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No. 51976-3-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

Appeal of Thurston County Superior Court Summary Judgment
(Case Number 17-2-01029-34)

GREGORY GRAHN and SUSAN GRAHN (husband and wife)

Plaintiffs / Appellants

V.

THE BANK OF NEW YORK MELLON CORPORATION, as Trustee for
the Certificate holders of CWALT, INC., Alternative Loan Trust 2007-9T1
Mortgage Pass-Through Certificates, Series 2007-9T1

and

NISQUALLY BLUFF HOMEOWNES ASSOCIATION

Defendants.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants, Gregory and Susan Grahn, submit this brief in support of their motion to appeal a summary judgment ruling, and the subsequent denial of reconsideration, made by the Thurston County Superior Court. Appellants/Plaintiffs brought their action under the Uniform Declaratory Judgment Act (UDJA), where Appellants were seeking declaratory relief concerning the rights of the parties, and how those rights related to the disposition of the deeds of trust against their real property. This is the third court action between the parties. In the second court action, the court ruled that the former foreclosure, brought by BNY-Trust, was void. BNY-Trust (Plaintiff in that action) thereafter dismissed that court action prior to trial. This court action deals with determining the unresolved rights and interests of the parties (and the deed of trust) coming back out of that void foreclosure.

BNY-Trust claims that it became the beneficiary by mere virtue of the prior foreclosure being declared void. Appellants disagree – noting that the prior judge affirmatively denied such reinstatement (twice). Appellants further claim that BNY-Trust is an unlawful beneficiary because it never held any interests in the underlying debt, and also because the deed and debt were permanently split from each other. Appellants lastly assert that because BNY-Trust has been unable to secure its valid

rights to either the deed or the debt, (BNY-Trust agrees that such rights were not “corrected” until March of this year) the enforcement of the deed of trust is now barred by RCW 7.28.300 and the statute of limitations, because the default occurred over nine years ago.

The underlying trial court granted summary judgment in favor of Defendant-BNY-Trust. The court then dismissed the Appellants’ complaint without making any declaratory findings. Appellants sought reconsideration, but the court upheld its ruling. The appellants then brought this appeal.

II. ASSIGNMENTS OF ERROR

Appellants assert four general assignments of error:

1. The court erred by not declaring whether Defendant/BNY-Trust can be a lawful beneficiary when it claims no interests in the debt.
2. The court erred by not declaring whether the deeds of trust were rendered unenforceable after being permanently split from the debt.
3. The court erred by not quieting title over the deeds of trust pursuant to RCW 7.28.300 and the statute of limitations.
4. The court erred by granting Defendant’s summary judgment motion and dismissing the remainder of Appellants’ complaint.

Issues Pertaining to Assignment of Error

Error #1:

If BNY-Trust failed to establish (or even claim) that it ever held any interests in the underlying debt, does that render it an unlawful beneficiary under the Washington Deed of Trust Act as defined by our state Supreme Court in *Bain v. Metropolitan*?¹

Error #2:

- A. If the original lender, Kitsap Bank, assigned the deed of trust and “all beneficiary interests” to MERS, does such a full and complete assignment relieve Kitsap Bank, of its security interests?
- B. Does unsecured debt survive bankruptcy? . . . and after its discharge, can it then be reunited with a deed of trust?

Error #3:

A: Are Appellants allowed to assert RCW 7.28.300 and the statute of limitations when the confirmed default occurred over nine-years prior?

B: Can a party claim a “void” foreclosure carries the same effect as a valid foreclosure for purposes of tolling? . . . and can that party claim tolling without citing a tolling statute, and without providing any evidence to justify why it failed to file a lawful action in the first place?

Error #4

¹ Cited in full as *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash. 2d 83, 285 P3d. 34 (2012). For future reference, cited as *Bain*, or *Bain v Metropolitan*.

A: If BNY-Trust (as the actual named party in interest) refuses to claim any facts under oath, refuses to file any documents under its own name, and refuses to appear on its own behalf, does CR 56(e) then allow summary judgment to be based on unsworn statements of fact introduced by attorneys who had no personal knowledge of the underlying events?

B. Is it a violation of judicial estoppel for BNY-Trust's attorneys to write factual narratives that contradict BNY-Trust's prior pleadings?

