Supreme Court No. 99832-9

Court of Appeals No. 80484-7-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HUY YING CHEN and YUEH HUA CHEN

Petitioners,

v.

THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION FKA THE BANK OF NEW YORK TRUST COMPANY, N.A. AS SUCCESSOR TO JPMORGAN CHASE BANK, N.A. AS TRUSTEE FOR RESIDENTIAL ASSET MORTGAGE PRODUCTS, INC. MORTGAGE ASSET BACKED PASS THROUGH CERTIFICATES SERIES 2005 RP3; JPMORGAN CHASE BANK, AS TRUSTEE F/K/A THE CHASE MANHATTAN BANK SUCCESSOR IN INTEREST TO THE CHASE MANHATTAN BANK N.A.; AND PAUL SAVITSKY, AS VICE PRESIDENT OF JPMORGAN CHASE BANK, N.A. F/K/A JPMORGAN CHASE BANK

Respondents

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Submitted By:
Thomas N. Abbott, WSBA No. 53025
PERKINS COIE LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209
Telephone: (503) 727-2131
Facsimile: (503) 727-2222
TAbbott@perkinscoie.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. IDENTITY OF RESPONDENTS

Respondents are The Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A. as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2005-RP3 ("The Bank of New York Mellon Trust Company, as Trustee"); JPMorgan Chase Bank, as Trustee f/k/a The Chase Manhattan Bank Successor in Interest to the Chase Manhattan Bank N.A. ("JP Morgan Chase Bank, as Trustee"); and Paul Savitsky, as Vice President of JPMorgan Chase Bank, N.A. f/k/a JPMorgan Chase Bank ("Savitsky") (collectively, "Respondents").

II. INTRODUCTION

Petitioner Huy Ying Chen ("Chen") filed a petition for discretionary review of the Court of Appeal's opinion affirming the trial court's order denying his motion to set aside the sheriff's sale and the Court of Appeals' order denying Chen's motion for reconsideration. This answer addresses the petition for discretionary review.

The procedural basis of Chen's petition is erroneous. His petition is significantly untimely. Chen fails to establish that the Court of Appeals' opinion and order are decisions terminating review. Chen therefore incorrectly relies on RAP 13.4, and its more expansive time period for seeking review, when RAP 13.5 applies. Even if the opinion and order are decisions terminating review, Chen fails to establish grounds for

discretionary review as set forth under RAP 13.4. Chen focuses only on why he believes the trial court was wrong in denying his motion—advancing the same arguments he made in support of the motion to set aside the sheriff's sale and in support of his motion for reconsideration. Chen fails to identify, however, a single basis for granting discretionary review.

Chen's petition for discretionary review should be denied. Nothing in the petition satisfies RAP 13.4 or 13.5.

III. STATEMENT OF THE CASE

A. Loan, Default, and Foreclosure Judgment

This case concerns a $525,000 mortgage loan to Chen, secured by a deed of trust against certain real property known as 5112 189th Ave. N.E., Redmond, WA 98052. CP 7 ¶ 2, CP 457-467. The genesis of this action dates back to May 10, 2006, when JP Morgan Chase Bank, as Trustee as successor to Washington Mutual initiated a judicial foreclosure action in response to missed payments on the loan. CP 469-488.

On March 19, 2007, Chen filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. CP 490-521. On April 13, 2007, Chen removed the judicial foreclosure action to the Bankruptcy Court as an adversary proceeding. CP 523-526. On November 29, 2007, the Bankruptcy Court granted JP Morgan Chase Bank, as Trustee's Motion for Summary Judgment, and ordered a foreclosure sale to proceed in satisfaction of the $647,478.68 debt Chen owed to JP Morgan Chase Bank, as Trustee at the time. CP 528-533.

In December 2007, Chen appealed the order granting summary judgment in favor of JP Morgan Chase Bank, as Trustee. CP 535-547. Chen moved to stay the sale pending his appeal, which the Hon. Judge Ricardo Martinez denied on March 24, 2008. CP 549-555. The Court specifically found, "[b]ecause Chen are unlikely to prevail on appeal against JP Morgan Chase Bank, as Trustee, the foreclosure sale of their Redmond home is unavoidable." CP 552.

