70628-4
90512-6

SUPREME COURT OF THE STATE OF WASHINGTON,

HERBERT HEINTZ AND BARBARA HEINTZ, HIS WIFE,

PETITIONERS

v.

J. P. MORGAN CHASE BANK NATIONAL ASSOCIATION AND QUALITY LOAN SERVICE CORP. OF WASHINGTON, TRUSTEE,

RESPONDENTS.

MOTION FOR DISCRETIONARY REVIEW

Robert H. Stevenson
Attorney for Petitioners
810 3rd Ave. #228
Seattle, WA 98104
(206) 682-3624

Table of Authorities

A. Identity of Petitioners

Herbert Heintz and his wife ask this court to accept review of the decision of the Court of Appeals, Division 1, dated June 16, 2014.

B. The Court of Appeals reviewed a Summary Judgment dismissing an action by Heintz pursuant to Civil Rule CR12(b)(6). The decision was unpublished and entered on June 16, 2014, affirming the trial court's dismissal.

Attached is Appendix A containing a copy of said decision.

C. Errors of Court of Appeals

1. Did the Court miscalculate the "trigger" for raising monthly payments of the note by misreading and applying the wrong sections of the note and the math involved.

2. Can Heintz be in "default" on his note if he has made all of his payments called for by the 5-year moratorium in his note?

3. Can the Court ignore the moratorium in the note which is plain and unambiguous?

4. Did the Court misapply CR 12(b)(6) rule of the Superior Court in Chase's Motion to Dismiss the complaint of Heintz?

5. Can the Court exclude extrinsic evidence of the circumstances of the execution of the 5-year moratorium?

6. Can a trustee under a deed of trust ignore R.C.W. 61.24.03(8) requiring a written notice of default within 30 days of a foreclosure sale and 120 days continuance under R.C.W. 61.24.040(6)?

D. Statement of the Case

This appeal represents a common example of a 2007 mortgage executed for the purpose of paying interest only for a period of time with the balance of the interest added to the principal due.

In October of 2007, the Petitioners (Heintz), with the agreement of Washington Mutual Savings Bank of Seattle, refinanced their home mortgage for a lower rate of interest and borrowed one million dollars. The monthly payments were $3451.26 per month for a period of 5 years. (Section 4 (I), p.3 of promissory note):

> "Section4 (I) required monthly payment. On the fifth anniversary of the due day of the first monthly payment, and on that same day every fifth year thereafter, any minimum monthly payment will be adjusted without regard to the payment cap limitation in Section 4(F)." (Emphasis Ours.)

Relying on the 5-year moratorium, Heintz made payments for 27 months, in addition to paying insurance and taxes.

Unknown to Heintz, the Federal Deposit Insurance Corporation (FDIC) closed down Washington Mutual on September 25, 2008, and sold its assets to Chase the same day. It included the Heintz note and deed of trust.

Meanwhile, Chase sent a written first notice to Heintz on October 17, 2008, to pay a raised monthly sum of $3710.00. Chase continued to send notices raising the monthly payments and completely ignored the 5-year moratorium in the note. Protests by Heintz were summarily disregarded by Chase.

A first foreclosure sale by Chase, set for February 11, 2011, was cancelled and set over to a new date of December 12, 2012, and eventually cancelled by Chase. The trustee, Quality Loan Service, allowed two years to elapse between a notice of default in September 2010 and November 16, 2012 without a notice of default as required by R.C.W. 61.24.031 (8). This statute requires a 30-day notice of default. The trustee also violated R.C.W. 61.24.040(6) fixing 120 days as the maximum time a nonjudicial foreclosure can be continued. This breach voids any sale. The Court of Appeals ignored these breaches and contrary to the brief of Heintz, claimed Heintz failed to identify any authority for the claim against the trustee.

E. Argument Why Review Should Be Accepted

I. THE COURT REFUSED TO APPLY THE "CONTEXT" RULE LAID DOWN IN BERG v.. HUDESMAN WHICH ALLOWS EVIDENCE OF THE SURROUNDING CIRCUMSTANCES AND BACKGROUND OF AN AGREEMENT OF THE PARTIES.

