NO. 30726-3-III

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

CHRISTOPHER L. SHORT, et al.,

Appellant,

v.

WELLS FARGO BANK, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Series 2005-PR1 Trust,

Respondent.

RESPONDENT WELLS FARGO BANK, N.A.'S AMENDED BRIEF

APPEAL FROM OKANOGAN COUNTY SUPERIOR COURT
The Honorable Christopher E. Culp

Ann T. Marshall, WSBA No. 23533
Barbara L. Bollero, WSBA No. 28906
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I. INTRODUCTION

Borrower Christopher Short appeals the summary judgment granting judicial foreclosure of his real property located in Okanogan County.[1] In arguing that his original promissory note must be filed with the trial court before a foreclosure judgment is entered, Mr. Short's appeal manifests a fundamental misunderstanding of the difference between a suit on a promissory note and a judicial foreclosure of the Deed of Trust securing that note, incorrectly conflating the two. Appellant's other arguments attempt through mere strength of assertion to impugn the foreclosing Plaintiff's summary judgment evidence. However, because Mr. Short offered no controverting evidence after Plaintiff had met its initial burden of proof below, summary judgment was correctly awarded.

The evidence before the court on the motion of Respondent Wells Fargo Bank, N.A., as Trustee of WaMu Mortgage Pass-Through Certificates Series 2005-PR1 Trust ("Wells Fargo") was so one-sided that the resulting foreclosure judgment is unassailable. Wells Fargo owned the debt when the foreclosure suit on appeal was filed on Wells Fargo's behalf by its servicing agent JPMorgan Chase Bank, N.A. ("Chase") and through entry of summary judgment. Wells Fargo was also the assignee of the

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[1] Although the Deed of Trust describes the secured real property as non-agricultural (CP 140, ¶25), Appellant asserts it is in fact agricultural realty (Appellant's Brief, p. 4). For purposes of this appeal, Respondent does not dispute that assertion.

related Deed of Trust before suit was filed. The trial court properly recognized Wells Fargo's suit as one for judicial foreclosure of the trust deed, and not a "suit on the note." Chase, as Wells Fargo's servicing agent, provided sufficient admissible evidence of its possession of the note and entitlement to foreclose on behalf of Wells Fargo. Moreover, the borrower admitted both his execution of the note and his payment default. Given the absence of any dispute of the dispositive facts for a foreclosure action, the trial court properly awarded summary judgment to Wells Fargo.

Consequently, the trial court's award of summary judgment of foreclosure, and denial of Plaintiff's Motion for Reconsideration, should be affirmed on appeal.

II. ASSIGNMENTS OF ERROR

Respondent Wells Fargo makes no assignments of error, inasmuch as the judgment below was correct. Therefore, Wells Fargo restates the issues pertaining to Appellant's assignments of error as follows:

1. The trial court correctly held that the plaintiff moving party need not produce the original promissory note to prevail on summary judgment of judicial foreclosure of real property.

2. The trial court properly concluded that the uncontroverted, competent, admissible evidence proving the terms of the promissory note

and Deed of Trust, the borrower's default, the location of the original promissory note, the identity of the note holder, and authority to foreclose, entitled plaintiff to judgment of judicial foreclosure as a matter of law.

III. STATEMENT OF THE CASE

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

In November of 2004, Appellant Christopher L. Short ("Borrower") borrowed $114,750.00 from Washington Mutual Bank ("WaMu"). He executed a promissory note dated November 30, 2004, in that principal amount payable to the order of WaMu (the "Note"). (CP 110, ¶6; CP 116-22.) The Note was secured by a Deed of Trust encumbering certain real property located in Tonasket, Washington. (CP 110, ¶7; CP 124-49.) The Deed of Trust was dated December 3, 2004, and recorded on December 7, 2004, under Okanogan County Auditor's Instrument No. 3082930 (the "Deed of Trust"). (CP 111, ¶8; CP 125, 141.) The Deed of Trust is against real property owned by Mr. Short (CP 409, ¶3; CP 615, ¶3), commonly known as 600 Cape La Belle Road, Tonasket, Okanogan County, Washington 98855 (the "Property"). (CP 110, ¶7; CP 127.)

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 2005-PR1 Trust" (the "WaMu Trust"). (CP 39, ¶14.) The Trustee of the WaMu Trust is Plaintiff Wells Fargo. (CP 40, ¶14.) An Assignment reflecting the transfer of interest to Wells Fargo as Trustee of the WaMu Trust, dated August 10, 2010, was recorded on August 17, 2010 – prior to commencement of the judicial foreclosure action – under Okanogan County Auditor's Instrument No. 3157196 (the "Assignment"). (CP 111, ¶10; CP 155-57.)

In September of 2008 all WaMu assets, including all loan debts due to WaMu and its servicing rights, were acquired by Chase under the terms of a Purchase and Assumption Agreement between the Federal Deposit Insurance Corporation as Receiver for WaMu ("FDIC-R") and Chase (the "WaMu Agreement"). (CP 111, ¶9; CP 150-53.) An Affidavit of FDIC-R attesting to the WaMu asset transfer to Chase, dated October 2, 2008, was recorded on October 3, 2008, under King County Auditor's Instrument No. 20081003000790 (the "FDIC-R Affidavit"). (CP 111, ¶9; CP 150-53.) Accordingly, on September 25, 2008, Chase became the servicing agent for Mr. Short's loan in the place of WaMu. (CP 112, ¶14.)

C. Mr. Short Defaults on Note and Wells Fargo Institutes Foreclosure.

Beginning with the payment due on April 1, 2010, and continuing for the nearly three years thereafter, Mr. Short failed to make any of the monthly payments due on his Note – facts which Appellant admits. (CP 95; CP 111, ¶11; RP 01/27/12, p. 10, l. 8 – p. 13, l. 5.) Due to Mr. Short's default, Wells Fargo accelerated the debt in accordance with the loan documents and declared the entire unpaid balance immediately due and payable. (CP 111, ¶11.)

