No. 89915-1

SUPREME COURT OF THE STATE OF WASHINGTON

BANK OF NEW YORK, AS TRUSTEE PURSUANT TO THE TERMS OF THAT CERTAIN POOLING AND SERVICING AGREEMENT DATED AS OF NOVEMBER 1, 1996 RELATED TO METROPOLITAN ASSET FUNDING, INC., MORTGAGE PASS-THROUGH CERTIFICATES SERIES 1996-A,

Respondent,

v.

MARCO T. BARBANTI, ROYAL POTTAGE ENTERPRISES, STERLING SAVING BANK, JUNCO FROST LAVINIA, INC., UNIFUND CCR PARTNERS, AND BANKERS TRUST COMPANY OF CALIFORNIA,

Petitioners.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

Brian R. Hooper and Lisa M. Hooper (the "Hoopers") owned a commercial property in Spokane, Washington, commonly known as 5711 North Division Street, Spokane, Washington 99207 ("the Subject Property"). On March 25, 1993, the Hoopers executed and delivered to Metropolitan Mortgage & Securities, Co. Inc. ("Metropolitan") a promissory note ("Note"). CP 65-66. At the same time, the Hoopers executed and delivered to Metropolitan a written deed of trust ("Deed of Trust") that secured to Metropolitan the Subject Property. The Deed of Trust was recorded on April 23, 1993, under Spokane County Auditor's File No. 9304230387. CP 68-71.

On May 1, 1996, the Hoopers entered into a real estate contract ("Hooper-Barbanti contract") for the sale of the Subject Property to petitioner Marco Barbanti ("Barbanti"). CP 73-87. The purchase price for the subject property under the Hooper-Barbanti contract was $160,000, which was comprised of three components: 1) a $7,000 cash down payment; 2) the sum of $133,549.83, which represented the principal balance owed on the Hoopers' Note as of the date of the Hooper-Barbanti contract; and 3) an additional sum of $19,450.17, plus interest. CP 74.

The Hooper-Barbanti contract provided for Barbanti to take the Property subject to Metropolitan's Note and Deed of Trust. CP 77. The Hooper-Barbanti contract further provided the underlying obligation of $133,549.83 would be paid by the Hoopers but funded by Barbanti through payments to the Hoopers' escrow agent. CP 86. Later, Barbanti made arrangements to make the payments directly to Metropolitan's escrow agent. CP 159-160.

Metropolitan assigned its interest under the Deed of Trust to Bank of New York as Trustee, Pursuant to the Terms of that Certain Pooling and Servicing Agreement Dated as of November 1, 1996 Related to Metropolitan Asset Funding, Inc., Mortgage Pass-Through Certificates Series 1996-A ("BNY") pursuant to an Assignment of Deed of Trust recorded on April 28, 1997, under Spokane County Auditor's File No. 4097545. CP 90.

Barbanti ultimately ceased making the payments on that portion of the Hooper-Barbanti contract dedicated to the $133,549.83 owing on the Note. CP 161. He made his last payment to BNY directly on March 8, 2003 and no further payments were made thereafter. CP 161, 309. On July 17, 2003, Mr. Barbanti quit claimed his interest in the Subject Property to petitioner Royal Pottage Enterprises, Inc. ("Royal Pottage"). CP 97-98.

In April of 2009, BNY sued to foreclose the Deed of Trust in an action entitled *The Bank of New York, as Trustee v. Brian R. Hooper, et al.*, Spokane County Superior Court Cause No. 09-2-01686-5. CP 111. In its complaint, BNY sought a money judgment and decree of foreclosure against the Hoopers. BNY's complaint also named several other persons and entities alleged to have an interest in the Subject Property as defendants, including Barbanti, Royal Pottage, and petitioner Junco Frost Lavinia Inc. (collectively the "Petitioners"). The complaint sought to foreclose any interest in the Property held by the Petitioners. CP 111-112.

During the course of the foreclosure action, the Hoopers quit claimed the Subject Property to BNY and also assigned their interest in the Hooper-Barbanti contract to BNY. CP 105-108. The Deed and Seller's Assignment of Real Estate Contract was recorded on September 24, 2010, under Spokane County Auditor's File No. 5936989. CP 105-108.

