

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

NO. 50333-6 -II

(Clark County Superior Court Case No. 16-2-05554-4)

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SVETLANA KUDINA,

Appellant/Plaintiff,

vs.

CITIMORTGAGE, INC., QUALITY LOAN SERVICE  
CORPORATION, MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., and JOHN DOES 1-10,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON IN AND FOR THE COUNTY OF CLARK

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APPELLANT KUDINA's OPENING BRIEF

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## I ASSIGNMENTS OF ERROR

### A. **The trial court erred in dismissing the claims asserted in the Amended Complaint**

#### 1. Improper Application of *Res Judicata*

#### 2. Improper Application of Collateral Estoppel

### B. **Issues Pertaining to Assignments of Error**

1. If all of the “identity” elements of either *res judicata* or collateral estoppel are not satisfied, is dismissal proper?
2. If the claims in an Amended Complaint are different than those identified in prior *pro se* litigation, can the elements for either *res judicata* or collateral estoppel be satisfied to justify dismissal of a Complaint?

## II STATEMENT OF THE CASE

### A. Relevant Facts

The following facts are taken from Appellant's Amended Complaint (hereafter "AMC") which was filed on or about September 9, 2016 (Clerk's Papers [hereafter "CP"], pages 148-167). The AMC was filed without the necessity of a motion as no responsive pleading to the original Complaint had been filed by any of the Respondents/Defendants below as of September 9, 2016 (AMC, paragraph 10, CP page 151). "Plaintiff" referred to below is Appellant herein. The acronym "DOT" refers to the Deed of Trust identified in paragraph 3 of the AMC (CP page 150). "Defendant CMI" is Respondent herein Citimortgage, Inc.

Plaintiff originally entered into a mortgage loan with non-party E-Loan, Inc., which is the "Lender" identified on the Note and DOT. This transaction will be hereafter referred to as the "mortgage loan". (AMC, paragraph 12, CP 152). Some time prior to June 1, 2008, Plaintiff received a "Notice of Assignment, Sale, or Transfer of Servicing Rights" which states that the servicing of a mortgage loan was transferred "effective June 1, 2008" from E-Loan, Inc. to non-party Popular Mortgage Servicing, Inc. There is nothing in this Notice which advises of any sale of the Note or DOT from E-Loan to any third party. A copy of the subject Notice of Assignment is attached to the original Complaint marked Exhibit "A" and incorporated herein by reference. (AMC, paragraph 13, CP 152).

Some time after May 5, 2008, Plaintiff received a second "Notice of Assignment, Sale, or Transfer of Servicing Rights" dated May 5, 2008 which states that the servicing of the mortgage loan was transferred from non-party Popular Mortgage Servicing to Citicorp Mortgage effective May 22, 2008. This is a factual impossibility, as Popular did not come into any successor rights to servicing until June 1, 2008 as set forth and pursuant to Exhibit "A" above, so Popular had

nothing to “transfer” to Citicorp Mortgage on May 22, 2008. As with the previous Notice, this second Notice does not disclose or advise of any sale of the Note or the DOT. A copy of this second Notice of Assignment, etc. is attached to the original Complaint marked Exhibit “B” and incorporated herein by reference. (AMC, paragraph 14, CP 152).

Some time after May 20, 2008, Plaintiff received a two-page letter from Defendant CMI dated May 20, 2008 “welcoming” Plaintiff to CMI. This letter fraudulently represents that the right to collect payments on the mortgage loan “is being” transferred to Defendant CMI and would be effective June 1, 2008. This is false in view of the first Notice of Assignment (Exhibit “A”) which states that servicing would be transferred to Popular Mortgage Servicing, Inc. as of June 1, 2008. A copy of this letter is attached to the original Complaint marked Exhibit “C” and incorporated herein by reference. (AMC, paragraph 15, CP 153).

A document styled “Assignment of Deed of Trust” dated November 17, 2010 was filed in the Public Records of Clark County, Washington on November 30, 2010 (hereafter the “ADOT”), which is purportedly executed by an alleged “Assistant Secretary” of Defendant MERS, claiming to be the “Beneficiary” and “solely as nominee” for E-Loan, Inc. The ADOT purports to permit MERS to transfer the beneficial interest in the DOT to Defendant CMI. There is no language within the ADOT as to any assignment or transfer of the Note. A copy of the ADOT is attached to the original Complaint marked Exhibit “D” and incorporated herein by reference. (AMC, paragraph 16, CP 153).

