NO. 94347-8

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 73833-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Long Beach Mortgage Loan Trust 2006-4,

Respondent

v.

JOHN E. ERICKSON AND SHELLEY A. ERICKSON, individuals residing in Washington;

Petitioners

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

A. IDENTITY OF PETITIONER

John E. Erickson and Shelley A. Erickson ("Ericksons") ask this court to accept review of the Court of Appeals decisions terminating review designated in Part B of this petition.

Respondent on this petition for review is Deutsche Bank National Trust Co., as Trustee for Long Beach Mortgage Loan Trust 2006-4 ("Deutsche Bank").

B. COURT OF APPEALS DECISIONS

A copy of the decision filed February 13, 2017, is in the Appendix at pages A-1 through A-11.

A copy of the March 8, 2017, order denying Ericksons' motion for reconsideration is in the Appendix at pages A-12 through A-13

C. ISSUES PRESENTED FOR REVIEW

(1) Must a properly challenged foreclosing plaintiff seeking summary judgment prove it had standing to foreclose on the homeowner's property at the commencement of the lawsuit to be entitled to foreclosure of the subject property?

(2) Did Deutsche Bank establish that it was entitled to enforce the Ericksons' note at the time it commenced judicial foreclosure proceedings? Stated differently, did genuine issues of material fact exist as to whether Deutsche Bank established that it was entitled to

enforce the Ericksons' note at the time it commenced foreclosure proceedings, thus precluding summary judgment as to Deutsche Bank's standing to institute the proceedings?

(3) Does collateral estoppel bar the Ericksons from asserting that Deutsche Bank was not the holder of Ericksons' Note, i.e. in possession of the Note, on January 3, 2014, when the complaint to enforce the note and foreclose the deed of trust was filed

D. STATEMENT OF THE CASE

Deutsche Bank filed this action on January 3, 2014, in King County Superior Court to enforce a promissory note and judicially foreclose a deed of trust executed by the Ericksons on March 6, 2006. (CP 1 – 23) The note in the principal sum of $476,000 is payable to Long Beach Mortgage Company ("Long Beach").

Ericksons' answer to Deutsche Bank's complaint alleges that *"Plaintiff lacks authority to bring this action. Plaintiff lacks standing."* (CP 25) Ericksons answer denies that the Note and Deed and Trust were transferred or otherwise assigned to Deutsche Bank and denies that Deutsche Bank was then the holder and owner of the Note and Deed of Trust (CP 26) and denies Deutsche Bank's allegations regarding the amount of the unpaid principal and interest owing on the Note. (CP 3; CP 26)

Ericksons' Answer, Affirmative Defenses, and Counterclaims allege, among other things, that:

> 23. Plaintiff **lacks authority** to judicially foreclose under CH 61.12 RCW (CP 27 l. 6)
>
> 27 Plaintiff **lacks standing** to enforce the note behalf of the trust (CP 27 l. 13)

Deutsche Bank filed a motion for summary judgment on May 19, 2015 (CP 213 - 234) together with a declaration by its attorney of record, lawyer J. Will Eidson, in support. (CP 235 – 255) Lawyer Eidson's declaration has two exhibits, a copy of a promissory note (CP 239 – 242) and a copy of a deed of trust (CP 244 – 255)

Ericksons responded (CP 259 – 280; CP 281 – 454).

Deutsche Bank replied (CP 455 – 462).

Two hearings were held on the motion for summary judgment. The first hearing was on July 2, 2015. (VRP July 2, 2015) The second hearing was on July 13, 2015. (VRP July 13, 2015)

Deutsche Bank filed a Supplemental Declaration of J. Will Eidson in Support of Plaintiff's Motion for Summary Judgment on July 6, 2015. (CP 470 – 503) which included a copy the decision in the U.S. District Court caser of *Erickson v. Long Beach Mortgage Co.*, No. 10–1423 MJP, 2011 WL 830727 (W.D. Wash. Mar. 2, 2011) Ericksons filed a

Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on July 8, 2015. (CP 504 – 516)

The second hearing on summary judgment was held on July 13, 2015. (VRP July 13, 2015)

The court entered an order granting plaintiff's motion for summary judgment on July 17, 2015. (CP 539 – 541) Ericksons moved for reconsideration on July 27, 2105. (CP 542 – 546) The court entered an order denying reconsideration on August 4, 2015. (CP 640 – 648) and a Judgment and Decree of Foreclosure on August 27, 2015. (CP 680 – 685)

Ericksons filed their Notice of Appeal on Monday, August 17, 2015, from the July 17, 2015 Order Granting Plaintiff's Motion for Summary Judgment and the August 4, 2015 Order Denying Defendants' Motion for Reconsideration. (CP 640 – 648) Ericksons filed their Amended Notice of Appeal on August 31, 2015, adding the August 27, 2015 Judgment and Decree of Foreclosure to the trial court decisions from which review is sought. (CP 686 – 700)

The Note attached to Deutsche Bank's complaint (CP 3 ¶ 7; CP 26 ¶ 7; CP 29 ¶ 46) as Exhibit "A" (CP 7 – 10) is payable to Long Beach and has no indorsements or allonges. Although the complaint alleges that Deutsche Bank is the holder and owner of the Note and Deed of Trust (CP

26), it does not allege that the attached Note is a copy of the original Note or that Deutsche Bank has possession of the original.

The note was secured by a deed of trust on Ericksons' homestead in Auburn, King County, Washington, executed on March 3, 2006, recorded on March 9, 2006, naming Long Beach Mortgage Company ("Long Beach") as the original Beneficiary, Ericksons as the Grantors, and Older Republic Title, Ltd, as the Trustee. (CP 3 ¶ 8; CP 29 ¶ 48) A copy of the deed of trust is attached to the complaint (Exhibit "B" at CP 12 – 23) and to Ericksons' answer (Exhibit 2 at CP 52 – 59)

Deutsche Bank submitted three declarations under penalty of perjury in support of its summary judgment motion. All three are signed by its attorney of record, lawyer Will J. Eidson, of Stoel Rives, LLP. (CP 235 – 255; CP 470 – 503; and CP 660 – 666). In addition, lawyer Eidson made unsworn oral representations at the two summary judgment hearings (VRP 7/2/2015; VRP 7/13/2015). No officer, agent, records custodian, employee, or person other than Eidson submitted a declaration or testimony in support of Deutsche Bank's claims.

Eidson's May 19, 2015, two-page declaration with 20 pages of attachments (CP 235 – 255) asserts that Deutsche Bank was the holder of the Ericksons' Note at that time but makes no assertion that it was the

holder or in possession of the Note when the complaint was filed January 3, 2014. Eidson's May 19, 2015 declaration states:

> 4. The current holder of the Note and Deed of Trust is Plaintiff Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4.

Ericksons challenged Deutsche Bank's standing to bring this judicial foreclosure action. Deutsche Bank does not assert in its motion for summary judgment, in its lawyer's declarations, or orally at either of the two summary judgment hearings, or otherwise, that it possessed the Ericksons' original note when it filed the judicial foreclosure action on January 3, 2014. Eidson nowhere avers that Deutsche Bank had possession of Ericksons' Note when the judicial foreclosure complaint was filed on January 3, 2014.

Eidson's May 19, 2015 declaration (CP 235 – 255) has a note copy attached that Eidson asserts has an undated blank indorsement on the back of the last page. No explanation was provided regarding the undated indorsement. (CP 239 – 242) This Note copy is substantially different in appearance from the note copy attached to the January 3, 2014 complaint. (CP 48 – 50)

The lack of competent admissible evidence in support of the relief granted on summary judgment runs through Deutsche Bank's entire case. For example, the trial court's judgment and decree of foreclosure (CP 680

– 685) enters a money judgment in favor of Deutsche Bank against Ericksons in the principal amount of $465,047.67 plus interest totaling $253,354.11 for a total of amount of $718, 401.78. No evidence was presented as to how the amount of principal or interest was calculated. No records, no ledger, no statement of account was provided. The amount of the money judgment is based solely on lawyer Eidson's statements with no supporting evidence or documentation of any kind. Nowhere does Eidson claim to be a custodian of, to have access to, or to have reviewed any underlying business records.

Regarding the amount claimed and awarded, the Court of Appeals' unpublished opinion recites that *"The Ericksons do not challenge the mathematical calculation of the amount due under the note, but stress the fact that no additional evidence of the amount was offered."* "No additional evidence" was offered? But no evidence whatsoever was offered by Deutsche Bank in support of the monetary amount awarded to by the trial court. Deutsche Bank's lawyer Eidson submitted no mathematical calculation of any kind. Eidson merely asserted that this amount is due and the trial court and the Court of Appeals accepted it and awarded and affirmed it without any supporting evidence whatsoever.

Deutsche Bank asserts that a Memorandum Decision entered on by the U.S. District Court, *Erickson v. Long Beach Mortgage Co.*, No. 10–

1423 MJP, 2011 WL 830727 (W.D. Wash. Mar. 2, 2011) (Copy attached at Appendix A- through A-) established that Deutsche Bank had possession of the Ericksons' original Note. The Court of Appeals concluded that "collateral estoppel bars the Ericksons' arguments that Deutsche Bank does not hold the original note". In so holding, the Court of Appeals misconstrues the federal court decision. Nowhere in the federal court decision does it state that Deutsche Bank is holder of the Ericksons' original note. Rather, the federal court decision states only that "the defendants provided sufficient evidence to prove their ownership of the 2006 note." (Unpublished opinion at p. 3)

There were four defendants named in the federal case (removed by defendants from King County Superior Court to U.S. District Court): Long Beach Mortgage Company, Washington Mutual Bank, Deutsche Bank National Trust Company, and Chase Bank. Long Beach had ceased to exist before defendants removed Ericksons' lawsuit from King County Superior Court to the U.S. District Court at Seattle.

Although the federal decision recites that "the defendants provided sufficient evidence to prove their ownership of the 2006 note", it fails to identify which of the several defendants had become the owner of the Note. Nowhere does the federal decision make a determination that any of

the federal case defendants was a holder of the Note with the power to foreclose the deed of trust versus merely an owner of the note.

Nothing stated in the federal court decision confers holder status upon Deutsche Bank. Yet the Court of Appeals unpublished opinion simply assumes despite the lack of such finding that Deutsche Bank was found by the federal court to be the owner *and* holder of the Ericksons' original Note. The Court of Appeals apparently draws that conclusion on the basis of the patently incompetent declaration submitted by Deutsche Bank's lawyer Will Eidsen.

The elements for application of collateral estoppel are not satisfied because the federal decision simply does not place Deutsche Bank in the shoes of a holder of the Ericksons' Note, nor even those of the owner of the note. It states only that the several defendants in that case have shown with sufficient evidence that they are the *owners* of the Note. The federal decision is ambiguous and inconclusive on this critical point.

There is no endorsement on the note copy attached to the January 3, 2014, complaint. The first time any endorsements are purported to be on the Ericksons' note is when lawyer Eidson submitted a note copy followed by a blank white page containing an endorsement as Exhibit A to his declaration dated May 19, 2015. (CP 235 – 242)

There is no proof in this case that Deutsche Bank had possession or was holder of the Ericksons' original note when it filed the complaint on January 3, 2014. As noted in *Bavand v. OneWest Bank, FSB*, 176 Wn.App. 475, 498, 309 P.3d 636 (2013), possession of a copy of the original note does not establish possession of the original note.

None-the-less, the trial court granted all the relief requested by Deutsche Bank's motion for summary judgment, and the Court of Appeals affirmed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted under RAP 13.4(b)(2) because the decision of the Court of Appeals in this case is in conflict with a published decision of the Court of Appeals[1], and RAP 13.4(b)(4) because the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Under Washington law there is a clear distinction between the rights of a holder and the rights of an owner of a promissory note. An owner does not have the right to enforce the note unless the owner is also a holder of the Note or otherwise has the rights of a holder. The right to enforce an instrument and ownership of the instrument are two different

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[1] *Bavand v. OneWest Bank, FSB*, 196 Wn.App. 813, 385 P.3d 233 (Div. 1 2016) as amended 1-15-2016

concepts. *Trujillo v. Northwest Trustee Services, Inc*., 181 Wn.App. 484, 326 P.3d 768 (Div. 1 2014).

In *Bavand v. OneWest Bank, FSB*, 196 Wn.App. 813, 385 P.3d 233 (Div. 1 2016) as amended 1-15-2016, the Court of Appeals discusses the difference between the rights of an owner of the promissory note and the rights of the holder. The *Bavand* decision makes clear that status as holder is necessary for a plaintiff to have standing to enforce the Note and foreclose the Deed of Trust, stating that:

> "A note owner's identity is immaterial to this litigation. The identity of the note "holder" is material to enforcement of the delinquent note and deed of trust. 196 Wn.App. 823 (citing *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 540, 359 P.3d 771 (2015); *Trujillo*, 181 Wn.App. at 500-02.)
>
> *Bavand*, 196 Wn.App. 824- 825

> "Under CR 56, the moving party may support its summary judgment motion with affidavits, and the adverse party may file opposing affidavits. CR 56(a), (c) CR 56(e) states that parties must make supporting and opposing affidavits "on personal knowledge," must describe facts admissible in evidence, and must affirmatively show "that the affiant is competent to testify to the matters stated therein."
>
> *Bavand*, 196 Wn.App. 825- 826

> "To establish standing, Washington law requires that a claimant satisfy a two pronged test. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875, 101 P.3d 67 (2004) First, that party "must show 'a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief.'" *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2013) (quoting *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)), cert. denied,

> 135 S.Ct. 139 (2014). Second, the party must show that his or her interest is within the "zone of interests protected by the statute" at issue. Id.
>
> *Bavand,* 196 Wn.App. 834
>
> "We review de novo whether a party has standing. *In re Estate of Becker,* 177 Wn.2d 242, 246, 298 P.3d 720 (2013).
>
> *Bavand,* 196 Wn.App. 834
>
> "In *Brown*, the supreme court concluded that the status of "holder" is dispositive for purposes of enforcing a promissory note. *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 536-540, 359 P.3d 771 (2015); see also *Trujillo v. NwW Tr. Servs., Inc.,* 181 Wn.App. 484, 497-502, 326 P.3d 768 (2014).The status of "owner" is not.
>
> *Bavand,* 196 Wn.App. 846
>
> "Ownership of a note is irrelevant to enforcement of the note. *Brown,* 184 Wn.2d at 536-40; *Trujillo,* 181 Wn.App. at 499-502.
>
> *Bavand,* 196 Wn.App. 848

Deutsche Bank lacked standing to file the action to enforce the Ericksons' Note and foreclose their deed of trust. Although its complaint alleges that *"Deutsche Bank is now the holder and owner of the Note and Deed of Trust",* Deutsche Bank failed to provide any evidence that it possessed the Ericksons' Note when the complaint was filed on January 3, 2014.

"Standing is a threshold issue". *In re Estate of Becker,* 177 Wn.2d 242, 246, 298 P.3d 720 (2013) (citing *Knight v. City of Yelm,* 173 Wash.2d 325, 336, 267 P.3d 973 (2011)); See also *Alexander v. Sanford, No. 69637-8-1, Slip Op. ¶ 28 (Wn.App. Div. 1 05-12-2014)* (Review granted,

339 P.3d 634 (2014). [2]Standing of a plaintiff to bring suit must be determined as of the commencement of the suit. Dispositive to this argument is: “The absence of a valid right of action at the inception of a suit [lack of standing] cannot be cured by filing a supplemental complaint alleging subsequent acquisition of such right of action.” *Amende v. Town of Morton*, 40 Wn.2d 104, 106, 241 P.2d 445 (1952).

New York’s highest court recently ruled regarding that state’s requirement for a plaintiff to prove standing:

> “[Because] defendants raised the issue of standing in their answer, plaintiff was [ ] obligated to demonstrate that it was a holder or assignee of the note and subject mortgage at the time the action was commenced. *JPMorgan Chase Bank, N.A. v. Hill*, No. 519429 (NY App. 09-10-2015) (citing *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d at 1376; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 1307 [2012])).

In the federal system, "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Without standing, a foreclosure claimant’s claim cannot move forward. Indeed, "the [ ] courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the

[2] Washington courts have been reluctant to address the issue of standing in the context of judicial foreclosure actions though, as a matter of law, there can be no summary judgment of foreclosure unless standing to enforce the note and foreclose is first established.

jurisdictional doctrines." *FW/PBS. Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal quotation marks omitted); see also *Vickers v. Henry County Savings & Loan Ass'n*, 827 F.2d 228, 230 (7th Cir. 1987). Furthermore, the burden is upon the plaintiff to establish standing and the presence of jurisdiction [ ]. *NLFC, Inc. v. Devcom Mid-America. Inc.*, 45 F.3d 231, 237 (7th Cir. 1995); *Grafon v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979).

In Washington, standing as to a particular claim may be raised at any time. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 103 Wash.App. 764, 768, 14 P.3d 193 (2000) ("Standing… may be raised for the first time on appeal."). Ericksons' raised the standing issue in their answer to Deutsche Bank's complaint (CP 25; CP 26) and have consistently asserted Deutsche Bank's lack of standing.

