

FILED  
Court of Appeals  
Division II  
State of Washington  
COURT OF APPEALS STATE OF WASHINGTON  
DIVISION TWO

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FLOYD AND MARGARET SCOTT,  
Appellants,

v.

ALLY BAN CORP.; FEDERAL HOME LOAN MORTGAGE  
CORPORATION; OCWEN LOAN SERVICING, LLC; QUALITY LOAN  
SERVICES CORP. OF WASHINGTON; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.; AND JOHN DOES 1-10,  
Respondents.

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Appeal from Clark County Superior Court  
Case No. 17-2-01253-3, Hon. Robert A. Lewis

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ANSWER BRIEF OF FEDERAL HOME LOAN MORTGAGE  
CORPORATION, OCWEN LOAN SERVICING, LLC, AND MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC.

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## **I. INTRODUCTION**

Respondents, Federal Home Loan Mortgage Corporation (“FHLMC”); Ocwen Loan Servicing, LLC (“Ocwen”); and Mortgage Electronic Registration Systems, Inc. (“MERS”) (collectively “Respondents”), respond in opposition to the motion of Appellants, Floyd and Margaret Scott, for discretionary review.

Floyd and Margaret Scott (“Appellants”) have appealed the trial court’s order entered March 16, 2018, dismissing Respondents from Clark County Superior Court case 17-2-01253-3 (“Order”).

## **II. ASSIGNMENTS OF ERROR**

- A. Whether the trial court erred by finding that Ocwen was entitled to foreclose as holder of the Note.
- B. Whether the trial court erred by finding that it lacked personal jurisdiction over defendants FHLMC, Ocwen, and/or MERS.
- C. Whether the trial court erred by dismissing Appellants’ complaint for failure to state a claim upon which relief may be based
- D. Whether the trial court erred by finding that Ocwen lawfully appointed the successor trustee.
- E. Whether the trial court erred by failing to find RCW 61.24.030(7)(a) unconstitutional.
- F. Whether the trial court erred by violating a requirement imposed by RCW 61.24.030(3) to determine whether a default had occurred.
- G. Whether appellants are entitled to attorneys’ fees for defense of this appeal.

## **III. STATEMENT OF THE CASE**

Appellants Floyd and Margaret Scott initiated the action in the Superior Court of Clark County, Washington on May 26, 2017, by filing a

Complaint for damages pursuant to Washington's Consumer Protection Act and Tortious Interference with a Business Expectancy, asserting that Respondents commenced a non-judicial foreclosure in violation of Washington law. However, Appellants failed to properly serve their Complaint upon the Respondents or file affidavits of service with the trial court. The Appellants also sought a preliminary injunction to stop a foreclosure sale, which the trial court denied on July 24, 2017.

On March 16, 2018, the trial court granted the motion of Respondents FHLMC, Ocwen, and MERS for dismissal from the action on the basis of the Appellants' failure to state a claim against Respondents pursuant to CR 12(b)(6). That order did not direct entry of a final judgment as to those litigants; nor did it indicate a finding that there was no just reason for delay; nor did it dismiss the action. The underlying action has not been dismissed and remains open.

Appellants filed a Notice of Appeal of the Order on or about April 12, 2018. This issued a ruling on July 18, 2018, finding that the Order was not appealable as a matter of right because not all defendants had been dismissed, and the superior court case was still pending. Subsequently the cause was converted to an appeal on October 25, 2018.

#### IV. ARGUMENT

##### A. Standard of Review

Washington CR 12(b)(6) provides that that a pleading should be dismissed when it fails to state a claim upon which relief can be granted. A dismissal pursuant to CR 12(b)(6) is reviewed *de novo*. *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 331 P.3d 29, 34, 180 Wash.2d 954, 962 (Wash.,2014). All facts alleged in a complaint are taken as true; however, if a claim is shown to be legally

insufficient even under a claimant's own alleged facts, dismissal should be upheld. *Id.*

**B. The Trial Court Did Not Err by Finding that Ocwen Could Foreclose Without Owning the Note When It Was the Holder.**

RCW 61.24.030(7)(a) governs who may initiate a trustee's sale.

The section states in pertinent part:

...the trustee shall have proof that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the **holder of any promissory note** or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(emphasis added). Article 3 of the Uniform Commercial Code ("UCC"), as adopted, is Washington's law on negotiable instruments. RCW 62A.3-101. A promissory note is a negotiable instrument. RCW 62A.205(a), (b), and (e). A note may be enforced by "the holder of the instrument," which is the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201(b)(21)(A), 62A3-301. It is well settled in Washington that the Deed of Trust follows the Note and is enforceable by the note holder. *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 102, 104 (2012). A deed of trust is a mere incident of the debt it secures. *See Pratt v. Pratt*, 121 Wash. 298 (1922).

RCW 62A.3.104(a) states:

Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

RCW 62A.1-201 defines the “holder” of a negotiable instrument as “the person in possession of a negotiable instrument that is payable either to bearer or to an identified person in possession. If the instrument is endorsed in blank, then it is payable to the bearer. RCW 62A.3-205(b).

Additionally, RCW 62A.3-301 states:

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

The beneficiary of a deed of trust is the holder of the instrument or document evidencing the obligations it secures. *Bain v. Metro Mtg. Gp., Inc.*, 175 Wn.2d 83, 98-99 (Wa. 2012). The beneficiary can act through an authorized agent in appointing the successor trustee and executing the statutory beneficiary declaration. *Id.* at 106 (2012) (the DTA approves of the use of agents); *Djigal v. Quality Loan Serv. Corp. of Wash.*, 2016

Wash. App. LEXIS 2585, 15-16 (2016) (holding that beneficiary's agent could execute the trustee appointment and beneficiary declaration); *Pelzel v. Nationstar Mortg., LLC*, 2015 Wash. App. LEXIS 638, 14-15 (2015) (same); *Daviscourt v. Quality Loan Servs. Corp. of Wash.*, No. 74979-0-I, 2017 Wash. App. LEXIS 1987, at \*21 (2017); *Hurney v. HSBC Bank, USA, N.A.*, No. 75043-7-I, 2017 Wash. App. LEXIS 1295, at \*8-9 (2017) (same); *gs v. Nw. Tr. Servs. of Wash.*, No. 74264-7-I, 2016 Wash. App. LEXIS 2886, at \*14 (2016) (same); *Meyer v. U.S. Bank Nat'l Ass'n*, 530 B.R. 767, 778 (W.D. Wash. 2015) (same); *Brodie v. Northwest Trustee Serv.*, 579 Fed. Appx. 592, 593 (9th Cir. 2014) (same).

