NO. 928681

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

VALERIE SLOTKE, an unmarried woman,
Petitioner/Plaintiff,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for IXIS REAL ESTATE CAPITAL TRUST 2006-HE3 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-HE3,

Respondent/Defendant.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This petition for review arises out of a judicial foreclosure action brought by Deutsche Bank as Trustee ("Deutsche Bank as Trustee")[1] after borrower Valerie Slotke "Slotke" defaulted on a promissory note and deed of trust held by the Trust. Slotke has never argued that she was appropriately paying on the Note or that the Note is not in default. Instead, she petitions this Court on the grounds that it should reverse its prior rulings regarding whether the mortgage follows the note and create new law prohibiting relying on the language of a note and a deed of trust in the same action.

This Court's discretionary review is not warranted. The Court of Appeals' decision is fact-specific and entirely consistent with settled Washington law. Slotke provides no reasonable argument to support her claim that the issue she presents qualifies as an issue of substantial public interest, and it is clear there is no conflict among the Courts of Appeal. Accordingly, this Court should deny review.

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[1] Respondent's complete name is Deutsche Bank National Trust Company, as Trustee for Ixis Real Estate Capital Trust 2006-HE3 Mortgage Pass Through Certificates, Series 2006-HE-3.

II. ISSUES PRESENTED FOR REVIEW

1. Is there any basis, as required under the Washington Rules of Appellate Procedure ("RAP"), Rule 13.4(b), for this Court to accept discretionary review of this matter?

2. Is the Trust entitled to an award of attorney's fees and costs incurred in responding to the Slotke's Petition for Review?

III. COUNTER-STATEMENT OF THE CASE

The following outlines the relevant factual and procedural history of this matter:

A. Slotke Obtains a Loan and Grants a Deed of Trust

On May 16, 2006, Slotke executed and delivered a Promissory Note (the "Note") for a loan in the amount of $253,575.00 to First Financial Services, LLC, DBA The Lending Center. (CP 10, 14-19.) In order to secure the payments required by the Note, Slotke concurrently executed the Deed of Trust, which granted her lender a lien against the Property. (CP 10, 21-42.)

B. The Loan was Securitized and Assigned to Deutsche Bank as Trustee

The ownership interest in the Loan was assigned to a securitized mortgage loan trust named Ixis Real Estate Capital Trust 2006-HE3

Mortgage Pass Through Certificates, Series 2006-HE3. (CP 3, 9.) The Trustee of the Trust is Deutsche Bank National Trust Company. (*Id.*) An Assignment of Deed of Trust was recorded on August 5, 2011, under Pierce County recording number 201108050538, reflecting that Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for First Financial Services, LLC, DBA The Lending Center and its successors and assigns, assigned its interests in the Deed of Trust to Deutsche Bank as Trustee. (CP 44.)

C. Slotke Defaults on the Loan and Deutsche Bank as Trustee Initiates Foreclosure and Obtains Summary Judgment

It is undisputed that Slotke defaulted on her Loan on or about April 1, 2010, and that she failed to cure the default. (CP 11-12.) On May 14, 2013, Deutsche Bank as Trustee filed a judicial foreclosure action in Pierce County Superior Court and was assigned Case No. 13-2-09169-6.

On January 16, 2014, Deutsche Bank as Trustee filed a Motion for Summary Judgment that was supported by several sworn affidavits. The evidence presented to the trial court established that (1) Slotke was in default, (2) Deutsche Bank as Trustee provided notice of the default to Slotke, (3) Deutsche Bank as Trustee was the holder of the note, and (4) all of the preconditions to enforcement of the Note and Deed of Trust had been met. (CP 9-46, 60-97.) Specifically as to evidence of Deutsche Bank

as Trustee's status as holder of the note, the evidence included an affidavit attesting that the note was physically in the possession of Deutsche Bank as Trustee or Deutsche Bank as Trustee's agent as custodian or bailee. (CP 10.) The affidavit also provided true and correct copies of the Note, Deed of Trust, and the Assignment of the Deed of Trust by MERS to Deutsche Bank as Trustee, which were recorded in the official records of Pierce County. (CP 14-44.) The copy of the original Note showed that the Note itself was specially indorsed to the Trust.

