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Division II
State of Washington

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)

SVETLANA KUDINA,

Appellant/Plaintiff,

vs.

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

Respondents/Defendants

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

APPELLANT KUDINA'S REPLY BRIEF

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I. SUMMARY OF THE ARGUMENT

The Brief of Respondents Citimortgage, Inc. (hereafter “CMI”) and Mortgage Electronic Registration Systems, Inc. (hereafter “MERS”), although lengthy, simply repeats the same general and erroneous position over many pages, and ignores both the record facts and the applicable law in Washington as to the application of *res judicata* and the sparing application of dismissals based on CR 12(b)(6). As the Order appealed from does not specifically name *res judicata* or collateral estoppel, Appellant has addressed the application of both doctrines lest either CMI or MERS complain that Appellant waived any argument thereto.

The Order appealed from did not set forth that there was no set of facts under which Appellant could recover or find that there was something on the face of the Amended Complaint that amounted to an insuperable bar to relief, warranting reversal of the Order appealed from.

The Order appealed from does not dismiss the action based on the “lack of merit” arguments set forth in the Motion to Dismiss filed by Respondent Quality Loan Service Corporation of Washington (hereafter “QLS”), and thus it would be improper to argue, on appeal, an issue which was not included within the Order appealed from. QLS admits that it “joined” in the arguments of Respondents CMI and MERS as to claim

preclusion and *res judicata*, and in fact admits in its Brief that “the trial court’s ruling agreed that claim preclusion and *res judicata* applies”.

This appeal concerns the specific Order appealed from, which did not address any “lack of merit” arguments, and only dismissed the action below on the basis of claim preclusion and *res judicata*. The Order appealed from should be reversed based on the arguments in this Reply Brief and Appellant’s Opening Brief.

II. ARGUMENT

A. There Was No Finding of any “Insuperable Bar to Relief” on the Face of the Complaint which would justify dismissal under CR 12(b)(6)

The Washington standard for dismissals under CR 12(b)(6) is well-established and very stringent: motions based on CR 12(b)(6) should *only* be granted sparingly and with care, and *only in the unusual case* in which the plaintiffs allegations show, *on the face of the complaint*, some *insuperable* bar to relief. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1988) (emphasis added), citing *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988); *West v. Stahley*, 229 P.3d 943, 945 (Wash.App. 2010, citing *Hoffer, supra* and *Cutler v. Phillips Petroleum Co.*, 124 Wash.2d 749, 755, 881 P.2d 216 (1994)). *See also Hawkins v. Empres Healthcare Management, LLC*, 193 Wash.App. 84, 92, 371 P.3d 84, 88 (Wash.App. 2016) (reversing dismissal of fraud claims and as trial

court did not decide if plaintiff waived claim for rescission). Under this standard, the court may even consider hypothetical facts not part of the formal record. *West, supra*, citing *Cutler, supra*, 124 Wash.2d at 755.

There was no finding, in the Order appealed from, that the face of Appellant's Amended Complaint presented some "insuperable bar to relief". Also and significantly, neither CMI, nor MERS, nor QLS challenged the specific facts alleged by Appellant in her Amended Complaint below, and have not addressed these specific facts in their respective Briefs which facts must be taken as true on a CR 12(b)(6) motion to dismiss. *Futureselect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 331 P.3d 29, 34, 180 Wash.2d 954 (Wash. 2014), citing *Tenore v. AT&T Wireless Servs.*, 136 Wash.2d 322, 330, 962 P.2d 104 (1998); *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). Respondents have thus waived any argument as to the substance or sufficiency of the facts plead on appeal. *See. e.g., Wash. Fed. Sav. v. Klein*, 177 Wash.App. 22, 311 P.3d 53, 57 (Wash.App. 2013)(argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal); *Sourakli v. Kyriakos, Inc.*, 144 Wash.App. 501, 509, 182 P.3d 985 (2008)(argument neither pleaded nor argued to the trial court

cannot be raised for the first time on appeal, citing *Sneed v. Barna*, 80 Wash.App. 843, 847, 912 P.2d 1035 (1996)).

Absent any finding of any “insuperable” bar to relief on the face of Appellant’s Amended Complaint, the Order appealed from improperly granted Respondents’ Motions to Dismiss, warranting reversal of the subject Order.