A party seeking foreclosure must be the "actual holder" to foreclose. "Only the holder of a note can authorize the foreclosure of the collateral that is security for the note." *Brown, Slip Op.* at 778 n.5 (quoting *SA Anderson On The Uniform Commercial Code* §§ 3-201:5, at 448; *concurring:* Richard Cosway, *Negotiable Instruments-A Comparison of Washington Law and Uniform Commercial Code Article 3*, in *Collected Essays On The Uniform Commercial Code In Washington* 261,268 (1967)).

The term “Holder” is a legally defined term:

> Washington's UCC defines a "holder" to be the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.l-201(2l)(A); accord *Black's Law Dictionary* 848 (10th ed. 2014) (defining "holder" to be a person "who has legal possession of a negotiable instrument and is entitled to receive payment on it").
>
> *Brown v. Dep't of Commerce,* 184 Wn.2d 509, 526, 359 P.3d 771 (2015)

Recent decisions by the Supreme Courts of New Mexico and Hawaii are in accord with the foregoing analysis:

Deutsche Bank Nat'l Trust Co. v. Johnston, 2016 -NMSC- 013, 369 P.3d 1046 (March 3, 2016)
(Copy attached at Appendix A-34 through A-49)

and

Bank of America, N.A. v. Reyes-Toledo, SCWC-15-0000005 Supreme Court of Hawaii (February 28, 2017)
(Copy attached at Appendix A-21 through A-33)

F. CONCLUSION

Petitioners respectfully ask this Court to:

1. Declare that Deutsche Bank lacked standing;

2. Reverse the decisions of the Court of Appeals;

3. Remand to the superior court with instructions to:

    a. Reverse and vacate the Order Granting Plaintiff’s Motion for Summary Judgment. (CP 539 – 541)

    b. Reverse the Judgment and Decree of Foreclosure. (CP 680 – 685)

c. Dismiss Deutsche Bank's complaint for lack of standing.

4. Award Ericksons' their costs, disbursements and reasonable attorney fees on this petition for review, in the Court of Appeals, and in the trial court;

5. Grant such other relief as is just and proper.

Respectfully submitted this 7th day of March, 2017.

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INDEX TO APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Long Beach Mortgage Loan Trust 2006-4,

Respondent,

v.

JOHN E. ERICKSON AND SHELLEY A. ERICKSON, individuals residing in Washington;

Appellants,

BOEING EMPLOYEES' CREDIT UNION, a Washington corporation; AMERICAN GENERAL SERVICES, INC., a Delaware corporation; TBF FINANCIAL, LLC, an Illinois limited liability corporation; JUSTIN PARK & ROMERO PARK & WIGGINS, PS, a Washington Professional Services Corporation; RANDAL EBBERSON, an individual residing in Washington; THE LAW FIRM OF KEATING BUCKLIN & McCORMACK, INC., PS, a Washington professional services corporation; CITY OF AUBURN, WASHINGTON, a Washington municipality; CHARLES JOINER, an individual residing in Washington; PAUL KRAUSS, an individual residing in Washington; DAN HEID, an individual residing in Washington; SHELLEY COLEMAN, an individual residing in Washington; BRENDA HEINEMAN, an individual residing in

No. 73833-0-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: February 13, 2017

Washington; and THE WASHINGTON CITIES INSURANCE AUTHORITY, a municipal organization of Washington public entities,

Defendants,

JPMORGAN CHASE BANK, N.A., a national banking association; LONG BEACH MORTGAGE LOAN TRUST, 2006-4; JOHN DOES 1-99,

Third Party Defendants.

APPELWICK, J. — Deutsche Bank National Trust Co. (DBNTC) filed suit to foreclose on the Ericksons' home. The Ericksons argue that DBNTC has failed to show that it possesses the original note, and therefore it has no standing to foreclose. DBNTC argues that it is entitled to foreclosure because it produced the original note, and that the Ericksons are collaterally estopped from arguing otherwise. The trial court granted summary judgment in favor of DBNTC. We affirm.

FACTS

John and Shelly Erickson purchased a house in 2006 with a loan from Long Beach Mortgage Company. The Ericksons and Long Beach executed a deed of trust with Old Republic Title Ltd. as trustee. Long Beach was a part of Washington Mutual Inc. Washington Mutual failed and JPMorgan Chase Bank National Association purchased its assets. Shortly after executing the loan, Long

Beach sold the loan into Long Beach Mortgage Loan Trust 2006-4 (LBMLT). DBNTC was the trustee of the LBMLT.

The Ericksons defaulted on their payments in 2009. In 2010, the Ericksons filed suit against Long Beach, JP Morgan Chase, and Deutsche Bank, seeking various forms of relief. Erickson v. Long Beach Mortg. Co., No. 10-1423 MJP, 2011 WL 830727 (W.D. Wash. Mar. 2, 2011), aff'd, 473 F. App'x 746 (9th Cir. 2012). After removal to federal court, that lawsuit was dismissed on summary judgment. Id. at *2. The court held that the defendants provided sufficient evidence to prove their ownership of the 2006 note. Id. at *3.

Later, on January 31, 2013, JP Morgan assigned all beneficial interest under the deed of trust to DBNTC. DBNTC filed this lawsuit seeking foreclosure on the Ericksons' property in January 2014. DBNTC moved for summary judgment, arguing that it was entitled to foreclosure, because it possessed the note. DBNTC presented the original note with an endorsed in blank stamp at the summary judgment hearing. It also attached a copy of this original note to its attorney's declaration. The trial court granted DBNTC's motion for summary judgment and denied the Ericksons' motion for reconsideration. The Ericksons appeal.

ANALYSIS

First, DBNTC argues that collateral estoppel bars the Ericksons from contesting DBNTC's claim that it possesses the original note. Second, the

Ericksons argue that DBNTC has not shown that it possesses the note and therefore is not entitled to foreclosure.

We review summary judgment orders de novo, taking all facts and inferences in the light most favorable to the nonmoving party. Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). A party resisting summary judgment cannot satisfy his or her burden of production merely by relying on conclusory allegations, speculative statements, or argumentative assertions. Boguch v. Landover Corp., 153 Wn. App. 595, 610, 224 P.3d 795 (2009). Rather, the nonmoving party must set forth specific facts demonstrating a genuine issue of fact. Id.

I. Collateral Estoppel

The Ericksons argue that DBNTC has not shown that it holds the original note. DBNTC responds that the 2010 federal lawsuit collaterally estops the Ericksons' argument that Deutsche Bank has not shown that it possesses the note. In that suit, the Ericksons argued that the defendants did not provide evidence that they held the note. The federal court's entire analysis of this argument was as follows:

> Plaintiffs' argument rests on the contention that Defendants lack standing to foreclose because they are not the original creditors,

> and cannot produce the original note. Courts "have routinely held that [this] so-called 'show me the note' argument lacks merit." Freeston v. Bishop, White & Marshall, *P.S.*, No. C09–5560BHS, 2010 WL 1186276 (W.D.[ ]Wash. Mar.[ ]24, 2010) (quoting Diessner v. Mortg. Elec. Registration Sys., 618 F.Supp.2d 1184, 1187 (D. Ariz. 2009) (collecting cases)[, aff'd, 384 Fed. App'x 609 (9th Cir. 2009)]). The Court agrees with these cases. More importantly, Defendants provide evidence demonstrating their ownership of the note, which the Ericksons do not credibly challenge. The Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to claims for a declaration or an injunction against foreclosure. The Court DISMISSES this claim.

Erickson, 2011 WL 830727, at *3 (first alteration in original) (emphasis added).

The doctrine of collateral estoppel prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case. Hanson v. City of Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). The party seeking collateral estoppel must establish four elements: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the argument is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. Hadley v. Maxwell, 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001). Although the doctrine is usually characterized as an affirmative defense, it is equally available to plaintiffs and may be applied "offensively" to bar a defendant from relitigating issues in a second proceeding. State Farm Fire & Cas. Co. v. Ford Motor Co., 186 Wn. App. 715, 722, 346 P.3d 771 (2015).

All four collateral estoppel elements are satisfied here. First, the issues are identical. Hadley, 144 Wn.2d at 311-12. In the federal case, the Ericksons alleged that the defendants lacked standing to foreclose because they were not the original creditor and could not produce the original note. Erickson, 2011 WL 830727, at *3. The Ericksons' main argument in this appeal is that DBNTC has failed to show that it possesses the original note. The Ericksons make the same argument in both cases: that DBNTC has not produced enough evidence to prove ownership of the original note and therefore cannot foreclose. These issues are identical.

The "final judgment on the merits" element is also met. Id. A final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. In re Dependency of H.S., 188 Wn. App. 654, 661, 356 P.3d 202 (2015). The federal court entered summary judgment against the Ericksons on all issues, including their claim on possession of the note, and the Ninth Circuit Court of Appeals affirmed. Erickson, 2011 WL 830727, at *7; Erickson, 473 F. App'x at 746. The resolution of the 2010 suit constitutes a final judgment on the merits.

The Ericksons argue that the identity of party element is not satisfied, because in this case Deutsche Bank is appearing as "Deutsche Bank National Trust Company, a Trustee for Long Beach Mortgage Loan Trust 2006-4," while in the federal case it appeared only as "Deutsche Bank National Trust Company."

(Emphasis added.) But, the standard requires that only the party against whom collateral estoppel is being asserted was a party to the prior case. Hadley, 144 Wn.2d at 311-12. The Ericksons were a party to the federal case. Erickson, 2011 WL 830727, at *1. And, even if the standard required DBNTC to be a party to the prior case, it was. Id. Regardless of whether DBNTC appeared on its own behalf or as a trustee in the federal case, it was clearly "a party to or in privity with a party to the prior adjudication." Hadley, 144 Wn.2d at 311-12. The identical party element is satisfied.

Finally, applying collateral estoppel will not work an injustice against the Ericksons. The Ericksons make no substantive argument on this element. Applying collateral estoppel may seem unjust because the Ericksons were not represented by counsel in the federal case. But, they made the conscious choice to pursue those claims pro se. See Edwards v. LaDuc, 157 Wn. App. 455, 464, 238 P.3d 1187 (2010) ("[T]he trial court must treat pro se parties in the same manner it treats lawyers."). Enforcing collateral estoppel here would not amount to an injustice.

We hold that collateral estoppel bars the Ericksons' arguments that Deutsche Bank does not hold the original note.

II. Possession of the Note

Even if the Ericksons were not collaterally estopped from their substantive arguments, a holder of a note endorsed in blank is entitled to enforce that note.

Brown v. Dep't of Commerce, 184 Wn.2d 509, 536, 359 P.3d 771 (2015). Presentation of the original note at a summary judgment hearing is sufficient to prove a party's status as holder of the note. Deutsche Bank Nat. Trust. Co. v. Slotke, 192 Wn. App. 166, 175, 367 P.3d 600, review denied, 185 Wn.2d 1037, 377 P.3d 746 (2016).

DBNTC attached a copy of the note to its attorney's summary judgment declaration. That copy included an endorsement in blank.[1] The summary judgment hearing transcript also shows that DBNTC presented an original copy of the note at the summary judgment hearing. Because DBNTC presented an original, signed, endorsed in blank note at the summary judgment hearing, it was entitled to summary judgment and to enforce the note against the Ericksons.

The Ericksons make a number of counterarguments. First, the Ericksons argue that DBNTC should not be entitled to foreclosure because it has failed to explain how it came into possession of the note. The Ericksons do not provide any legal support for their argument that, despite possessing the note, DBNTC

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[1] The copy of the note attached to the complaint did not include the endorsed in blank stamp. DBNTC attached a copy of the note with the endorsed in blank stamp in support of its summary judgment motion. The Ericksons argue that DBNTC's failure to originally include the endorsement in blank stamp is evidence that DBNTC is actually not the proper holder of the note. But, this argument is merely speculative. See Boguch, 153 Wn. App. at 610 ("[A] party resisting summary judgment cannot satisfy his or her burden of production merely by relying on conclusory allegations, speculative statements, or argumentative assertions. Rather, the nonmoving party 'must set forth' specific facts demonstrating a genuine issue of fact." (citation omitted) (quoting Las v. Yellow Front Stores, Inc., 66 Wn. App. 196 198, 831 P.2d 744 (1992)).

cannot enforce the note if it cannot explain all previous transfers of the note. DBNTC produced the original note endorsed in blank. That alone allows DBNTC to enforce it. RCW 62A.1–201(21)(A) (defining "holder" as "[t]he person in possession of a negotiable instrument."); RCW 62A.3–205(b) ("When [e]ndorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially [e]ndorsed."); see also Brown, 184 Wn.2d at 536 ("As the holder of the note [endorsed in blank], M & T Bank is entitled to enforce the note."); Deutsche Bank, 192 Wn. App. at 173 ("[I]t is the holder of the note who is entitled to enforce it. It is not necessary for the holder to establish that it is also the owner of the note secured by the deed of trust.").

Second, the Ericksons argue that the note was not properly authenticated. DBNTC's attorney submitted the note as an exhibit to his declaration. The note is commercial paper. See United States v. Varner, 13 F.3d 1503, 1508 n.5 (11th Cir. 1994). Under ER 902(i), commercial paper qualifies as a self-authenticating document. See, e.g., Varner, 13 F.3d 1508-09 ("Mere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible.") (emphasis added)).

Third, the Ericksons argue that the note constitutes inadmissible hearsay. Statements that have "operative legal effect" are not subject to the prohibition on hearsay. ARONSON & HOWARD, THE LAW OF EVIDENCE IN WASHINGTON § 10.05[2][f] (5th ed. 2016). The note is a legally enforceable promise to pay and it therefore

has independent legal significance. See Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527, 540 (5th Cir. 1994) (" 'Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance and are not hearsay.' " (quoting THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 180 (1988)). The promissory note was self-authenticating and not subject to the prohibition on hearsay.

Fourth, the Ericksons argue without citation to authority that notes are tantamount to a conveyance of real property, and therefore should be subject to the statute of frauds'[2] protections. Washington cases involving enforcement of notes have not identified the statute of frauds as an impediment to foreclosure. See, e.g., Slotke, 192 Wn. App. at 173 ("[I]t is the holder of a note who is entitled to enforce it."); Brown, 184 Wn.2d at 535-36 ("M & T Bank is the holder of Brown's note because M & T Bank possesses the note and because the note, having been indorsed in blank, is payable to the bearer."). The statute of frauds does not bar DBNTC's enforcement of the note.

III. Amount of Judgment

The Ericksons also argue that, besides the note itself, DBNTC submitted no evidence to support the monetary judgment entered against them. But, the note is evidence of the debt. The trial court entered a judgment and decree of foreclosure against the Ericksons for the $465,047.67 loan principal and

[2] RCW 64.04.020.

$253,354.11 in interest. The Ericksons do not challenge the mathematical calculation of the amount due under the note, but stress the fact that no additional evidence of the amount was offered. Payment is an affirmative defense under Washington law. U.S. Bank Nat'l Ass'n v. Whitney, 119 Wn. App. 339, 347, 81 P.3d 135 (2003). The Ericksons did not assert any payment defense in their answer. Thus, they cannot now challenge the principal and interest owed under the note.

IV. Attorney Fees

The Ericksons have requested attorney fees. Because we affirm summary judgment against the Ericksons, we deny their request for attorney fees.

We affirm.

WE CONCUR:

Spearman, J.

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Long Beach Mortgage Loan Trust 2006-4, Respondent, v. JOHN E. ERICKSON AND SHELLEY A. ERICKSON, individuals residing in Washington; Appellants, BOEING EMPLOYEES' CREDIT UNION, a Washington corporation; AMERICAN GENERAL SERVICES, INC., a Delaware corporation; TBF FINANCIAL, LLC, an Illinois limited liability corporation; JUSTIN PARK & ROMERO PARK & WIGGINS, PS, a Washington Professional Services Corporation; RANDAL EBBERSON, an individual residing in Washington; THE LAW FIRM OF KEATING BUCKLIN & McCORMACK, INC., PS, a Washington professional services corporation; CITY OF AUBURN, WASHINGTON, a Washington municipality; CHARLES JOINER, an individual residing in Washington; PAUL KRAUSS, an individual residing in Washington; DAN HEID, an individual residing in Washington; SHELLEY COLEMAN, an individual residing in Washington; BRENDA HEINEMAN, an individual residing in Washington; and THE WASHINGTON CITIES INSURANCE AUTHORITY, a municipal organization of Washington public entities, Defendants,	No. 73833-0-I ORDER DENYING MOTION FOR RECONSIDERATION

No. 73833-0-I /2

JPMORGAN CHASE BANK, N.A., a national banking association; LONG BEACH MORTGAGE LOAN TRUST, 2006-4; JOHN DOES 1-99,

Third Party Defendants.

The appellants, John and Shelley Erickson, have filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 8th day of March, 2017.

Judge

H

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington, at Seattle.

John E. ERICKSON, Shelley A. Erickson, and Shelley's Total Bodyworks Day Spa/Shelley's Suntan Parlor, Plaintiffs,

v.

LONG BEACH MORTGAGE CO., Washington Mutual Bank, Deutsche Bank National Trust Company, and Chase Bank, Defendants.

No. 10–1423 MJP.
March 2, 2011.

John E. Erickson, Auburn, WA, pro se.

Shelley A. Erickson, Auburn, WA, pro se.

