the January 27, 2012 order and judgment of Judge Steven J. Mura granting Plaintiff's Motion for Summary Judgment" (CP 97), it is apparent that Mr. Short meant to reference the Order granting BOA's summary judgment motion dated February 3, 2012 (CP 108-10).

arguments concerning WCCR 54(c) (RP 04/27/12, p. 3, ll. 18-23), and the "incorrect" Plaintiff (RP 04/07/12, p. 3, l. 22 – p. 4, l. 10). The trial court entered the Judgment. (RP 04/27/12, p. 5, l. 20 – p. 6, l. 7; CP 414-18.)

G. Mr. Short's Motion to Vacate Summary Judgment is Denied.

Unwilling to accept the trial court's judgment, on August 7, 2012, Mr. Short filed a CR 60 Motion to Vacate, urging the failure to file the original Note was fatal to BOA's summary judgment under WCCR 54(c). (CP 571-74.) BOA opposed the motion. (CP 616-24.) Mr. Short's motion was heard on September 21, 2012, and a denial order entered on October 4, 2012. (CP 677-78.)

H. Summary Judgment is Affirmed on Appeal.

Mr. Short timely appealed the summary judgment order. (CP 4-8.) He assigned error to the trial court's admission of Ms. Urquidi's Declaration and exhibits, the WaMu Trust's interest in his loan, and the failure to file his Note with the trial court. (Appellant's Brief, pp. 2-3.)

BOA argued it was entitled to initiate foreclose proceedings by action of its servicing agent Chase, Ms. Urquidi's Declarations were neither contradictory nor mutually exclusive, they contained adequate foundation, their exhibits were appropriately authenticated, and the trial court did not abuse its discretion in admitting the evidence – but if there

was error, it was harmless as Mr. Short introduced the identical evidence in his opposition pleadings. (Respondent's Brief, pp. 16-31.)

BOA also argued that CR 25(c) allowed it to continue prosecuting the action in its name, even after USBank substituted as Trustee of the real party in interest, the WaMu Trust. Because no party ever moved to substitute the current Trustee, the trial court did not abuse its discretion by allowing the action to continue in BOA's name. (*Id.,* pp. 31-34.)

Division I issued its unpublished opinion on September 23, 2013. It affirmed Judgment, but remanded for filing of the original Note in compliance with WCCR 54(c). Specifically, Division I held the trial court did not err in: (1) allowing the action to be maintained by BOA as the original party in interest under CR 25(c); (2) accepting into evidence the Note copy attached to Ms. Urquidi's Declaration when its authenticity was unchallenged and unprejudicial; and (3) finding Ms. Urquidi's Declaration to be well-founded, competent, admissible evidence.

Mr. Short's Petition for Review was filed on October 2, 2012.

IV. ARGUMENT

A. Summary Judgment Awards are Reviewed *De Novo*.

The appellate standard of review for summary judgment is *de novo*, with the reviewing court performing the same inquiry as the trial court. *Del Guzzi Constr. Co. v. Global Northwest Ltd.,* 105 Wn.2d 878,

882, 719 P.2d 120 (1986); *Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

B. Appellant has Failed to Carry his Burden of Showing Appropriate Grounds for Review.

RAP 13.4(b) identifies the only four grounds on which this Court will accept review. They include an issued opinion which: (1) conflicts with a Supreme Court decision; (2) conflicts with another appellate court decision; (3) involves a significant question of constitutional law; or (4) involves an issue of substantial public interest.

Although Mr. Short's Petition for Review references all four grounds (p. 8), it neither addresses nor discusses how they are implicated by Division I's decision. The entire Petition mentions only three cases and the U.S. Constitution's Seventh Amendment, all cited within the issues presented section. No analysis of the four authorities is provided, nor discussion of their application to the present facts.

Because Division I's opinion does not conflict with any issued Supreme Court or appellate court decisions, and does not involve either a significant question of constitutional law or an issue of substantial public interest, the Petition for Review should be denied.

1. No Conflicting Supreme or Appellate Court Decisions are Identified.

Only three case authorities are cited in the Petition for Review, two Washington Supreme Court decisions and one Division II decision. However, Division I's opinion does not conflict with any of them.