The Court in *Brown* held that Washington's Uniform Commercial Code at RCW 61.24.030(7)(a) authorized a holder of a note to enforce the obligation through foreclosure, even if another entity "owned" it. *Brown v. Washington State Dept. of Commerce* 184 Wash.2d 509 (Wash., 2015). As the Court in *Brown* explained:

Freddie Mac [FHLMC] authorizes the servicer to institute the foreclosure process. *Id.* ch. 66.1 ("The Servicer must refer to, manage and complete foreclosure in accordance with this chapter [chs. 66.1–66.75] when there is no available alternative to foreclosure."). When a servicer forecloses on a Freddie Mac owned note, the servicer does **so in its own name**, not in Freddie Mac's name. *See id.* ch. 66.11(a) ("The Servicer must instruct the foreclosure counsel to process the foreclosure in the Servicer's name...."). The servicer has authority to do this because when Freddie Mac purchases the mortgage note, the *Servicer's Guide* requires the note to be indorsed in blank. *See id.* ch. 16.4(c) ("At the time the Mortgage is sold to Freddie Mac, the Seller must [i]ndorse the Note in blank...."). When a note is indorsed in blank, it is "payable to bearer and may be \*523 negotiated by transfer of possession alone." RCW 62A.3–205(b).

Before the servicer institutes foreclosure proceedings, Freddie Mac provides the servicer with actual or constructive possession of the original note. *See Servicer's Guide, supra*, ch. 18.6(d), (e). Under the *Servicer's Guide*, the servicer is deemed to be in constructive possession of the note when the servicer commences a legal action or files the form (form 1036) that seeks actual possession of the note from Freddie Mac's note custodian. *Id.* at 18.6(d). Alternatively, if applicable state law requires the servicer to have actual possession of the note to institute foreclosure proceedings, the servicer submits a form 1036 to Freddie Mac's note custodian, who then delivers physical possession of the note to the servicer. *Id.* at 18.6(e).

*Id.* (emphasis supplied). The Court held that the servicer's undisputed declaration under penalty of perjury that it held the note satisfied RCW 61.24.030(7) and empowered it to commence a non-judicial foreclosure. *Id.* at 787. This is directly contrary to Appellants' interpretation of *Brown*. Indeed, while Appellants claim that *Brown* could not have supported "agency successors" because the two terms are opposed to one another, their briefing fails to make a coherent argument to that effect.

In the case at bar, as holder of the Note, Ocwen was entitled to commence foreclosure of the Deed of Trust. Appellants concede that the noteholder is entitled to payments due under the note [**Br.**, pp. 24, 29]; that Ocwen held the note [**Br.**, pp. 28, 33, 36]; that it was appropriate to make payments owed to FHLMC through Ocwen, the servicer [**Br.**, pp. 34-35]; and therefore concedes that Ocwen (1) was the servicer of the loan; (2) FHLMC owned it; and (3) Ocwen serviced the loan on behalf of FHLMC.

As in *Brown*, the servicer commenced a non-judicial foreclosure by referring a loan owned by FHLMC to a foreclosure trustee. As in *Brown*, the servicer held the Note, which satisfied the plain language of RCW 61.24.030(7)(a). Accordingly, as in *Brown*, the servicer of the subject loan was empowered to commence the non-judicial foreclosure

because it held the Note. Therefore, the Court did not commit error in dismissing an action for wrongful foreclosure on the basis that the servicer, Ocwen, sufficiently demonstrated its right to enforce the loan documents.

**C. The Trial Court Did Not Find Lack of Personal Jurisdiction Over the Respondents, although Dismissal on That Basis Would Have Been Proper.**

Appellants assert that the trial court erred by finding that it lacked personal jurisdiction of the respondents. However, the court ruled on the legal sufficiency of the pleadings, and declined to explore evidentiary questions of service. [Tr., p. 24, ln 5-7] Accordingly, this purported assignment of error speaks to a decision not made in the lower court and is therefore not properly on appeal.

Assuming *arguendo* that the trial court had dismissed due to lack of personal service on MERS, the record reflects that Appellants attempted to serve MERS at 93 South Jackson Street in Seattle. [Br., App. A-3]. The Division Three Court of Appeals has ruled on the matter of attempting to serve MERS in Washington and upheld vacation of a default against it on the basis that such service was invalid. *Salmon v. Mortgage Electronic Registration Systems, Inc.*, 2017 WL 532492, at \*1 (Wash.App. Div. 3, 2017) (unreported) [App. 2]; review denied 188 Wash.2d 1014 (2017).

The trial court did not dismiss MERS or any other defendant on the basis of lack of personal jurisdiction; however, because service on MERS was invalid as a matter of law, dismissal as to MERS would have been proper.

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**C. The Trial Court Properly Dismissed Appellants Claims because they Failed to State a Claim for which Relief May be Granted.**

A private claim under Washington’s Consumer Protection Act (“CPA”) requires (1) an unfair or deceptive act or practice (2) occurring in trade or commerce; (3) that impacts the public interest; (4) injury to business or property; and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Failure to satisfy even one of the elements is fatal to a CPA claim. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (2002).

The trial court did not commit any error in dismissing the Respondents based on the record because the Complaint failed to state a legally cognizable claim for wrongful foreclosure under Washington law; failed to plausibly state an unfair or deceptive act or practice; and failed to establish causation of redressable injury.

1. Petitioners Have Failed to Plausibly Allege an Unfair or Deceptive Act by Any Respondent.

The Appellants’ case rests heavily on the fanciful notion that only the originating lender under the Deed of Trust may commence a foreclosure sale (*i.e.* it can never be transferred or otherwise assigned); however, this is unsupported by well-settled law. Notably, Appellants concede that FHLMC owns the loan, which is in itself fatal to their claim. Complaint, ¶4.7. Further, Appellants concede that the security follows the note. *Id.* Appellants’ Complaint asserts that the Respondents relied upon an unauthorized assignment of the Deed of Trust from MERS, which Appellants simply assert without evidence to be invalid.

