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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

ERIK MOSEID, an individual, and
DIANNA MOSEID, an individual,

Appellants,

vs.

U.S. BANK, N.A., a national banking
association, as trustee for SERIES
#2011-1 CERTIFICATES and
successor in interest to CREDIT
SUISSE FINANCIAL
CORPORATION, a business entity,
form unknown, LAW OFFICES OF
KAREN L. GIBBON P.S., a business
entity, form unknown, and DOES 1
through 15, inclusive,

Respondents.

Court of Appeal No. 70823-6-1

(Superior Court Case # 13-2-19543-7 SEA)

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SUPERIOR COURT

Appeal From a Judgment of the Superior Court, County of King

The Honorable Monica Benson, Judge Presiding

APPELLANTS' OPENING BRIEF

Erik and Dianna Moseid
12708 167th Place, Northeast
Redmond, Washington 98052
Phone (206) 849-5365
Self-represented Appellants

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STATE OF WASHINGTON
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1. Introduction and Synopsis.

This appeal arises from an action to set aside a trustee’s sale, or alternatively, for damages for wrongful foreclosure of Plaintiffs’/Appellant’s home, 12708 167th Place, Northeast, Redmond, Washington 98052 (“the Property”). Appellants’ major contention is that the trial court erred by not granting leave to amend the original complaint when deciding Defendants’/Respondents’ CR 12(b)(6) motion. To the extent the trial court’s decision rested upon the so-called waiver rule of RCW 61.24.040 or Washington’s claim preclusion doctrine, Appellants address those issues too.

2. Assignments of Error and Statement of Issues on Appeal.

- 1) Did the trial court abuse its discretion by declining to grant Appellants leave to amend their original complaint consistent with Appellants’ request and CR 15?
- 2) Did the trial court abuse its discretion insofar as its granting the CR 12(b)(6) motion was based upon the waiver rule in RCW 61.24.040?
- 3) Did the trial court abuse its discretion insofar as its granting the CR 12(b)(6) motion was based upon Washington claim preclusion doctrine?

3. Statement of the Case.

A. Factual Background

Appellants are each residents of King County, Washington and owners of certain residential real property commonly known as 12708 167th Place, Northeast, Redmond, Washington 98052 (“the Property”).

C.T. 3

In 2006, Appellants obtained a loan secured by the Property in the principal sum of \$600,000.00. C.T. 5

In June 2008, Appellant Erik’s business failed and his income was sharply reduced. At that same time, Citibank, the loan servicer, notified Appellants their monthly payments on the loan were increasing due to the increase in the interest rate. Appellants contacted Citibank and was informed that the payment could be reduced to \$2,253.00 per month using a Make Home Affordable modification. Citibank then immediately lowered Appellants’ monthly payment by \$1,968.86 per month. Citibank representatives further told Appellants that if they made the payments under the modification the payments would become permanent. C.T. 5-6.

Appellants performed under this arrangement, and when they contacted Citibank in September 2008, Citibank representatives told Appellants they were “swamped with modifications,” and to keep on making the payments. Appellants continued making timely payments under the above-mentioned modified monthly payments. C.T. 6.

Appellants’ lender and loan servicer declined to make Appellants’

modified monthly payments permanent for over one year, and then told Appellants their request for a permanent modification was denied. C.T. 6.

In May 2010, the lender and loan servicer told Appellants that the loan modification application was denied and that monthly payments would be increasing to the \$4,221.86 amount. Appellants remitted an additional \$1,968.86 on June 1, 2010 to cover the arrearage. C.T. 6. A Citibank representative contacted Appellants and explained that Appellants owed not only for that month, but also back to the beginning of the loan modification, so Appellants were “in fact” over \$14,000.00 in arrears and in default status. C.T. 6. Appellants were further informed the lender would start foreclosure proceedings. The loan servicer and lender refused to credit Appellants for their timely payments under the trial modification as extended by the lender.