Wells Fargo retained counsel to institute suit to judicially foreclosure the Property, and Wells Fargo's foreclosure Complaint was filed in the Okanogan County Superior Court on November 16, 2010. (CP 408-13.) The Complaint included as exhibits the Note, Deed of Trust, FDIC-R Affidavit, and Assignment. (CP 414-54.) Mr. Short answered the Complaint, *pro se,* admitting that he owned the Property. (CP 409, ¶3; CP 615, ¶3).

D. Wells Fargo's Summary Judgment Motion is Granted.

1. Wells Fargo's Summary Judgment Motion and Evidence.

On October 17, 2011, Wells Fargo filed the subject Motion for Summary Judgment. (CP 348-52.) The motion was supported by the Declaration of a Chase employee, Araceli Urquidi, dated September 21,

2011. (CP 353-56.) The four exhibits to Ms. Urquidi's Declaration were the same as the exhibits attached to Wells Fargo's Complaint, *i.e.,* the Note, Deed of Trust, FDIC-R Affidavit, and Assignment. (*Compare,* CP 357-97 to CP 414-54.) Ms. Urquidi's Declaration attested to the foregoing facts, provided foundation for all the exhibits, and swore to Mr. Short's default and the loan balance due. (CP 353-56.)

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

On January 11, 2012, Mr. Short filed his opposition to Wells Fargo's summary judgment motion. (CP 333-47.) He contended, without citation to proof:

1. Wells Fargo's supporting declarations contradicted its discovery responses (CP 333-38);

2. Wells Fargo's supporting declarations were "defective" in form and inadmissible (CP 333, 339-45);

3. Wells Fargo was "deliberately misleading" the trial court as to the true Plaintiff's identity (CP 333-34); and

4. Wells Fargo failed to deliver the original Note to the trial court, and prove it was entitled to foreclose (CP 335, 338, 347).

The only evidence Mr. Short filed supporting his opposition was his Declaration (CP 329-32), to which he attached Wells Fargo's amended discovery responses (CP 598-610), and other exhibits (CP 611-14). Mr.

Short did not provide any evidence disputing the authenticity of the Note or Deed of Trust in support of the motion or the fact of his default – nor did his briefing address any of those issues. (CP 333-47.) All of the bases on which Mr. Short argued for denial of the motion were immaterial and non-dispositive and, as such, could not defeat the well-supported motion.

3. Wells Fargo's Reply and Additional Evidence.

In reply to Mr. Short's opposition, Wells Fargo pointed out that Mr. Short did not dispute either the Note terms or his default. (CP 100-08.) Citing its own discovery responses, Wells Fargo argued that Mr. Short's loan servicer, Chase, possessed his Note with the power to foreclose under RCW 61.24.005. (CP 107-08.) Because the WaMu Trust owned Mr. Short's loan, Chase introduced the Pooling and Servicing Agreement ("Servicing Agreement"), among other documents, granting Chase the authority to foreclose. (CP 112, ¶14; CP 158-272.)

Supporting its reply, Wells Fargo presented a Declaration of its counsel, Albert Lin (CP 273-74), and a second Declaration of Ms. Urquidi (CP 109-13).[2] Mr. Lin's reply Declaration was a Request for Judicial Notice of three documents concerning Chase's acquisition of WaMu's assets. (CP 275-328.)

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[2] Ms. Urquidi's reply Declaration has the same title as her Declaration filed with the moving papers; however, it is dated January 19, 2012. (CP 109-13.)

Ms. Urquidi's reply Declaration was virtually identical to her previous Declaration. In addition, under penalty of perjury, it specified that Chase currently possessed Mr. Short's original Note, was the authorized servicing agent for his loan, and had authority to enforce the Note by foreclosing for the loan owner, the WaMu Trust. (CP 111, ¶14 – CP 112, ¶16.)

4. Oral Argument of Summary Judgment Motion, and Entry of Judgment.

Oral argument of Plaintiff's summary judgment motion was conducted by Judge Christopher E. Culp on January 27, 2012. (CP 94-95.) In the following exchange with the trial court, Mr. Short acknowledged the facts that:

a. He drew the Note and granted the Deed of Trust to WaMu;

b. He defaulted on the payments due on the Note after April of 2010; and

c. No entity other than Plaintiff and its loan servicer, Chase, had ever demanded payments from him:

> THE COURT: So are you saying that you didn't ever sign a note? Is that what you're telling me?
>
> MR. SHORT: No your Honor, I signed a note with Washington Mutual Bank ....

THE COURT: So you agree that on or about November 30, 2004, you signed a note with Washington Mutual Bank secured by a deed of trust in the amount of a hundred and fourteen thousand seven hundred and fifty dollars ($114,750)? I'm hearing you say you agree.

MR. SHORT: I – I – I – I do agree – I do admit to that, yes your Honor.

THE COURT: Okay. And the – the Plaintiff, as named, alleges – basically agrees that you apparently made the payments on that note until April of 2010. Is that correct?

MR. SHORT: I—I did make payments on that until approximately that day.

THE COURT: Okay, and are – are you prepared today or can you point to any evidence, Mr. Short, that – that you made the payments on this note to someone? Anyone?
MR. SHORT: Absolutely not.

THE COURT: Okay. Has anyone, any entity, whether it's – whether it's Washington Mutual Bank – or I should say has anyone other than Washington Mutual Bank or Wells Fargo Bank or JPMorgan Chase – has anyone other than any of those three entities made any demand of you for payment?

MR. SHORT: No.

...

THE COURT: Did you – can you show payments then tendered to Washington Mutual Bank?

MR. SHORT: I could – I could show that I made payments to Washington Mutual Bank but not recently.

THE COURT: Not since –

MR SHORT: --I—I initially made payments to Washington Mutual Bank.

THE COURT: But you agree not since April of 2010?