BNY's foreclosure action was ultimately dismissed and the trial court quieted title in Royal Pottage and awarded attorney fees to the Petitioners. CP 112-113. BNY appealed that portion of the trial court's order quieting title and awarding attorney fees. The Court of Appeals found in favor of BNY and reversed the trial court's decision

on quiet title and attorney fees in *Bank of New York v. Hooper*, 164 Wn.App. 295; 263 P.3d 1263 (2011) (review denied *Bank of New York v. Hooper*, 173 Wash. 2d 1021, 272 P.3d 850 (2012)) ("BNY One").

BNY brought a second action for enforcement of the Hooper-Barbanti contract. CP 1-42. BNY moved for summary judgment based on Barbanti's failure to make payment on that portion of the Hooper-Barbanti contract dedicated to satisfaction of the obligation owed under the Note. CP 54-56, 109-120. In his opposition to BNY's Motion for Summary Judgment, Barbanti stated in his declaration dated July 9, 2012, that "The last payment I made on the Promissory Note referenced in the Hooper-Barbanti Real Estate Contract was made on March 8, 2003 and was made directly to the Plaintiff [BNY]. The next payment on that Promissory Note was due on April 1 2003. The April 1, 2003 Promissory Note payment was never made." CP 161. Barbanti further stated that an escrow account No. 15206 had been set up to handle payments made on the $133,549.83 portion of the purchase price. CP 159-160. Barbanti supported his declaration by attaching an "Account Detail Report" for escrow account No. 15206, dated July 9, 2012, that showed an unpaid balance in the amount of $125,011.72. CP 309.

The trial court granted summary judgment in favor of BNY, judicially foreclosing the Hooper-Barbanti Contract and quieting title in BNY. CP 47-51. The Petitioners appealed and the Court of Appeals affirmed Barbanti's default on the Hooper-Barbanti contract but reversed the trial court's order on judicial foreclosure and quiet title, and remanded for determination of the amount in foreclosure. *See Bank of New York v. Barbanti*, 31034-5-III, 2013 WL 6567662 (Wash. Ct. App. Dec. 12, 2013) ("BNY Two").

The Petitioners moved for reconsideration of the Court of Appeals' decision in BNY Two and their motion was denied. Petitioners now seek discretionary review pursuant to RAP 13.4.

II. ARGUMENT

1. Standard of Review.

The Washington State Supreme Court only accepts a petition for review of an appellate court's decision in certain limited circumstances. Those circumstances justifying review are set forth in RAP 13.4(b) as follows:

> (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.

The present petition for discretionary review involves the Court of Appeals' decision to uphold a portion of a trial court's ruling on summary judgment. Review of a trial court's decision on summary judgment is de novo. *Vallandigham v. Clover Park Sch. Dist. No. 400,* 154 Wash.2d 16, 26, 109 P.3d 805 (2005). An appellate court will affirm an order granting summary judgment 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." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wash. 2d 59, 69-70, 170 P.3d 10, 15-16 (2007)(citing CR 56(c)). Uncontroverted, relevant facts offered in support of summary judgment are deemed established. *Cent. Wash. Bank v. Mendelson-Zeller, Inc.,* 113 Wash.2d 346, 354, 779 P.2d 697 (1989). Additionally, an appellate court may affirm a trial court's disposition

of a summary judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.,* 75 Wash.App. 424, 426, 878 P.2d 483 (1994). The appellate court may uphold the decision on summary judgment if the court determines that, based on all of the evidence, reasonable persons could reach but one conclusion. *Vallandigham,* 154 Wash.2d at 26, 109 P.3d 805.

The record on appeal clearly demonstrates that none of the four factors warranting review under RAP 13.4(b) are present in this case. The sole basis for discretionary review is the petitioner's contention that Barbanti's default was never at issue before the trial court and therefore could not be affirmed by the Court of Appeals. There is ample evidence in the record on appeal demonstrating that the trial court considered the question of whether Barbanti was in default. The record also reflects that Barbanti's default was supported by uncontroverted evidence submitted by BNY and by Barbanti's own admissions. The record on appeal supports the Appellate Court's decision that summary judgment on the question of Barbanti's default was properly decided in favor of BNY. As such, the Appellate Court's decision does not conflict with other appellate or Supreme Court decisions, nor does the opinion present significant questions of constitutional law or involve a substantial public interest.

Review under RAP 13.4(b) therefore is inappropriate and should not be granted.