In the Spring of 2011, Citibank transferred the loan to another loan servicer, whose representatives told Appellants they were going to work with Appellants to produce a loan modification. C.T. 6 - 7. When Appellants contacted this new loan servicer, representatives told Appellants not to send their monthly payments but to wait due to documentation problems associated with the transfer of the loan and loan servicing. C.T. 7.

In the Fall of 2011, Appellants received notice that another lender, Selene, now owned the loan. C.T. 7. At that time, Appellant Erik had been laid off from work, and Appellants agreed to a short sale of the

Property. The Property was listed on the market for about 6 months through Keller Williams, but received no offers. C.T. 7, R.T. 3.

In 2012 Appellant Erik resumed employment, and the new lender Selene indicated an interest in working out a loan modification. C.T. 7.

Appellants provided all information necessary to proceed with a loan modification but Selene denied the request for a loan modification and indicated that instead it would proceed to foreclose on the Property. C.T. 7. Only the intervention of *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash. 2d 83, 285 P. 3d 34 (2012) prevented a trustee's sale from occurring on the Property. R.T. 14-15.

In December 2012, Selene again requested information to review the loan for a workout. Appellants submitted the requested documentation again. C.T. 7- 8.

In January 2013, Selene again declined Appellants a loan modification, claiming that Appellants had "insufficient income." That assertion is specious and false. C.T. 8.

Appellants attempted to obtain a restraining order to prevent the sale in federal court, but were not successful. C.T. 8. Instead, without further notice, on March 8, 2013, Selene attempted and purported to sell the Property. Selene was the allegedly successful bidder at the sale. A trustee's deed upon sale ("TDUS") was issued to Selene. C.T. 8.

After the sale, Appellants offered to make payments to Selene either while a loan modification is obtained or until Appellants could

obtain financing to purchase the Property. Selene has rejected all such offers. C.T. 8.

Appellants filed this action on May 13, 2013. C.T. 1.

B. Summary of The Complaint

The crux of Plaintiffs' Complaint is that Defendants strong-armed the trustee's sale of their home without affording them any meaningful opportunity to mitigate loss and avoid foreclosure. Under the guise of attempting to work something out, Defendants proceeded with foreclosure and literally misled Plaintiffs into believing they would be fairly evaluated for a loan modification. Plaintiffs were further lulled into believing they would be allowed to do a short sale of the property to mitigate their loss, but Defendants allowed only six months for a sale to take place, and there were no offers at the end of the period. Defendants then further lulled Plaintiffs into believing they would be re-evaluated for a loan modification given Plaintiffs improving employment and income, only to turn Plaintiffs down less than a week before a scheduled trustee's sale. C.T. 8.

The Complaint contains four (4) claims for relief: 1) to set aside the trustee's sale of March 8, 2013 (C.T. 9), 2) for cancellation of the trustee's deed upon sale (C.T. 10), 3) for damages for wrongful foreclosure (C.T. 10-11), and 4) for relief based upon an estoppel to deny reformation of the loan agreement. C.T. 11-12.

C. Procedural Background

The Complaint was filed on May 15, 2013. C.T. 1.

Defendants/Respondents Selene Financial filed their motion to dismiss, setting a hearing date for July 19, 2013. The motion to dismiss raised five points: 1) that Plaintiffs held no present interest in the property and therefore had no standing, 2) that Plaintiffs' claims were barred by the waiver doctrine, 3) that no facts alleged supported a wrongful foreclosure claim, 4) that Plaintiffs' filing of the action in state court constituted forum shopping, and 5) that Plaintiffs' quiet title claim failed as a matter of law because Plaintiffs did not tender the debt due. C.T. 48-52.

Plaintiffs filed opposition to the motion, contesting each point and the framework for analysis of the motion. C.T. 150-158.

At the hearing, Plaintiff indicated a willingness to remedy any deficiencies in the pleading. R.T. 19.

The trial court took the matter under submission and entered an order granting the motion and dismissing the Complaint. Appellants timely filed their Notice of Appeal.

