Supreme Court No. 95376-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals Case No. 75262-6-I)

21st Mortgage Corporation
Respondent/Appellee

v.

Duncan K. Robertson, et al,

Petitioner/Appellant

PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS DECISION FILED IN NO. 7563I-1-I ON OCTOBER 30, 2017 AND DECEMBER 12, 2017 DENIAL OF MOTION TO RECONSIDER

(Filing required by March 12, 2018 per 1/11/2018 Letter of Court)

Duncan K. Robertson
Petitioner, appearing pro se
3520 SE Harold Court
Portland, OR 86292-4344
(503)775-9164
uncacunc1@aol.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Constitution

Washington Constitution

Washington Statutes

Federal Cases

Washington State Cases

Washington Rules of Civil Procedure ("CR")

Washington Rules of Appellate Procedure ("RAP")

Other Authorities

I. IDENTITY OF PETITIONER

Duncan K. Robertson is Petitioner/Appellant and seeks review of an unpublished decision of the Court of Appeals, Division One, terminating review of his appeals to that court.

II. COURT OF APPEALS DECISION

October 30, 2017 court issued its amended Opinion ("OP"); a copy appears here in Appendix at pages A-1-11.

December 12, 2017 petitioner's reconsideration motion was denied; a copy of that order appears in Appendix at pages A-12.

III. ISSUE PRESENTED FOR REVIEW

1. Whether hearing of an appeal is of right and therefore required under RAP 2.1(a)(1), RAP 2.2, and when RCW 7.16.040 may apply;

2. Whether summary judgment rulings by a Superior Court (and appellate court's review thereof or denial of review), as state actions which deprive a party of property, mandate due process protections under U.S. Constitution Amendment Fourteen and Washington Const. Art. 1, § 3,[1] including strict compliance with CR 56(c), and written decisions identifying fact, law and reasoning of the court in reaching such.

IV. STATEMENT OF THE CASE

This case addresses whether summary judgment procedures were followed by the Superior and Appellate courts, including proper hearing and weighting of Robertson's evidence submissions; whether courts im-

1 "[T]he Washington Constitution provides equal, but not greater, due process protection[.]" *Amunrud v. Board of Appeals,* 158 Wash.2d 208143 P. 3d 571, 574 n.2 (2006) (en banc) (citing *In re Personal Restraint of Dyer,* 143 Wash.2d 384, 394 (2001) (en banc)). See Wash. Const. Art. I, §§ 3, 12.

properly assumed the role of factfinder in lieu of the demanded jury; and whether these procedures satisfied due process requirements.

A. History of Case in Federal Legal Systems.

A brief history of this case is essential to the bigger picture. Robertson purchased the subject property in September, 2008 at his own trustee's sale. Prior to that, on April 9, 2008, the then-servicer of the purported senior loan, Homecomings Financial, LLC,[2]("Servicer"), acknowledged receipt from Robertson's Trustee of notice of the sale and an invitation to participate, which they declined. *See* CP 2544; CP 2571 (Ex. Q to Declaration of Kathy Priore – *see infra*); 11/18/2016 Opening Brief ("Op.Brief") at 9 n.9. Sale occurred September 26, 2008. Servicer expressed no objection and filed no action to stop the sale in that time.[3]

Robertson's subsequent attempts to pay off an apparent senior lienholder and utilize the property were unlawfully thwarted and the property destroyed, including through a series of attempted foreclosures on the subject Note and deed of trust ("DOT") here. Seeking relief, Robertson filed suit in King County Superior Court, subsequently removed to federal district court, appealed to the 9th Circuit and currently before the U.S. Supreme Court, Case No. 17-978 on jurisdictional issues**.** For the factual history spawning these events and insight into Robertson's frustration *please see* CP 1926-41 (Original Complaint Facts).

2 Transitioning Servers during events here also included GMAC Mortgage, LLC and Ocwen Loan Servicing, LLC. *See* CP 1635.

3 To quote this Court, "waiver of defenses to a trustee's sale" occurs under these conditions. *Selene RMOF II REO Acq. II v. Ward,* 399 P.3d 1118, 1124 n.6 (Wash. Supr. Ct. 2017) (quoting *Fed. Nat'l Mortg. Ass'n v. Ndiaye,* 188 Wash. App. 376, 382 (2015) (citing *Albice v. Premier Mortg. Servs. of Wash., Inc.,* 174 Wash.2d 560, 569 (2012)).

The same real property issues on the same res were also heard simultaneously before *In re Residential Capital, LLC,* No. 12-12020 (Bankr. SDNY) ("ResCap bankruptcy"). All courts to date have rejected Robertson's motions brought under the exclusive jurisdiction doctrine to permit a conjoined hearing. The ResCap action was settled, as to those defendants only, in 2016.

B. History of Case in Superior Court

Meanwhile, on July 24, 2014, 21st filed a complaint to foreclose the subject property (this action), now placing Robertson in *three* legal systems, and tripling his burdens of time, finance and stress levels compared to any of his opponents. 21st Attached to its Complaint as its Exhibit E a "true and correct copy"[4] of the subject Note showing its last indorsement to "Bank One National Association as Trustee." ("Bank One"). CP 37. The Complaint asserted, "Current Ownership of Deed of Trust: Plaintiff is now the owner and holder of the Deed of Trust and the Note secured thereby." CP 04. Complaint also attached several assignments of deed of trust it claimed traced to 21st, beginning with one from Old Kent Mortgage Company (original lender to Nicholls) which, "identifies no principal (owner of the Note's beneficial interest) on whose behalf Bank One "as trustee" is accepting" (CP107) and bears no notary seal (CP 28-29).

Robertson answered the Complaint, raising affirmative defenses including 21st's lack of standing (note is indorsed to the defunct *Bank*

4 CP 03:19-20.

One), expiration of statute of limitations, laches, invalid assignments of DOT and others (CP 94-96). His verified Answer was supported by extensive facts and evidence especially as to failure of chain of title of both Note and Deed of Trust. *See* CP 105-17 and supporting exhibits; Answer generally. On February 27, 2015, 21st answered Robertson's Answer/Counterclaims (CP 824-38) including, "21st admits Robertson is title owner of the property at issue..." (CP 825:8).[5]

May 22, 2015 Robertson filed a Motion to Change Trial Date, ECF Dkt. 34, and also issued discovery requests, including asking 21st to admit/deny that "No interest in the *Original Note* has ever appeared as an asset of the ResCap Bankruptcy Estate." On May 29, 2015, 21st filed a response to the motion (CP 285-89), supported by affidavit of John Weil (CP 290-387). These introduced new claims of Note and DOT interest, Weil attesting, "Plaintiff is acting to enforce the interest acquired by Berkshire Hathaway, Inc. in the Note and the Deed of Trust at issue...", and that these had been purchased "free and clear" from the bankruptcy estate. CP 291. This contradicted 21st Complaint's owner/holder claims. *See supra*. On May 1, 2015 Robertson filed a reply (CP 487-491) arguing and showing that this assertion also contradicted legally established truth, whereas the subject loan had *never been an asset* of the ResCap Bankruptcy estate, and so incapable of being sold by them, free-and-clear or otherwise. This was supported by Robertson Declaration, CP 504, at-

5 See *Christian Legal Soc. Chapter v. Martinez,* 130 S. Ct. 2971, 3005 (2010)("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them."); CR 56(c) (requiring consideration of "admissions on file" in granting summary judgment).

taching ResCap Bankrupty Asset Schedules of prior DOT claimants Residential Funding Real Estate Holdings, LLC and Residential Funding Company, LLC showing neither held the underlying Note. (*see* CP 510-549, 551-791).