Fred B. Burnside, Joshua A. Rataezyk, Davis Wright Tremaine, Seattle, WA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

MARSHA J. PECHMAN, District Judge.

***1** This matter comes before the Court on Defendants' motion for summary judgment (Dkt. No. 51), and Plaintiffs' cross motion for summary judgment (Dkt. No. 82). Having reviewed the motions, Plaintiffs' response (Dkt. No. 81) and replies (Dkt.Nos.67, 70, 72), Defendants' reply (Dkt. No. 73), and all related documents, the Court GRANTS Defendants' motion, DENIES Plaintiffs' motion, and DISMISSES this action.

Background

Plaintiffs John E. and Shelley A. Erickson, husband and wife, used their Auburn home to secure a $476,000 loan currently being serviced by Defendant JP Morgan Chase Bank NA ("Chase"). (Decl. of Thomas Reardon (Dkt. No. 54) at ¶ 4.) Shelley's Total Bodyworks Day Spa and Shelley's Suntan Parlor are sole proprietorships owned by the Ericksons. (Dkt. No. 14. at 2.) Plaintiffs first obtained the loan from Defendant Long Beach Mortgage Co. ("LBMC") on March 3, 2006, and entered into a fixed/adjustable rate note secured by a deed of trust. (Reardon Decl. at ¶ 4.) The loan was then sold into a pool of loans held in trust by Defendant Deutsche Bank National Trust ("DB"). (*Id.* at ¶ 6.) Defendant Washington Mutual Bank ("WaMu") took over the loan in 2006, when it merged with LMBC, taking over all its rights and obligations. (*Id.* at ¶ 9.)

After WaMu failed and entered FDIC receivership on September 25, 2008, Chase purchased WaMu assets—including Plaintiffs' loan—under a Purchase and Assumption Agreement ("P & A Agreement"). *Purchase and Assumption Agreement Among Federal Deposit Insurance Corporation and JP Morgan Chase Bank, National Association,* (Sept. 25, 2008), *available at* http:// fdic.gov/about/freedom/Washington_mutual_p_and_a .pdf. Defendants request the Court follow other district courts in taking judicial notice of the P & A Agreement. (Dkt. No. 51 at 4 n. 2.) The Court takes judicial notice of the P & A Agreement "because it is a public record and not the subject of reasonable dispute." *Danilyuk v. JP Morgan Chase Bank, NA,* No. C10–0712JLR, 2010 WL 2679843, at *4 (W.D.Wash., July 2, 2010) (collecting cases).

In 2009, Plaintiffs sought to modify their loan through a program provided by Chase. (*Id.* at ¶ 10.) Plaintiffs claim they were told they must be three months in default to qualify for the program, but that they avoided falling behind on their loan as long as they could. (Dkt. No. 14 at 34.) Chase delivered a "Trial Modification Package" ("Application Package") to Plaintiffs on May 19, 2009, and claims Plaintiffs submitted a "Home Affordable Modification Trial Period Plan" ("Trial Plan") application and hardship affidavit to Chase, signed May 19, and May 20, 2009. (Reardon Decl.

at ¶ 10.) Although Defendants have produced the signed copy of the affidavit Plaintiffs submitted, the couple claims never to have received the Application Package. (Dkt. No. 14 at 47.) Plaintiffs claim an agent had already told them by phone they were approved for modification in April 2009. (Decl. of Shelley Erickson (Dkt. No. 84) at 4.)

***2** The Application Package set out the steps necessary for Plaintiffs to have obtained their loan. It stated generally that Plaintiffs needed to explain their financial hardship, submit required documentation as to income and make timely monthly trial period payments. (Reardon Deck, Ex. E at 56.) The Application Package stated:

> If your income documentation does not support the income amount that you previously provided in our discussions, two scenarios can occur:
>
> 1) Your monthly payment under the Trial Period Plan may change
>
> 2) You may not qualify for this loan modification program.
>
> (*Id.*)

Plaintiffs received a letter from Chase on May 29, 2009 regarding the Trial Plan. (Dkt. No. 7–1 at 2.) The letter instructed Plaintiffs to pay the modified rate instead of the regular rate during the Trial Plan period, and that "If you make all [3] trial period payments on time and comply with all of the applicable program guidelines, you will have qualified for a final modification ." (*Id.*) Plaintiffs paid the modified rate from June through October 2009. (Erickson Deck at 4.)

On October 13, 2009, Chase sent a letter rejecting Plaintiffs' loan modification due to insufficient credit. (Reardon Decl. at ¶ 11.) Plaintiffs filed suit in King County Superior Court on August 11, 2010, seeking relief under various state and federal law theories. (Dkt. No. 1 at 2.) Defendants removed under this Court's original and supplemental jurisdiction on September 2, 2010. (*Id.*)

Analysis

Both parties move for summary judgment pursuant to Fed.R.Civ.P. 56. Plaintiffs' pleadings are vague and difficult to understand, and the Court characterizes the claims as best it can. Plaintiffs' claims fall into two groups: those arising from the March 2006 loan, and those arising after Chase took over servicing the loan in September 2008. The Court only considers the claims in Plaintiffs' second amended complaint, given that Plaintiffs failed to file an amended complaint after having been given leave to file an amended pleading. (Dkt.Nos.14, 45.) Plaintiffs have failed to provide facts sufficient to establish the elements of any of the claims they pursue. Defendants are entitled to relief on their summary judgment motion.

A. *Standard*

Summary judgment is appropriate when a party fails to establish the existence of an essential element of their case for which they bear the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When a non-moving party has made no such showing, "the moving party may simply point to the absence of evidence." *In re Brazier Forest Prod. Inc.,* 921 F.2d 221, 223 (9th Cir.1990). The Ninth Circuit asks courts to give pro se petitioners "the benefit of any doubt" when interpreting their pleadings. *Bretz v. Kelman,* 773 F.2d 1026, 1027 n. 1 (9th Cir.1985). However, conclusory allegations, even when included in a signed affidavit, will not survive summary judgment. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

B. *Claims Arising from the 2006 Loan*

***3** As best the Court can understand from Plaintiffs' pleadings, Plaintiffs advance three claims traceable to LBMC's allegedly deceptive conduct during the loan process, and the invalidity of the note securing Plaintiffs' loan: (1) rescission under the Truth In Lending Act ("TILA"), (2) declaratory or injunctive relief preventing foreclosure, and (3) damages under TILA or various tort theories. These

claims are legally barred or lacking in merit.

1. *Rescission*

Plaintiffs' rescission claims are time-barred. Claims for rescission under TILA must be brought within three years of a loan's consummation. 15 U.S.C. § 1635(f). The loan from LBMC was consummated in 2006, more than five years before Plaintiffs filed suit in August of 2010. (Reardon Decl. at ¶ 4.) Plaintiff failed to bring suit within three years of their loan's consummation. Plaintiffs cannot pursue a TILA rescission claim. The Court GRANTS Defendants' motion and DISMISSES Plaintiffs' rescission claim under TILA.

2. *Declaratory or injunctive relief*

Plaintiffs assert Defendants are not entitled to foreclose on their house, and appear to seek either a declaration of Defendants' lack of interest in the property, or an injunction against foreclosure. The Court finds no merit to this claim.

Plaintiffs' argument rests on the contention that Defendants lack standing to foreclose because they are not the original creditors, and cannot produce the original note. Courts "have routinely held that [this] so-called 'show me the note' argument lacks merit." *Freeston v. Bishop, White & Marshall, P.S.*, No. C09–5560BHS, 2010 WL 1186276 (W.D.Wash. Mar.24, 2010) (quoting *Diessner v. Mortg. Elec. Registration Sys.*, 618 F.Supp.2d 1184, 1187 (D.Ariz.2009) (collecting cases)). The Court agrees with these cases. More importantly, Defendants provide evidence demonstrating their ownership of the note, which the Ericksons do not credibly challenge. The Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to claims for a declaration or an injunction against foreclosure. The Court DISMISSES this claim.

3. *Damages*

Plaintiffs advance TILA and fraud claims for damages arising from the March 2006 loan process. The Court agrees with Defendants that they are not the proper parties to these claims.

When WaMu entered receivership, the FDIC assumed liability associated with borrower claims. *Yeomalakis v. F.D.I.C.*, 562 F.3d 56, 60 (1st Cir.2009). Chase "assume[d] all mortgage servicing rights and obligations" from the FDIC. P & A Agreement, § 2.1. However, the P & A Agreement provides that

> any liability associated with borrower claims for payment of or liability to any borrower for monetary relief ... arising in connection with [WaMu's] lending or loan purchase activities are specifically not assumed by [Chase].

Id at § 2.5. Previous courts considering the P & A Agreement have held that it "reliev[es] Chase of all liability for borrowers' claims relating to loans made by Washington Mutual prior to September 25, 2008." *Danilyuk*, 2010 WL 2679843, at *4 (collecting cases). The FDIC retains any of WaMu's liability stemming from Plaintiffs' initial loan. Plaintiff has not sued the FDIC, which appears to be the proper party. Plaintiffs have produced no facts supporting claims for damages against DB, and LBMC no longer exists.

***4** The Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to all claims for damages relating to the 2006 loan process. The Court DISMISSES these claims for damages.

B. *Claims Arising After 2008*

Plaintiffs appear to pursue nine claims arising out of Defendants' conduct after Chase assumed WaMu's loan servicing obligations. Plaintiffs assert claims for (1) Racketeering Influenced and Corrupt Organizations ("RICO") Act violations, (2) mail fraud, (3) wire fraud, (4) money laundering, (5) Washington's Criminal Profiteering Act violations, (6) fraud, (7) promissory estoppel, and (8) intentional infliction of emotional distress. Plaintiffs have not shown evidence necessary to sustain these claims in the face of Defendants' summary judgment motion.

1. *RICO*

Plaintiffs claim Defendants violated RICO by engaging in mail fraud, wire fraud, and money laundering. Plaintiffs have not shown facts supporting a necessary element of a RICO claim.

To state a claim under RICO, a plaintiff "must allege facts tending to show that he or she was injured by the use or investment of racketeering income." *Nugget Hydroelectric, L.P. v. Pacific Gas and Elec. Co.,* 981 F.2d 429, 437 (9th Cir.1992). Allowing recovery without showing harm from racketeering income would "allow recovery for an injury arising from a mere element of a violation, rather than an actual violation." *Id.*

Plaintiffs point to no facts in the record showing the necessary element of harm caused by Defendants' use or investment of income. The Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to RICO claims. The Court DISMISSES this claim.

2. *Mail fraud, wire fraud, and money laundering*

Plaintiffs have no legal claim for mail fraud, wire fraud, or money laundering independent of RICO. The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, provide no private cause of action for mail or wire fraud. *See, e.g., Blake v. Irwin Mortgage,* No. CV–10–2435–PHX–GMS, 2011 WL 98538 (D.Ariz., Jan.12, 2011). Similarly, there is no individual cause of action for money laundering under 18 U.S.C. §§ 1956, 1957. *See, e.g., El Camino Resources, LTD. v. Huntington Nat. Bank,* No. 1:07–cv–598, 2010 WL 2651617 (W.D.Mich., July 1, 2010). The Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to independent mail fraud, wire fraud, or money laundering claims. The Court DISMISSES these claims.

3. *Criminal Profiteering Act*

Plaintiffs claim that Defendants violated Washington's Criminal Profiteering Act, Chapter 9A. 82 RCW, by engaging in mortgage fraud. This cause of action cannot be advanced.

The Criminal Profiteering Act gives a private remedy to plaintiffs injured by an act of criminal profiteering, including mortgage fraud. RCW 9A.82.100; RCW 9A.82.010(4)(qq). Until July of 2010, mortgage fraud included fraud or deception "in connection with making, brokering, or obtaining a residential mortgage loan." RCW 19.144.080 (2008). The definition of mortgage fraud was extended to include loan modification by an amendment which became effective July 1, 2010. 2010 Wash. Legis. Serv. Ch. 35 § 12 (West). The amendment contains no legislative intent of retroactive application, and thus does not apply before its effective date. *See Howell v. Spokane & Inland Empire Blood Bank,* 114 Wash.2d 42, 47, 785 P.2d 815 (1990).

***5** Because the amendment does not apply retroactively, the Court looks to the statute in effect at the time the allegedly fraudulent behavior occurred. However, during the time Plaintiffs sought and were ultimately denied loan modification, the earlier version of the statute was in effect—which did not apply to loan *modification.* Thus, Plaintiffs cannot establish a Criminal Profiteering Act claim based on mortgage fraud committed by Defendants during the 2009 loan modification process. Moreover, Plaintiffs have not shown sufficient evidence of deception or fraud in the modification process, as explained in more detail below. The Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to the Criminal Profiteering Act claim. The Court DISMISSES this claim.

4. *Tort claims*

Defendants argue Washington's independent duty doctrine bars Plaintiffs' tort claims. The Court disagrees with Defendants' broad interpretation of that doctrine.

The independent duty doctrine is a facet of Washington's economic loss rule, which precludes tort recovery for purely economic loss within a contractual relationship unless an independent duty can be established. *Eastwood v. Horse Harbor Found.,*

Inc., 170 Wash.2d 380, 241 P.3d 1256, 1264 (Wash.2010). The rule does not bar claims of misrepresentation, non-economic damage, or claims arising independently of a contract. *Id.* at 1261. Thus, the economic loss rule does not bar Plaintiffs' claims of (1) fraud, (2) promissory estoppel, or (3) intentional infliction of emotional distress. However, as explained below, there are independent reasons for dismissing all of Plaintiffs' tort claims.

a. *Fraud*

Plaintiffs claim Defendants engaged in fraud by misleading them into thinking they had been or would be approved for loan modification. Plaintiffs have not shown facts establishing necessary elements of a fraud claim.

A party claiming fraud must show each of nine elements: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon it, and (9) damages suffered by the plaintiff. *Steineke v. Russi,* 145 Wash.App. 544, 563, 190 P.3d 60 (2008) (quoting *Stiley v. Block,* 130 Wash.2d 486, 505, 925 P.2d 194 (1996)). Plaintiffs' evidence fails to establish the first element.

Plaintiffs claim they were told over the phone they were approved for a modification, but offer no specifics or evidence of the call. This conclusory claim is insufficient to raise a genuine issue of fact for summary judgment purposes. *Lujan,* 497 U.S. at 888. It is also contradicted by the letters Defendants have submitted that clearly show Plaintiffs were only offered the chance to enroll in the loan modification program, not that they had been enrolled. (Reardon Decl., Ex. E at 56.) Plaintiffs' best argument for fraud is the May 29 letter, which implies that three months' timely payment during the Trial Plan would suffice to qualify them for a loan. However, the letter at best is a promise to modify the loan in the future, not an "existing fact." "A promise of future performance is not a representation of an existing fact and will not support a fraud claim." *West Coast Inc. v. Snohomish County,* 112 Wash.App. 200, 206, 48 P.3d 997 (2002). Because they have shown at best only a future promise, Plaintiffs have not established the first element of fraud.

***6** Plaintiffs also have not provided or pointed to any specific facts showing their damages, the ninth element of fraud. It may be that they made higher payments under the Trial Plan than they would have otherwise, but they have provided no evidence of this fact. Moreover, it is unclear how payment on an outstanding debt constitutes damages. However, even with evidence of damages, Plaintiff's fraud claim would fail because they have not provided any evidence to support the first element.

The Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to the fraud claim. The Court DISMISSES this claim.

b. *Promissory estoppel*

Plaintiffs claim promissory estoppel based on Defendants' alleged promise of loan modification. Plaintiffs have not shown facts establishing necessary elements of the claim.

A party claiming promissory estoppel must show each of five elements: (1) a promise (2) the promisor should reasonably expect to cause the promisee to change position (3) which does cause the promisee to change position (4) justifiably relying on the promise, in such a manner that (5) injustice can only be avoided by enforcing the promise. *Havens v. C & D Plastics,* 124 Wash.2d 158, 171–72, 876 P.2d 435 (1994). Plaintiffs' evidence fails to establish the first element.

The first element requires a "clear and definite" promise. *Id* . at 173, 876 P.2d 435. A promise which is conditioned on the future signing of documents fails to satisfy this requirement. *Pacific Cas-*

cade Corp. v. Nimmer, 25 Wash.App. 552, 559, 608 P.2d 266 (1980). The defendant in *Pacific Cascade* executed a letter of intent to enter into a lease, after extended negotiations. *Id.* at 554–55, 608 P.2d 266. Even though the letter clearly expressed the defendant's intent to enter into the lease, the court held it would not support a claim of promissory estoppel. *Id.* at 559, 608 P.2d 266. The court held that even if the letter constituted a promise, "its terms were expressly conditioned upon the subsequent execution of a written document" (the lease), without which the promise was unenforceable. *Id.*

The Plaintiffs have not provided specific evidence sufficient to establish a service agent made a promise over the phone, as explained above. Plaintiffs' best support for their promissory estoppel claim is the May 29 letter. However, that letter at most promises that Defendants would execute a loan modification if Plaintiffs made all trial period payments on time "and compl[ied] with all of the applicable program guidelines." (Dkt. No. 7–1 at 2.) The loan modification would only become effective "[u]pon execution ... by the Lender and [Plaintiffs]." (Reardon Ex. E., at 63.) Because any promise in the May 29 letter was conditioned on future execution of the modification documents, it does not establish the first element of promissory estoppel.

