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Supreme Court No. 98587-1
(Court of Appeals Cause No. 81047-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRAD L. BILLINGS and JOHNITA D. BILLINGS,

Petitioners/Appellants,

v.

BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK
AS TRUSTEE FOR CERTIFICATEHOLDERS OF THE CWALT, INC.
ALTERNATIVE LOAN TRUST 2007-OA17 MORTGAGE PASS-
THROUGH CERTIFICATES SERIES 2006-OA17, QUALITY LOAN
SERVICES OF WASHINGTON, INC., and JOHN DOES 1-10,

Respondents.

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR
REVIEW

John M. Thomas, WSBA No. 42447
McCarthy & Holthus, LLP
920 SW Third Avenue, 1st Floor
Portland, OR 97204
Telephone: (971) 201-3200
jthomas@mccarthyholthus.com
Of Attorneys for Respondent

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Respondent herein, by and through counsel, respectfully files this ANSWER TO PETITION FOR REVIEW.

I. Introduction

Petitioners Brad L. Billings and Johnnita D. Billings (the “Billings”) appealed the dismissal of their civil action challenging the right of Respondent Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificate Holders of the C. Walt, Inc. Alternative Loan Trust 2007-OA17, Mortgage Pass-Through Certificates Series 2006-OA17 (the “Trust”) to enforce a note and deed of trust granted by the Billings and an order of restitution in the Trust’s action for unlawful detainer following a completed nonjudicial foreclosure. The Billings filed a prior case against the Trust and the Court of Appeals affirmed dismissal of those claims, thus barring their ability to bring the later action under the doctrine of res judicata.

The Billings were mistaken that their latest attempt to set aside the Trust’s nonjudicial foreclosure is “a case of first impression.” It is not. The Washington Court of Appeals had already ruled that the transfer of a promissory note into a mortgage-backed- securities trust does not change the character of the note or the debt obligation on the note, because the borrower’s loan contract is distinct and separate from any assignment of the note. Therefore, even if the Billings’ latest case was not barred by res judicata—which it was—their basis for setting aside the Trust’s nonjudicial

foreclosure nonetheless fails as a matter of law, and the trial court did not err in dismissing the Billings' request for declaratory relief.

Finally, because the Trust had the right to and properly foreclosed on the Billings' property, the trial court correctly denied the Billings' motion to stay and granted the Trust's request for restitution in the unlawful detainer proceeding.

Respondent requests that the court deny the petition for review. The Court of Appeals did not "ignore" the Billings' arguments, instead concluding that res judicata barred their claims and, as to the eviction action, the Bank complied with the statutory requirements to evict the Billings.

II. Statement of the Case

On or about August 16, 2006, the Billings executed a Monthly Adjustable Rate Pay option Note (the "Note") in the principal amount of \$674,500.00. The Note was secured by a Deed of Trust in favor of Countrywide Bank, N.A., for real property commonly known as 802 4th Avenue SW, Puyallup, WA 98371 (the "Property"). The Deed of Trust was recorded in the Pierce County records as Instrument No. 201106210720.

The Note was subsequently endorsed to Country Wide Home Loans, Inc. ("Countrywide") and then endorsed in blank by Countrywide. The Note was subsequently transferred to the Trust. An Assignment of Deed of Trust was recorded in the county records. On February 26, 2015, Select Portfolio Servicing Corporation ("SPS"), as attorney in fact for the Trust, executed a

Beneficiary Declaration declaring that the Trust was the actual holder of the Note. (CP 503.) On or about February 28, 2015, the Trust appointed Quality Loan Service Corporation of Washington (“QLS”) as Successor Trustee under the Deed of Trust. (CP 634-35.)

In or about February 2011, the Billings defaulted on the Note and Deed of Trust by failing to make loan payments as they came due. (CP 495 at ¶ 6.) As a result, the Trust commenced a nonjudicial foreclosure proceeding, and a Notice of Trustee’s Sale was issued on October 13, 2015. (CP 516-19.) The Trust was the winning bidder at the sale and, thereafter, moved to evict the Billings. (CP 267 at ¶ 1.0; 520-22.)

The trial court granted defendants’ motions for summary judgment. (CP 641-44.) The court concluded that the Trust was the holder of the Note and had presented the original Note to the court. The court further held that the Deed of Trust followed the transfer of the Note and, therefore, the Trust had authority to commence the nonjudicial foreclosure. Finally, the court concluded that the Billings had waived any right to challenge the validity of the foreclosure sale because they did not seek to enjoin the sale before it occurred. (RP at 48:12-15.)

The Billings moved for reconsideration of the trial court’s order, which was denied on December 13, 2016. (CP 728.) The Billings appealed. (CP 729-34.) On June 5, 2018, after the Court of Appeals terminated review, the Billings filed another action in Pierce County, Case No. 18-2-08721-5, seeking declaratory relief (hereinafter, the “2018 Action”). (CP 498-508.) In

the 2018 Action—which, along with the Eviction, is part of the consolidated appeal—the Billings once again argued that the Trust had no right to foreclose on the Property, contending that the Billings’ “loan contract” (their Note and Deed of Trust) was illegally unilaterally modified when it was transferred to the Trust. (CP 500-08.) The Billings requested an order finding their Note and Deed of Trust void and of no force and effect. (CP 507-08.)