Summary judgment is not available where the provisions of an agreement are plain and unambiguous. The main purpose of the Court is to ascertain the intention of the parties. In this case, the parties were Heintz and Washington Mutual Savings Bank. Berg v. Hudsman, 115 Wash. 2d 657, 801 Par. 2d 222 (1990).

The Court gave almost no credence to the provision which gave Heintz a 5-year moratorium on his monthly payments before a change could be made by the contract assignee, Chase. Instead, the Court wrongly focused on provisions that gave a right to change payments after the 5-year moratorium. If there is an ambiguity, the Court should remand for trial so that any ambiguity can be resolved by testimony. Evidence of the surrounding circumstances and intent of the original parties is admissible to resolve the problem even if there is no ambiguity. Berg, p. 669 and 671:

> ".....We need not reach the question of integration nor do we decide whether the matter is properly subject to appellate review in this case. In light of our adoption of the context rule for interpreting written contracts in accord with the party's intent, the summary judgment in favor of the landlord must be reversed and this matter must be remanded for trial."

The Court was in error for refusing to consider the affidavit of Heintz, which Chase never opposed at trial, setting out the intention of the parties and surrounding circumstances giving rise to the 5-year moratorium.

II. THE COURT WRONGLY TREATED A CR12(b)(6) MOTION THE SAME AS A SUMMARY JUDGMENT WHICH CONFLICTS WITH WASHINGTON CASE LAW.

The Court wrongly refused to apply the meaning of the use of CR12(b)(6) of the Rules of Superior Court. Instead of applying the rule which is a substitute for the old demurrer, the Court simply declared the rule to be "inappropriate." Appendix p.5.

A CR12(b)(6) motion for dismissal for failing to state a cause of action summary judgment is sparingly granted. It should not be granted unless it appears that no state of facts could be proved which would entitle a party to relief Collins v. Lomas Nettleton Corp., 29 Wash. App. 425, 628 Par. 2nd 855 (1981); Street v. Moore,. 26 Wash. App 450, 613 Par. 2d 1188 (1981).

Under a CR12(b)(6) motion for dismissal on the pleadings, pleaded (e.g. the moratorium provisions and declaration of Heintz) are taken as true. The matter must be resolved by a trial, Pearson v. Vandermay, 67 Wash.2d 222, 407 Par.2nd 143) (1965) (use of CR12(b)(6) as an old demurrer). Hodgson v. Bicknell, 49 Wash. 2d 130, 136, 298 Par. 2d 844 (1956):

> "The rule is that the party who moves for judgment on the pleadings, admits for the purposes of the motion, the truth of every fact well pleaded by his opponent and the untruth of his own allegations which have been denied." (Emphasis Ours.)

III. THE COURT WRONGLY CALCULATED THE AMOUNT NECESSARY TO CHANGE MONTHLY PAYMENTS.

The Court disagreed that Chase changed the monthly payments in violation of the moratorium provision. Appendix A, p.3.

It instead turned to Section 4 of the note involving interest rates and monthly payment changes. Citing 4 E, the provision called for a determination of the monthly payment.

> "sufficient to repay the projected principal balance that would be sufficient to repay the projected principal balance I am expected to owe as of the payment

> change date in full on the maturity date at the interest rate in effect 45 days prior to the payment change date ....." (Emphasis Ours.)

Likewise, the Court looked to Section H of the note which stated in a different manner:

> "Limit on my unpaid principal, increased minimum monthly payment. My unpaid principal can never exceed a maximum amount equal to 115% of the principal amount originally borrowed. In the event my unpaid principal would otherwise exceed that 115% limitation, I will be paying a new minimum monthly payment until the next payment change date ...." (Emphasis Ours.)