MR. SHORT: Yeah.

(RP 01/27/12, p. 10, l. 8 – p. 13, l. 5.)

Based on these admissions and other evidence, the trial court found there were no issues of material fact precluding entry of judgment. (RP 01/27/12, p. 16, ll. 18-21.) The court noted the evidence that Mr. Short had executed the Note, paid on it for over five years, stopped paying in April of 2010, ownership of the loan was transferred, and there was no evidence contradicting Wells Fargo's proof that no entity other than Plaintiff had made a claim for payments. (RP 01/27/12, p. 16, l. 21- p. 18, l. 9; CP 95.)

The trial court specifically ruled that the Plaintiff's Declarations established possession of the original Note, and the transfer of ownership interest did not absolve Mr. Short of his payment obligations. (RP 01/27/12, p. 18, ll. 14-20.) Finding no controverting evidence had been presented, the court awarded summary judgment to Plaintiff Wells Fargo. (RP 01/27/12, p. 18, l. 21 - p. 19, l. 4.)

At the hearing, the trial court entered Wells Fargo's Order granting it summary judgment, as proposed. (RP 01/27/12, p. 19, l. 5 – p. 20, l. 5; CP 92-93.) On July 2, 2012, the trial court entered the Judgment of Foreclosure. (CP 456-59.)

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

Mr. Short filed a reconsideration motion under CR 56 and CR 59. Although primarily repetitive of his summary judgment defenses, he raised a couple of new arguments which he could have addressed in response to summary judgment but elected not to do so, presumably for strategic reasons. (CP 67-77.) Even so, none of the new assertions challenging the trial court's acceptance of summary judgment evidence presented any facts that would have changed the result of that motion. In short, Mr. Short again failed to carry his burden to place any of the dispositive facts in dispute.

At oral argument of Mr. Short's reconsideration motion conducted on March 15, 2012 (CP 7-8), Mr. Short again specifically acknowledged his default on the Note:

> THE COURT: [Y]ou'll recall from our discussion in January at the time of that hearing, that you agreed you had signed the note and deed of trust and you agreed that you undertook or you obtained the loan proceeds and thereby incurred the repayment obligation. In light of your comments this afternoon, theoretically, or even in the abstract,

> who – who do you contend that you should have – have paid?
>
> MR SHORT: I honestly don't know sir but it's not these people.
>
> THE COURT: But you agree you owed somebody the –
>
> MR. SHORT: --I—I—I do not dispute that ....

(RP 03/15/12, p. 15, l. 16 - p. 6, l. 5.)

After considering the parties' arguments and complimenting Mr. Short's presentation as a *pro se* litigant, the trial court again commented that the facts were undisputed concerning Mr. Short's execution of the loan documents, payment default, and Plaintiff's entitlement to enforce the obligation against him. (RP 03/15/12, p. 10, l. 20 - p. 11, l. 10.) The court noted Mr. Short's evidentiary objections, but overruled them, finding Mr. Short had failed to prove the existence of a triable issue of material fact. (RP 03/15/12, p. 11, l. 10 – p. 14, l. 1) Remarking that the facts were undisputed and Mr. Short admitted his failure to make the payments due, the court denied the reconsideration motion. (CP 6-8.) The court entered the Order Denying Defendant's Motion for Reconsideration the same day, March 15, 2012. (RP 03/15/12, p. 14, ll. 2-16; CP 6-8.)

Mr. Short filed his Notice of Appeal on March 21, 2012, designating only the summary judgment order entered January 27, 2012. (CP 1-5.)

F. Contested Presentation of Foreclosure Judgment.

In accordance with the trial court's disposition of the matter, on July 2, 2012, Wells Fargo presented its Judgment of Foreclosure. (CP 568-89.) In response, Mr. Short requested the Court judicially notice the Washington State Attorney General's *amicus* brief filed in *Bain v. Metropolitan Mtg. Group, Inc.,* 175 Wn.2d 83, 285 P.3d 34 (2012), which concerns the authority of a non-party to this action, Mortgage Electronic Registrations Systems, Inc., to foreclose. (CP 530-58.) He also filed opposition, again raising the arguments that had been previously considered, heard, and rejected. (CP 559-61.)

At the judgment presentation, Mr. Short returned to his earlier arguments concerning the Plaintiff's failure to present the original promissory Note. (RP 07/02/12, p. 5, l. 15 – p. 6, l. 7.) The court again cited to the evidence that the original Note was in the servicer's warehouse in Louisiana (RP 07/02/12, p. 6, ll. 8-13), and that no payments had been made for some time, nor had any lender other than Plaintiff demanded such payments (RP 07/02/12, p. 7, ll. 3-8). After hearing argument, the Court entered the Judgment of Foreclosure in the form presented. (RP 07/02/12, p.10, ll. 9-14; CP 456-59.)

The Notice of Appeal was not amended to incorporate the trial court's subsequent rulings.

IV. ARGUMENT

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

The appellate standard of review for the summary judgment order is *de novo*, with the reviewing court performing the same inquiry as the trial court. *Del Guzzi Constr. Co. v. Global Northwest Ltd.,* 105 Wash.2d 878, 882, 719 P.2d 120 (1986); *Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Evidence not presented to the trial court is not considered on appeal. *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 390, 715 P.2d 1133 (1986); *Herron v. Tribune Pub. Co., Inc.,* 108 Wn.2d 162, 169, 736 P.2d 249, 255 (1987).

B. The Trial Court did Not Err by Holding that a Foreclosing Entity Need Not Present the Original Note as a Prerequisite to Judgment of Judicial Foreclosure.

Mr. Short's primary and repeated contention is that the trial court erred in not requiring the original Note be produced before entering summary judgment. Mr. Short fails to understand that Plaintiff moved for summary judgment foreclosing the Deed of Trust and, thus, need not present the Note.

