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Case No. 99340-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID DEVIN

Petitioner,

v.

MTC FINANCIAL, INC., ET. AL.

Respondents.

RESPONDENT BANK OF NEW YORK MELLON NA'S ANSWER
TO PETITION FOR REVIEW

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I. RESPONDING PARTY

The party submitting this Answering Brief is Respondent the Bank of New York Mellon, NA. (“BONYM”).

II. INTRODUCTION

Appellant David Devin’s (“Mr. Devin”) Petition for Review is not well grounded in law or fact. The Court of Appeals carefully and accurately articulated the procedural posture of the underlying Superior Court action and correctly found that, under RAP 2.4 and Mr. Devin’s Notice of Appeal, it had no basis to review the Superior Court’s orders granting Respondents’ motions for summary judgment against Mr. Devin. The Court of Appeals properly granted Respondents’ Motions to Dismiss Mr. Devin’s appeal and, consequently, this Court should deny Mr. Devin’s Petition for Review (the “Petition” or “Mr. Devin’s Petition”).

III. ASSIGNMENT OF ERROR

None. The Court of Appeals correctly found that: (1) Mr. Devin’s Notice of Appeal only identified the trial court’s *stand-alone* January 3, 2019 order denying his December 31, 2018 Motion for Reconsideration (it did not identify the trial court’s separate summary judgment orders); and (2) the summary judgment orders were not “underlying” orders *vis a vis* Mr. Devin’s December 31

Motion for Reconsideration. As a result, the Court of Appeals properly held that, under RAP 2.4, the court had no basis to review the summary judgment orders and correctly granted Respondents' RAP 17.4(d) motions to dismiss Mr. Devin's appeal.

IV. FACTS RELEVANT TO THE PETITION

On or about October 10, 2018, BONYM filed a motion for summary judgment seeking dismissal of Mr. Devin's claims against it. CP 277-282. In response to BONYM's motion, Mr. Devin filed a Motion to Stay Review of Defendant's Bad Faith Motion for Summary Judgment (CP 332); a Motion to Compel (CP 91-94); and a tardy, three-page Summary Judgment Response Brief (CP 295-297). On November 16, 2018, Respondent MTC Financial, Inc. ("MTC") filed a motion for summary judgment dismissal of Mr. Devin's claims against it. CP 95-100.

On November 30, 2018, the trial court heard Mr. Devin's motions to stay and compel discovery. Mr. Devin did not appear and the court denied his motions. CP 151-155. On or about December 3, 2018, Mr. Devin filed a Motion for Reconsideration of the court's denial of his motions to stay and compel. CP 156-157. On December 14, 2018, the trial court heard argument on Mr. Devin's motion for reconsideration, granted the motion, and allowed

him to provide argument to support his motions to stay and compel discovery. CP 183. At the same hearing, the trial court also heard argument on MTC's and BONYM's motions for summary judgment.

The trial court denied Mr. Devin's motions to stay and compel discovery from the bench. *Id.* The trial court also struck a "Revised Complaint" filed by Mr. Devin right before the summary judgment hearing. *Id.*; CP 161-165. The trial court took MTC's and BONYM's motions for summary judgment under advisement. CP 183.

On December 19, 2018, Mr. Devin moved for reconsideration of the trial court's denial of his motions to stay and compel discovery (CP 184-187), and he also filed a motion for the court to approve the previously stricken Revised Complaint (CP 188-189). On December 20, 2018, the court denied both motions. CP 235-236. Undeterred, on December 31, 2018, Mr. Devin filed yet another Motion for Reconsideration. This time Mr. Devin sought reconsideration of the trial court's December 20 order denying: (1) reconsideration of the court's December 14 ruling denying Mr. Devin's motions to stay and compel discovery, and (2) his December 19 motion for the court to approve the Revised Complaint. CP 237-243. On January 3, 2019, the trial court entered

an order denying Mr. Devin's December 31, 2018 Motion for Reconsideration. CP 253.¹

Separately, on January 3, 2019, the trial court entered two additional and separate orders granting MTC's and BONYM's motions for summary judgment to dismiss Mr. Devin's claims (the "SJ Orders"). CP 249-252 and 326-328.

Mercifully, rather than filing a fourth Motion for Reconsideration, on February 1, 2019, Mr. Devin filed a Notice of Appeal with the Court of Appeals. CP 255-257. Mr. Devin's Notice of Appeal sought review of "the ORDER entered on January 3, 2019 denying his Motion for Rule 59 Relief in this matter." CP 255. The Notice of Appeal states that "[a] copy of the decision is attached to this notice." *Id.* Mr. Devin then attached the trial court's January 3, 2019 Order on Reconsideration denying his December 31 Motion for Reconsideration based on Mr. Devin's failure to provide a sufficient "basis for reconsideration under CR 59." CP 257.

