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NO. 50895-8-II

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

PAUL MOSELEY,

Appellant,

v.

CITIMORTGAGE INC.,

Respondent.

RESPONDENT CITIMORTGAGE'S AMENDED[1] BRIEF

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[1] The Amended Brief is substantively identical to Citi's original brief; the brief has been revised solely to insert references to the Clerk's Papers that were timely designated by Citi on April 12, 2018.

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. ARGUMENT 5

A. With the Exception of the New Limitation-Period Defense to Foreclosure, All of the Supposed Legal and Factual Disputes Concerning Moseleys' Debt to Citi Were Adjudicated Against Moseley. 5

B. Citi's Judicial Foreclosure Action Is Not Time Barred. 8

C. As the Holder of the Note, CitiMortgage Was Entitled to Foreclose. 10

D. There Is No "Broken Chain of Title." 13

E. Moseley's "Counterfeit Note" Argument Is Meritless and Was Already Adjudicated Against Him. 15

F. Summary Judgement Does Not Violate Either the Federal or State Constitution. 16

G. The Trial Court Properly Considered the Evidence Submitted by Citi. 17

H. The Form of the Summary Judgment Order Is of No Consequence. 20

I. Citi's Judicial Foreclosure Action Is Not Barred by Discontinuance of Nonjudicial Foreclosure Proceedings. 21

III. REQUEST FOR FEES ON APPEAL 22

IV. CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

4518 S. 256th, LLC v. Karen L. Gibbon, P.S.,
195 Wn. App. 423, 382 P.3d 1 (2016) 8

In re Allen,
472 B.R. 559 (B.A.P. 9th Cir. 2012) 12

Bain v. Metro Mortg. Group, Inc.,
175 Wn.2d 83, 285 P.3d 34 (2012) 10, 11, 12

Barkley v. Greenpoint Mortg. Funding, Inc.,
190 Wn. App. 58, 358 P.3d 1204 (2015) 19

Bhatti v. Guild Mortg. Co.,
2011 WL 6300229 (W.D. Wash. 2011) 14

Bingham v. Lechner,
111 Wn. App. 118, 45 P.3d 562 (2002) 9

Boeing Emps.' Credit Union v. Burns,
167 Wn. App. 265, 272 P.3d 908 (2012) 22

Brown v. Wash. State Dep't of Commerce,
184 Wn.2d 509, 359 P.3d 771 (2015) 11

Bushong v. Wilsbach,
151 Wn. App. 373, 213 P.3d 42 (2009) 23

Cantrill v. Am. Mail Line, Ltd.,
42 Wn.2d 590, 257 P.2d 179 (1953) 18, 19

Cashmere Valley Bank v. Dep't of Revenue,
175 Wn. App. 403, 305 P.3d 1123 (2013) 14

Christensen v. Grant Cty. Hosp. Dist. No. 1,
152 Wn.2d 299, 96 P.3d 957 (2004) 5, 6

Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship,
158 Wn. App. 203, 242 P.3d 1 (2010) 23

Deutsche Bank Nat. Tr. Co. v. Slotke,
192 Wn. App. 166, 367 P.3d 600 (2016) 13

Diamond Door Co. v. Lane-Stanton Lumber Co.,
505 F.2d 1199 (9th Cir. 1974) 16

Discover Bank v. Bridges,
154 Wn. App. 722, 226 P.3d 191 (2010) 19

Duckworth v. City of Bonney Lake,
91 Wn.2d 19, 586 P.2d 860 (1978) 20

Edmundson v. Bank of Am.,
194 Wn. App. 920, 378 P.3d 272 (2016) 8, 10

Ensley v. Pitcher,
152 Wn. App. 891, 222 P.3d 99 (2009) 7

Estribor v. Mountain States Mortg.,
2013 WL 6499535 (W.D. Wash. 2013) 12

Folsom v. Burger King,
135 Wn.2d 658, 958 P.2d 301 (1998) 20

In re Healthcentral.com,
504 F.3d 775 (9th Cir. 2007) 16

In re Coday,
156 Wn.2d 485, 130 P.3d 809 (2006) 17

Kave v. McIntosh Ridge Primary Rd. Ass'n,
198 Wn. App. 812, 394 P.3d 446 (2017) 9

Lamb v. Mortg. Elec. Registration Sys., Inc.,
2011 WL 5827813 (W.D. Wash. 2011) 14

LaMon v. Butler,
112 Wn.2d 193, 770 P.2d 1027 (1989) 16

Marino Prop. Co. v. Port Comm'rs,
97 Wn.2d 307, 644 P.2d 1181 (1982).....7

Moseley v. CitiMortgage Inc.,
2011 WL 5175598 (W.D. Wash. 2011),
aff'd, 564 F. App'x 300 (9th Cir. 2014).....2, 6, 10, 14