2. Petitioners Have Failed to Plausibly Allege Causation or Damages under the CPA.

Petitioners have failed to establish how the transfer of the loan caused them any injuries. Appellants concede the default under the loan, and that the foreclosure commenced as a result of the default. Motion, p. 4. They further concede that the underlying lawsuit was commenced in direct response to the foreclosure. *Id.* Moreover, they now concede that they have reinstated the loan by paying their admitted arrearages to the parties to whom they were owed. Motion, p. 3. It is therefore uncontroverted that Appellants voluntarily expended time and energy into the unnecessary opposition to a foreclosure. Accordingly, Appellants can show no harm of any sort from any improper or illegal action of the Respondents, as the uncontroverted facts show that Respondents' own actions caused the entirety of the lawsuit at issue. Accordingly, Appellants' Motion fails to show that the Court below committed either obvious error or probable error in dismissing their CPA claim, as they have failed to brief the element of causation.

Similarly, Appellants have failed to brief the issue of damages, which under the CPA are strictly limited to "business or property." *Hangman Ridge* 105 Wn.2d at 792 (the "injury" element requires a "specific showing of injury" to "business or property."). A CPA claimant must establish that but-for the defendant's unfair or deceptive act or practice the plaintiff's injury would not have occurred. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82 (2007); *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 37 (2016) (claimants must prove more than the defendant violated the Deeds of Trust Act, and they were injured; but must also prove that but-for the violation

of the statute, they would not have been injured). The CPA does not compensate for personal injury, mental distress, embarrassment, and inconvenience. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431 (2014).

Here, Appellants cannot demonstrate injury to business or property caused by an unfair or deceptive act by Respondents. As already discussed, the default and foreclosure were advanced pursuant to the Appellants' uncontroverted default under the terms of the loan. Their Motion does not address the issue of damages at all and thus fails to raise the issue for consideration. Further, their Complaint asserted no recoverable damages under the CPA, and their Motion does not allege and cannot a specific showing of injury to business or property, as required in *Hangman Ridge*.

Here, there was no "unfair or deceptive" conduct by Respondents in calling the loan into default or advancing the foreclosure. Appellants' sole substantive argument on appeal is that the servicer of the loan, Ocwen, lacked authority to commence the foreclosure because it did not own the loan. They contest neither the fact of the transfer of the Note nor the fact that Ocwen held it. For this reason, the lower court's ruling should be affirmed.

**D. The Trial Court Did Not Err by Ruling that Ocwen Lawfully Appointed a Successor Trustee Because It Did So as Holder of the Note.**

Because Ocwen sufficiently showed its authority to enforce the loan documents via possession of the note on behalf of FHLMC, it similarly showed its authority to appoint a successor trustee to commence a non-judicial foreclosure.

RCW 61.24.010(2) empowers the beneficiary of a deed of trust to appoint a successor beneficiary. Because Ocwen held the Note on behalf of FHLMC, it was appropriately found to be the beneficiary under RCW 61.24.030(7)(a), and therefore authorized to appoint a successor trustee under RCW 61.24.010(2).

Appellants maintain that the Court in *Bain v. Metro Mtg. Gp., Inc.* “specifically rejected the MERS system of lending.” However, as this Court of Appeals recently found in its unpublished opinion in *Citimortgage v. Moseley*, No. 50895-7-II (Wash. Ct. App. March 5, 2019), Washington courts consistently reject this reading. [App. 1]. The Court provided the following string citations:

*Good v. Fifth Third Bank*, 2014 WL 2863022, at \*2 (W.D. Wash., June 23, 2014) (court order) (rejecting the argument that “MERS was not an eligible beneficiary . . . and therefore all subsequent assignments were void”); *Wilson v. Bank of Am., NA*, 2013 WL 275018, at \*8 n.9 (W.D. Wash. 2013) (court order) (“The *Bain* Court did not state, as the Wilsons allege here, that MERS is incapable of transferring its interest in a deed of trust. . . .”); *Renata v. Flagstar Bank, FSB*, No. 71402-3-I, slip op. at 9 (Wash. Ct. App. July 27, 2015) (unpublished), (“Renata fails to cite any authority, and we have found none, to support an argument that deeds of trust that name MERS as the beneficiary are void.”).

Appellants’ arguments regarding assignment of the Deed of Trust from MERS being unavailing, the beneficiary of the Deed of Trust remains the holder of the note it secures. Because Ocwen held the Note on behalf of FHLMC, it lawfully appointed the successor trustee, who in turn lawfully commenced the foreclosure.

**E. The Trial Court Did Not Err by Failing to find RCW 61.24.030(7)(a) to be an Unconstitutional Impairment of Contract or that Rendered the Power of Sale Clause Unenforceable.**

Appellants argue on appeal for the first time that RCW 61.24.030(7)(a) violates Article 1, Section 23 of the Washington Constitution. As a threshold matter, Appellants did not raise this argument in the lower court, and this Court therefore should not consider an issue raised for the first time on appeal. *Kave v. McIntosh Ridge Primary Road Association.*, 198 Wash.App. 812, 823 (Wash.App. Div. 2, 2017); see also RAP 2.5(a) (“a party may raise... manifest error affecting a constitutional right.”)

Appellants fail to argue show that the subsection impairs any obligations of contracts. RCW 61.24.030(7)(a) provides:

That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection

The section does not impair contractual obligations identified by Appellants. Rather, the section pertains to standards of proof needed to enforce existing contractual obligations under negotiable instruments. Accordingly, Appellants have failed to show how this issue, raised for the first time on appeal, consists of a manifest error affecting a constitutional right when the question was never placed before the trial court.

Alternatively, Appellants attempt to argue that RCW 61.24.030(7)(a) renders the “power of sale” clause in the Deed of Trust unenforceable. However, no cogent argument is presented to support this contention. The section, in conjunction with Washington’s enactment of the UCC, provides for the transfer of contractual obligations and rights, not their impairment. It does not confer rights on non-parties to the contract; it determines how a party may transfer its rights under the contract to another holder, although Appellants fail to brief how a party to a contract may be prevented from transferring their property interest in the instrument. Again, this argument was also not raised in the lower court and may not be raised here.

