Supreme Court No. 92135-1

Court of Appeals No. 71724-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARISA BAVAND,

Appellant,

vs.

CHASE HOME FINANCE LLC et al.;

Respondents.

ANSWER OF RESPONDENT
NORTHWEST TRUSTEE SERVICES, INC.
TO APPELLANT'S PETITION FOR REVIEW

Submitted By:
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I. IDENTITY OF ANSWERING PARTY

Respondent Northwest Trustee Services, Inc. ("NWTS") hereby answers the Petition for Review of Appellant Marisa Bavand ("Petition for Review") as follows below.

II. STATEMENT OF RELIEF SOUGHT

NWTS requests that the Washington Supreme Court decline to accept discretionary review of the unpublished decision in *Bavand v. Chase Home Fin., LLC*, 2015 WL 4400739 (Jul. 20, 2015).

III. FACTS RELEVANT TO THE PETITION FOR REVIEW

On or about March 18, 2004, Ms. Bavand executed a promissory note (the "Note") in the amount of $160,000.00, payable to Capital Mortgage Corp. CP 1558-61. Ms. Bavand secured repayment of the Note by granting the lender a Deed of Trust which names real property at 628 168th Pl. S.W., Lynnwood, WA 98037 (the "Property") as collateral. CP 1650-67. Ms. Bavand uses the Property as an income-generating rental. CP 1695 (Bavand Dep. 35:13-20); *see also* Opening Brief of Appellant at 46.

Ms. Bavand defaulted on the terms of the Note and Deed of Trust when she failed to make the payments due for September 1, 2012 and each monthly payment due thereafter. CP 1554 (Mullen Dec. at ¶ 6); CP 1670.

On or about February 1, 2011, as a result of Ms. Bavand's default,

NWTS sent her a Notice of Default. CP 1669-71.

On February 2, 2011, an Appointment of Successor Trustee, naming NWTS as Successor Trustee under the Deed of Trust was recorded with the Snohomish County Auditor. CP 1673.

On or about March 14, 2012, JPMorgan Chase Bank, N.A. ("Chase") executed an unambiguous sworn declaration stating that it was the holder of the Note. CP 1677.

On or about May 2, 2012, a Notice of Trustee's Sale was recorded with the Snohomish County Auditor. CP 1679-82.

On or about August 8, 2012, Ms. Bavand's counsel wrote to NWTS asserting a number of "issues" in the foreclosure documentation, and demanding postponement of the Trustee's Sale. CP 1902-03. On August 17, 2012, NWTS' counsel responded to this letter, stating that the pending trustee's sale would be cancelled. CP 1686. Nonetheless, Ms. Bavand filed suit three days later. *Bavand v. Chase Home Fin., LLC*, Case No. 12-2-07395-1 (Snohomish Cnty. Supr. Ct.), Dkt. No. 2.

No trustee's sale of Ms. Bavand's rental Property has occurred. CP 1706 (Stenman Dec. at ¶ 11).

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IV. ANSWER TO ISSUES PRESENTED[1]

1. The Supreme Court decision in *Trujillo v. NWTS*, -- Wn.2d --, 2015 WL 4943982 (Aug. 20, 2015) does not change the outcome of this case, as the evidence demonstrated Chase's authority to foreclose as the beneficiary.

2. The declarations submitted by Chase and Flagstar Bank, FSB were admissible evidence in support of summary judgment.

3. Ms. Bavand was not entitled to additional discovery after she capably responded to the Defendants' summary judgment motions with a 48-page brief plus other documentation.

4. The trial court did not err in granting summary judgment to NWTS on Ms. Bavand's Consumer Protection Act ("CPA") claim, and that decision was properly affirmed on appeal.

5. The trial court did not err in granting summary judgment to NWTS on Ms. Bavand's criminal profiteering claim, and that decision was properly affirmed on appeal.

6. The issues presented by Ms. Bavand in this case are not of substantial public interest.

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[1] NWTS did not participate in co-Defendant Chase's Motion to Strike the Declaration of Tim Stephenson, and therefore, NWTS will not address Ms. Bavand's related Assignment of Error.

V. AUTHORITY AND ARGUMENT

A. Standard of Review.

Discretionary acceptance of a decision terminating review may be granted only:

> (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.