At the same time, 21st responses to Robertson's discovery requests consisted nearly entirely of boilerplate objections, especially those relating to *chain of title* of subject Note and DOT. 21st asserted it had "free and clear" immunity from answering, based on the new Weil claims. *See*, e.g. CP 1052:6-14. After conferring on the matter (*see* CP 1233-58 – a 21st document) supplementary responses by 21st continued to yield obscure answers and cryptic highly redacted document submissions identifying no parties or the transaction to which they might apply. *See* 1184:12-24 (Admission No. 21); CP 932-35. This dispute as to how 21st could possibly have obtained any foreclosable interest through the ResCap Bankruptcy was raised repeatedly by Robertson (see, e.g. CP 1793-96 of Robertson MFSJ), but was never addressed by the court. Record generally.

On December 22, 2015 Robertson filed a motion to compel discovery. CP 1003–1014 ("Motion to Compel"), including, "21st Mortgage has consistently refused to provide chain of title information for either the Nicholl' s note or deed of trust..." CP 1006; *see also*, e.g. CP 1028-29 (Interr. 6). December 21, 2015 Robertson also filed a motion to stay proceedings or postpone trial date until federal proceedings on the same *res* are resolved, out of respect of exclusive jurisdiction doctrine (permitting

merger of cases). CP 989. Motion was denied as to this foreclosure, but counter/cross-claims were stayed and Motion to Compel was stricken. CP 1457. Robertson moved for reconsideration, CP 1459-63; denied, CP 1530.

December 31, 2015 21st filed its Motion for Summary Judgment, CP 1308-29 ("21st MFSJ"),introducing to the court for the first time a "Note" copy (CP 1335-40), that was inconsistent with their previous "true and correct" copy, plus separate "Allonges" (CP 1342-43). 21st also relied on the heavily redacted excerpts of documents showing no parties or transaction to which they pertained (CP 1453-56 - includes those *supra*), claiming they showed Berkshire Hathaway being delivered the Nicholls Loan. Motion also claimed tolling of statute of limitations citing excerpts from servicer's "notes". See CP 2003-27; *infra.* Robertson response (see CP 2096-2115), and its supporting Robertson Declaration (*see* CP 2118-24) and subsequent submissions presented extensive argument, evidence *from the same source*[6] and detail thereof, showing the 21st excerpt submissions were deceptive because entries that show no such payments were ever received had been omitted and/or redacted. CP 2096-2101; CP 1559:6-22; CP 1629-1730; CP 2542-45.

Then on February 6, 2016 21st filed a Motion for Judgment on the Pleadings, CP 1485 ("Pleadings Motion"), noted by court as a 5-Day motion. ECF Dkt. No. 124. It sought to have Robertson's property deed de-

6 Priore Declaration and its Exhibit Q (the "servicer notes" referenced here) are official records of *In Re Residential Capital, LLC,* No. 12-12062 (Bnkr. SDNY), Doc. 8072-24. Priore Declaration and its Exhibit Q appear at CP 1629-1730. s*ee* Op.Brief at 7 n6, at 9 n.9.

cleared "void" depriving him of any standing (anywhere). Robertson objected vigorously (CP 1533-1550, 2030-34) especially to a cause of action that did not appear in the pleadings, 21st previous admission to Robertson's ownership and Servicer's effective waivers (*supra*), and being brought nearly 8 years after its issuance from public sale. *Id.* February 12, 2016 Robertson filed Motion for Summary Judgment, CP 1791-1813 ("Robertson MFSJ"), largely devoted to showing 21st 's lack of standing to bring suit. *Id.* On March 14, 2016 Superior Court heard the three motions, *supra*, jointly, and issued its ruling, CP 2536-39 (A-13-17 here - "Motions Order"). Robertson moved for reconsideration (CP 2686-99) including court's failure to specify evidence considered and to identify grounds of its decisions under CR 59(a)(1),(7),(8). (CP 2687, 2698). Court responded by identifying documents considered, but otherwise denied . CP 2701-02. CR 54(b) certification was granted (CP 2728 -32), and judgment and decree of foreclosure issued. ECF Dkt. No. 191.

C. Appellate Court History

Robertson appealed four final judgments and sought discretionary review of two other orders, detailed *infra.* September 11, 2017 court issued its first opinion. October 2, 2018 Robertson filed a Motion to Reconsider ("Recons.1"). October 23, 2017 Recons.1 was denied stating no reasons. On October 30, 2017 court issued its Opinion (as amended) ("OP"). Opinion's opening paragraph through the first two paragraphs of its Facts section give the appearance that what follows is based upon a review of the record below. But the third through fifth paragraphs of that

section (OP at 2-3) abandon the record, stating as fact that which is not. Reality returns, for a time, in the third paragraph of page 3. *See* "Facts" discussion, *infra.* Opinion goes on to correctly identify that the testimony of Dr. James Kelley that Note and Allonges are forged and allonges never attached[7] "creates a genuine issue of fact whether 21st is a holder and entitled to enforce the note." OP at 7. It does not recognize, however, that Kelley also presented material evidence, including high-resolution renderings of allonges (CP 2062-67), gathered with 21st attorney present, that clearly show (no expert opinion required) that staple marks in the Note and Allonges proffered do not mach up (see Op.Brief. at 17 n.13[8]); indicating they were never "affixed" as required by law to constitute legal indorsement. RCW 62A.3-204(a), 3-203(c)(lack of indorsement deprives holder status).

Opinion also recognizes that contrary to 21st 's claim, Robertson *does* have standing to defend via challenge of documents. OP at 6 n.4 (a significant holding). But Opinion does not address how this affects the balance of its holdings (all rulings below left in place sub silentio are based on Robertson *not* having standing to defend).

7 "RCW 62.A.3-204 requires allonges be "affixed" so as to become a part the original Note. Section 3-204(a) provides that for the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is part of the instrument. (§ 3-204, Comment 1.) It continues the practice under prior §3-202(2); the paper 'so firmly affixed thereto as to become a part thereof' is called an allonge." 7 Wash. Prac., UCC Forms § 3-205 FORM 2 (June, 2016 Revision).

8 21st 's sole attempt to rebut this fact is found in its 02/02/2017 Respondant's Brief. ("Resp. Br."):"In a stretch of the imagination, Robertson claims that the staple marks on the Note do not match and that the allonges were not attached to the Note." Resp.Br. at 28 n.20.

Appellate Court declined to review (effectively *sub silentio*) orders brought before it under RAP 2.2, including Robertson MFSJ , Pleadings Motion (*see* OP at 9, identifying it as an "issue"), and Judgment for Foreclosure, leaving effects of these orders in place. Related orders brought before that court but effectively denied for discretionary review (by simply disregarding them) were court's striking of Motion to Compel, CP 1457-58/CP1003-1014; Motion to Stay (CP 1457-58) (addressing propriety of forcing Robertson to litigate real property rights of the same res simultaneously in multiple court systems; and Motion to Reconsider the stay motion, CP 1530-32.