**F. The trial court did not err by violating a requirement imposed by RCW 61.24.030(3) to determine whether a default had occurred.**

Appellants also appear to argue alternatively that either the trustee or the court failed to determine whether a default had occurred. In either iteration, this argument is raised for the first time on appeal, with the result that this Court should not consider it now.

Notably, the Appellants have not disputed and do not now dispute that their loan was in default. [brief, p. 1]. With respect to whether a court was required to determine the existence of a default, the plain language of RCW 61.24.030(3) states:

It shall be requisite to a trustee's sale:

(3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell

The plain language of the statute does not require a court adjudication to determine whether the default occurred for a trustee's sale to commence.

In addition, the unrebutted record and facts reflect that the trustee determined that the loan was in default. This is supported by Appellants' concession that the trustee issued a Notice of Default on November 10, 2015, and recorded a Notice of Trustee's Sale on February 2, 2017, both directed toward the alleged default upon the loan. [Brief, pp. 9-10]

Because the trustee issued its Notice of Default and Notice of Trustee's sale, evidencing a determination of default, this argument cannot prevail, and so the lower court's ruling should be upheld.

**G. Respondents Are Entitled to an Award of Attorneys Fees Pursuant to Contract.**

Washington allows for an award of attorney fees where authorized by contract. *Durland v. San Juan County*, 182 Wn.2d 55, 76 (2014). The lender under a deed of trust is entitled to an award of its fees and costs if it prevails in an action by the borrowers where the defense is one to construe or enforce the contract. *Podbielancik v. LPP Mortg. Ltd.*, 191 Wn. App. 662, 673 (2015). This includes the defense of a Consumer Protection Act claim. *Id.*

Here, the Deed of Trust provides that Respondents are entitled to attorney's fees incurred in pursuing default remedies. As was the case in *Podbielancik*, Respondents' defense of this action by the Appellants, which includes a request for trustee sale injunctive relief, is one to enforce the Deed of Trust and the Appellants' default. Thus, Respondents are contractually entitled to an award of attorney's fees as the prevailing party.

## V. CONCLUSION

Appellants' argument on appeal is unsupported by well-established Washington law that holds that the holder of a negotiable instrument is authorized to enforce it on behalf of its owner, which is contrary to Appellants' position. For this reason, the Court should affirm the lower court's dismissal of Appellant's complaint.

March 14, 2019

Respectfully submitted,

/s/ Joseph T. McCormick

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**CERTIFICATE OF SERVICE**

I certify that on the date stated below, I served a copy of the foregoing document, described as **Answer Brief**, on the following persons by U.S. First Class Mail:

Floyd and Margaret Scott  
33403 Pekin Ferry Dr.  
Ridgefield, WA 98642

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this Declaration was executed in Seattle, Washington.

Dated: March 14, 2019

/s/Karina Krivenko  
Karina Krivenko  
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## Appendices

1. *Citimortgage v. Moseley*, No. 50895-7-II (Wash. Ct. App. March 5, 2019).
2. *Salmon v. Mortgage Electronic Registration Systems, Inc.*, 2017 WL 532492 (Wash.App. Div. 3, 2017).

2019 WL 1040391

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

**CITIMORTGAGE, INC.**, Respondent,

v.

Paul A. **MOSELEY**; Michelle L. **Moseley**; Ludlow Maintenance Commission; Does 1-10 Inclusive; Unknown Occupants of the Subject Real Property; Parties in Possession of the Subject Real Property; Parties Claiming a Right to Possession of the Subject Real Property; All Other Unknown Persons or Parties Claiming Any Right, Title, Estate, Lien, or Interest in the Real Estate Described in the Complaint Herein, Appellants.

No. 50895-8-II

|  
March 5, 2019

Appeal from Jefferson Superior Court, 16-2-00216-1, Keith C. Harper, J.

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UNPUBLISHED OPINION

Melnick, J.

\*1 In this judicial foreclosure proceeding, Paul **Moseley**, a self-represented litigant, appeals the trial court's grant of summary judgment in favor of **CitiMortgage, Inc. (Citi)**. **Moseley** argues that the trial court committed numerous procedural errors when it failed to state its findings of fact and conclusions of law, failed to state what documents it relied on, denied his motion to strike the declarations supporting Citi's motion for summary judgment, and violated his right to possession during the redemption period. **Moseley** argues that the trial court erred in granting summary judgment because the statute of limitations barred it, previous nonjudicial foreclosure attempts barred it, and Citi did not have standing to institute the proceedings. **Moseley** also argues that genuine disputes of material fact remain regarding whether the promissory note's chain of title was broken and whether the note the trial court relied on was counterfeit. Finally, **Moseley** argues that the court's grant of summary judgment violated his constitutional right to a jury trial.

We affirm.

FACTS

On March 2, 2008, Paul and Michelle **Moseley** obtained a loan for their home in Jefferson County (the property). The loan was documented by a promissory note and secured by a deed of trust. The note required the **Moseleys** to pay \$ 262,500 plus 5.5 percent yearly interest, for monthly payments of \$ 1,490.45. The note was endorsed in blank. The deed of trust listed the **Moseleys** as the borrowers, First American Title Company as the trustee, Citi as the lender, and Mortgage

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Electronic Registration Systems, Inc. (MERS) as the beneficiary and nominee for the lender. The deed of trust contained an acceleration clause.

In late 2010, the **Moseleys** stopped making monthly payments.

In May 2011, **Moseley** filed suit in federal court. *Moseley v. CitiMortgage Inc.*, No. C11-5349RJB, 2011 WL 5175598 (W.D. Wash. Oct. 31, 2011) (court order) (*Moseley I*), *aff'd*, 564 F. App'x 300 (2014). The complaint sought, among other remedies, “a declaration that the **Moseleys** [were] the exclusive title holders” to the property and that the note was “void, invalid, satisfied and/or lost.” *Moseley I*, 2011 WL 5175598, at \*1.

In June, MERS assigned its interest in the note and deed of trust to Citi. In October, the district court granted Citi's motion for summary judgment on all claims and stated “there [were] no factual allegations that would state a claim that the Deed of Trust and Note [were] void or invalid.” *Moseley I*, 2011 WL 5175598, at \*8.