On May 22, 2008, JP Morgan Chase Bank, as Trustee filed its foreign judgment in the King County Superior Court under Case No. 08-2-1328-1. CP 557-566. On August 13, 2008, the Bankruptcy Court dismissed Chen's chapter 11 bankruptcy petition and barred Chen from filing a new bankruptcy for 180 days. CP 583 (Case No. 07-11172-PHB, Dkt. No. 124). On September 24, 2008, Chen's appeal was dismissed. CP 583 (Case No. 07-11172-PHB, Dkt. No. 132).

On October 2, 2008, JP Morgan Chase Bank, as Trustee obtained a Writ for Order of Sale to foreclose on the Property. CP 586-589. On January 2, 2009, the King County Sheriff returned the Writ because the scheduled sale did not occur. CP 591-592.

B. Chen's First Unsuccessful Suit to Stop Foreclosure - *Chen I*

On September 28, 2011, Chen filed suit against JP Morgan Chase Bank, as Trustee under King County Superior Court Case No. 11-2-33383-3 ("*Chen I*"). CP 594-604. On February 3, 2012, the King County Superior Court granted a dismissal with prejudice of Chen's suit. CP 606-607.

On October 20, 2016, a new Order of Sale was issued in the King County Superior Court, and the King County Sheriff's Office was instructed to proceed with sale of the Property and provide the requisite statutory notices. CP 609-611, 613-619. On October 24, 2016, a Sheriff's Levy on Real Property was recorded with the King County Auditor. CP 621-629.

On December 12, 2016, Chen filed a "Motion to Dismiss a Wrongful Judicial Foreclosure" in the King County Superior Court under the 2008 case number. CP 631-655. On December 15, 2016, the King County Superior Court denied Chen's motion, permitting the sheriff's sale to proceed in satisfaction of the underlying judgment. CP 657.

On December 16, 2016, the sheriff's sale occurred. CP 659-660. On December 23, 2016, a Notice of Return of Sheriff's Sale on Real Property was filed with the King County Superior Court. CP 661-662. On January 12, 2017, Chen filed an Objection to Confirmation of the Sheriff's Sale through his attorney, Anne E. Mjaatvedt. CP 664-675. On February 10, 2017, the Superior Court overruled Chen's objections and confirmed the sale. CP 677-678; RP at pp. 52-54.

Chen appealed to the Washington Court of Appeals, Division One. CP 680-696 (Case No. 76624-4-I). On February 14, 2018, the Superior Court issued a written order to confirm the sheriff's sale in favor of The Bank of New York Mellon Trust Company, as Trustee (as successor to JP Morgan Chase Bank, as Trustee) *nunc pro tunc* to February 10, 2017. CP 698-701. On October 8, 2018, the Court of Appeal affirmed in an unpublished opinion. CP 703-709. On April 3, 2019, this Court denied

Chen's petition for review. CP 711.

C. Chen's Second Unsuccessful Suit to Stop Foreclosure - *Chen II*

In August 2018, Chen filed a new lawsuit in the United States District Court, Western District of Washington, Case 18-cv-01269 MAT ("*Chen II*"). CP 713-739. On April 17, 2019, the district court dismissed *Chen II*. CP 741-745. On May 24, 2019, the district court denied Chen's motion for reconsideration. CP 747-749.

D. Chen's Third Unsuccessful Suit to Stop Foreclosure - *Chen III*

On June 12, 2019, Chen initiated this action ("*Chen III*"). CP 1-118. On July 3, 2019, Respondents moved to dismiss for failure to state a claim. CP 432-448. Dismissal was warranted, inter alia, because *Chen III* is barred by the doctrine of res judicata because Chen's prior state and federal lawsuits against Respondents concerned the same issues and were adjudicated in Respondents' favor. CP 438-439. Moreover, Chen exhausted the appeals in his prior litigation, including a failed petition for review to the Supreme Court of Washington. CP 703-709, 711.

While the motion to dismiss was pending, Chen filed a motion to set aside the sheriff's sale and vacate the sheriff's deed. CP 122-151. On September 4, 2019, Respondents filed their response. CP 789-794. On September 9, 2019, the trial court denied Chen's motion. CP 152-153.

E. The Appeal of *Chen III*

On September 13, 2019, Chen filed a notice of appeal concerning the trial court's September 10, 2019 Order denying his motion to set aside

the sheriff's sale. CP 795-801. After briefing by the parties, the Court of Appeals affirmed the trial court's order denying Chen's motion to set aside the sheriff's sale. *Chen v. JP Morgan Chase Bank*, 16 Wash. App. 2d 1049 (2021) (unpublished) (the "Opinion"); *see also* Petitioner's Appendix A. On March 18, 2021, Chen filed his motion for reconsideration of the Opinion. On April 30, 2021, the Court of Appeal denied Chen's motion for reconsideration (the "Order"). *See* Petitioner's Appendix B.

