

Court of Appeals Docket Number 339386-III

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

SAMUEL AND ROXY SALMON,

Appellants and Plaintiffs,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC.,

Respondent and Defendant.

Appeal from the Stevens County Superior Court
Case No. 2013-2-00-2815

**RESPONDENT MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.'S ANSWER TO
PETITION FOR REVIEW**

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I. INTRODUCTION

Petitioners Samuel and Roxy Salmon (“Petitioners”) filed multiple lawsuits in an attempt to invalidate the deed of trust recorded against their property. This lawsuit, Petitioners’ third, was correctly dismissed by the trial court, and affirmed by the Court of Appeals, due to the *res judicata* and collateral estoppel effects of the judgments dismissing their prior lawsuits, both of which attempted to obtain the same improper relief. Petitioners’ lawsuits and Petitioners’ Petition for Review are designed merely to delay the inevitable foreclosure of their home. This is not a case suitable for the Supreme Court to exercise its discretion to review.

II. IDENTITY OF RESPONDENT

The Respondent is MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation (“Respondent” or “Respondent MERS”).

III. ISSUES PRESENTED FOR REVIEW

Respondent disputes the issues that Petitioners state are

presented for review, as follows:

For Petitioners' first issue, Petitioners erroneously state that the Court of Appeals' decision is in conflict with a decision of the Supreme Court, in *Bain v. Metro Mortgage Group, Inc.*, 175 Wn. 2d 83 (2012). The decision of the trial court, which the Court of Appeals affirmed, was based on *res judicata* and collateral estoppel grounds. Accordingly, the decision of the Court of Appeals was not based on any of the issues discussed in the *Bain* decision, and the trial court's decision did not rely upon any law or theory that is related to the issues in the *Bain* decision.

For Petitioners' second issue, Petitioners refer to unsupported facts and conjecture that are not evidence in the record.

For Petitioners' third issue, Petitioners concede that the claims asserted in this case and the claims adjudicated in their earlier actions are similar and that all three actions have the same goal - to invalidate the trust deed on their property to avoid or delay the foreclosure of their home.

For Petitioners' fourth issue, Petitioners provide no explanation for their contentions that their Constitutional rights were violated and, therefore, this is simply not a valid issue on review.

Respondent believes the correct issues on review are as follows:

1. Given that this action was dismissed based on the *res judicata* and collateral estoppel effect of Petitioners' two previous, failed lawsuits attempting to invalidate the mortgage lien against their home, is there a substantial public interest involved in this private matter that would provide a basis for the Supreme Court to exercise its discretion to review this case?

2. Since the Court of Appeals' decision is not inconsistent with any decision of the Supreme Court or published decision of the Court of Appeals, is there any basis for the Supreme Court to exercise its discretion to review this case?

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IV. STATEMENT OF THE CASE

A. Statement of Facts

1. Respondent MERS.

Respondent MERS is a Delaware corporation, with its principal place of business in Reston, Virginia. CP 162. MERS is not licensed to do business in Washington, nor does it have a registered agent in Washington. CP 163. Respondent MERS was not served with the Summons and Complaint in this action. CP 150.

2. Fake MERS.

On June 3, 2009, an individual named Robert Jacobson (“Jacobson”) set up another entity named Mortgage Electronic Registration Systems, Inc. as a Washington domestic corporation (“Fake MERS”). CP 176-178. Fake MERS has the same UBI No. as a company called “Mortgage Electronic Registry System.” CP 173-182. Jacobson improperly established Fake MERS in order to trick people into thinking that he was a proper registered agent who could accept service on behalf of MERS.

CP 162-163. Jacobson then attempted to solicit payment from MERS to obtain the legal notices and documents received by fake MERS. CP 163. Jacobson has never been MERS' registered agent. CP 162-163.

Respondent MERS sued Jacobson in the US District Court, Northern District of California, Case No. 4:09-03600-SBA. On or about February 3, 2010, Respondent MERS obtained a permanent injunction against Jacobson, permanently enjoining him from using the name of Mortgage Electronic Registration Systems, Inc. CP 162-163; CP 194-196. Fake MERS' Washington registration expired in June 2010. CP 202.

