Supreme Court No. 95863-7
Court of Appeals Case No. 75593-5-I

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

RYAN R. HOWARD,

Appellant,

v.

OCWEN LOAN SERVICING, LLC, et al.,

Respondents.

PROPOSED

APPLELLANT'S SECOND AMENDED PETITION FOR REVIEW

Melissa A. Huelsman, WSBA #30935
Attorney for Ryan R. Howard
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
206-447-0103

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

Rules

Treatises

I. IDENTITY OF PETITIONER

The Petitioner is Ryan Howard, former owner of real property that is the subject of this litigation, which he would still own if Respondent had not breached the terms of a settlement agreement, and the injured party.

II. CIITATION TO COURT OF APPEALS DECISION

Mr. Howard seeks review of the decision of Division I of the Court of Appeals in this case (hereinafter the "Decision"), Case No. 75593-5-I. The unpublished Opinion was filed on March 5, 2018 and the Motion for Reconsideration filed by Mr. Howard was denied on April 16, 2018.

III. ISSUES PRESENTED FOR REVIEW

1. Were Ocwen and Deutsche bound by the terms of the Loan Modification and Settlement Agreement offered to Mr. Howard since he accepted and performed under the terms of those documents to his detriment, by dismissing other claims against them?

2. Did Ocwen and Deutsche engage in intentional and/or negligent misrepresentation and/or fraud in the inducement by inducing him to enter into the settlement and dismiss the other lawsuits and appeals with no intention to perform the contractual requirements?

IV. STATEMENT OF THE CASE

Procedural History

See Attachment A.

Factual History

Mr. Howard, acting through a lawyer and then *pro se*, has been challenging the ability of his loan servicer, Ocwen Loan Servicing, Inc.

("Ocwen") and Deutsche Bank, as Trustee of the IndyMac INDA Mortgage Loan Trust 2007-AR7, Mortgage Pass Through Certificates, Series 2007-AR7 ("Deutsche"), the alleged loan owner and noteholder, to foreclose on his former home for years. He first filed a lawsuit in 2011 and following entry of a final judgment, that case was appealed (Case No. 76276-I). Mr. Howard filed another appeal pending with the Court of Appeals under Case No. 75593-I, which resulted in a Petition for Review to this Court (Case No. 70629-2-I), acting *pro se*.

Mr. Howard is a computer professional who had some financial problems several years ago that caused him to fall behind on his mortgage. CP 3. When foreclosure proceedings were commenced in early 2011, Mr. Howard filed the lawsuit against Deutsche and others. *Id.* Ultimately that case was the subject of the other appeals.

By May of 2015, appeals and lawsuits relating to the foreclosure were pending in the Court of Appeals and the Supreme Court. CP 1-11. On May 21, 2015, counsel for Ocwen (loan servicer) sent Mr. Howard an offer of a permanent loan modification. CP 1-11; 97-100. To accept the offer, Mr. Howard was required to sign the loan modification and a settlement agreement and release, which required dismissal of all of the pending litigation without an award of attorneys' fees and costs to either party. Mr. Howard weighed his options and the fact that he wanted to keep

his house and get on with his life, so he signed. CP 1-11; 57-78; 97-100.

Acceptance of the terms was due on June 1, 2015, but Mr. Howard asked for an extension. CP 1-11; 57-78. Counsel for Ocwen agreed to a ten (10) day extension, on the condition that if he accepted, it would be treated as though he had done so by June 1, 2015. *Id.* Mr. Howard agreed and exchanged emails with Ocwen's attorney about the documents for several days. On June 10, 2015, Mr. Howard signed and returned the documents along with a cashier's check for the first payment due. CP 1-11; 71-78. He sent the second payment, due on July 1, 2015, on June 28, 2015, to the address in the agreement and the check was cashed. *Id.*

In July 2015 Mr. Howard asked for copies of the completed documents and did not receive them. CP 1-11. Instead, he received an email from an Ocwen attorney asserting for the first time that the loan modification could not be completed because of alleged title insurance issues. Ms. Edling's email, dated July 17, 2015, indicated he had thirty days to get title to the property "clear" if he "wished to proceed with the loan modification", with no further explanation. CP 4-5.

Emails exchanged with Ms. Edling between July 17-23, 2015 make clear that Ocwen was falsely contending that junior liens somehow prevented Deutsche, a first position lienholder, from having clear title to the property. Ocwen was contending, in contravention of Washington law,

that its position was compromised such that a title insurance company could not give it clear title in the event of a foreclosure. CP 79-87. In reality, the title document eventually provided, which was **not** a title report, merely listed all **potential** liens on the property which would affect Mr. Howard's ability to sell or transfer the property, but they had no impact whatsoever upon Deutsche's lien rights in the event of a subsequent foreclosure. Mr. Howard noted in his July 24, 2015 email that Deutsche had already completed a judicial foreclosure of the property which was going to be "unwound" as a result of the settlement. Deutsche would be reinstated to its first lien position because the Deed of Trust would have remained in effect once the Judgement of Foreclosure was vacated. *Id.* CP 90-96. Title for Deutsche was demonstrably "clear".

The referenced document was nothing more than a lien and encumbrance search. CP 90-96. It incorrectly listed title as being vested in Mr. Howard on **June 19, 2015** – information that Ocwen and Deutsche knew was not true. CP 91. Title had transferred to Deutsche on **June 10, 2013** (CP 160-164), as evidenced by the Decree of Foreclosure, Sheriff's Levy on Real Property and Order of Sale, and Order Confirming Sheriff's Sale recorded as Document No. 20131021000790, making clear the identity of the current title holder. CP 92.

