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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

FROM THE SUPERIOR COURT OF KING COUNTY

WERELIUS v. WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2

CASE NO. 14-2-19177-4

COA No. 73951-4-1

APPELLANTS' PETITION FOR REVIEW OF PUBLISHED APPELLATE COURT DECISION

Jay L. and Carol A. Werelius, Appellants

IN THE COURT OF APEALS FOR THE STATE OF WASHINGTON, KING COUNTY

JAY L. AND CAROL A. WERELIUS

APPELLANTS

v.

WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2

APPELLE

_____/

PETITION FOR REVIEW

PUBLISHED OPINION OF APPEALS COURT

The appeals court failed to make its own ruling. Instead, it simply adopted the naked, unproven and factually incorrect allegations of the attorneys who were representing the appellee and restated those identical statements as if they were the findings of the appeals court.

The appeals court has ignored the holdings of this court regarding summary judgments and its ruling is in conflict with other rulings of the appeals court as set forth in the attached appeals brief.

There is a great public interest in this case for the following reasons.

From the time that the appeals court was constructed under the state constitution, the court has held the process of summary judgment as an extraordinary measure and that it should not be used without careful consideration. Judging by the recent flood of foreclosures, the trial court system appears to be supported by the appeals court in using summary judgments in place of trials. This appears to be the new normal, if not for any other reason than the judges don't want to hear defenses from what they consider "dead beats" and, more importantly and more likely, giving the banking system what it wants in every single case, and without any trials, helps the banking system prop up the stock market so that the pension funds of the court's personnel are not adversely affected.

A true and correct copy of the appeals brief and this court's ruling and the appellants' objection is included with this petition.

ISSUES TO BE REVIEWED

I – The trial court substituted summary judgment for a trial when a trial was required under the rules.

If the trial courts are going to act in this manner, denying consumers access to the court and allowing the banking system to take property without one scintilla of evidence, then this marks a significant change in public policy, for which no notice to the public has been given.

In fact, hearings are now conducted in private chambers, not in open court where anyone can listen to the proceeding. This is very suspicious and unless the Supreme Court is behind these unpublished and surreptitious changes, it should review and intervene.

The appellants advise the court that the word in social media these days is that the court system is now owned by private banking interests in which bonds for case files are sold as securities and the court is no longer a court but a broker-dealer for the banking system use in conveying property rights for its own gain. In turn, the "court" personnel are rewarded by a fake stock market. Again, this is the "word on the street" as it were.

II – The appellate court failed to make its own findings of fact or conclusions of law, but instead, adopting averments made by attorneys in place of its own findings and legal conclusions.

The appeals court failed to make any of its own ruling in this appeal but instead, simply adopted the same claims made by the appellee's attorney, stating that the appellee produced evidence to prove its case when in fact, no evidence was ever produced in the trial court proceeding. A review of the appeals court's "ruling" is attached for this court to review.

The appeal was filed based upon an abuse of discretion but the appeals court failed to review the record and make its own findings of fact or conclusions of law. If you review the appellants' objection to the appeals court's decision, you will discover that the appeals court failed to make any ruling, but instead, only mimicked what the appellee's attorneys stated during the proceeding.

No evidence was taken at any time during the proceeding and the trial court judge tampered with the transcript so he could help the plaintiff and his own pension fund. The affidavits supporting this were ignored by the appeals court.

It appears that the trial court and its attorneys are fully aware that whatever is claimed during the trial court proceeding will be endorsed by the appeals court, especially in a foreclosure and this appears to have encouraged this type of conduct.

The appellee and its attorneys filed false documents with the court and made false claims, and produced counterfeit and forged

securities in support of the foreclosure complaint. This was never addressed during the proceeding because the appellants were denied access to the court and a trial and meaningful discovery.

The appellants want this matter reversed and the case remanded back to the trial court for a trial.

DATED this 31st day of January 2017.

Jay L. Werelius, Appellant

Carol A. Werelius, Appellant

IN THE COURT OF APEALS FOR THE STATE OF WASHINGTON, KING COUNTY

JAY L. AND CAROL A. WERELIUS

APPELLANTS

v.

WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2

APPELLE

_____/

CERTIFICATE OF SERVICE

I Carol A. Werelius hereby certify that a true and correct copy of the foregoing was served upon the appellee's attorney, Jonathan A. Burky, 1601 Fifth Ave. Ste 850, Seattle WA 98101, on this 14th day of February, 2017.