Accordingly, the Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to the promissory estoppel claim. The Court DISMISSES this claim.

c. *Intentional Infliction of Emotional Distress*

***7** Plaintiffs contend Defendants' denial of loan modification constitutes intentional infliction of emotional distress ("IIED"). Plaintiffs have not shown facts supporting the necessary elements of an IIED claim.

A party claiming IIED must show each of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Kloepfel v. Bokor,* 149 Wash.2d 192, 195, 66 P.3d 630 (2003). Plaintiffs' evidence fails to establish the first or second element.

"The first element [of IIED] requires proof that the conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Robel v. Roundup Corp.,* 148 Wash.2d 35, 51, 59 P.3d 611 (2002). Default and foreclosure proceedings generally do not rise to the level of extreme and outrageous conduct. *See, e.g., Thepvongsa v. Regional Trustee Servs. Corp.,* No. C10–1045 RSL, 2011 WL 307364, at *3–4 (W .D. Wash. Jan 26, 2011). Denying a loan modification which might result in foreclosure is no more "outrageous in character" than actually foreclosing. Because Plaintiffs have provided no specific evidence of Defendants' outrageous conduct beyond loan modification denial, they fail to establish the first element of an IIED claim.

The second IIED element requires intentional or reckless conduct, not mere bad faith or malice. *Dicomes v. State,* 113 Wash.2d 612, 631, 782 P.2d 1002 (1989). Because Plaintiffs offer no specific facts showing Defendants' mental state, they fail to establish the second element of IIED.

The Court GRANTS Defendants' motion and DENIES Plaintiffs' motion with respect to the IIED claim. The Court DISMISSES this claim.

Conclusion

Plaintiffs are not entitled to pursue any of their claims against the Defendants arising from the 2006 loan process. Plaintiffs have also failed to show evidence supporting necessary elements of each of their claims arising from the 2009 loan modification process. Plaintiffs' motion is DENIED with respect to all claims. Given Plaintiffs' failure to show specific facts supporting elements necessary to each of the claims, Defendants' motion is GRANTED with respect to all claims. The Court DISMISSES

Plaintiffs' entire action with prejudice.

The clerk is ordered to provide copies of this order to all counsel and Plaintiffs.

W.D.Wash.,2011.
Erickson v. Long Beach Mortg. Co.
Not Reported in F.Supp.2d, 2011 WL 830727 (W.D.Wash.)

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2017 WL 772603
Only the Westlaw citation is currently available.
Supreme Court of Hawai'i.

BANK OF AMERICA, N.A., Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP, Respondent/Plaintiff-Appellee,
v.
Grisel REYES-TOLEDO, Petitioner/Defendant-Appellant,
and
Wai Kaloi at Makakilo Community Association; Makakilo Community Association; and Palehua Community Association, Respondents/Defendants-Appellees.

SCWC-15-0000005
|
FEBRUARY 28, 2017

Synopsis

Background: Loan servicer filed foreclosure action against mortgagor. Mortgagor filed counterclaims for wrongful disclosure, declaratory relief, quiet title, and unfair and deceptive trade practice. Following dismissal of the counterclaims, the Circuit Court, Bert I. Ayabe, J., No. 12-1-0668, granted summary judgment in favor of loan servicer and entered foreclosure decree. Mortgagor appealed. The Intermediate Court of Appeals No. CAAP-15-0000005, 2016 WL 1092305, affirmed. Mortgagor filed application for writ of certiorari, which was granted.

Holdings: The Supreme Court, Pollack, J., held that:

[1] genuine issues of material fact existed as to whether loan servicer was in entitled to enforce note at time it commenced foreclosure proceedings, thus precluding summary judgment as to the loan servicer's standing to institute the proceedings;

[2] assignment of mortgage was insufficient to establish loan servicer's standing to institute foreclosure proceedings; and

[3] judgment on foreclosure decree was final appealable judgment, and thus Intermediate Court of Appeals had appellate jurisdiction over circuit court's order dismissing mortgagor's counterclaims.

Vacated and remanded.

West Headnotes (20)

[1] Judgment
Mortgages and secured transactions, cases involving

Genuine issues of material fact existed as to whether a loan servicer, which was in possession of a promissory note indorsed in blank at the time it sought summary judgment in its foreclosure action against a mortgagor, possessed the note or was otherwise a holder entitled to enforce the note at the time it commenced the foreclosure proceedings, thus precluding summary judgment as to the loan servicer's standing to institute the foreclosure proceedings. Haw. Rev. Stat. § 490:3-301.

2 Cases that cite this headnote

[2] Appeal and Error
Cases Triable in Appellate Court

Supreme Court reviews the circuit court's grant or denial of summary judgment de novo.

Cases that cite this headnote

[3] Appeal and Error
Judgment

In reviewing the grant or denial of summary judgment, the Supreme Court views all the evidence and inferences in the light most favorable to the party opposing the motion.

Cases that cite this headnote

[4] Judgment
Presumptions and burden of proof

Moving party on a motion for summary judgment bears the burden of demonstrating that there is no genuine issue as to any material fact with respect to the essential elements of the claim or defense and must prove that the moving party is entitled to judgment as a matter of law.

Cases that cite this headnote

[5] **Judgment**

Absence of issue of fact

A fact is material, for purposes of a summary judgment motion, if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.

Cases that cite this headnote

[6] **Mortgages and Deeds of Trust**

Judicial foreclosure in general

To prove entitlement to foreclose, the plaintiff is typically required to prove the existence of an agreement, the terms of the agreement, a default by the mortgagor under the terms of the agreement, and giving of the cancellation notice.

Cases that cite this headnote

[7] **Mortgages and Deeds of Trust**

Persons Entitled to Foreclose;Plaintiffs

A foreclosing plaintiff must prove its entitlement to enforce the note and mortgage. Haw. Rev. Stat. §§ 490:3-301, 490:3-308.

2 Cases that cite this headnote

[8] **Action**

Persons entitled to sue

"Standing" is concerned with whether the parties have the right to bring suit.

Cases that cite this headnote

[9] **Action**

Persons entitled to sue

Typically, a plaintiff does not have standing to invoke the jurisdiction of the court unless the plaintiff has suffered an injury in fact.

Cases that cite this headnote

[10] **Action**

Persons entitled to sue

Inquiry into whether a party has standing involves consideration of whether the plaintiff suffered an actual or threatened injury as a result of the defendant's conduct; whether the injury is traceable to the challenged action; and whether the injury is likely to be remedied by a favorable judicial decision.

Cases that cite this headnote

[11] **Mortgages and Deeds of Trust**

Default in payment in general

Mortgages and Deeds of Trust

Persons Entitled to Foreclose;Plaintiffs

The underlying injury in fact to a foreclosing plaintiff is the mortgagee's failure to satisfy its obligation to pay the debt obligation to the note holder; accordingly, in establishing standing, a foreclosing plaintiff must necessarily prove its entitlement to enforce the note as it is the default on the note that gives rise to the action. Haw. Rev. Stat. §§ 490:3-301, 490:9-102, 490:9-601, 667-1.5.

1 Cases that cite this headnote

[12] **Action**

Persons entitled to sue

Crucial inquiry with regard to standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf.

Cases that cite this headnote

[13] **Action**

Persons entitled to sue

As standing relates to the invocation of the court's jurisdiction, standing must be present at the commencement of the case.

Cases that cite this headnote

[14] **Mortgages and Deeds of Trust**

Persons Entitled to Foreclose;Plaintiffs

A foreclosing plaintiff does not have standing to foreclose on mortgaged property unless the plaintiff was entitled to enforce the note that has been defaulted on. Haw. Rev. Stat. §§ 490:3-301, 490:9-102, 490:9-601, 667-1.5.

2 Cases that cite this headnote

[15] **Mortgages and Deeds of Trust**

Mortgage as following note;note as following mortgage

Mortgages and Deeds of Trust

Loan servicers, nominees, and other agents of lenders

Assignment of mortgage to loan servicer prior to the loan servicer's commencement of foreclosure action against mortgagor was insufficient to establish loan servicer's standing to institute foreclosure proceedings; injury in foreclosure proceedings was premised on default under note, and although security followed the debt, the debt did not automatically follow the security. Haw. Rev. Stat. § 490:9-203(g); Restatement (Third) of Property (Mortgages), § 5.4(c).

Cases that cite this headnote

[16] **Mortgages and Deeds of Trust**

Finality

Circuit court's judgment, which granted summary judgment in favor of loan servicer on foreclosure claims against mortgagor and entered foreclosure decree, was final appealable judgment that complied with procedural requirement of being set forth on separate document, and thus Intermediate Court of Appeals had appellate jurisdiction over all interlocutory orders leading up to judgment, including circuit court's orders dismissing mortgagor's counterclaims for unfair trade practices and other causes of action and denying mortgagor's motion for reconsideration and certification; orders concerning dismissal of counterclaims were both issued prior to foreclosure decree and concerned issues involving the foreclosure in the case. Haw. Rev. Stat. §§ 641-1, 667-51(a); Haw. R. Civ. P. 58.

Cases that cite this headnote

[17] **Appeal and Error**

Necessity of final determination

Mortgages and Deeds of Trust

Decisions Reviewable

A party typically does not have a right to appeal unless there is entry of a final judgment; however, in foreclosure cases, appellate jurisdiction over appeals is further defined by statute providing for appellate jurisdiction over a judgment on a decree of foreclosure. Haw. Rev. Stat. §§ 641-1(a), 667-51.

Cases that cite this headnote

[18] **Mortgages and Deeds of Trust**

Decisions Reviewable

Under rule governing appeals in foreclosure proceedings, foreclosure cases are bifurcated into two separately appealable parts: (1) the decree of foreclosure and order of sale, and (2) all other orders that fall within the second part of the bifurcated proceedings, including orders confirming sale, deficiency judgments, orders directing the distribution of proceeds, and other orders issued subsequent to the decree of foreclosure that are separately appealable. Haw. Rev. Stat. § 667-51.

Cases that cite this headnote

[19] **Mortgages and Deeds of Trust**

Decisions Reviewable

Issues that are not unique to the confirmation of a foreclosure sale must be raised on appeal with respect to the foreclosure decree. Haw. Rev. Stat. §§ 641-1, 667-51.

Cases that cite this headnote

[20] **Appeal and Error**
Certificate as to grounds

A judgment reflecting that it is entered as a final judgment and that there is no just reason for delay is not dispositive of whether the judgment is itself a final, appealable judgment that would allow review of other interlocutory orders. Haw. R. Civ. P. 54(b).

Cases that cite this headnote

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS (CAAP-15-0000005; CIVIL NO. 12-1-0668)

Attorneys and Law Firms

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NAKAYAMA, ACTING C.J., McKENNA, POLLACK, AND WILSON, JJ., AND CIRCUIT COURT JUDGE GARIBALDI, IN PLACE OF RECKTENWALD, C.J., RECUSED

Opinion

OPINION OF THE COURT BY POLLACK, J.

*1 This case raises issues of standing and appellate jurisdiction that pertain to foreclosure proceedings. We consider whether a foreclosing plaintiff seeking summary judgment must prove it had standing to foreclose on the homeowner's property at the commencement of the lawsuit to be entitled to foreclosure of the subject property. We also determine the extent of appellate jurisdiction over interlocutory orders leading up to a foreclosure decree.

I. BACKGROUND

The subject of the foreclosure proceedings is the home of Grisel Reyes-Toledo ("Homeowner"). On September 24, 2007, Homeowner executed a promissory note made payable to Countrywide Bank, FSB (the "Note"). The Note was secured by a mortgage on the property encumbering the property to mortgagee, Mortgage Electronic Registration Systems, Inc., as nominee for the lender, Countrywide Bank, FSB (the "Mortgage"). The Mortgage was recorded on September 28, 2007, in the Office of the Assistant Registrar of the Land Court of the State of Hawai'i.

In early 2011, Homeowner received a notice of intent to accelerate from BAC Home Loans Servicing, LP, a Bank of America company, dated January 7, 2011. The acceleration notice stated that BAC Home Loans Servicing, LP, services the loan on her property "on behalf of the holder of the promissory note" and that her loan was in serious default because required payments had not been made.

An assignment of the Mortgage from Mortgage Electronic Registration Systems, Inc., "solely as nominee for Countrywide Bank, FSB," to Bank of America, N.A., a National Association, as successor by merger to BAC Home Loans Servicing, LP, was recorded in the Office of the Assistant Registrar of the Land Court of the State of Hawai'i on October 19, 2011 (the "Assignment"). The Assignment was dated October 12, 2011.

On March 12, 2012, Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP ("Bank of America"), filed a complaint in the Circuit Court of the First Circuit (the "circuit court") seeking to foreclose on Homeowner's property. The complaint asserted that Bank of America was in possession of the Mortgage and Note and entitled to foreclosure of the Mortgage and sale of Homeowner's property.

Homeowner subsequently filed an answer and counterclaims on September 28, 2012, denying all allegations in the complaint except those relating to her personal background and the execution of the Note and Mortgage. Homeowner asserted numerous defenses, including that Bank of America was not the holder

of the Note and Mortgage and therefore not entitled to foreclosure.[1] Homeowner attacked the validity of the Assignment[2] and any negotiation of the Note.[3] Homeowner also asserted additional defenses that would apply if the Note and Mortgage were transferred into a trust and securitized.[4] Homeowner asserted four counterclaims: wrongful foreclosure, declaratory relief, quiet title, and unfair and deceptive trade practice.

*2 Bank of America subsequently filed a motion to dismiss Homeowner's counterclaims, which was granted by the court in a February 12, 2013 order ("Order Granting Motion to Dismiss Counterclaims"). Homeowner filed a motion for reconsideration or certification for appeal, which the circuit court denied in a December 31, 2013 order ("Order Denying Motion for Reconsideration and Certification").

Bank of America moved for summary judgment and an interlocutory decree of foreclosure, asserting that it was entitled to judgment as a matter of law. Bank of America maintained that, in order to obtain summary judgment, it was required to prove the existence of an agreement, the terms of the agreement, default, and the giving of the requisite notice. Bank of America contended that no genuine issue as to any material fact existed because the declarations and exhibits attached to its motion demonstrated the existence of the Mortgage and Note, the terms of the Mortgage and Note, Homeowner's default, and the giving of the requisite notice to Homeowner.

The attachments to Bank of America's motion for summary judgment included a "Declaration of Indebtedness" by Katherine M. Egan, an officer of Bank of America ("Egan Declaration"). The Egan Declaration was dated January 27, 2014, and it stated that Bank of America "has possession" of the Note and that the Note "has been duly endorsed to blank." Also attached was a copy of the Note that was signed by Homeowner, which identified Countrywide Bank, FSB, as the lender. The Note included two stamps with undated signatures that read as follows:

PAY TO THE ORDER OF

WITHOUT RECOURSE

COUNTRYWIDE HOME LOANS, INC.

BY: [signature Michele Sjolander]

MICHELE SJOLANDER

EXECUTIVE VICE PRESIDENT

* * * * * *

PAY TO THE ORDER OF

COUNTRYWIDE HOME LOANS, INC

WITHOUT RECOURSE

COUNTRYWIDE BANK, FSB

BY: [signature Laurie Meder]

LAURIE MEDER

Senior Vice President

The attachments to the motion also included a copy of the Mortgage, a copy of the Assignment, a copy of the January 7, 2011 notice of intent to accelerate, and payment records for Homeowner's loan account.

In opposition to Bank of America's motion for summary judgment, Homeowner asserted that material questions of fact remained as to the validity of the Assignment and whether Bank of America was the lawful holder of the Note. Homeowner argued that she did "not have to prove who owns the note and mortgage" and that it was Bank of America's burden "to prove by a preponderance of the evidence that it owns the note and mortgage." Homeowner contended that the evidence produced by Bank of America was insufficient as there was no evidence of the date of the transfer of the Note. Homeowner also asserted that the motion for summary judgment should be denied because discovery was ongoing, or alternatively, that the circuit court should continue the hearing pending the completion of discovery.

The circuit court granted Bank of America's motion for summary judgment, entering its December 9, 2014 "Findings of Fact, Conclusions of Law, Order Granting Plaintiffs Motion for Summary Judgment Against All Parties and for Interlocutory Decree of Foreclosure Filed April 4, 2014" ("Foreclosure Decree"). The court found that Bank of America was the "current holder" of the Note and Mortgage.[5] The court concluded that Bank of America was entitled to foreclosure of the Mortgage and sale of the property. The Foreclosure Decree also provided

that it was "entered as a final judgment pursuant to Rule 54(b) of the Hawai'i Rules of Civil Procedure (HRCP) as there was no just reason for delay." The court also entered a separate judgment on December 9, 2014, directing that the Foreclosure Decree was entered "as a final judgment in favor of Plaintiff and against all Defendants as there [was] no just reason for delay pursuant to [HRCP] Rule 54(b)" (the "Judgment").

*3 Homeowner timely filed a notice of appeal from the Judgment.[6] On appeal to the Intermediate Court of Appeals (ICA), Homeowner asserted that the circuit court erred in holding that Bank of America had standing to bring the foreclosure action, in granting summary judgment to Bank of America, in dismissing her counterclaims, and in denying her motion for reconsideration of the dismissal of her counterclaims.