C. Can MERS provide a valid assignment of a deed of trust after it stipulates to no longer having any interests in that deed of trust?

III. STATEMENT OF THE CASE

Appellants purchased their residential property on February 22, 2007. The underlying debt to the real property consisted of two promissory notes executed that same day (CP33, Exh.17, Promissory Note.) The promissory notes were secured by two deeds of trust. The original lender, Kitsap Bank (hereinafter Kitsap), assigned "all beneficiary interests" in the two deeds of trust to Mortgage Electronic Registration Services (MERS) (CP33 Exh.10 & 11 - Assignments). Kitsap then endorsed and transferred the promissory notes to Countywide Bank, N.A. (CP33, Exh.17.) Through a series of subsequent endorsements, the first lien note was turned into bearer paper. (CP33, Exh.17.) Plaintiffs defaulted on that note by March

2009 (confirmed by Defendants). On April 18, 2009, the debt was fully accelerated per a Notice of Acceleration. (CP33, Exh.19 - Notice of Acceleration.)² In May 2009, MERS initiated a non-judicial foreclosure against the Appellants. Appellants then filed bankruptcy; the underlying debt was discharged in January 2010 (confirmed by Defendants). In May 2010, MERS attempted to assign the first lien deed of trust to BNY-Trust (CP33, Exh.13- Assignment). MERS however, erroneously did not identify the trust by its correct name – it failed to include the identifying name of the depositor, “CWALT INC.” Despite having knowledge of the incorrect assignment³ (which BNY-Trust now confirms as being a cause for declaring the foreclosure void), BNY-Trust still initiated a non-judicial foreclosure over the Appellants’ home. The home was foreclosed on October 8, 2010.⁴ At that time, Appellants were unaware of BNY-Trust’s titling imperfections.

First Court Action: Defendant-BNY-Trust filed an unlawful detainer action against the Appellants under Thurston County Cause #11-2-00751-8. Rather than filing the action using its correct legal name,

² This document was supplied by BNY-Trust as part of its production of documents.

³ BNY-Trust’s Pooling and Servicing Agreement requires the Trustee to review all foreclosure related documents. PSA §3.12.

⁴ This is the same date that the Bank of America (loan servicer for BNY-Trust), announced its national moratorium on non-judicial foreclosures while it investigated the issues of robo-signing and other procedural irregularities.

BNY-Trust filed that action using the same false name as stated on the faulty assignment (CP21, Ex.1 – Complaint). BNY-Trust then re-recorded a “hand-corrected” version of the trustee’s deed to try and correct its name for titling purposes (confirmed by Defendants in 2013).⁵

Appellants discovered the re-recording and determined that BNY-Trust was operating under a false name. Appellants thereafter submitted discovery to BNY-Trust. Rather than fulfilling the discovery requests, BNY-Trust voluntarily dismissed its unlawful detainer action.

Second Court Action: BNY-Trust, after waiting a year and a half, then filed a quiet title action under Thurston County cause number 13-2-02021-9 (“2013 action”). BNY-Trust made numerous averments concerning the interests related to the debt and of the deed of trust. BNY-Trust claimed that MERS (not BNY-Trust) was the current beneficiary of the deed of trust. (CP33, Exh.16 - BONY Complaint, ¶3). BNY-Trust claimed the May 2010 assignment from MERS to BNY-Trust was faulty because “it failed to include the full name of the Assignee.” (CP33, Exh.16 - BONY Complaint ¶11); and BNY-Trust claimed that the faulty assignment was adequate cause for declaring the foreclosure void. (CP33,

⁵ The current attorney for BNY-Trust claimed (not under oath) that the re-recorded deed was recorded on October 26, 2010, but that was the original trustee’s deed. The copy of the re-recorded deed, as originally supplied by BNY-Trust, shows it was recorded in April 2011, and that it was delivered to the auditor by the processing company used by BNY-Trust’s attorneys . . . not mailed in by ReconTrust from California.