Moseley v. CitiMortgage Inc.,
2011 WL 6151414 (W.D. Wash. 2011),
aff'd, 564 F. App'x 300 (9th Cir. 2014).....3

Moseley v. CitiMortgage, Inc.,
2015 WL 728655 (W.D. Wash. 2015),
aff'd, 671 F. App'x 1008 (9th Cir. 2016).....3, 4, 6, 7, 10

Nave v. City of Seattle,
68 Wn.2d 721, 415 P.2d 93 (1966).....16

OneWest Bank, F.S.B. v. Erickson,
185 Wn.2d 43, 367 P.3d 1063 (2016).....17

Preston v. Duncan,
55 Wn.2d 678, 349 P.2d 605 (1960).....16

In re Reinke,
2011 WL 5079561 (Bankr. W.D. Wash. 2011).....12

Remington Invs., Inc. v. Berg Prod. Design, Inc.,
172 F.3d 876, 1999 WL 132267 (9th Cir. 1999).....18

Salmon v. Bank of Am. Corp.,
2011 WL 2174554 (E.D. Wash. 2011).....12

Sidorenko v. Nat'l City Mortg. Co.,
2012 WL 3877749 (W.D. Wash. 2012).....14

St. John v. Nw. Tr. Serv., Inc.,
2011 WL 4543658 (W.D. Wash. 2011).....12

State v. Ben-Neth,
34 Wn. App. 600, 663 P.2d 156 (1983).....18, 19

State v. Kane,
23 Wn. App. 107, 594 P.2d 1357 (1979) 19

State v. Kreck,
86 Wn.2d 112, 542 P.2d 782 (1975) 19

State v. Quincy,
122 Wn. App. 395, 95 P.3d 353 (2004) 19

State v. Ziegler,
114 Wn.2d 533, 789 P.2d 79 (1990) 19

Sunbreaker Condo. Ass'n v. Travelers Ins. Co.,
79 Wn. App. 368, 901 P.2d 1079 (1995) 20

Timberland Bank v. Mesaros,
1 Wn. App. 2d 602, 406 P.3d 719 (2017) 9

United States v. Karr,
928 F.2d 1138, 1991 WL 40296 (9th Cir. 1991) 18

United States v. Rubier,
651 F.2d 628 (9th Cir.1981) 18

Upkoma v. U.S. Bank Nat. Ass'n,
2013 WL 1934172 (E.D. Wash. 2013) 14

W.R. Grace & Co.—Conn. v. State, Dep't of Revenue,
137 Wn.2d 580, 973 P.2d 1011 (1999) 21

In re Wemberley,
186 Wn. App. 475, 349 P.3d 11 (2015) 10

Wilson v. Bank of Am.,
2013 WL 275018 (W.D. Wash. 2013) 12

Zhong v. Quality Loan Serv. Corp.,
2013 WL 5530583 (W.D. Wash. 2013) 12

Statutes

RCW 5.45.020 19

RCW 61.12.120 21

RCW 61.24.005 12

RCW 61.24.100 22

RCW 61.24.120 21

RCW 62A.1-201 12

RCW 62A.2A-506 21

RCW 62A.3-205 14

RCW 62A.3-301 12

Constitutional Provisions

United States Constitution, Seventh Amendment.....16

Washington Constitution, Article 1 16

Rules

CR 52 20

CR 56 21

RAP 2.5.....9

RAP 9.12.....21

RAP 18.1.....22, 23

Other Authorities

K. Tegland,
5A. Wash. Prac. § 372 (2d ed. 1982) 19

I. STATEMENT OF THE CASE

On March 2, 2008, Paul and Michelle Moseley borrowed $262,500.00 from CitiMortgage ("Citi"). The loan was documented in a Note and secured by a Deed of Trust, CP 434, 436-60, facts which have been adjudicated against Mr. Moseley ("Moseley") in several prior lawsuits.

After making payments for a few years, in late 2010, the Moseleys "suspended payments" on the loan while they sought to "verify that they were paying the correct party" and that alleged "accounting errors would be resolved." App. Br. at 5-6. Save for one payment made as part of scheme to pay pennies on the dollar on the loan, the Moseleys have not made a payment since.

