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Court of Appeals
Division I
State of Washington

No. 73724-4-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

JEFF BAILEY,

Plaintiff-Appellant,

v.

JOSEPH LUCAS, III; U.S. BANK, N.A. AS TRUSTEE FOR OWNIT
MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET BACKED
CERTIFICATES, SERIES 2006-3; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC; AND JOHN DOE 1-50,

Defendants-Respondents.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ISSUES PRESENTED FOR REVIEW.....	4
III. RESTATEMENT OF THE CASE.....	4
A. Borrower Lucas Takes Out a Loan to Purchase Property.....	4
B. Bailey and Borrower Enter into a Real Estate Contract.....	5
C. The Trust Filed a Judicial Foreclosure Action.	5
D. The Borrower Filed Chapter 7 Bankruptcy and Bailey’s Adversary Complaint was Dismissed.....	6
E. The Property was Sold to the Trust at a Sheriff’s Sale	6
F. Bailey Files a Separate Lawsuit to Challenge the Decree of Foreclosure.....	7
G. Bailey’s Appeal.....	9
IV. AUTHORITY AND ARGUMENT.....	10
A. The Standard of Review on a 12(b)(6) Motion to Dismiss.....	10
B. The Court Properly Dismissed Bailey’s Complaint.....	11
1. Bailey Failed to Plead a Claim for Breach of Contract Against Respondents.....	11
2. The Court Properly Dismissed the “Void Order” Claim.....	14

a.	The King County Superior Court had personal jurisdiction over the Borrower.....	15
b.	The King County Superior Court had subject matter jurisdiction over the Judicial Foreclosure Action.....	17
3.	The Court Properly Dismissed the Privity of Contract Claim	18
a.	Bailey is a stranger to the mortgage loan and has no standing to bring a claim to enforce the terms of the loan.....	19
b.	The Trust had Authority to Foreclose in the Prior Action.....	20
4.	Bailey’s Claim for Impairing Contractual Obligations was Properly Dismissed.....	21
C.	The Failure to Rule on Bailey’s Motion to Continue Does Not Warrant Reversal.....	23
D.	Bailey’s Motion for Reconsideration Was Properly Denied.....	28
1.	The Motion Failed to Comply with the Mandatory Requirements of CR 59.....	28
2.	The Motion Had No Merit on Substantive Grounds	29
V.	CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases

In re Joseph Lucas, III, No. 13-13656-MLB (Bankr. W.D. Wash., entered April 22, 2013) [ECF No. 1].6

Jeffrey Bailey v. Joseph Lucas, III, et al., No. 13-01401-MLB (Bankr. W.D. Wash., entered July 22, 2013) [ECF No. 1].....6

Gaspar v. Peshastin Hi-Up Growers, 131 Wash.App. 630, 128 P.3d 627 (2006).....10

Lawson v. State, 107 Wash.2d 444, 730 P.2d 1308 (1986).....10

Bowman v. John Doe Two, 104 Wash.2d 181, 704 P.2d 140 (1985)10

Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 744 P.2d 1032 (1987).....10

Papasan v. Allian, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).....11

Rodriguez v. Loudeye Corp., 144 Wash. App. 709, 189 P.3d 168 (2008)11

P.E. Systems, LLC v. CPI Corp., 176 Wash.2d 198, 289 P.3d 638 (2012).....11

Independent Forest Mfrs. V. Dep’t of Labor and Industries, 78 Wn.App. 707, 899 P.2d. 6 (1995).....11, 12

National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479 (1998)13

Branson v. Port of Seattle, 152 Wash. 2d 862, 101 P.3d 67 (2004)13, 14

Sears v. Rusden, 39 Wn.2d 412, 235 P.2d 819 (1951)15

State v. Murdock, 18 Wn.App. 294, 567 P.2d 267 (1977).....15

Mueller v. Miller, 82 Wn.App. 236, 917 P.2d 604 (1996).....15

<i>Raymond v. Robinson</i> , 104 Wn.App. 627, 15 P.3d 697 (2001).....	16
<i>Lobak Partitions, Inc. v. Atlas Const. Co., Inc.</i> , 50 Wn.App. 493, 749 P.2.d 716 (1988).....	19
<i>Layrite Concrete Products of Kennwick, Inc. v. II Halvorson, Inv.</i> , 68 Wn.2d 70, 411 P.2d 405 (1966).....	19
<i>Deutsche Bank Nat. Trust Co. v. Slotke</i> , --- P.3d. ---, 2016 WL 107783 (Wash. Ct. App. Jan. 11, 2016).....	19, 21
<i>Paradise, Inc. v. Pierce County</i> , 124 Wn.App. 759, 102 P.3d 173 (2004)	20
<i>Jackson v. Quality Loan Service Corp.</i> , 347 P.3d 487, 168 Wash.App. 838 (2015).....	21
<i>Brown v. Washington State Dep't of Commerce</i> , 184 Wash. 2d 509, 536, 359 P.3d 771, 779 (2015).....	20
<i>John Davis & Co.</i> , 75 Wash.2d 214, 450 P.2d 166 (1969).....	21
<i>Bain v. Metropolitan Mortg. Group, Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012).....	22
<i>Lynott v. Mortgage Electronic Registration Systems, Inc.</i> , No. 12-cv-5572- RBL, 2012 WL 5995053 (W.D. Wash. Nov. 30, 2012).....	22
<i>Bldg. Indus. Ass'n of Wash. v. McCarthy</i> , 152 Wn.App. 720, 218 P.3d 196 (2009).....	24
<i>Old City Hall LLC v. Pierce County AIDS Found.</i> , 181 Wn.App. 1, 329 P.3d 83 (2014).....	25
<i>Turner v. Kohler</i> , 54 Wn.App. 688, 775 P.2d 474 (1989).....	25
<i>State v. Garcia</i> , 179 Wn.2d 828, 318 P.3d 266 (2014).....	25
<i>State v. Lamb</i> , 175 Wn.2d 121, 285 P.3d 27 (2012).....	25
<i>Doyle v. Lee</i> , 166 Wn.App. 397, 272 P.3d 256 (2012).....	25