Exh.16 - BONY Complaint ¶15). In making these claims, BNY-Trust never once averred that it had any rights in the debt or in the deed of trust. BNY-Trust also did not request the court to correct or reinstate the May 2010 assignment from MERS to BNY-Trust; instead it prayed for the court to only reinstate the 2007 assignment from Kitsap Bank to MERS. (CP33, Exh.#16 - BONY Complaint, Relief #5).

Approximately ten months later, BNY-Trust brought a motion for summary judgment. It admitted that the foreclosure was void and that the deed of trust should be reinstated in the “same position as just before the foreclosure.” Appellants defended on the grounds that BNY-Trust cannot reinstate the deed of trust without the debt. Appellants wrote, “the note is endorsed in blank – so it is bearer paper. There is no added evidentiary proof that it is currently held by the Plaintiff/Trust.” [CP #42, exhibit #20 – Resp. Dec. pg 11.]⁶ The court (Judge Tabor) ordered the foreclosure void, invalidated the Trustee’s deed, and denied reinstating title or the deed of trust. Judge Tabor noted that the Grahns established numerous issues of material fact. [See CP 38, Ex.“A,” Transcript July 25, 2014, page 21] BNY-Trust then sought reconsideration to have the deed of trust

⁶ Appellants, also claimed that the deed and debt were split, and that the Trust cannot prove ownership of the debt due to its bulk settlement with Bank of America [CP #42, ex 20, page 15 – 17].

reinstated as a matter of law. BNY-Trust also finally admitted that it claimed no direct interests in the deed or the debt:

Defendant [Grahm] challenges merely that Plaintiff [BNY-Trust] is not the holder of the note. . . . However, because Plaintiff [BNY-Trust] is merely seeking an order making it clear that the deed of trust is reinstated after the trustee's sale is voided (and not that Plaintiff [BNY-Trust] is the beneficiary, in possession of the note, or entitled to enforce the note)- it does not matter who the beneficiary is ... [See CP #21, exhibit 5. BONY Mn., Page 4]

BNY-Trust then also admitted that it had limited standing.

To the extent that [Grahns] argue that [BNY-Trust] does not have standing to bring this action, or must prove standing, [BNY-Trust] is the grantee of the Trustee's deed;" [see CP #21, exhibit 5. BONY Mn., Page 5]

Judge Tabor upheld his original ruling; he again noted the numerous issues of material fact, and further stated, "I am not convinced that the deed of trust is automatically reinstated when the trustee sale has been rescinded." [CP38, Exh. "B" Transcript Nov. 21, 2014, page 13.] BNY-Trust later dismissed its (second) court action, without any further motions to reinstate the deeds of trust.

Third (current) Court Action: Appellants filed the current underlying court action ("2017 action") to address the issues that were left unresolved from BNY-Trust's dismissal. Appellants cited the UDJA, and requested for BNY-Trust verify its actual interests relative to the debt and deeds of trust. MERS was also originally named as a defendant (as it was

in the 2013 court action). However, in discovery, MERS admitted that it never held interests in the debt, nor was it an agent to a debt holder (Request for Admissions #1).⁷ MERS was thereafter dismissed with prejudice when it stipulated that it no longer claimed any interests in the deeds of trust. That stipulation was signed by all parties, and executed as a court order, dated August 15, 2017.

Appellants again propounded discovery on BNY-Trust, but BNY-Trust again refused to provide or certify its own answers. Instead all discovery was responded to and certified by BNY-Trust's loan servicer, Bayview Loan Servicing (hereinafter Bayview). (See CP #42, Ex 22 – Discovery responses.)⁸ BNY-Trust's refusal to respond to discovery was just the tip of a larger evidentiary problem. Throughout the entire case, BNY-Trust never stated a single fact under oath, and never filed a single document or pleading under its own name. As noted by Bayview and the attorneys "The "Trust" is not a party to this action nor is the management of the Trust other actions at issue in this case." [CP 42, Exh. 22 – see multiple discovery answers.]

⁷ BNY-Trust confirmed in discovery that MERS was never its agent. The attorneys for BNY-Trust are also the attorneys who certified MERS's discovery answers as well.

⁸ Bayview claimed it had the right to be BNY-Trust's representative, but it never entered any document into the court record that verified the accuracy of this claim.