R.A.P. 13.4(b). Ms. Bavand addresses only the first and fourth criteria. Petition for Review at 19.

B. The Court of Appeals' Decision Does Not Conflict With Supreme Court Precedent.

Ms. Bavand contends that the Court of Appeals incorrectly found that NWTS satisfied RCW 61.24.030(7)(a) in light of *Trujillo* and *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014). Petition for Review at 8. But both *Trujillo* and *Lyons* remanded claims based on the presence of an "ambiguous" beneficiary declaration, while this case involves a declaration that *does not contain equivocal language*. CP 1677.

Lyons permits reliance on a beneficiary declaration – or numerous other forms of proof – *unless* "there is an indication that the beneficiary declaration might be ineffective," in which case "a trustee should verify its

veracity...." 181 Wn.2d at 790. Here, not only was the beneficiary declaration unambiguous and compliant with RCW 61.24.030(7)(a), but Chase actually did hold the Note at all relevant times during the entire unfinished foreclosure process. CP 1554 (Mullen Dec. at ¶ 4); CP 1677. Moreover, NWTS was not presented with any legitimate reason to call Chase's declaration into question. *Cf. Lyons, supra.*

NWTS does not disagree that RCW 61.24.030(7)(a) requires proof of a note's "ownership" prior to recording a sale notice. *See Trujillo, supra.* However, there is *no case law* supporting Ms. Bavand's contention that "ownership" equates to a loan's investor.

To the contrary, the Court should look to the common meaning of an undefined statutory term. *Nissen v. Pierce Cnty.*, 2015 WL 5076297, at *7 (Aug. 27, 2015), *citing HomeStreet, Inc. v. Dep't of Revenue,* 166 Wn.2d 444, 451, 210 P.3d 297 (2009). In *Nissen*, the Court specifically analyzed the word "owned," finding that "to 'own' a record means 'to have or hold [it] as property." *Id.*, *citing O'Neill v. City of Shoreline,* 145 Wn. App. 913, 925, 187 P.3d 822 (2008); Webster's Third New International Dictionary 1612 (2002). The Deed of Trust Act supports using this common definition.

Defining the term "owner" in RCW 61.24.030(7)(a) as the Court did in *Nissen* would be consistent with *Bain v. Metro. Mortg. Grp., Inc.*,

which found that interpretation of the Deed of Trust Act "should be guided by... UCC definitions, and thus a beneficiary must either actually *possess* the promissory note or be the payee...." 175 Wn.2d 83, 104, 285 P.3d 34 (2012) (emphasis added). Ms. Bavand's reasoning would absurdly transform a beneficiary's declaration of its holder status into proof of being an investor, whether true or not.[2] Moreover, the Deed of Trust Act's mediation statute clearly differentiates the terms "beneficiary" and "investor," substantiating that under principles of statutory interpretation, a beneficiary and an investor are *not per se the same entity* for purposes of non-judicial foreclosure. *See* RCW 61.24.163(5)(j).

Here, the evidence showed that Chase was the entity in *possession* of the Note. CP 1554 (Mullen Dec. at ¶ 4). The Note was endorsed in blank and Chase was its holder; *i.e.*, the beneficiary entitled to foreclose on the Property after Ms. Bavand's default on the loan it secured. CP 1556 (Mullen Dec. at ¶ 9).[3] NWTS obtained a sworn declaration establishing that fact prior to recording a sale notice, which satisfied RCW 61.24.030(7)(a). CP 1677. Whether Fannie Mae was the loan's *investor*

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[2] Defining "owner" as "investor" would also bizarrely create a statutory scheme in the Deed of Trust Act whereby a beneficiary, *i.e.* note holder, could effectuate every step in the process, but suddenly upon reaching the sale notice procedure, that entity could no longer complete foreclosure unless it was simultaneously the loan's investor – a duality that rarely exists among loans in Washington State.

[3] Ms. Bavand argues that Chase was "*merely* a 'holder' of Ms. Bavand's Note, acting as an agent for Fannie Mae." Petition for Review at 13. But a holder is *precisely who can foreclose* non-judicially in Washington State. RCW 61.24.005(2).

is not material to any of Ms. Bavand's legal theories involving NWTS, and further appellate review is not warranted on this basis.