In a summary disposition order, the ICA affirmed the circuit court's Judgment. The ICA's decision first addressed Homeowner's assertion that Bank of America lacked standing to foreclose. With regard to Bank of America's standing to enforce the Note, the ICA concluded that Bank of America produced sufficient evidence to establish its authority to enforce the Note.[7] The ICA reasoned that Bank of America "provided evidence that it was in possession of the Note, the blank endorsement established that [Bank of America] was the 'holder' of the Note, and the Egan Declaration stated that the Note was a true and correct copy of the Note in [Bank of America's] possession."

The ICA also considered whether it had appellate jurisdiction over Homeowner's challenge to the Order Granting Motion to Dismiss Counterclaims and Order Denying Motion for Reconsideration and Certification. The ICA concluded that it did not have jurisdiction over these orders as they were not final appealable orders and had not been reduced to a final appealable judgment. The ICA reasoned that it had jurisdiction over the appeal of the Judgment on the Foreclosure Decree as a final and appealable order under Hawaii Revised Statutes (HRS) § 667-51(a)(1) but that HRS § 667-51 did not provide appellate jurisdiction over the orders regarding the counterclaims. Thus, the ICA affirmed the circuit court Judgment.

*4 Homeowner filed an application for writ of certiorari with this court, which was granted.

II. DISCUSSION

[1] There are two primary issues presented in Homeowner's application to this court.[8] The first issue is whether the ICA erred in affirming the circuit court's grant of summary judgment in favor of Bank of America. The second issue is whether the appellate courts have jurisdiction to review the circuit court's Order Granting Motion to Dismiss Counterclaims and related Order Denying the Motion for Reconsideration and Certification under HRCP Rule 54(b), which were issued prior to the Judgment.

A. Summary Judgment

[2] [3] [4] [5] Homeowner argues that the ICA erred in affirming the circuit court's grant of summary judgment in favor of Bank of America "where the evidence proved" that Bank of America did not own or hold the Mortgage and Note by valid assignment.[9] Homeowner asserts that she "does not have to prove who owns the note and mortgage" and that Bank of America "had to prove by a preponderance of the evidence that it owns the note and mortgage." In both her application for writ of certiorari and her opening brief to the ICA, Homeowner argued that there was no evidence regarding the date of the transfer of the Note. The ICA determined that Bank of America sufficiently evidenced its authority to enforce the Note because the blank endorsement of the Note established that Bank of America was the holder.

[6] [7] In order to prove entitlement to foreclose, the foreclosing party must demonstrate that all conditions precedent to foreclosure under the note and mortgage are satisfied and that all steps required by statute have been strictly complied with. See 55 Am. Jur. 2d Mortgages § 575 (Nov. 2016 Update). This typically requires the plaintiff to prove the existence of an agreement, the terms of the agreement, a default by the mortgagor under the terms of the agreement, and giving of the cancellation notice. See Bank of Honolulu, N.A. v. Anderson, 3 Haw.App. 545, 551, 654 P.2d 1370, 1375 (1982) (citing 55 Am. Jur. 2d Mortgages § 554 (1971)). A foreclosing plaintiff must also prove its entitlement to enforce the note and mortgage. HRS § 490:3-301 (providing who is entitled to enforce an instrument); see id. § 490:3-308 (concerning proof of signatures and status as a holder in due course); id. cmt.

2 (noting that "[i]f a plaintiff producing the instrument proves entitlement to enforce the instrument, either as a holder or a person with rights of a holder, the plaintiff is entitled to recovery unless the defendant proves a defense or claim in recoupment"). [10]

*5 [8] [9] [10] [11] A foreclosing plaintiff's burden to prove entitlement to enforce the note overlaps with the requirements of standing in foreclosure actions as "[s]tanding is concerned with whether the parties have the right to bring suit." Mottl v. Miyahira, 95 Hawai'i 381, 388, 23 P.3d 716, 723 (2001). Typically, a plaintiff does not have standing to invoke the jurisdiction of the court unless the plaintiff has suffered an injury in fact. Id. at 391, 23 P.3d at 726. [11] A mortgage is a conveyance of an interest in real property that is given as security for the payment of the note. HRS § 490:9-102 (defining "mortgage"). A foreclosure action is a legal proceeding to gain title or force a sale of the property for satisfaction of a note that is in default and secured by a lien on the subject property. HRS § 667-1.5 (providing for foreclosure by action); id. § 490:9-601(a) (providing that after default, a secured party "[m]ay reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure"). See generally 55 Am. Jur. 2d Mortgages § 573 (Nov. 2016 Update) (discussing the nature and purpose of a foreclosure suit). Thus, the underlying "injury in fact" to a foreclosing plaintiff is the mortgagee's failure to satisfy its obligation to pay the debt obligation to the note holder. Accordingly, in establishing standing, a foreclosing plaintiff must necessarily prove its entitlement to enforce the note as it is the default on the note that gives rise to the action. See HRS § 490:9-601 (providing for a secured party's rights after default).

[12] [13] [14] "It is well settled that the crucial inquiry with regard to standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf." Mottl, 95 Hawai'i at 389, 23 P.3d at 724 (quoting Akinaka v. Disciplinary Bd. of Haw. Supreme Ct., 91 Hawai'i 51, 55, 979 P.2d 1077, 1081 (1999)). As standing relates to the invocation of the court's jurisdiction, it is not surprising that standing must be present at the commencement of the case. Sierra Club v. Haw. Tourism Auth., 100 Hawai'i 242, 257, 59 P.3d 877, 892 (2002) (noting that "standing must be established at the beginning of the case"). Accordingly, a foreclosing plaintiff does not have standing to foreclose on mortgaged property unless the plaintiff was entitled to enforce the note that has been defaulted on. See Hanalei, BRC Inc. v. Porter, 7 Haw.App. 304, 310, 760 P.2d 676, 680 (1988) (noting that "an action cannot be maintained if it is prematurely commenced" before the plaintiff is entitled to enforce the instrument). [12]

The principle that a foreclosing plaintiff must establish entitlement to enforce the note at the time the action was commenced has been recognized in several other jurisdictions. See, e.g., U.S. Bank, N.A. v. Ugrin, 150 Conn.App. 393, 91 A.3d 924, 930 (2014) ("Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property."); McLean v. JP Morgan Chase Bank Nat. Ass'n, 79 So.3d 170, 173 (Fla. Dist. Ct. App. 2012) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose."); Deutsche Bank Nat. Trust Co. v. Johnston, 369 P.3d 1046, 1052 (N.M. 2016) (holding that "standing must be established as of the time of filing suit in mortgage foreclosure cases"); U.S. Bank, N.A. v. Collymore, 68 A.D.3d 752, 890 N.Y.S.2d 578, 580 (2009) (noting that "the plaintiff must prove its standing in order to be entitled to relief" and that, "[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced"); Bank of N.Y. Mellon v. Grund, 27 N.E.3d 555, 559 (Ohio Ct. App. 2015) (noting that, in a mortgage foreclosure action, the mortgage lender must establish an interest in the promissory note or the mortgage "as of the filing of the complaint" (citing Fed. Home Loan Mortg. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 979 N.E.2d 1214, 1219 (2012))); Deutsche Bank Nat. Trust v. Brumbaugh, 270 P.3d 151, 154 (Okla.2012) ("Being a person entitled to enforce the note is an essential requirement to initiate a foreclosure lawsuit. In the present case, there is a question of fact as to when Appellee became a holder, and thus, a person entitled to enforce the note. Therefore, summary judgment is not appropriate."); U.S. Bank Nat. Ass'n v. Kimball, 190 Vt. 210, 27 A.3d 1087, 1092 (2011) (affirming the circuit court's granting of summary judgment for the homeowner where the bank could not prove it was the holder of the note).

*6 The requirement that a foreclosing plaintiff prove its entitlement to enforce the note at the commencement of the proceedings "provides strong and necessary incentives to help ensure that a note holder will not proceed with a foreclosure action before confirming that it has a right to do so." Deutsche Bank Nat. Trust Co. v. Johnston, 369 P.3d 1046, 1052 (N.M. 2016); see Porter, 7 Haw.App. at 308, 760 P.2d at 679 (noting that the general requirement that a holder be in possession of the instrument is meant "to protect the maker or drawer from multiple liability on the same instrument"). The Supreme Court of New Mexico recently observed that "[t]his procedural safeguard is vital because the securitization of mortgages has given rise to a pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes and, more generally the recording of interests in property."[13] Johnston, 369 P.3d at 1053. Indeed, scholars have commented on the widespread documentation problems that are associated with modern mortgage securitization practices.[14] It appears that "[u]nder these circumstances, not even the plaintiffs may be sure if they actually own the notes they seek to enforce." Id. at 1052. Basic requirements of Hawaii's Uniform Commercial Code and our law on standing should not be modified, especially in light of the widespread problems created by the securitization of mortgages, because a requirement that seems to be merely technical in nature may serve an essential purpose. For example, the possession requirement, which applies unless a specific statutory exception exists, protects the maker of an instrument from multiple enforcements of the same instrument. See Porter, 7 Haw.App. at 308, 760 P.2d at 679.

Whether a party is entitled to enforce a promissory note is determined by application of HRS § 490:3-301 (2008), which provides the following:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 490:3-309 or 490:3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Bank of America has maintained that it was the holder of the Note based on the Egan Declaration and the blank indorsement on the Note. Accordingly, we consider whether the Bank produced sufficient evidence to demonstrate that it was entitled to enforce the Note as a holder of the instrument at the time that the foreclosure proceedings were commenced.[15]

*7 The negotiation asserted by Bank of America involved negotiation by blank indorsement and transfer of possession of the Note. In contrast, a special indorsement occurs if the indorsement is made by the holder of an instrument and the indorsement identifies a person to whom it makes the instrument payable. HRS § 490:3-205(a). When an instrument is specially indorsed, it becomes payable to the identified person and may be negotiated only by the indorsement of that person. Id. A blank indorsement occurs when an indorsement is made by the holder of an instrument and is not a special indorsement; in other words, a blank indorsement is not payable to an identified person. Id. § 490:3-205(b). When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer or possession alone until specially indorsed. Id.

Here, the Note, which was attached to Bank of America's motion for summary judgment as Exhibit A, contains two indorsements. One indorsement is a special indorsement by Countrywide Bank, FSB, to Countrywide Home Loans, Inc. See HRS § 490:3-205(a). The other is a blank indorsement by Countrywide Home Loans, Inc. See id. § 490:3-205(b). Thus, because the Note was last negotiated by a blank indorsement, it may be negotiated by transfer of possession.

Although Bank of America produced evidence that it possessed the blank-indorsed Note at the time it sought summary judgment, a material question of fact exists as to whether Bank of America possessed the Note, or was otherwise a holder, at the time it brought the foreclosure action. Indeed, the copy of the Note attached to the summary judgment motion does not reflect the date of the blank indorsement, and the Egan Declaration, which was made after the filing of the complaint in this case, does not

indicate when the indorsement occurred. Further, there is no additional evidence in the record regarding the date of the indorsements or whether Bank of America possessed the Note at the time of the filing of the complaint. Thus, there is a material question of fact as to whether Bank of America was the holder of the Note at the time the foreclosure proceedings were commenced, which in turn raises the issue of whether Bank of America had standing to foreclose on the Property at the time it brought the foreclosure action. [16]

[15] Both the ICA and the circuit court appear to have determined that Bank of America was entitled to enforce the Note as the holder at the time Bank of America moved for summary judgment. As the moving party, it was Bank of America's burden to demonstrate there was no genuine issue as to any material fact with respect to the essential elements of a foreclosure action. See French v. Haw. Pizza Hut, Inc., 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004). Here, there is no evidence in the record, either through the Note itself, the Egan Declaration, or the other documents attached to the motion for summary judgment, showing that the blank indorsement on the Note occurred prior to the initiation of the suit. [17] Consequently, there is a genuine issue as to whether Bank of America was entitled to foreclose when it commenced the proceeding. Thus, viewing the facts and inferences in the light most favorable to Homeowner, there is a genuine issue of material fact as to whether Bank of America held the Note at the time it filed the complaint. Accordingly, Bank of America failed to meet its burden of demonstrating that it was entitled to judgment as a matter of law, and the circuit court erred in granting Bank of America's motion for summary judgment. [18] In light of this ruling, we need not address Homeowner's arguments with respect to whether the Mortgage was validly assigned to Bank of America.

B. Appellate Jurisdiction Over the Circuit Court Orders Concerning Dismissal of the Counterclaims

*8 **[16]** Homeowner also argues on certiorari to this court that the ICA erred in holding that it lacked jurisdiction to review the dismissal of her counterclaims. The ICA determined that, although it had jurisdiction over the Judgment and Foreclosure Decree, it did not have jurisdiction over the Order Granting Motion to Dismiss Counterclaims or the Order Denying Motion for Reconsideration and Certification. For the reasons discussed below, we conclude that the circuit court's Judgment was a final appealable judgment, and thus, there is appellate jurisdiction over all interlocutory orders leading up to the Judgment in this case, including the court's two orders concerning the dismissal of Homeowner's counterclaims.

[17] HRS § 641-1(a) [19] provides for appeals as of right in civil cases from final judgments, orders, or decrees of circuit and district courts. Thus, a party typically does not have a right to appeal unless there is entry of a final judgment. See Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 118, 869 P.2d 1334, 1337 (1994) (requiring entry of final judgment on a separate document even where orders purport to be final). However, in foreclosure cases, appellate jurisdiction over appeals is further defined by HRS § 667-51, which provides for appellate jurisdiction over a judgment on a decree of foreclosure.

[18] HRS § 667-51(a) provides the following with regard to appeals in foreclosure actions:

> Without limiting the class of orders not specified in section 641-1 from which appeals may also be taken, the following orders entered in a foreclosure case shall be final and appealable:
>
> (1) A judgment entered on a decree of foreclosure, and if the judgment incorporates an order of sale or an adjudication of a movant's right to a deficiency judgment, or both, then the order of sale or the adjudication of liability for the deficiency judgment also shall be deemed final and appealable;
>
> (2) A judgment entered on an order confirming the sale of the foreclosed property, if the circuit court expressly finds that no just reason for delay exists, and certifies the judgment as final pursuant to rule 54(b) of the Hawaii rules of civil procedure; and
>
> (3) A deficiency judgment; provided that no appeal from a deficiency judgment shall raise issues relating to the judgment debtor's liability for the deficiency judgment (as opposed to the amount of the deficiency judgment), nor shall the appeal affect the finality of the transfer of title to the foreclosed property pursuant to the order confirming sale.

HRS § 667-51 (Supp. 2004) (emphases added). Under HRS § 667-51, foreclosure cases are bifurcated into two

separately appealable parts: (1) the decree of foreclosure and order of sale appealable pursuant to HRS § 667-51(a) (1) and (2) all other orders that "fall within the second part of the bifurcated proceedings."[20] Mortg. Elec. Registration Sys., Inc. v. Wise, 130 Hawai'i 11, 16, 304 P.3d 1192, 1197 (2013). This is consistent with the court's well-established holding that a decree of foreclosure "finally determines the merits of the controversy." Id. (quoting MDG Supply, Inc. v. Diversified Invs., Inc., 51 Haw. 375, 380, 463 P.2d 525, 528 (1969)).

*9 In this case, the circuit court entered its Judgment on the Foreclosure Decree. As a judgment entered on a decree of foreclosure, it is "final" and "appealable," HRS § 667-51(a), and thus it is a final judgment under HRS § 641-1. Because the Judgment was final and complied with HRCP Rule 58,[21] the ICA had jurisdiction over the circuit court's Judgment.

[19] As an appeal from a final judgment, Homeowner's appeal from the circuit court's Judgment brought up for review "all interlocutory orders not appealable directly as of right which deal with issues in the case." See Ueoka v. Szymanski, 107 Hawai'i 386, 396, 114 P.3d 892, 902 (2005) (quoting Pioneer Mill Co. v. Ward, 34 Haw. 686, 694 (1938)); see also Lussier v. Mau-Van Dev., Inc., 4 Haw.App. 359, 395-96, 667 P.2d 804, 827 (1983) ("It is well-settled that an appeal from a final judgment brings up for appellate review all interlocutory orders dealing with issues in the case not appealable directly as of right."). The circuit court's orders concerning the dismissal of Homeowner's counterclaims were both issued prior to the Foreclosure Decree and concerned issues involving the foreclosure in this case. Thus, Homeowner's appeal of the circuit court's Judgment to the ICA brought up for review the circuit court's Order Granting Motion to Dismiss Counterclaims and Order Denying Motion for Reconsideration and Certification, in addition to the Foreclosure Decree.[22] See Ueoka v. Szymanski, 107 Hawai'i at 396, 114 P.3d at 902.

[20] The circuit court's description of its Foreclosure Decree as interlocutory, and the Judgment's explanation that it was "entered as a final judgment ... as there is no just reason for delay" has no bearing on whether the court's Judgment is a final, appealable judgment in this case.[23] See Sec. Pac. Mortg. Corp. v. Miller, 71 Haw. 65, 67 n.1, 783 P.2d 855, 856 n.1 (1989) (stating that the use of the term "interlocutory" has no bearing on the finality of the order). Thus, a judgment reflecting that it is entered in accordance with HRCP Rule 54(b)[24] is not dispositive of whether the Judgment is itself a final, appealable judgment that would allow review of other interlocutory orders.