It is black letter law and has long been recognized in Washington that, "[i]n transactions involving both notes and mortgages, the notes represent the debts, the mortgages security for payment of the debts. Either may be the basis of an action." *Am. Fed. Savings & Loan v.*

McCaffrey, 107 Wn.2d 181, 189, 728 P.2d 155 (1986) (internal citations omitted). Indeed, "Washington case law makes clear that ... the holder of the real property security interest has the option to sue on the note, obtain a judgment, and later foreclose the security interest to satisfy any unpaid obligation of the borrower on the note." *Boeing Employees' Credit Union v. Burns,* 167 Wn.App. 265, 274, 272 P.3d 908 (2012).

Under RCW 61.12, *et seq.,* there is no bar to suing first to foreclose and bringing an action on the note thereafter; however, bringing a "suit on the note" concurrently with a foreclosure action is expressly forbidden:

> The plaintiff shall not proceed to foreclose his or her mortgage while he or she is prosecuting any other action for the same debt or matter which is secured by the mortgage, ...; nor shall he or she prosecute any other action for the same matter while he or she is foreclosing his or her mortgage or prosecuting a judgment of foreclosure.

RCW 61.12.120; WASHINGTON REAL PROPERTY DESKBOOK, 3d ed. (Wash. State Bar Ass'n. 1996), §48.2(2), p. 48-5; *also see,* Rombauer, WASHINGTON PRACTICE: Creditors' Remedies – Debtors' Relief, (West 1998), §3.5, p. 141 ("A foreclosure action may not be commenced while the Plaintiff is prosecuting any other action on the same obligation, nor may any other action be commenced while the judicial foreclosure is proceeding ....").

There can be no real dispute that the Complaint here was for judicial foreclosure. The Complaint asserted the "interests of ... Defendants in the Property shall be eliminated at the time of the foreclosure sale by Plaintiff." (CP 410, ¶13.) As required by RCW 61.12.120, the Complaint makes clear that "[n]o other suit or action has been instituted or is now pending upon said Note or to foreclose the Deed of Trust." (CP 411, ¶15.) Further, the Complaint specifically prays for foreclosure of Mr. Short's Property, determination of the priorities of interests in that Property, and issuance of a Sheriff's Deed. (CP 412-13, ¶¶2, 4, 8.) Thus, Wells Fargo chose to foreclose the Deed of Trust, not file suit on a negotiable instrument. Plaintiff having sustained its burden of proof and Mr. Short having failed to present evidence calling those proofs into question, the court correctly awarded judgment.

Contrary to Mr. Short's arguments, the court did not need to look to any other matters. It granted Plaintiff the Judgment of Foreclosure that it sought – no more and no less. Indeed, the form of Judgment which was entered is titled "Judgment of Foreclosure." (CP 456-59.) Further, Wells Fargo's counsel acknowledged to the Court that it was suing to foreclose the Deed of Trust, not for a money judgment on the Note:

> MS. STEARNS: ... [A]dditionally I would just state that we are not collecting on the note. We are foreclosing or we are seeking a judgment to foreclose against the property. ... But again, we're

> not collecting on the note. We are foreclosing on the property and that would extinguish – extinguish the obligation.

(RP 07/02/12, p. 6, l. 16 – p. 7, l. 2.)

Analysis of Mr. Short's primary assertion of error – one for which he cites no authority other than an inapplicable local court rule[3] – reveals the express statutory authority and requirement that, when a plaintiff proceeds with a judicial foreclosure action, it must do so *without* suing on the underlying obligation. Wells Fargo did not seek a judgment on a negotiable instrument, *i.e.,* its action was *not* a suit on the Note. Accordingly, there was no requirement to present the original Note to the trial court prior to entry of judgment.

Consequently, the trial court did not err in awarding summary judgment to Wells Fargo in the absence of Plaintiff producing the original Note.

C. The Trial Court Properly Granted Summary Judgment of Judicial Foreclosure Based on Plaintiff's Uncontroverted and One-Sided Evidence.

1. Ms. Urquidi's Declarations are Not Contradictory.

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[3] Appellant's citation to Whatcom County Court Rule ("WCCR") 54(c) is inapposite here because, as he admits, "Whatcom County Superior Court is *not* the trial court in this case." (Appellant's Brief, p. 5, n. 2 (emphasis supplied).) Appellant cites no authority for the novel proposition that Local Civil Rules are binding on any jurisdiction other than the promulgating court, and the WCCR's expressly reject that notion: "*Procedure in the Superior Court* of the State of Washington *for* ***Whatcom*** *County* shall comply with Washington statutes, Rules of Court and *these rules*." Whatcom County Administrative Rule 0.1(a) (emphasis supplied).

Mr. Short assigns error to the trial court's award of summary judgment on the basis of ostensibly conflicting supporting evidence which showed "two mutually exclusive accounts of the material facts regarding the chain of title of [his] promissory note." (Appellant's Brief, p. 22.) This claimed error is specifically confined to the two supporting Declarations of Araceli Urquidi. (*Id.*, p. 16 ("[O]nly the competency of the new witness Araceli Urquidi, who provided declarations for Trust's second motion for summary judgment, will be addressed.") (citation and footnote omitted).)

Nothing about the two Declarations is contradictory, much less mutually exclusive. Ms. Urquidi's original summary judgment declaration (CP 353-56) ("Urquidi Original Declaration"), and her reply declaration (CP 109-13) ("Urquidi Reply Declaration"), are virtually word-for-word identical, and both attach the same four exhibits, the Note, Deed of Trust, WaMu Affidavit, and Assignment. (CP 116-57; CP 357-97.)

The sole substantive difference is that the Urquidi Reply Declaration contains three additional paragraphs, numbered 14-16, and attached and authenticated a copy of the Servicing Agreement. (CP 111-13; CP 158-272.) Those additional paragraphs are essentially identical to Wells Fargo's discovery responses, which Mr. Short himself submitted as evidence. (CP 604-09.) They provide specific details concerning the precise authority, agency and agreements under which Chase acts for WaMuTrust, as the Note

owner, and by which Chase has authority to foreclose the Deed of Trust.[4] (CP 111-13.)