By: Carol A. Werelius

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2,	)	No. 73951-4-I
Respondent,	)	DIVISION ONE
v.	)	
CAROL A. WERELIUS AND JAY L. WERELIUS,	)	UNPUBLISHED OPINION
Appellants,	)	FILED: January 17, 2017
UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE; ALSO ALL PERSONS OF PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT HEREIN,	)	
Defendants.	)	

BECKER, J. — Appellants argue that the trial court erred in considering the original promissory note presented at a summary judgment hearing because it was new evidence. It was not new evidence. The note beneficiary had

previously produced a copy of the note in support of its motion for summary judgment. We affirm.

In 2006, appellants Carol and Jay Werelius obtained a mortgage loan, evidenced by a promissory note. The note was secured by a deed of trust on their property. Respondent Wilmington Trust National Association eventually became the beneficiary of the promissory note and deed of trust.

In 2011, the Wereliuses defaulted on their loan. In July 2014, Wilmington Trust sued to foreclose on the Wereliuses' property.

On June 18, 2015, Wilmington Trust moved for summary judgment. On August 13, the trial court held a hearing on the motion and entered an order granting summary judgment in favor of Wilmington Trust. The Wereliuses moved to set this order aside 12 days later. Nothing came of this motion, and no error has been assigned concerning it.

In October 2015, the trial court entered a judgment and decree of foreclosure in favor of Wilmington Trust. The Wereliuses appeal.

We review an order granting summary judgment de novo, engaging in the same inquiry as the superior court. Deutsche Bank Nat'l Trust Co. v. Slotke, 192 Wn. App. 166, 170, 367 P.3d 600, review denied, 185 Wn.2d 1037 (2016).

At the summary judgment hearing, Wilmington Trust presented the original promissory note.[1] The Wereliuses argue that the court erred in considering the

[1] The Wereliuses allege that the verbatim report of proceedings was altered and that the original note was not presented at the hearing. They have not submitted sufficient evidence to support this allegation, and we do not consider it.

original promissory note because an attorney cannot present new evidence at a summary judgment hearing. But Wilmington Trust had previously filed an affidavit from their loan servicer in support of its motion for summary judgment. Attached to this affidavit was a copy of the promissory note. The Wereliuses do not allege that the affidavit was wrongfully considered. We conclude the original promissory note presented at the hearing was not new evidence.

The Wereliuses claim that their motion to dismiss "is still pending and the appellee has failed to respond in any way." In August 2014, the Wereliuses moved to dismiss Wilmington Trust's complaint, but they failed to note the motion for a hearing. A year later, in August 2015, the Wereliuses finally noted their motion to dismiss for a hearing, scheduled for the same day as the summary judgment hearing. At the hearing, the trial court considered the Wereliuses' motion to dismiss as an opposition to Wilmington Trust's motion for summary judgment. The trial court's grant of summary judgment to Wilmington Trust served as a denial of the Wereliuses' motion to dismiss.

The Wereliuses claim that Wilmington Trust's notice of hearing on its motion for summary judgment failed to comply with the notice requirements set forth in CR 56 and unfairly denied them an opportunity to respond timely as set forth in the rules. CR 56(c) requires a party to file and serve a motion for summary judgment "and any supporting affidavits, memoranda of law, or other documentation" no later than 28 calendar days before the hearing. Wilmington Trust filed and served its motion for summary judgment and supporting affidavit, memorandum of law, and other documentation on June 18. This was 56

calendar days before the August 13 hearing. We conclude Wilmington Trust complied with the notice requirements of CR 56.

Wilmington Trust requests an award of attorney fees and costs as the prevailing party. Attorney fees may be awarded according to a contract, statute, or a recognized ground of equity. Edmundson v. Bank of America, 194 Wn. App. 920, 932, 378 P.3d 272 (2016).

Paragraph 21 of the deed of trust provides as follows:

> 21. Acceleration; Remedies. If any installment under the Note or notes secured hereby is not paid when due, or if Borrower should be in default under any provision of this Security Instrument, or if Borrower is in default under any other deed of trust or other instrument secured by the Property, all sums secured by this Security Instrument and accrued interest thereon shall at once become due and payable at the option of Lender without prior notice, except as otherwise required by applicable law, and regardless of any prior forbearance. In such event, Lender, at its option, and subject to applicable law, may then or thereafter invoke the power of sale and/or any other remedies or take any other actions permitted by applicable law. Lender will collect all expenses incurred in pursuing the remedies described in this Paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of this evidence.

The quoted language is similar to the language in the deed of trust that was found to authorize an award of attorney fees on appeal in Edmondson. "This provision applies because this action arises out of Carrington's pursuit of the foreclosure remedies permitted by the deed of trust." Edmondson, 194 Wn. App. at 933. The same is true here. Wilmington Trust's request for attorney fees and costs is granted.

Affirmed.

Becker, J.

WE CONCUR:

Mann, J.