The Court of Appeals found that the orders underlying Mr. Devin's Notice of Appeal were all related to his motions for

¹ It has not escaped Respondent's counsel that this paragraph sounds like part of Abbot & Costello's "Who's on First" routine.

reconsideration of the trial court's denial of his motions to stay, compel, and for the court's approval of the Revised Complaint. The underlying orders did not include the SJ Orders. The Court of Appeals therefore held RAP 2.4(c)(3) did not give the court authority to review the SJ Orders and, as a result, the court dismissed Mr. Devin's appeal.

V. ARGUMENT

A. Standard of Review.

Under RAP 13.4(b), "[a] petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

B. Mr. Devin's Petition Does Not Meet the Criteria of RAP 13.4(b).

The Court of Appeals' opinion is not in conflict with a decision of the Supreme Court or a published opinion of the Court of Appeals. Mr. Devin's Petition does not involve any constitutional

issues nor does it raise any matters of public interest. This Court should decline to accept Mr. Devin's request of a discretionary review of the Court of Appeals' decision.

C. Under RAP 2.4, the Court of Appeals Had No Authority to Review the Superior Court's Summary Judgment Orders

The scope of the Court of Appeal's review of a trial court's decision is governed by RAP 2.4. The pertinent parts of that rule state as follows:

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e).

(b) Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

(c) Final Judgment Not Designated in Notice. Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the

notice only if the notice designates an order deciding a timely motion based on (1) CR 50(a) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CR 7.4 (arrest of judgment), or (5) CR 7.5 (new trial).

The Notice of Appeal filed by Mr. Devin makes no reference to either summary judgment order nor does it attach either order. CP 255-257. Because the SJ Orders were not designated or identified in the Notice of Appeal nor attached to it, RAP 2.4(a) did not provide a basis for the Court of Appeals to review the SJ Orders.

The Court of Appeals correctly determined that RAP 2.4(b) did not apply. RAP 2.4(b) allows the consideration of orders that adversely affected the decision on appeal, *i.e.* that the order appealed from would not have happened but for the first order. *See Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 134 (1988). RAP 2.4(b) assumes the proper appeal of a final decision on the merits. *See Id.*; *See also Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wash. 2d 370, 378-380 (2002). Here, there was no proper appeal of the decision on the merits and the SJ Orders had no impact on the entry of the January 3 Order on Reconsideration, the order Mr. Devin appealed. Lastly, Mr. Devin's Petition does not raise RAP 2.4(b) as a basis under which the Court

of Appeals should have considered the SJ Motions and, therefore, waived the right to make any such argument to this Court.

The Court of Appeals correctly determined that it could only review the SJ Orders if they fell under RAP 2.4(c). Under RAP 2.4(c), on an appeal of a CR 59 motion to reconsider, the court may consider the propriety of the “underlying” order, *i.e.* the order upon which reconsideration was sought. See *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 492 (2008), *abrogated on other grounds by Frausto v. Yakima, HMA, LLC*, 188 Wn.2d 227 (2017). Mr. Devin’s December 31 Motion for Reconsideration (CP 237-243) only sought a reconsideration of his previously denied December 19 Motion for Reconsideration relating to his motions to stay and compel (CP 184-187 & 235-236), and the denial of his December 19 Motion for Court to Approve Revised Complaint (CP 188-189 & 235-236). *None* of Mr. Devin’s plethora of motions for reconsideration sought review or reconsideration of the SJ Orders. Mr. Devin’s Notice of Appeal (CP 255-257) specifically and only seeks review of the trial court’s January 3 Order on Reconsideration, CP 253, that specifically identifies the December 31 Motion for Reconsideration (CP 237-243). Indeed, as required by RAP 5.3(a), the Notice of Appeal attaches “a copy of the signed order or judgment from which the appeal is made”, *i.e.* the January 3 Order on Reconsideration. CP 257.

RAP 2.4(c) does not provide that an appeal of an order for reconsideration brings up for review *all* orders entered in the subject case. That would negate the purpose of RAP 2.4 and RAP 5.3 (the Notice of Appeal). To be considered for review under RAP 2.4(c), there must be a connection between the underlying order and the order identified in the Notice of Appeal.

Here, there is none. Mr. Devin only attempted to appeal from the stand-alone January 3 Order on Reconsideration denying his December 31 Motion for Reconsideration, which sought reconsideration of the December 20 order denying: (1) Mr. Devin's December 19 Motion for Reconsideration, which sought reconsideration of the trial court's December 14 denial of his motions to compel and stay; and (2) Mr. Devin's December 19 motion for the court's approval of the Revised Complaint. Convoluting as that may be, these are the entire universe of "underlying" pleadings associated with the January 3 Order on Reconsideration identified in the Notice of Appeal. The SJ Orders are not part of this universe. As such, the Court of Appeals correctly concluded RAP 2.4(c) did not provide a basis for the court to review the SJ Orders.