The ADOT is false and fraudulent and is contrary to Washington law, and is thus a legal nullity and did not serve to transfer any interest in the DOT to Defendant CMI. (AMC, paragraph 17, CP 153). Defendant CMI has also engaged in a form of illegal extortion by demanding that

Plaintiff deposit additional funds in her escrow account when in fact and as known to Defendant CMI, there was a surplus in the escrow at all times material. (AMC, paragraph 18, CP 153).

Plaintiff has completed the foreclosure mediation process which did not result in the resolution of the issues herein or any settlement. (AMC, paragraph 19, CP 154).

Defendant CMI has taken the position that it has essentially inherited the rights to the Note by virtue of a “blank endorsement” which allegedly renders the Note a “negotiable instrument”, and also claims that it has inherited the rights to the DOT by virtue of the ADOT and as “the DOT follows the Note”. (AMC, paragraph 20, CP 154). However, for the reasons set forth below, the Note is not a negotiable instrument and thus the “blank endorsement” is a legal nullity, resulting in no transfer of any interest in either the Note or the DOT from the original lender to Defendant CMI. (AMC, paragraph 21, CP 154).

RCW Chapter 62A.3 defines and governs what constitutes a negotiable instrument. Under RCW 62A.3-104(a)(3) the term “negotiable instrument” means “[A]n unconditional promise or order to pay a fixed amount of money, and it does not state any other undertaking by the person promising or ordering payment to do any act in addition to the payment of money. The Note herein is not a negotiable instrument as defined by RCW 62A-3.104 because it is not an unconditional promise to pay money, as there are numerous other conditions required of the obligor set forth in the DOT and as the Note incorporates the separate obligations of the DOT. (AMC, paragraph 31, CP 155).

RCW 62A.3-106(a), defines “unconditional” by stating those conditions that prevent a promise from being unconditional:

Except as provided in this section, for the purposes of RCW 62A.3-104(a), a promise or order is unconditional unless it states:

An express condition to payment; and that the promise or order is *subject to or governed by another writing*; or that *rights or obligations with respect to the promise or order are stated in another writing*.

(AMC, paragraph 32, CP 156)

Paragraph 10 of Plaintiffs' Promissory Note herein provides:

In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of these conditions are described as follows...

(AMC, paragraph 33, CP 156).

The additional protections are those set forth in a separate document in addition to the Note, and tie the Note obligations to those obligations set forth in the DOT. (AMC paragraph 34, CP 157).

Uniform Covenant paragraph 1 of the DOT specifically links the DOT to the Note. (AMC, paragraph 35, CP 157). Uniform Covenant paragraph 4 of the DOT requires the borrower to pay all taxes, which is an obligation separate from the payment of principal and interest under the Note and affects the amount due under the Note. (AMC, paragraph 36, CP 157). Uniform Covenant paragraph 5 of the DOT requires the borrower to obtain and maintain insurance on the property, and that the Lender may "force place" insurance. This affects the amount due under the Note. (AMC, paragraph 37, CP 157).

Uniform Covenant paragraph 7 of the DOT requires the borrower to maintain the property, which is an additional obligation other than the payment of money and which is not described in the Note. (AMC, paragraph 38, CP 157). Uniform Covenant paragraph 9 of the DOT provides that funds disbursed for the protection of the lender's interest shall become

additional debt and bear interest. These additional obligations are not described in the Note. (AMC, paragraph 39, CP 157)

Uniform Covenant 10 of the DOT requires mortgage insurance, which is a separate obligation other than the payment of money and which affects the amount due under the Note. (AMC, paragraph 40, CP 157). Uniform Covenant paragraph 14 of the DOT provides for the refund of loan charges, which affects the “fixed amount of money” due under the Note. (AMC, paragraph 41, CP 157).