In June 2014, Citi accelerated all outstanding payments on the loan.

In October, **Moseley** filed another lawsuit in federal court, seeking to have the court discharge his debt because Citi refused to accept a check he sent to Citi for the balance of the outstanding loan amount. *Moseley v. CitiMortgage, Inc.*, No. 3:14-cv-05802-RJB, 2015 WL 728655, at \*1 (W.D. Wash. Feb. 19, 2015) (court order) (*Moseley II*), *aff'd*, 671 F. App'x 1008 (2016). The court granted Citi's motion to dismiss on all claims. *Moseley II*, 2015 WL 728655, at \*5.

\*2 Sometime thereafter, Citi made unsuccessful attempts to nonjudicially foreclose on the property.

In December 2016, Citi sued the **Moseleys** and all others with an interest in the property, seeking to judicially foreclose on the property. **Moseley** filed an answer and counterclaim. In his answer, **Moseley** contested the validity of his signature on the note. **Moseley** later filed a “motion to dismiss to quiet title,” alleging that under a recent Washington Supreme Court case, MERS was not a valid beneficiary and thus its assignment of the note and deed of trust to Citi was invalid. Clerk's Papers (CP) at 161. The court denied the motion.

Citi then moved for summary judgment. Citi argued that the **Moseleys'** missed payment on December 1, 2010 constituted default under the note and deed of trust. Citi argued that the **Moseleys** failed to make any payments since December 1, 2010, and that acceleration occurred on June 20, 2014. In its motion, Citi provided a list of the “evidence relied upon,” including the declarations of Joseph McCormick, Citi's lawyer; Jennifer Ollier, Citi's Vice President-Documents Control; and Lorissa Russelburg, Citi's Assistant Vice-President. CP at 422. All three declarations were signed under the penalty of perjury. McCormick's declaration attached court decisions from *Moseley I* and *Moseley II*, and a copy of the note.

**Moseley** filed motions to strike the declarations of McCormick, Ollier, and Russelburg. The court's ruling is not in the record.

**Moseley** then filed a response in opposition to summary judgment. After a hearing, the trial court granted Citi's motion. The order granting summary judgment did not contain findings of fact, conclusions of law, or the evidence the court relied on in coming to its decision. The court then entered a judgment and decree of foreclosure. The judgment and decree provided that the purchaser of the property was entitled to exclusive possession from the date of sale. **Moseley** appealed.

Subsequently, the trial court issued an order of sale.

## ANALYSIS

## I. LEGAL PRINCIPLES

We review an order for summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). “We consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.” *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 199, 428 P.3d 1207 (2018). “Summary judgment is proper when the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Munich v. Skagit Emergency Comm'n Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012).

## II. PROCEDURAL ERRORS

### A. Findings of Fact and Conclusions of Law

**Moseley** argues that the trial court's order on summary judgment was improper because it did not contain written findings of fact or conclusions of law. We disagree.

In a summary judgment, a trial court's findings of fact and conclusions of law are not required under the civil rules. CR 52(a)(5)(B). In fact, they are superfluous because we review summary judgment orders de novo. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002), *overruled on other grounds by Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015).

### B. Documents Relied On

\*3 **Moseley** argues that the trial court erred under RAP 9.12<sup>1</sup> because it did not list the evidence upon which it relied in its order granting Citi's summary judgment motion. We agree that the court erred but conclude that the error was harmless.

RAP 9.12 provides: “The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.”

**Moseley** cites no authority to support his argument that the summary judgment order's failure to comply with RAP 9.12 requires reversal. In fact, when the documents a trial court considered, but failed to specifically list in its order, are included in the record on appeal, any error in failing to specifically list those documents is harmless. *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 591, 973 P.2d 1011 (1999).

**Moseley** does not contend that the record on appeal differs from the record the trial court considered. We conclude that the trial court's failure to comply with RAP 9.12 was harmless.

### C. Declarations

**Moseley** argues that the trial court erred when it did not grant his motion to strike the three declarations used in support of Citi's motion for summary judgment. We disagree.

#### 1. Legal Principles

We review de novo evidentiary rulings made by the trial court in conjunction with a summary judgment order. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). De novo review “is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.” *Folsom*, 135 Wn.2d at 663.

A party may support a motion for summary judgment by filing declarations to supply the court with additional facts. CR 56(a), (b); GR 13. The declarations must be based on personal knowledge, set forth such facts as would be admissible in evidence, and “show affirmatively that the [declarant] is competent to testify to the matters stated therein.” CR 56(e). Similarly, ER 602 states that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is inadmissible unless it falls within an exception. ER 802.

Business records of regularly conducted activity are an exception to the hearsay rule. RCW 5.45.020; *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). Court orders from other jurisdictions can satisfy the business records exception. *OneWest Bank, FSB v. Erickson*, 185 Wn.2d 43, 68-69, 367 P.3d 1063 (2016). “RCW 5.45.020 does not require examination of the person who actually made the record.” *Iverson*, 126 Wn. App. at 337. Testimony by the “custodian” of the records “or other qualified witness” will be sufficient to properly introduce the record. RCW 5.45.020. Reviewing courts interpret the statutory terms “custodian” and “other qualified witness” broadly. *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004).

## 2. McCormick Declaration

\*4 **Moseley** argues that McCormick had no personal knowledge of the case and therefore his declaration should have been stricken. We disagree.

McCormick stated under penalty of perjury that he was acting as Citi's counsel and that he had personal knowledge of the facts stated in his declaration. He also stated that the attached exhibits consisted of true and correct copies of previous judicial orders adjudicating claims made by **Moseley** against Citi and that the attached note was a true and correct copy of the original.

Because McCormick had personal knowledge regarding the previous judicial orders and because the orders and note met the business records exception, the trial court did not err in considering McCormick's declaration.