These cited provisions are all contrary to the 5-moratorium which takes priority in the note. Washington Mutual and Heintz had agreed in the moratorium that Heintz would not pay the full interest rate per month for 5 years and instead would pay $3451 per month and add the difference of $4014 to the principal of $1,000,000 so long as Heintz did not exceed $1,150,000 or the 115% of the principal.

At the time Chase chose, in spite of the 5-year moratorium, to change the monthly payment on October 17, 2008, and changes thereafter, Heintz did not exceed the $1,150,000 or 115% of the principal. The Court was in error when it held that he had. Appendix A, p.4.

1. Obligation owed - $1,000,000 x interest rate at 8.75% = $7465 (per moth).
2. Heintz paid $3451 per month.
3. Difference between $3451 and $7465 is $4014 to be added to the principal.
4. Heintz paid a total of $93,177 over 27 months on his note.
5. At the end of the 27 months, the principal owed was $1,058,230 ($1,150,000 less interest paid of $93,177), not $1,150,000.

Chase was in breach of the agreement even under its own claim of change of interest exceeding the principal of $1,150,000, and so was the Court of Appeals.

IV. THE COURT WRONGLY DECIDED HEINTZ DID NOT CITE AUTHORITY FOR THE UNLAWFUL ACTS OF THE TRUSTEE.

The Court held that Heintz "failed to identify any authority for the claim that Quality Loan Service, the trustee under Heintz's deed of trust, lost its authority to act on the 2010 "notice of default". And, the Court further found that Heintz "cured the defaul". Appendix A, 6

This reading is in error. In Heintz's opening appellate brief, Heintz pointed out the negligence and wrong acts of the trustee. It explained that the conduct of the trustee was a question for trial, but the allegations revealed Heintz incurred attorney's fees and costs as a direct result of the conduct.

Given the Heintz foreclosure was nonjudicial, notices are important because the debtor has no court protection. Cox v. Helenius, 104 Wash. 2nd 383 (1985) (trustee in a deed trust has a fiduciary duty to both the mortgage and mortgagee and must act impartially).

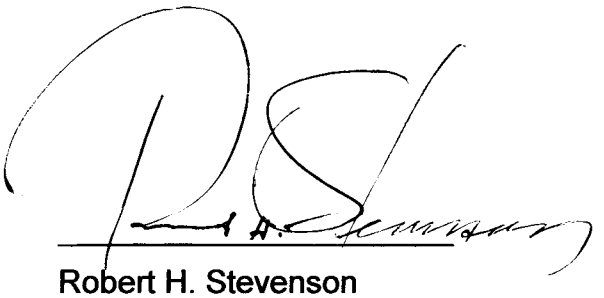
Under R.C.W. 61.24.03(8) a Notice of Default must be given for Chase's second foreclosure sale which was set for June 2012. The first notice of default was sent by the Trustee for the first sale, on September 2010. No notice of default was sent to Heintz for the second sale. The Court held that the original first notice of default was good enough, contrary to the clear wording of the statute. This is in error.

In addition, the Court refused to consider that the trustee continued the first sale for two years and did not abide by R.C.W. 61.24.040(6) which fixed 120 days as the maximum time a nonjudicial foreclosure can be continued. The Court ignored this requirement also and found the trustee had acted properly. CHD, Inc. v. Bayles, 138 Wash. App. 131, 137, 157, Par. 2d 415 (2007); Albice v. Premier Mortgage Services, 174 Wash. 2d 360 (2011).

CONCLUSIONS

This Court should accept review of the decision of the Court of Appeals for the reasons stated above and reverse and remand this case for trial on all issues.

Dated this 10th day of July, 2014.



Robert H. Stevenson
Attorney for Petitioners

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HERBERT HEINTZ and BARBARA HEINTZ, husband and wife, Appellants, v. JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, and QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, trustee, Respondents.	No. 70628-4-I DIVISION ONE UNPUBLISHED FILED: June 16, 2014

Cox, J. — After defaulting on a promissory note secured by a deed of trust, the borrower filed suit claiming the lender increased the monthly payment in violation of terms of the note and the successor trustee under the deed of trust lacked authority to schedule a nonjudicial foreclosure sale. Because no genuine issue of material fact appears in the record and the lender and successor trustee are entitled to judgment as a matter of law, we affirm the orders dismissing the complaint.