IV. RESPONSE TO ISSUES PRESENTED

Respondents were entitled to enforce a valid judgment filed in state court through judicial foreclosure, and the judgment had not expired at the time of sale confirmation.

RAP 13.5 applies to Chen's Petition because the Opinion is not a "decision terminating review."

The Petition is untimely because it was filed more than 30 days after the Court of Appeals issued the Opinion.

V. ARGUMENT AND AUTHORITIES

A. Standard of Review

1. RAP 13.5 Applies Because the Opinion and Order Are Not Decisions Terminating Review

Chen cites RAP 13.4(b)(2), which governs discretionary review of decisions terminating review. Pet. at 4-5; *see also* RAP 13.4. However, Chen's Petition concerns (i) the Opinion; and (ii) the Order. Pet. at 4; Pet. Appx. A-B. Neither is a decision terminating review.

Under RAP 12.3(a) a decision terminating review must *inter alia*

terminate review "unconditionally." RAP 12.3(a)(2). Upon issuance of a decision terminating review, the Court of Appeals issues written notification to the trial court "of an appellate court decision terminating review." RAP 12.5(a). "No mandate issues for an interlocutory decision…" *Id.* Neither the Opinion nor the Order meet the requirements of a decision terminating review. Accordingly, the Opinion and Order are "interlocutory decisions." RAP 12.3(b) (noting an "interlocutory decision" is any opinion or order which is not a decision terminating review). Accordingly, RAP 13.5 applies.

Discretionary review of an interlocutory decision may only be granted pursuant to the criteria set forth in RAP 13.5(b):

> (1) if the Court of Appeals has committed an obvious error which would render further proceedings useless; or
>
> (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

RAP 13.5(b)(1)-(3). To reach this analysis, Chen must comply with the time requirement under RAP 13.5(a):

> A party seeking review by the Supreme Court of an interlocutory decision of the Court of Appeals must file a motion for discretionary review in the Supreme Court and a copy in

> the Court of Appeals within 30 days after the decision is filed.

Chen fails to show that his Petition is timely under RAP 13.5(a). Chen also does not specify the basis on which this Court may grant discretionary review of the Opinion and the Order. Pet. at 4-5. The record shows that further review is unwarranted and untimely.

B. This Court Should Deny the Petition as to the Opinion Because the Petition is Untimely

Chen's reliance on RAP 13.4 is fatal to his Petition. Although RAP 13.4(a) permits extending the 30-day period for filing a petition for discretionary review of a decision terminating review upon the timely filing of a motion for reconsideration, RAP 13.5(a) does not. Because the Opinion and Order are not "decisions terminating review," Chen had to file his Petition within 30 days of each. The Opinion is therefore not subject to discretionary review because Chen filed his Petition on May 28, 2021—88 days after the Court of Appeals issued the Opinion on March 1, 2021.

C. This Court Should Deny the Petition as to the Order Because the Motion for Reconsideration was Improper

In response to the *Chen III* Opinion, Chen filed a motion for reconsideration pursuant to RAP 12.4. As he has done here, however, Chen incorrectly viewed the opinion as a decision terminating review. As relevant here, RAP 12.4 authorizes motions for reconsideration only as to a decision terminating review. RAP 12.4(a) ("A party may file a motion for reconsideration only of a decision by the judges (1) terminating review…"). Because the Opinion was not a decision terminating review, the Court of

Appeals correctly denied Chen's motion for reconsideration.

D. The Court Should Deny Discretionary Review Even if it Concludes That Chen's Petition is Timely

Chen asserts six reasons why discretionary review should be granted. He is wrong on each count for the simple reason that his reliance on RAP 13.4, and its different requirements for discretionary review, is misplaced. Even if the Court were to conclude that RAP 13.4 applies—which it should not—the reasons for review argued by Chen lack merit.