Rather than repay the loan, Moseley embarked on years of frivolous litigation—both in small claims court and the federal courts—litigation through which he hoped to somehow escape his debt without actually paying it. In his first federal lawsuit filed in 2011:

> [Moseley's] complaint names CitiMortgage Inc. as the defendant, alleging that CitiMortgage services a deed of trust note on the Moseleys' home. Mr. Moseley requests a declaration that the Moseleys are the exclusive title holders to their residential real property; that the deed which purported to convey their exclusive title to the property was in fact an equitable deed of trust; and that the note encumbering the property is void, invalid, satisfied and/or lost. The complaint further alleges that (1) CitiMortgage

> violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605, based upon CitiMortgage's failure to make appropriate corrections to the mortgage account, despite Mr. Moseley's dispute of the charges, and failure to respond to qualified written request inquiries; (2) CitiMortgage violated the Uniform Commercial Code § 3-409, based upon CitiMortgage's cashing a check after Mr. Moseley sent the check with a letter that told CitiMortgage that the payment constituted a settlement of all monies owed on the account; (3) CitiMortgage failed to comply with the Truth in Lending Act (TILA), 12 U.S.C. § 2605(e), in not granting the Moseleys the right of rescission; (4) CitiMortgage violated the Fair Debt Collection Practices Act (FDCPA), 12 U.S.C. § 2605(f)(1)(a) and (b), based upon CitiMortgage's failure to comply with credit reporting requirements; (5) CitiMortgage is not the real party in interest because it does not hold the Note; (6) the assignment of the Deed of Trust to the Mortgage Electronic Registration System (MERS) was invalid because MERS did not hold a beneficial interest in the Note; (7) CitiMortgage should be declared "in Dishonor" for not paying certain liens the Moseleys filed on the property in state court; (8) the Moseleys exercised the right of rescission under TILA, and CitiMortgage failed to honor that right; (9) the Deed of Trust is invalid because CitiMortgage did not follow general accounting principles/breached the contract/breached its fiduciary duty; and (11) CitiMortgage trespassed twice on the Moseleys' property.

Moseley v. CitiMortgage Inc., 2011 WL 5175598, at *1 (W.D. Wash. 2011) ("*Moseley I*"), *aff'd*, 564 F. App'x 300 (9th Cir. 2014). After dissecting each argument, the district court granted judgment in favor of Citi, ruling that "the claims . . . do not entitle Mr. Moseley to any relief," finding, among other things, that "the current balance owing on the loan as of September 27, 2011 is $268,445.05. The Moseleys have not paid the

outstanding debt secured by the mortgage." *Id.* at *6. The district court subsequently granted fees to Citi as provided in Deed of Trust, noting that most of the claims in Moseley's suit "constitute a direct attack on both the Deed of Trust and the loan it secures." *Moseley v. CitiMortgage Inc.*, 2011 WL 6151414, at *3 (W.D. Wash. 2011), *aff'd*, 564 F. App'x 300 (9th Cir. 2014).

Three years later—just weeks after the Ninth Circuit rejected his appeal of the first suit—Moseley filed another lawsuit against Citi, arguing that his debt had been discharged by "tender of payment," and that Citi was liable for violating other federal debt collection and reporting laws. The district court again rejected every one of Moseley's arguments, finding that "on March 2, 2008, plaintiff borrowed $262,500.00 from, and executed a promissory note for the same payable to, CitiMortgage, Inc. . . . The note was secured by a Deed of Trust ('DOT'), identifying CitiMortgage as the Lender and plaintiff and his wife as the Borrower." *Moseley v. CitiMortgage, Inc.*, 2015 WL 728655, at *3 (W.D. Wash. 2015) ("*Moseley II*"), *aff'd*, 671 F. App'x 1008 (9th Cir. 2016). The district court ruled:

> [P]laintiff has failed to properly pay his debt.
>
> . . . .

> CONCLUSION
>
> Plaintiff's complaint is without merit. The Court should dismiss plaintiff's complaint for failure to state any legally cognizable claim with no leave to amend. The Court should order that, if plaintiff files any documents in this case in the future, the Clerk will docket, but the Court will not act upon, any such documents. If plaintiff appeals this order and/or dismissal of this case, this Court should deny any in forma pauperis status without prejudice to plaintiff to file an application to proceed in forma pauperis with the U.S. Ninth Circuit Court of Appeals.

Id. at *4-5.

After attempts at nonjudicial foreclosure during the pendency of the federal lawsuits became bogged down by frivolous argument and threats by Moseley against persons participating in the sale process, Citi discontinued its efforts and filed suit in Jefferson County Superior Court seeking to foreclose judicially on the property on December 7, 2016. CP 309-42.

After Citi filed a motion for default, Moseley filed an Answer and Counterclaim, which morphed into yet another motion by Moseley to "quiet title." *See* CP 161-272. Moseley's motion was denied on June 16, 2017, and Citi filed a motion for summary judgment in which it listed the evidence presented in support, including four declarations. CP 422.