C. The Court of Appeals Properly Admitted Declarations From Chase and Flagstar.

NWTS' Motion for Summary Judgment relied, in part, on the arguments presented by Chase and Flagstar. CP 1627. Those co-Defendants each submitted supporting declarations confirming information about negotiation and delivery of the Note. CP 1498-1507; CP 1552-1603.

Courts broadly interpret the terms "custodian" and "other qualified witness" under RCW 5.45.020, the business records statute. *See State v. Quincy,* 122 Wn. App. 395, 95 P.3d 353 (2004); *State v. Ben-Neth,* 34 Wn. App. 600, 663 P.2d 156 (1983). The person who created a record need not be the same individual identifying it. *See Cantrill v. Am. Mail Line, Ltd.,* 42 Wn.2d 590, 257 P.2d 179 (1953); *Ben–Neth, supra.* at 603. Indeed, "the requirement of personal knowledge imposes only a 'minimal' burden on a witness; if reasonable persons could differ as to whether the witness had an adequate opportunity to observe, the witness's testimony is admissible." *Schultz v. Wells Fargo Bank*, 2013 WL 4782157 (D. Or. Sept. 5, 2013), *citing* 1 *McCormick on Evidence* § 10 (Kenneth S. Broun, 7th ed. 2013).

In *Amer. Express Centurion Bank v. Stratman*, Division One upheld the admissibility of an employee declaration expressing the contents of business and financial records. 172 Wn. App. 667, 292 P.3d 128 (2012); *see also Capitol Specialty Ins. Corp. v. JBC Entm't Holdings, Inc.*, 172 Wn. App. 328, 289 P.3d 735 (2012) (use of declaration upheld although the corporate vice-president did not state personal knowledge of certain aspects related to an insurance policy).

In *Discover Bank v. Bridges*, Division Two affirmed the propriety of declarations where a creditor's employees stated who they worked for, that they had access to relevant account records, testified based on personal knowledge from a review of those records, and the records were made in the ordinary course of business. 154 Wn. App. 722, 226 P.3d 191 (2010).

The declarations Ms. Bavand challenges each met the same criteria as the declarations analyzed in *Stratman* and *Bridges*. There is no conflict with existing precedent and no public interest in accepting further review of the evidence supporting summary judgment in this case.

D. Ms. Bavand Was Not Entitled to Additional Discovery.

A trial court "may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would

be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003). Here, Ms. Bavand failed to offer *any* valid reason for a continuance to the trial court.

First, Ms. Bavand did not properly note a CR 56(f) Motion in accordance with the Snohomish County Court's Local Rules, but rather included her request for a continuance as an afterthought in responsive briefing on summary judgment.

Second, Ms. Bavand's lawsuit was filed in August 2012, and yet she conducted no depositions during this entire eighteen-month period. CR 56(f) is not designed to reward procrastination. Ms. Bavand did send twenty pages of discovery demands to NWTS back in December 2012, and those were all answered within the required timeframe. CP 1284-1317 (Jones Dec. at Ex. G).

Third, Ms. Bavand did not indicate how further discovery would be of assistance to her. NWTS answered her Interrogatories and Requests for Production (the only discovery she sought from NWTS), and NWTS' responses were signed by counsel per CR 26(g). CP 1317.

Fourth, Ms. Bavand did not identify how she was somehow unable to defend against summary judgment. Quite the opposite – she filed a 48-page opposition brief articulating her position on every legal issue and

provided declarations to the trial court. CP 349-1367; CP 1387-1448; CP 1449-1497.

Review of Ms. Bavand's claim under CR 56(f) is not appropriate given these facts. *See also Butler, supra.*

E. The Trial Court Did Not Err in Granting Summary Judgment to NWTS on Ms. Bavand's CPA Claim.

Ms. Bavand assigns error to the trial court's finding that Chase was the proper beneficiary based on "mere possession of... [the] Note, endorsed in blank...." Petition for Review at 15. But it is *precisely* possession and endorsement that makes one a note holder, *i.e.*, beneficiary. *See* RCW 62A.3-109; RCW 62A.3-201. If there is negotiation of a note, that holder possesses the right to enforce it, as well as the right to enforce any instrument securing the note's repayment, *e.g.*, a deed of trust. *See Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313 (1872); *see also* RCW 62A.3-203, cmt. 1 ("the right to enforce an instrument and ownership of the instrument are two different concepts.").