1. The Opinion Does Not Conflict with *Hazel*

Chen contends that the Opinion conflicts with *Hazel v. Van Beek*, 135 Wash. 2d 45 (1998). Pet. at 4, 7. Chen appears to assert that the Opinion differs from the holding in *Hazel* that all steps, including confirmation of sale, must occur before the judgment expires within the ten year period. Pet. at 7. Nothing in the Opinion is contrary to the holding in *Hazel*. Chen fails to identify any conflict in holdings. Indeed, the Court of Appeals held that all steps, including the last step of confirming the sale, occurred within the ten year period. *Chen v. JP Morgan Chase Bank*, 16 Wash. App. 2d 1049 ¶¶ 9-10 (explaining that the record does not support Chen's claim that confirmation occurred after the ten year period). Because the Court of Appeals considered whether all events occurred within the ten year period, it follows that the Court of Appeal's analysis tracked the holding in *Hazel* that all steps, including confirmation of sale, had to occur within the ten year period.

2. The Opinion Does Not Conflict with *American Trucking*

Chen also contends that the Opinion conflicts with *Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133 (1958). Pet. at 4, 8. There are several reasons why this contention fails to warrant discretionary review.

First, even if RAP 13.4(b)(2) applies, the United States Supreme Court decision in *American Trucking* is not "a published decision of the Court of Appeals." On this basis alone, discretionary review should be denied.

Second, *American Trucking* is inapposite. The issue on appeal was:

> whether the Interstate Commerce Commission has the power to modify certificates of public convenience and necessity containing inadvertent errors, and, if so, whether, in the circumstances of these cases, the Commission could modify certificates which had inadvertently authorized the performance of unrestricted motor carrier services by a wholly owned subsidiary of a railroad.

Am. Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 134 (1958). The case concerned "four of appellee's routes aggregating some 284 miles. Prior to appellee's purchase, each of the routes was serviced by an independent motor carrier which engaged in unrestricted motor carrier operations." *Id*. at 136. Here, at issue is whether Chen's motion to set aside the sheriff's sale was properly denied. The factual questions relating to this matter concern whether all steps for the sheriff's sale were completed within the ten year period for the judgment. *American Trucking* does not concern a sheriff's sale of real property to satisfy a judgment, and therefore, is

inapplicable here.

3. The Opinion Does Not Conflict with *Miebach*

Chen further contends that the Opinion conflicts with *Miebach v. Colasurdo*, 102 Wash. 2d 170 (1984). Pet. at 4, 15-17. At issue in *Miebach* was whether a grossly insufficient price paid at auction for real property was grounds to set aside the sale. The indebtedness at issue in *Miebach* was a $1,300 note to purchase an automobile. *Id*. at 172. The creditor obtained a default judgment, searched for personal property to sell to satisfy the judgment, and after finding none, convinced the sheriff to sell the debtor's residence to satisfy the $1,300 judgment. *Id.* at 172-73. The property sold to the judgment creditor, the only bidder, for $1,340.02. *Id.* at 173. The court confirmed the sale and the successor in interest to the judgment debtor later moved to set aside the sale asserting "the gross inadequacy of the price paid" and "irregularities surrounding the sale." *Id*. at 175.

In the Opinion, the Court of Appeals acknowledged that "a grossly inadequate purchase price together with circumstances of other unfair procedures may provide equitable grounds to set aside a sale." *Chen v. JP Morgan Chase Bank*, 16 Wash. App. 2d 1049 ¶ 12 (citing *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 157 Wn. App. 912, 933 (2010)). However, the record showed "the property sold at public auction for $926,834.20" and the court noted that "Chen offers no evidence in the record to show that this price is inadequate." *Id.* ¶ 12. There is no conflict between the Opinion and *Miebach*. Rather, Chen simply failed to show that the nearly $1 million paid

at public auction was "grossly inadequate."

4. The Opinion Does Not Conflict with *Kawachi*

Chen next contends that the Opinion conflicts with *Seattle-First National Bank v. Kawachi*, 91 Wash. 2d 223 (1978). Pet. at 4-5, 11. The *Kawachi* opinion explains the limits of the doctrines of res judicata and collateral estoppel. *Seattle-First Nat. Bank v. Kawachi*, 91 Wash. 2d 223, 225–26 (1978). Specifically, the case confirms that "a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated." *Id.* at 226.

In the Opinion, the Court of Appeals did not reach the issue of whether the doctrine of res judicata bars *Chen III*. *Chen v. JP Morgan Chase Bank*, 16 Wash. App. 2d 1049 n.7 ("Because Chen's present attempt to litigate the foreclosure and sheriff's sale is legally and factually unsupported, we need not reach the Respondents' assertion that Chen's lawsuit is also barred by the doctrine of res judicata."). There can be no conflict between *Kawachi* and the Opinion because the Court of Appeal did not reach the issue of res judicata.