<i>Albright v. Oliver</i> , 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994).....	26, 27
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	27
<i>Armstrong v. Manzo</i> , 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).....	27
<i>Perry v. Hamilton</i> , 51 Wash.App. 936, 756 P.2d 150 (1988).....	28
<i>Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland</i> , 95 Wash. App. 896, 977 P.2d 639 (1999).....	28
<i>Wilcox v. Lexington Eye Inst.</i> , 130 Wash. App. 234, 122 P.3d 729 (2005).....	28
<i>JDFJ Corp. v. Int'l Raceway, Inc.</i> , 97 Wash.App. 1, 970 P.2d 343 (1999).....	28
<i>Schaeferco, Inc. v. Columbia River Gorge Com'n</i> , 121 Wn.3d 366, 849 P.2d 1225 (1993).....	28
<i>Moore v. Wentz</i> , 11 Wash.App.796, 525 P.2d 290 (1974).....	29
<u>Statutes</u>	
RCW 4.28.320.....	10
RCW 4.28.185.....	15
RCW 2.08.010.....	17
RCW 62A.3-301.....	20
RCW 61.24.....	21
RCW 62A.1-201.....	22

Rules

CR 12(b)(6)10,11

RAP 5.3.....10

LCR 7.....24

CR 56.....24

CR 59.....28

CR 6.....29

LCR 56.....28

CR 59.....29, 30

ER 401.....30

ER 801.....30

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is a wrongful foreclosure complaint, with a twist. The appellant, Jeff Bailey (“Bailey”), is not the borrower. Bailey is neither a party to, nor an intended beneficiary of, the mortgage loan. Instead, Bailey first became involved with the property *after* the note and deed of trust were executed by borrower Joseph Lucas (the “Borrower”).

After the origination of the loan, Bailey and the Borrower entered into a real estate contract for the express purpose of avoiding a potential foreclosure. Neither respondent Mortgage Electronic Registration Systems, Inc. (“MERS”) nor U.S. Bank National Association, as Trustee for Ownit Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-3 (the “Trust”) are parties to the real estate transaction between Bailey and the Borrower.

After Bailey and the Borrower entered into the real estate contract, the Borrower defaulted on the mortgage loan. The Trust filed a judicial foreclosure action, the property was foreclosed, and on January 9, 2015, the King County Sheriff sold the property to the Trust.

Instead of contesting the judicial foreclosure action, on January 7, 2015, Bailey filed a *separate* complaint against the Borrower, the Trust,

and MERS to pursue a collateral attack of the judicial foreclosure.¹ The second amended complaint (“Complaint”) ultimately filed by Bailey is the operative pleading, and it alleged against MERS and the Trust claims or requests for relief entitled (1) breach of contract, pertaining to the January 21, 2006 real estate contract; (2) “void order,” seeking to set aside the judgment in the judicial foreclosure action; (3) “privity of contract,” asserting that the Trust and MERS interfered with the Real Estate Contract by redefining the terms of the note and otherwise improperly foreclosed on the property without authority of the “Certificateholders;” and (4) “impairing contractual obligations,” asserting that Washington law impairs the Real Estate Contract between Bailey and the Borrower and again challenging the judicial foreclosure action.²

Respondents filed and properly noted a Motion to Dismiss. Bailey did not file or serve a timely opposition to the Motion to Dismiss and waited until two days before the hearing to request a continuance of the hearing. Respondents advised that they would not agree to a continuance, but that Bailey could seek a continuance from the Court.

¹ Bailey filed a first amended complaint on March 28, 2015 and then a second amended complaint on March 5, 2015. Both the first amended complaint and second amended complaint are titled “Amended Complaint.” For the purposes of this appeal, all references to the “Amended Complaint” refer to the second amended complaint filed on March 5, 2015.

² Bailey does not challenge or identify the Washington Deed of Trust Act on appeal.

Bailey did not attend the hearing, did not file an opposition to the Motion to Dismiss,³ and never noted a Motion to Continue the hearing. On June 12, 2015, the Court properly entered an order dismissing Bailey's claims against the Trust and MERS with prejudice.

Bailey filed a Motion for Reconsideration and to Vacate or Amend Order, which was untimely and failed on both procedural and substantive grounds. Accordingly, it was denied. On this record, Bailey appeals (1) the order granting the unopposed Motion to Dismiss, (2) the court's failure to consider the Motion to Continue, which was never noted or heard, and (3) the court's refusal to grant his untimely Motion for Reconsideration.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Court properly dismissed Bailey's Amended Complaint, which failed to state a claim.
2. Whether the Court properly denied Bailey's untimely Motion for Reconsideration.
3. Whether the Court improperly failed to rule on Bailey's Motion to Continue.

³ On June 10, 2015, Bailey mailed a Motion to Continue Motion to Dismiss. The Motion to Continue did not argue that Bailey could not attend the hearing. Bailey never noted the Motion to Continue and failed to file or note a Motion for Order Shortening time. Similarly, Bailey failed to appear at the Motion to Dismiss hearing to request additional time to respond. Accordingly, it appears that the motion was never heard.

As explained below, the first two questions are answered in the affirmative and the latter question is answered in the negative. This Court should uphold the trial court's dismissal of the Trust and MERS.