## 3. Ollier and Russelburg Declarations

**Moseley** argues that Ollier's and Russelburg's declarations violated ER 602 and 802.<sup>2</sup> We disagree.

In their declarations, Ollier and Russelburg declared under penalty of perjury that they were employed by Citi as the Vice President-Documents Control and Assistant Vice President, respectively. They further stated they had personal knowledge of Citi's practices of creating and maintaining business records, and they had personal knowledge from their own review of records related to **Moseley's** note and deed of trust. Their declarations also said the attached records were true and correct copies of documents which were made at or near the time of the occurrences, and created and kept in the regular course of Citi's business activities.

Because Ollier and Russelburg had personal knowledge of the information in their declarations and because the attached exhibits satisfied the business records exception, the trial court did not err in considering Ollier's and Russelburg's declarations.

D. RCW 6.23.110(4)

**Moseley** argues that the judgment and decree entered by the trial court violated RCW 6.23.110(4). He argues that the order violates the statute because “it provided the purchaser[] exclusive possession of the ... property during [the] right of redemption period.” Br. of Appellant at 35. We disagree.

RCW 6.23.110(4) provides: “In case of any homestead as defined in chapter 6.13 RCW and occupied for that purpose at the time of sale, the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or for value of occupation.” The redemption period begins on the date of the sale. RCW 6.23.020(1).

**Moseley** challenges the following portion of the judgment and decree:

Plaintiff or any other party to this suit may become the purchaser at the sale of the real property. The purchaser is entitled to exclusive possession of the real property from and after the date of sale and is entitled to such remedies as are available at law to secure possession, including a writ of assistance, if Defendants or any other party or person shall refuse to surrender possession to the purchaser immediately on the purchaser's legal demand for possession.

\*5 CP at 306. The trial court subsequently entered an order of sale.

**Moseley** asserts that he had a possessory right to the property during the redemption period afforded to homesteads. However, nothing in the record indicates that the property was a homestead as that term is defined in chapter 6.13 RCW. Furthermore, although the court issued an order of sale, **Moseley** argues that “the Order [of Sale] was not successful and was not executed.” Reply Br. of Appellant at 2. The redemption period does not begin until the date of sale. The record does not contain the date of sale.

The record is inadequate for us to review this argument. As a result, we do not consider it.

### III. STATUTE OF LIMITATIONS

**Moseley** argues that Citi's action is barred by a six-year statute of limitations under RCW 4.16.040. **Moseley** argues that the cause of action accrued on November 2, 2010, and because Citi filed its lawsuit on December 7, 2016, Citi's action is barred.<sup>3</sup> We disagree.

An action upon a contract or agreement in writing must be commenced within six years. RCW 4.16.040(1). “As an agreement in writing, [a] deed of trust foreclosure remedy is subject to a six-year statute of limitations.” *Edmundson v. Bank of Am., NA*, 194 Wn. App. 920, 927, 378 P.3d 272 (2016).

An installment promissory note is payable in installments and matures on a future date. *Edmundson*, 194 Wn. App. at 929; see also *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945). “[W]hen recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.” *Edmundson*, 194 Wn. App. at 930 (quoting *Herzog*, 23 Wn.2d at 388). When acceleration occurs, “the statute of limitations for the entire debt accrue[s] at that time.” *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 436, 382 P.3d 1 (2016).

In order to accelerate the obligations due under a note, “[s]ome affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due.” *Weinberg v. Naher*, 51 Wash. 591, 594, 99 P. 736 (1909).

Here, the 2008 promissory note was an installment note. The note stated that the **Moseley's** “monthly payment will be in the amount of ... \$ 1,490.45,” and the deed of trust stated that the **Moseleys** “promised to pay th[e] debt in regular Periodic Payments.” CP at 317, 322. The undisputed evidence shows that acceleration occurred on June 20, 2014, and therefore, the statute of limitations for the entire debt accrued at that time. Because the complaint in the current suit was filed on December 7, 2016, well within the six-year statute of limitations, we conclude that Citi's lawsuit was not time-barred.

#### IV. NONJUDICIAL FORECLOSURE ATTEMPTS

**Moseley** argues that Citi is barred from its current suit because of previous voluntary discontinuances of nonjudicial foreclosure actions. **Moseley** relies on RCW 62A.2A–506. We disagree.

\*6 Chapter 62A.2A RCW “applies to any transaction, regardless of form, that creates a lease.” RCW 62A.2A–102. In defining “lease,” RCW 62A.2A–103(j), states that the “retention or creation of a security interest is not a lease.”

Because Citi is suing the **Moseleys** to enforce a security interest in the property, not a lease, and because **Moseley** has not provided any authority indicating that this statutory provision provides him relief, we reject **Moseley's** argument on this point.

#### V. CITI'S STANDING

**Moseley** argues that under *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), MERS was an unlawful beneficiary at the outset of the loan. **Moseley** argues that because MERS was an unlawful beneficiary, its assignment to Citi is meaningless because it had no interest to assign. For this reason, **Moseley** argues that Citi has no interest in the property and no standing to initiate the judicial foreclosure proceedings. We disagree.

A deed of trust may be judicially foreclosed to secure the performance of an obligation to the beneficiary by a borrower on a negotiable instrument such as a promissory note. *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 171, 367 P.3d 600 (2016). A “person entitled to enforce” a negotiable instrument is “the holder of the instrument.” RCW 62A.3–301. The holder of a note is “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.” RCW 62A.1–201(b)(21)(A). A note endorsed in blank is payable to the bearer and “may be negotiated by transfer of possession alone.” RCW 62A.3–205(b). The holder of the note, which is the evidence of the debt, has the power to enforce the deed of trust because the deed of trust follows the note by operation of law. *Bain*, 175 Wn.2d at 104.

Regarding *Bain*, courts have rejected arguments identical to that which **Moseley** makes here. *E.g.*, *Good v. Fifth Third Bank*, 2014 WL 2863022, at \*2 (W.D. Wash., June 23, 2014) (court order) (rejecting the argument that “MERS was not an eligible beneficiary ... and therefore all subsequent assignments were void”); *Wilson v. Bank of Am., NA*, 2013 WL 275018, at \*8 n.9 (W.D. Wash. 2013) (court order) (“The *Bain* Court did not state, as the Wilsons allege here, that MERS is incapable of transferring its interest in a deed of trust ....”); *Renata v. Flagstar Bank, FSB*, No. 71402-3-I, slip op. at 9 (Wash. Ct. App. July 27, 2015) (unpublished), <http://www.courts.wa.gov/opinions/pdf/714023.pdf> (“Renata fails to cite any authority, and we have found none, to support an argument that deeds of trust that name MERS as the beneficiary are void.”). We agree with this line of cases.