Mr. Short ascribes "mutually exclusive" meaning to the following two statements by Ms. Urquidi (Appellant's Brief, pp. 21-22):

1. "On 09/25/2008, the Note and Deed of Trust was assigned by Washington Mutual Bank to JPMorgan Chase Bank, N.A. pursuant to a Purchase and Assumption Agreement between the FDIC as receiver of Washington Mutual and JPMorgan Chase Bank, NA." (CP 111, ¶9; Appellant's Brief, p. 21.)

2. "The subject loan, ... in favor of ... WaMu, ... was securitized into a mortgage-backed security identified as the WaMu ... Trust .... As such, the owners of the Loan are the Trust and its investors. The Trust is governed by a Pooling and Servicing Agreement ... and the [Servicing Agreement] governs all aspects of the Trust. ... [T]he Trustee may allow the Trust Servicer ... to hold the subject loans for the benefit of the Trust, ... and because the Notes are endorsed in blank, ... the Servicer is

[4] The trial court has the discretion to accept affidavits filed at any time before issuing its final summary judgment order. *Brown v. Peoples Mortgage Co.*, 48 Wn.App. 554, 559-60, 739 P.2d 1188 (1987); CR 6(b). Mr. Short did not and has not argued that the trial court abused its discretion in considering the Urquidi Reply Declaration.

the holder of the Note for the benefit of the Trust, which owns the subject loan." (CP 111-12, ¶14.)

Mr. Short argues that because his Note was "not part of the [WaMu] asset pool seized by the FDIC ... [it] could not have been assigned to [Chase] ..., and therefore all ... subsequent assignments of [the Note and Deed of Trust] ... would be of necessity a nullity[.]" (Appellant's Brief, pp. 21-22.) However, he conveniently overlooks that Chase, as successor to WaMu's servicing rights, at all times had authority to foreclose, irrespective of what entity owned the Note. The fact that Mr. Short's loan was securitized does not alter that authority.

Washington courts recognize that a loan's securitization has no bearing on whether a party may foreclose, and does not provide a basis to relieve a borrower of his loan obligations. "[S]ince the securitization merely creates a separate contract, distinct from plaintiffs' debt obligations under the Note and does not change the relationship of the parties in any way, plaintiffs' claims arising out of securitization fail." *Lamb v. Mortg. Elec. Registration Sys., Inc.*, 2011 WL 5827813, *6 (W.D. Wash. 2011) (citing cases); *Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229, *5 (W.D. Wash. 2011) (citing cases); *Veal v. American Home Mortg. Servicing, Inc.*, 450 B.R. 897, 912 (9th Cir. BAP 2011) ("[Plaintiffs] should not care who actually owns the Note—and it is thus irrelevant whether the Note

has been fractionalized or securitized—so long as they do know who they should pay.").

Mr. Short further ignores that, at the time the foreclosure action was commenced, the WaMu Trust was the beneficiary of the Deed of Trust through the Assignment, and thus entitled to foreclose on that Deed of Trust. (CP 156-57.) The bottom line, as stated elsewhere in the Urquidi Reply Declaration, is that:

1. "[T]he Trustee may allow the Trust Servicer [Chase] ... to hold the subject loans for the benefit of the Trust, ... and because the Notes are endorsed in blank, ... the Servicer is the holder of the Note for the benefit of the Trust," (CP 112, ¶14); and

2. "The original promissory note evidencing Mr. Short's loan is in the possession of Chase's loan record department, and is physically located in Chase's secure warehouse in Monroe, Louisiana." (CP 112, ¶16.)

Further, as Wells Fargo itself acknowledged – and Mr. Short highlighted in his pleadings – "WaMu was the Trust Servicer and held the Note for the benefit of the Trust, and thus had the right to enforce the loan on behalf of the Trust. Thus, on September 25, 2008, Chase became the Note holder for the subject loan when WaMu was seized[.]" (CP 337.)

Try as Mr. Short might to contort the meaning of the Urquidi Original Declaration and Urquidi Reply Declaration, the documents speak for themselves, and there are no contradictory factual averments.

2. No "Show Me the Note" Requirement Exists to Obtain Judicial Foreclosure.

Although Mr. Short correctly recognizes that the "holder" of a promissory note is entitled to foreclose on the obligation secured by the Deed of Trust under RCW 61.24.005(2) (Appellant's Brief, p. 4, n. 1), he ignores that the holder is not doing so on the basis of the Note here. He asserts, devoid of citation to any controlling authority,[5] that "[t]o prove one is the holder/person in possession of a promissory note in a judicial proceeding one simply needs to file the original promissory note with the court." (*Id.*, p. 5.) Significantly, Mr. Short's claim that the original note must be produced for a foreclosure action has been soundly and repeatedly rejected by innumerable courts:

> In her complaint, [plaintiff] contends that the Uniform Commercial Code (UCC) §3-309 was violated because it was not proven that the foreclosure trustee possessed the original note and deed of trust. ... However, as this Court has concluded before, courts "have routinely held that [the plaintiff's] so called 'show me the note' argument lacks merit." *Freeston v. Bishop, White & Marshall, P.S.*, 2010 WL 1186276 (W.D.Wash.,

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[5] Mr. Short's passing reference to WCCR 54(c) is inapposite. *See, supra,* n. 3.

> 2010) (*quoting, Diessner v. Mortgage Electronic Registration Systems,* 618 F.Supp.2d 1184, 1187 (D.Ariz. 2009) (collecting cases)). The Court finds that [plaintiff] has failed to state a plausible claim for relief based on Defendants' alleged failure to produce the original promissory note.