III. RESTATEMENT OF THE CASE

A. Borrower Lucas Takes Out a Loan to Purchase Property

On January 20, 2006, in consideration for a mortgage loan ("Mortgage Loan"), the Borrower executed a promissory note ("Note") in the amount of \$225,000.00 in favor of Ownit Mortgage Solutions, Inc. [CP 344]. On January 20, 2006, in order to secure repayment of the Mortgage Loan, the Borrower executed a deed of trust ("Deed of Trust") encumbering the property located at 10743 56th Avenue South, Seattle, WA 98178 (the "Property"). [CP 314-333.] Collectively, the Note and Deed of Trust will be referred to as the "Loan." The Deed of Trust was recorded on February 2, 2006 with the King County Auditor's Office as Instrument No. 20060202001073. Bailey was not a party to the Note, Deed of Trust, or origination of the Loan. [*Id.*]

On or about January 5, 2012, MERS assigned its record nominee (agency) interest in the Deed of Trust to the Trust. The Assignment of Deed of Trust was recorded on April 4, 2012 with the King County Auditor's Office as Ins. No. 20120404001648. [CP 371.]

B. Bailey and Borrower Enter into a Real Estate Contract

On January 21, 2006, the Borrower and Jeff Bailey (“Bailey”) entered into a real estate transaction (“Real Estate Contract”) involving the Property for the “purpose of selling and repurchasing the Property as a viable alternative to avoid foreclosure and the loss of the property.” [CP 298; 298-312.] The Real Estate contract is subordinate to all existing mortgages and deeds of trust on the Property. [CP 302.] The Real Estate Contract was not recorded with the King County auditor’s office until June 11, 2015, one day before Respondents filed a Motion to Dismiss in Bailey’s affirmative action against it, discussed further below. [CP 24.]

C. The Trust Filed a Judicial Foreclosure Action

On April 3, 2013, the Trust filed a foreclosure complaint in King County Superior Court under Cause. No. 13-2-15447-1 SEA (the “Judicial Foreclosure Action”). [CP 335-380]. The Foreclosure Complaint was filed to foreclose the Deed of Trust encumbering the Property due to the Borrower’s default under the terms of the Loan. [*Id.*]

D. The Borrower Filed Chapter 7 Bankruptcy and Bailey’s Adversary Complaint was Dismissed

On April 22, 2013, the Borrower filed a voluntary petition under Chapter 7 of the bankruptcy code in the United States Bankruptcy Court for the Western District of Washington.⁴

On July 22, 2013, Bailey initiated an adversary proceeding against the Borrower.⁵ On December 3, 2013, Bailey filed a Second Amended Adversary Complaint, adding in Ocwen Loan Servicing, LLC and Litton Loan Servicing LP.⁶ [CP 382-387]. On March 11, 2014, the Bankruptcy Court entered an Order dismissing the Adversary Proceeding (“Bankruptcy Dismissal Order”).⁷ [CP 389.]

E. The Property was Sold to the Trust at a Sheriff’s Sale

On September 11, 2014, a Judgment and Decree of Foreclosure in favor of the Trust was entered in the Judicial Foreclosure Action. [CP 391.] On January 9, 2015, the King County Sheriff sold the Property by way of a sheriff’s sale to the Trust. On February 13, 2015, the King County Superior Court entered an Order confirming the sheriff’s sale of the Property.⁸

F. Bailey Files a Separate Lawsuit to Challenge the Decree of Foreclosure

⁴ *In re: Joseph Lucas, III*, No. 13-13656-MLB (Bankr. W.D. Wash., entered April 22, 2013) [ECF No. 1].

⁵ *Jeffrey Bailey v. Joseph Lucas, III, et al.*, No. 13-01401-MLB (Bankr. W.D. Wash., entered July 22, 2013) [ECF No. 1].

⁶ *Id.* at Dkt. # 12.

⁷ *Id.* at Dkt. # 17.

⁸ *Jeffrey Bailey v. Joseph Lucas, III, et al.*, No. 13-01401-MLB (Bankr. W.D. Wash., entered July 22, 2013) [ECF No. 1].

On January 7, 2015, Bailey filed the underlying Complaint for Wrongful Foreclosure and to Quiet Title, initiating the present action. [Dkt. # 1.] On January 28, 2015, Bailey filed an Amended Complaint. [CP 1.] On March 5, 2015, Bailey filed a second complaint, also titled “Amended Complaint for Breach of Contract, Wrongful Foreclosure and to Quiet Title” (the “Amended Complaint”). [CP 270.] The March 5, 2015, second Amended Complaint is the operative complaint. [*Id.*]

On May 12, 2015, the Trust and MERS filed a Motion to Dismiss Bailey’s Amended Complaint (the “Motion to Dismiss”). Bailey did not file an opposition or response to the Motion to Dismiss. [CP]

On June 10, 2015 at 4:17 p.m., Bailey filed a Motion for Continuance of the June 12, 2015 hearing on the Motion to Dismiss (the “Motion to Continue”). The Motion to Continue was not noted for hearing or consideration and did not contain a Note for Motion. [CP 20-12.] In addition, it was not served with the required six days-notice or a motion for order shortening time. [*Id.*] The Proof of Service reflects that it was mailed to Respondents on June 10, 2015, despite the fact that the motion it sought to continue was scheduled for June 12, 2015.

On June 12, 2015, the Court heard Respondent’s Motion to Dismiss. Appellant did not appear at the hearing or file any opposition

thereto. [CP 410:13-15.] Respondents advised the Court that Bailey had requested a continuance of the hearing but Respondents would not agree to that, and that there were no further discussions between Respondents and Bailey. [CP 411:1-13.] The Court entered an Order Dismissing Bailey's Amended Complaint with Prejudice.