In *Hiatt v. Walker Chevrolet Co.,* 120 Wn.2d 57, 837 P.2d 618 (1992), the Supreme Court reversed the Court of Appeals and reinstated the trial court's summary judgment award dismissing the plaintiff's religious discrimination claims. In doing so, the Court recited the oft-quoted standards for summary judgment review:

> Because this is an appeal from an order granting summary judgment, review is de novo and we engage in the same inquiry as the trial court. The facts must be interpreted in the light most favorable to the nonmoving party. Where a dispute as to a material fact exists, summary judgment is improper. However, where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is appropriate. *Although a party moving for summary judgment has the initial burden of showing there is no dispute as to any issue of material fact, once that burden is met, the burden shifts to the nonmoving party.*

Id., at 65-66 (fns. and citations omitted) (emphasis supplied).

Division I's analysis here commenced with the same reasoning – indeed, its statement of governing law is virtually identical to the *Hiatt* Court's. (*Compare,* decision, pp. 4-5, to quotation above.) Because no conflict exists between Division I's decision and the *Hiatt* case, the Petition for Review is unsupported.

Mr. Short's second citation, to *Hudson v. Alaska Airlines, Inc.,* 43 Wn.2d 71, 260 P.2d 321 (1953), is similarly inapposite. Appellant appears to contend the case supports his claim that, "the Trustee of an express trust bringing suit in its own name and not joining the party for whose benefit the action is brought may [not] disregard the express governing provisions of said trust which specifically prohibit certain acts ..." (Petition, p. 3.)

The *Hudson* case involved a corporate officer's breach of fiduciary duty in violating corporate by-laws. The opinion does not involve issues of a real party in interest, incorrect plaintiff, a trust, a Trustee's duties, or judicial foreclosure. There is no conflict between the appealed decision and *Hudson.*

Finally, Mr. Short cites *Wash. St. Dept. of L. & I. v. Kantor,* 94 Wn. App. 764, 973 P.2d 30 (1999), also in support of his incorrect plaintiff claim. (Petition, p. 3.) The case involves the scope of a state administrative agency's authority to discipline a licensed physician. Again, the opinion does not involve issues of a real party in interest, incorrect plaintiff, a trust, a Trustee's duties, or a judicial foreclosure; accordingly, there is no conflict between the appealed decision and the *Kantor* case.

Thus, none of Petition's cited cases support a grant of review under RAP 13.4(b)(1) or (2) concerning conflicting decisions.

2. No Significant Question of Constitutional Law is Identified.

Mr. Short appears to claim that his jury trial right guaranteed by the U.S. Constitution's Seventh Amendment has been abrogated by summary judgment. (Petition, pp. 2-3.) This Court has repeatedly rejected similar contentions. In *Nave v. City of Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966), the Court held:

> The plaintiff claims his right to a jury trial guaranteed in civil actions under U.S.Const. amend. 7, and by Wash.Const. art. 1, s. 21 were infringed by the summary judgment proceedings. This exact contention was before the United States Court of Appeals, 7th circuit, in *United States v. Stangland,* 242 F.2d 843 (1957) and was rejected upon the authority of the decision of the United States Supreme Court in *Fidelity & Deposit Co. of Maryland v. United States,* 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902). This court has adopted the same reasoning in proceedings where there are no issues of facts to be determined by the jury. *In re Brandon v. Webb,* 23 Wash.2d 155, 160 P.2d 529 (1945).

Similarly, citing the *Nave* decision, this Court more recently held:

> [Petitioners] argue that this conclusion [that summary judgment was properly entered against them due to their failure to introduce controverting evidence] violates their constitutional right to a jury trial. Const. art. 1, § 21. We are well aware that summary judgment decisions should not involve the resolution of factual issues. Such is the province of the factfinder at trial. Yet, Washington courts have held many times that summary judgment should be granted when reasonable persons, giving all reasonable inferences to the nonmoving party, could only conclude that the moving party is entitled to judgment. In such cases, there is no genuine issue of

> material fact. ... *When there is no genuine issue of material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial.*

LaMon v. Butler, 112 Wn.2d 193, 199, n. 5, 770 P.2d 1027 (1989) (citations omitted; emphasis supplied).