2. The Finding of a Fact that is Not in Dispute Does Not Implicate a Significant Question of Constitutional Law.

Barbanti's assertion that his due process rights were violated is directly refuted by the record on appeal. The record clearly shows that his default on the Hooper-Barbanti contract was alleged in BNY's Complaint. The record also demonstrates that the issue of Barbanti's default was directly addressed in BNY's Motion for Summary Judgment and that Barbanti addressed the allegations of default in his Response brief. CP 109-120, 121-151. BNY's Reply on Summary Judgment again offered additional argument in support of its allegation that Barbanti was in default. CP 310-319. Barbanti clearly had an opportunity to address the allegations of contractual default on summary judgment and his assertion to the contrary patently disregards the record on appeal.

Not only did Barbanti have the opportunity to submit argument against the allegations of his default, he also had the opportunity to submit evidence in support of his position. To that end, Barbanti submitted a declaration in which he admitted to failing to make the payments due and owing under the Hooper-Barbanti

contract. CP at 159-161. As Barbanti's own declaration testimony supported BNY's contention that he was in default, the trial court was entitled to treat Barbanti's default as an established, uncontroverted fact. *See e.g. Cent. Wash. Bank,* 113 Wash.2d at 354. Thus, there was no genuine issue of material fact as to Barbanti's default on the Hooper-Barbanti contract and the Court of Appeals did not violate Barbanti's due process right in upholding the trial court's ruling.

To the extent that Barbanti is arguing that the trial court's ruling should have been denied for failure to enter a specific finding of fact as to the state of Barbanti's default, that assertion lacks merit. Even without a finding of fact, the court of appeals can affirm the trial court's decision on any facts supported by the record. Here the record clearly supports the finding that Barbanti was in default under the contract. Additionally, doing so does not infringe upon Barbanti's due process rights as the question of his default was actively litigated by the parties below. Barbanti's claim that his due process rights were violated is specious and in deliberate disregard of the record on appeal. As such, review pursuant to RAP 13.4(b)(3) is unwarranted.

3. The Court of Appeals' Decision in BNY Two Does Not Conflict With Any Decisions From the Court of Appeals or the Supreme Court.

As the Court of Appeals was well within its right to uphold the trail court's decision, BNY Two is consistent with the decisions of the Court of Appeals and the Supreme Court. Accordingly, there is no basis for review under RAP 13.4(b) (1) or (2). This proposition is supported by the cases cited by the Petitioners.

The Petitioners cite to *Renfro v. Kaur*, for the proposition that summary judgment "is not proper if the parties' written contract, viewed in light of the parties other objective manifestations, has two 'or more' reasonable but competing meanings." *Renfro v. Kaur*, 156 Wn. App. 655, 661, 235 P.3d 800, 802-03 (2010). This proposition is supported by the Court of Appeal's decision in BNY Two as both parties' objective manifestations indicated that Barbanti failed to make all payments owing and was therefore in default on the Hooper-Barbanti contract. The Court of Appeals was acting in conformity with Renfro when it affirmed the trial court's decision.

The petitioning parties also cite to *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 112-13, 529 P.2d 466, 467 (1974) for the proposition that a Court of Appeals must accept the truth of the evidence asserted by the non-moving party on summary judgment, and to *Landberg v. Carlson*, 108 Wn.App. 749, 753, 33 P.3d 406 (2001) for the proposition that summary judgment is a

procedure for testing the existence of the parties' evidence. Again, BNY Two is in accord with both of these cases. The evidence presented by the non-moving parties at trial established that Barbanti was in default under the Hooper-Barbanti contract for failure to make payment. Ample evidence in support of that contention was submitted by the parties, including Barbanti's own admissions made in his declaration. Thus none of the Court of Appeals' decisions cited by the petitioning parties conflict with BNY Two and review pursuant to RAP 13.4(b)(1) is inappropriate.

The petitioning parties lastly claim that BNY Two conflicts with this court's decision in *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wn. 2d 118, 148, 969 P.2d 458, 474 (1999). In *R.D. Merrill Co.*, the Supreme Court held that "nothing in CR 56(c) allows the raising of additional issues other than in the motion and memorandum in support of the motion." *R.D. Merrill Co.*, 137 Wn. 2d 118, 147 (citing *White v. Kent Med. Ctr., Inc.*, 61 Wash.App. 163, 168, 810 P.2d 4 (1991)). The rationale behind the limitation on raising additional issues on rebuttal is that "it is unfair to grant the extraordinary relief of summary judgment without allowing the nonmoving party the benefit of a clear opportunity to know on

what grounds summary judgment is sought." *R.D. Merrill Co.*, 137 Wn. 2d 118, 148.