Further, Ms. Bavand seeks to mislead the Court about NWTS' statutory duty, insisting that trustees owe a "fiduciary" duty to borrowers. Petition for Review at 16, *citing Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013); *cf. Bavand*, 2015 WL 4400739 at *10, n. 25. In *Klem*, the Court addressed a trustee's "fiduciary duty" only because the

underlying facts dated from an earlier version of the Deed of Trust Act.[4] The *current* statute provides: "[t]he trustee or successor trustee has a duty of *good faith* to the borrower, beneficiary, and grantor." RCW 61.24.010(4) (emphasis added).

Nowhere in the record has Ms. Bavand shown that she produced testimony or documentation supporting the requisite prongs of a CPA claim.

Ms. Bavand failed to prove how it was unfair or deceptive for NWTS to have carried out its duties as trustee on behalf of the *correct* beneficiary, and she introduced no evidence below establishing that some entity other than Chase was actually holding the Note, or that NWTS had reason to believe the same.

Ms. Bavand failed to prove that NWTS engaged in a broad sweep of activity likely to affect the general public. *See e.g., Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on

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[4] As Chief Justice Madsen noted:

> [t]he majority repeatedly refers to the fiduciary duty of the trustee. In the present case, the trustee owed fiduciary duties because among other things the nonjudicial foreclosure sale occurred early in 2008. However, the judicially imposed 'fiduciary' standard applies, at the latest, only in cases arising prior to the 2008 amendment of RCW 61.24.010. The 2008 amendment expressly rejected the 'fiduciary' standard. *Id.*

information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to satisfy public interest requirement).

Ms. Bavand likewise failed to prove that receiving legally-mandated foreclosure notices due to her own failure to pay the secured loan led to compensable injury. If the simple act of initiating a non-judicial foreclosure were to serve as grounds for damages to a plaintiff who may experience a "loss of time," denigration of credit, or desire to "investigate" the lender's authority after defaulting on a secured loan, then *every* non-judicial foreclosure in Washington State would give rise to CPA liability. Instead, the CPA requires a causal connection between harm and unfair or deceptive conduct, which is notably absent in this case. *See Cooper's Mobile Homes, Inc. v. Simmons,* 94 Wn.2d 321, 617 P.2d 415 (1980) (alleged deceptive acts must result in injury).

The Court of Appeals observed that "extensive correspondence between Bavand and Chase from at least 2010 to 2012 demonstrates that Bavand knew who held her note, who was enforcing the obligation, and to whom she could apply for assistance." *Bavand,* 2015 WL 4400739 at *6. Consequently, "any inability on Bavand's part to 'meaningfully pursu[e] her options' was not because of any lack of reasonable notice or opportunity to seek foreclosure assistance." *Id.* at *5. Thus, Ms. Bavand's CPA claim was correctly adjudicated in NWTS' favor.

F. The Trial Court Did Not Err in Granting Summary Judgment to NWTS on Ms. Bavand's Criminal Profiteering Claim.

Ms. Bavand additionally contends that she was entitled to a trial on her criminal profiteering claim under RCW 9A.82 *et seq.* Petition for Review at 17. She argues that a "pattern of misconduct" existed, including "extorting funds." *Id.* at 17-18.

However, Ms. Bavand was unable to present evidence of three acts in five years that NWTS committed for financial gain, and which constitute felonies. RCW 9A.82.010(12); *see also Trujillo, supra.* at *8 ("Trujillo fails even to identify an enterprise in her complaint.").[5] Thus, the Court of Appeals accurately found, "the record does not support any claim for criminal profiteering. The respondents' actions related to Bavand's loan consist of servicing the loan and sending numerous notices about the foreclosure following Bavand's undisputed default." *Bavand,* 2015 WL 4400739 at *6.