The Lien and Encumbrance Search is not what the defendants

represented it to be – a prohibition on Deutsche vacating the Judgment of Foreclosure and resuming its first lien position unless other potential liens are satisfied. CP 229-254.[1] The Lien and Encumbrance Search is dated **June 19, 2015** – almost one month before Ms. Edling notified Mr. Howard that its contents were allegedly precluding completion of the loan modification. CP 91. Ocwen and Deutsche intentionally delayed as long as possible in order to have the Mandate issued in the Court of Appeals case, which would allow them to seek attorneys' fees and costs against him, but also to induce him to file dismissals of his claims, before telling him that they were taking the position that the settlement agreement and loan modification were not valid. CP 233.

The liens entered against Mr. Howard had no effect whatsoever on the property on the date of the report since they were foreclosed out by the first position lienholder. CP 160-164. The report did list judgments entered against Mr. Howard personally, but any lien rights to real property owned by him terminated when the foreclosure judgment was entered, consistent with the Judgment of Foreclosure, and the Defendants' position in this and other litigation. RCW 61.12.060; 61.12.090. CP 160-164. Mr. Howard's only interest in the property at that time was his right to his homestead

[1] Document disclaimer: "THIS IS NOT a title report since no examination has been made of the title to the above-described property. Our search for apparent encumbrances was limited to our Tract Indices, and therefore above listings do not include additional matters which might have been disclosed by an examination of the record title." CP 94.

exemption rights in the amount of $125,000.00 over and above the debt owed to Deutsche. RCW 6.13.030. Washington adheres to the "first in time, first in right" lien theory.[2] Deutsche's Deed of Trust was in first position and the Judgment of Foreclosure foreclosed that lien, to the detriment of any lienholder sitting behind it. CP 160-164. But since Ocwen and Deutsche agreed to void the transfer of title, Deutsche would simply have resumed its first lien position.

In an email exchange with Ms. Edling, dated July 25, 2015, she admitted that Ocwen was complaining about alleged property tax arrears, even though it was Ocwen was supposed to be paying them. This was merely another unsupported excuse for not adhering to the contract terms. She later began the assertions about the alleged title defects. CP 79-87. Ms. Edling also admitted that one of the "title issues" was a Lis Pendens that had been filed by Deutsche and which she refused to release until her client's new demands about "clearing title" were satisfied. CP 78-87. Thus, Deutsche and Ocwen were contending that their own pleading was interfering with the clear title on the property. *Id.*

What became clear to Mr. Howard is that Ocwen and Deutsche intentionally tricked him into dismissing all of his pending claims in return for a settlement agreement and loan modification that they never intended

[2] *Homann v. Huber*, 38 Wn.2d 190, 198, 228 P.2d 466 (1951).

to fulfill. CP 1-11; 97-100. Ocwen, acting as the agent for Deutsche, breached the terms of the loan modification and settlement agreement, and it did so intentionally because they never intended to adhere to any of the proffered terms. CP 1-11; 97-100.

When Mr. Howard filed his lawsuit, he named Deutsche in its individual capacity, as well as in its capacity as the trustee of the securitized trust that owned Mr. Howard's loan, and which acquired title to the property through judicial foreclosure. CP 1-46. On April 1, 2016, Deutsche, in its individual capacity, moved to dismiss those claims (CP 138-146) which was supported by a Request for Judicial Notice that provided the trial court with documentation relating to the entire history of the litigation. CP 147-228.

Ocwen and Deutsche in its capacity as trustee also filed a Motion to Dismiss. CP 229-254. They argued that because there was vague language about the need for "clear title" (with no definition of what that meant in light of the condition of the title and Deutsche's previous position as the first position lienholder) buried in the documentation, Mr. Howard did not fulfill its terms. They maintained that Deutsche was acting within its rights to refuse to honor the loan modification that they had proffered to Mr. Howard in order to get him to dismiss his pending appeals. CP 231-232. They maintained that it was just "sour grapes". *Id.*

Ocwen and Deutsche also contended that the "condition precedent, 'that a clear and marketable title policy can be issued'" was breached, without providing any evidence whatsoever that such a policy could not be issued nor explaining why Deutsche returning to its original first lien position was not evidence of its "clear title". CP 234. Including the fact that title to the property had already transferred to Deutsche free and clear of all of those liens. CP 233-234. "A Superior Court judgment and subsequent sheriff's sale in 2013 extinguished [Mr. Howard's] interest in the subject property." CP 231. All of this was ignored by the trial court and on appeal.

The Judgment of Foreclosure also makes this clear, referring first to the Deed of Trust signed by Mr. Howard and recorded on August 17, 2007 as Document No. 20070817001240 in the records of King County, as supporting a "valid lien for the amount of Deutsche Bank's judgment set forth in paragraph 1 above against all the real property . . ." CP 163. It notes that the "lien is **superior to any interest, lien, or claim of Howard, the Third-Party Defendants, or any of them, in the Real Property."** CP 163 (emphasis added). At Paragraph 5, the Judgment requires that:

> Howard and all persons claiming through or under him, as purchasers, encumbrancers, or otherwise; and any and all other persons claiming any right, title, or claim of interest in and to the Real Property or any part thereof subsequent to August 9, 2007, all such claims being inferior and subordinate to Deutsche Bank's deed of trust lien, are hereby forever foreclosed of all interest, lien or claim in the

> Real Property described above and every portion thereof excepting only any statutory right of redemption as any of them may have for an eight month period pursuant to RCW 6.23.020(1)(a).

CP 163-164.

Ocwen and Deutsche glossed over the particulars of their offer and the self-evident limitations of the Lien and Encumbrance Search (as well as the falsehoods contained therein) and minimized their intentional acts by calling the offer of a loan modification and settlement agreement an "olive branch" to Mr. Howard, as if it were a gift. Instead, it was an attempt to put an end of lengthy and difficult litigation for everyone involved. But here, Ocwen and Deutsche knew and had known for years about the judgment liens since they were identified in the judicial foreclosure proceeding, and most of them were included as Third-Party Defendants. CP 161-162 (note the case caption). Ocwen and Deutsche also knew that Mr. Howard had not redeemed the property from the foreclosure. RCW 6.23.020(1)(a). CP 161. At the time of the offer, Deutsche owned the Property free and clear of liens following the sale and the redemption period. CP 160-164; 182-206.