B. There was no Satisfaction of the “Identity” Elements Which Justify the application of *res judicata*.

The Brief of Respondents CMI and MERS is long on rhetoric but short on substance, essentially reiterating the same mantras throughout their Brief which itself ignores the specific record facts starting with the differences between the prior *pro se* litigation and the litigation below. As reflected by a review of the litigation, the *pro se* case was based on an alleged misapplication of payments and fraudulent default. Appellant’s *pro se* First Amended Complaint (hereafter “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. **No claim for declaratory relief was alleged in the pro se FAC**, as the underlying facts

were grounded in an allegation that Appellant had made her payments and was not in default.

A plain reading of the Amended Complaint below shows that different causes of action were alleged, including a claim based on the non-negotiability of the Note in view of the express language of RCW Chapter 62A.3 (which defines and governs what constitutes a negotiable instrument); RCW 62A.3-106(a) (which defines “unconditional” by stating those conditions that prevent a promise from being unconditional); the specific paragraphs of the Note and the Uniform Covenants of the DOT which, as applied to the Note, render it non-negotiable; and claims under the Consumer Protection Act and for fraud. These claims were not present in the prior *pro se* litigation, and thus there was no satisfaction of the “identity of claims” element required under Washington law for the application of *res judicata* as the application of the doctrine 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 as the “and” language means that all four elements must be satisfied. It is without issue that the second element (identity of claims) was not present

between the prior *pro se* litigation and the litigation below, warranting reversal of the Order appealed from.

Respondents CMI and MERS admit that “[W]hile identity of causes of action ‘cannot be determined precisely by mechanistic application of a simple test,’ ‘the following criteria have been considered:...’” (Respondent CMI and MERS’s Brief, page 16, citing to *Rains v. State of Washington*, 100 Wash.2d 660, 663-64, 674 P.2d 165 (1983, which itself relied on a case from the 9th Circuit decision arising out of a California Federal case)). Significant is the holding’s use of the word “considered”, and that there is no language in *Rains* which provides that the enumeration of the possible criteria is either exclusive or exhaustive (although Respondents would have this court believe that they are). In any event, Respondents’ reliance on *Rains* actually demonstrates the fallacy in Respondents’ position.

Citing to *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982), the possible criteria set forth in *Rains* are four in number: (1) whether rights or interests in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

As the criteria are all essential by virtue of the word “and”, the absence of satisfaction of any one of the factors destroys the “identity” element for purposes of *res judicata*.

Factor (2) does not apply. The evidence as to the non-negotiability of the Note, fraud, CPA claims, and the actions of MERS would not have been presented in the prior *pro se* litigation, which was grounded upon a dispute as to application of payments. In fact, Respondents CMI and MERS candidly admit, on page 17 of their Brief, that Appellant “did not specifically cite to the Assignment of Deed of Trust in the District Court complaints”, thus admitting that the evidence in the two actions would be different.

Factor (3) does not apply. Appellant’s prior *pro se* litigation involved her right not to be placed in default as she asserted that she had made her payments which were misapplied. The action below involved Appellant’s rights as to the property, including the right not to be foreclosed upon when the foreclosure was based on a non-negotiable instrument and fraud; and the right not to be subjected to violations of the Consumer Protection Act.

Factor (4) does not apply, as the different claims in the two actions did not arise out of the same “transactional” nucleus of facts: the *pro se* litigation arose out of facts as to payments made and not credited; the transactional facts in the action below involved the claimed non-

negotiability of the Note, the wrongful actions of MERS, and the actions amounting to fraud based on the fraudulent representations of CMI and the facts giving rise to the CPA claim, which allegations must be taken as true on a CR 12(b)(6) motion.

No less than three of the four “suggested” factors do not apply to satisfy the “identity” prong for *res judicata* purposes. The Order appealed from must thus be reverse.