The Note requires payment only of principal, interest, late fees and costs and expenses associated with enforcement of the Note. Thus, the taxes and insurance on the property, interest on additional disbursements, and the requirement to maintain the property are “other charges” that are not “described in” the Note as required by RCW 62A.3-104(a). Thus, Plaintiffs’ Note is, and has always been, non-negotiable. Since it is non-negotiable, the provisions in Article 3 (RCW Chapter 62A.3) do not apply to it. (AMC, paragraph 43, CP 158) (Note: there is no paragraph 42 in the AMC).

These obligations alter the fixed amount of money due under the promissory note and require additional undertakings and instructions beyond the mere repayment of money, thereby rendering the Note non-negotiable pursuant to the statutory definition and limitations governing negotiable instruments. (AMC, paragraph 44, CP 158). The Note is effectively “subject to or governed by” the DOT, which in turn means the promises contained in the Note are not unconditional. *See RCW 62A.3-106*. The lack of an unconditional promise also destroys negotiability. (AMC, paragraph 45, CP 158)

Defendant CMI has also taken the position that the MERS ADOT, where Defendant MERS purported to act as the “beneficiary”, transferred the DOT to Defendant CMI. This is a

factual and legal impossibility, as MERS cannot, as a matter of law, be the “beneficiary” of a DOT under Washington law. (AMC, paragraph 46, CP 158). Further, the MERS “Terms and Conditions” by which Defendant MERS agreed to be bound do not permit the use of the MERS system to either create or transfer beneficial interests in mortgage loans. (AMC, paragraph 47, CP 158)

It is axiomatic that Defendant MERS was not the lender, did not extend any credit to Plaintiff, and is not the “beneficiary”. The ADOT is thus a legal nullity. (AMC, paragraph 49, CP 158)(Note: there is no paragraph 48 in the AMC). It is also without dispute that Defendant MERS, which never had any interest in the Note, could not (and did not) transfer any interest in the Note to Defendant CMI. (AMC, paragraph 50, CP 159).

In view of the above, neither Defendant CMI nor Defendant MERS had any power or authority to appoint Defendant QLS as the “successor trustee” (as only the true “beneficiary” may appoint a successor trustee), and thus Defendant QLS was never legally appointed as the successor trustee. (AMC, paragraph 51, CP 159). The NOTS was thus issued in violation of applicable law, and is of no force or effect. (AMC, paragraph 52, CP 159).

Appellant thus filed the action below to challenge the foreclosure and sale of her property to Respondent CMI, asserting claims for Declaratory Relief (CP pages 154-160); Temporary and Permanent Injunctive Relief (CP pages 160-163); Violations of the Washington Consumer Protection Act (CP pages 163-165); Fraud (CP pages 165-167). Appellant also demanded trial by jury of all matters so triable as a matter of right and pursuant to law (CP page 167).

## **B. Procedural Facts.**

Appellant commenced the action below to enjoin a sale of her property by the filing of the original Complaint on August 15, 2016 (CP 3-16), together with a Lis Pendens (CP 17) and

Motion for Temporary Restraining Order Enjoining and Precluding Sale (CP 26-38). Respondents CMI and MERS filed a Response in Opposition to Appellant's Motion for Temporary Restraining Order on August 19, 2016 (CP 61-72), together with a Declaration of counsel for Respondent CMI which attached prior *pro se* pleadings filed by Appellant in prior litigation (CP 73-140).

Appellant filed her Amended Complaint for Declaratory Relief, Injunctive Relief, Violations of the Consumer Protection Act, and Other Relief Including Enjoining Any Trustee's Sale Pending Full Disposition of Action on the Merits on September 9, 2016 (CP 148-189). Respondent Quality Loan Service (hereafter "QLS") filed a Motion to Dismiss Appellant's Amended Complaint on September 30, 2016 (CP 215-222). Defendant CMI filed a Motion to Dismiss Appellant's Amended Complaint on October 3, 2016 (CP 225-236), together with a Declaration of counsel for CMI which attached certain documents filed in other prior *pro se* litigation and Bankruptcy proceedings involving Appellant (CP 237-445). Appellant filed her Response to Respondent CMI's Motion to Dismiss on October 31, 2016 (CP 446-458). Both motions were grounded upon CR 12(b)(6) for alleged failure to state a claim.