Hearing on the Motions to Dismiss was held on June 10, 2016 and Mr. Howard did not file a Response, instead filing a Motion to Continue, apparently believing that he therefore did not need to file a response. CP

407-413. Mr. Howard appeared at the hearing on June 10, 2016 and participated in oral argument. CP 417.

Because Mr. Howard was acting *pro se* and had not filed a responsive brief, his oral argument constitutes the "arguments" that he made to the trial court. They were framed by the Court's questions and his responses, including references to the documents that were part of the record under review. The Court entered an Order Granting the Motion to Dismiss filed by Deutsche. Mr. Howard filed a Motion for Reconsideration, which was denied on July 5, 2016. CP 430-431. An appeal ensued.

V. STANDARD ON REVIEW

RAP 13.4(b) sets forth the considerations governing acceptance of review by the Supreme Court. Mr. Howard maintains the Appellate Court's decision is conflict with this Court's decisions regarding the proper application of CR 12(b)(6) and is in conflict with case law.

VI. ARGUMENT

A. Division I's Decision is not supported by Washington case law.

When rendering its decision affirming the trial court's Order, the Court of Appeals erroneously found in its Opinion that Mr. Howard did not make many of the arguments below. Op. 7-8. However, a review of the hearing transcript confirms that he did make those arguments, although

they were inarticulately presented to the trial court and were a bit convoluted because of his responses to questions raised by the trial court. Mr. Howard and Judge Hill referenced the Complaint and attachments when discussing the arguments he presented. VR 16:4-22:9. Those included Mr. Howard's Verification of the Complaint, as well as his testimony about actions taken in connection with his attempts to comply with the loan modification terms. CP 97-100. Mr. Howard specifically argued that Ocwen and Deutsche were really trying to change the terms of the parties' agreements after he had performed his obligation, and that they had deliberately used language to create the false impression that he had agreed to "clear" liens that were junior to Deutsche's first mortgage lien position, even though those liens were avoided in the judicial foreclosure process. VR 21:9-22:8.

The **only** language in the loan modification addressing title is at Paragraph 2, which reads the modification is subject to "clear title" and that "a clear and marketable title policy can be issued." CP 72. As Mr. Howard noted at oral argument and in his Complaint, the Note and Deed of Trust owned by Deutsche was in first lien position. Therefore, Deutsche **did** have clear title for its lien at all times during the non-judicial and the judicial foreclosure process. There were no liens superior to the first mortgage lien. *Id.*; VR 21:9-22:8.

The loan modification was created and sent to Mr. Howard by Ocwen on behalf of Deutsche, which means that the plain language of the agreement controls. Given Deutsche's lien position, the lack of any other language about title to the property and there being no definition of "clear title" therein, as well as the repeated assertions that the original loan Note and Deed of Trust would remain in full force and effect after rescission of the Judgment of Foreclosure and Confirmation of the Sale. Thus, the reasonable interpretation of the "title" language in Paragraph 2 is that which Mr. Howard argued – that Deutsche have "clear title" solely in relation to its first position lien. There is nothing in the modification agreement which would lead to a reasonable conclusion that Mr. Howard was agreeing to clear any or all of the subordinate liens on the property, which had no bearing whatsoever to the Deutsche lien. CP 71-78.

Mr. Howard also argued below that Ocwen and Deutsche intentionally delayed as long as possible so that the Mandate issued in the Court of Appeals case would be issued and allow them to seek attorneys' fees and costs against him, but also to induce him to file dismissals of his claims, before telling him that the Modification Agreement was not valid. CP 233; VR 16:22-22:8.

1. Standard on Review at the Court of Appeals.

Mr. Howard argued to the Court of Appeals that it should apply that standard for review as one under CR 12(b)(6). Instead, the Court of Appeals applied the CR 56 analysis in spite of the ruling.

> A trial court may grant dismissal for failure to state a claim under CR 12(b)(6) only if "'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'" *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985); *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). CR 12(b)(6) motions should be granted "sparingly and with care". *Orwick*, at 254.

Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 744 P.2d 1032 (1987). Thus, there could be no affirmance of the trial court.

When determining whether an issue of material fact exists on summary judgment, a court must construe all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), *review denied* 175 Wn.2d 1010, 287 P.3d 594. Mr. Howard maintains that even under this standard, the trial court erred.

2. The Court of Appeals did not engage in the required analysis of the facts and did not apply the law appropriately.

Ocwen and Deutsche argued below that “a title report obtained on

the Property revealed that title was not clear . . .” CP 234 (lines 10-12). This was a blatant misrepresentation as the Lien and Encumbrance Search was explicitly identified internally as “NOT (sic)” being a title report. Defendants did not advise the trial court that the document was facially in error (indicating that title was vested in Mr. Howard), nor that it was not a title report and merely a listing of potential liens and encumbrances from the title company’s own records. CP 229-254. That information was contained in the attached documents, but Defendants had an obligation not to mislead the trial court with assertions that the document was a “title report” and that its contents confirmed a defective lien position by Deutsche. RPC 3.3.