3. Petitioners Served Fake MERS, not Respondent MERS.

The Salmons served Fake MERS through the Washington Secretary of State. CP 1-3. The Salmons erroneously contended that service on Fake MERS somehow effected service on MERS.

4. Motion and Order to Vacate the Default.

Petitioners obtained a Default Order against MERS for its alleged failure to appear in the action. CP 017. As soon as

Respondent MERS learned of the Order of Default, it filed a Motion to Vacate the Default Order based on Petitioners' improper service of the Summons and Complaint ("the Motion"). CP 148-152; CP 154.

Based on the record presented to the trial court that Petitioners had served Fake MERS instead of Respondent MERS, the trial court properly granted the Motion and entered an order vacating the default order entered against Respondent MERS. CP 019-021 ("Order Vacating the Default").

Moreover, because the record clearly supported the trial court's Order Vacating the Default, there was no need for the Salmons' further requested discovery on the issue of Respondent MERS, Fake MERS, and whether Respondent MERS had been served.

5. Petitioners' Multiple Bites at the Same Apple.

In an attempt to stop the foreclosure of their property located at 917 A Philpott Rd., Colville, WA 99114-8278 (the "Property"), Petitioners filed two prior actions. In November

2010, Petitioners filed a lawsuit in Stevens County Superior Court against several defendants, including MERS. CP 215-236. That lawsuit was removed to the United States District Court for the Eastern District of Washington, Case No. CV-10-446-RMP (“First Lawsuit”). Petitioners argued that the foreclosure could not proceed because Respondent MERS had not proven itself to be the original beneficiary of the Deed of Trust and, therefore, could not assign the Deed of Trust to BAC Home Loans. *See* CP 124. As a result, BAC Home Loans was not the proper beneficiary of the Deed of Trust and, therefore, could not foreclose the Deed of Trust. CP 229. The District Court considered and rejected this argument. CP 215-236. After giving the parties an opportunity to fully litigate and argue the issues, on May 25, 2011, the District Court entered a judgment dismissing the First Lawsuit with prejudice. CP 215-236. Petitioners did not appeal this dismissal.

Three months after the District Court dismissed the First Lawsuit with prejudice, Petitioners filed a second lawsuit in

Stevens County Superior Court, Case No. 11-2-00426-9 (“Second Lawsuit”) to stop the foreclosure of the Property. CP 214, ¶¶ 4, 5, CP 237-245. In the Second Lawsuit, the Salmons challenged BAC Home Loans’ authority to foreclose because MERS executed an assignment of any interest it may have had in the Deed of Trust to BAC Home Loans. CP 237-244. Based on the preclusive effect of the First Lawsuit, on April 10, 2012, the Court entered a judgment dismissing the Second Lawsuit with prejudice. CP 237-244.

Like the First and Second Lawsuits, this lawsuit also asserted that the assignment of the Deed of Trust from Respondent MERS is “unlawful” and void and, therefore, the foreclosure process cannot continue. CP 53, 56-57. Respondent MERS filed a CR 12(b)(6) Motion to Dismiss this action based on *res judicata* and collateral estoppel.¹ CP 204-

¹ On a Rule 12(b)(6) motion to dismiss based on *res judicata*, a court may consider documents outside the complaint, including public court documents from the prior litigation. ER 201(b) and (f); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008) (holding

212. The trial court properly granted, and the Court of Appeals properly affirmed, the CR 12(b)(6) motion in this case. CP 024-026.

6. Petitioners' Motion for Reconsideration and Sour Grapes Motion to Recuse.

Disappointed that they did not receive a windfall for defaulting Respondent MERS without even serving it, Petitioners filed a motion for reconsideration and, after that motion was denied, Petitioners blamed their loss on the trial court judge that ruled on the issues, Judge Nielson. Each one of Judge Nielson's rulings, Orders, and Judgment is supported by the appropriate evidence and authorities. Judge Nielson properly denied Petitioners' motion for reconsideration and their motion for recusal.

that a court may take judicial notice of public documents when ruling on a motion to dismiss if their authenticity cannot be reasonably disputed); *Yurtis v. Phipps*, 143 Wn. App. 680, 689-93, 181 P.3d 849 (2008) (relying on pleadings from prior litigation to affirm trial court's grant of motion to dismiss plaintiff's claims based on *res judicata*). Accordingly, the Court may consider pleadings from the First Lawsuit and the Second Lawsuit, as those terms are defined.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' decision is not inconsistent with the *Bain* decision.