Because Citi was the holder of the note, it was entitled to enforce the note and deed of trust.

#### VI. CHAIN OF TITLE

**Moseley** argues that because the note and deed of trust were physically separated, the chain of title was broken. We disagree.

**Moseley** cites *Bank of America, NA v. Miller*, 194 Ohio App. 3d 307, 2011-Ohio-1403, 316, 956 N.E.2d 319, for the proposition that proof of chain of title is required. Although proof of chain of title may very well be required, it does not flow from this assertion that chain of title requires physical proximity between the note and deed of trust at all times.

\*7 “We do not consider conclusory arguments that are unsupported by citation to authority.” *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2013). Because **Moseley** fails to cite to relevant authorities, we do not consider his argument. RAP 10.3(a).

#### VII. EVIDENCE OF A FRAUDULENT NOTE

**Moseley** argues that there is a genuine dispute of material fact as to whether the note in evidence was counterfeit. Therefore, he argues that summary judgment was improper. We disagree.

Under RCW 62A.3–308(a),

In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, *but the signature is presumed to be authentic and authorized* unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.

(Emphasis added.)

Here, **Moseley** contested the validity of his signature in his answer. However, because **Moseley** was neither dead nor incompetent at the time he raised the signature-validity issue, the signature on the note was still presumed authentic and authorized. **Moseley** failed to present evidence that rebutted this presumption. Accordingly, we conclude that no genuine dispute of material fact exists regarding whether the note was fraudulent.

#### VIII. CR 56'S CONSTITUTIONALITY

**Moseley** argues that because he never waived his right to a jury trial, summary judgment in Citi's favor violates his right to such under the Seventh Amendment of the United States Constitution and article I, section 21 of the Washington Constitution. We disagree.

The Seventh Amendment's protection of the jury trial does not apply to civil cases in state courts. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217, 36 S. Ct. 595, 60 L.Ed. 961 (1916); *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 768, 287 P.3d 551 (2012).

Article I, section 21 of the Washington State Constitution provides: “The right of trial by jury shall remain inviolate.” However, “[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, 199 n.5, 770 P.2d 1027 (1989). Because we conclude that **Moseley** has not shown that a genuine issue of material fact exists, we also conclude that the grant of summary judgment did not violate **Moseley's** right to a jury trial under the Washington Constitution.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Worswick, P.J.

Sutton, J.

**All Citations**

Not Reported in Pac. Rptr., 2019 WL 1040391

**Footnotes**

- 1 A related rule is CR 56(h). **Moseley** does not argue that the trial court's order failed to comply with CR 56(h).
- 2 Below, **Moseley** did not argue that the exhibits attached to Ollier's and Russelburg's declarations failed to satisfy the best evidence rule. Hence, we do not consider this argument. RAP 2.5(a).
- 3 **Moseley** additionally argues, for the first time on appeal, that we should separate any unpaid installments due before December 7, 2010. We conclude that **Moseley** has waived this argument under RAP 2.5(a).

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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,  
Division 3.

Samuel SALMON and Roxy Salmon, Appellants,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Respondent.

No. 33938-6-III

|  
FEBRUARY 9, 2017

Appeal from Stevens Superior Court, 13-2-00281-5, Honorable Allen C. Nielson, Judge.

**Attorneys and Law Firms**

Samuel Salmon, Colville, WA, pro se.

Roxy Salmon, Colville, WA, pro se.

Laurie R. Hager, William G. Fig, Sussman Shank LLP, Portland, OR, for Respondent.

**Opinion**

Pennell, J.

\*1 Samuel and Roxy Salmon appeal the dismissal of their lawsuit against Mortgage Electronic Registration Systems, Inc. (MERS) for violation of the Consumer Protection Act (CPA), chapter 19.86 RCW. The superior court determined res judicata barred the Salmons' CPA action. The Salmons contend the court erred in (1) vacating the order of default entered against MERS, (2) determining res judicata barred their claim, (3) denying their motion for discovery, (4) denying their motion to recuse, and (5) denying their motion to reconsider. We affirm.

**FACTS**

In June 2013, the Salmons filed a complaint in Stevens County Superior Court against MERS, a Delaware corporation. In September 2013, after serving an inactive Washington domestic corporation named MERS via the secretary of state, the Salmons attempted to obtain a default judgment against MERS for its alleged failure to appear in this action. The superior court denied their request in a letter, indicating it was unclear if additional service was required. The Salmons again sought a default judgment in early 2015. This time they obtained an order of default against MERS.<sup>1</sup> When MERS learned of the order of default, it filed a motion to vacate based on the Salmons' improper service of the summons and complaint.

In its motion, MERS maintained the Salmons served a bogus MERS entity. The MERS sued in this lawsuit is a Delaware corporation with its principal place of business in Virginia. MERS does not have a registered agent in Washington. The bogus MERS served by the Salmons used MERS' UBI<sup>2</sup> number but was incorporated in Washington on June 3, 2009, by Robert Jacobson. MERS submitted documents and affidavits in support of its contention that Mr. Jacobson established this bogus MERS in order to trick people into thinking he was a proper registered agent who could accept service on

MERS' behalf. Mr. Jacobson would then solicit payment from MERS to obtain the legal notices and documents he received. In February 2010, MERS obtained a permanent injunction against Mr. Jacobson in United States District Court for the Northern District of California enjoining him from using MERS' name. The bogus MERS' Washington registration with the secretary of state expired in June 2010.

Based on this evidence, the superior court determined good cause existed to vacate the order of default. MERS then filed a CR 12(b)(6) motion to dismiss the Salmons' complaint based on res judicata and collateral estoppel. MERS' motion was based on the Salmons' prior attempts to litigate the foreclosure of their home.

In November 2010, the Salmons filed a lawsuit in Stevens County Superior Court against several defendants, including MERS, in an attempt to stop the foreclosure of their home.<sup>3</sup> Essentially, the Salmons claimed MERS was not a lawful beneficiary of the deed of trust and thus could not assign its interest in the deed of trust to the third party who eventually foreclosed on the deed of trust. After the lawsuit was removed to federal district court, that court dismissed it with prejudice as to all defendants.