Similarly, Defendants did not confirm that the vacation of the Judgment of Judicial Foreclosure (CP 160-164) would have restored Deutsche’ first position lien status. CP 229-254. *See, In re Foreclosure of Liens*, 117 Wn.2d 77 (1991). Although the *Foreclosure* case involved vacation of a tax foreclosure judgment, it nevertheless makes clear that when a judgment of foreclosure is vacated, the lienholders retain the position they had before the foreclosure. This Court held that the trial court did not have jurisdiction to allow the sale to occur, so the transfer was void. It is relevant here because it demonstrates what happens when a foreclosure judgment is vacated. Deutsche would resume its first lien

position by way of the Deed of Trust, rendering the other liens irrelevant to Deutsche. *Id.* The Defendants should not benefit from misleading the trial court and the Court of Appeals should not have allowed the Defendants' wrongdoing to be rewarded, especially when the party on the other side is representing himself *pro se*.

3. There were genuine issues of material fact present before the trial court which precluded granting summary judgment or dismissal.

Mr. Howard received an unsolicited loan modification and a settlement agreement from Ocwen. Based upon a reasonable person's understanding of the "objective manifestations of the contracts", he accepted their terms on the date to which the acceptance time had been extended. CP 1-11; 97-100. *See, Wash. Fed. Sav. & Loan Ass'n v. McNaughton Group,* 179 Wn.App. 319, 319 P.3 805 (Div. 1, 2014); *Hogland v. Meeks,* 139 Wn.App. 854, 170 P.3d 668 (2012). He returned the signed documents, made the payments required, dismissed claims and then waited. He believed that the entire matter of fighting to save his home would soon be over. *Id*.

While the history of contract interpretation in Washington case law makes clear that the "objective" standard is applied to contract scrutiny, there must be "mutual assent" (otherwise referred to historically as a meeting of the minds). When a court is required to determine whether a

party intended to contract, that party will be held to what a reasonable person in the same position as the other person would conclude that his agreement would mean. *Nye v. Univ. of WA,* 163 Wn.App. 875, 260 P.3d 1000, review denied, 173 Wn.2d 1018, 272 P.3d 247 (2012); *City of Everett v. Sumstad's Estate,* 95 Wn.2d 853, 631 P.2d 366 (1981).

Here, in light of what the Defendants were proposing (restoring title to the Property in him with a first lien position under modified loan terms), Mr. Howard's reasonable belief was that Deutsche would have clear title to the property once "vesting" was restored, because any other liens were inferior to Deutsche's Deed of Trust. CP 1-49; 97-100.

Mr. Howard performed under the terms of the proffered unilateral contracts by signing and making the first two payments due under the loan modification. *Id*. Because the loan modification was a unilateral contract, meaning that Mr. Howard could not negotiate its terms and had to "take it or leave it", when he performed according to the terms of the contract, it confirmed that he had accepted the contract. His "substantial performance" was enough to accept the contractual terms. *Storti v. Univ. of WA,* 330 P.2d 159, 306 Ed. Law Rep. 1088 (Wash. 2014). Further, the payments made by Mr. Howard constituted the contractual requirement of "consideration". *Id.* Mr. Howard reasonably expected that once he had performed by paying the consideration he would receive the benefit he had

been promised in exchange and he relied upon it to his detriment by dismissing his other appeals. Ocwen and Deutsche then breached those terms by refusing to honor them, only after they gained what they wanted. Their actions were based upon a false assertion that there was "title report" prohibition on completing the transaction. CP 229-254. RCW 60.11.090.

When reviewing a purported contract to determine enforceability, the Court must ascertain how to interpret and decide construction of the contract. Interpretation involves a court determining what meaning it will give to the language of the contract by considering the objective manifestations of the parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d. 222 (1990); *Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005). The intent of the contractual parties needs to be decided by considering the contract as a whole and the meaning of the language used by the parties. *Saunders v. Meyers*, 175 Wn. App. 427, 306 P.3d 91 (2013). The Court must apply relevant legal policies to the specific facts involved in the making of the contract to determine the legal consequences that will result therefrom. *Intl. Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 313 P.3d 395 (2013); *Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn.2d 493.

When the trial court considered the contents of the loan modification to decide the proper construction of the contract and its

interpretation, it had to use the "reasonable" standard. The Court should have considered and decided what was a "reasonable meaning" of the "clear title" language was in the loan modification, and it did not do so. *Chevalier v. Woemmper,* 172 Wn.App. 467, 920 P.3d 1031 (2012). "Clear title" in that document reasonably referred to returning the first position lienholder to its former status. A reasonable person would certainly have understood that once the Judgment of Foreclosure was vacated, title would re-vest in Mr. Howard and the lien rights evidenced by the Deed of Trust would be restored. RCW 60.11 *et seq.* The trial court was required to use an understanding of the contract language that would apply to an "average person". *Wilkinson v. Chiwawa Comm. Ass'n,* 180 Wn.2d 241, 327 P.3d 614 (2014). The alleged inability to modify the loan was nothing more than the creation of Defendants Ocwen and Deutsche and their attorneys after they obtained what they wanted – Mr. Howard's dismissals.

The long-standing principle of contract interpretation is that any ambiguity in a contract is construed against the drafter. *McKasson v. Johnson,* 178 Wn.App. 422, 315 P.3d 1138 (2013); *Outdoor Advertising v. Harwood,* 162 Wn.App. 385, 254 P.3d 208 (2011). The rule is often applied when the contract in question is a contract of adhesion, such as the situation is here, because of the unequal bargaining positions of the parties. Restatement (Second) of Contracts § 206 comment a (1981).

Further, Washington Courts are required to consider the context of the entry into the subject contract when evaluating whether or not a contract was formed and enforceable. *Top Line Builders, Inc. v. Bovenkamp*, 179 Wn.App. 794, 320 P.3d 130 (2014); *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012). The totality of the circumstances here – the "context" – make clear what Mr. Howard reasonably believed and the deceptions in which Ocwen and Deutsche were engaged as regards alleged "title issues", especially since they had named most of those entities as defendants in the judicial foreclosure. The meaning of a writing "can almost never be plain except in a context." *Berg v. Hudesman,* 115 Wn.2d 657, (quoting Restatement (Second) of Contracts § 212 comment b (1981)).