The trial court scheduled a hearing on the Respondents' Motions to Dismiss for December 20, 2016 pursuant to notice filed by counsel for Respondent CMI on November 2, 2016 (CP 461-462). On December 9, 2016, counsel for Respondent CMI filed a "Reply in Support of" its Motion to Dismiss (CP 463-470). The hearing on the Motions to Dismiss was continued to February 7, 2017 by Decision and Order of the lower court dated December 19, 2016 (CP 532-533) pursuant to Motion filed by Appellant (CP 518-526).

The trial court held the hearing and entertained argument on the Motions to Dismiss on February 7, 2017. The transcript of that hearing is filed herewith. The trial court entered its minutes as to the matters argued at the February 7, 2017 hearing (CP 534-535).

The trial court entered its 2-page Decision and Order as to the Motions to Dismiss on April 21, 2017 (CP 536-537). Appellant filed her Notice of Appeal of the subject April 21, 2017 Decision and Order on May 3, 2017 (CP 538-542), and her Designation of Clerk's Papers on June 2, 2017 (CP 545-548). The Clark County Clerk transmitted copies of the designated Clerk's Papers to this Court on June 12, 2017 (CP 549).

### III. ARGUMENT

#### A. Standard of Review

This court reviews the dismissal of a claim under CR 12(b)(6) *de novo*. *Reid v. Pierce County*, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998). The standard for dismissal is a stringent one and where this court accepts as true the allegations in a plaintiff's complaint and any reasonable inferences therein. *Reid* at 201.

Dismissal is only proper under CR 12(b)(6) if the complaint alleges no facts that would justify recovery, *Reid, supra* at 201, and is only appropriate when it appears *beyond a doubt* that the claimant can prove no set of facts consistent with the complaint that justifies recovery. *San Juan County v. No New Gas Tax*, 160 Wash.2d 141, 164, 157 P.3d 831 (2007)(emphasis added). A trial court should *only* grant a CR 12(b)(6) motion "only in the unusual case which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief". *San Juan County* at 164 (emphasis added).

## **B. The Trial Court Erred in Dismissing Appellant's Amended Complaint**

The April 21, 2016 Decision and Order is properly reversed in view of the stringent requirements to justify a dismissal established by the Washington appellate courts. There is no evidence or finding in the trial court's Decision and Order that it was "beyond a doubt" that Appellant could prove no set of facts to be entitled to Declaratory Relief, or Injunctive Relief, or any of the other forms of relief sought in the AMC. There is also nothing "on the face of" the AMC which show "an insuperable bar to relief". The April 21, 2017 Decision and Order is thus properly reversed on this threshold ground.

The trial court's two-page April 21, 2016 Decision and Order is grounded upon two bases, which appear to be some form of either *res judicata* or collateral estoppel although the Decision and Order do not mention these concepts. The first is that Appellant was precluded from re-litigating claims that were brought or could have been brought in prior Federal litigation. The second is that there was identity of the parties in the case below and the prior litigation. However, as the Decision and Order candidly admits, there is no "full analysis" set forth in the subject Decision and Order, which appears to have been decided on matters outside of the face of the AMC pursuant to the filings of Respondent CMI.

### **1. Improper Application of Res Judicata**

*Res judicata* is an affirmative defense. *Hisle v. Todd Pacific Shipyards Corp.*, 93 P.3d 108, 114, 151 Wash.2d 853 (Wash. 2004)(party asserting the defense of *res judicata* bears the burden of proof, *Civil Serv. Commn. Of City of Kelso v. City of Kelso*, 137 Wash.2d 166, 172, 969 P.2d 474 (1999). Further and significantly, *res judicata* does not bar claims arising out of different causes of action or intend "to deny the litigant his or her day in court". *Schoeman v. N.Y. Life Ins. Co.*, 106 Wash.2d 855, 860, 726 P.2d 1 (1986). The trial court's apparent

application of the doctrine, in the context of a CR 12(b)(6) motion, did in fact deny Appellant her day in court where she asserted, for the first time through counsel, claims which were different than those which she raised in her prior *pro se* litigation.

The party asserting the affirmative defense of *res judicata* bears the burden of proof. *Hisle v. Todd Pacific Shipyards Corp., supra*. In the event of an entry of a final judgment on the merits in a prior action, the application of *res judicata* in a subsequent action requires concurrence of (a) subject matter; (b) cause of action; (c) people and parties; and (d) “quality of persons for or against whom the claim is made”. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983), citing *Seattle First Nat’l Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978). In the absence of any one of these elements, *res judicata* does not apply.