In opposition, Slotke did not challenge whether there was a default; did not challenge whether Deutsche Bank as Trustee physically possessed the Note; and did not challenge the special endorsement to Deutsche Bank as Trustee. Rather, Slotke argued that Deutsche Bank as Trustee was required to prove additional things in order to foreclose, such as that it owned (rather than only held) the Note and that the Note was transferred into the trust by the closing date of the trust. (CP 110-111.)

Ultimately, the trial court agreed that Deutsche Bank as Trustee had established that it was entitled to foreclose, and granted summary judgment.

D. Slotke's Appeal

Slotke appealed the trial court's grant of summary judgment to the Court of Appeals of the State of Washington, Division II. Her Opening Brief argued: (1) Deutsche Bank as Trustee was not entitled to enforce the

Note and Deed of Trust simultaneously in a judicial foreclosure action (Opening Br. at 14); (2) Deutsche Bank as Trustee could not foreclose on proof of its status as "holder," only, but was required to prove that it was "owner" of the beneficial interest in the Note and Deed of Trust (*Id.* at 14-21); and (3) Deutsche Bank as Trustee was not the holder of the Note by virtue of its physical possession of the Note; rather, the definition of holder in the UCC requiring possession referred to some other form of possession such that the actual holders were certificate holders of the trust. (*Id.* at 17-21.) In Slotke's Reply briefing, Slotke raised for the first time her argument that the deed of trust does not follow the note when the note is transferred to a new holder – but only when it is transferred correctly to a new owner – and that Washington courts have misapplied the rule that the security follows the note. (Reply Br. at 6-8.)

E. The Court of Appeals Affirms

On January 11, 2016, the Washington Court of Appeals affirmed the trial court's grant of summary judgment. *Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016). Among other decisions, the Court held that a foreclosing party need not prove it owns the Note. Pursuant to both the common law of Washington under *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wash. 2d 214, 222-23, 450 P.2d 166 (1969) and the law under UCC 3-301, as adopted in RCW 62A.3-301, proof that an entity is the "holder" of the note is proof that it is

entitled to enforce an instrument. *Slotke*, 367 P.3d at 604. Further, the court rejected Slotke's argument that Deutsche Bank as Trustee's foreclosure suit was an impermissible attempt to enforce the note and deed of trust simultaneously by seeking a judicial decree of foreclosure based on the failure to make note payments. *Id.* at 607.

Although the *Slotke* Court made other legal determinations, these are the only two issues on which Slotke now petitions for review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard for Review

Pursuant to the Washington Rules of Appellate Procedure, Rule 13.4(b), a petition for review to the Washington Supreme Court is accepted 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.

RAP 13.4(b). Slotke contends that review is warranted because the appeal raises an issue of substantial public interest. As discussed further below, Petitioner is mistaken and review is not warranted under any of the criteria established in RAP 13.4(b).

B. Slotke's Petition for Review is a Legally Unsupportable Challenge to Supreme Court Precedent

The Washington Court of Appeals' decision in this matter involves straightforward application of settled principles of law to the undisputed facts. Slotke's petition challenges settled Washington law concerning who is entitled to enforce a note; the role of an "owner" versus a "holder" of a note; and even the most basic process for bringing a judicial foreclosure suit. As discussed further below, none of the legal issues raised by Slotke have any merit or present any undecided issue under Washington law.

1. Deutsche Bank as Trustee was the "holder" entitled to foreclose as a matter of settled law

Deutsche Bank as Trustee proved that it was entitled to enforce the Note and therefore entitled to foreclose on the Deed of Trust in the underlying foreclosure matter. Under clear Washington law, both as expressly set forth in the Revised Code of Washington and as stated by this Court, the "person entitled to enforce" a note evidencing a home loan is the holder of the note *Brown v. Washington State Dep't of Commerce*, 184 Wash. 2d 509, 524-25, 359 P.3d 771 (2015) (citing RCW 62A.3-301.) Clear Washington law dictates that a "holder" of a promissory note is "the person in possession of a negotiable instrument that is payable either to

bearer or to an identified person that is the person in possession . . . ." RCW 62A.1-201(b)(21)(A). *See also Brown*, 184 Wash. 2d at 525 (quoting from statute); *Bain v. Metro Mortg. Group, Inc.*, 175 Wash. 2d 83, 104, 285 P.3d 34 (Wash. 2012) (quoting from statute, previously codified as RCW 62A.1-201(20)(2001)).