Appelwick, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

FROM THE SUPERIOR COURT OF KING COUNTY

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APPEALS NO. 73951-4-I

CASE NO. 14-2-19177-4

APPELLANTS' OPENING BRIEF

Jay L. and Carol A. Werelius, Appellants

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Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)

Zobrist v. Culp, 18 Wash. App. 622, 637, 570 P.2d 147 (1977)

Regulations and Rules

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ASSIGNMENTS OF ERROR

No. 1 Summary judgment hearings are not the time to take new evidence.

No. 2 An attorney cannot introduce evidence at a summary judgment hearing.

Issues Pertaining to Assignments of Error

Assignment of Error 1.

"Is it the purpose of summary judgment to take new evidence at the hearing on a party's motion for summary judgment?"

Assignment of Error 2.

"Can the attorney representing the moving party in its motion for summary judgment proffer evidence at the hearing?"

STATEMENT OF THE CASE

This is an appeal from a foreclosure complaint that was commenced by the appellee on the date of July 8th 2014.

The appellants were served with the summons and complaint on the date of August 11th, 2014.

The complaint alleged that the appellee was the holder and owner of a promissory note and trust deed to which the appellants were in default and indebted to the appellee.

The appellants filed a timely motion to dismiss on the date of August 29th 2014.

The appellee attempted to obtain a default judgment against the defendants and it was denied by the court on November 10th 2014.

No action was undertaken by the appellee to move the case forward until it filed its motion for summary judgment some time in June, 2015, which was heard on the date of August 13th 2015.

The appellants served notice that their motion to dismiss would also be heard on that date, but it was ignored and no ruling was made by the court.

In response to the appellee's motion for summary judgment, the appellants filed an opposition with supporting affidavits on or about the date of June 20th 2015.

The court held a hearing on the date of August 13th 2015, at which time it granted the motion and a final entry of the judgment was entered on September 28th 2015.

The appellants filed a motion to set aside the August 13th order granting summary judgment and the court refused to schedule any hearing on it and the motion was never heard or ruled upon by the court.

The appellants filed a timely notice of appeal with the appropriate filing fees and this appeals brief is now filed within the time limits imposed by the court.

SUMMARY OF ARGUMENT

A summary judgment hearing is not appropriate for presenting evidence. At the hearing on appellees' motion for summary judgment, the plaintiff's attorney brought a piece of paper with words on it, claiming that it was the note but without anyone to authenticate the paper or bring it into evidence and no note has ever been taken into evidence in this proceeding. He stated it to be "the actual written note in this case". (Ref page 3, paragraph1 of the Verbatim Transcript.)

The court is limited to reviewing only the record as it existed at the time the motion for summary judgment was filed.

ARGUMENT

This appeals court has jurisdiction to hear this appeal as a matter of right under Rule 2.1a(1) and Rule 2.2a(1).

The trial court incorrectly or in error, granted summary judgment based upon the plaintiff's attorney's claims of having new evidence that had not yet been entered into the record at that point, and still has not been entered into the record, and while the attorney was not a witness, ignoring the appellants' objections. The attorney claimed to have the original note, yet it was not the time to introduce evidence and there was no witness to enter the evidence, yet this attorney did not even bother to bring the purported trust deed to the hearing.

Unsworn statements made by an attorney cannot be used by the court to make determinations of fact, and the defendants have objected to the same. The attorney who appeared at the hearing was not of record. He brought with himself new papers that were never entered into evidence and informed the court that these papers were the original note and that this somehow entitled his client to a judgment without any discovery and without any evidence

and without any trial. This is not supported by any laws in this state as demonstrated within the following memorandum of law.

This conduct violates not only the rules of civil procedure, but public policy and the purpose for which a court system was created in the first place. The defendants were unfairly denied any opportunity to cross examine any witnesses or evidence.

The motion for summary judgment, in the first place, was untimely.

Appellants objected to the motion for summary judgment because it was filed at a time when the moving party was not entitled to summary judgment as a matter of law and the facts alleged in the complaint conflicted with the exhibits. (Ref page 8, paragraph 5 of the Verbatim Transcript.) The appellee had not undertaken any actions to advance the complaint and had not responded to the appellants' motion to dismiss that was still pending.

There were and are genuine issues of material fact in dispute and the appellee was not entitled to judgment as a matter of law.

No evidence and no evidentiary material has been taken in this case. The appellee has failed to prosecute or advance its complaint and there was no evidence in the record.

This is a contested foreclosure and should have been set for trial.