Wallis v. Indymac Fed., 717 F.Supp.2d 1195, 1200 (W.D.Wash. 2010); *accord, Vawter v. Quality Loan Svc. Corp. of Wash.,* 707 F.Supp.2d 1115, 1127 (W.D.Wash. 2010). No Washington authority requires that a lender or servicer exhibit the original note to be awarded judicial foreclosure, and Mr. Short has cited none.

Notably, in a recent federal case on parallel facts, the United States District Court for the Western District of Washington granted summary judgment against a borrower making precisely the same claims as Mr. Short that the original note must be produced, and a Declaration regarding the note's whereabouts in a secure vault is insufficient proof of holder status. There, the court reasoned:

> The sole basis for [the borrower's] claim is his allegation that Defendant Wells Fargo is not the beneficiary of the deed of trust because it does not hold the promissory note, and, therefore, that Defendant Wells Fargo could not initiate foreclosure proceedings. The only disputed issue is whether Defendant Wells Fargo holds the promissory note. *As proof that it holds the promissory note, Defendant Wells Fargo submitted a declaration from its assistant custodian of records*, Roy Gissendanner. ... In his declaration, Mr. Gissendanner *attests that the original promissory note, with Plaintiff's original signature,*

> *is located in a secure storage vault* in Wachovia Mortgage's service center in San Antonio, Texas. ... Mr. Gissendanner further attests that Exhibit A, the exhibit attached to his declaration, is a true and correct copy of the original promissory note.
>
> *Plaintiff presents no evidence that Defendant Wells Fargo does not hold the promissory note.* Plaintiff instead argues that the Court should disregard Mr. Gissendanner's declaration as hearsay, ... Mr. Gissendanner's *declaration provides an adequate basis for this Court to find that Defendant Wells Fargo holds the promissory note.*
>
> The Court finds there to be no genuine issue of material fact. Wachovia, a division of Defendant Wells Fargo, holds the promissory note. ... Accordingly, the Court grants Defendant's motion for summary judgment

Theros v. First Am. Tit. Ins. Co., 2011 WL 462564, *1-2 (W.D.Wash. Feb. 3, 2011) (emphasis supplied). The case is both instructive and persuasive on the very arguments that Mr. Short advances here.

No law supports Appellant's claimed error that an original note must be produced as evidence that Plaintiff has authority to foreclose. Nor was there any basis for the trial court to reject Wells Fargo's evidence in support of its motion that Chase possesses the original Note on Plaintiff's behalf. The trial court did not err in awarding summary judgment of judicial foreclosure on the basis of Plaintiff's evidence, without filing of the original Note.

3. The Note Holder may Foreclose by Agents.

As a matter of pure contract, Appellant is wrong that *only* the entity that actually holds the Note may prosecute a foreclosure action and must do so in its *own* name. (*See,* Appellant's Brief, p. 4, n. 1 ("The holder is the only party that has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."); *id.,* p. 10 ("[The] Trust was not the holder of the promissory note;"); *id.,* p. 11 ("[T]he deed of trust was improperly assigned ....").)

The Deed of Trust Act specifically allows the beneficiary *or* its "authorized agent" to commence foreclosure. *See, e.g.,* RCW 61.24.031 (1)(a)-(c) and (2). In addition, the Washington Supreme Court recently held with regard to a foreclosure challenge similar to Mr. Short's that, "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note." *Bain, supra,* 175 Wn.2d at 106.

Accordingly, foreclosure litigation may be pursued by a loan servicing agent that possesses the note and is empowered to act on behalf of the loan owner – precisely the circumstances that exist here. A recent federal opinion succinctly summarizes the analysis defeating Mr. Short's arguments:

> [The borrower's] claims arise from a fundamental misunderstanding of the law. U.S. Bank is the beneficiary of the deed [of trust] because it holds Plaintiff's note, not because MERS assigned it the deed [of trust]. Under Washington law, a beneficiary is ***by definition*** the party holding the note: .... This

> rule, however, is merely the codification of the longstanding principle that "the deed follows the debt." ... The Washington Supreme Court reiterated this principle in *Bain* ..., stating "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." *In sum, possession of the note makes U.S. Bank the beneficiary;* the assignment merely publicly records that fact. *Because U.S. Bank is the proper beneficiary, it is empowered to initiate foreclosure following Plaintiff's default.*
>
> ...
>
> Lastly, Plaintiff argues that Chase improperly issued foreclosure notices because it has "no recorded interest" in the property. But, *it is abundantly clear that Chase was acting as an agent for U.S. Bank, the proper beneficiary. The Washington Deed of Trust Act expressly authorizes the use of agents.* ... Chase thus acted properly as an agent for U.S. Bank.

Lynott v. Mtg. Elec. Reg. Sys., Inc., et al, 2012 WL 5995053, *2 (W.D.Wash. Nov. 30, 2012) (original bold emphasis; italicized emphasis supplied).

Similarly here, the *only* evidence before the trial court was that Chase was in possession of the Note, holding the instrument at Chase's secure warehouse. (CP 112, ¶16.) There was also uncontroverted evidence that Chase is the servicing agent for the Note owner, empowered and authorized to act on its behalf in instituting foreclosure proceedings. (CP 111-12, ¶14; CP 337.) Although given the opportunity to do so, Mr. Short *never* disputed that information by providing controverting evidence.

Accordingly, the trial court did not err in awarding summary judgment of foreclosure on the basis of Plaintiff's supporting evidence, and without the original Note being filed.

D. The Trial Court did Not Err by Considering Evidence within the Two Declarations of Araceli Urquidi.

1. Admission of Summary Judgment Evidence is Reviewed Under Abuse of Discretion Standard.

The balance of Mr. Short's asserted errors are challenges to the admissibility and weight of the Urquidi Original Declaration and Urquidi Reply Declaration. Trial court rulings on admissibility of evidence are generally reviewed under an abuse of discretion standard. *Brouillet v. Cowles Pub'g. Co.,* 114 Wn.2d 788, 801, 791 P.2d 526 (1990); *McKee v. American Home Prods.,* 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *In re Marriage of Kovacs,* 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *Havens v. C & D Plastics, Inc.,* 124 Wn.2d 158, 168, 876 P.2d 435, 441 (1994).