Following oral argument on September 1, 2017, the Superior Court granted summary judgment in favor of Citi and entered a Judgment and

Decree of Foreclosure, including an award of attorneys' fees. CP 303-307. After Moseley appealed to this Court, an Order of Sale issued on January 26, 2018. CP 546-48.

II. ARGUMENT

Moseley's brief contains eleven Assignments of Error, App. Br. at 9-11, followed by six pages of Issues Pertaining to Assignments of Error, *id.* at 11-17. His Argument is presented in five numbered sections, *id*. at 19-32, followed by a another section titled "Court Procedural Errors in Argument – Appealable Issues," *id.* at 33-36. Citi has done its best to present a structured response to Moseley's arguments (as Citi understands them), focused primarily on the five points on which Moseley has presented argument.

A. With the Exception of the New Limitation-Period Defense to Foreclosure, All of the Supposed Legal and Factual Disputes Concerning Moseleys' Debt to Citi Were Adjudicated Against Moseley.

While summary judgment was properly entered against Moseley on the evidentiary record before the trial court, Moseley already litigated—and lost—essentially every contested issue in the previous lawsuits he filed in federal court. Collateral estoppel bars his attempt to relitigate those issues in this case. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004) ("Collateral estoppel, or

issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties.”).

The doctrine of collateral estoppel applies where there is a showing that “(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.” *Christensen*, 152 Wn.2d at 307. Here, the district court actually and necessarily determined (and the Ninth Circuit affirmed):

- That Moseley received the loan and executed the Note and Deed of Trust on March 2, 2008. *Moseley I* at *2; *Moseley II* at *1.
- That Moseley stopped making payments on the loan in 2010. *Moseley I* at *3.
- That Citi notified Moseley by letter dated December 16, 2010, that two monthly payments were then due. *Id.* at *2.
- That “[t]he Moseleys have not paid the outstanding debt secured by the mortgage.” *Id.* at *6.

- That Moseley has no claim based on "the role of MERS." *Id.* at *7.
- That there were no factual allegations, let alone proof, that "would state a claim that the Deed of Trust and Note are void or invalid." *Id.* at *8.
- That on February 12, 2012, Moseley purportedly tried to tender full payment on the Note. *Moseley II* at *3.

To the extent Moseley did ***not*** make claims that were available to him at the time of the federal lawsuits, res judicata bars those claims. *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009) ("'The doctrine of res judicata rests upon the ground that a matter which has been litigated, or ***on which there has been an opportunity to litigate***, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.'") (quoting *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982)) (emphasis added).

Other than his new statute of limitations defense, and possibly his inquiry into whether Citi was the holder of the Note at the time of foreclosure, Moseley's claims were either decided, or could have been

raised, in his prior lawsuits. Moseley has argued the same theories *ad nauseum*, and the Court should not allow him to do so again.

B. Citi's Judicial Foreclosure Action Is Not Time Barred.

Moseley contends that Citi's right to judicially foreclose is barred by the six year statute of limitations applicable to written contracts. App. Br. at 8 (Assignment of Error 4), 13, 19. He argues that because he missed an installment payment more than six years before Citi filed its judicial foreclosure suit, Citi has no remedy.

Moseley's argument fails. The statute of limitations runs on each installment from the time it is due, and does not begin to run on the entire debt until all future installments are accelerated. *Edmundson v. Bank of Am.*, 194 Wn. App. 920, 930-31, 378 P.3d 272 (2016); *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 434-35, 382 P.3d 1 (2016). Moseley's insinuation that the debt was accelerated more than six years before suit was filed is demonstrably false, see CP 399-416,[2] and Citi's judicial foreclosure action is not time barred.

On appeal, Moseley for the first time suggests that "[a]t the very minimum, the trial court should have considered that installments due

[2] Moseley attempted to cut and paste various documents in order to suggest that the payments on the Note were accelerated prior to December 7, 2010. *See* CP 281-283. The loan was not accelerated in 2010, a fact that is not only directly proven by the Declaration of Lorissa Russelburg, CP 399-416, but is also self-evident from Moseley's own filing. CP 282 (December 17, 2010 letter stating that "[f]ailure to cure default ***by 01/16/11 may result in the acceleration*** of all sums due") (emphasis added).

prior to six years before CMI commenced the action, would most assuredly be barred from the computation of the amounts allegedly owed by Moseley." App. Br. at 24. But Moseley did not make this argument to the trial court, nor did he take exception to the amount of the Judgment. As such, he waived this new argument. *Timberland Bank v. Mesaros*, 1 Wn. App. 2d 602, 606, 406 P.3d 719 (2017) ("Under RAP 2.5(a), the 'appellate court may refuse to review any claim of error which was not raised in the trial court.' And we generally do not consider arguments raised for the first time on appeal. *Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 823, 394 P.3d 446 (2017).").