Mr. Devin's Notice of Appeal did not properly seek review of the SJ Orders, and the Court of Appeals properly determined there was no basis under RAP 2.4 for it to review the SJ Orders. The Court of Appeals properly granted Respondents' motions to dismiss

Mr. Devin's appeal. Consequently, this Court should deny Mr. Devin's Petition for Review of the Court of Appeals' ruling.

D. Mr. Devin's Position is Inaccurate and Without Merit.

Mr. Devin's Petition conveniently avoids any discussion of the elephant in the room, *i.e.* the clear and ambiguous language of Mr. Devin's Notice of Appeal and the attached stand-alone January 3 Order on Reconsideration. The Petition offers no discussion regarding the language of the Notice of Appeal, its reference to CR 59, nor the attached order. None.

Because the Notice of Appeal creates a hole he simply cannot dig out of, Mr. Devin completely ignores it and, instead, focuses on the SJ Orders² and his various conspiracy theories. Rather than explaining why his Notice of Appeal did not identify or attach the SJ Orders, Mr. Devin simply makes up his own reality and *falsely* tells the court, "it is patently clear that the Notice of Appeal referred to an Order that included the Dismissal on the Merits." Petition, p. 4.³

² The proposed SJ Orders were presented to the trial court prior to the December 14, 2018 hearing and, therefore, contained all of the issues anticipated to be addressed by the trial court. However, the SJ Orders were not executed by the court until January 3, 2019. At this point the court had ruled on, and denied, Mr. Devin's motions to stay, compel and for approval of the Revised Complaint. CP 183.

³ It is curious that Mr. Devin would make such a blatantly false statement to the Court when the Court can clearly read the language in the Notice of Appeal. CP 255-257.

The Notice of Appeal is two sentences. Its text states, *in its entirety*, as follows:

NOW COMES PLAINTIFF DAVID W. DEVIN to seek review by Washington State Appellate Court DIVISION II, District 2 of the ORDER entered on January 3, 2019 denying his Motion for Rule 59 Relief in this matter.

A copy of the decision is attached to this notice. CP at 255.

The text of the "Order on Reconsideration" attached to the Notice of Appeal states, in its entirety:

THIS MATTER comes before the Court upon Plaintiff David Devin's "Motion for the Court To Re-Consider" ('Motion'). Mr. Devin seeks reconsideration of Judge Olsen's Order denying his prior Motion for Reconsideration, issued December 20, 2018.

In considering this Motion, the Court has reviewed the file and records therein. The Court having concluded that the Motion states insufficient basis for reconsideration under CR 59, it is hereby

ORDERED that Plaintiffs Motion is DENIED.

The Notice of Appeal and Order make absolutely no reference, never mind a "patently clear" reference, to the SJ Orders, the summary judgment motions, CR 56, or a dismissal on the merits. Neither of the SJ Orders is attached to the Notice of Appeal.

The clear and inescapable truth, memorialized in black and white, is that Mr. Devin's Notice of Appeal only sought review of the January 3 Order on Reconsideration denying his December 31,

2018 Motion for Reconsideration. Mr. Devin simply did not appeal the SJ Orders and, despite his best efforts, he cannot manufacture any facts to change this reality. Mr. Devin's false and unsupported proclamations do not alter the objective facts before this Court. As a result, what is "patently clear" is that Mr. Devin's Notice of Appeal was (and is) fatally flawed. The Court of Appeals correctly determined that RAP 2.4(c) did not provide a basis for it to review the SJ Orders and it properly dismissed Mr. Devin's appeal.

VI. CONCLUSION

Based on the above, BONYM requests this Court deny Mr. Devin's Petition for Review.

Dated this 18th day of March, 2021.

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, Joanna M. Bolstad, state that on the 18th day of March, 2021, I caused the original **RESPONDENT BANK OF NEW YORK MELLON NA'S ANSWER TO PETITION FOR REVIEW** to be filed in the **Supreme Court** and a true copy of the same to be served on the following in the manner indicated below:

David W. Devin So 3B Ngach 50, NGO 1194 Duoung Lang Quan Dong Da, Hanoi Vietnam 00000 Vietnam Email: david_devin11676@yahoo.com	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Email
Michael S. DeLeo Peterson Russell Kelly PLLC 10900 NE 4th St Ste 1850 Bellevue, WA 98004-8341 mdeleo@prklaw.com	<input type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Email

SIGNED in Portland, Oregon, this 18th day of March, 2021.

s/ Joanna M. Bolstad

Joanna M. Bolstad, Legal Assistant

SUSSMAN SHANK LLP

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