Every contract in Washington imposes upon the parties thereto a duty of good faith and fair dealing. *Rekhter v. State Dept. of Social and Health Services*, 180 Wn.2d 102, 323 P.3d 1036 (2014); *Ross v. Ticor Title Ins. Co.*, 135 Wn.App. 182, 143 P.3d 885 (2006), aff'd in part disapproved in part on other grounds, 162 Wn.2d 493, 172 P.3d 701 (2007). Here, Ocwen and Deutsche did not act in good faith with Mr. Howard nor deal with him fairly. They induced him to sign the documents when they: (1) knew the process involved in vacating the Judgment of Foreclosure so that its first lien position would be restored; (2) knew of the

existence of the other judgment creditors since most of them were named as third-party defendants in its lawsuit; (3) knew that Mr. Howard had performed under the contract by signing, making payments and dismissing his appeals. The Washington Legislature defined "good faith" at RCW 62A.1-201(19) as "honesty in fact in the conduct in the transaction concerned." Ocwen and Deutsche never dealt with Mr. Howard in good faith and unfortunately, that behavior has been condoned by the Court of Appeals in its refusal to acknowledge that Mr. Howard, although inarticulately and without written briefing, did advance these arguments at the trial court. Deutsche and Ocwen should have been denied dismissal until the trial court could engage in an appropriate analysis of the enforceability of the loan modification and the settlement agreement.

VII. CONCLUSION

Mr. Howard respectfully requests that this Court agree to accept review of this case. The Court of Appeals' Opinion is contrary to the holding of this Court in other contract interpretation cases and will harm other members of the public if it is permitted to stand as binding authority in Washington, as supports the position that it is acceptable under the law to induce unsophisticated *pro se* litigants into dismissing their claims in return for empty promises by sophisticated litigants.

//

Respectfully submitted this 4th day of June, 2018.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.

/s/ Melissa A. Huelsman
Melissa A. Huelsman, WSBA 30935
Attorney for Appellant Ryan Howard
705 Second Avenue, Suite 601
Seattle, WA 98104
P (206) 447-0103 / Fax (206) 673-8220
Email:
mhuelsman@predatorylendinglaw.com

CERTIFICATE OF SERVICE

I, Tony Dondero, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on Monday, June 4, 2018, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

Ryan S. Moore, WSBA #50098 Houser & Allison 1601 5th Avenue, Suite 850 Seattle, WA 98101 206-596-7838 rmoore@houser-law.com	□ Legal Messenger ☒ Electronic Mail □ Federal Express Other: Regular U.S. mail, postage prepaid
Emilie Ka-Aw Edling Houser & Allison APC 9600 Oak St., Suite 570 Portland, OR 97223 eedling@houser-law.com	□ Legal Messenger ☒ Electronic Mail □ Federal Express Other: Regular U.S. mail, postage prepaid

I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated this Monday, June 4, 2018, at Seattle, Washington.

Tony Dondero, Paralegal

ATTACHMENT A

Procedural History

Mr. Howard, through his attorney David Leen, filed suit in King County Superior Court on February 2, 2011 in Case Number 11-2-05565-5 for damages, criminal profiteering, unfair and deceptive practices, and injunctive relief against defendants Pierce Commercial Bank, Regional Trustee Services, and Deutsche Bank. Mr. Howard filed a motion for preliminary injunction in order to enjoin a pending non-judicial foreclosure sale. He obtained a temporary restraining order. CP 9-11. The attempted foreclosure was of his residence located at 11310 Riviera Place NE in Seattle, Washington.

On May 8, 2012 Deutsche filed a Motion to Dismiss set for hearing on May 25, 2012. CP 352-362, 417-420, 497-503. On May 17, 2012, Mr. Howard's counsel, Mr. Leen, filed a Motion to Continue Trial Date set for hearing on the same date. Mr.Leen filed a Response. CP 477-486. The Motion for Continuance was granted and a new trial date was set, including an amended case schedule. The Motion to Dismiss was continued.

Mr. Howard amended his Complaint and filed it on August 21, 2012. Deutsche filed a Supplemental Brief in support of its Motion on August 22, 2012. Mr. Howard's additional Response was filed on August 23, 2012. A hearing on the Motion to Dismiss was held on August 24, 2012 and an Order granting Deutsche Bank's Motion to Dismiss for claims related to RICO violations, deceptive practices, and promissory estoppel was signed the same day. However, Judge Armstrong included that the caveat that Mr. Howard's "fraud in the inducement claim may be asserted as a defense to foreclosure."

On September 11, 2012 Deutsche filed an Answer and Third-Party Complaint and Counter-Claim and amended its Answer on October 2, 2012. On November 29, 2012, Mr. Howard's counsel filed an Answer to Deutsche's Counterclaim. On December 13, 2012,

Deutsche filed a Motion for Judgment on the Pleadings and for Failure to Prosecute. Mr. Howard's Response was filed on December 18, 2012 and Deutsche filed its Reply on December 19, 2012.

On December 20, 2012 Judge Armstrong signed an Order Denying Deutsche's Motion for Judgment on the Pleadings; filed with the court on December 21, 2012.

On February 15, 2013 Deutsche filed a Motion for Summary Judgment. On March 18, 2013, Mr. Howard filed his Response and his Declaration. On April 1, 2013, an Order Denying Summary Judgment was signed by Judge Timothy Bradshaw and it was filed on April 3, 2013.