Opinion remands to Superior Court but with no directive as to what is to be accomplished there. (Attach Allonges?)

V. ARGUMENT/WHY REVIEW SHOULD BE GRANTED

A. *Denial of review under RAP 2.2 conflicts with this Court*

Other than the "Note", The Superior Court's Motions Order does not identify any of the evidence considered. That court appears to base all of its holdings on the Pleadings Motion, first converted to one for summary judgment, then after-the-fact to "Plaintiff's Motion to Dismiss Duncan Robertson's claims (a motion joined in by other third party defendants)".[9] Motions Order at 2. It ruled that a procedural error in the trustee's sale where Robertson acquired the property rendered his trustee's deed invalid (effectively interpreted "void") because,"'Without

9 It would appear this was done to permit all of Robertson's opponents to avail themselves of collateral estoppel,whereas numerous of Robertson's Affirmative defenses also appear as causes of action in his counterclaims/cross-claims and in his federal action, in particular his claim of *no chain of title* to either Note or DOT in all such.

statutory authority, any action taken [to foreclose] is invalid.' *Albice v. Premier Mortgage Services,* 174 Wn. 2d 560, 568 (2012). That is the inescapable conclusion here." Motions Order at 3. The Order then states:

> "With the above ruling indicated, the Court probably need go no further. However, since other issues have been briefed and argued, some responsive conclusions will be mentioned whether they are characterized as rulings, dicta or conditional rulings."

Id. The court then ruled that the foreclosure could proceed, because it had found that 21st held the Note "and that it can document the chain of transactions that bring us here."[10] It then ruled, with no further discussion, "Defendant Robertson's affirmative defenses as to the above claim are stricken; Defendant Robertson's Motion for Summary Judgment is denied". *Id.* at 4.

This Court recognizes a litigant's "right to appeal." *Green River Comm. Coll. Dist. No. 10 v. Higher Educ. Bd.,* 107 Wn.2d 427, 443 (1986) (en banc)("A civil appellant has a right to appeal under RAP 2.2"). Appellate Court declined to review Pleadings Motion sub silentio[11], and Robertson MFSJ with no mention other than acknowledging he filed it (*id*. at 3), both certified as final judgments under CR 54(b). OP at 4. Opinion fails to address the propriety of leaving undisturbed the Order for Foreclosure[12] while simultaneously ruling that 21st had failed to show

10 This implies that 21st has not so produced, but the judge's belief that they "can", and is inappropriate, especially whereas Robertson has demanded jury trial. "It is not for courts at summary judgment to weigh evidence or determine the credibility of [a witness's] testimony; we leave those tasks to factfinders." *O'Leary v. Accretive Health, Inc.,* 657 F. 3d 625, 630 (7th Cir. 2011) (quoting *Berry v. Chicago Transit Auth.,* 618 F.3d 688, 691 (7th Cir. 2010).

11See OP at 9(stating the Pleadings Motion is being left unreviewed because "his interest in [the real property] will be foreclosed").

12 Effectively declining to review this appealed order *sub silentio*.

standing to bring this action (*see,* OP at 10("If 21st does not hold the note, then it does not have standing to enforce it"), thus depriving the Order and its now consummated sale of the property of any legal basis.[13] The explicit language of *Green River*, *supra*, and RAP 2.2 appears to preclude a court's discretion to deny review of appeals meeting its definitions, at least without some cognizable explanation. *Id*. Accordingly, these denials are in conflict with decisions of this Court and qualify for review by this Court under RAP 13.4(b)(1).

Opinion makes no mention whatever of Robertson's petition for discretionary review of the striking of his Motion to Compel, Motion to Stay, and Motion to Reconsider the stay motion. These orders directly impacted and prejudicially affected the RAP 2.2 appealed orders. *See motions, supra;* RAP 2.2(b); *Right-Price Recreation v. Connells Prarie,* 146 Wash.2d 370, 378 (2002) (en banc)("Generally, an appellate court will "review the decision or parts of the decision designated in the . . . notice for discretionary review *and other decisions in the case* as provided in [RAP 2.4](b), (c), (d), and (e)."). Also, writ of review is available under RCW 7.16.040 "Where the trial court 'act[ed] illegally.'"*State v. Chelan County Dist. Court et al.,* No. 93098-8, Slip Op. at 5 (Wash. Supr. Ct. 11-16-2017) (en banc). "Writ is also available "to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no...plain, speedy and adequate

13 See, e.g. *Brown v. Washington State Dept. of Commerce,* 184 Wn.2d 509, 524-25 (2015) (en banc) (UCC requires foreclosing entity to be note holder); *also id.* at n.5("Only the holder of a note can authorize the foreclosure of the collateral that is security for the note.").

remedy at law." RCW 7.16.040. The statute's explicit language designating review by "any court" and this Court's ruling *supra,* indicate it may also be applicable to this Petition. *Id.* RAP 13.4(b)(1), (4).

B. Opinion states as "Facts" unresolved disputed issues and presumptions that do not appear in the record.

The "Facts" section of Opinion includes assertions never pleaded or evidenced in the record below by 21st, some which are contradicted by the Opinion itself, and others that remain in dispute, indicating they are *not* the product of proper *de novo* review. Robertson addressed and identified these in both of his Motions for Partial Reconsideration:

> Enumerated "facts" of the Opinion's Facts section remain disputed – some contradicted by this Court's own rulings identifying them as being in dispute. The following issues, now stated as "facts" in Opinion 2, were argued and evidenced by both sides. The language in Opinion 2 objected to as untenable includes:
> a. Entire last paragraph of Opinion at 2 (assertions of note transfers via allonge). This Court has acknowledged these are disputed (*id.* at 8 ¶2), yet adopts 21st pleading to this Court (and not appearing or evidenced below) as "facts" on this issue.
> b. All but the first sentence of *id.* at 3 ¶1 remain disputed, especially, "Nicholls loan was among the assets liquidated in the bankruptcy". All evidence in the record shows that the loan was not in the bankruptcy - see, e.g.McDonnell Declarations (CP 2775 (38); and argument (CP 2269-70), acknowledged as considered by the court below but with no comment on the conflict between Robertson's evidence and 21st 's allegations (21st did not dispute McDonnell facts and produced no evidence to refute. Record below).
> c. *Id.* at 3 ¶2. No "evidence" of Nicholls "payments on loan" (*Id.* at 3) has been produced. *See infra*. [also included here].

Recons.1 at 11. That reconsideration motion (*which see*) then argues and shows how truth and law render these "facts" untenable, including:

> Statute of Limitations Review: 21st conceded that the 6-year statute of limitations on the subject loan commenced to run in 2004 (see Respondent's Brief submitted 02/02/2017 ("Resp. Brief") at *35), thereby establishing this as fact. But it then argued

> that the statute had been tolled by claimed "payment(s)" in 2009. *Id.* The trial court pronounced only that, "evidence before the Court supports the conclusion [of] payment on the note in 2009." 03/14/2016 Order CP 2539. This Court ruled that 21st did not exceed the statute of limitation in bringing this action because,
>
> > 21st...offers evidence that Nicholls made payments on the first priority loan in June [sic] and August of 2009. Robertson argues that the evidence is not credible but he offers no evidence disputing that Nicholls made those payments.
>
> Opinion at 9.