The Trust moved for summary judgment, arguing that the Billings had waived their right to contest the foreclosure and subsequent eviction and, in any case, that the 2018 Action was not an issue of first impression, but rather numerous courts had already rejected their argument that the assignment of a promissory note to a securitized trust somehow affected the borrower’s obligation under the note. (CP 351-57; 383-89.) The Trust also filed a motion to dismiss the 2018 Action, asserting that it failed to state a claim upon which relief could be granted and that it was barred by res judicata. (CP 511-21.)

On August 17, 2018, Superior Court Judge Jack Nevin granted the Trust’s motion to dismiss the 2018 Action. (CP 584-85.) On the same day, Superior Court Judge Edmund Murphy denied the Billings’ motion to stay the Eviction and granted the Trust’s motion for summary judgment, finding that the Trust had the right to foreclose, was the winning bidder at the foreclosure sale, and therefore established its right to an order or restitution as a matter of law. (CP 451-53.)

III. Issue Presented for Review

2. **Is there any basis, as required under the Washington Rules of Appellate Procedure 13.4 (a) or (b)(4) for this Court to accept discretionary review of this matter?**

IV. Argument

A. The Billings Waived Their Right to Challenge the Nonjudicial Foreclosure Because They Did Not Seek to Enjoin the Sale Before It Occurred.

The trial court correctly concluded that the Billings “waived their right to challenge the validity of the foreclosure sale because they did not seek to enjoin the trustee sale before it occurred.” (RP at 48:12-15.) While RCW 61.24.127(1) allows a borrower to bring a wrongful foreclosure claim for damages, subsections (2)(b)-(c) provide that the borrower’s claim “may not seek any remedy at law or in equity other than monetary damages [and] may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property.” Such relief is improper under RCW 61.24.127(1); *see also Merry v. Nw. Tr. Servs., Inc.*, 188 Wn. App. 174, 195, 352 P.3d 830 (2015) (plaintiff waived right to challenge foreclosure sale by not seeking to have it restrained prior to date of sale).

Neither the trial court nor Court of Appeals ignored the Billings arguments and correctly concluded that the Billings waived their right to challenge the nonjudicial foreclosure. (Opinion p. 4)

B. The 2018 Action Was Properly Dismissed on the Basis of Res Judicata.

The Billings argued that the superior court erred in dismissing the 2018 Action under *res judicata* or collateral estoppel. Dismissal was appropriate under either theory, however, because (1) the Billings should have litigated their claim for “declaratory relief” in their prior, wrongful foreclosure action (the 2016 Action); and (2) the issue of the enforceability of the Note and Deed of Trust was actually determined in the 2016 Action.

In the 2018 Action, the Billings argue that the Trust did not have the right to initiate foreclosure proceedings because their Loan was illegally unilaterally modified when the Note was transferred and the Deed of Trust assigned to the Trust. (CP 502-03.) The Billings sought an order declaring their Note and Deed of Trust void and of no force and effect. (CP 507-08.)

The 2016 Action was also predicated on the Billings’ assertion that the Note and Deed of Trust were not properly assigned to the Trust and therefore that the Trust was not the holder of the Note and did not have authority to initiate a nonjudicial foreclosure proceeding pursuant to the Deed of Trust. (*See* CP 322, 397.) The superior court granted the Trust’s motion for summary judgment in the 2016 Action and this Court affirmed, holding that the Billings waived their right to challenge the Trust’s right to foreclose by not seeking preliminary relief before the foreclosure sale. The court further stated that it was “undisputed that the [Trust] was the holder of the note and as such it was entitled to enforce the deed of trust through the nonjudicial foreclosure procedure set out in the [Deed of Trust Act].” *Id.* at *2 n.2.

Neither the trial court nor Court of Appeals ignored the Billings arguments and correctly concluded that the Affidavit of Marie McDonnell did not create any issue of material fact that precluded summary judgment.

.IV. Conclusion

. Discretionary review should be denied. The law concerning the foreclosure is well settled and the problem of the multiple lawsuits is one of the Billings own making, not the appellate court ignoring their issues. The public interest does not warrant review.

DATED: 9/8/2020

MCCARTHY & HOLTHUS LLP

s/ John Thomas
John Thomas, WSBA No 42447
jthomas@mccarthyholthus.com

CERTIFICATE OF SERVICE

I, Jacob Flatau, certify that on 9/8/2020, I served a copy of the foregoing Answer to Petition for Review, described as **RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW**, on the following person by U.S. First Class Mail and electronic service:

Lucy B. Gilbert
Hermitage Law
10660 NE Manor Lane
Bainbridge Island, WA 98110
Hermitagelaw@gmail.com

W. Jeff Barnes, Esq, PHV
W.J. Barnes, P.A.
1515 North Federal Highway, Suite 300
Boca Raton, Florida 33432
jeff@wjbarneslaw.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this Declaration was executed in Seattle, Washington.

DATED: 9/8/2020

MCCARTHY & HOLTHUS LLP

s/ Jacob Flatau
Legal Assistant

MCCARTHY HOLTHUS, LLP

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- vtrask@mccarthyholthus.com

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Sender Name: John Thomas - Email: jthomas@mccarthyholthus.com
Address:
920 SW 3RD AVE STE 100
PORTLAND, OR, 97204-2419
Phone: 971-201-3203

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