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(Court of Appeals No. 73336-2-I)

(King County Superior Court No. 14-2-12762-6 SEA)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BYRON BARTON and JEAN BARTON,

Petitioners/Plaintiffs,

v.

JP MORGAN CHASE BANK, N.A., et al.,

Respondents/Defendants.

ANSWER OF JPMORGAN CHASE BANK, N.A., TO MOTION TO FILE A SUPPLEMENT TO PETITION FOR REVIEW BY BYRON BARTON and JEAN BARTON

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I. INTRODUCTION

Petitioners Byron and Jean Barton ("Bartons") filed a document entitled RAP Rule 18.8 Waivers of Rules and Extension of Time, which this Court has treated as a Motion to File a Supplement to Petition for Review on four subjects:

1. JPMorgan Chase Bank, N.A. ("Chase")'s alleged use of robo-signers;

2. Chase's lack of standing;

3. Chase failing to grant a HAMP modification; and

4. the applicability of *res judicata*.

There is no reason to allow the Bartons to supplement their original petition so the Court can consider these four issues. The four issues cannot revive this third lawsuit because they have no merit. Except for the *res judicata* issue, none of the issues was raised below. The Court should deny the Motion for the following reasons:

First, the Bartons waived review of the robo-signer, standing, and HAMP issues because they did not raise them below;

Second, the Bartons fail to explain how the appellate court decision conflicts with decisions of the Supreme Court or another Court of Appeals, or cite an issue of substantial public interest in the four subjects;

Third, denial of the petition is appropriate because review of the four issues is pointless because the issues lack substantive merit.

The Court should affirm the appellate court decision and should award Chase its attorney fees.

II. IDENTITY OF RESPONDENT

Chase is the respondent and a defendant in this case.

III. STATEMENT OF CASE

Chase has provided a detailed statement in its November 14, 2016 Answer. A brief summary is below.

A. Factual Background

In August 2007, Mrs. Barton obtained a $456,500 first loan and a $207,500 Home Equity Line of Credit ("HELOC") second loan from Washington Mutual Bank ("WaMu") in a cash-out refinance of the Bartons' prior loans. CP 216-221, 276-284. The two new loans were evidenced by Notes and secured by Deeds of Trust recorded against the Bartons' property. CP 216, 221, 223-243, 276-284.

The first recorded Notice of Trustee's Sale scheduled a sale for December 21, 2012. CP 340-343. A second Notice of Trustee's Sale set a sale for August 9, 2013. CP 412-415. In December 2013, the foreclosure trustee recorded a third Notice of Trustee's Sale, setting a sale date for April 11, 2014. CP 461-464. On April 11, 2014, the Property was sold to Triangle Property Development for $646,000.00. CP 466-468.

B. Procedural Background

The Bartons filed three lawsuits: the First Lawsuit on August 31, 2012; the Second Lawsuit on April 23, 2013; and the Third Lawsuit (the current one) on May 5, 2014. The complaints in the First and Second Lawsuits were identical, and the complaint in the Third was similar to the first two. Each was dismissed. CP 1-17, 245-259, 349-362, 408-410, 417-

421, 597-598, 623-626, 726-727. On September 26, 2016, the appellate court affirmed the trial court's determination that *res judicata* barred this current lawsuit.

IV. ARGUMENT

The Bartons move this Court to be allowed to supplement their previous petition for review of the appellate court decision. There is no reason to review the appellate court's decision on the four additional bases the Bartons raise.

A. The Bartons Waived Review of the First-Third Issues Mentioned in Their Supplemental Petition

Under Rule Of Appellate Procedure 2.5, the appellate court can refuse to review any claim of error that was not raised in the trial court. Likewise, under Rule Of Appellate Procedure 12.1, the appellate court can only decide a case on the issues raised in the appellate briefs.

None of the first three issues was adequately raised in the appellate court. The Bartons failed to make any substantive arguments referring to them or otherwise raise those issues in both their trial and appellate court pleadings. CP 482-495, 525-528, 623-626, 677-679; RP 10-15, 17-19; Appellate Opening Brief. They therefore have waived any review of the four issues by this Court. *See Mangat v. Snohomish Cty.*, 176 Wn. App. 324, 334 (2013); *US W. Commc'ns, Inc. v. Wash. Utilities & Transp. Comm'n*, 134 Wn.2d 74, 112 (1997), *as corrected* (Mar. 3, 1998). For the HAMP issue, it does not appear anywhere in the operative Complaint. The Bartons cannot manufacture new claims through argument and may

not plead their theories seriatim. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472 (2004) ("A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.").

To the extent that the Bartons' argument is that Chase did not have possession of the Note (as opposed to arguing it was not a successor to Washington Mutual on the loan), that is not a standing argument (the Bartons sued Chase, not the other way around). Rather, it is an argument over a wrongful foreclosure claim, and barred under *res judicata*, as discussed below.