10/2/2017 Recons. Motion at 11. If the Opinion's "Fact" of Nicholls making a payment and tolling the statute is based on the Opinion's own "finding" that Robertson "offers no evidence disputing that Nicholls made those payments", that finding is blatantly false. *See supra* (itemizing Robertson's evidence of record showing she didn't). This surmising appears to derive from 21st Resp.Br.[14] combined with Motions Order's failure to mention any of Robertson's submissions on this issue, stating only, "the evidence before the Court supports the conclusion that Ms. Nicholls made a payment..." *Id.* at 4. Actual *de novo* review of the record (cites thereto on this point also provided in Robertson's Opening Brief, *supra)* would immediately have revealed the evidence refuting the allegation, and that it remains a disputed issue if not a disproved claim.

21st evidence presented (excerpts from servicer notes) also cannot not fulfill the "matter of law" standard of CR 56(c), making this finding untenable. This Court established long ago that a record credit entry does not constitute evidence of payment. *Wickwire v. Reard,* 37 Wn.2d 748, 751 (1951)("it is the fact of partial payment, and not the formal en-

14*See, e.g.,* Resp.Br. at 26, asserting "there was no admissible evidence before the trial court that supported Robertson's claims." *Id.*

try of credit, which tolls the statute.") (citing cases). *See* quotation and analysis of *Wickwire* . Recons.1 at 13.

This treatment of a facts section also directly conflicts with the policy relating to summary judgments announced in *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, n.1 (to "Facts" header) (2017) (en banc) (in review of summary judgment, viewing facts in the "light most favorable to the nonmoving party" dictates employing that party's factual account).

Opinion's "Facts" section gives the impression that these are issues which have been resolved in the course of litigation – which is demonstrably untrue. Record below. And, this appearance would seem to afford license not only 21st but all of Robertson's opponents to claim that these "Facts" and the other unsupported "findings" are now res judicata and/or collaterally estopped from further litigation, effectively depriving Robertson of the causes of action these claims represent. RAP 13.4(b)(1), (4).

C. Other Procedural Violations

1. *Appellate Court improperly declined to consider chain of title issues*. Opinion recognized Robertson's DOT chain of title issues as being addressed (OP 4); but rules, "he does not support this with argument. Thus, we decline to review it",[15] OP 4 n.3. Robertson's argument on assignments, albeit abbreviated in his Opening Brief, is at the core of most of his causes of action against all parties, and from the beginning has been *extensively* argued, evidenced and legal precedent cited (*see* in addition to citations, *supra*, CP 106-112 (detailing each of the claimed assign-

15 Citing *Joy v. Dep't of Labor & Indus.,* 170 Wn.App. 614, 629, 285 P.3d 187 (2012).

ments and their legal failures). The *Joy* case cited in Opinion was a unique judgment as a matter of law, and her brief while attempting to steer to other law, failed to cite to it. *Id.* While *judgment as a matter of law* and *summary judgments* share identical definitions as to what constitutes a "matter of law",[16] the latter focuses on whether the facts established meet that standard, and is weighted in favor of the non-movant. If the Appellate Court is to take a purely technical stand, in *Joy* her argument was rejected for being unsupported by authority (critical to what she was asserting). *Id.* Robertson's *is* supported. *See* Op.Brief at 28 n.20 citing *Grove v. Payne,* 47 Wn.2d 461, 467 (1955)(quoting 3 Tiffany, Real Property (3d ed.) 14, § 681.), and citation to CP 107-111 (argument and authority in record). A defense is treated as having been raised in the pleadings if that defense is consistently raised throughout the litigation. *Reichelt v. Johns-Manville Corp.,* 107 Wn.2d 761, 766-68, 733 P.2d 530 (1987). RCW 64.04.010 (property interest conveyances must be by deed) establishes chain of title to any *claimed* real property interest; absent such deed no interest (i.e. in the DOT) can be conveyed. *Id.*

2. <u>*Disregard of a summary judgment movant's failure to meet their initial burden defies the rulings of this Court.*</u> This Court has established *when* parties' summary judgment burdens arise: "***If*** the moving party satisfies its burden, ***then*** the non-moving party must present evidence demonstrating material facts are in dispute. *Atherton Condo Ass'n v.*

16 *See Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150 (2000)(also distinguishing that in summary judgment, "court must review the record "taken as a whole.")*; See also* Recons.1 at 6-7.

Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (emphasis added). The Fifth Circuit puts this more pragmatically: the movant must satisfy its obligation that there are no fact issues warranting trial before the non-movant is required to produce any evidence in opposition to the summary judgment motion." *Lemelle v. Universal Mfg. Corp.*, 18 F. 3d 1268, 1274 (5th Cir. 1994) (citing *Russ v. Int'l Paper Co.*, 943 F.2d 589, 592 (5th Cir.1991). This Court:

> "[Movants] do not point to any specific pleadings, affidavits, or depositions showing the absence of evidence on the issue of futility. [ ] [ ]. Therefore, the Superior Court was correct in its determination that [movants] did not meet their initial burden of showing there were no issues of fact regarding futility.

Baldwin v. Sisters of Province, 112 Wn.2d 127, 132 (1989) (en banc). 21st moving to have all of Robertson's Affirmative Defenses stricken consisted solely of, "Each of Robertson's affirmative defenses is without merit" (pointing to none or what the insufficiencies might be[17]). CP 1320. 21st then pleaded legal basis to be "Robertson lacks standing". *Id.* Robertson addressed these deficiencies, CP 2103 and in Op.Brief at 29. Opinion dismissed based on, "Robertson fails to advance argument or cite authority in support of his remaining affirmative defenses." OP at 10. But, Opinion found that Robertson *has* standing (OP at 6 n.4), depriving movant's basis in law, and with no specificity of fact left this motion with no substantive basis whatever to be granted. Opinion's decision conflicts with those of this Court (*supra*), warranting review. RAP 13.4(b)(1).

17 Motion addressed Statute of limitations issue, also contained in Affirmative Defenses, under its objections to Robertson's counterclaims. CP 1326.

D. Due Process violations meriting review under RAP 13.4(b)(3), (4)[18]

Due process protections under the U.S. and Washington Constitutions apply when an individual is deprived of "property" through government action, including a court action.[19] *Board of Regents of State Colleges v. Roth,* 408 US 564, 569 (1972). *See also Roake v. Delman,* No. 93456-8, Slip Op. * 8 n.6 (Wash. Supr. Ct. 01-11-2018) (en banc), summarizing procedural requirements generally.[20] Also, "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Tulsa Professional Collection Services, Inc. v. Pope,* 485 US 478, 485 (1988) (citations omitted). Washington courts have adopted *Black's Law Dictionary* definition of *cause of action* as being, "a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; claim." *Eugster v. Washington State Bar Association,* 198 Wash. App. 758, ¶61, 397 P. 3d 131, 146 (2017) (quoting *Black's Law Dictionary* 266 (10th ed. 2014)).[21]

18"[C]onstitutional error may be raised for the first time on appeal, particularly where the error affects "fundamental aspects of due process." *State v. Lively,* 130 Wash. 2d 1, 921 P. 2d 1035, 1044, (1996) (en banc).