*10 Accordingly, for the reasons discussed above, the ICA erred in its determination that it did not have jurisdiction over the circuit court's Order Granting Motion to Dismiss Counterclaims or the Order Denying Motion for Reconsideration and Certification. Given that the ICA did not reach the merits of Homeowner's appeal with respect to the dismissal of her counterclaims, we remand the case to the ICA to address the merits of Homeowner's appeal of the dismissal of her counterclaims.[25]

III. CONCLUSION

For the reasons discussed, the ICA's April 13, 2016 judgment on appeal is vacated. The circuit court's December 9, 2014 Judgment is also vacated to the extent it grants summary judgment to Bank of America. The case is remanded to the ICA for a determination of whether the circuit court erred in dismissing Homeowner's counterclaims.

All Citations

--- P.3d ----, 2017 WL 772603

Footnotes

1 By extension, Homeowner raised fraud and illegality defenses based on her understanding that Bank of America was not entitled to enforce the Note and Mortgage. Homeowner also claimed the following: the complaint failed to state a claim upon which relief could be granted; assumption of risk and contributory negligence; Bank of America was not the real party-in-interest; and Mortgage Electronic Services, Inc., could not be a lawful beneficiary of a mortgage if it lacked possession of the Note.

2 Homeowner maintained that there was "no valid interim assignment" of the Mortgage to Bank of America and that Mortgage Electronic Systems, Inc., "was nothing more than a strawman and a conduit for fraud."

3 Homeowner contended that there was no valid negotiation for value of the Note and that Bank of America was not a holder in due course.

4 Homeowner asserted violations of the terms of the trust, the Internal Revenue Code, New York trust law, and the Pooling and Service Agreement. Homeowner also asserted that the "purported assignment may have been performed by robo-signers" and was therefore fraudulent and void; that the "promissory note and mortgage may never have been deposited or transferred into the trust"; and that "the signatures may have been by unauthorized persons and, therefore, are void as forgeries."

5 The court found, "Plaintiff is the current holder of the Note and Mortgage by an Assignment of Mortgage ('Assignment') recorded on October 19, 2011 in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 4105159 and noted on Transfer Certificate of Title No. 878,760."

6 Prior to filing her notice of appeal, Homeowner moved for a stay of the Foreclosure Decree and cancellation of the sale of the property. In her supporting memorandum, Homeowner requested that the circuit court "stay the summary judgment order and the judgment, cancel any proposed sale, and permit [Homeowner's] house to act as collateral for the supersedeas bond." It does not appear from the record that the circuit court resolved Homeowner's motion for a stay prior to the filing of the notice of appeal.

Homeowner also moved for a stay in the ICA requesting that the ICA stay the Foreclosure Decree, cancel the sale of the property, and allow the property to act as a supersedeas bond. The ICA granted the motion in part on the condition that, within twenty days, Homeowner submit to the circuit court for approval a supersedeas bond issued by a licensed surety in the amount of $ 300,000.

7 The ICA also concluded that Homeowner's arguments with respect to the validity of the Assignment were without merit. With respect to Homeowner's assertion that any transfers of the Note and Mortgage were void and in violation of the rules of the trust, the ICA noted that Homeowner failed "to cite to the record or any evidence to support her assertion that the Note and Mortgage were in a trust that dissolved, or that the transfers were based on forged documents," and the ICA concluded that Homeowner thus "failed to demonstrate that the assignment of the Note and Mortgage was void." Finally, the ICA determined that Homeowner failed to establish that she was entitled to a continuance to complete discovery pursuant to HRCP Rule 56(f).

8 Homeowner presents four questions on certiorari to this court: (1) whether the ICA erred in affirming the circuit court's grant of summary judgment to Bank of America; (2) whether the ICA erred in affirming the dismissal of her counterclaims; (3) whether the ICA erred in affirming the circuit court's denial of her motion for reconsideration of the dismissal of her counterclaims and HRCP Rule 54(b) request for certification; and (4) whether the ICA erred in affirming the denial of her request "to use her home as the supersedeas bond."

9 "We review the circuit court's grant or denial of summary judgment de novo." Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005). The court views all the evidence and inferences in the light most favorable to the party opposing the motion. Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004). The moving party bears the burden of demonstrating that there is no genuine issue as to any material fact with respect to the essential elements of the claim or defense and must prove that the moving party is entitled to judgment as a matter of law. French v. Haw. Pizza Hut, Inc., 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Durette, 105 Hawai'i at 501, 100 P.3d at 71 (quoting Haw. Cmy. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000)).

10 See also Bank of Am., N.A. v. Hermano, 138 Hawai'i 140, 377 P.3d 1058 (App.2016) (SDO) (interpreting HRS § 490:3-301 to require that plaintiff establish that it is the holder of, or otherwise entitled to enforce, the promissory note and mortgage in order to be entitled to summary judgment in a foreclosure action).

11 The standing inquiry involves consideration of whether the plaintiff suffered an actual or threatened injury as a result of the defendant's conduct; whether the injury is traceable to the challenged action; and whether the injury is likely to be remedied by a favorable judicial decision. Mottl, 95 Hawai'i at 391, 23 P.3d at 726.

12 It is noted that the Porter case allowed for the curing of the premature commencement by the filing of an amended complaint after the plaintiff came into possession of the instrument. We note that this case does not present the issue of whether an amended complaint will cure the premature filing of a foreclosure action, and therefore we do not address this aspect of the Porter case.

13 See, e.g., Wells Fargo Bank, N.A. v. Marchione, 69 A.D.3d 204, 887 N.Y.S.2d 615, 617 (2009) (foreclosing bank claimed standing based on an assignment of the relevant mortgage and note that was executed after the commencement of the action).

14 See, e.g., Shaun Barnes et al., In-House Counsel's Role in theStructuring of Mortgage-Backed Securities, 2012 Wis. L. Rev. 521, 528 (2012) ("Unfortunately, over the years procedural standards in mortgage securitizations appear to have deteriorated along with loan-underwriting standards. As a result, in some, if not many or most, cases, notes were neither indorsed nor delivered to the [special purpose vehicle] or its agent in accordance with the delivery instructions. Moreover, it appears that mortgage loan servicers seeking to enforce notes on behalf of the [special purpose vehicle] did not always bother to take physical possession of the notes in accordance with state law."); Elizabeth Renuart, Uneasy Intersections: The Right to Foreclose and the U.C.C., 48 Wake Forest L. Rev. 1205, 1209-10 (2013) ("The evidence reveals the failure to deliver the original notes with proper indorsements to the trustee or its document custodian, the routine creation of unnecessary lost note affidavits, the destruction of the original notes, and the falsification of necessary indorsements."); Alan M. White, Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection, 24 Loy. Consumer L. Rev. 468, 475 (2012) ("Much anecdotal evidence suggests that servicers of private-label securitized mortgages either delivered original notes without endorsements to document custodians for the trust, routinely prepared lost note affidavits in lieu of delivering notes to foreclosure attorneys and trustees, routinely destroyed original notes, and/or obtained or forged necessary endorsements long after the transfers were supposed to have taken place." (footnotes omitted)).

15 A "holder in due course" is defined as follows:

> Subject to subsection and section 490:3-106(d), "holder in due course" means the holder of an instrument if:
>
> (1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
>
> (2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in section 490:3-306, and (vi) without notice that any party has a defense or claim in recoupment described in section 490:3-305(a).

HRS § 490:3-302(a) (2008).

16 It is noted that Bank of America may also demonstrate its standing by establishing that at the commencement of the suit it was either a nonholder in possession of the instrument with the rights of a holder or a person not in possession of the instrument who was entitled to enforce the instrument pursuant to HRS §§ 490:3-309 or 490:3-418(d). See HRS § 490:3-301.

17 An assignment of the Mortgage to Bank of America prior to the commencement of the action would not be sufficient to establish standing as an injury to the plaintiff in a foreclosure proceeding, which is premised on the default under the note. Although the security follows the debt, the debt does not automatically follow the security. See HRS § 490:9-203(g) & cmt. 9 (2008) (codifying the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien); see also, e.g., Vega v. CTX Mortg. Co., LLC, 761 F.Supp.2d 1095, 1097 (D.Nev.2011) ("The Traditional Rule is that the mortgage or deed of trust (the security instrument) automatically follows the secured debt, but not vice versa."); Restatement (Third) of Property (Mortgages) § 5.4(c) (1997) ("A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.").

18 It is noted that this decision does not modify notice pleading standards. See Johnston, 369 P.3d at 1055 (explaining that in foreclosure cases a foreclosing plaintiff satisfies notice pleading requirements by simply alleging that it is the holder of the note without attaching any additional documentary evidence).

19 HRS § 641-1(a) (Supp. 2012) provides, "Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts and the land court to the intermediate appellate court, subject to chapter 602."

20 Orders confirming sale, deficiency judgments, orders directing the distribution of proceeds, and other orders issued subsequent to the decree of foreclosure are separately appealable pursuant to HRS § 667-51(a)(2)-(3) and therefore "fall within the second part of the bifurcated proceedings." Mortg. Elec. Registration Sys., Inc. v. Wise, 130 Hawai'i 11, 16, 304 P.3d 1192, 1197 (2013); see also Sec. Pac. Mortg. Corp. v. Miller, 71 Haw. 65, 70, 783 P.2d 855, 858 (1989) (treating an appeal from an order confirming sale and for deficiency judgment as separate from an appeal from the decree of foreclosure); E. Sav. Bank, FSB v. Esteban, 129 Hawai'i 154, 296 P.3d 1062 (2013) (treating an appeal from the judgment confirming the foreclosure sale as a separate matter from the judgment of foreclosure).

21 HRCP Rule 58 (2010), provides in relevant part, "Every judgment shall be set forth on a separate document."

22 This conclusion logically follows well-settled law addressing the scope of issues that may be raised on appeal from a foreclosure decree and from an order confirming the foreclosure sale. Issues that are not "unique" to the confirmation of sale must be raised with respect to the foreclosure decree. See, e.g., Wise, 130 Hawai'i at 17-18, 304 P.3d at 1198-99 (concluding that mortgagors were precluded from challenging nominee's standing to bring foreclosure action in an appeal from an order confirming the foreclosure sale). None of the counterclaims would be considered "unique" to the confirmation of sale, and, thus, they must be addressed simultaneously with the foreclosure decree. See id. at 17, 304 P.3d at 1198 ("[W]here an appellant challenges the right of a party to obtain a deficiency judgment in a foreclosure case, he must take his appeal in a timely fashion from the order which finally determined the right to a deficiency, i.e., the order granting summary judgment." (internal quotation marks omitted) (quoting Miller, 71 Haw. at 71, 783 P.2d at 858)).

23 It appears that the characterization of the Foreclosure Decree as an "interlocutory decree" stems from Bank of America's motion for summary judgment, which requested that "Pursuant to Rule 54(b) of the HRCP, Plaintiff moves for a determination and direction that there is no just reason for the delay in entry of Judgment and Decree of Foreclosure as a final judgment." HRCP Rule 54(b) provides that, when there are multiple claims for relief presented in an action, the court may "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." It was unnecessary for Bank of America to request a judgment pursuant to HRCP Rule 54(b) because the decree of foreclosure is a final appealable order as discussed above.

24 HRCP Rule 54(b) (2000), provides in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

25 We need not consider Homeowner's arguments regarding her motion for stay and request to allow her home to act as supersedeas bond in light of our disposition of the case.

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2016-NMSC-013

Filing Date: March 3, 2016

Docket No. S-1-SC-34726

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL 1 INC. TRUST 2006-NC4,

Plaintiff-Petitioner,

v.

JOHNNY LANCE JOHNSTON,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Manuel I. Arrieta, District Judge

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New Mexico Foreclosure Defense Group

OPINION

CHÁVEZ, Justice.

{1} This case requires us once again to examine traditional rules of jurisdiction and standing in the context of modern mortgage foreclosure actions. In *Bank of New York v. Romero*, 2014-NMSC-007, ¶¶ 19-38, 320 P.3d 1, we concluded that the plaintiff did not establish standing to foreclose on the defendant's home when it could not prove that it had the right to enforce the promissory note on the mortgage at the time it filed suit. *See* NMSA 1978, § 55-3-301 (1992) (defining " '[p]erson entitled to enforce' [a negotiable] instrument"). In the present case, Petitioner Deutsche Bank National Trust Company, acting as trustee for Morgan Stanley ABS Capital 1 Inc. Trust 2006-NC4 (Deutsche Bank), filed a complaint seeking foreclosure on the home of Respondent Johnny Lance Johnston (Homeowner) and attached to its complaint an unindorsed note, mortgage, and land recording, both naming a third party as the mortgagee. Deutsche Bank later provided documentation and testimony showing that (1) a document assigning the mortgage to Deutsche Bank was dated *prior* to the filing of the complaint but recorded *after* the complaint was filed; (2) Deutsche Bank possessed a version of the note indorsed in blank at the time of trial; and (3) a servicing company began servicing the loan to Homeowner on behalf of Deutsche Bank prior to the filing of the complaint. After receiving this evidence, the district court found that Deutsche Bank had standing to foreclose on Homeowner's property. The Court of Appeals disagreed, opining that "standing is a jurisdictional prerequisite for a cause of action," and concluded that the evidence provided by Deutsche Bank did not establish its standing as of the time it filed its complaint. *Deutsche Bank Nat'l Tr. Co. v. Beneficial N.M. Inc.*, 2014-NMCA-090, ¶¶ 8, 13-15, 335 P.3d 217, *cert. granted*, 2014-NMCERT-008. Although we hold that standing is not a jurisdictional prerequisite in this case, we nonetheless affirm the Court of Appeals's ultimate conclusion that the evidence

provided by Deutsche Bank did not establish standing.

I. BACKGROUND

{2} On January 31, 2006, Homeowner refinanced his home by executing a promissory note made payable to New Century Mortgage Corporation (New Century). The note was secured by a mortgage on Homeowner's property in Las Cruces. Homeowner defaulted on his loan payments beginning in August 2008, and received a letter notifying him of his default dated October 12, 2008 from American Servicing Company (ASC), a loan servicing company.

{3} On February 24, 2009, Deutsche Bank filed a complaint for foreclosure. Deutsche Bank attached two exhibits to its complaint: (1) a January 31, 2006 promissory note made payable to New Century which did not contain an indorsement; and (2) a January 31, 2006 mortgage on Homeowner's property recorded in the Doña Ana County Office of the County Clerk on February 7, 2006 by New Century, which the County Clerk also names as the mortgagee. In its complaint, Deutsche Bank alleged that it owned the mortgage through assignment and was a holder in due course of the note. Homeowner "acknowledge[d]" this allegation in his pro se answer to Deutsche Bank's complaint.

{4} On August 11, 2010, Homeowner filed an amended motion to dismiss for lack of standing, contending that Deutsche Bank "did not show ownership of the note, nor a security interest," and that it provided no other evidence that it was the holder of the note as of the date that it filed its complaint. Deutsche Bank's response to Homeowner's motion to dismiss attached an assignment of mortgage document dated February 7, 2006 and recorded in Doña Ana County on December 9, 2009 as proof that Deutsche Bank held the note at the time it filed the complaint.[1]

{5} The district court set the hearing on Homeowner's motion to dismiss for the same day as trial. After concluding that Homeowner's arguments on the motion to dismiss would be similar to his arguments on the merits, the district court took Homeowner's motion under advisement and agreed to consider it during the bench trial on the merits.

{6} At trial, Deutsche Bank offered further evidence to prove that it owned the note. First, Deutsche Bank proffered a version of the January 31, 2006 note that was indorsed in blank by New Century. This new note was identical to the original note attached to Deutsche Bank's complaint except that the note attached to the complaint did not contain any indorsement. Second, Deutsche Bank offered the testimony of Erin Hirzel Roesch, a

[1]Deutsche Bank's response to Homeowner's motion to dismiss claimed that the assignment of mortgage was recorded on January 9, 2009, which would have been prior to its February 24, 2009 complaint. However, Deutsche Bank did not provide any evidence establishing that the assignment was recorded on that date.

litigation specialist for the loan servicing company. Ms. Roesch was employed by Wells Fargo Bank, NA, which she testified is effectively the same company as ASC. Ms. Roesch testified based on her review of the file on Homeowner's mortgage. She testified that because the proffered note was indorsed in blank, Deutsche Bank, as holder of the note, could act as the lender of the note; that Deutsche Bank was assigned the mortgage on February 7, 2006; and that her company began servicing the loan in July 2006.

{7} The district court concluded that Deutsche Bank was "the current holder of the Note and Mortgage." The court also concluded that Homeowner was "in default in payment of the principal and interest on the Note and Mortgage described in [Deutsche Bank's] Complaint." Based on these findings, the district court then held that Deutsche Bank was entitled to a foreclosure judgment on Homeowner's property.