Elements (b) and (c) were not and could not have been satisfied. First, the action below did not sit in Federal Court. Even if it had, the court would be required to apply “the res judicata law of the state in which it sits”, which would be Washington law. As set forth above, Washington law has four (4) distinct elements which must be satisfied in order for *res judicata* to apply. *Knuth v. Beneficial Washington, Inc.*, 107 Wn.App.727, 31 P.3d 694 (Wash.App. 2001).

There is no law which would permit the trial court to add additional requirements into the four “identity” elements under Washington law, or which would permit a party seeking to assert *res judicata* to intentionally mischaracterize the nature of the second action in an attempt to “pigeonhole” it into the first action. The April 21, 2017 Decision and Order cites no law which would permit the application of *res judicata* because a prior Complaint limited its chosen form of relief, while a second action sought different relief under different facts or a similar form of relief (here, a request for injunctive relief) under different facts.

The April 21, 2017 Decision and Order ignores the actual facts set forth in the AMC, which facts must be taken as true on a CR 12(b)(6) Motion and with all reasonable inferences from the factual allegations being made in Appellant’s favor. *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wash.2d 820, 355 P.3d 1100 (Wash, 2015)(reversing court of appeals and holding that homeowner’s allegations as to an improper foreclosure supported a CPA claim). In fact, the Washington standard on a Motion to Dismiss is so stringent that the law restricts dismissal as follows: “unless it appears *beyond doubt* that the plaintiff can prove no set of facts consistent with the complaint that would entitle him or her to relief, the motion [to dismiss] must be denied.” *Becker v. Cmty. Health Sys., Inc.*, 359 P.3d 746, 748, 184 Wash.2d 252 (Wash. 2015)(emphasis supplied), citing *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wash.2d 959, 577 P.2d 580 (1978).

The identity of cause of action element was not satisfied, which is apparent from a plain reading of the allegations and claims in the *pro se* Federal Action against the claims in the action below, and the specific facts upon which they are based which were asserted in the AMC by Appellant’s first-ever counsel. The *pro se* Federal action sought relief based on issues surrounding the application of payments and escrow issues. The AMC sought relief based on the following matters pursuant to the specific facts alleged which must be taken as true on a CR 12(b)(6) motion:

(a) the Note not being a “negotiable instrument” under RCW 62A.3-106(a), paragraph 10 of the Note, and Uniform Covenants 1, 4, 5, 7, 9, 10, and 14 of the DOT;

(b) the lack of evidence of any legal or effective transfer of the interest in the Note in view of the conflicting information set forth in the general allegations of the AMC as to the multiple alleged transfers of interests;

- (c) the fact that MERS is not the “beneficiary” of the DOT based on the *Bain* decision;
- (d) the ADOT being a legal nullity;
- (e) the NOTS being issued without legal authority and thus being void.

These claims were not before the Federal court in the prior *pro se* action. The April 21, 2017 Decision and Order must thus be reversed.

## 2. Improper Application of Collateral Estoppel

Collateral estoppel is also an affirmative defense. *State Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wash.App. 715, 722, 346 P.3d 771 (Wash.App. 2015)(reversing application of collateral estoppel as error). The first element of the doctrine is that the issue sought to be precluded is identical to that involved in the prior action; the fourth element of collateral estoppel which must be proven is that the application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Hadley v. Maxwell*, 144 Wash.2d 306, 311-12, 27 P.3d 600 (2001). The failure to establish any one of the four elements is fatal. *LeMond v. Dep’t of Licensing*, 143 Wash.App. 797, 805, 180 P.3d 829 (2008).

As with *res judicata*, the party asserting collateral estoppel bears the burden of proof. *In Re Moi*, 184 Wash.2d 575, 579 (Wash., 2015). For collateral estoppel to apply, the following four elements must be established:

- (a) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding;
- (b) the earlier proceeding ended in a judgment on the merits;
- (c) the party against whom collateral estoppel was asserted was a party to, or in privity with a party to, the earlier proceeding; and
- (d) the application of collateral estoppel does not work an injustice on the party against whom it is applied.