19 *Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680 (1930)(*federal guaranty of due process *extends to state actions through its judicial branch).*

20 Including test to be applied:"In evaluating the process due in a particular situation, we consider (1) the private interest impacted by the government action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government interest, including the additional burden that added procedural safeguards would entail." *Id*. (citing *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976)).

21Several of Robertson's claims ("factual situation[s] that entitle [him] to obtain a remedy in court) raised in his affirmative defenses and also in his counterclaims/ cross claims, and lodged also in federal court – especially lack of chain of title authorizing all previous actions - have been "deprived" through the Motions Order's arbitrary assertion of the judge's personal conviction that 21st "can document the chain of transactions that bring us here" (*see supra*) and the Appellate Court's declining to address this issue. *See supra*.

Due process is to assure *fairness* of prescribed procedures and their application: "The most familiar office of ['the Due Process Clause of the Fourteenth Amendment'] is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State." *Collins v. Harker Heights,* 503 US 115, 125 (1992). Prohibition of "arbitrary action" is core to the due process guarantee:

> We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," [ ], whether the fault lies in a denial of fundamental procedural fairness, [ ] (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power **without any reasonable justification** in the service of a legitimate governmental objective[ ].

County of Sacramento v. Lewis, 523 US 833, 845-46 (1998) (emphasis added). "Arbitrary" is defined as "Depending on individual discretion; *specif.*, determined by a judge rather than by fixed rules or law." *Black's Law Dictionary,* 160 (7th ed. 1999).[22]

> Fundamental to due process protections are its provisions that -
>
> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." [ ] It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." [ ].

Fuentes v. Shevin, 407 US 67, 80 (1972) (internal citations omitted). See also *Troxel v. Granville,* 530 US 57, 65 (2000) (due process also imposes *added* protections when rights deprived go to "fundamental areas of human concern").

22 *See also Heinmiller v. Dep't of Health,* 127 Wn.2d 595, 609 (1995) (en banc)("Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances.") (interpreting explicit language of RCW 34.05.570).

It would seem that so long as the state-prescribed procedures (here CR 56(c) and this Court's interpretation thereof) pass constitutional muster, and these are properly applied, that the requisite standards are met in judicial foreclosures via summary judgment. But, when the procedures have been *improperly* applied, and the only remaining remedy therefor denied – without explanation – due process has been violated under the authorities cited *supra.* Due process protections are required at each required procedural step, including that the court notify Robertson of the factual and legal basis of his being deprived of property.

> "[B]y `due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." *Hagar v. Reclamation District,* 111 U. S. 701, 708 (1884) (citation omitted)

It should be safe to say that close to all judicial foreclosures in this State are resolved through *summary judgment*. It also is apparent that due process protections must be applied in this context. When, as here, requisite summary judgment procedures and principles are *not* adhered to by the court, and property deprived (be it real property or causes of action), a violation of due process occurs. *Supra*. Again applying due process protections, a party so deprived has a right to seek relief, and the prescribed relief for such violation when other possible remedies have been exhausted, is *appeal*. Thus -

First, the party who has been deprived of their property through

the summary judgment process must be notified of which facts constitute the requisite "matter of law" (CR 56(c)), so that they may properly prepare a defense. The Motions Order in this case fails virtually entirely in this regard; and question must be raised as to whether it constitutes a lawful judgment, especially when findings/rulings are left to the reader "characterize[] as rulings, dicta or conditional rulings". Such vagueness meets the definition of "arbitrary." RCW 7.16.040. Due process is violated when "any interference with property rights was irrational or arbitrary." *Sintra, Inc. v. City of Seattle,* 119 Wn.2d 1, 21-22 (1992) (en banc).

Second, when the only relief for due process violation – appeal - is then denied by the appellate court, and again without cognizable justification, and the "opportunity to be heard...in a meaningful manner" has been deprived. Accordingly, this Petition presents "significant question[s] of law under the Constitution of the State of Washington or of the United States", qualifying for review under RAP 13.4(b)(1),(3).

VI. CONCLUSION

Based on issues shown here this Court should grant Petition for Review of this case under RAP 13.4(b)(1),(2),(3) and (4).

Respectfully submitted this 12th day of March, 2018 by -

s/ Duncan K. Robertson-
Duncan K. Robertson

Petitioner/Appellant, pro se
3520 SE Harold Court
Portland, OR 97202-4344
Ph: (503)775-9164
uncadunc1@aol.com

APPENDIX

TABLE OF CONTENTS

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

21st MORTGAGE CORPORATION, a Delaware Corporation, Respondent, v. DUNCAN K. ROBERTSON, Appellant. LINDA C. NICHOLLS, Third-Party Plaintiff RESIDENTIAL FUNDING COMPANY, LLC, a limited liability company, OCWEN LOAN SERVICING, LLC, A LIMITED LIABILITY COMPANY; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation, MARY A. MILLER, an Iowa resident; TYRONE THORGOOD, a Pennsylvania resident; DOES 1-10, Third-Party Defendants.	)	No. 75262-6-I DIVISION ONE UNPUBLISHED OPINION FILED: October 30, 2017

SPEARMAN, J. — The holder of a promissory note secured by real property is entitled to enforce it through judicial foreclosure. A holder is the person in possession of a note that is payable either to bearer or to the person in possession. On summary judgment in this judicial foreclosure, defendant Duncan Robertson presented an affidavit opining that the note and its endorsements to the holder, 21st Mortgage (21st), are not authentic. This evidence is sufficient to create a genuine issue of material fact whether 21st is entitled to enforce the

note. In this respect, the trial court erred in granting summary judgment to 21st. We reverse in part and affirm in part.

FACTS

Linda Nicholls inherited a house in southwest Seattle (Property). In 1999, she borrowed $100,000 from Old Kent Mortgage Company and executed a promissory note secured by a deed of trust that encumbered the Property (first priority loan).

In 2006, Nicholls borrowed $82,000 from defendant Duncan Robertson (Robertson loan). The loan was secured by a deed of trust that acknowledged the first priority loan. Nicholls defaulted on the Robertson loan. A notice of trustee's sale was recorded on January 8, 2008 and announced that the sale would take place on April 11, 2008. When the sale actually took place, on September 26, 2008, Robertson purchased the Property.

In the meantime, the first priority loan changed hands several times. Old Kent endorsed the note to Residential Funding Corporation. Residential Funding Corporation placed the loan in a securitized trust and endorsed the note to Bank One as trustee for that trust. In an undated allonge attached to the note, Bank One as trustee for Residential Funding Company endorsed the note in blank. In another allonge, the Bank of New York Mellon Trust Company (Mellon), as trustee for Residential Funding Company, endorsed the note to Residential Funding Company. In a third allonge, Residential Funding Company endorsed the note in blank.