{8} The Court of Appeals reversed and remanded to the district court "with instructions to vacate its judgment of foreclosure" because Deutsche Bank lacked standing to foreclose. *Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶¶ 15, 18. The Court of Appeals reasoned that under *Bank of New York*, 2014-NMSC-007, ¶ 17, "standing is a jurisdictional prerequisite for a cause of action and must be established at the time the complaint is filed." *Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶ 8. Accordingly, "to establish standing to foreclose, a lender must show that, *at the time it filed its complaint for foreclosure*, it had: (1) a right to enforce the note, which represents the debt, and (2) ownership of the mortgage lien upon the debtor's property." *Id.* (emphasis added). In practical terms, the Court of Appeals's decision requires a party seeking to establish its right to enforce a note to either produce an original or properly indorsed note with its complaint for foreclosure or to later introduce a dated indorsed note executed prior to the initiation of the foreclosure suit. *See id.* ¶ 12. The Court concluded that in this case, "neither the unindorsed copy of the note produced with the foreclosure complaint nor the indorsed note produced at trial were sufficient to show that [Deutsche Bank] held the note when it filed the complaint" and that the assignment of mortgage proffered by Deutsche Bank had "no bearing on the validity or the timing of the note's indorsement." *Id.* ¶¶ 13-14.

{9} We granted Deutsche Bank's petition for certiorari to review (1) whether standing is jurisdictional in mortgage foreclosure cases; (2) whether the Court of Appeals erred in interpreting *Bank of New York* to require a plaintiff who presents an original, indorsed-in-blank promissory note at trial to establish that it is the holder of the note by presenting an indorsement dated prior to the filing of the complaint or by attaching an indorsed copy of the note to the complaint; and (3) whether the Court of Appeals erred by concluding that an assignment of mortgage dated prior to the filing of the complaint cannot by itself establish standing. While we take this opportunity to clarify that standing is not a jurisdictional prerequisite in mortgage foreclosure cases in New Mexico, we otherwise affirm the result reached by the Court of Appeals based on principles of prudential standing.

II. DISCUSSION

A. The Doctrine of Standing in New Mexico

{10} Deutsche Bank challenges the Court of Appeals's statement that "standing is a jurisdictional prerequisite for a cause of action." *Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶ 8 (citing *Bank of N.Y.*, 2014-NMSC-007, ¶ 17). Deutsche Bank accurately observes that our jurisprudence has previously recognized that standing is jurisdictional in the context of statutory causes of action rather than all causes of action. *Bank of N.Y.*, 2014-NMSC-007, ¶ 17. With that distinction in mind, Deutsche Bank then argues that the cause of action to enforce a promissory note existed at common law and was not created by statute. Deutsche Bank concludes that standing in this case therefore cannot be jurisdictional. We agree with Deutsche Bank that standing is not jurisdictional in this case because the cause of action to enforce a promissory note was not created by statute. Therefore, only prudential rules of standing apply to the claims in this case.

{11} As a general rule, "standing in our courts is not derived from the state constitution, and is not jurisdictional." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9, 144 N.M. 471, 188 P.3d 1222. However, " '[w]hen a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.' " *Id.* ¶ 9 n.1 (quoting *In re Adoption of W.C.K.*, 2000 PA Super 68, ¶ 6, 748 A.2d 223 (Pa. Super. Ct. 2000), *abrogated by In re Nomination Petition of deYoung*, 903 A.2d 1164, 1168, 1168 n.5 (Pa. 2006)). In light of the conclusions reached by the Court of Appeals in this case, *Deutsche Bank National Trust Co.*, 2014-NMCA-090, ¶ 8, we take this opportunity to clarify our statements in *Bank of New York*, 2014-NMSC-007, ¶ 17, and hold that mortgage foreclosure actions are not created by statute. Therefore, the issue of standing in those cases cannot be jurisdictional.

{12} The cause of action to enforce a promissory note originated at common law and already existed when New Mexico adopted the Uniform Commercial Code (UCC) in 1961. *See Kepler v. Slade*, 1995-NMSC-035, ¶ 14, 119 N.M. 802, 896 P.2d 482 ("Under the common law rule, an action to foreclose on real property is separate and distinct from an action to recover on an underlying promissory note."); *Edwards v. Mesch*, 1988-NMSC-085, ¶ 4, 107 N.M. 704, 763 P.2d 1169 ("The rights of a holder of a promissory note were discussed by this court as early as [1853]."). New Mexico's adoption of the UCC did not create the rights and remedies associated with actions to enforce promissory notes, but instead merely codified those rights and clarified their scope in the interest of attaining uniformity with other states that had adopted the UCC. *See Males v. W.E. Gates & Assocs.*, 504 N.E.2d 494, 495 (Ohio Misc. 2d 1985) ("[A]ctions on promissory notes are rooted in the common law of contracts. The Uniform Commercial Code represents the fifty states' effort toward achieving uniformity and certainty in commercial transactions. Thus, this action is not a representative of a right created by statute, such as a wrongful death action."). *See also* 1A C.J.S. Actions § 37 (2015) (noting that the UCC "has been held to displace common-law remedies even though *it does not create new causes of action*, where it provides a comprehensive remedy" (emphasis added) (footnotes omitted)). Indeed, the UCC

recognizes the continuing vitality of common law "principles of law and equity" which supplement its provisions. Section 55-1-103(b). *See also Venaglia v. Kropinak*, 1998-NMCA-043, ¶¶ 11-12, 125 N.M. 25, 956 P.2d 824 ("There are two principal sources of law governing the rights and duties of the parties with respect to a guarantee of a promissory note. One is Article 3 of the Uniform Commercial Code. . . . The other is the common law."). Thus, an action to enforce a promissory note fell within the district court's general subject matter jurisdiction in this case because it was not created by statute.

{13} When standing does not act as a jurisdictional threshold, as in this case, prudential considerations govern our analysis. *See ACLU of N.M.*, 2008-NMSC-045, ¶ 9. While New Mexico courts are not subject to the jurisdictional limitations imposed by Article III, Section 2 of the United States Constitution, the standing jurisprudence in our courts has "long been guided by the traditional federal standing analysis." *ACLU of N.M.*, 2008-NMSC-045, ¶ 10. "Thus, at least as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate injury in fact, causation, and redressability to invoke the court's authority to decide the merits of a case." *Id.*; *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) ("To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling."). However, it is well settled that New Mexico courts are also not bound by the limitations on standing that are constitutionally imposed on federal courts and we have occasionally granted standing when it would not otherwise exist under the federal analysis, most notably in instances where a case presents a "question of fundamental importance to the people of New Mexico." *See, e.g., Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 4, 132 N.M. 282, 47 P.3d 441 (holding that validity of the Concealed Handgun Carry Act raised important constitutional question sufficient to ignore normal limitations on standing (internal quotation marks and citation omitted)); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶¶ 1-2, 15, 120 N.M. 562, 904 P.2d 11 (claim that the Governor lacked authority to enter into various compacts pursuant to the Indian Gaming Regulatory Act was of sufficient public importance to confer standing without examining the standing of individual litigants); *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 7, 86 N.M. 359, 524 P.2d 975 (conferring standing under this Court's discretionary power due to great public importance of constitutional challenge to partial vetoes); *State ex rel. Gomez v. Campbell*, 1965-NMSC-025, ¶¶ 15, 18, 75 N.M. 86, 400 P.2d 956 (concluding that the plaintiffs did not establish standing but proceeding to the merits of the constitutional question in that case due to its "great public interest").

{14} In *ACLU of New Mexico*, we reaffirmed our adherence to the federal three-pronged approach in cases that do not present issues of fundamental public importance; we also recognized that the injury in fact requirement in particular is "deeply ingrained in New Mexico jurisprudence." 2008-NMSC-045, ¶¶ 10-22. Even a slight injury establishes an injury in fact sufficient to confer standing. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 12, 126 N.M. 788, 975 P.2d 841. However, we have repeatedly emphasized that the injury in fact prong of our standing analysis "[r]equir[es] that the party

bringing suit show that he [or she] is injured or threatened with injury in a direct and concrete way" as a matter of "sound judicial policy." *ACLU of N.M.*, 2008-NMSC-045, ¶ 19 (internal quotation marks and citation omitted); *see also N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 12 (litigant generally must show direct injury to establish standing). Although the UCC's definition of who may enforce a note does not create a jurisdictional prerequisite in this case, it nonetheless guides our determination of whether the plaintiff can articulate a direct injury that the cause of action is intended to address. *See Bank of N.Y.*, 2014-NMSC-007, ¶¶ 19-38 (analyzing whether foreclosure plaintiff had standing under provisions of Section 55-3-301 defining who is legally entitled to enforce a promissory note); *see also Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶¶ 10-11, 121 N.M. 764, 918 P.2d 350 (determining that the question of whether a party has standing to sue is not distinct from whether that party can assert a cause of action under a particular statute). The UCC provides that there are three scenarios in which a person is entitled to enforce a negotiable instrument such as a promissory note: (1) when that person is the holder of the instrument; (2) when that person is a nonholder in possession of the instrument who has the rights of a holder; and (3) when that person does not possess the instrument but is still entitled to enforce it subject to the lost-instrument provisions of UCC Article 3. Section 55-3-301. To show a "direct and concrete" injury, Deutsche Bank needed to establish that it fell into one of these three statutory categories that would establish both its right to enforce Homeowner's promissory note and its basis for claiming that it suffered a direct injury from Homeowner's alleged default on the note. *ACLU of N.M.*, 2008-NMSC-045, ¶ 19; *see also Bank of N.Y.*, 2014-NMSC-007, ¶ 19.

B. Homeowner Did Not Waive the Issue of Standing

{15} Deutsche Bank contends that because standing was not a jurisdictional prerequisite in this case, the issue "may be and was admitted and waived" because Homeowner " 'acknowledge[d]' " Deutsche Bank's allegation within its complaint that Deutsche Bank owned both the note and the mortgage. We agree that our determination that standing is not jurisdictional in this case opens up the possibility that Homeowner could have waived the issue, but disagree that Homeowner waived it here.

{16} Arguments based on a lack of prudential standing are analogous to asserting that a litigant has failed to state a legal cause of action. As we have previously discussed, we generally require "injury in fact, causation, and redressability" to establish standing. *ACLU of N.M.*, 2008-NMSC-045, ¶ 10. If these elements are not met, as a logical matter, a plaintiff generally cannot show that he or she has stated a cause of action entitling him or her to a remedy. *See Key*, 1996-NMSC-038, ¶¶ 10-11. Thus, while a plaintiff's failure to state a cognizable claim for relief and a plaintiff's lack of prudential standing are not strictly jurisdictional, both implicate the "properly limited . . . role of courts in a democratic society" and are relevant concerns throughout a litigation. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 149 N.M. 42, 243 P.3d 746 (internal quotation marks and citation omitted). Under Rule 1-012(H)(2) NMRA, "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered . . . or by

motion for judgment on the pleadings, or at the trial on the merits." We hold that Rule 1-012(H)(2) applies to issues of prudential standing and precludes any waiver of standing prior to the completion of a trial on the merits. *Sundance Mech. & Util. Corp. v. Atlas*, 1990-NMSC-031, ¶ 25, 109 N.M. 683, 789 P.2d 1250.

{17} In this case, Homeowner did not waive standing because he raised the issue in a motion filed on August 11, 2010, over a month before the September 16, 2010 trial. In addition, the district court considered Homeowner's challenge to Deutsche Bank's standing during the trial on the merits. Homeowner therefore raised the issue of standing both by motion and at the trial on the merits, either of which would independently constitute a timely assertion of this defense. Rule 1-012(H)(2).

{18} Further, we are not convinced by Deutsche Bank's argument that Homeowner waived his right to challenge its standing because in his answer to Deutsche Bank's complaint, he "acknowledge[d]" Deutsche Bank's allegation that it owned Homeowner's note and mortgage through assignment. Even under the generous assumption that Homeowner's "acknowledge[ment]" that Deutsche Bank was entitled to enforce the note was an admission of that fact, we disagree with Deutsche Bank's premise that Homeowner could have waived this defense through his initial responsive pleading. When standing is a prudential consideration, it can be raised for the first time at any point in an active litigation, just like a defense of failure to state a claim, and unlike defenses relating to personal jurisdiction, venue, and insufficient service of process, all of which must be raised in an initial or amended responsive pleading. *Compare* Rule 1-012(H)(2) *with* Rule 1-012(H)(1).

{19} Moreover, it would be nonsensical to place any burden on a foreclosure defendant to know whether the party seeking foreclosure is actually entitled to do so. For example, in the present case, Homeowner signed his financing agreement with New Century; received correspondence regarding his defaults on his mortgage payments from ASC, the loan servicing company, which was apparently also the same company as Wells Fargo Bank, N.A.; and he was ultimately sued by Deutsche Bank. Under these circumstances, there is no indication that either Homeowner or any defendant being sued over a securitized mortgage, for that matter, would be in a position to have personal knowledge of who had the right to enforce his or her mortgage. In addition, as we will explain, allowing a foreclosure defendant to waive the issue of standing would not only vitiate that homeowner's rights, but could in fact cloud the title of the underlying property and lead to other problems to the detriment of New Mexico's property system as a whole. Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 Duke L.J. 637, 662 (2013). The important societal interests in maintaining the integrity of the property system, protecting subsequent purchasers of the property, and the minimal probative value of the alternative, convince us that a foreclosure defendant cannot voluntarily waive a challenge

to the plaintiff's standing during the course of the litigation.[2]

C. Standing Must Be Established as of the Date of Filing Suit in Mortgage Foreclosure Cases

{20} Before turning to a specific analysis of Deutsche Bank's standing in this case, we will clarify why standing must be established as of the time of filing suit in mortgage foreclosure cases, despite our determination that standing is not a jurisdictional issue in such cases. *Bank of New York*, relying on *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-71, 570 n.5 (1992), states that "standing to bring a foreclosure action" must exist "at the time [a plaintiff] file[s] suit." 2014-NMSC-007, ¶ 17. Deutsche Bank asks this Court to revisit this requirement, contending that (1) unlike in federal courts, standing in New Mexico courts is not a jurisdictional issue such that standing does not necessarily have to exist at the time of filing; and (2) as a prudential matter, requiring foreclosure plaintiffs to establish that they had standing at the time of filing contravenes our interest in judicial economy. Neither argument advanced by Deutsche Bank convinces us to deviate from well-established principles of standing, which are solidly supported by several prudential and policy considerations that arise in the particular context of mortgage foreclosure actions.

{21} There are sound policy reasons for requiring strict compliance with the traditional procedural requirement that standing be established at the time of filing in mortgage foreclosure actions. This procedural safeguard is vital because the securitization of mortgages has given rise to a pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes, and more generally the recording of interests in property. *See* Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 Wake Forest L. Rev. 1205, 1209-10 (2013) ("[T]he failure to deliver the original notes with proper indorsements [to assignees], the routine creation of unnecessary lost note affidavits, the destruction of the original notes, and the falsification of necessary indorsements . . . is widespread."). Under these circumstances, not even the plaintiffs may be sure if they actually own the notes they seek to enforce. As Professor Levitin notes, Article 3 of the UCC and the land records recording system are each based upon the notion of strict "compliance with demonstrative legal formalities to achieve property rights," which admittedly carries "up-front costs," but also ensures "a high degree of security in the property rights, both vis-à-vis other competing claimants to the property rights and as to the ability to enforce the mortgage property rights." Levitin, *supra*, at 648. This regime is also desirable for its simplicity—"possession clarifies title because there can be only one possessor at a time," while "[i]ndorsement creates a chain of title that travels with the instrument and provides an easy, objective manner for establishing who has rights to the instrument." Levitin, *supra*, at 662. These formalities are strengthened by strict standing requirements. Otherwise, institutions could potentially cloud title by foreclosing

[2]As we will explain in Section II, Part E, a foreclosure defendant effectively waives his right to challenge the plaintiff's standing once a final judgment has been entered.

on a property upon which they do not possess the right to foreclose.[3]

{22} Indeed, standing in foreclosure actions "is not a mere procedural detail"; it protects homeowners against double liability such as "when the wrong party sells the home and the note holder later appears seeking full payment on the note," or when a homeowner faces multiple lawsuits in different jurisdictions. Renuart, *supra*, at 1212. Reducing the potential for double liability is also beneficial to the property system at large because "[i]f a debtor fears multiple satisfaction of the same debt, the debtor will not borrow, thereby chilling economic activity," whereas strict compliance with UCC requirements "enables verification of the terms of the obligation[,] and hence greater ability to enforce[, and] provid[es] a mechanism for verifying the discharge of the obligation." Levitin, *supra*, at 664. In our view, the minor up-front compliance costs that foreclosure plaintiffs will incur by confirming that they have the proper documentation *before* filing suit are a small price to pay for protecting the rights of New Mexico homeowners and the integrity of the State's title system by requiring strict and timely compliance with long-standing property law requirements. To be clear, perhaps despite recent industry practices, this is *not* an additional requirement that we impose punitively; it is simply a symptom of compliance with long-standing rules. *See* Levitin, *supra*, at 650-51 ("A mortgage loan involves a bundle of rights, including procedural rights. These procedural rights are not merely notional; they are explicitly priced by the market. Mortgage finance availability and pricing is statistically correlated with variations in procedural protections for borrowers. Retroactively liberalizing the rules for mortgage enforcement creates an unearned windfall for mortgagees." (footnote omitted)). In other words, requiring that standing be established as of the time of filing provides strong and necessary incentives to help ensure that a note holder will not proceed with a foreclosure action before confirming that it has a right to do so.