*Christensen v. Grant County Hosp. Dist.*, 98 P.3d 957, 961, 152 Wash.2d 299 (Wash. 2004). Elements (a) and (d) were not satisfied, warranting reversal of the trial court's April 21, 2017 Decision and Order.

It is beyond dispute that the facts giving rise to the relief requested herein were not either identical or "decided" in the *pro se* Federal action, and as to the *Bain*-related claims, could not have been as a matter of fact. In view of the specific facts set forth in the AMC herein, the trial court's application of collateral estoppel worked a substantial injustice on Appellant as it denied her any form of relief notwithstanding her specific and well-pleaded allegations which are based on both Washington statutory and decisional law, and especially considering that she could not have even brought the MERS-related claims in the prior action as a matter of fact.

Counsel for Respondent CMI filed copies of the prior *pro se* proceedings which are referred to herein. As set forth therein, Appellant had, long prior to the institution of the action hereinbelow, filed a *pro se* Complaint against CMI for "Emergency Injunctive Relief, Damages, and Declaratory Judgment" in the United States District Court for the District of Washington on or about December 7, 2010 (hereafter the "Federal Action"). Despite the title of the *pro se* Complaint, no claim for Declaratory Judgment was denominated in that action, which was premised primarily on the Fair Debt Collection Practices Act and arising out of a foreclosure attempt by Respondent CMI after CMI had filed a motion for relief from stay in Appellant's then-bankruptcy proceeding and again after Appellant received her discharge. The original *pro se* Complaint sought an emergency restraining order enjoining CMI from proceeding with the non-judicial foreclosure process, judgment for actual and punitive damages, and to "correct" Appellant's monthly mortgage amount to conform to the amount due under the Note.

Appellant filed a First Amended Complaint (hereafter “FAC”) in the Federal Action on or about January 11, 2011. The FAC sought Injunctive Relief against what was then an imminent foreclosure sale; a claim for “Tortious Fraud and Deceit”; and a claim for “Negligence”, all of which were based on an allegation that CMI falsely and fraudulently declared Appellant to be in default when Appellant alleged that she had made her mortgage payments timely. The FAC sought damages including interest, attorneys’ fees and costs, and a judgment quieting title although no claim for either quiet title or declaratory relief was set forth in the FAC.

Appellant filed a Motion for Summary Judgment (hereafter “PMSJ”) in the Federal Action. CMI filed a Response and Cross-Motion for Summary Judgment (hereafter “XMSJ”). On October 26, 2011, the Federal Judge entered an Order on the motions for summary judgment, finding that Appellant was not entitled to an injunction because she did not make what was termed to be “the full amount” of her monthly payment and was not qualified to have her escrow account closed. Although Appellant had made her monthly principal and interest payment, the dispute was as to the escrow for taxes and insurance. The Order also denied Appellant’s MSJ on the fraud and negligence claims for the same reasons.

The subject Order granted CMI’s XMSJ which, per the language of the Order itself, sought “dismissal” of Appellant’s fraud, negligence, and injunctive claims and due an allegation of Appellant’s failure to comply with the terms of her contract as to the escrow account. The 9<sup>th</sup> Circuit affirmed the Order following Appellant’s appeal thereof.

CMI filed its CR 12(b)(6) Motion to Dismiss below based on an alleged application of *res judicata* and/or collateral estoppel as a result of the dismissed *pro se* Federal action which did not contain claims for violations of the Washington Consumer Protection Act, or Declaratory Relief as to the facts set forth in the present action, which facts were unknown to Appellant at the

time she filed the *pro se* Federal action and could not have been known to her as she was not (and is not) an attorney. Further, the crux of the causes of action in the *pro se* Federal litigation were grounded in the “escrow dispute”: that is, that Appellant claimed that her payments were improperly applied in the context of escrow obligations.

In *State Farm v. Ford*, Division 1 of this Court found that “a number of courts have concluded that the opportunity to introduce evidence not before the fact finder in the prior action is a new procedural opportunity that precludes the application of collateral estoppel”. *State Farm*, 186 Wash.App. at 725-726 (multiple citations omitted here). The Court reversed the trial court’s application of collateral estoppel, holding that such application “worked an injustice against Ford”, and also found that there was no satisfaction of the “identity” element.