Bayview, in responding to the discovery, was unable to provide numerous answers directly concerning BNY-Trust and the management of its assets. For example, Bayview refused to identify any individuals who were responsible for the compliance of the Trust [CP 42, Exh. 22 - Interrogatories #2, #3, #5, and #7].” Bayview also refused to identify whether BNY-Trust ever took ownership of the debt: [CP42, Ex 22 – see below excerpt.]

INTERROGATORY NO. 9:

Identify the date that the Subject Debt was first acquired by the TRUST and the date that such debt was fully incorporated as a TRUST fund asset.

RESPONSE: Objection, the request is not relevant or reasonably calculated to lead to the discovery of admissible evidence.

Objection. The request seeks attorney-client privileged communications and work product.

Objection, the request is vague as to the term “fully incorporated” and “held by the TRUST” and overbroad as to time and such ambiguity and vagueness renders the request unintelligible. Propounding party does not identify the relevant time period of when it seeks such information.

Objection. The “Trust” is not a party to this action nor is the management of the Trust other actions at issue in this case.⁹

Subject to and notwithstanding these objections, the Pooling and Service Agreement provides acquisition on or about March 1, 2007 with a closing date of March 30, 2007.

⁹ This is a concerning objection because Bayview and the Attorneys are asserting that the named party in interest is not the appearing party in this court action. This objection was used in numerous responses.

Lastly Bayview was also unable to make an accurate claim concerning the chain of title of the promissory note. After providing the equivalent objections as above, Bayview stated:

Subject to and notwithstanding these objections, Responding Parties **believe** the “chain of title” is as follows: 1) Kitsap Bank, 2) MERS, 3) BONY, as trustee. (Bold *emphasis added*.) [CP #42, exhibit 22 – Interrogator #10]

This last response was proven inaccurate by a verified copy of the promissory note, which showed on its face that the endorsements went from (1) Kitsap Bank, to (2) Countrywide NA, to (3) Countrywide Home Loans, and then to (4) bearer paper – never going to MERS, nor BNY-Trust [CP#33, Ex 17 - Copy of promissory note.] The irony to this is that it was BNY-Trust (in 2013) who first introduced the promissory note as being accurate. So whereas, BNY-Trust knew the note’s correct chain of endorsements in 2013, that knowledge was somehow lost in 2017 when Bayview took over the litigation duties. Bayview eventually produced the same copy of the note. It produced it (and certified its accuracy) as part its response for production of documents. Bayview also attached the note to a declaration, whereby it stated under oath that it was accurate. (See CP35 – Declaration of G. Trueba). Based on these subsequent certifications, Bayview essentially confirmed that the debt was never directly endorsed and transferred to BNY-Trust.

Both the Appellants and the Defendant independently filed summary judgment motions [see CP32 Grahns' Mtn., and CP36 BNY-Trust's Mtn.]. Defendant-BNY-Trust asserted that the deed of trust was "automatically" reinstated per the prior court action. It then sought to have the current court confirm this reinstatement. Appellants disagreed, based on the actual court records and court transcripts from the 2013 action. Appellants also asserted that BNY-Trust was not a lawful beneficiary and the deeds of trust were no longer enforceable. (Detailed arguments concerning each motion are contained in the below section, IV – ARGUMENTS.)

The trial court ruled in favor of BNY-Trust, and dismissed the Appellants' complaint without making any declaratory rulings (or findings). The actual court order, provides little information on its face. (CP 50- Court Order.] The order simply reads as follows:

IT IS HEREBY ORDERED that Defendant Bank of New York's motion's Motion for Summary Judgment is **GRANTED**, and Plaintiff's claims against Defendant Bank of New York Mellon and the entirety of this action are hereby dismissed with prejudice.

Appellants sought reconsideration, focusing primarily on the fact that BNY-Trust never claimed any ownership in the debt. Appellants also asked the court for clarification because of the vague nature of the order. The court denied reconsideration and refused to clarify or make any additional findings. The Appellants then brought this appeal.

IV. ARGUMENT

FIRST ASSIGNMENT OF ERROR:

ISSUE #1: Pursuant to Bain v. Metropolitan, can BNY-Trust be a lawful beneficiary when it never held any interests in the underlying debt. - NO

To determine whether BNY-Trust can be a lawful beneficiary, this court must first determine the rights and interests possessed by BNY-Trust.