Here, it is undisputed that Slotke was in default on her Loan, and undisputed that the Note on which she was obliged was endorsed to Deutsche Bank as Trustee, who was also in physical possession of the Note. (CP 10, 14-44.) Deutsche Bank as Trustee was therefore the holder, entitled to enforce the Note. The Court of Appeals applied the well-settled law to the facts, affirming the trial court's determination that Deutsche Bank had proved its standing to foreclose. There is no reason for this Court to review that decision.

2. Slotke's argument that Deutsche Bank as Trustee was required to prove it owned the Note is contrary to this Court's precedent and not supported by any authority

Slotke's petition for review argues that status as a holder of the Note is inadequate for Deutsche Bank as Trustee to enforce the Deed of Trust. According to Slotke, RCW 62A.9-203(a), (b), and (g) set forth requirements that must be met for a person to obtain an enforceable interest in a note so that it can enforce a deed of trust, and require an ownership interest in the Note. (Petition at 7.) Further, Slotke argues that

this Court should clarify that Washington law providing that the security follows the note is limited in that the deed of trust only follows *ownership* of the note; but does not follow holder-ship of the note.

First of all, Slotke's argument was not raised until Slotke's Reply Brief (Reply Br. at 6-10), and is therefore not preserved. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Further, however, none of the cases cited in Slotke's petition provide specific support for the distinction argued by Slotke, let alone tee up the issue for analysis and consideration. In contrast, numerous Washington cases support the accepted principal that a party who is holder of a note is the party entitled to enforce both the note and – through foreclosure – the deed of trust. In *In re Butler,* 512 B.R. 643, 656 (Bankr.W.D.Wash.2014), *aff'd*, No. C14-1250Z, 2015 WL 9309511 (W.D. Wash. Jun. 10, 2015), the Court noted that under the deed of trust act, "a security interest follows the obligation it secures," and this is true whether the deed of trust was assigned properly or at all. In *In re Jacobson,* 402 B.R. 359, 367 (Bankr.W.D.Wash.2009), the Court noted that "[i]n Washington, only the holder of the obligation secured by the deed of trust is entitled to foreclose . . . . '[T]ransfer of the note carries with it the security, without any formal assignment or delivery, or even

mention of the latter.'" (quoting *Carpenter v. Longan,* 83 U.S. 271, 21 L.Ed. 313 (1872)).

Finally, in *Bain v. Metro. Mortg. Grp., Inc.*, the Supreme Court of Washington held in an en banc decision that a plain reading of the Washington Deed of Trust Act "leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be the beneficiary" with the power to proceed with foreclosure. 175 Wash. 2d 83, 89, 285 P.3d 34 (2012). The *Bain* Court's decision was based on an analysis of the Washington Deed of Trust Act, which defines who the "beneficiary" of a deed of trust is at RCW 61.24.005(2). The act is separate from the UCC and provides specific guidance regarding foreclosures. The statute provides:

> "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

RCW 61.24.005(2).

Slotke argues that that the "security follows the note" doctrine is codified in RCW 62A.9A-203(a), (b), and (g), and therefore these provisions must be followed in order for the security to follow the note. (Petition at 5.) But, according to *Bain*, the security follows the note rule is codified in RCW 61.24.005(2). *Bain*, 175 Wash. 2d 83, 104

("Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around.") Even if there is some historical connection between RCW 62A.9A-203 and the rule that ownership of a security follows ownership of a note, RCW 61.24.005(2) makes clear that under Washington law, the ability to enforce a security also follows the *holder* of a note.

This interpretation is further supported in *Brown*. In that case, the Washington Supreme Court analyzed the UCC at length, noting that promissory notes "embrace two sets of rights," that of the "party entitled to enforce" the note (the "PETE"), and that of the owner. *Brown*, 184 Wash. 2d at 524-25. "The PETE and the owner of the note can be the same entity, but they can also be different entities. RCW 62A.3-301 "clarifies the relationship between PETE status and ownership status. It provides that a person *need not* own a note to be entitled to enforce the note."