In October 2007, Herbert and Barbara Heintz (Heintz) obtained a one million dollar loan to refinance their home from Washington Mutual Bank FA by means of a promissory note and a deed of trust to secure the note. In December 2012, Heintz filed a complaint to restrain a nonjudicial foreclosure sale and for restitution for breach of the loan agreement against Quality Loan Service Corp. of

judgment order, we view the facts and reasonable inferences in the light most favorable to the nonmoving party.[2] We may affirm an order granting summary judgment if there are no genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law.[3] Under 12(b)(6), dismissal is proper only if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery."[4] In making this determination, the court presumes the plaintiff's allegations to be true and "may consider hypothetical facts not included in the record."[5] If materials "outside the pleadings are presented to and not excluded by the court," the CR 12(b)(6) motion is treated as a summary judgment motion under CR 56.[6]

As below, Heintz claims on appeal that Chase raised the monthly payment in violation of the terms of the note providing a "moratorium" preventing any change to the monthly payment amount for five years. We disagree.

In a section entitled "4. INTEREST RATE AND MONTHLY PAYMENT CHANGES," the note provides in pertinent part:

> (E) Payment Change Dates
> Effective every year commencing DECEMBER 01, 2008, and on the same date each twelfth month thereafter ("Payment Change Date"), the Note Holder will determine the amount of the monthly payment that would be sufficient to repay the projected principal balance I am expected to owe as of the Payment Change Date in full on the maturity date at the interest rate in effect 45 days prior to the Payment Change Date in substantially equal payments. The result of this calculation is the new amount of my minimum monthly payment, subject to Section 4(F) below, and I will make payments

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[2] Lam, 127 Wn. App. at 661 n.4.
[3] CR 56(c).
[4] Tenore v. AT&T Wireless Services, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).
[5] Id.
[6] CR 12(b)(6).

> in this new amount until the next Payment Change Date unless my payments are changed earlier under Section 4(H) of this Note.
> (F) Monthly Payment Limitations
> Unless Section 4(H) and 4(I) below apply, the amount of my new minimum monthly payment, beginning with a Payment Change Date, will be limited to 7 1/2% more or less than the amount I have been paying. This payment cap applies only to the principal payment and does not apply to any escrow payments Lender may require under the Security Instrument.
> ...
> (H) Limit on My Unpaid Principal; Increased Minimum Monthly Payment
> My unpaid principal can never exceed a maximum amount equal to 115% of the principal amount originally borrowed. In the event my unpaid Principal would otherwise exceed that 115% limitation, I will begin paying a new minimum monthly payment until the next Payment Change Date notwithstanding the 7 1/2% annual payment increase limitation. The new minimum monthly payment will be an amount which would be sufficient to repay my then unpaid Principal in full on the Maturity Date at my interest rate in effect the month prior to the payment due date in substantially equal payments.
> (I) Required Full Monthly Payment
> On the fifth anniversary of the due date of the first monthly payment, and on that same day every fifth year thereafter, my minimum monthly payment will be adjusted without regard to the payment cap limitation in Section 4(F).[7]

The unambiguous terms of the note provide for the annual recalculation of the monthly payment beginning after the first year of the loan. And the "payment cap" merely limits the extent of each change to a 7 ½ percent increase or decrease from the previous monthly payment until December 1, 2012, the fifth anniversary of the due date of the first monthly payment. Heintz fails to identify any language in the note preventing annual changes to the minimum payment in the first five years. Because the reasonable meaning of the words in the note

[7] Clerk's Papers at 114.

demonstrate the objective intent of the parties, we will not consider extrinsic evidence offered by Heintz to support the claim of a different intent.[8]