Petitioners' prior two lawsuits to invalidate of the Deed of Trust recorded against their home were dismissed on May 25, 2011, and April 10, 2012, prior to the August 16, 2012 *Bain* decision. The trial court's decision in this case, affirmed by the Court of Appeals, was based on the effects of collateral estoppel and *res judicata* effects of those prior dismissals. Because the criteria for collateral estoppel and *res judicata* were met, the decisions in this case are appropriate. The decisions in this case were not based on application of an issue decided in the *Bain* decision. Thus, the collateral estoppel and *res judicata*-based decisions in this case are not in conflict with the Supreme Court's decision in *Bain*.

Even if, *arguendo*, the prior dismissals that led to the collateral estoppel and *res judicata* bar to this action were inconsistent with *Bain*, the collateral estoppel and *res judicata* decision in this case would still be proper.

The *res judicata* effect of a final, unappealed judgment on the merits is not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428 (1981). Explaining its decision, the *Moitie* Court said:

As this Court explained in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927), an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely upon the plea of *res judicata*. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that "[the] indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert."

Moitie, 452 U.S. 394 at 398-99, quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932). Likewise, in *Columbia Rentals v. State*, 89 Wn.2d 819 (Wash. 1978), the Supreme Court of Washington

rejected an attempt to avoid *res judicata* on the grounds of a changed judicial interpretation of the law in a subsequent case. *Columbia Rentals, supra*, at 822 (citing *Pacific Tel. & Tel. Co. v. Henneford*, 199 Wash. 462, 92 P.2d 214 (1939)). Here, claim preclusion bars Petitioners' attempt to relitigate their failed arguments from the First Lawsuit, which were dismissed with prejudice and without an appeal.

B. The decision of the Court of Appeals is based on issues unique to the parties and the circumstances of the case, and does not create a substantial public interest that the Supreme Court should review.

Petitioners' long discussion of the procedural history of this case, and their many grievances of the various rulings throughout the proceedings, demonstrates that this action has no public interest at all, much less a substantial one required under RAP 13.4(b)(4). Rather, this action relates to issues that are very unique to Petitioners.

The decision of the trial court, affirmed by the Court of Appeals, related to the setting aside of the default was based on

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the unique circumstances of Petitioners serving the wrong party, *i.e.* Fake MERS.

The decision of the trial court, affirmed by the Court of Appeals, related to the dismissal of Petitioners' claims is based on Petitioners' prior attempts to achieve the same result, namely to have a court invalidate the trust deed recorded against their home in order to avoid the foreclosure of that trust deed. Likewise, the denial of Petitioners' motion for reconsideration of this decision is based on the same circumstances unique to Petitioners.

The decision of the trial court, affirmed by the Court of Appeals, related to denial of Petitioners' motions for recusal are unique to the unsupported allegations of Petitioners against the judge who ruled against them.

In an attempt to pique the Court's interest in this case, Petitioners have recited pages of unsupported accusations and conjecture regarding Respondent and its alleged general practices. *See* pages 15 through 20 of the Petition for Review.

These unsupported accusations and conjecture are not based on any facts in the record and have no bearing on the trial or appellate court's decision based on collateral estoppel and *res judicata* grounds. Thus, these "facts" should not be considered by the Court for the Petition for Review.

C. There is no significant question of law or Constitutional Question for the Court to review.

Petitioners recite unsupported allegations and conjecture about the Respondent, the mortgage industry, and mortgage loans to argue that there is a significant question of law involved. Petition, pp. 14-20. This case is not about any of those issues. Rather, as discussed above, this case was decided on collateral estoppel and *res judicata* grounds.

Petitioners also claim (without any explanation) that their due process rights and equal protection rights were violated. Petition for Review, p. 20. These accusations are not based on any argument or facts in the record. Rather, it appears Petitioners

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randomly reference the Constitution in a futile attempt to pique the Court's interest. The Court should not take the bait.

IV. CONCLUSION

For all of the foregoing reasons, Respondent MERS respectfully requests that this Court deny Petitioners' petition for discretionary review in this case.

Dated this 6th day of April, 2017.

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