On June 29, 2015, two weeks *after* the hearing on the Motion to Dismiss, Bailey filed an untimely Motion for Reconsideration. The Motion for Reconsideration requested the Court vacate the Order granting Respondent's Motion to Dismiss, grant Bailey leave to amend, and amend the order to dismiss the case without prejudice "so that the Plaintiff is not barred from acquiring justice at a later more viable time." [CP 26.] The motion relied in part on a forensic audit that purported to review the Borrower's loan documents and the securitization of the loan.

On July 6, 2015, Respondents filed an opposition to the Motion for Reconsideration. The Trust and MERS argued that the Motion for Reconsideration was untimely, based on conclusory statements that contradicted the terms of the Deed of Trust and Real Estate Contract and failed on substantive grounds because the "forensic audit" Bailey submitted with his motion (1) did not constitute new evidence, (2) was not relevant or admissible evidence, and (3) was inadmissible hearsay. [CP 263-264; 264-266.] The Trust and MERS further noted that the "forensic

audit” was the type of mortgage and foreclosure scam addressed by the Washington Attorney General in published advisories to consumers. [CP 266.]

On July 8, 2015, the Court denied Bailey’s Motion for Reconsideration and found that the motion was untimely and that the forensic audit was inadmissible. [CP 22-25.]

G. Bailey’s Appeal

Bailey filed a Notice of Appeal to the Court of Appeals on July 13, 2015. The Notice of Appeal sought review of paragraphs 7-9 only of the lower court’s Order granting motion to dismiss. [CP 400.] On July 31, 2015, Bailey filed a Motion to Amend his Appeal. Bailey’s Amended Appeal challenges (1) paragraphs 7-9 of the Order granting Motion to Dismiss, (2) the failure to rule on the Motion for Continuance (which had never been noted for hearing or ruled upon), and (3) the Order of Denial for Motion for Consideration.

On appeal, the opening brief makes four challenges. First, Bailey challenges the trial court’s dismissal of the (second) Amended Complaint with prejudice. Second, Bailey challenges the trial court’s “termination of the Real Estate Contract,” which was actually a cancellation of the Lis

Pendens.⁹ Third, Bailey assigns error to the “failure to grant Appellant’s Motion for Continuance.” Last, Bailey assigns error to the trial court for “failing to exercise its discretion” in determining that the motion for reconsideration was untimely.

IV. AUTHORITY AND ARUGMENT

A. The Standard of Review on a 12(b)(6) Motion to Dismiss

This court applies the de novo standard of review to a trial court’s decision to dismiss pursuant to 12(b)(6). *Gaspar v. Peshastin Hi-Up Growers*, 131 Wash.App. 630, 634, 128 P.3d 627 (2006). Dismissal under CR 12(b)(6) is proper where the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Lawson v. State*, 107 Wash.2d 444, 448, 730 P.2d 1308 (1986) (quoting *Bowman v. John Doe Two*, 104 Wash.2d 181, 183, 704 P.2d 140 (1985)). However, the court need not accept legal conclusions as correct. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987). Courts are not bound to accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allian*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

⁹ Bailey challenges the cancellation of the lis pendens pursuant to RCW 4.28.320. However, Bailey waived his right to challenge those provisions when he limited his appeal to the specific findings in Paragraphs 7-9 of the Order of Dismissal. RAP 5.3. References to the lis pendens and recordation of the Real Estate contract were contained in paragraphs 10-12 of the order.

Documents whose contents are alleged in a complaint may be considered in ruling on a CR 12(b)(6) motion to dismiss. *Rodriguez*, 144 Wash.App. at 726 & n. 45 A trial court may properly consider documents that are the “subject of judicial notice” as a matter of public record and where the validity is capable of “accurate and ready determination.” *Id.* at 726, 189 P.3d 168 (quoting ER 201(b)). *See also P.E. Systems, LLC v. CPI Corp.*, 176 Wash.2d 198, 204–05, 289 P.3d 638 (2012).

B. The Court Properly Dismissed Bailey’s Complaint

As discussed further below, the Court properly dismissed Bailey’s Complaint because Bailey failed to allege any of the elements of his claims as a matter of law.

1. Bailey Failed to Plead a Claim for Breach of Contract Against Respondents

Bailey failed to state a claim for breach of contract against Respondents. A breach of contract claim is actionable only where there is a contract, the contract imposes a duty, that duty is breached, and the breach proximately causes damages to the claimant. *Northwest Independent Forest Mfrs. V. Dep’t of Labor and Industries*, 78 Wn.App. 707, 712, 899 P.2d.6 (1995). Here, Bailey’s breach of contract claim failed to set forth a single allegation against Respondents, let alone

allegations that Respondents had breached a contract or damaged him. [CP 271-272].

Further, the claim identified a single contract, to which Respondents were not a party. [*Id.*]. The contract alleged “[wa]s entered into on January 21, 2006 between Joseph Lucas III as “Seller” and Jeff Bailey, as “Buyer.”” [CP 162]. Neither the Trust nor MERS are parties to the contract and neither are identified anywhere in the Real Estate Contract. [CP 162; 161-175]. Furthermore, Bailey’s allegations of breach are limited to the actions and omissions of the Borrower. Specifically, Bailey claimed the Borrower refused to cooperate with Bailey to acquire the property, “in compliance with the terms of the agreement between [Bailey] and Defendant Lucas.” [CP 272].