On May 14, 2012, Residential Funding Company filed for bankruptcy. The Nicholls loan was among the assets liquidated in the bankruptcy and sold to Berkshire Hathaway. Berkshire Hathaway deposited the Nicholls loan in the Knoxville 2012 Trust, with Christiana Trust as its trustee. Christiana then elected 21st as the Servicer for the Knoxville 2012 Trust.

Nicholls defaulted on the first priority loan. She made her last payments on July 8, 2009 and August 11, 2009. At least two non-judicial foreclosures were scheduled, but eventually cancelled. Robertson v. GMAC Mortg. LLC, 982 F.Supp.2d 1202, 1205 (W.D. Wash. 2013).

21st purports to hold the original note for the first priority loan. 21st filed a complaint for judicial foreclosure against Nicholls and Robertson on July 24, 2014. Nicholls did not respond to the foreclosure complaint and defaulted. Robertson answered, asserting 22 affirmative defenses and 13 counterclaims. The trial court stayed Robertson's counterclaims and third party claims pending the outcome of related federal litigation.[1]

Both 21st and Robertson filed motions for summary judgment in the judicial foreclosure.[2] 21st also moved to strike certain expert declarations filed by

---

[1] In 2012, Robertson filed a complaint in superior court against multiple defendants. It sought quiet title and a declaratory judgment that 21st's predecessors violated the law with respect to their attempted foreclosures of the Property. Robertson, 982 F.Supp.2d at 1206. Meanwhile, Residential Funding Company had entered bankruptcy and Robertson filed claims in those proceedings, several of which were permitted to proceed. A number of Robertson's causes of action were stayed due to the bankruptcy proceedings. The case was removed to federal district court. The district court dismissed the two causes of action that were not stayed. Robertson appealed. The Ninth Circuit Court of Appeals found that the district court had not established subject matter jurisdiction and remanded the case for an evidentiary hearing on the citizenship of the corporate defendants.

[2] 21st first moved for a judgment on the pleadings. The trial court converted it to a motion for summary judgment, and considered it at the same time as 21st and Robertson's motions for summary judgment.

Robertson in opposition to 21st's motion. In its order on summary judgment, the trial court found that the 2008 trustee sale was invalid, and thus that Robertson was not the owner of the Property. The court ordered that 21st was entitled to a decree of foreclosure and struck Robertson's affirmative defenses. It did not rule on 21st's motion to strike. On reconsideration, the trial court revised the summary judgment order to clarify that it considered all written submissions in connection with the motions. On April 28, 2016, the court certified its orders as final for the purposes of appeal under CR 54(b).

Robertson appeals.

DISCUSSION

Authenticity of the Promissory Note

Robertson argues that the trial court erred by granting summary judgment to 21st because there is a genuine issue of material fact whether 21st is a beneficiary of the Nicholls promissory note. Robertson disputes that 21st holds the original note and that it can establish chain of title for the note. Thus, he argues that 21st is not entitled to enforce the note. Robertson also argues that 21st is excluded from the definition of "beneficiary" as a result of the bankruptcy proceedings.[3]

We review an order granting summary judgment de novo. Deutsche Bank Nat. Trust Co. v. Slotke, 192 Wn. App. 166, 170, 367 P.3d 600, rev. denied, 185 Wn.2d 107, 377 P.3d 746 (2016). Summary judgment is appropriate if there is no

[3] Robertson also challenges 21st's chain of title for the deed of trust, but he does not support this with argument. Thus, we decline to review it. Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 629, 285 P.3d 187 (2012).

genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The initial burden is on the moving party to show there is no genuine issue of any material fact. CR 56(e). The burden then shifts to the nonmoving party to "'set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.'" Slotke, 192 Wn. App. at 170-71 (quoting Meyer v. Univ. of Washington, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). To accomplish this, the nonmoving party "may not rely on speculation [or] argumentative assertions that unresolved factual issues remain." Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." Id. (citing Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). We review the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Id.

A deed of trust may be judicially foreclosed to secure the performance of an obligation to the beneficiary by a borrower on a promissory note. Slotke, 192 Wn. App. at 171. The person entitled to enforce a promissory note is:

> (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.

RCW 62A.3-301. A "holder" is "[t]he 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.1-201(b)(21)(A). "[I]t is the holder of a 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." Slotke, 192 Wn. App. at 173.

Robertson argues that his evidence creates a genuine issue of material fact that 21st does not possess the original first priority promissory note.[4] He relies on a report and affidavit by James Kelley, who examined the note. Kelley concluded that the note is "not the original adjustable rate note but a copy thereof." CP at 2049. 21st argues that the Kelley report is inadmissible, but the trial court explicitly left that question open, and the report was among the documents considered on summary judgment. Thus, we consider it in the light most favorable to Robertson. The Kelley report is evidence that the note is a copy, so there is a genuine issue of material fact whether 21st holds the note and is entitled to enforce it.

---

[4] As a threshold matter, 21st argues that Robertson does not have standing to contest the assignment of the promissory note. It relies on two federal district court cases holding that a borrower does not have standing to challenge the appointment of a successor trustee to a deed of trust; Cagle v. Abacus Mortg. Inc., 2014 WL 4402136 (W.D. Wash. 2014) and Brodie v. Northwest Trustee Servs., Inc., 2012 WL 6192723 (E.D. Wash..2012). The same cases were cited as authority on standing in Bavand v. OneWest Bank, 196 Wn. App. 813, 385 P.3d 233 (2016). There, we found them unpersuasive because neither applied Washington's test for standing. To establish standing in Washington, the claimant must show a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief, and that his or her interest is within the zone of interests protected by the statute at issue. Bavand, 196 Wn. App. at 834 (citing State v. Johnson, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014)). Here, Robertson's potential loss of the Property is fairly traceable to a foreclosure by 21st, and is likely to be redressed by the requested relief that 21st lacks authority to foreclose. And, Robertson can show that he is within the zone of interests protected by the Deeds of Trust Act, which governs mortgage law with respect to junior lienholders and owners. We again decline to follow the federal cases cited by 21st because they do not apply Washington's test for standing.

Robertson's evidence distinguishes this case from Bavand v. OneWest Bank, 196 Wn. App. 813, 385 P.3d 233 (2016). In Bavand, the beneficiary wrote a declaration that it was the actual holder of the note. But the declarant did not write the year that he signed the declaration. Bavand argued that this created a genuine issue of material fact whether the declaration was ineffective because it could have been signed after the foreclosure started. This court disagreed, noting that Bavand did not point to any evidence in the record to substantiate that the declaration was signed after the foreclosure started. Here, Robertson goes further than the borrower in Bavand. He provides the Kelley affidavit to substantiate that there is a question of fact whether 21st possesses the original note. To the extent that the affidavit is an admissible expert opinion, which is a question that is not before us, it creates a genuine issue of fact whether 21st is the holder of the note.

Robertson next argues that the allonges documenting the history of the note's negotiation are invalid. Robertson appears to propose that they were created sometime after 21st filed its complaint in this matter because they were not attached to the promissory note in the complaint, or submitted to the bankruptcy court. He supports this argument with Kelley's affidavit, which opines that the allonges were never permanently affixed to the note, and that signatures on two of the allonges were made with a printer and are thus most likely copies. Viewing the Kelley affidavit in the light most favorable to Robertson, it creates a genuine issue of fact whether 21st is a holder and entitled to enforce the note. If the allonges are fraudulent, the note is not endorsed in blank, but is instead

endorsed to Bank One. And if that is true, 21st holds a note endorsed to an entity other than itself and is thus not entitled to enforce it. Thus, the Kelley affidavit creates an issue of material fact on this question as well.