After discussing the fact that a note had holders and owners, with different legal rights each, the *Brown* Court then considered Washington law in order to determine who the "beneficiary" of a deed of trust is. *Id.* at 533. The question before the Court was whether the term "beneficiary" under Washington law referred to the owner of the note or the holder of the note. *Id.* at 534. The Court noted the definition of RCW 61.24.005(2)

indicating that a "beneficiary" means the "holder of the instrument or document evidencing the obligations secured by the deed of trust . . . ." *Brown*, 184 Wash. 2d at 533. The Court then noted 61.24.030(7)(a), which requires that in order to conduct a trustee's sale, the beneficiary of a deed of trust must prepare a declaration "made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust . . . ." *Id.* (citing RCW 61.24.030(7)(a)). In light of these two statutes, the Court concluded that the beneficiary of a deed of trust under Washington law is the holder of the note. *Id.* at 535.

The *Brown* Court also found that this conclusion was consistent with the UCC, noting that under the UCC, the PETE is the party entitled to enforce the note and the party with authority to modify and discharge the obligation, which would protect the borrower from further suit on the obligation. *Id.* (citing RCW 62A.3-604.) It follows that the holder of the note is also deemed the beneficiary of the deed of trust, and party entitled to modify, discharge, or enforce the deed of trust by virtue of its authority to modify, discharge, or enforce the note. *Id.*

Slotke concedes that her argument that Deutsche Bank as Trustee must prove it owned the Note in order to enforce the Deed of Trust contradicts this Court's recent decision in *Brown*. (Petition at 7.) She

asks this Court to abandon *Brown*, but she fails to explain how her analysis reconciles with the explicit language in RCW 61.24.005(2) defining a beneficiary of a deed of trust as the holder of the note. In sum, Slotke's position is contradicted by well-settled Washington law, and there is no reason to accept review.

3. Slotke provides no authority for the argument that simultaneous enforcement of the Note and Deed of Trust is prohibited

Slotke argues that RCW 62A.3-310(b)(3) and RCW 61.24.030(4) prevent simultaneous enforcement of the Note and Deed of Trust. (Petition at 5-6.) According to Slotke, Deutsche Bank as Trustee's suit attempts to enforce both the Note and the Deed of Trust at the same time because it seeks to foreclose as permitted by the Deed of Trust, but Deutsche Bank as Trustee's only claim of authority to foreclose is through its status as holder of the Note. (Petition at 6.)

The argument, though clever, is inconsistent with the Washington law cited above, which dictates that the holder of a note may foreclose the related deed of trust. Further, the Court of Appeals correctly held that RCW 61.12.120 is dispositive of the argument. That statute provides that a plaintiff in a judicial foreclosure action –

> "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, or while he or she

> is seeking to obtain execution of any judgment in such other action; 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. As the Court of Appeals noted, Washington courts interpreting this code have held that, under it, "two separate actions cannot be maintained at the same time for the collection of the same debt," but there is no prohibition on enforcing both in the same suit. *Deutsche Bank Nat. Trust Co. v. Slotke*, 367 P.3d at 606 (2016) (citing *Hinchman v. Anderson*, 32 Wash. 198, 206, 72 P. 1018 (1903).) Further, the statute merely precludes a foreclosing party from suing for monetary recovery on the note at the same time it is also seeking to foreclose. *Farm Credit Bank of Spokane v. Tucker*, 62 Wn. App. 196, 201 (1991) (holding statute prohibits foreclosing while prosecuting another action for the same debt). *See also Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wn. App. 1, 7 (2012) ("In other words, a creditor may not levy upon the same or additional real or personal property of a mortgage debtor after initiation of a foreclosure action unless or until the judgment remains unsatisfied after applying the proceeds of the sale of the mortgaged property to the debt.") "It does not prevent a plaintiff from pleading the terms of a note in a foreclosure action." *Farm Credit*, 62 Wn. App. at 201. RCW 61.12.120 is clearly on point, and allows Deutsche Bank as Trustee to foreclose on the

Property since Deutsche Bank as Trustee is not also seeking the entire obligation under the note in a separate action.

Further, Slotke's authorities are inapplicable. She cites RCW 62A.3-310(b)(3) in support, but RCW 62A.3-310(b)(3) is limited to cases in which a check or a note is given to *discharge* an obligation, not where a deed of trust is executed simultaneously with a note in order to secure the note. *See, e.g., Aplacas of America, LLC v. Groome*, 179 Wn. App. 391, 396 (2014) ("If a promissory note is taken for an obligation, such as an obligation to pay for goods sold, the obligation is suspended and subsequently discharged to the extent the note is paid. RCW 62A.3-310(b). When the note holder is also the obligee, the obligee may enforce either the note or the obligation. RCW 62A.3-310(b)(3).") *See also In re Henrickson*, 14 B.R. 474, 477 (D. Minn. Bankr. 1981) ("When the debtor transferred the check to Mr. Flatten and received a receipt, a negotiable instrument was given for an obligation.") (citing Minn.Stat.s. 336-3-802(1), a corollary to RCW 62A.3-310.) RCW 61.24.030(4) is inapplicable because it governs the requirements for a trustee's sale, and no trustee's sale is at issue in this case.