Even on appeal, Bailey’s arguments focus almost entirely on the *Borrower’s breaches of the Real Estate Contract*. Bailey argues that (1) “Respondent Lucas III, breached contract by failing to pay mortgage as Plaintiff’s payments were current when Respondent Lucas, III informed Bailey of Lucas III’s intent to forego mortgage payments and file bankruptcy” [App. Br. §8]; (2) the Borrower “failed to detect the ultra vires act(s) of the Trustee [App. Br. §9]; and (3) “Lucas did willfully breach the contract and failed to uphold the agreement between Bailey and Lucas III.” [App. Br. §14]. Bailey further argued that his remedies were

to “raise the interest rate on the balance of the purchase price or declare the entire balance of the purchase price due and payable under his contract with the Borrower.” [App. Br. §15]. These claims and remedies are pled against the Borrower, not against Respondents. Accordingly, these allegations do not support Bailey in his appeal. Neither the Order of Dismissal nor the Order Denying Reconsideration address Bailey’s claims against the Borrower. [CP 22-25; CP 268-267]. In his Brief, Bailey argues that the Real Estate Contract “did grant to Bailey interest in said property and the right and obligation to defend the position of the contract and for possession of the property.” [CP §5]. Bailey argues that he has standing to sue under the contract because he is in the “zone of interests.” As support, Bailey cites *National Credit Union v. First National Bank and Branson v. Port of Seattle*. [Opening Br. at App. §1 (citing *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 493-494 (1998); *Branson v. Port of Seattle*, 152 Wash. 2d 862, 867, 101 P.3d 67, 69 (2004)]. However, neither case involves a breach of contract claim and both cases are factually distinguishable from this case. *National Credit Union* addressed the zone of interest test in considering whether a plaintiff had prudential standing to seek judicial review, under the Administrative Procedures Act, of an agency’s interpretation of a statute. The Court in *Branson* considered a class action lawsuit alleging that the

airport concession fees charged to rental car companies conducting business at the Seattle Tacoma Airport violate the 1945 Revised Airports Act. The Court found that the airport concession fees did not deny the public equal and uniform use of the airport because the fees did not impact the public use of airport property and found that the Plaintiff lacked standing to challenge the reasonableness, uniformity, or basis of the fees.

However, even if the Real Estate Contract granted Bailey an interest in the Property, he fails to identify (1) legal authority that would require MERS or the Trust to comply with the Real Estate Contract or (2) a provision of the contract that was allegedly breached by the Respondents. [CP 271-272]. The Real Estate Contract imposed no contractual duty on Respondents and the Breach of Contract claim against Respondents fails as a matter of law.

2. The Court Properly Dismissed the “Void Order” Claim.

Dismissal of Bailey’s impermissible collateral attack on the underlying Judicial Foreclosure Action was appropriate. The allegations in the complaint, the public records (which are subject to judicial notice), and Washington law establish that Bailey’s collateral attack of the judicial foreclosure judgment fails as a matter of law because the King County Superior Court had both personal and subject matter jurisdiction in the Judicial Foreclosure Action.

A collateral attack is an attempt to impeach the judgment by matters outside the record, in an action other than that in which it was rendered. *Sears v. Rusden*, 39 Wn.2d 412, 419, 235 P.2d 819 (1951) (citations omitted). It is generally the rule that judgments cannot be collaterally attacked. *State v. Murdock*, 18 Wn.App. 294, 296, 567 P.2d 267 (1977). There is, however an exception to this rule which permits collateral attack when the judgment is challenged as void for lack of jurisdiction. *Id.* (citations omitted). A judgment is void when the court does not have personal or subject matter jurisdiction, or “lacks the inherent power to enter the order involved.” *Mueller v. Miller*, 82 Wn.App. 236, 251, 917 P.2d 604 (1996) (citations omitted). Here there are no facts that implicate the exception.

a. The King County Superior Court had personal jurisdiction over the Borrower

A Washington court may exercise specific personal jurisdiction over a nonresident defendant when the defendant’s limited contacts give rise to the cause of action. RCW 4.28.185. In determining whether specific personal jurisdiction exists, the court must determine whether (1) the defendant made a purposeful act toward the forum state, (2) the defendant’s contact with the forum state caused the injury, and (3) exercising jurisdiction over the defendant violates fundamental notions of

fairness. *Raymond v. Robinson*, 104 Wn.App. 627, 633, 15 P.3d 697 (2001).

Here, the public records show that the Borrower took out the underlying mortgage loan in King County Washington. [CP 317, 330, 344.] The Borrower granted the mortgage lender a security interest in real property located in King County, Washington. [CP 317-330.] These acts establish a purposeful act towards the forum state.

The Borrower's subsequent default on the mortgage loan served as the basis for the judicial foreclosure action. This establishes that the Washington mortgage loan caused the underlying injury to the Trust, which was the beneficiary of the Borrower's Deed of Trust.

Finally, exercising personal jurisdiction over the Borrower did not violate any fundamental notions of fairness. The Borrower owned the Subject Property when he obtained the mortgage loan. [CP 317]. The Borrower admitted he was a resident of the State of Washington in the Real Estate Contract. [CP 45]. Furthermore, in April 2013, the same month as the filing of the Judicial Foreclosure Action, the Borrower filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the Western District of Washington. [CP 11]. As set forth in the Voluntary Petition, the Borrower resides in Seattle, Washington. [CP 11]. Accordingly, the

King County Superior Court had jurisdiction over the Borrower in the Judicial Foreclosure Action.

b. The King County Superior Court had subject matter jurisdiction over the Judicial Foreclosure Action

Similarly, there is no doubt that the Superior Court had subject matter jurisdiction over the Judicial Foreclosure Action. Pursuant to RCW 2.08.010, the superior court has original jurisdiction in all cases that involve the title or possession of real property. Because the Judicial Foreclosure Action involved title to the Subject Property, the King County Superior Court had subject matter jurisdiction over the case.