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[5] It is unclear whether Ms. Bavand followed RCW 9A.82.100(10) in this action. That subsection states, in relevant part: "A person other than the attorney general or county prosecuting attorney who files an action under this section shall serve notice and one copy of the pleading on the attorney general within thirty days after the action is filed with the superior court." The statute does not proscribe a penalty for non-compliance, although dismissal of the claim appears to be a reasonable option.

G. Ms. Bavand's Lawsuit Does Not Present a Substantial Public Interest.

Ms. Bavand is hardly a victim of "unscrupulous lenders and servicers," as she suggests. Petition for Review at 18.[6] Ms. Bavand – a licensed attorney – has been involved in many cases related to the foreclosure of rental properties she owned but could no longer afford. *See, e.g., Bavand v. OneWest Bank*, 587 Fed. Appx. 392 (9th Cir. 2014) (affirming summary judgment in favor of lender and NWTS on multiple claims); Case No. 15-00065 (W.D. Wash.) (pending Chase judicial foreclosure); Case No. 12-2-01711-3 (Snohomish Cnty. Supr. Ct.) (appeal dismissed for late filing); Case No. 11-2-05131-3 (Snohomish Cnty. Supr. Ct.) (summary judgment granted to defendants); Case No. 11-2-04945-9 (Snohomish Cnty. Supr. Ct.) (summary judgment granted to defendants); *see also Bavand v. OneWest Bank*, 176 Wn. App. 475, 309 P.3d 636 (2013) (reversing CR 12(b)(6) dismissal of claims related to personal residence; remanded for further proceedings due to a limited record).

What has become unfortunately "typical" based on expansive readings of recent case law is the proliferation of lawsuits designed to stall foreclosure through vague, burden-shifting claims of malfeasance against every company involved in the process. *Cf.* Petition for Review at 19.

[6] NWTS accepts Ms. Bavand's implicit recognition through silence that trustees are not swept within the scope of such behavior.

Purely private transactions have been brought within the scope of the CPA, and bare assertions of "questioning" the identity of one's lender – despite information contained in the plain language of loan documents – have led to threats of liability against trustees such as NWTS. The Court should quell this tide by bringing Ms. Bavand's legal challenge to a close.

VI. CONCLUSION

NWTS delivered notices to Ms. Bavand that her loan was in default, and the rental Property was subject to foreclosure. NWTS then stopped the process upon learning of Ms. Bavand's procedural concerns, which were ultimately determined to be unsubstantiated. Summary judgment was the appropriate outcome.

Thus, NWTS respectfully requests that the Supreme Court decline to accept Ms. Bavand's Petition for Review. R.A.P. 13.4(b)(1) and (4). The Court of Appeals' unpublished decision does not conflict with established precedent and it does not give rise to a matter of substantial public interest.

DATED this 10th day of September, 2015.

RCO LEGAL, P.S.

By: _____
Joshua S. Schaer, WSBA #31491
Of Attorneys for Respondent
Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On September 10, 2015 I caused a copy of the **Answer of Respondent Northwest Trustee Services, Inc. to Appellant's Petition for Review** to be served to the following in the manner noted below:

Richard Llewelyn Jones Kovac & Jones, PLLC 1750 112th Ave. NE, Suite D-151 Bellevue, WA 98004 Attorneys for Plaintiff	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile
Fred B. Burnside Ryan C. Gist Davis Wright Tremaine, LLP 1201 Third Ave., Suite 2200 Seattle, WA 98101 Attorneys for Defendant Flagstar Bank, FSB	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

Katie A. Axtell Marshall & Weibel, P.S. 720 Olive Way, Suite 1201 Seattle, WA 98101 Attorneys for Defendants Chase Home Finance, LLC, Federal National Mortgage Association, and Mortgage Electronic Registration Systems, Inc.	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 16th day of September, 2015.

Kristine Stephan, Paralegal

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Marisa Bavand (Appellant) v. Chase Home Finance, LLC, et al. (Respondents)
Supreme Court No. 92135-1
Court of Appeals No. 71724-3-I
Filed by: Joshua Schaer
WSBA #31491
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Please file the attached **Answer of Respondent Northwest Trustee Services, Inc. to Appellant's Petition for Review.**

If there are any questions, please contact us. Thank you.

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