C. *Bain*-Related Arguments Were Not Part of the Lower Court Record in the Prior *pro se* Litigation and thus Could Not Have Been Raised in that Litigation

Respondents assert that “With reasonable diligence, MERS and the trustee could have been named in the District Court case” (referring to the *pro se* litigation; Respondent CMI and MERS’ Brief, page 14). This allegation belies the law as to pleading in good faith and the record and undisputed fact that the *Bain* decision (*Bain v. Metropolitan Mortgage*, 175 Wash.2d 83, 285 P.3d 34 (2012), hereafter “*Bain*”) was not decided, as Respondents CMI and MERS admit, until “during the pendency of Kudina’s Ninth Circuit appeal”. (Respondents CMI and MERS’ Brief, page 12).

Again, the claims raised in the prior *pro se* litigation were grounded upon a claim that Defendant CMI had improperly failed to credit Appellant’s payments and fraudulently declared Appellant to be in default.

Appellant plead these claims in good faith based on her allegations of payments made.

CR 11 requires that a party plead claims which are supported by facts and law. As of the time of the *pro se* litigation in the District Court, there was an absence of the specific legal authority, later provided by *Bain*, as to claims involving Respondent MERS. Respondents CMI and MERS take the position that because Appellant attempted to argue *Bain* as supplemental authority *during the course of her appeal* that *res judicata* applies to bar any *Bain*-related arguments or claims in the litigation below. This position ignores the well-established law in Washington, as set forth hereinabove, that an argument not made to the trial court cannot be raised for the first time on appeal. *Wash. Fed. Sav. v. Klein*, 177 Wash.App. 22, 311 P.3d 53, 57 (Wash.App. 2013)(argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal); *Sourakli v. Kyriakos, Inc.*, 144 Wash.App. 501, 509, 182 P.3d 985 (2008)(argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal, citing *Sneed v. Barna*, 80 Wash.App. 843, 847, 912 P.2d 1035 (1996)).

Appellant could not have raised *Bain*-related arguments in the *pro se* District Court case in good faith or as a matter of law at the trial (District) court level, thus precluding the application of *res judicata* to her

claims herein below. The Order appealed from must thus be reversed to the extent that it barred *Bain*-related claims.

D. Respondents' Remaining Argument

Respondents CMI and MERS cite to *Salmon v. MERS*, 197 Wash.App. 2067 (Div. III 2017), a decision which is admittedly unpublished, on page 22 of their Brief for the proposition that “*Bain* did not trump the application of *res judicata* because the same arguments could have been made in prior litigation”, citing a portion of the unpublished opinion which discusses that the homeowners could not have “reopened their litigation based on *Bain*” as “The *Salmons* could have appealed their 2010 judgment...”. The instant case is factually distinguishable, and thus the unpublished *Salmon* decision has no bearing on this appeal.

Respondents CMI and MERS readily admit that Appellant herein raised *Bain* as supplemental authority during the course of her appeal to the 9th Circuit. Thus, there was no “appeal” possible on the basis of *Bain*, as Appellant’s matter was already on appeal. *Salmon* thus provides no basis for affirmance of the Order appealed from.

III. CONCLUSION

Respondents’ Briefs ignore the record facts below, rely on

inapplicable legal arguments, and provide no basis for affirmance of the Order appealed from. There is nothing on the face of Appellant's Amended Complaint which precludes relief, and the "identity" elements of *res judicata* were not satisfied. The Order appealed from must thus be reversed.

IV. REQUEST AND MOTION FOR APPELLATE ATTORNEYS' FEES AND COSTS

Appellant requests, if she is the prevailing party in this appeal, that this Court enter an Order of entitlement for Appellant's attorneys' Fees and Costs, as this Court has inherent jurisdiction to fix attorneys' fees for services on appeal when allowable by contract and may remand to the trial court to take evidence as to the amount and reasonableness of fees, *Brandt v. Impero*, 463 P.2d 197, 1 Wn.App. 678, 683 (Wash.App. 1969); *Granite Equipment Leasing Corp. v. Hutton*, 525 P.2d 223, 84 Wn.2d 320, (Wash. 1974, citing *Brandt, supra*), and as the loan documents the subject of this appeal provide for an award of attorneys' fees and costs.

DATED THIS 2RD DAY of November, 2017

Respectfully submitted,

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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 November 2, 2017, I caused the Appellant/Plaintiff's Reply 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-mailed in the above referenced case, as follows:

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