There was no identity of issues between the prior *pro se* litigation and the AMC below which would permit application of the doctrine *under the standards enunciated by this Court*, which application by the trial court below worked an injustice on Appellant by failing to permit the advancement of the claims in the AMC through counsel, which claims were different from those in the prior *pro se* litigation. The April 21, 2017 Decision and Order must thus be reversed.

With regard to the issue of fairness in the context of the offensive use of collateral estoppel, the United States Supreme Court has identified four factors that the court should consider, including whether a party might be afforded procedural opportunities in a later action that were unavailable in the first which would readily cause a different result. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-332, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), cited in *State Farm v. Ford*, *supra*, 186 Wash.App. at 725. The action below is markedly different as to the claims made and the basis for the relief sought than those matters in the prior *pro se* litigation, and Appellant was denied the procedural opportunities by the trial court below to advance different

claims, which itself demonstrates that the “identity” elements for any application of either *res judicata* or collateral estoppel were not met.

Further, it is without issue that the Supreme Court of Washington’s decision in *Bain v. Metropolitan Mortgage*, 285 P.3d 34 (Wash, 2012) had not been decided as of the pendency of Appellant’s *pro se* Federal Action or her October 28, 2011 Notice of Appeal of the District Court’s decision, although there is a passing reference to *Bain* in the 9<sup>th</sup> Circuit’s March 18, 2014 affirmance. The lower court’s statement in the April 21, 2017 Decision and Order that “Indeed, arguments made in the case of *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012) could have been brought at the time of the Federal lawsuit, regardless of whether or not the arguments had at that time failed appellate court approval” is thus problematic on multiple levels.

First, had Appellant made such arguments in her *pro se* Federal action “without appellate court approval”, Respondent Citi would have complained that the arguments “lacked merit or legal support”, and Appellant may have opened herself up to sanctions. Thus, as a practical matter, the *Bain* arguments were not “available” to Appellant at the time she prosecuted her *pro se* Federal action.

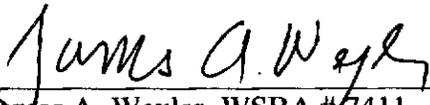
Second, in view of the timing of the *Bain* decision, any *Bain*-related arguments could not have been raised in the Federal Action, as that action was dismissed ten (10) months before the *Bain* opinion was issued (which was on August 16, 2012). The record fact that *Bain* had not been decided at the time of the prior *pro se* litigation demonstrates that there cannot and could not be “identity” of the claims in the AMC and the prior *pro se* litigation. The April 21, 2017 Decision and Order is thus properly reversed on these matters alone.

There has been no claim, and there is no language in the trial court's April 21, 2017 Decision and Order, that Appellant did not allege all elements of each cause of action asserted, notwithstanding that the motion to dismiss was allegedly based on CR12(b)(6) for "failure to state a claim". It is thus without issue that Appellant did allege, in the AMC, all of the necessary *elements for pleading* her three causes of action. The granting of the CR 12(b)(6) motions for "failure to state a cause of action" was thus error, requiring reversal of the trial court's April 21, 2017 Decision and Order.

#### IV CONCLUSION

The trial court improperly applied *res judicata* and/or collateral estoppel. The necessary elements of identify were not satisfied, and the application of collateral estoppel worked a hardship on Appellant, who set forth all of the elements for pleading her causes of action set forth in her AMC. The trial court's April 21, 2017 Decision and Order must thus be reversed.

Respectfully submitted,

  
James A. Wexler, WSBA #7411  
*Attorney for Appellants*

CERTIFICATE OF SERVICE

I, James A. Wexler, WSBA #7411 certify and declare as follows:

1. I am the Attorney for Appellant/Plaintiff Svetlana Kudina in the above-referenced cause of action,
2. On August 23, 2017, I caused the Opening Brief and this Certificate of Service by and through James A. Wexler, as their attorney to be e- filed with Court of Appeals II through the Appellate Court e-filing system and delivered by e-service to the defendants' attorney if enrolled, or hand-delivery and e-mail in the above referenced case, as follows

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DATED THIS 23<sup>rd</sup> Day of August, 2017 at Issaquah, Washington.

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**Comments:**

Appellant's Opening Brief with Certificate of Service attached

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