On Appeal, Bailey argues that “he is under no contractual or legal obligation to submit to a void and invalid mortgage encumbrance” and claims that “he has the right and obligation to defend” his interest. [App. Br. §5]. Bailey similarly challenges the judicial foreclosure, the Trust’s standing to foreclose in the judicial foreclosure action, and the assignment of the Deed of Trust in Sections 6, 9, 10, 12, 14, 17, 18 of his Brief. [App. Br. 6, 9-10, 12, 14, 17-18]. However, the Judgment and Decree of Foreclosure in favor of the Trust was entered in the Judicial Foreclosure Action and the Property was sold by way of a sheriff’s sale on January 9, 2015. Bailey’s claims are nothing more than an impermissible collateral attack that must be dismissed.

For all of the foregoing reasons, the “Void Order” claim fails as a matter of law. The Amended Complaint and related documents, which are subject to judicial notice, establish that the King County Superior Court had both subject matter jurisdiction over the case and personal jurisdiction over the Borrower. Therefore, the “Void Order” was properly dismissed as an improper collateral attack on the Judgment and Decree of Foreclosure in the Judicial Foreclosure Action.

3. The Court Properly Dismissed the Privity of Contract Claim

Bailey’s claim entitled “privity of contract” sought to challenge the foreclosure by asserting that the Trust and MERS interfered with the Real Estate Contract by redefining the terms of the note and otherwise improperly foreclosed on the property without authority of the “Certificateholders.” The claim was properly dismissed because Bailey had no standing to seek protection under the mortgage contract and there are no grounds for alleging the foreclosure had been improper.

a. Bailey is a stranger to the mortgage loan and has no standing to bring a claim to enforce the terms of the loan

Under ordinary circumstances, a stranger to a contract may not sue. *Lobak Partitions, Inc. v. Atlas Const. Co., Inc.*, 50 Wn.App. 493, 497, 749 P.2.d 716 (1988). A third party may enforce a contract to which he is not

in privity only if it is made to appear that the contracting parties intended to “secure to him personally the benefits of the provisions of the contract.” *Layrite Concrete Products of Kennwick, Inc. v. II Halvorson, Inv.*, 68 Wn.2d 70, 72, 411 P.2d 405 (1966) (citations omitted). The borrower lacks standing to challenge a note holder’s authority to enforce the note based on the note holder’s alleged noncompliance with the trust’s pooling and servicing agreement, where the borrower was not a party to, or an intended third party beneficiary of, that agreement. *Deutsche Bank Nat. Trust Co. v. Slotke*, --- P.3d. ---, 2016 WL 107783, at *5 (Wash. Ct. App. Jan. 11, 2016).

Here, Bailey had no contractual relationship with the Respondents and Bailey cannot allege any set of facts establishing privity with MERS or the Trust. The Note, Deed of Trust, Assignment, and Pooling and Servicing Agreement establish that Bailey is not a party to the contracts and there are no facts establishing that the parties entered into the Note, Deed of Trust, Assignment, or Pooling and Servicing Agreement to benefit Bailey. Bailey is not the lender, does not receive a financial benefit from the loan, and is not identified anywhere in the loan or Pooling and Servicing Agreement. Bailey has not set forth any facts showing the mortgage loan was entered to benefit him, a third-party with no ownership interest in the Property and no personal liability under the loan.

Furthermore, as addressed above, Bailey's attack of the Judicial Foreclosure Action is an impermissible collateral attack. On these grounds alone, dismissal is appropriate as it is beyond a reasonable doubt that any facts exist that would justify recovery. *Paradise, Inc. v. Pierce County*, 124 Wn.App. 759, 767, 102 P.3d 173 (2004).

b. The Trust had authority to foreclose in the prior action

Bailey argues the mortgage and foreclosure were invalid because the Trust was only the Note Holder and thus not the real party in interest entitled to foreclose. This directly contradicts Washington law. The Uniform Commercial Code ("UCC") specifically provides that the person entitled to enforce a negotiable instrument is "[t]he holder of the instrument" RCW 62A.3-301; *Brown v. Washington State Dep't of Commerce*, 184 Wash. 2d 509, 536, 359 P.3d 771, 779 (2015). Accordingly, the holder of the Note is entitled to enforce the Note. There is no basis in law for Bailey's contention that holder status does not provide the right of enforcement under Washington law or his claim that the trial court "erred in amended the definition of "Note Holder." [App. Br. §7].

In fact, Bailey's argument that the investors/certificate holders are the true parties in interest has been rejected by Washington courts on

multiple occasions. *Jackson v. Quality Loan Service Corp.*, 347 P.3d 487, 168 Wash.App. 838 (2015). See also *Deutsche Bank Nat. Trust Co. v. Slotke*, --- P.3d. ---, 2016 WL 107783, at *5 (Wash. Ct. App. Jan. 11, 2016), citing *John Davis & Co.*, 75 Wn.2d at 222-23 (“The holder of a negotiable instrument may sue thereon in his own name... It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.”) (citation omitted.)). As a matter of clear Washington code and case law interpreting the code, the Trust was entitled to foreclose as the holder of the Note. *Id.*

4. Bailey’s Claim for Impairing Contractual Obligations was Properly Dismissed

Bailey argued that the Washington Deed of Trust Act, RCW 61.24 *et seq.* (the “DTA”) impaired the Real Estate Contract by allowing the Trust to foreclose the Deed of Trust. While it is unclear whether Bailey has abandoned this argument, the claim fails. A deed of trust is a security instrument that is incident to the obligation it secures: “Washington’s [Deed of Trust Act] contemplates the security instrument will follow the note, not the other way around.” *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012). As set forth by the UCC, a holder refers to the person in possession of the negotiable instrument that

is payable either to bearer or to an identified person that is the person in possession. RCW 62A.1-201(a)(21)(A).