Although Heintz did not specifically claim that Chase breached the terms of the note by increasing the monthly payment by more than 7 ½ percent, to the extent the court considered such hypothetical facts to be encompassed within the broad language of the complaint, dismissal under CR 12(b)(6) would have been inappropriate. But Chase presented copies of letters sent to Heintz between 2008 and 2011 listing the new monthly payment calculated for each Payment Change Date, none of which exceeds the previous payment by more than 7 ½ percent. And the record indicates that the trial court did not exclude the evidence. Heintz failed to respond with any evidence to raise a genuine issue for trial as to whether Chase breached the terms of the note. Because dismissal of Heintz's claim against Chase was proper under CR 56, the trial court did not err.

For the first time on appeal, Heintz claims that other terms of the note are illusory, vague, and incomprehensible. These arguments contradict Heintz's position below and were not properly preserved. We will not consider them.[9]

Heintz next contends that a genuine issue of fact for trial exists whether Quality violated the Deeds of Trust Act, chapter 61.24 RCW. Heintz acknowledges receiving a notice of default in 2010 and a notice of a February 2011 sale, which was never held. But Heintz claims the act required Quality to

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[8] Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005).

[9] RAP 2.5(a); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

issue a new notice of default before issuing the second notice of sale in November 2012. We disagree.

In 2010, the act required the trustee to provide a written notice of default to the borrower at least 30 days before issuing a notice of sale.[10] The act also provided time limits for the notice of sale and required the trustee to conduct the sale within 120 days of the original sale date or it would lose the authority to sell without issuing a new notice of sale.[11] But Heintz fails to identify any authority for the claim that Quality lost its authority to act on the 2010 notice of default. And no evidence before the trial court suggested that Heintz cured the default. The trial court properly granted summary judgment to Quality.

ATTORNEY FEES

Heintz and Chase each request an award of attorney fees under the terms of the deed of trust. The instrument provides, "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument." As the prevailing party, Chase is entitled to an award of fees under this provision.

Accordingly, we award Chase attorney fees and costs, subject to Chase's compliance with RAP 18.1.

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[10] Former RCW 61.24.030(8) (2010).

[11] Former RCW 61.24.040 (2010); Albice v. Premier Mortgage Services of Washington, Inc., 174 Wn.2d 560, 568, 276 P.3d 1277 (2012).

We affirm the summary judgment order and award attorney fees to Chase, subject to its compliance with RAP 18.1.

COX, J.

WE CONCUR:

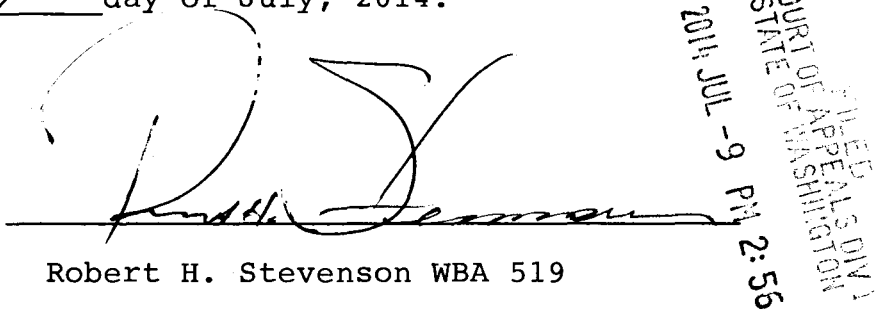
Dicky, J

Leach, J.

CERTIFICATE OF SERVICE

Robert H. Stevenson, swears under the penalty of perjury, pursuant to the laws of the state of Washington, that he mailed a copy of a Petition for Review in the Supreme Court to the court on 9th day of July, 2014 postage prepaid, and on the same day filed a copy of same with the Court of Appeals, Division 1 in Seattle, Washington. That on the same day I also mailed a copy of the Petition for Review to counsel for the Respondents at their last known addresses. postage prepaid. This certificate is made on the personal knowledge of affiant.

Dated this 9th day of July, 2014.



Robert H. Stevenson WBA 519