4. Standards and Scope of Review.

A. Standards of Review for Motions to Dismiss under CR 12(b)(6)

This Court reviews dismissals under CR 12(b)(6) *de novo*. Reid v. Peirce County, 136 Wash. 2d 195, 200-201 (1998).

B. Scope of Review for Motions to Dismiss under CR 12(b)(6).

Motions to dismiss under CR 12(b)(6) are to be granted sparingly and with care. Bravo v. Dolan Cos., 125 Wash. 2d 743, 750 (1995). A challenge to the legal sufficiency of a complaint's allegations must be denied unless no state of facts which could be proven consistent with the complaint would entitle a plaintiff to any relief. McCurry v. Chevy Chase Bank, 169 Wash. 2d 96, 98 (2010). A court analyzing a CR 12(b)(6) motion presumes allegations in the complaint true. Cutler v. Phillips Petroleum Co., 124 Wash. 2d 749, 755 (1994). A court may also consider hypothetical facts outside the record in determining a CR 12(b)(6) motion. Burton v. Lehman, 153 Wash. 2d 416, 422 (2005).

C. The impact of CR 15 with respect to Motions to Dismiss under CR 12(b)

A party may seek leave to amend before the trial court and "leave shall be freely given." CR 15(a).

5. Argument.

A. The Trial Court erred by granting Defendants' CR 12(b)(6) motion without leave to amend.

The trial court should have either overruled the CR 12(b)(6) motion or granted it with leave to amend. A trial court should freely grant leave to amend when justice so requires. CR 15(a), Wilson v. Horsley, 137 Wash. 2d 500, 505 (1999). A trial court considers several factors to determine whether to grant leave to amend, including undue delay, juror

confusion, and unfair surprise. Id. at 505-506. None of these factors here weigh against allowance of leave to amend.

A reviewing court analyzes a trial court's decision to not grant leave to amend for abuse of discretion. Id. A trial court's failure to explain its reason for denying leave to amend may amount to abuse of discretion unless the reasons are apparent in light of the circumstances shown in the record. Rodriguez v. Loudeye Corp., 144 Wash. App. 709, 729 (2008).

Here, there are no reasons cited for denial of leave to amend in the order granting the motion to dismiss or in the transcript of the hearing. The lack of explanation, given that this is an original complaint, strongly indicates abuse of discretion. The judgment should be reversed and this case remanded with instructions to allow an amended pleading.

B. The Trial Court erred by granting Defendants' CR 12(b)(6) motion based on the so-called "waiver" rule in RCW 61.24.040.

To the extent the trial court based its ruling as to either granting the motion to dismiss or declining leave to amend based upon RCW 61.24.040, such reasoning is also error.

First, RCW. 61.24.040 doesn't apply to the third claim for relief in the Complaint, which seeks money damages only. Second, it further doesn't apply because it requires an action to stay the trustee's sale be filed before the sale, and that's exactly what Appellants did here.

Third, the trial court misread the state supreme court’s decision in Albice v. Premier Mortgage Services, 174 Wash. 2d 560, ___ 276 P. 3d 1277 (2012). The state supreme court observed:

Waiver, however, cannot apply to all circumstances or types of postsale challenges. . . . The word “may” indicates the legislature neither requires nor intends for courts to strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act. 174 Wash. 2d 560, _____, 276 P. 3d at 1283.

Since Albice makes clear that waiver applies only where it is equitable under the circumstances, an analysis of circumstances is necessarily fact-specific and thus not cognizable on a motion to dismiss. Kelm v. Washington Mutual Bank, 176 Wash. 2d 771 (2013) confirms Albice. There, in Footnote 7, the court noted:

But we have rejected the argument that, under Plein, the failure to seek a presale injunction acts as a per se bar to any postsale challenge. Id. at 783, n. 7.

The waiver rules, even if they apply to this action (they don’t), cannot form the basis for dismissal of the complaint. The trial court’s

judgment should be reversed.

- C. The Trial Court erred by granting Defendants' CR 12(b)(6) motion based on ground of Claim Preclusion arising from the prior Federal Action.