B. The Bartons Fail to Show Any Basis for This Court to Review the Four Issues

Under Rules of Appellate Procedure 13.4(b)(1), (2) and (4), a petition to review a decision is accepted only if the decision conflicts with decisions of the Supreme Court or another Court of Appeals, or if an issue of substantial public interest is present. RAP 13.4; *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 125 (1993). For the four issues, the Bartons fail to explain how the appellate court's decision conflicts with this Court's decision or other appellate court decisions. The appellate court's opinion did not address the first three issues, so there cannot be any conflict. For the fourth, *res judicata*, the law is settled and there is no reoccurring conflict. There is no novel issue of law, and reviewing the appellate court's decision will not lead to guidance on those four issues. As discussed below, the four issues cannot revive their lawsuit as they cannot

be the basis for any claims. The four issues are personal to the Bartons. The Bartons simply want a fourth bite at the apple.

C. The Court Should Deny the Motion Because the Bartons' Four Issues Lack Merit

The Bartons' four issues may not revive their lawsuit. Even if the Court granted review, the Bartons could not base claims on those issues.

1. The Bartons Fail to Show Any Robo-signing

The Bartons claim *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 792 (2013), made robo-signing actionable. But the *Klem* court only found that pre-dated and/or false notarizations are actionable, not robo-signing per se. Washington courts recognize that simply calling someone a "robo-signer" is a legal conclusion, not a factual allegation, and does not support liability of any kind. *Mickelson v. Chase Home Fin. LLC*, 2012 WL 1301251, *4-*5 (W.D. Wash. 2012) (unpublished) (granting motion to dismiss and rejecting claims based on alleged "robo-signing" as nothing more than legal conclusions unsupported by factual allegations"); *see also Mortensen v. Countrywide Bank, FSB*, 13-35286, 2016 WL 5800476, at *1 (9th Cir. Oct. 5, 2016) (unpublished); *Orlob-Radford v. Midland Funding LLC*, 2:15-CV-00307-JLQ, 2016 WL 5859002, at *6 (E.D. Wash. Oct. 5, 2016) (unpublished); *Brophy v. JPMorgan Chase Bank, N.A.*, 2:14-CV-0411-TOR, 2015 WL 11117681, at *4 (E.D. Wash. Feb. 13, 2015) (unpublished).[1]

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[1] Recent court decisions in other states have rejected "robo-signer" challenges brought by borrowers. *See Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808, 818–19, 199 Cal. Rptr. 3d 790, 798–99

The Bartons merely claim (without pointing to any evidence in the record) that the appointment of the successor trustee was robo-signed. They do not show that any improper actions occurred or that a notarization was improper. Their only "proof" of robo-signing was that Salwa Ahmed could not be found in an internet search. This means nothing, as many entities do not list all of their employees or officers on the internet. There simply is no evidence that any robo-signing or improper actions occurred, and the Bartons do not point to where the record shows any.

2. Chase had "Standing" as it was a Successor to Washington Mutual's Loans

The Bartons do not explain how Chase lacks standing. They seem to argue that Chase did not obtain the loan from Washington Mutual. There is no question Chase succeeded Washington Mutual on the loan; numerous courts have held that. *See e.g., GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1029–30 (9th Cir. 2012); *Gossen v. JPMorgan Chase Bank*, 819 F. Supp. 2d 1162, 1167 (W.D. Wash. 2011); *In re Tr.'s Sale of Real Prop. of Ball*, 179 Wn. App. 559, 561 (2014).

The Bartons also cite several out-of-state cases claiming that Chase must prove it owns the Note to plead its claims. Since Chase did not bring

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(2016), *reh'g denied* (Apr. 11, 2016), *review denied* (July 13, 2016); *Wells Fargo Bank, N.A. v. Anderson*, 89 Mass. App. Ct. 369, 372, 49 N.E.3d 682, 685 (2016); *Bank of New York Mellon v. Bobo*, 50 N.E.3d 229, 237 (Ohio Ct. App. 2015); *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521–22 (10th Cir. 2013); *Logan v. LaSalle Bank Nat. Ass'n*, 80 A.3d 1014, 1024 (D.C. 2013).

this lawsuit, there is no issue of standing to prosecute claims. As discussed below, they already made this argument in the first two complaints. Even if the Bartons are claiming that Chase did not possess the Note (so it could not foreclose), they cannot state such claims. The Bartons waived their post-foreclosure DTA claims when they did not obtain a pre-sale injunction. RCW 61.24.040(1)(f)(IX); *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163 (2008); *Frizzell v. Murray*, 179 Wn.2d 301, 306–307 (2013); *Patrick v. Wells Fargo Bank N.A.*, --- P.3d ---, 73827-5-I, 2016 WL 6949587, at *4 (Wash. Ct. App. Sept. 26, 2016); CP 3, 341, 408-410, 413, 417-421, 461-464.