Because the only evidence Mr. Short submitted to oppose summary judgment was essentially identical to BOA's supporting evidence, both the trial and appellate courts found no material fact issue existed. In the absence of a material fact issue, summary judgment does not infringe on a litigant's constitutional right to a jury trial. *Nave, supra,* 68 Wn.2d at 725; *LaMon, supra,* 112 Wn.2d at 199, n. 5.

Further, Mr. Short's constitutional claim was not raised in either the trial court or Division I, and accordingly is barred by RAP 2.5(a). That rule's exception for manifest error affecting a constitutional right does not assist Petitioner:

> Because RAP 2.5(a)(3) is an exception to the general rule that parties cannot raise new arguments on appeal, we construe the exception narrowly by requiring the asserted error to be (1) manifest and (2) " 'truly of constitutional magnitude'." ... The policy behind RAP 2.5(a)(3) is simply this: Appellate courts will not waste their judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.

State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999) (citations omitted). Given the established law that summary judgment does not infringe on a litigant's jury trial right, Mr. Short's claimed error is neither manifest nor of true constitutional magnitude; accordingly, it is barred by RAP 2.5(a).

3. No Issue of Substantial Public Interest is Identified.

Despite failing to identify any issue of substantial public interest requiring resolution, the Petition asserts RAP 13.4(b)(4) as a basis for relief.

In determining whether a matter, though moot, is of continuing and substantial public interest and thus reviewable, this Court considers: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. *In re Cross,* 99 Wn.2d 373, 377, 662 P.2d 828 (1983) (citing, *Sorenson v. Bellingham,* 80 Wn.2d at 558, 496 P.2d 512 (1972)). "Arguably a fourth factor exists, that being the level of genuine adverseness and the quality of advocacy of the issues." *Hart v. Dep't. of Soc. & Health Servs.,* 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (citations omitted).

As explained by the *Hart* court:

> The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, ...; the validity and

> interpretation of statutes and regulations, ...; and matters deemed sufficiently important by the appellate court, ...
>
> Most of the public interest exception cases fall into the first two categories as they tend to present issues which are more public in nature and are more likely to arise again. Further, decisions involving the constitution and statutes generally help to guide public officials. The public interest exception has not been used in statutory or regulatory cases that are limited on their facts, ..., or involve statutes or regulations that have been amended.
>
> The third category includes cases taken by the appellate courts within their discretion because of the importance of the issues involved [such as] ... case involving definition of death; ... public campaign financing and election limit ordinance in Seattle; ... Seattle's building and zoning ordinances; ... negligence of a third party supplying liquor to a minor; ... large development project and Environmental Impact Statement requirements; [and] ... referendum to repeal city ordinance.

Id., at 449-50 (citations omitted).

The issues noted for review satisfy none of the three substantial public interest standards. First, judicial foreclosure of a secured property interest due to loan default is a private matter limited to the contracting parties. Division I's decision did not add to or expand on the recently developing body of foreclosure law other than, perhaps, by requiring compliance with WCCR 54(c), as Mr. Short urged.

Second, there is no issue requiring an authoritative determination to provide future guidance to public officers. Judicial foreclosures have been prosecuted for at least a century in Washington State, and no statutory interpretations were argued or contested in the trial or appellate courts.

Finally, although judicial foreclosures and summary judgments are likely to recur, a Supreme Court decision in this case is unlikely to affect any such future proceedings. The underlying rulings were limited to the specific facts of this case, and they do not expand the law of either judicial foreclosures or summary judgments.

Because no issue of substantial public interest has been identified or exists, the Petition for Review should be denied.

C. The Judgment and Affirmation are Correct.

Mr. Short never introduced any evidence controverting the facts that: (1) his loan was owned by a securitized Trust; (2) the Trust agreement allowed the servicing agent to hold the Trust loans for the benefit of the Trust; (3) although WaMu was the Trust's original servicing agent, Chase assumed those duties in September of 2008; and (4) Chase held Mr. Short's Note for the benefit of the Trust. (CP 113-15.) Indeed, his own summary judgment evidence confirmed these facts. (CP 246.)

As held by this Court:

> The UCC provides: *"Holder" with respect to a negotiable instrument, means the person in possession* if the instrument is payable to bearer .... The UCC also provides: *"Person entitled to enforce" an instrument means (i) the holder of the instrument,* (ii) a nonholder in possession of the instrument who has the rights of a holder .... A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument .... The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus *a beneficiary must either actually possess the promissory note or be the payee. ... We agree.*

Bain v. Metro. Mortgage Grp., Inc., 175 Wn.2d 83, 103-04, 285 P.3d 34 (2012) (citations omitted; emphasis supplied).