\*2 Three months after the 2010 lawsuit was dismissed, the Salmons filed a second lawsuit in Stevens County Superior Court to stop the foreclosure of their home. The Salmons challenged the bank's authority to foreclose based on MERS' assignment of its beneficial interest to the bank. MERS was not a party to the 2010 lawsuit. Because of the preclusive effect of it, that lawsuit was also dismissed with prejudice.

In 2013, the Salmons filed this third lawsuit. Their complaint, entitled "Consumer Protection Act Complaint and Injunction Pursuant [to] Supreme Court Decision: 86206-1 [*Bain* <sup>4</sup>]," asserted MERS' assignment of the deed of trust was unlawful because MERS was not a beneficiary. Clerk's Papers (CP) at 50. The Salmons further requested relief from MERS' "unfair or deceptive acts or practices." CP at 58.

The superior court heard argument on MERS' motion to dismiss and the Salmons' motion for discovery, which sought documents relating to the issues discussed in MERS' motion to vacate the order of default. The court granted MERS' motion to dismiss, finding the Salmons' claim could have and should have been raised previously.

Following entry of these orders, the Salmons unsuccessfully moved for reconsideration. The Salmons also moved to recuse the superior court judge from the case. The court also denied the recusal motion. The Salmons appeal.

## ANALYSIS

### *Vacation of order of default*

The superior court has discretion when deciding whether to vacate an order of default. *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999). As such, this court reviews the superior court's decision for abuse of discretion.<sup>5</sup> *Id.* Abuse of discretion means the trial court exercised its discretion on untenable grounds or for untenable reasons or acted in a manifestly unreasonable way. *Stevens*, 94 Wn. App. at 29.

The superior court's decision to vacate its order of default was based on a reasoned analysis of numerous unique facts. There was no abuse of discretion.

### *Res judicata*

The superior court granted MERS' CR 12(b)(6) motion to dismiss on the ground of res judicata. A court's decision to grant a CR 12(b)(6) motion to dismiss is a question of law this court reviews de novo. *Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008). Res judicata prohibits relitigation of previously decided matters. *Ensley v. Pitcher*, 152

Wn. App. 891, 898–99, 222 P.3d 99 (2009). Res judicata requires a concurrence of identity in four respects: (1) persons or parties, (2) quality of the person for or against whom the claim is made, (3) cause of action, and (4) subject matter. *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 858, 726 P.2d 1 (1986). Res judicata also requires a final judgment on the merits. *Id.* at 860.

All four elements of res judicata are satisfied. MERS was a party to the Salmons' 2010 suit and the quality of its participation, as the reputed beneficiary of a deed of trust, is the same in both actions. In addition, the subject matter and cause of action are the same. Both complaints are premised on the claim that MERS could not appoint a successor trustee to initiate nonjudicial foreclosure of the Salmons' property because MERS was not the original beneficiary of the deed of trust and never held the applicable promissory note. The Salmons lost this argument in 2010. Since that time, our supreme court issued a decision favoring the Salmons' legal theory in *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012). However, res judicata prohibits the Salmons from reopening their litigation based on *Bain*. The Salmons could have appealed their 2010 judgment, relying on arguments ultimately deemed successful in *Bain*. Because they did not, they are barred from relitigating the issue of whether MERS acted unlawfully in assigning the deed of trust to the Salmons' property, regardless of how their claims are captioned.

#### *Motion for discovery*

\*3 The Salmons next contend the superior court erred in denying their motion for discovery. They assert discovery was needed to rebut MERS' claims of ineffective service. The superior court has discretion in deciding whether to deny a motion to compel discovery. *Clarke v. Office of the Attorney Gen.*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006). This court will not disrupt that ruling absent an abuse of discretion. *Id.* Because no discovery was necessary to resolve the superior court's decision to vacate its order of default, there was no abuse of discretion.

#### *Motion to recuse*

This court reviews a trial court's decision to recuse for an abuse of discretion. *Tatham v. Rogers*, 170 Wn. App. 76, 87, 283 P.3d 583 (2012). Washington has long recognized judges must recuse themselves when the facts suggest they are actually or potentially biased. *Id.* at 93. While the facts here demonstrate the trial judge disagreed with the Salmons' legal argument, there was no indication of bias. Denial of the motion to recuse was proper.<sup>6</sup>

#### *Motion for reconsideration*

This court reviews a superior court's denial of a motion for reconsideration for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). Because the trial court did not commit any error in addressing the Salmons' legal claims, it was not an abuse of discretion to deny reconsideration.

## CONCLUSION

The orders of the superior court are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Korsmo, J.

Siddoway, J.

**All Citations**

Not Reported in P.3d, 197 Wash.App. 1067, 2017 WL 532492

**Footnotes**

- 1 Although the order is entitled “Order of Default Judgment,” the contents of the order and the minutes from the court hearing make it clear it is an order of default. *See* Clerk's Papers (CP) at 17–18.
- 2 The Unified Business Identifier (UBI) number is a nine-digit number used to identify persons engaging in business activities in Washington.
- 3 The facts of this case, as summarized here, are discussed in more detail in the United States District Court for the Eastern District of Washington's order dismissing the case. *See* CP 215–35.
- 4 *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).
- 5 The Salmons argue MERS must prove by clear and convincing proof that service was improper in order to vacate the order of default. But the Salmons are confusing an *order* of default with a default *judgment*. The cases they cite deal with the latter. *See Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918) (after default judgment the burden is on the party attacking service to show, by clear and convincing proof, the service was irregular); *see also McHugh v. Conner*, 68 Wash. 229, 231, 122 P. 1018 (1912); *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991).
- 6 The Salmons contend the superior court committed a felony when it “erased” their proposed orders of default. Br. of Appellant at 13, 18. This claim is outside the scope of the record on review and will not be addressed. The record that exists shows no evidence of bias.

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**March 14, 2019 - 6:24 PM**

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**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51742-6  
**Appellate Court Case Title:** Floyd and Margaret Scott, Appellants v AllyBank Corp., etal, Respondents  
**Superior Court Case Number:** 17-2-01253-3

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