"The function of summary judgment is to determine whether there is a genuine issue of material fact requiring a formal trial." Chase v. Daily Record, Inc., 83 Wn.2d 37, 42, 515 P.2d 154 (1973) (quoting Leland v. Frogge, 71 Wn.2d 197, 200, 427 P.2d 724 (1967)). 'Summary judgment is a procedure for testing the existence of a party's evidence.' Cofer v. County of Pierce, 8 Wn. App. 258, 261-62, 505 P.2d 476 (1973). In a summary judgment hearing, "{t}he evidence before the judge is that contained in the pleadings, affidavits, admissions and other material properly presented." Chase, 83 Wn.2d at 42 (quoting Leland, 71 Wn.2d at 200).

Rule CR 56 SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment

may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is

neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The appellee's notice of hearing on its motion for summary judgment fails to comply with the notice requirements set forth in Rule 56 and unfairly denies the appellants an opportunity to respond timely as set forth in the rules.

The appellants' motion to dismiss is still pending and the appellee has failed to respond in any way. A motion to dismiss does not admit allegations in the complaint that conflict with facts disclosed in the exhibits. Brock v. Anderson Road Ass'n, 287 Ill. App. 3d 16, 21, 677 N.E.2d 985, 989 (1997). The exhibits attached

to the complaint are controlling. Brock, 287 Ill. App. 3d at 21, 677 N.E.2d at 989.

Summary judgment is appropriate if the evidence, viewed in the nonmoving party's favor, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). The court should grant the motion if reasonable persons could reach only one conclusion. Wilson, 98 Wn.2d at 437; see also Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) and Idahosa v. King County (2002).

Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules. See, e.g., American Discount Corp. v. Saratoga West, Inc., 81 Wash. 2d 34, 499 P.2d 869 (1972); Rinke v. Johns-Manville Corp., 47 Wash. App. 222, 225, 734 P.2d 533 (1987). Indeed, our own Court of Appeals has noted the Celotex rule. See Controlled Atmosphere, Inc. v. Branom Instrument Co., 50 Wash. App. 343, 350, 748 P.2d 686 (1988).

The Celotex standard comports with the purpose behind the summary judgment motion: "to examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." Zobrist v. Culp, 18 Wash. App. 622, 637, 570 P.2d 147 (1977).

Summary judgment can be granted only when the pleadings and the evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). A "material fact" is a fact upon which the litigation depends, in whole or in part. Barrie v. Hosts of Am., Inc., 94 Wash. 2d 640, 643, 618 P.2d 96 (1980). Once the moving party has made and supported his motion, the nonmoving party must come forward with specific facts showing that a genuine issue of fact exists for trial. CR 56(e).

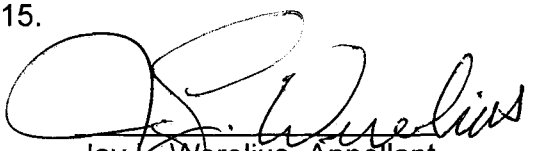
The moving defendant may meet the initial burden by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case."

Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

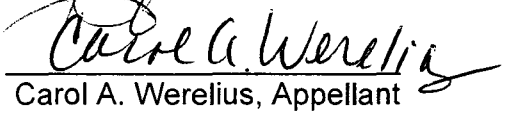
CONCLUSION

This is a contested foreclosure and must be set for hearing. The appeals court should reverse the trial court's decision and remand the matter for further proceedings.

DATED this 31st day of December 2015.



Jay L. Werelius, Appellant



Carol A. Werelius, Appellant

IN THE COURT OF APEALS FOR THE STATE OF WASHINGTON, KING COUNTY

JAY L. AND CAROL A. WERELIUS

APPELLANTS

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APPELLEE

_____/

CERTIFICATE OF SERVICE

I Carol A. Werelius hereby certify that a true and correct copy of the foregoing was served upon the appellee's attorney, Tiffany Archer, by first class mail to: 710 Second Avenue, Suite 710, Seattle, WA 98104, this 3rd day of December, 2015.

By: Carol A. Werelius

IN THE COURT OF APPEALS FOR

THE STATE OF WASHINGTON, KING COUNTY

JAY L. AND
CAROL A. WERELIUS
APPELLANTS

v.

WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2
APPELLEE

CERTIFICATE OF SERVICE

I, Carol A. Werelius hereby certify that a true and correct copy of the foregoing was served upon the appellee's attorney, Emilie Edling, by first class mail to: 9600 SW Oak St, Ste 570, Portland, OR, 97223-6503, this 2ND day of June 2016.

By: Carol A. Werelius

IN THE COURT OF APPEALS FOR

THE STATE OF WASHINGTON, KING COUNTY

JAY L. AND
CAROL A. WERELIUS
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APPELLEE

CERTIFICATE OF SERVICE

I, Carol A. Werelius hereby certify that a true and correct copy of the foregoing was served upon the King County Superior Court by USPS Priority Mail to: 516 3rd Ave, Room E609, Seattle WA 98104, this 2ND day of June 2016.

By: Carol A. Werelius