Had Moseley argued about the ***calculations*** (rather than arguing that Citi's action was barred in its entirety), Citi could have presented a litany of additional arguments and evidence as to why the entire debt was due and owing at the time suit was filed, including the fact that the pendency of interim nonjudicial foreclosure proceedings tolled the limitations period, *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562 (2002) ("commencement of a nonjudicial foreclosure tolls the statute of limitations"); that Moseley's acknowledgement of—and attempt to repay[3]—the debt restarted the limitations period, *In re Wemberley*, 186

[3] Moseley's failed 2014 gambit to "pay off" the loan in 2014—which Moseley characterized at the time as tender of payment of an obligation to pay an instrument—is

Wn. App. 475, 515-16, 349 P.3d 11 (2015) ("the clock resets once the promisor executes a new writing expressly acknowledging the debt or promising to pay it"); that Moseley's partial payment on December 23, 2010,[4] extended the limitations period another six years, *id.*; and the fact that the written notice of default during the limitations period was an action sufficient to restart the clock on the missed payment. *Edmundson*, 194 Wn. App. at 930.

The foreclosure lawsuit was timely filed, and Moseley's argument to the contrary is without merit. It is too late for him to raise new theories about debt calculations, but his arguments would have been unavailing in any event.

C. As the Holder of the Note, CitiMortgage Was Entitled to Foreclose.

Citing *Bain v. Metro Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), Moseley next argues that Citi is somehow precluded from foreclosing because MERS, which is identified as the lender's nominee in the Deed of Trust, assigned its interest in the Deed of Trust to Citi in 2011. It is apparently Moseley's contention that any loan touched by MERS is

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discussed in detail in the District Court's order dismissing his second lawsuit. *Moseley II* at *1, 3-4.

[4] *Moseley I* at *2 (describing payment mailed on December 23, 2010).

void or uncollectible. Moseley's argument (which he made and lost in *Moseley I*) is a non-sequitur that the trial court properly rejected.

In *Bain*—a case arising from a nonjudicial foreclosure under the Deed of Trusts Act—the Washington Supreme Court held that "MERS is an ineligible 'beneficiary within the terms of the Washington Deed of Trust Act[]' if it never held the promissory note or other debt instrument secured by the deed of trust." 175 Wn.2d at 110. The Court allowed that it was still possible MERS was entitled to foreclose as an agent of the lender or its assigns, but that "[i]It ha[d] not established that it is an agent for a lawful principal." *Id.* There is nothing "illegal" about MERS; the Washington Supreme Court noted its valuable role in increasing liquidity in the residential lending markets, *id.* at 94-96, and specifically rejected the argument that the deed was void, noting that plaintiff had cited "no authority in his opening brief for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title." *Id*. at 112.

Here, Citi ***is*** the holder of the Note, and is entitled to enforce the Note and the Deed of Trust. *See Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 520-23, 546-47, 359 P.3d 771 (2015) (explaining that note servicer may hold and enforce note); *Bain*, 175 Wn.2d at 101-02 (holder of a note secured by a deed of trust is entitled to

foreclose on the deed of trust); RCW 62A.3-301; RCW 62A.1-201; *see also* RCW 61.24.005(2). As a result, "an assignment of the DOT is not relevant because under Washington law, the security for an obligation follows the debt." *In re Allen*, 472 B.R. 559, 569 (B.A.P. 9th Cir. 2012); *see also St. John v. Nw. Tr. Serv., Inc.*, 2011 WL 4543658, at *3 (W.D. Wash. 2011) ("Washington State does not require recording of such transfers and assignments."); *In re Reinke*, 2011 WL 5079561, at *10 (Bankr. W.D. Wash. 2011) ("The WADOTA does not require that an assignment of a deed of trust be recorded in advance of the commencement of foreclosure."); *Salmon v. Bank of Am. Corp.*, 2011 WL 2174554, at *8 (E.D. Wash. 2011) ("there is no basis for the Court to find that the [borrowers'] rights under the First Deed of Trust were affected by the recording of the [MERS] Corporation of Assignment of Deed").

And whatever MERS's former interest may be been, there is "no authority for [Moseley's] assertion that MERS is incapable of transferring its interest in a deed of trust." *Zhong v. Quality Loan Serv. Corp.*, 2013 WL 5530583, at *3 (W.D. Wash. 2013); *Estribor v. Mountain States Mortg.*, 2013 WL 6499535, at *3 (W.D. Wash. 2013); *see also Wilson v. Bank of Am.*, 2013 WL 275018, at *8-9 n.9 (W.D. Wash. 2013) ("The *Bain* Court did not state, as the Wilsons allege here, that MERS is incapable of transferring its interest in a deed of trust . . . .").