Because Chase, as the loan owner's servicing agent, at all pertinent times actually held Mr. Short's original Note, it had authority to foreclose on behalf of the former Trustee, BOA. Both the trial court's summary Judgment and Division I's affirmation are correct decisions.

V. CONCLUSION

After the moving party shows the absence of material facts, the summary judgment inquiry shifts to the party with the burden of proof at trial. *Young v. Key Pharmaceuticals,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the non-moving party then fails to establish the existence of an element essential to that party's case, the moving party is entitled to

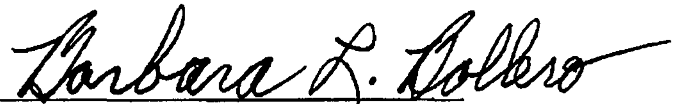
summary judgment as a matter of law. *Id.,* at 225; *Sun Mountain Productions, Inc. v. Pierre,* 84 Wn.App. 608, 616, 929 P.2d 494 (1997).

Here, BOA carried its summary judgment proof by uncontroverted, competent, admissible evidence. Mr. Short did not dispute the facts by introducing controverting evidence. Further, continuance of suit in the name of the real party in interest's former representative is expressly allowed by CR 25(c).

Accordingly, Respondent BOA respectfully requests the Petition for Review be denied.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

BISHOP, MARSHALL
& WEIBEL, P.S.



Ann T. Marshall, WSBA #23533
Barbara L. Bollero, WSBA #28906
Attorneys for Respondent BOA
720 Olive Way, Suite 1201
Seattle, WA 98101

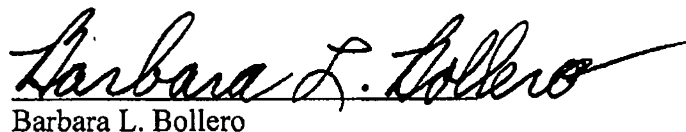
DECLARATION OF SERVICE

Barbara L. Bollero, upon oath and duly sworn, states the following is true and correct to the best of her knowledge and belief.

On January 10, 2014, I caused to be delivered in the U. S. Postal Service, the foregoing Answer to Petition, addressed to the following parties:

Christopher L. Short
P. O. Box 1080
Republic, WA 99166

DATED this 10th day of January, 2014, at Seattle, Washington.



Barbara L. Bollero

OFFICE RECEPTIONIST, CLERK

From:	Ana Todakonzie <atodakonzie@bwmlegal.com>
Sent:	Friday, January 10, 2014 11:50 AM
To:	OFFICE RECEPTIONIST, CLERK
Cc:	Barbara L. Bollero
Subject:	Short v. Bank of America, Supreme Court Case No. 89610-1
Attachments:	Answer to Petition for Review.FINAL.1-10-2014.pdf
Importance:	High

Dear Clerk,
Attached please Respondent's Answer to Petition. The attorney's name is Barbara L. Bollero, phone: (206) 622-5306, Ext. 5918, email address is bbollero@bwmlegal.com.

Ana Todakonzie | Litigation

Bishop, Marshall & Weibel, P.S.

720 Olive Way, Suite 1201, Seattle, WA 98101
Telephone (206)622-5306 | Ext.5911 | Fax (206)622-0354
Email:atodakonzie@bwmlegal.com
www.bwmlegal.com

NOTICE: OUR LAW FIRM ENGAGES IN DEBT COLLECTION. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. This communication, including attachments, may contain information that is confidential and protected by the attorney/client or other privileges. It constitutes non-public information intended to be conveyed only to the designated recipient(s). If the reader or recipient of this communication is not the intended recipient, an employee or agent of the intended recipient who is responsible for delivering it to the intended recipient, or you believe that you have received this communication in error, please notify the sender immediately by return e-mail and promptly delete this e-mail, including attachments without reading or saving them in any manner. The unauthorized use, dissemination, distribution, or reproduction of this e-mail, including attachments, is prohibited and may be unlawful. Receipt by anyone other than the intended recipient(s) is not a waiver of any attorney/client or other privilege.