Finally, Robertson questions whether 21st is the beneficiary as defined by the deeds of trust act, (DTA) chapter 61.24 RCW, because the Nicholls loan may have been pledged as collateral when it became a bankruptcy asset. Excluded from the definition of "beneficiary" in the DTA are "persons holding the [instrument] as security for a different obligation." RCW 61.24.005(2). Robertson contends that the Nicholls loan may be held as security in the Residential Funding Company bankruptcy because a "significant amount of the assets on the Debtors' Schedule B have been pledged as collateral by the Debtors and are outside of the Debtors' control." CP at 1569. But because Robertson provides no evidence that the Nicholls loan was among those assets, he fails to raise a genuine issue of fact. Regardless, Robertson's argument would fail on the merits. When the court transferred the loan through the bankruptcy, it ordered that the asset was "free and clear of all Claims, Liens, encumbrances, or other interests. . . ." CP at 1361. Thus, it could not have been held as collateral after the bankruptcy.

With the Kelley affidavit, Robertson met his burden to present evidence that creates a genuine issue of material fact whether the note and its allonges are original, and thus whether 21st is the holder entitled to enforce the note.

Robertson's 2008 non-judicial foreclosure

Robertson argues that the trial court erred by finding that he did not acquire title to the Property after the 2008 trustee's sale. He claims that there are issues of material fact related to ownership of the Property.

Robertson's status as either junior lienholder or owner is immaterial to whether 21st is entitled to a decree of foreclosure.[5] Regardless of whether Robertson owns the property or is a junior lienholder, his interest in it will be foreclosed, and he will be entitled to any surplus. BAC Home Loans Servicing, LP v. Fulbright, 180 Wn.2d 754, 761, 328 P.3d 895 (2014); RCW 61.12.150. Therefore, we decline to reach whether the trial court erred in granting summary judgment on this ground.[6]

Affirmative Defenses

Robertson argues that the trial court erred in striking his 22 affirmative defenses. But in his briefing to this court, he advances arguments in support of only two of them: statute of limitations and standing.[7]

Robertson argues that the judicial foreclosure is barred by the six year statute of limitations, which he contends expired in 2010. RCW 4.16.040. 21st argues that the claim was timely filed on July 24, 2014 and in support, offers

---

[5] Robertson's status as junior lienholder or property owner may be material to his stayed counterclaims, which are not on appeal.

[6] Robertson advances another argument in support of his position that he owns the Property. He contends that because the federal district court previously noted that he owned the Property, the trial court's ruling to the contrary violated principles of federalism, the "exclusive jurisdiction doctrine," and the law of the case. Brief of App. at 37-45. But as discussed, Robertson's interest in the Property is not material to the foreclosure. Therefore, we decline to reach this issue.

[7] In his brief, Robertson anticipates arguing laches, but makes no such argument. See Br. of App. at 29-37.

evidence that Nicholls made payments on the first priority loan in June and August of 2009. Robertson argues that the evidence is not credible but he offers no evidence disputing that Nicholls made those payments.

Robertson additionally argues that under Berteloot v. Remillard, 130 Wash. 587, 228 P. 690 (1924), 21st must show that Nicholls intended to keep the debt alive when making her 2009 payments. But Berteloot requires evidence of intent to revive the debt where the statute of limitations has run at the time of payment. Here, there is no evidence that the statute of limitations had run in 2009. Thus, even if it carried the burden to do so, 21st need not prove that Nicholls made her payments voluntarily. The trial court did not err in striking the statute of limitations affirmative defense.

Robertson next argues that it was improper for the trial court to strike his affirmative defense that 21st lacks standing for a judicial foreclosure on the Property. As discussed, the Kelley affidavit creates a genuine issue of material fact whether 21st holds the note. If 21st does not hold the note, then it does not have standing to enforce it. See RCW 62A.3-301. The trial court erred in striking this affirmative defense.

Robertson fails to advance argument or cite authority in support of his remaining affirmative defenses. The defendant carries the burden of proof on an affirmative defense. See Rivas v. Overlake Hosp. Med. Ctr., 164 Wn.2d 261, 267, 189 P.3d 753 (2008). Because Robertson bears the burden of proof on his affirmative defenses, he must make a showing sufficient to establish the existence of the essential elements of those affirmative defenses. Young v. Key

Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). While Robertson refers to prior arguments in the record on each of his affirmative defenses, he does not take the opportunity to argue each defense on appeal. The court is not required to search the record to locate the portions relevant to a litigant's arguments. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Passing treatment of an issue or lack of reasoned argument are insufficient to merit judicial consideration. Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 629, 285 P.3d 187 (2012) (citing West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)). We decline to consider Robertson's remaining affirmative defenses due to lack of argument.

Reversed in part and remanded.

Spearman, J.

WE CONCUR:

Cox, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

21st MORTGAGE CORPORATION, a Delaware Corporation, Respondent, v. DUNCAN K. ROBERTSON, Appellant. LINDA C. NICHOLLS, Third-Party Plaintiff RESIDENTIAL FUNDING COMPANY, LLC, a limited liability company, OCWEN LOAN SERVICING, LLC, A LIMITED LIABILITY COMPANY; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation, MARY A. MILLER, an Iowa resident; TYRONE THORGOOD, a Pennsylvania resident; DOES 1-10, Third-Party Defendants.	No. 75262-6-I ORDER DENYING APPELLANT'S MOTION FOR PARTIAL RECONSIDERATION

Appellant/Defendant Duncan Robertson filed a motion to reconsider in part the amended opinion filed on October 30, 2017. A majority of the panel has determined the motion should be denied.

THEREFORE, IT IS HEREBY

ORDERED that appellant/defendant motion for partial reconsideration is denied.

FOR THE COURT:

Presiding Judge

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

21st MORTGAGE CORPORATION, a Delaware corporation, Plaintiff, v. LINDA C. NICHOLLS; DUNCAN K. ROBERTSON and JANE DOE ROBERTSON, and the marital community composed thereof, Defendants and Third-Party Plaintiffs, v. RESIDENTIAL FUNDING COMPANY. LLC. a limited liability company; OCWEN LOAN, SERVICING, LLC, a limited liability company; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; MARY A. MILLER, an Iowa resident; TYRONE THOROGOOD, a Pennsylvania resident; DOES 1-10, Third-Party Defendants.	NO. 14-2-20431-1 SEA ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The matter now comes before the Court on three separate motions recently filed by the parties. These are:

1. Plaintiff's Motion to Dismiss Duncan Robertson's claims (a motion joined in by other third party defendants);
2. Plaintiff's Motion for Summary Judgment; and
3. Duncan Robertson's Motion for Summary Judgment.

As a preliminary matter, it should be noted that the plaintiff in this action seeks to foreclose on a note and deed of trust. Defendant Nicholls, the original obligor on the note and grantor of the deed, has not appeared and has been adjudged to be in default. Defendant Robertson, a junior lien holder with respect to the property, has appeared to contest the foreclosure and has also brought claims for relief against the plaintiff and against the third party defendants.