Furthermore, any assignment of the security instrument which secures repayment of the negotiable instrument is irrelevant to holder status. Because the Deed of Trust follows the Note under Washington law, possession of the Note makes the Trust the beneficiary of the Deed of Trust and holder of the Note; the assignment merely publicly records that fact. *See, e.g., Lynott v. Mortgage Electronic Registration Systems, Inc.*, 2012 WL 5995053 at *2 (Nov. 30, 2012, W.D. Wash. 2012).

In his brief, Bailey argues “it is not legally possible for Trustee to have had interest conveyed to it by the assignment from MERS...Respondent Trustee is asserting rights that it never received.” [App. Br. §14]. Bailey further argues that “the court erred in upholding an assignment by an “unlawful beneficiary” pursuant to Washington State law to trust without standing by hearing” and that “MERS shall serve as mortgage of record with respect... to mortgage loans... in an administrative capacity, for the beneficial owner or owners thereof from time to time.” [App. Br. §18.] However, as stated above, the Trust was entitled to foreclose because it was the Note Holder. The Deed of Trust automatically followed the Note it secured and the assignment simply made that fact a matter of public record. The assignment was not

necessary to foreclose and Bailey, who is neither a party to the assignment, or an intended third party beneficiary thereof, lacks standing to challenge it.

Washington law is clear that the Trust, as holder of the Note has the required authority to enforce the Note in the judicial foreclosure action. Bailey's argument regarding the Trust's authority to enforce the note is contradicted by law. As a stranger to the Note, Deed of Trust, Assignment, and Pooling and Servicing Agreement, Bailey lacks standing to challenge those contracts, or the Trust's compliance therewith. Furthermore, to the extent that Bailey sought to challenge the judicial foreclosure, he should have done so in the Judicial Foreclosure Action.

C. The Failure to Rule on Bailey's Motion to Continue Does Not Warrant Reversal

Bailey's Appeal of the Motion to Continue Fails on both procedural and substantive grounds. As a preliminary matter, the Court never ruled on Bailey's Motion to Continue because he never noted it for hearing.

King County Local Rule 7 requires the moving party serve and file all motions six court days before the date the party wishes the motion to be considered. The motion must be scheduled for hearing on a judicial day. LCR 7(b)(4)(A). A Note for Motion is required. LCR 7(b)(4)(A). The

Note for motion provides the title of the motion, the date and time the hearing will be held, or the date on which the matter will be taken under advisement. [*Id.*]. In this case, Bailey failed to note the Motion to Continue and he did not appear at the Motion to Dismiss hearing to request the hearing be continued. [CP 410:10-15.]

Even if the Motion to Continue had been heard, Bailey's Motion to Continue was untimely and failed to meet the required standard for such motions. Motions under Civil Rule 12(b) are subject to the scheduling requirements of CR 56 and Local Civil Rule 56. CR 56 requires that a party opposing the dispositive motion file an opposition no later than 11 days before the motion hearing.

If the party opposing a summary judgment motion submits an affidavit stating that she is unable to present facts essential to her opposition, then the Court may order a continuance "if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions or conduct discovery." *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 742, 218 P.3d 196 (2009); CR 56(f). A superior court does not abuse its discretion if it denies a motion for a continuance because "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence would be established through the additional

discovery, or (3) the desired evidence will not raise a genuine issue of material fact.” *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn.App. 1, 16, 329 P.3d 83 (2014) (quoting *Turner v. Kohler*, 54 Wn.App. 688, 693, 775 P.2d 474 (1989)). “A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Garcia*, 179 Wn.2d 828, 846, 318 P.3d 266 (2014) (quoting *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)). The Court of Appeals reviews a superior court's decision to deny a motion for a continuance for a manifest abuse of discretion. *Doyle v. Lee*, 166 Wn.App. 397, 403-04, 272 P.3d 256 (2012).

In this case, Bailey’s appeal fails for procedural and substantive grounds. First, as described above, Bailey failed to note the Motion to Continue. Accordingly, the Motion to Continue was not heard and the Court never ruled on his motion. Second, Bailey’s Motion to Continue failed to identify facts, depositions, or discovery required to respond to the Motion to Dismiss or identify any evidence that would be established through the additional discovery. [CP 20]. Instead, Bailey’s Motion stated that he needed more time to consult counsel to “ensure Plaintiff response is formulated properly and articulated in a manner that is coherent for the Court to understand such.” [*Id.*] However, Bailey also failed to offer a good reason for the delay and the case had been pending for more than

five months before the Motion to Dismiss was heard on June 12, 2015. Furthermore, the Judicial Foreclosure Complaint was filed on April 3, 2013, and Bailey's Second Amended Adversary Complaint in the Borrower's Bankruptcy was filed on December 2, 2014. [CP 335, 382]. Bailey had sufficient time to conduct discovery and obtain counsel before the hearing on the Motion to Dismiss. Finally, Bailey was entitled to appear at the Motion to Dismiss and could have requested additional time to respond.¹⁰ However, Bailey failed to note the Motion to Continue, failed to meet the standard on a Motion to Dismiss, and he failed to appear at the hearing on the Motion to Dismiss to request additional time. Even if the Court had denied Bailey's Motion to Continue, such a ruling would have been justified.

Bailey also argues that because the Court did not grant his request for a continuance, that his right to due process was violated. [App. Br. §7]. The due process clause of the Fourteenth Amendment confers both procedural and substantive protections. *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.

¹⁰ Bailey's Motion to Continue requested additional time to respond, but did not indicate that he was unable to attend the hearing. [CP 20].