On April 26, 2013, Deutsche filed another Answer and Counter-Claim. On May 23, 2013, Deutsche filed a Motion for Entry of Judgment and noted it for hearing on June 3, 2013. Mr. Howard, who had begun representing himself, filed an Objection/Opposition to the hearing on May 31, 2013. Judge Bradshaw entered a Judgment of Foreclosure on June 10, 2013, along with an Order Granting the Motion for Entry of Judgment. CP 110-117. A Praecipe for Execution on Judgment and Issuance of Order of Sale was filed by Deutsche on June 20, 2013. Mr. Howard filed his Notice of Appeal in that case, *pro se*, on July 8, 2013.

On August 16, 2013, a Sheriff's Return on Order of Sale of Real Property was filed. The Sheriff's Public Notice of Sale of Real Property was also filed on August 16, 2013.

On May 21, 2015, Mr. Howard was offered settlement terms which he maintains that he accepted, but which have become the subject of this lawsuit. On September 3, 2015, Mr. Howard filed the lawsuit upon which this appeal is based against Ocwen and Deutsche relating to its breach of the loan modification. CP 1-46.

On April 1, 2016, Defendants Deutsche and Ocwen filed a Motion to Dismiss the case, and a Request for Judicial Notice, and noted the hearing for May 27, 2016. CP 229-336. On

April 14, 2016, Deutsche renoted the hearing for June 10, 2016. CP 337-338

Mr. Howard filed a Motion to Continue the hearing on June 10, 2016, however Judge Hollis Hill heard the Motion to Dismiss that day. CP 393-405.

An Order Granting Ocwen and Deutsche Bank's Motion to Dismiss With Prejudice was signed by Judge Hill and entered on June 10, 2016. CP 435-436. Mr. Howard filed a Motion for Reconsideration on June 20, 2016, (CP 416-426) and it was denied by Judge Hill on July 6, 2016. CP 430.

On August 3, 2016, Mr. Howard filed a Notice of Appeal. CP 432-433.

On December 28, 2016, Mr. Howard filed another Notice of Appeal and amended it on January 9, 2017

The Court of Appeals, Division I, issued an opinion affirming the trial court's decision dismissing Mr. Howard's lawsuit, was issued and filed on March 5, 2018.

ATTACHMENT B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RYAN R. HOWARD, an individual, Appellant, v. OCWEN LOAN SERVICING, LLC, et al., DEUTSCHE BANK NATIONAL TRUST COMPANY a Delaware corporation, and its SUCCESSOR AND ASSIGNS: DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the IndyMac INDA Mortgage Loan Trust 2007-AR7, Mortgage Pass-Through Certificates, Series 2007-AR7 under the Pooling and Servicing Agreement—dated as of September 1, 2007—(or dates otherwise) stated) SEC Accession No. 0000905148) -07-006297 I.R.S. EIN: 95-4791925, Respondents.	No. 75593-5-I DIVISION ONE UNPUBLISHED OPINION FILED: March 5, 2018

MANN, J. — Ryan Howard appeals the trial court's dismissal of his lawsuit alleging breach of contract, misrepresentation, and several other claims against Ocwen Loan Servicing, L.L.C. and Deutsche Bank National Trust Company. Because the trial court considered material outside the pleadings, we review the dismissal of Howard's claims

under the summary judgment standard. However, we decline to address the majority of Howard's claims because they were not raised below. Because he otherwise raises no genuine issue of material fact, we affirm.

FACTS

This is the second appeal involving real property previously owned by Howard. The background facts surrounding the 2013 foreclosure of the property are derived from our unpublished prior decision affirming the judgment of foreclosure. Howard v. Pierce Commercial Bank, No. 70629-2-I (Wash. Ct. App. Mar. 9, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/706292.pdf.

In 2007, Howard obtained a loan from Pierce Commercial Bank to purchase a home. Howard eventually defaulted on the loan and the lender initiated nonjudicial foreclosure proceedings. In 2011, Howard filed a lawsuit against Deutsche Bank National Trust Company, which he identified as the beneficiary of the deed of trust and promissory note, and other entities. He sought damages and sought to enjoin the pending trustee's sale.

Deutsche Bank asserted counterclaims and initiated a judicial foreclosure. After entry of judgments as to all other parties, Howard and Deutsche Bank agreed to settle the case and entered into a memorandum of settlement prepared by a mediator. After disputes arose with regard to the language of formal settlement documents and a stipulated judgment, Deutsche Bank filed a motion for entry of judgment based on the settlement memorandum.

In 2013, the trial court granted Deutsche Bank's motion and entered a judgment of foreclosure. The court issued an order of sale and the King County Sheriff's Office sold the property at auction in August 2013 to Deutsche Bank.

Howard appealed the judgment of foreclosure enforcing the settlement agreement. This court affirmed. Howard filed a petition for review in the Washington State Supreme Court. The Supreme Court advised Howard that his petition was not timely filed, but allowed him the opportunity to file a motion for an extension of time to file a petition.

Shortly after Howard filed his petition for review, in May 2015, the loan servicer, Ocwen Loan Servicing, L.L.C. and Deutsche Bank as trustee,[1] offered Howard a loan modification, in conjunction with a settlement and release agreement and a stipulated order of dismissal that would resolve the 2011 litigation. These agreements would have the effect of undoing the prior foreclosure, reinstating Howard's loan, and resolving the 2011 foreclosure litigation.

The loan modification agreement was subject to the following condition:

> This Modification is subject to clear title and will be effective on July 1, 2015, on condition that a clear and marketable title policy can be issued.

In June 2015, Howard agreed to the settlement terms and executed the documents.[2] Howard tendered a down payment, along with the settlement documents, and then, at the end of the month, made the first payment due under the loan modification agreement. Howard confirmed that he would inform the Supreme Court

---

[1] It is undisputed that at some point Howard's loan was transferred to Deutsche Bank National Trust Company as trustee for IndyMac INDA Mortgage Loan trust 2007-AR7, Mortgage Pass-Through Certificates Series 2007-AR7.