A party may object to an affidavit filed in support of a motion for summary judgment if it sets forth facts that would not be admissible in evidence. *Smith v. Showalter,* 47 Wn.App. 245, 248, 734 P.2d 928 (1987) (*citing, State v. The (1972) Dan Evans Campaign Comm.,* 86 Wn.2d 503, 506, 546 P.2d 85 (1976)). If a party fails to object or bring a motion to

strike deficiencies in affidavits or other documents in support of a motion for summary judgment, as occurred here, the party waives any defects. *Smith,* 47 Wn.App. at 248 (*citing, Lamon v. McDonnell Douglas, Co.,* 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); *Greer v. Nw. Nat'l. Ins. Co.,* 36 Wn.App. 330, 338, 674 P.2d 1257 (1984)).

2. If this Court Entertains the Waived Evidentiary Objections, It Should Still Affirm in the Absence of Controverting Facts.

Mr. Short objected to Ms. Urquidi's Declarations on several grounds, although he did not move to strike any portion of either the Urquidi Original Declaration or Reply Declaration. However, Mr. Short's evidentiary arguments are no substitute for countervailing proof.

Although the trial court did not expressly rule on Mr. Short's evidentiary objections, it implicitly overruled them. The court specifically noted that Mr. Short offered *no* controverting evidence on the material issues:

> THE COURT: ... You [Mr. Short] presented your written materials. ... But I'm satisfied that the note is in the possession of the Plaintiff as indicated in the declarations of the individuals as suggested by [Plaintiff's counsel.] ... And so the Court today specifically finds that there are no genuine issues of material fact. *I find that the Defendant, Mr. Short, has presented no evidence* of any sort of other claimants or any other payments that he made to anybody else as far as repayment of the mortgage amount, that he is in default on the payment, and that the Plaintiff is entitled to summary judgment.

(RP 01/27/12, p. 18, l. 12 – p. 19, l. 4 (emphasis supplied).)

a. The Declarations were adequately founded.

Each of Ms. Urquidi's Declarations contained at least three paragraphs concerning the foundation of her personal knowledge to testify. (CP 109-10, ¶¶1-3; CP 353-54, ¶¶1-3.) They stated that she had personal knowledge of the facts contained in the Declarations and that she was an authorized agent and signatory for both the named Plaintiff, Wells Fargo, and its servicing agent, Chase. (CP 109, ¶¶1-2; CP 353, ¶¶1-2.)

Both Declarations stated that Ms. Urquidi was duly authorized and empowered to provide each specific Declaration that she made. (CP 109, ¶2; CP 353, ¶2.) Both Declarations also provided the background of Ms. Urquidi's knowledge as to the manner in which loan records are obtained, prepared, and maintained. (CP 110, ¶3; CP 353-54, ¶3.) Ms. Urquidi specifically stated that she personally reviewed Mr. Short's loan records in preparation for making her Declarations. (CP 110, ¶3; CP 353-54, ¶3.)

Similar foundation and Declarations of Chase's HL Senior Research Specialists – the same job title as Ms. Urquidi's (CP 113; CP 356) – have been found sufficient to carry a party's evidentiary burden in support of its motion. *See, e.g., Agin v. Mtg. Elec. Reg. Sys., Inc., et al (In Re Bower),* 462 B.R. 347, 349, n. 6 (Bankr. E.D.Mass. 2012) (Granting summary judgment, in part, in reliance on, "the Declaration of … the *HL*

Senior Research Specialist with JPMorgan Chase Bank, N.A., [stating] '[o]n or about June 30, 2006, the Bank entered into a Pooling and Servicing Agreement ("PSA") whereby it became the trustee for the certificate holders of [a securitized mortgage-backed trust]. The mortgage and note of the ... Loan was conveyed and assigned to the Bank as trustee under the terms of the PSA as of the closing date of the Trust.'") (emphasis supplied); *Knopp v. JPMorgan Chase Bank,* 2012 WL 4056785, at *4 (E.D.Cal. Sept. 14, 2012) (Denying borrowers' preliminary injunction, in part based on "the declaration of one of *Chase's HL Senior Research Specialist*, Roberto Silva, states that Chase acquired its interest in the subject loan through the [Agreement]. ... Silva also declares that Chase holds the original note in its possession at a designated confidential location and that Chase is the designated beneficiary under the deed of trust.") (emphasis supplied).

Accordingly, the trial court did not err in implicitly overruling foundation objections to Ms. Urquidi's Declarations.

b. The exhibits were appropriately authenticated, and judicially noticeable.

Mr. Short assigns error to admission of the Urquidi Declarations because they were not supported by attachment of sworn or certified documents under CR 56(e). (Appellant's Brief, p. 2, ¶1.1.) Appellant reads too much into the "sworn or certified copy" requirement of CR

56(e). As to each of the four identical exhibits attached to each of her two Declarations, Ms. Urquidi *swore* that they were copies of the documents. (CP 110-11, ¶¶6-10; CP 354-55, ¶¶6-10.) Accordingly, the CR56(e) requisite of providing the trial court with sworn documents was satisfied.

Further, even if the exhibit authentication was insufficient – which Wells Fargo expressly disputes – three of the documents (the Deed of Trust, WaMu Affidavit, and Chase Assignment) were recorded public records and thus are judicially noticeable under ER 201(b)(2) (authorizing the trial court to take judicial notice of a fact that is "not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). *Rodriguez v. Loudeye Corp.,* 144 Wn.App. 709, 725-26, 189 P.3d 168 (2008). Indeed, Wells Fargo argued for just such judicial notice in its reply briefing. (CP 106.)