Mathews v. Eldridge, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The opportunity to be heard must be “at a meaningful time and in a meaningful manner,” appropriate to the case. *Id.* at 333, 96 S.Ct. 893 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). In this case, Bailey received notice of the Motion to Dismiss. [CP 396-397]. Bailey had several weeks to submit a written opposition to the Motion to Dismiss, but failed to do so. [CP 410-411]. The hearing on the Motion to Dismiss was scheduled for 10:30 A.M. on Friday June 12, 2015, at the King County Superior Court. [CP 291-293]. Bailey knew of the hearing, but chose not to appear. [CP 20-22, 411]. Bailey has not and cannot demonstrate that he was denied due process when he was given appropriate notice, had multiple opportunities to meaningfully respond, and failed to do so.

D. Bailey’s Motion for Reconsideration Was Properly Denied

Bailey’s Motion for Reconsideration was properly denied because the motion failed to comply with appropriate procedural requirements and also had no merit.

1. The Motion Failed to Comply with the Mandatory Requirements of CR 59

Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling

absent a showing of manifest abuse of discretion. *Perry v. Hamilton*, 51 Wash.App. 936, 938, 756 P.2d 150 (1988). A trial court abuses discretion when its decision is based on untenable grounds or reasons. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wash. App. 896, 906, 977 P.2d 639 (1999). *Wilcox v. Lexington Eye Inst.*, 130 Wash. App. 234, 241, 122 P.3d 729, 732 (2005). CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision. *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wash.App. 1, 7, 970 P.2d 343 (1999).

A motion for reconsideration shall be filed not later than 10 days after entry of the judgment, order, or other decision. CR 59(b). It must also be served within the ten day time. *Schaefco, Inc. v. Columbia River Gorge Com'n*, 121 Wn.3d 366, 367-368, 849 P.2d 1225 (1993). A trial court may not extend the time period for filing a motion for reconsideration. CR 6(b)(2); *Moore v. Wentz*, 11 Wash.App. 796, 799, 525 P.2d 290 (1974).

Here, the order granting the Motion to Dismiss Amended Complaint was entered on June 12, 2015. [CP 22]. Accordingly, Bailey was required to file and serve a motion for reconsideration on or before

Tuesday, June 23, 2015.¹¹ CR 59(b), CR 6. However, Bailey did not file his Motion for Reconsideration until June 29, 2015 and again on June 30, 2015. Accordingly, because the Motions for Reconsideration were untimely and the trial court may not extend the time period for filing a motion for reconsideration, the Court's denial of his motion was appropriate.

Similarly, a motion to alter or amend a judgment must be filed not later than 10 days after entry of judgment. CR 59(h). Bailey's request that the Order of Dismissal be amended to a dismissal without prejudice similarly failed to comply with the mandatory 10 day deadline articulated in CR 59(h) and fails for the same reason.

2. The Motion Had No Merit on Substantive Grounds.

CR 59(a) limits the grounds for reconsideration to nine identified causes. CR 59(a)(1)–(9). Here, the only category implicated in Bailey's Motion to Continue is his claim that there was newly discovered material evidence that he could not with reasonable diligence have discovered and produced at the trial. CR 59(a)(4). Bailey alleged that the "Forensic Audit" he provided with his motion constitutes new evidence. However, the Forensic Audit did not satisfy CR 59(a)(4) and did not constitute admissible evidence because it is not relevant. The Forensic Audit does

¹¹ Ten days from June 13, 2015 is June 23, 2015.

not have any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable. ER 401. The Deed of Trust unequivocally establishes that Plaintiff is a stranger to the Borrower's mortgage loan. The Real Estate Contract establishes not only the parameters of Bailey's contractual relationship with the Borrower, it also establishes that the Bailey has no contractual relationship with the Trust or MERS. The Forensic Audit fails to set forth any evidence that would make the existence of any material fact more or less probable. The conclusory allegations regarding the securitization of the loan are not only speculative, they are irrelevant to Bailey, who is not a party to the Borrower's loan.

Second, the Forensic Audit constitutes inadmissible hearsay. The Forensic Audit is a written statement, made by "Certified Mortgage Review & Analysis, PMA," not made while testifying at a trial or hearing, offered in evidence, to prove the truth of the matter asserted. ER 801(c).

The Rules of Evidence establish that the "Forensic Audit" does not constitute admissible evidence. The Motion for reconsideration should be denied as the evidence must be admissible at trial. CR 59(a)(4). Notably, this type of Forensic Mortgage Loan Audit conducted by a "loan auditor" to determine compliance with state and federal laws is exactly the type of mortgage and foreclosure scam referenced on the Washington

Attorney General's Website: <http://www.atg.wa.gov/mortgage-and-foreclosure-scams>.

V. CONCLUSION

For the reasons set forth above, Respondents request the Court affirm the trial court's rulings.

RESPECTFULLY SUBMITTED this 7th day of March, 2016.

HOUSER & ALLISON, APC

By: /s/ Cara C. Christensen

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Respondents U.S. Bank National
Association, as Trustee for Ownit
Mortgage Loan Trust, Mortgage Loan
Asset-Backed Certificates, Series 2006-3
and Mortgage Electronic Registration
Systems, Inc.

CERTIFICATE OF SERVICE

I the undersigned declare as follows: I am over the age of 18 years and am not a party to this action. I certify that on the 7th day of March 2016, I caused a true and correct copy of this Response Brief to be served on the following via UPS Overnight:

Jeff Bailey
10743 56th Ave.
Seattle, WA 98178

Gregory J. Jalbert
1001 4th Ave 3200
Seattle, WA 98154

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

Dated: March 7, 2016

/s/ Shawn Williams

Shawn Williams