[2] The settlement documents Howard submitted as attachments to his complaint are unsigned, but Howard asserts that he signed and executed all settlement documents on June 10, 2015.

that he did not intend to file a motion for an extension of time to file a petition for review, and would instead file a stipulation and order of dismissal.

In July, Ocwen's counsel informed Howard that the loan modification could not proceed because there were still outstanding liens on the property which prevented the issuance of a clear title policy. Counsel told Howard that if he wished to proceed with modification, Ocwen would allow him an additional 30 days to clear the title. Alternatively, counsel offered to collaborate on a stipulation that would enable him to seek an extension of the time to file a petition for review and proceed with his appeal.

Howard maintained that Ocwen had accepted his payments and the loan modification agreement could not be revoked. He pointed out that neither tax liens nor a lis pendens were barriers to clear title and that the remaining liens on record were foreclosed prior to sheriff's sale in 2013. Ocwen agreed that neither the taxes nor lis pendens were problematic, but stated that the prior liens were not foreclosed unless the sheriff's deed was recorded, which did not, and would not, occur if the parties proceeded with loan modification. In August 2015, Ocwen formally notified Howard that the loan modification agreement could not be consummated because he had not fulfilled his obligation to clear title. Ocwen's counsel returned Howard's down payment and informed him that Ocwen would reimburse him for his subsequent payment.

On September 3, 2015, Howard, acting pro se, filed the lawsuit at issue against Deutsche Bank as trustee and Ocwen.[3] Howard's 46-page complaint alleged 11 causes

[3] Howard sued Deutsche Bank National Trust Company both as trustee and in its individual capacity. Deutsche Bank, in its non-trustee status, separately moved to dismiss on the ground that it had no interest in the property or connection to the proceedings separate from its role as trustee. The court entered a separate order granting that motion to dismiss. Although Howard designates both orders of

of action, including breach of contract, negligent inducement and fraud, misrepresentation, and criminal profiteering. His complaint primarily alleged that he performed his obligations under the settlement agreements, the loan modification went into effect, and the defendants acted unlawfully by belatedly attempting to revoke the agreement. Howard claimed that it was impossible for him to satisfy the condition precedent because only the defendants could release the lis pendens.

On April 1, 2016, Ocwen and Deutsche Bank jointly filed a motion to dismiss. The defendants argued that Howard failed to satisfy an express condition precedent, relieving the defendants from any liability under the settlement agreement. The defendants also contended that Howard failed to state a claim for relief with respect to the other 10 causes of action asserted in the complaint. Howard did not file a response to the motion.

On the date of the hearing on the defendants' motion, June 10, 2016, Howard filed a motion for a continuance. The court declined to consider the untimely motion. The court allowed Howard to orally respond to the defendants' motion. Howard asserted, without explanation or corroborating evidence, that any liens listed against the property were not "valid." He also contended that he had a right to enforce the agreements because he made initial payments, which the defendants accepted, and he reasonably believed that no further action was required of him. Again, he claimed that the defendants made it impossible to comply with the condition to clear title because they refused to release the lis pendens filed in connection with the foreclosure litigation.

---

dismissal in his notice of appeal, he does not challenge the dismissal of his claims against Deutsche Bank in its non-trustee status.

The court granted the motion, and later, denied Howard's motion for reconsideration. This appeal followed.[4]

ANALYSIS

We review a trial court's ruling on a motion to dismiss under CR 12(b)(6) de novo, as a question of law. FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014). A CR 12(b)(6) motion challenges the legal sufficiency of the allegations in a complaint. Contreras v. Crown Zellerbach Corp., 88 Wn.2d 735, 742, 565 P.2d 1173 (1977).

Either party may submit documents not included in the original complaint for the court to consider in evaluating a CR 12(b)(6) motion. Bavand v. OneWest Bank, FSB, 176 Wn. App. 475, 485, 309 P.3d 636 (2013); Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 726, 189 P.3d 168 (2008). Such submissions generally convert a CR 12(b)(6) motion into a motion for summary judgment. Bavand, 176 Wn. App. at 485. However, in considering a motion to dismiss, the trial court may take judicial notice of public documents if their authenticity cannot reasonably be contested, and the court may also consider documents whose contents are alleged in a complaint but not physically attached to the pleadings. Rodriguez, 144 Wn. App. at 725-26.

In support of his complaint, Howard filed an affidavit and several attachments, including unsigned copies of the proposed settlement and release agreement, the loan modification agreement, and the proposed stipulation and order of dismissal. He also submitted printed copies of e-mail correspondence with Ocwen's counsel and the

[4] Although Howard represented himself below, he is represented by counsel on appeal.

results of the lien and encumbrance search obtained by Ocwen in June 2015.[5] In connection with the motion to dismiss, Deutsche Bank requested judicial notice of several court orders related to the foreclosure, documents filed in that prior litigation and other court documents.

Unlike the documents submitted by the defendants, the documents Howard filed as attachments to his complaint were not public documents. And while the complaint refers to some of the attached documents, much of the content is not included in the allegations of the complaint. The trial court's order granting the defendant's motion indicates that it considered all the attachments. Accordingly, review under the summary judgment standard is appropriate.

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). We review an order granting summary judgment de novo; all facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 685, 871 P.2d 146 (1994); Greater Harbor, 132 Wn.2d at 279.

Howard contends that the trial court improperly dismissed his lawsuit based on a variety of arguments and theories not presented to the court below. For instance, he raises several claims based on his subjective understanding of the obligation to "clear

[5] Howard's attachments were stamped as "Sealed," but he conceded there was no court order sealing the documents.

title" and his opinion about whether satisfying preexisting liens was necessary to protect Deutsche Bank's position as the superior lienholder. Howard maintains that the defendants knew about the other liens and knew that he could not afford to satisfy them. Therefore, he claims that the defendants "intentionally tricked" him into agreeing to dismiss his pending litigation by holding out the "false promise" of loan modification. Howard also contends that the trial court improperly dismissed his claims that the defendants breached the duty of good faith and fair dealing, violated the Consumer Protection Act, and engaged in negligent and intentional misrepresentation.