In addition, contrary to Mr. Short's claim, a declarant's personal knowledge of contents of documents is not necessarily required. "Authentication is a threshold requirement designed to assure that evidence is what it purports to be." *State v. Payne,* 117 Wn.App. 99, 106, 69 P.3d 889 (2003). "CR 56(e) allows an [affidavit] to [be] base[d] on documents properly before the court. And this includes documents already in the court files, as well as additional documents presented by the

parties in a motion for summary judgment." *Int'l. Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.,* 122 Wn.App. 736, 745, 87 P.3d 774 (2004). CR 56(e)'s "requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact finder to find in favor of authenticity." *Id.,* at 746; ER 901(a) (authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). If the challenged documents "are properly authenticated [under ER 901 or 902] and are not excluded because of hearsay, then [a party] may rely on them in a summary judgment motion regardless of any lack of personal knowledge." *Int'l. Ultimate, supra,* at 746.

The trial court committed no error in considering the exhibits to Ms. Urquidi's Declarations.

c. The Note was appropriately authenticated, and has not been disputed.

As to the fourth exhibit, the Note, Mr. Short's objections are similarly unavailing. First, foundation was laid for Ms. Urquidi's knowledge of the loan documents, and the Note is obviously one such document. (CP 110, ¶3; CP 353-54, ¶3.) Second, Ms. Urquidi provided sworn testimony as to the location of the original Note. (CP 112, ¶16.) Third, the whereabouts of the original Note was also established in Plaintiff's discovery responses. (CP 609.) And finally, although having

multiple opportunities to do so, Mr. Short *never* questioned the authenticity of the Note, copies of which were attached to and authenticated by the Complaint and two supporting Declarations. (CP 110, ¶6; CP 116-22; CP 354, ¶6; CP 357-63; CP 409, ¶4; CP 414-20.)

Accordingly, there is no true issue of fact that Chase, as Plaintiff's authorized agent, possessed Mr. Short's original Note.

E. <u>If the Trial Court Erred by Considering the Two Urquidi Declarations, the Error was Harmless</u>.

For all the reasons stated above, the trial court did not err in considering the two Declarations of Araceli Urquidi and their attachments. Even should overruling Mr. Short's evidentiary objections be found an abuse of the trial court's discretion, however, such error was harmless.

The last three paragraphs of the Urquidi Reply Declaration (CP 111-12, ¶¶14-16) were virtually identical to Plaintiff's written discovery responses (CP 604-09). Under CR 56(e), "[t]he court may permit affidavits to be supplemented ... by ... answers to interrogatories." Mr. Short himself placed Wells Fargo's discovery responses into evidence in connection with the summary judgment hearing. (CP 337-38; CP 599-610.) Consequently if the trial court erred in overruling the objections to the two Urquidi Declarations, the error was harmless, as the identical uncontroverted facts were already in the summary judgment record.

To the extent Mr. Short may be asserting his payment default was not adequately proven, both of Ms. Urquidi's Declarations swore to that default. (CP 111, ¶11; CP 355; ¶11.) No further documentation was necessary to prove it. In addition, Mr. Short himself acknowledged his default in the payment terms:

> THE COURT: Okay, and are – are you prepared today or can you point to any evidence, Mr. Short, that – that you made the payments on this note to someone? Anyone?
> MR. SHORT: Absolutely not.
>
> ...
>
> THE COURT: Did you – can you show payments then tendered to Washington Mutual Bank?
>
> MR. SHORT: I could – I could show that I made payments to Washington Mutual Bank but not recently.
>
> THE COURT: Not since –
>
> MR SHORT: --I—I initially made payments to Washington Mutual Bank.
>
> THE COURT: But you agree not since April of 2010?
>
> MR. SHORT: Yeah.

(RP 01/27/12, p. 11, l. 6 – p. 13, l. 5.)

Consequently, any claimed error in admitting Ms. Urquidi's Declarations of default were cured by Mr. Short's admission.

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, Wells Fargo carried its summary judgment proof by uncontroverted, competent, admissible evidence. Mr. Short did not dispute the validity or terms of the Note and Deed of Trust, and admitted his default. No law requires prior filing or production of the original Note for a judicial foreclosure judgment to be entered.

Mr. Short's circumstances in defaulting on his mortgage, while unfortunate, do not differ from those of many other real property owners, and do not entitle him to vacate a rightfully granted and supported order of judicial foreclosure. This Court should:

1. Affirm entry of the trial court's Order Granting Plaintiff's Motion for Summary Judgment, dated January 27, 2012;

2. Affirm entry of the trial court's Order Denying Defendant's Motion to Reconsider, dated March 15, 2012;

3. Dismiss this appeal; and

4. Award Wells Fargo its costs on appeal, pursuant to a Cost Bill to be presented after entry of this Court's order.

RESPECTFULLY SUBMITTED this 29th day of March, 2013.

BISHOP, WHITE, MARSHALL
& WEIBEL, P.S.

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IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CHRISTOPHER L. SHORT, Appellant, v. WELLS FARGO BANK, N.A. as Trustee to WaMu Mortgage Pass-Through Certificates Series 2005-PR1 Trust, Respondent.	Case No. 30726-3-III AFFIDAVIT OF SERVICE

COUNTY OF KING)
) ss
STATE OF WASHINGTON)

The undersigned being first duly sworn upon oath, deposes and says:

That on the 29th day of March, 2013, she caused to be delivered copies of the following document: Respondent Wells Fargo Bank's Amended Brief, to the following parties in the manner indicated:

Via U. S. Mail
Christopher L. Short
P. O. Box 1080
Seattle, WA 99166

Dated this 29th day of March, 2013

Barbara L. Bollero

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SIGNED AND SWORN TO (or affirmed) before me on the 29th day of March, 2013.

Ana I. Todakonzie

ANA I. TODAKONZIE
Notary Public in and for the
State of Washington.
Residing in Seattle, Washington.
My appointment expires: 2/28/2015.