Nothing in BNY Two conflicts with the court's holding in *R.D. Merrill Co.* An examination of BNY's Motion for Summary Judgment and supporting papers clearly shows that the issue of Barbanti's default was raised in BNY's opening briefing. That contention was later addressed by Barbanti in his Response brief and supporting papers. Finally, BNY's reply brief rebutted the arguments put forth by Barbanti on the issue of his default. Unlike the moving party in *R.D. Merrill Co.*, BNY's Reply brief did not raise additional issues outside the scope of its initial Motion for Summary Judgment. Barbanti and the Petitioners were therefore afforded full opportunity to apprise themselves of the issues presented on summary judgment and respond accordingly. The holding articulated in *R.D. Merrill Co.* is not applicable to the facts of BNY Two.

The petitioning parties have failed to put forth any examples of case law from either the Court of Appeals or the Supreme Court in support of their contention that RAP 13.4(b)(1) and (2) applies in the present case. As BNY Two is not in conflict with Washington decisions and the petitioning parties have failed to provide any examples to the contrary, this court should decline to accept review.

4. Overruling the Court's Decision in BNY Two Would Conflict with the Court of Appeals Prior Decision in BNY One.

While examination of the cases put forward by the petitioning parties and the record on appeal demonstrate that BNY Two is in accord with current Washington law, overturning the Court of Appeals' decision in BNY Two would be in direct conflict with the Court of Appeals' decision in BNY One.

In BNY One, the Court of Appeals addressed the question of Barbanti's compliance under the terms of the Hooper-Barbanti contract in the context of foreclosure of the underlying Deed of Trust. There the Court of Appeals stated that "Mr. Barbanti admitted he had failed to make the payments to escrow to pay the underlying deed of trust payments as required by his real estate contract with the Hoopers." *Bank of New York v. Hooper*, 164 Wn.App. 295, 299, 263 P.3d 1263 (2011) (review denied *Bank of New York v. Hooper*, 173 Wash. 2d 1021, 272 P.3d 850 (2012)). As the factual basis for both BNY One and BNY Two is identical, the Court of Appeals would have contradicted its prior finding had it not upheld the trial court's ruling on Barbanti's default in BNY Two. Thus the Supreme Court should not accept review of the Court of Appeals decision in BNY

Two as reversal of the Court of Appeals' decision would put it in conflict with the Court of Appeals' prior decision in BNY One.

5. The Decision to Affirm a Ruling on Summary Judgment that is Supported by Undisputed Facts Does Not Involve an Issue of Substantial Public Interest.

The Court of Appeals' affirmance of the trial court's well founded decision on summary judgment does not involve an issue of substantial public interest. In other contexts, when an appellate court is determining whether an issue is a matter of substantial public interest, it 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." *Westerman v. Cary,* 125 Wash.2d 277, 286, 892 P.2d 1067 (1994)(addressing the question of whether to review an issue that is moot).

In the present case, the Appellate Court's decision in BNY Two fails under the second prong of the analysis as the Court of Appeal's application of the law on summary judgment is within well settled law on the subject. The Court of Appeals was entitled to affirm the trial court's decision on any ground supported by the record. *See e.g. Redding v. Virginia Mason Med. Ctr.,* 75 Wash.App. 424, 426, 878 P.2d 483 (1994). Given the undisputed evidence of

Barbanti's failure to make payment under the Hooper-Barbanti contract, it was reasonable for the Court of Appeals to conclude that Barbanti had defaulted and that that portion of the trial court's determination on summary judgment should be upheld. Review of such a straight forward application of the law on summary judgment would not offer any new guidance to public officers. Accordingly, BNY Two does not present a question of substantial public interest and this court should decline to accept review under RAP 13.4(b)(4).

III. CONCLUSION

The record on appeal clearly demonstrates that none of the four factors warranting review under RAP 13.4(b) are present in this case. The record on appeal supports the Appellate Court's decision that summary judgment on the question of Barbanti's default was properly decided in favor of BNY. As such, the Appellate Court's decision does not conflict with other appellate or Supreme Court decisions, nor does the opinion present significant questions of constitutional law or involve a substantial public interest. Review under RAP 13.4(b) therefore is inappropriate and should not be granted.

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Dated this 7 day of March, 2014.

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CERTIFICATE OF SERVICE

I, ~~Whitley Gillins~~ John Reid, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a clerk at Robinson Tait, P.S., attorneys for the Answering party, and am competent to be a witness herein.

On March 7, 2014, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing BANK OF NEW YORK'S ANSWER to the following:

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