Initially, the plaintiff brought its motion for dismissal fashioned as a CR 12 motion. It asserted that Robertson's claimed title to the property in question was void due to the fact that his interest stemmed from a trustee's sale that was not in compliance with the Deed of Trust Act. Since the motion asked the Court to look beyond the pleadings and consider documents and events referenced in those pleadings, the Court converted the motion to a motion for summary judgment and deferred its resolution until the Court also had before it the parties' additional cross motions for summary judgment.

Robertson's ownership interest in the property arises from his purchase as the sole bidder and a credit bidder at a trustee's sale on September 26, 2008. That sale took place pursuant to a Notice of Trustee's Sale that was entered on January 8, 2008. Per RCW 61.24.040(6) no more than 120 days may lapse between the notice and the actual sale. That period was exceeded in this case.

With strict compliance with the statute required, "...failure to act within that time violates the statute and divests the party of statutory authority. Without statutory authority, any action taken is invalid." Albice v. Premier Mortgage Services, 174 Wn. 2d 560, 568 (2012). That is the inescapable conclusion here.

Robertson was not a bona fide purchaser for valuable consideration and nothing in the facts before the Court leads to a conclusion that the plaintiff waived, or should be collaterally estopped from, challenging the basis for his ownership interest. Although Ms. Nicholls was involved in Bankruptcy Court proceedings at the time, there was no stay in place that could have extended the 120 day period.

With the above ruling indicated, the Court probably need go no further. However, since other issues have been briefed and argued, some responsive conclusions will be mentioned whether they are characterized as rulings, dicta or conditional rulings.

The Court lacks sufficient information to determine whether or not the purported expert testimony on documents examination would be admissible at trial. There are substantial questions as to methodology and qualifications but, at this stage, all that can be said for certain is that the offering party would be given a chance to make an offer of proof by question and answer before the Court could rule.

In any event, the Court concludes for today's purposes that the plaintiff has made a sufficient showing that it now holds the original of the note in question and that it can document the chain of transactions that bring us here.

As to Robertson's assertion of a Statute of Limitations defense to enforcement of the note held by the plaintiff, the evidence before the Court supports the conclusion that Ms. Nicholls made a payment on the note in 2009. Thus, this action, which was commenced in July of 2014, was timely filed.

Today's ruling will obviously impact the status of Robertson's claims and the status of the third party defendants. All claims of Mr. Robertson seeking affirmative relief (not simply raising questions of ownership of the property) have been stayed by this Court. Whether to leave that stay in place, to lift it so that other motions may be brought or to make some other arrangement that will facilitate an early appellate review is a question to be discussed among counsel for the parties and for further court action as requested.

It is HEREBY ORDERED:

(1) The plaintiff is entitled to the decree of foreclosure sought in this action;

(2) Defendant Robertson's ~~affirmative~~ defenses as to the above claim are stricken;

(3) Defendant Robertson's Motion for Summary Judgment is denied; and

(4) Defendant Robertson's counterclaims and third party claims seeking damages (such as civil conspiracy, trespass, conversion, negligence, CPA, civil rights, etc.) have previously been stayed and remain in that status pending further action by the federal court or this court.

DATED this 14th day of March 2016.

HON. WILLIAM L. DOWNING

Washington Constitution Sect. 21:

“The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.” Id.

RCW 7.16.040
Grounds for granting writ.
A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

[1987 c 202 § 130; 1895 c 65 § 4; RRS § 1002.]

CERTIFICATE OF SERVICE

RE: 21st Mortgage Corp.,Respondent v. Linda C. Nicholls; Duncan K. Robertson, Appellant, Supreme Court No. 95376-7, App. Court No. 75262-6-I, Wn. App. Dist. 1.

I, Duncan K. Robertson certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Oregon, over the age of eighteen years, a pro se party to the above entitled action, and competent to be a witness therein.

2. That on the 12h day of March, 2018, I caused to be served a true and correct copy of -

   PETITION FOR DISCRETIONARY REVIEW
   FROM THE COURT OF APPEALS DECISION DECEMBER 12, 2017
   DENIAL OF MOTION TO RECONSIDER

   to Respondents and Appellant in the above titled matter by causing it to be delivered via electronic Email to:

John Anthony McIntosh
RCO Legal, P.S.
13555 SE 36th St Ste 300
Bellevue, WA 98006-1489
jmcintosh@rcolegal.com

Charles Thomas Meyer
Severson & Werson
19100 Von Karman Ave Ste 700
Irvine, CA 92612-6578 ‘
ctm@severson.com

Eleanor A DuBay
Tomasi Salyer Martin
121 SW Morrison St Ste 1850
Portland, OR 97204-3120
edubay@tomasilegal.com

John W. Weil
Tomasi Salyer Martin
121 SW Morrison St Ste 1850
Portland, OR 97204-3120
jweil@tomasilegal.com

Kathryn P Salyer
Tomasi Salyer Martin
121 SW Morrison St Ste 1850
Porrtland, OR 97204-3120
ksalyer@tomasilegal.com

William G Fig
Sussman Shank LLP
1000 SW Broadway Ste 1400
Portland, OR97205-3089
billf@sussmanshank.com

Scott E. Stafne
Stafne Law & Advocacy
239 N Olympic Ave.
Arlington, WA 98223-1336
Scott@stafnelaw.com

Dunncan K. Robertson
3230 SE Harold Court
Portland, OR 8720204344
uncadunc1@aol.com

4. That on the 12th day of March, 2018, I caused to be served a true and correct copy of this same document to the following persons via First Class Mail:

Linda C. Nicholls
822 SW 136th Street
Burien, WA 98166

DATED this 12th day of March, 2018, at Portland, Oregon.
By

s/ Duncan K. Robertson

Duncan K. Robertson
3520 SE Harold Court Portland, OR 97202-4344
Ph: (503)775-9164
Fax: (503)775-9164
Email: uncadunc1@aol.com

DUNCAN ROBERTSON - FILING PRO SE

March 12, 2018 - 3:20 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95376-7
Appellate Court Case Title:	21st Mortgage Corporation v. Linda C. Nicholls; Duncan K. Robertson, et ux.
Superior Court Case Number:	14-2-20431-1

The following documents have been uploaded:

- 953767_Petition_for_Review_20180312151746SC813856_4573.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PETITION FOR REVIEW-Robertson.pdf

A copy of the uploaded files will be sent to:

- ctm@severson.com
- dhitti@tomasilegal.com
- edubay@tomasilegal.com
- johnm@schweetlaw.com
- jramig@tomasilegal.com
- jweil@tomasilegal.com
- kmuir@sussmanshank.com
- ksalyer@tomasilegal.com
- kstephan@rcolegal.com
- pam@stafnelaw.com
- scott@stafnelaw.com
- uncadunc1@aol.com
- wfig@sussmanshank.com

Comments:

See Court's letter of 01/11/2018

Sender Name: Duncan Robertson - Email: uncadunc1@aol.com
Address:
3520 SE Harold Ct.
Portland, OR, 97202
Phone: (503) 775-9164 EXT 503

Note: The Filing Id is 20180312151746SC813856