An appeals court generally will not review an "issue, theory, argument, or claim of error not presented at the trial court level." RAP 2.5(a); Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001). The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid unnecessary rehearings. Postema v. Postema Enters., Inc., 118 Wn. App. 185, 193, 72 P.3d 1122 (2003). While appellate courts retain discretion to consider arguments not raised below, we exercise such discretion sparingly. Karlberg v. Otten, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012). Specific to summary judgment, RAP 9.12 provides that the "appellate court will consider only evidence and issues called to the attention of the trial court." See, e.g., Vernon v. Aacres Allvest, LLC, 183 Wn. App. 422, 436, 333 P.3d 534 (2014) (declining to consider argument on appeal not made during summary judgment proceedings below). This rule ensures that we engage in the same inquiry as the trial court. Vernon, 183 Wn. App. at 436. Based on these rules and the policies underlying them, we decline to address Howard's arguments asserted for the first time on appeal.

The only claim Howard raises on appeal that appears to be related to his arguments below is his contention that he substantially performed his obligations by making payments under the loan modification agreement and is therefore entitled to enforce the agreement.

The loan modification agreement was expressly made "subject to clear title." A condition precedent is a fact or event included in a contract that must take place before a right to performance arises. Ross v. Harding, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). Whether a contract provision is a condition precedent "depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances." Ross, 64 Wn.2d at 236. The intent of the parties to create a condition precedent may often be illuminated by phrases and words such as "on condition," "provided that," "so that," "when," "while," "after," or "as soon as." Ross, 64 Wn.2d at 237. A party's material breach or a failure to satisfy a condition precedent will discharge the duty of the other party. Jacks v. Blazer, 39 Wn.2d 277, 235 P.2d 187 (1951) (material breach); Ross, 64 Wn.2d at 240-41(condition precedent).

It is clear from the record that the "subject to clear title" provision was a condition precedent and that the property was subject to liens and encumbrances. Howard identifies no genuine issue of material fact with respect to these issues. There was no substantial performance with respect to the condition precedent. The doctrine of substantial performance is intended for the protection and relief of those who have faithfully endeavored to perform their contractual obligations in all material and substantial particulars, so that their contractual rights may not be forfeited because of

"mere technical inadvertent or unimportant omissions or defects." Donald W. Lyle, Inc. v. Heidner & Co., 45 Wn.2d 806, 812, 278 P.2d 650 (1954). The doctrine applies only in rare instances where only "minor and relatively unimportant deviations" remain to accomplish full contractual performance. Taylor v. Shigaki, 84 Wn. App. 723, 729, 930 P.2d 340 (1997) (quoting 17A AM. JUR. 2D CONTRACTS, § 634 (1991)). There is nothing in the record to suggest that the failure to satisfy the condition precedent was a minor omission that could be excused because Howard tendered two payments.

Deutsche Bank and Ocwen request reasonable attorney fees on appeal, citing Howard's prior appeal wherein we awarded attorney fees to Deutsche Bank under a provision of the deed of trust. The deed of trust is not in the record in this case, nor is it clear that the language of that provision, as cited in our prior opinion, encompasses the fees incurred to defend against this litigation to enforce the settlement and loan modification agreements. Nevertheless, the settlement agreement provides that "If any Party hereto commences any action arising out of this Agreement, including, without limitation, any action to enforce or interpret this Agreement, the prevailing party or parties in such action shall be entitled to recover its reasonable attorney's fees and other expenses incurred in such action." This provision supports the respondents' request for attorney fees. Accordingly, we award reasonable attorney fees to the respondents.

Affirmed.

WE CONCUR:

ATTACHMENT C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RYAN R. HOWARD, an individual, Appellant, v. OCWEN LOAN SERVICING, LLC, et al., DEUTSCHE BANK NATIONAL TRUST COMPANY a Delaware corporation, and its SUCCESSOR AND ASSIGNS: DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the IndyMac INDA Mortgage Loan Trust 2007-AR7, Mortgage Pass-Through Certificates, Series 2007-AR7 under the Pooling and Servicing Agreement—dated as of September 1, 2007—(or dates otherwise stated) SEC Accession No. 0000905148-07-006297 I.R.S. EIN: 95-4791925, Respondents.	No. 75593-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Ryan Howard has filed a motion for reconsideration of the court's opinion filed on March 5, 2018. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE PANEL:

Mann, A.C.J.

LAW OFFICES OF MELISSA HUELSMAN

June 04, 2018 - 5:10 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75593-5
Appellate Court Case Title:	Ryan R. Howard, App. v. Ocwen Loan Servicing, LLC, et al., Res.
Superior Court Case Number:	15-2-21740-2

The following documents have been uploaded:

- 755935_Petition_for_Review_20180604170955D1090618_1292.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Second Amended Petition for Review - Howard.pdf

A copy of the uploaded files will be sent to:

- eedling@houser-law.com
- rmoore@houser-law.com
- skuger@houser-law.com
- swilliams@houser-law.com

Comments:

Sender Name: Tony Dondero - Email: paralegal@predatorylendinglaw.com
Filing on Behalf of: Melissa Ann Huelsman - Email: Mhuelsman@predatorylendinglaw.com (Alternate Email: paralegal@predatorylendinglaw.com)

Address:
705 Second Ave.
Suite 601
Seattle, WA, 98104
Phone: (206) 447-0103

Note: The Filing Id is 20180604170955D1090618