Moseley cites no other authority for his assertion that MERS is incapable of transferring its interest as nominee for the beneficiary, or how such a transfer would affect a foreclosure action filed years later by the holder of the Note in any event. Washington law plainly establishes that Citi, the holder of the Note, had the right to foreclose when it filed suit.

D. There Is No "Broken Chain of Title."

Moseley's third argument is that foreclosure was improper because there was a "break" in the "chain of title" of either the Note or Deed of Trust. App. Br. at 27-29. Moseley apparently contends that because only the original Note was brought to the summary judgment hearing on September 1, 2017, the "physical separation" of the note and deed somehow makes the loan documents void.

Mosely cites no competent authority for his argument, because there is none. Citi was the holder of the Note when it filed the foreclosure action, CP 310, 464, and the trial court correctly concluded that as the holder of the Note and beneficiary of the Deed of Trust, Citi was entitled to foreclose on its interest. *Deutsche Bank Nat. Tr. Co. v. Slotke*, 192 Wn. App. 166, 179, 367 P.3d 600 (2016) ("as the holder of the note, Deutsche Bank had the requisite authority under the deeds of trust act to enforce the note and deed of trust" in judicial foreclosure action). Citi possessed the original Note, which was indorsed-in-blank. As such, the Note was

payable to the bearer, and could be negotiated without any further indorsements. *See* RCW 62A.3-205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.").

Moseley's argument that foreclosure was somehow wrongful because the loan was "securitized" is a red herring. The securitization of a loan does not change the character of a note or deed of trust. *Cashmere Valley Bank v. Dep't of Revenue*, 175 Wn. App. 403, 410-12, 305 P.3d 1123 (2013). It "merely creates a separate contract, distinct from [borrower]'s debt obligations under the Note and does not change the relationship of the parties in anyway." *Lamb v. Mortg. Elec. Registration Sys., Inc.*, 2011 WL 5827813, at *6 (W.D. Wash. 2011) (citing cases); s*ee also Upkoma v. U.S. Bank Nat. Ass'n*, 2013 WL 1934172, at *3 (E.D. Wash. 2013) ("The note remained secured by the deed of trust despite the fact that the former was securitized."); *Bhatti v. Guild Mortg. Co.*, 2011 WL 6300229, at *5 (W.D. Wash. 2011) (citing similar cases); *Moseley I* at *7 (finding that securitization is irrelevant); *Sidorenko v. Nat'l City Mortg. Co.*, 2012 WL 3877749, at *2 (W.D. Wash. 2012) (plaintiff's "securitization argument and his 'true lender' arguments fail as a matter of law.").

Citi's right to enforce the Note and Deed of Trust does not depend upon and is unaffected by an assignment from MERS—nor is CitiMortgage's right dependent on the Note and Deed of Trust being in the same room at any moment in time.

E. Moseley's "Counterfeit Note" Argument Is Meritless and Was Already Adjudicated Against Him.

Moseley again raises the meritless argument that he did not sign the Note. Based on this bare assertion, Moseley asserts that summary judgment cannot be entered against him. But multiple courts have adjudicated this very issue ***multiple*** times, and Mosely admitted executing a note in his answer, CP 5, and at the summary judgment hearing (where the original Note was made available to Moseley and the trial court for inspection). RP 4:17-18; 5:17-18; 16:14-15; 18:9-10 ("The plaintiff admits the Deed and Note were executed properly.").

Citi more than met its burden of proving it is the holder of a note executed by Moseley. There is no ***evidence*** in the record suggesting that the Note is a "forgery,"[5] and no genuine dispute as to whether Moseley executed the Note. He did, and his liability on the Note has now been adjudicated at least three separate times.

[5] Perhaps hoping to avoid the consequences of perjury, Moseley did not submit a sworn statement that he did not sign the Note, or that the signatures on the Note submitted by Citi were forgeries.

F. Summary Judgement Does Not Violate Either the Federal or State Constitution.

As his fifth argument, Moseley suggests that the entry of summary judgment is a violation of his constitutional right to a jury trial guaranteed in civil actions under U.S. Const. amend. 7, and by Wash. Const. art. 1, § 21 were infringed by the entry of summary judgment. It is well established that "[w]hen there is no genuine issue of material fact, . . . summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial." *LaMon v. Butler*, 112 Wn.2d 193, 200 n.5, 770 P.2d 1027 (1989) (citing *Nave v. City of Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966)). That is because summary judgment is granted as a *matter of law* where there is no material factual issues, "and, therefore, the province of the jury, fact finding, is not invaded." *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 & n.6 (9th Cir. 1974). Indeed, the very "function of summary judgment is to avoid a useless trial." *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960); *see also In re Healthcentral.com*, 504 F.3d 775, 787 (9th Cir. 2007) (court's ruling on dispositive motions does not affect a party's Seventh Amendment right to a jury trial as these motions merely address whether trial is necessary at all).