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C. Slotke's Petition Does Not Identify any Conflict Between the Court of Appeals Decision and Any Supreme Court or Other Court of Appeals Decision

This Court will accept a petition for review if the decision of the Court of Appeals is in conflict with a decision of this Court or a decision of any other Washington Court of Appeals. RAP 13.4(b)(1-2). Respondent, however, fails to even suggest that there is a conflict. Instead, Respondent contends that the issue it presents is has "never been addressed by this or any other court in the State of Washington." (Petition at 1.) Novelty is not a grounds for review in this Court. *See In re Coats*, 173 Wn.2d 123, 132-33 (2011) (noting "petitioner must persuade us that either the decision below conflicts with a decision of this court or another division of the Court of Appeals; that it presents a significant question of constitutional interest; or that it presents an issue of substantial public interest that should be decided by this court.") (citing RAP 13.4(b)).

D. The Petition Does Not Involve an Issue of Substantial Public Interest Requiring a Determination by this Court.

Slotke contends that her Petition involves an issue of substantial public interest that should be decided by the Supreme Court due to the number of homeowners who are "abused by the ability of persons with whom those homeowners have no contractual relationship to sell those homeowners' homes in violation of the *security follows the note* doctrine .

. . ." (Petition at 5.) To the contrary, Slotke faces no abuse, nor do any other homeowners who face valid foreclosure proceedings where it is established the homeowners are in default and also established that the party seeking to foreclose is the party entitled to enforce the note. To the contrary, this Petition and others like it merely present another delay tactic to keep control of property that Slotke has long since stopped paying for.

Moreover, even if this Court found that the issue raised by Slotke was an issue of substantial public interest, it is unlikely this Court could reach that issue due to Slotke's failure to properly preserve her argument before the Court of Appeals.

V. ATTORNEY'S FEES AND COSTS

Washington Rules of Appellate Procedure allow an award of fees where supported by law. RAP 18.1(a). Here, the deed of trust executed by Slotke includes a provision awarding attorney's fees, including appellate fees, to a prevailing party. Consequently, if this Court denies Slotke's Petition, Respondent respectfully requests that the Court award reasonable attorney's fees and costs pursuant to RAP 18.1(a) for time spent preparing an Answer to the petition.

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VI. CONCLUSION

For the reasons stated above, Respondents request that this Court deny Slotke's Petition for Review.

RESPECTFULLY SUBMITTED this 20th day of April, 2016.

HOUSER & ALLISON, APC

/s/ Emilie K. Edling
Emilie K. Edling, WSBA #40542
Robert W. Norman, WSBA #37094
Attorneys for Respondents

CERTIFICATE OF SERVICE
(BY U.S. Mail)

STATE OF OREGON, COUNTY OF WASHINGTON:

I, the undersigned say: I am a person over the age of eighteen years and not a party to this action. My business address is 9600 S.W. Oak Street, #570, Portland, OR, 97223.

On April 20, 2016, I served true copies of the attached

ANSWER TO PETITION FOR REVIEW

[X] **VIA U.S. MAIL/COURIER:** By placing a true copy thereof enclosed in a sealed envelope, addressed as above, and placing each for collection by U.S. mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would in the ordinary course of business, be delivered to an authorized courier or delivery authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day for delivery on the following business day.

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

Dated: April 20, 2016

Sharon Kuger

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OFFICE RECEPTIONIST, CLERK

To: Sharon N. Kuger
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Supreme Court Clerk's Office

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Subject: Slotke v. Deutsche Bank National Trust Company - Supreme Court of Washington - Case No. 928681

Dear Court Clerk,

Please find attached Respondent Deutsche Bank as Trustee's Answer to Petition for Review for filing.

If you have any questions, please do not hesitate to call at (503) 914-1382, Extension 275.

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