{23} Further, although we are sympathetic to the additional burdens this may impose on an entity seeking to foreclose on a home, New Mexico is hardly alone among the states in requiring a foreclosure plaintiff to prove that it was entitled to enforce the note when it filed suit. *See* Levitin, *supra*, at 642-44 ("[T]here is broad agreement among courts that some sort of standing or similar status is necessary for both judicial and nonjudicial foreclosure . . . . There is also broad agreement that the party bringing the foreclosure action or sale *must have standing at the time the litigation . . . is commenced*." (emphasis added) (footnote omitted)).

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[3]Professor Levitin illustrates this idea with the following example:

> If the seller is not the person entitled to foreclose, the foreclosure sale is no different from a sale of the Brooklyn Bridge. Accordingly, the foreclosure-sale purchaser has no ability to transfer title to the property, no matter [his or] her equities, because [he or] she lacks title, just like the hapless buyer of the Brooklyn Bridge.

Levitin, *supra*, at 646.

For example, in *Federal Home Loan Mortgage Corp. v. Schwartzwald*, 2012-Ohio-5017, ¶¶ 24-25, 979 N.E.2d 1214, *overruling on other grounds recognized by Bank of New York Mellon v. Grund*, 2015-Ohio-466, ¶¶ 23-24, 27 N.E.3d 555, the Supreme Court of Ohio clarified that, under Ohio law, standing must be analyzed as of the commencement of an action in mortgage foreclosure cases. *See also U.S. Bank Nat'l Ass'n v. McConnell*, 305 P.3d 1, 8 (Kan. Ct. App. 2013) (concluding that the foreclosure plaintiff had standing because it was undisputed that the plaintiff held the note *prior* to the date that suit was filed). Therefore, "[p]ost-filing events that supply standing that did not exist on filing may be disregarded . . . despite a showing of sufficient present injury caused by the challenged acts and capable of judicial redress." *Fed. Home Loan Mortg. Corp.*, 2012-Ohio-5017, ¶ 26 (first alteration in original) (internal quotation marks and citation omitted). The Supreme Court of Oklahoma has similarly explained that if a foreclosure plaintiff "became a person entitled to enforce the note . . . after the foreclosure action was filed," the plaintiff's initial lack of standing could not be cured and the proper remedy was to dismiss the case without prejudice. *Deutsche Bank Nat'l Tr. v. Brumbaugh*, 2012 OK 3, ¶ 11, 270 P.3d 151; *see also McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. Dist. Ct. App. 2012) ("While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor of the plaintiff, this does not alter the rule that a party's standing is determined at the time the lawsuit was filed. Stated another way, the plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." (internal quotation marks and citation omitted)); *Deutsche Bank Nat'l Tr. Co. v. Mitchell*, 27 A.3d 1229, 1234-36 (N.J. Super. Ct. App. Div. 2011) (stating that a plaintiff must have standing at the time the foreclosure complaint is filed, and a lack of standing cannot be cured by showing that a plaintiff acquired standing after the complaint was filed); *Wells Fargo Bank, N.A. v. Marchione*, 887 N.Y.S.2d 615, 616-17 (N.Y. App. Div. 2009) (noting that a plaintiff-assignee lacked standing where the note and mortgage were assigned to the plaintiff after commencement of the foreclosure action); *U.S. Bank Nat'l Ass'n v. Kimball*, 2011 VT 81, ¶¶ 12-20, 27 A.3d 1087 (stating that standing must be established at the time of filing suit, and it did not contravene the interest of judicial efficiency to dismiss the complaint of a foreclosure plaintiff who acquired standing after the complaint had been filed). As a result, we conclude that it is not presumptuous to require, as do a substantial number of other states, that a company claiming to be a mortgage holder must produce proof that it was entitled to enforce the underlying promissory note prior to the commencement of the foreclosure action by, for example, attaching a note containing an undated indorsement to the initial complaint or producing a note dated before the filing of the complaint at some appropriate time in the litigation. We agree with the Vermont Supreme Court, which opined that "[i]t is neither irrational nor wasteful to expect a foreclosing party to actually be in possession of its claimed interest in the note, and have the proper supporting documentation in hand when filing suit." *Kimball*, 2011 VT 81, ¶ 20.

{24} Deutsche Bank also argues that our insistence that it demonstrate that a note indorsed in blank was indorsed prior to the time of filing improperly adds a new requirement that indorsements be dated, in contravention of the UCC. *See Deutsche Bank Nat'l Tr. Co.*,

2014-NMCA-090, ¶ 12 (holding that "if [a] lender produces the indorsed note after filing the complaint, the indorsement must be dated to show that the indorsement was executed prior to the initiation of the foreclosure suit"). We agree with Deutsche Bank that the UCC does not require that instruments be dated. *See* NMSA 1978, § 55-3-113(b) (1992) ("If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder."). However, Deutsche Bank conflates the need to date a negotiable instrument, so as to create an enforceable promissory note, with the requirement that Deutsche Bank establish that it was entitled to enforce the instrument at the time of filing. Because the time of filing requirement does not affect the validity of an underlying negotiable instrument, *see Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶ 12, this rule does not add a new requirement under the UCC.

{25} Deutsche Bank additionally contends that "when a plaintiff presents the original note to the court with a blank indorsement, the plaintiff establishes it is then the holder of the note, and is entitled to enforce the note and foreclose the mortgage." Deutsche Bank is correct that the holder of a note indorsed in blank may, as a general matter, enforce the note. *See* § 55-3-301; NMSA 1978, § 55-3-205(b) (1992). However, Deutsche Bank again conflates two distinct concepts: whether it may, as the holder of a note indorsed in blank, enforce the note and whether it can establish that it owned the note at the time of filing. If Deutsche Bank had presented a note indorsed in blank with its initial complaint, it would be entitled to a presumption that it could enforce the note at the time of filing and thereby establish standing. However, Deutsche Bank did not produce a note indorsed in blank when it filed suit in this case, and the subsequent production of a blank note does not prove that Deutsche Bank possessed the blank note *when it filed suit*.

{26} We further disagree with Deutsche Bank's argument that the Court of Appeals's opinion in this case, *Deutsche Bank Nat'l Tr. Co.*, 2014-NMCA-090, ¶¶ 11-13, requires that a "plaintiff conclusively establish its standing upon first filing the complaint." Deutsche Bank contends that this requirement would contravene well-established notice pleading standards in New Mexico, which require a complaint to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 1-008(A)(2) NMRA. According to Deutsche Bank, it should satisfy minimum pleading requirements for a foreclosure plaintiff to merely allege that it is the holder of the note, and then later prove this fact through more detailed documentation, either at trial or in connection with a dispositive motion. We agree with Deutsche Bank that "it is only at trial or in a dispositive motion that plaintiffs are required to *prove* the necessary elements of their claims," including standing, and that a bare statement that the plaintiff holds the note may satisfy pleading standards. *See N.M. Pub. Sch. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11, 145 N.M. 316, 198 P.3d 342 ("In reviewing the district court's decision to dismiss for failure to state a claim, we accept as true all well-pleaded factual allegations in the complaint and resolve all doubts in favor of the complaint's sufficiency.").

{27} However, this is an issue of proof rather than pleading standards. The elements of standing

> are not mere pleading requirements but rather an indispensable part of the plaintiff's case, [and therefore] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

Lujan, 504 U.S. at 561. For example, a foreclosure plaintiff may satisfy pleading requirements by simply alleging that it is the holder of the note without attaching any additional documentary evidence, but when a defendant subsequently raises the defense that the plaintiff lacks standing to foreclose, the plaintiff must then prove that it held the note *at the time of filing*. Attaching the note to the complaint is not the only means of proving that the plaintiff held the note at the time of filing because standing can also be proven through a dated indorsement establishing when the note was indorsed to the plaintiff. Therefore, neither *Bank of New York* nor the Court of Appeals's opinion in this case establish an additional pleading requirement, as Deutsche Bank argues, but rather set forth requirements that must be met to prove standing, should that issue be raised by the defendant or *sua sponte* by the Court.[4]

D. Deutsche Bank Did Not Establish Standing

{28} Deutsche Bank argues that substantial evidence supports the district court's determination that Deutsche Bank had standing to pursue its foreclosure complaint against Homeowner. We review the district court's determination that Deutsche Bank had standing under a substantial evidence standard of review. *Bank of N.Y.*, 2014-NMSC-007, ¶ 18. " 'Substantial evidence' means relevant evidence that a reasonable mind could accept as adequate to support a conclusion. This Court will resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings." *Id.* (internal quotation marks and citations omitted). However, "[w]hen the resolution of the issue depends upon the interpretation of documentary evidence, this Court is in as good a position as the trial court to interpret the evidence." *Id.* (alteration in original) (internal quotation marks and citation omitted).

{29} Deutsche Bank contends that there was sufficient evidence to establish standing for two reasons. First, Deutsche Bank argues that "the Assignment of Mortgage in this case . . . evidence[d] the timing of the transfer of the note." Second, Deutsche Bank avers that other corroborating evidence presented at trial, in conjunction with the assignment of mortgage, established that it owned the note at the time of filing. Deutsche Bank's arguments do not persuade us that there is substantial evidence to support the district court's determination that

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[4]In instances where a foreclosure plaintiff seeks a default judgment, courts should raise the standing issue *sua sponte* and carefully scrutinize the plaintiff's standing to safeguard the integrity of New Mexico's property system and protect subsequent bona fide purchasers.

Deutsche Bank had standing.

{30} In response to Homeowner's motion to dismiss for lack of standing, Deutsche Bank produced an assignment of mortgage dated February 7, 2006. Deutsche Bank's proffer of the February 7, 2006 assignment of mortgage in this case was insufficient to establish standing because (1) the assignment of mortgage does not establish that Deutsche Bank was injured for the purposes of standing; and (2) it does not prove if or when the note was transferred. As we have previously stated, to establish standing we require that a plaintiff show that he or she has actually suffered a direct and concrete injury. *ACLU of N.M.*, 2008-NMSC-045, ¶ 19 (citation omitted). "A party who only has the mortgage but no note has not suffered any injury given that bare possession of the mortgage does not endow its possessor with any enforceable right absent possession of the note." *BAC Home Loans Servicing, LP v. McFerren*, 2013-Ohio-3228, ¶ 12, 6 N.E.3d 51 (citing Restatement (Third) of Prop.: Mortgages § 5.4(e), at 385 (1996) ("[I]n general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation.")). Consequently, "possession of the mortgage is of no import unless there is possession of the note." *BAC Home Loans Servicing, LP*, 2013-Ohio-3228, ¶ 12. Moreover, because an assignment of mortgage does not "effect an assignment of a note," an assignment of mortgage does not prove "transfer of [a] note." *Bank of Am., NA v. Kabba*, 2012 OK 23, ¶ 9, 276 P.3d 1006. As a result, the date that Homeowner's *mortgage* was assigned to Deutsche Bank does not establish a corresponding date indicating when the *note* was transferred to Deutsche Bank, or even *if* the note was transferred.

{31} Deutsche Bank's proffer of additional evidence to establish standing similarly fails to meet the threshold for substantial evidence. First, Deutsche Bank contends that because Ms. Roesch, an employee of a loan servicing company, "testified that the Assignment of Mortgage was dated February 7, 2006," Deutsche Bank established ownership of the note at the time of filing. Once again, this assertion fails because the date on the assignment of mortgage does not establish either when or whether Deutsche Bank obtained the right to enforce the note. *See id.* Second, Deutsche Bank argues that Ms. Roesch's testimony that her company began servicing the note in 2006 proves that Deutsche Bank owned the note prior to its February 2009 complaint. This testimony does not establish that Deutsche Bank had standing. Again, the assertion that an entity allegedly started servicing the loan on behalf of Deutsche Bank prior to the time of filing suit does not prove anything regarding the actual ownership of the note, and further, because "falsification of necessary indorsements" appears to be a "widespread" phenomenon, Renuart, *supra*, at 1210, there is reason to believe that creditors could potentially seek to enforce notes that they do not hold under the law. Thus, the additional evidence supplied by Deutsche Bank does not bear on whether Deutsche Bank actually owned the note at the time of filing, nor does it establish when the necessary indorsements were made, so that whether Deutsche Bank had the right to enforce the note as of February 24, 2009 remains unclear.

{32} Finally, the unindorsed note attached to Deutsche Bank's original complaint did not establish standing. "Possession of an unindorsed note made payable to a third party does not

establish the right of enforcement, just as finding a lost check made payable to a particular party does not allow the finder to cash it." *Bank of N.Y.*, 2014-NMSC-007, ¶ 23. In addition, as we have discussed, the undated indorsed note that Deutsche Bank presented at trial did not prove that Deutsche Bank had standing when it filed its complaint. Because Deutsche Bank failed to provide evidence establishing its right to enforce the note on Homeowner's home, we hold that the district court's determination that Deutsche Bank established standing to foreclose was not supported by substantial evidence, and we accordingly reverse the district court's decision and affirm the result reached by the Court of Appeals.

E. Completed Foreclosure Judgments Should Not Be Voided for Lack of Standing

{33} We also take this opportunity to address Deutsche Bank's assertion that "several lower courts . . . have vacated long-completed foreclosure judgments under Rule 1-060(B) NMRA[,] holding they are 'void' for lack of subject matter jurisdiction." To avoid this issue in the future, we will clarify the practical implications of our holding that standing is not jurisdictional in mortgage foreclosure cases.

{34} "Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it." *Sundance Mech. & Util. Corp.*, 1990-NMSC-031, ¶ 22 (internal quotation marks and citations omitted). Further, a party can raise subject matter jurisdiction at any time, even through a collateral attack alleging that a final judgment is void for lack of subject matter jurisdiction. *Chavez v. Cty. of Valencia*, 1974-NMSC-035, ¶ 15, 86 N.M. 205, 521 P.2d 1154; *see also* Rule 1-012(H)(3) ("*Whenever* it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added)). However, as we have previously discussed, a challenge to standing is in many ways analogous to a defense for failure to state a claim because it does not deprive the court of subject matter jurisdiction over the case, but instead bears on whether the plaintiff has stated a cognizable claim for relief. A failure to state a claim may only be raised "during the pendency of the action," including on appeal, *Sundance Mech. & Util. Corp.*, 1990-NMSC-031, ¶ 25, but it cannot be the basis for a collateral attack on a final judgment. *See Palmer v. Palmer*, 2006-NMCA-112, ¶¶ 13-22, 140 N.M. 383, 142 P.3d 971 (considering whether a court which entered a settlement agreement between the parties had subject matter jurisdiction, but refusing to consider after the entry of the judgment whether one party had failed to state a claim). Therefore, a final judgment from a cause of action that may have lacked standing as a jurisdictional matter may be subject to a collateral attack, while a final judgment on any other cause of action, including an action to enforce a promissory note such as this case, is not voidable under Rule 1-060(B) due to a lack of prudential standing.

III. CONCLUSION

{35} For the foregoing reasons, we affirm the judgment of the Court of Appeals and remand this matter to the district court with instructions to vacate its judgment of foreclosure

against Homeowner.

{36} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

JUDITH K. NAKAMURA, Justice

HAWAII UCC STATUTES[1] (CITED BY *REYES-TOLEDO* COURT)
AND WASHINGTON EQUIVALENTS[2]

Hawaii HRS §490:3-301: "Person entitled to enforce instrument. "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 490:3-309 or 490:3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. [L 1991, c 118, pt of §1]" *Id.*

Washington RCW 62A.3-301

"Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." *Id.*

Hawaii HRS §490:3-308 "Proof of signatures and status as holder in due course. (a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under section 490:3-402(a).

(b) If the validity of signatures is admitted or proved and there is compliance with subsection (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under section 490:3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim. [L 1991, c 118, pt of §1]" *Id.*

[1] Source: http://law.justia.com/codes/hawaii/2009/volume-11/title-27/chapter-490/
[2] Source: http://apps.leg.wa.gov/rcw/default.aspx?Cite=62A

Washington RCW 62A.3-308

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Hawaii HRS §490:9-102(a): "'Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation." *Id*.

Washington RCW 62A.9A-102(a) "Article 9A definitions. In this Article: …
(55) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation." ***Id.***

Hawaii HRS §490:9-601(a), (b): "Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(a) After default, a secured party has the rights provided in this part and, except as otherwise provided in section 490:9-602, those provided by agreement of the parties. A secured party:

(1) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover." *Id.*

(b) A secured party in possession of collateral or control of collateral under section 490:7-106, 490:9-104, 490:9-105, 490:9-106, or 490:9-107 has the rights and duties provided in section 490:9-207.

Washington RCW 62A.9A-601(a), (b):

"Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(a) Rights of secured party after default. After default, a secured party has the rights provided in this part and, except as otherwise provided in RCW 62A.9A-602, those provided by agreement of the parties. A secured party:

(1) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) Rights and duties of secured party in possession or control. A secured party in possession of collateral or control of collateral under RCW 62A.7-106, 62A.9A-104, 62A.9A-105, 62A.9A-106, or 62A.9A-107 has the rights and duties provided in RCW 62A.9A-207.