Accordingly, any right to a jury trial Mr. Moseley had was in no way infringed as a result of the trial court granting judgment in favor of CitiMortgage because there were no genuine issues of material fact that needed to be tried

G. The Trial Court Properly Considered the Evidence Submitted by Citi.

As part of what he characterizes as "procedural error," Moseley argues that the trial court erred in considering three declarations submitted by Citi, evidence which he contends should have been excluded "based on hearsay and best evidence rule." App. Br. at 33-35. The trial court properly considered the declarations given that there was no genuine dispute as to the reliability of the evidence, including the business records appended thereto.

For the convenience of the court below, Citi's counsel, Mr. McCormick, submitted a declaration attaching copies of various federal court decisions adverse to Moseley, all of which are subject to judicial notice. *See In re Coday*, 156 Wn.2d 485, 500 n.3, 130 P.3d 809 (2006); *OneWest Bank, F.S.B. v. Erickson*, 185 Wn.2d 43, 68-69, 367 P.3d 1063 (2016) (ruling that trial court properly admitted unauthenticated faxed document of Idaho court that was not prepared by bank as business record based on "sufficient indicia of authenticity"). Mr. McCormick also

provided a copy of the original note, CP 357, an original that was present at the summary judgment hearing. RP 4:17-18; 5:17-18.

Jennifer Ollier, CP 433-62, and Lorissa Russelburg, CP 398-416, are Citi employees (and records custodians) whose declarations were properly considered by the trial court. Several of the attached records—such as the Note and Deed of Trust—"are operative contractual documents, the hearsay rule is not implicated and it is unnecessary to consider whether they come in under the business records exception." *Remington Invs., Inc. v. Berg Prod. Design, Inc*., 172 F.3d 876, 1999 WL 132267, at *1 (9th Cir. 1999) (citing *United States v. Rubier*, 651 F.2d 628, 630 (9th Cir. 1981) ("[F]acts of independent legal significance constituting a contract which is at issue are not hearsay.")); *United States v. Karr*, 928 F.2d 1138, 1991 WL 40296, at *1 (9th Cir. 1991) ("[T]he promissory notes, like a contract, are not hearsay and are admissible.").

Both witnesses provided a foundation for the admission of the documents appended to the declarations and the testimony therein:

> Reviewing courts ***broadly interpret the statutory terms "custodian"*** and "other qualified witness." [*State v. Ben-Neth*, 34 Wn. App. 600, 603, 633 P.2d 156 (1983)]. It is not necessary that the person who actually made the record provide the foundation. *Id.* "Testimony by ***one who has custody of the record as a regular part*** of his work or has supervision of its creation ('other qualified witness' under the statute) will suffice." *Id.* (citing *Cantrill v. American Mail Line, Ltd.*, 42 Wash.2d 590, 257 P.2d 179 (1953)).

State v. Quincy, 122 Wn. App. 395, 399, 95 P.3d 353 (2004) (emphasis added); *Barkley v. Greenpoint Mortg. Funding, Inc.*, 190 Wn. App. 58, 67, 358 P.3d 1204 (2015) ("Reviewing courts interpret the statutory terms 'custodian' and 'other qualified witness' broadly."). As stated in *Ben-Neth*:

> Admissibility hinges upon the opinion of the trial court that "the sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020; K. Tegland, 5A. Wash. Prac. § 372, at 240 (2d ed. 1982). A trial court's ruling admitting or excluding such records is given considerable weight and will not be reversed absent a manifest abuse of discretion. *State v. Kreck*, 86 Wash.2d 112, 542 P.2d 782 (1975); *Cantrill*.

34 Wn. App. at 603. A summary of what is found in the records is independently admissible under ER 1006. *State v. Kane*, 23 Wn. App. 107, 110-11, 594 P.2d 1357 (1979).

The ultimate test is ***reliability***, and in this case, there is no genuine dispute that the evidence considered by the court below was reliable. *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990) ("business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify"). The trial court did not abuse its discretion in considering the declarations, and this Court should not rule otherwise. *Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010) ("We review a trial court's decision to admit or

exclude business records for a manifest abuse of discretion."); *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995) ("The standard of review for trial court evidentiary decisions, including those made in the course of summary judgment proceedings, is abuse of discretion.").[6]

H. The Form of the Summary Judgment Order Is of No Consequence.

At various places in his brief, Moseley suggests that the form of the order granting summary judgment against him is fatally defective, arguing that the order should have included findings and conclusions, and that the order should have listed the evidence called to the attention of the trial court. App. Br. at 11, 35.[7]

Findings and conclusions are not required on summary judgment, CR 52(a)(5)(B), and are "superfluous." *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978). While it is true that the summary judgment order does not list the evidence called to the attention of the Court, there is no dispute as to the substance of the summary judgment record: Citi listed the evidence in its summary judgment

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[6] Other case law suggests that appellate courts review evidentiary issues related to summary judgment proceedings *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998).