There is no similarity between the prior federal action seeking to enjoin the trustee's sale, and the present action which seeks either to set the sale aside or recover damages. Claim preclusion in Washington requires the concurrence of identity in four respects in a subsequent action. There must be identity of subject matter, cause of action, persons and parties, and the quality of persons for or against whom the claim is made. Seattle-First Nat'l Bank v. Kawachie, 91 Wash. 2d 223 (1978), Loveridge v. Fred Meyer, Inc., 125 Wash. 2d 759 (1995).

Two causes of action are identical for purposes of claim preclusion if (1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same transactional nucleus of facts. Rains v. State, 100 Wash. 2d 660 (1987).

Here, the analysis ends at the first and second elements of the doctrine. There is no identity of subject matter as the claims for relief here arise and relate to the trustee's sale of March 8, 2013. Further, the claims for relief are different from those alleged in the federal action and could not have been alleged in the federal action as they were each unripe or

premature prior to the trustee's sale. See Rosenfeld v. JP Morgan Chase Bank, N.A., 732 F. Supp. 2d 952, 961 (N.D. Cal. 2010)(wrongful foreclosure claims premature prior to sale).

Further, it's obvious that the elements for claim preclusion are factual in nature and hence beyond a motion dismiss. There is no basis for claim preclusion of this action, and the trial court's judgment should be reversed insofar as it's based on claim preclusion doctrine.

6. Conclusion.

For each of the foregoing reasons, Appellants pray this Court reverse the trial court's judgment and remand with instructions to grant leave to file an amended complaint or to overrule the order granting the motion to dismiss.

7. Certificate of Compliance.

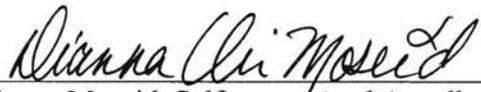
The signatures on this brief confirm that it consists of 2,504 words and was composed on Word Perfect X6 and then published to Adobe Acrobat.

Dated: March 17, 2014

Respectfully submitted,



Erik Moseid, Self-represented Appellant



Dianna Moseid, Self-represented Appellant

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5 **COURT OF APPEALS, STATE OF WASHINGTON, DIVISION ONE**
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7 ERIK MOSEID, an individual, and DIANNA
8 MOSEID, an individual,

9 Plaintiff(s),

10 vs.

11 U.S. BANK, N.A., a national banking
12 association, as trustee for SERIES #2011-1
13 CERTIFICATES and successor in interest to
14 CREDIT SUISSE FINANCIAL
CORPORATION, a business entity, form
unknown, *et al.*

15 Defendant(s).

Case No. 70823-6-I

Trial Court Case # 13-2-19543-7 SEA

CERTIFICATE OF SERVICE FOR
APPELLANTS' OPENING BRIEF
PROCEEDINGS

16 I certify under penalty of perjury under the laws of the State of Washington that, on the date
17 stated below, I did the following:

18 On the 17th Day of March 2014, I served the foregoing document by placing it in the U.S. Mail,
19 with first class postage thereon being fully prepaid, at a place where U.S. Mail is regularly picked up and
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22 Wright, Finlay & Zak
Post Office Box 461539
23 Escondido, California 92046-1539

Valerie I. Holder
RCO Legal P.S.
13555 SE 36th Street, Suite 300
Bellevue, Washington 98006

24 Rebecca R. Shrader
Bishop, White, Marshall & Weibel, PS
25 720 Olive Way, Suite 1201
Seattle, Washington 98101-3809

Karen L. Gibbon
Law Offices of Karen L. Gibbon P.S.
3409 McDougall Avenue # 252
Everett, Washington 98201

26 Hon. Monica J. Benton
27 King County Superior Court, Dep't 49
516 Third Avenue, Room C-503
28 Seattle, Washington 98104

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Dated this 17th Day of March 2014, in Redmond, Washington.

I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Erik Moseid
(Printed Name)

Erik Moseid
(Signature)