3. The Bartons Cannot State a Claim for Violating HAMP

The supposed HAMP violation was not even pled in the complaint in the Third Lawsuit. The Bartons do not allege any facts showing Chase violated HAMP or that they were even eligible. A failure to provide a HAMP modification alone is simply not a basis for a claim. *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 231–32 (2016). They otherwise have not stated any basis on which to bring a HAMP-based claim. They cannot state a claim for failure to modify their loan. "While the parties may choose to renegotiate their agreement, they are under no good faith obligation to do so." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 572 (1991). Chase has the freedom to contract with whom it pleases nothing requires it to modify the loan. *See Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn. App. 898, 908 (2015), *review*

denied, 185 Wn.2d 1006 (2016); *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 146–47 (2014), *review denied*, 181 Wn.2d 1008 (2014). There is no private right of action under HAMP, in any event, and this issue may not act as a basis to review or to revive their lawsuit.

4. The Appellate Court's Decision Correctly Held *Res Judicata* Barred the Bartons' Claims

Chase has discussed the issue of *res judicata* in its November 14, 2016 brief. To avoid duplication and promote efficiency, it will summarize its arguments below and address the new issues of robo-signing, standing and HAMP modifications.

As to the dismissal of this action, *res judicata* applies when there is a "concurrence of identity in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made." *Emeson v. Dep't of Corr.*, 194 Wn. App. 617, 627 (2016). This lawsuit and the previous two cases litigated the same subject matter—the loan, the right to title and possession and, most importantly, stopping the foreclosure on the Bartons' property. All three sought to nullify the deed of trust (and therefore stop the foreclosure). All three lawsuits arose from the same facts—Chase succeeding to the loan, their default, and the subsequent foreclosure. *First Lawsuit Complaint*: CP 349 ("according to RCW 61.24.130 stop the sale of the home"), CP 350 ("they have received notification that their home may be foreclosed upon"), 352 ("costs and expenses incurred to attempt to prevent and fight pending foreclosure"), 359-361; *Second Lawsuit Complaint*: CP 246 ("according to

RCW 61.24.130 stop the sale of the home"), 247 ("they have received notification that their home may be foreclosed upon"), 249 ("costs and expenses incurred to attempt to prevent and fight pending foreclosure"), 256-258; *Third Lawsuit Complaint*: CP 3-4 ("The Barton's [sic] filed suit to stop the sale of the illegal auction"), 5 ("Chase knowingly used "FAT to illegally foreclose"). Thus, *res judicata* properly applied.

5. *Res Judicata* Bars Any Claim Based upon the First-Third Issues

Res judicata also bars the first three issues the Bartons now raise. As mentioned, *res judicata* encompasses claims that were brought in earlier lawsuits. *Emeson*, 194 Wn. App. at 627. It also bars claims that "could have been raised, and in the exercise of reasonable diligence should have been raised". *Emeson*, 194 Wn. App. at 626.

The robo-signing was allegedly of the appointment of a successor trustee on June 7, 2012. Supplement Petition p.2; CP 346. This occurred before the Bartons filed their First Lawsuit on August 31, 2012, so they should have alleged it in that complaint. Their failure to do so bars the claim from the April 23, 2013 Second Lawsuit, and the current, May 5, 2014 Third Lawsuit.

The issue whether Chase had an interest in the loan was, in fact, litigated in all three lawsuits. *First Lawsuit Complaint*: CP 355 ("There is no evidence submitted by Defendant's that proper assignment(s) were made to prove ownership of Plaintiff's note."); *Second Lawsuit Complaint*: CP 252 (same); *Third Lawsuit Complaint*: CP 9 ("The

Defendant Chase Bank is not the real party of interest and has no standing to pursue this action"). All three trial courts dismissed the claims, as did the appellate court. Appellate Opinion p.5-6. As discussed above, Chase did succeed to the loan, so the allegation is simply wrong. And since they did not enjoin the sale, they have waived any challenge based upon Chase supposedly not possessing the Note. *Frizzell*, 179 Wn.2d at 306–307; *Patrick*, --- P.3d ---, 2016 WL 6949587, at *4. Thus, it is res judicata.

Finally, the Bartons may not raise the issue of a HAMP denial for the first time in a petition for review, as it was not pled in the complaint in the Third Lawsuit or argued to the Court of Appeals. Even if it had been, it again was litigated in the First and Second Lawsuits. *First Lawsuit Complaint*: CP 355 ("Defendants violated HAMP"); *Second Lawsuit Complaint*: CP 252 (same). The Bartons may not bring in new theories in argument or plead their theories seriatim. *Kirby*, 124 Wn. App. at 472.

V. CONCLUSION

There is no reason for the Court to grant the Bartons' motion. The Bartons waived review of the first three issues because those issues were not raised below. Their four issues also lack merit and do not support any claims. For the reasons stated above, the Court should deny the petition for review and the Court should award Chase its attorney fees.

RESPECTFULLY SUBMITTED this 8th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies and declares under penalty of perjury under the laws of the state of Washington that on this 8th day of December 2016, she served a copy of the foregoing document upon the following via messenger:

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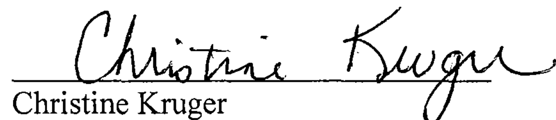

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