[7] Mosely also makes passing argument that the Order of Sale—which he did not put into the record—somehow violated his right to possession during the redemption period. App. Br. at 35. There is no basis for this argument, and no proof that any of Moseley's rights have been violated since summary judgment was entered against him.

motion, CP 422, and all of the evidence is included in the appellate record. *W.R. Grace & Co.—Conn. v. State, Dep't of Revenue*, 137 Wn.2d 580, 590-91, 973 P.2d 1011 (1999) ("[B]ecause the trial court indicated it had indeed read [the] affidavits, and the affidavits are included in the record before us, DOR's assertion that CR 56(h) and RAP 9.12 require the listing of such evidence in the judgment is of no moment. Because the affidavits are included in the record on appeal, any error in failing to list the affidavits in the summary judgment order is harmless.").

I. Citi's Judicial Foreclosure Action Is Not Barred by Discontinuance of Nonjudicial Foreclosure Proceedings.

In various places, Moseley argues that Citi's suit is barred because "[v]oluntary dismissal was entered in the record for not one but two-nonjudicial foreclosures." App. Br. at 8-9, 13-14, 22. He cites RCW 62A.2A-506(2)(3) as authority for his argument.

The UCC provision Moseley cites applies to lease contracts, and it has no relevance to this case. Chapter 61.24 of the Revised Code of Washington is clear that nonjudicial foreclosure proceedings do not supersede a creditor's other rights. RCW 61.24.120. While two actions cannot proceed simultaneously, RCW 61.12.120, Citi is entitled to foreclose judicially after discontinuing the trustee's sales. RCW 61.24.100(2)(a) ("Nothing in this chapter precludes an action against any

person liable on the obligations secured by a deed of trust . . . after the discontinuance of the trustee's sale."); RCW 61.24.100(2)(b) ("No action under (a) of this subsection precludes the beneficiary from commencing a judicial foreclosure or trustee's sale under the deed of trust after the completion or dismissal of that action."); s*ee also Boeing Emps.' Credit Union v. Burns*, 167 Wn. App. 265, 276, 272 P.3d 908 (2012) (under RCW 61.24.100(2)(a), "commencing an action on a promissory note that is secured by a deed of trust either before a nonjudicial foreclosure or after the discontinuance of a trustee's sale of that deed of trust is permissible").

III. REQUEST FOR FEES ON APPEAL

Citi is entitled to an award of fees, and respectfully makes a request for same pursuant to RAP 18.1(a). Here, Citi is entitled to fees under both the Note and Deed of Trust. Section 6(E) of the Note provides:

> If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

CP 438. Similarly, Section 26 of the Deed of Trust provides:

> Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any terms of this Security Instrument. "Attorneys' fees," wherever used in this Security Instrument, shall include without limitations attorneys' fees incurred by Lender in any bankruptcy proceeding or on appeal.

CP 454. Citi is defined as the Lender in the Deed of Trust. CP 441 (Definition "C").

Contractual fee clauses are enforceable, and Citi is entitled to fees and costs in this matter. *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 236, 242 P.3d 1 (2010); *see also Bushong v. Wilsbach*, 151 Wn. App. 373, 376, 213 P.3d 42 (2009) ("Because the underlying contract provided for an award of attorney fees, Wilsbach is entitled to fees on appeal provided she complies with RAP 18.1.").

IV. CONCLUSION

Citi is the holder of the Note executed by Paul Moseley. Moseley's attempts to deny or escape the Note have been rejected by other courts, and he is bound by the final judgments entered in those cases. Citi was entitled to foreclose, and did so in a timely fashion. The Judgement entered against Moseley was correct in all materials respects, and should be affirmed by this Court with an award of fees.

RESPECTFULLY SUBMITTED this 20th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington and the United States that, on the date indicated below, I caused to be filed, the foregoing document, with the Clerk of the Court and delivered a true and correct copy of the same to the following in the method indicated:

Paul A. Moseley
101 Fleet Drive
Port Ludlow, WA 98365
E-mail: moseley007@yahoo.com

Sent via email and U.S. Mail

DATED this 20th day of April, 2018.

s/ Brad Fisher
Brad Fisher, WSBA #19895

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