5. The Opinion Does Not Conflict with *Westberg*

Chen's assertion of a conflict between the Opinion and *Westberg v. All-Purpose Structures, Inc.*, 86 Wash.App. 405 (1997) also lacks merit. Pet. at 5, 12. Chen asserts that the trial court did not treat him the same way it would treat lawyers because it did not agree with Chen's expert's report that purported to support Chen's allegation that JPMorgan Chase Bank, as

Trustee is a fictitious entity. Pet. at 12. Without offering any basis, Chen speculates that the trial court would have assigned "much more weight" to the expert report had it been "submitted by Counsel." *Id.* Not so.

The Court of Appeals addressed the "expert report" proffered by Chen. *Chen v. JP Morgan Chase Bank*, 16 Wash. App. 2d 1049 ¶ 13. The court noted that Chen's purported expert admitted that he would need to review unseen documents to reach a conclusion as to whether "nonexistent entities without any legal standing to foreclosure" had obtained the property through the foreclosure. *Id.* The Court of Appeals noted, properly, that such "evidence" is not sufficient to demonstrate substantial irregularities. Indeed, such speculation cannot stand in for facts. The declaration of Paatalo contains admissions that he did not review documents that he felt were important. Any conclusions Mr. Paatalo offered in his report were necessarily speculative as a result. The Court of Appeal's response to Mr. Paatalo's declaration was not a matter of treating Chen differently because he is pro se; rather, it related solely to the substance (or lack thereof) of the report. Accordingly, there is no conflict between *Westberg* and the Opinion.

6. The Opinion Does Not Conflict with *Tacoma Gravel*

Finally, Chen asserts that the Opinion conflicts with *United States v. Tacoma Gravel & Supply Co.*, 376 F.2d 343 (9th Cir. 1967). Pet. at 5, 18.

Even if RAP 13.4(b)(2) applies, the Ninth Circuit decision in *Tacoma Gravel* is not "a published decision of the Court of Appeals." On this basis alone, discretionary review should be denied.

In addition, Chen contends that the time to satisfy a judgment is not ten years, but six years under *Tacoma Gravel*. *Id.* at 18. Chen's argument fails for the simple reason that RCW 4.56.210—the statute cited in *Tacoma Gravel* for the rule that a judgment ceases to be a lien after six years—was amended to lengthen the time period to ten years. Thus, RCW 4.56.210 now provides in salient part:

> after the expiration of ten years from the date of the entry of any judgment heretofore or hereafter rendered in this state, it shall cease to be a lien or charge against the estate or person of the judgment debtor.

RCW 4.56.210(1). Indeed, the newer ten year period is expressly recognized in *Hazel*, which cites to RCW 4.56.210(1). *Hazel v. Van Beek*, 135 Wash. 2d 45, 53 (1998). Thus, there is no conflict.

VI. CONCLUSION

Based on the foregoing, Respondents respectfully request the Court deny Chen's Petition for Review.

DATED: July 12, 2021

PERKINS COIE LLP

By: s/ *Thomas N. Abbott*

Thomas N. Abbott, WSBA No. 53024
TAbbott@perkinscoie.com

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209
Telephone: (503) 727-2131
Facsimile: (503) 727-2222

Attorneys for Respondents The Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A. as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2005-RP3; JPMorgan Chase Bank, as Trustee f/k/a The Chase Manhattan Bank Successor in Interest to the Chase Manhattan Bank N.A.; and Paul Savitsky, as Vice President of JPMorgan Chase Bank, N.A. f/k/a JPMorgan Chase Bank

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on July 12, 2021, I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

DATED this 12th day of July, 2021.

/s/ Matthew Walkup
Matthew Walkup

PERKINS COIE LLP

July 12, 2021 - 12:24 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99832-9
Appellate Court Case Title:	Huy-Ying Chen, et ano v. JP Morgan Chase Bank, et al.

The following documents have been uploaded:

- 998329_Answer_Reply_20210712122229SC273429_5486.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 20210708 Respondents Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- SteveLinkon@msn.com
- fmarttila@wrightlegal.net
- hy@nobo.us
- kstephan@rcolegal.com
- syoungquist@perkinscoie.com

Comments:

Respondents' Answer to Petition for Review

Sender Name: Thomas Abbott - Email: tabbott@perkinscoie.com
Address:
1120 NW COUCH ST FL 10
PORTLAND, OR, 97209-4128
Phone: 503-727-2131

Note: The Filing Id is 20210712122229SC273429