[T]he trial court must ascertain and determine the rights of the parties under the pleadings and evidence, and grant such relief as may be proper.¹⁰

The obligation to prove one's own interests falls squarely on each individual party. BNY-Trust confirmed this standard when it quoted Walker v. Quality Loan Servicing Corp., 176 Wash App 294, 308, P.36 716 (Div. 1, 2011), which provides that a party may only prevail on showing the strengths of that party's own interests. Despite quoting this standard, BNY-Trust refused to provide any evidence verifying that it ever held interests in the debt. The absolute importance of this cannot be overstated. BNY-Trust's attorneys contend this issue is irrelevant because it doesn't block the automatic reinstatement. That argument, however, is a non sequitur. Regardless of reinstatement (which only concerns the deed of trust as a single instrument), BNY-Trust must still verify its own rights

¹⁰ 65 Am. Jur. 2nd Ed. "Quiet Title" §59.

and interests relative to the debt. By failing to do so, the court cannot determine that it is a lawful beneficiary.

Appellants gave BNY-Trust the platform to verify its interests, but BNY-Trust purposefully refused to claim it ever received any interests in the debt. (This is in addition to BNY-Trust directly disclaiming such interests in the 2013 action.) In short, there is no contested issue here. The court has clear findings that BNY-Trust claims no interests in the debt. According to our state Supreme Court, that makes BNY-Trust an unlawful beneficiary under the Washington deed of trust act.

According to *Bain*, an entity must have valid interests in the underlying debt to be a lawful beneficiary. The Court stated this core ruling multiple times.

Simply put, if MERS does not hold the note, it is not a lawful beneficiary. [*Bain* pg. 89.]

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. [*Bain*, pg. 109]

Under the deed of trust act, the beneficiary must hold the promissory note. [*Bain*, pg. 120.]

Applying *Bain* to the current action is straight forward. BNY-Trust claims no interests in the debt; therefore it does not meet the requirements of the Act. It is that simple. Appellants therefore request this court to declare BNY-Trust as an ineligible beneficiary to the current deeds of trust.

SECOND ASSIGNMENT OF ERROR:

ISSUE#2B: Did the intentional splitting of the deed and the debt relieve Kitsap Bank of its security over the debt? -Yes.

The second half of the *Bain* Argument centers on the specific actions of Kitsap Bank, where it directly assigned “all beneficiary interests” in the deeds of trust to MERS, and subsequently endorsed and transferred all interests in the promissory notes to Countrywide N.A. The end result of these transfers was that each instrument (the deed and the debt) was separately placed with independent entities who had no agency agreement with the other. According to *Bain*, this constitutes a physical splitting.

Selkowitz argues that MERS and its allied companies have split the deed of trust from the obligation, making the deed of trust unenforceable. While that certainly *could* happen given the record before us, we have no evidence that it did. [*Bain*, Page 112.]

The difficulty in *Bain* is not deciding whether a splitting occurred, but rather, determining the legal effects of such event. The *Bain*, Court left this as an unanswered question that requires case by case determination.

MERS states that any violation of the deed of trust act “should not result in a void deed of trust, both legally and from a public policy standpoint.” Resp. Br. Of MERS at 44. While we tend to agree, resolution of the question before us depends on what actually occurred with the loans before us and that evidence is not in the record. [*Bain*, page 114.]

BNY-Trust argues that the *Bain* ruling is irrelevant and does affect this litigation. In making this argument, BNY-Trust paraphrases the Appellants' position as: "Grahns contend that merely because MERS was implicated in the chain of title, the entirety of the assignments are invalid and thus title reverted back to them." (CP 36 – BONY Mtn. for SJ) This paraphrasing is a gross misstatement. Appellants have always focused on the rights of the parties over the validity of the instruments (this was true in the 2013 action as well). Additionally, Appellants never argued that the assignment to MERS was invalid; to the contrary, Appellants agree that the assignment was fully valid and effective.¹¹ It is by appreciating the full nature of the assignment, that Appellants assert it caused a permanent severing between the deed and the debt.

Unlike in *Bain*, where the homeowners directly granted MERS a "nominee's interests on behalf of the lender and its assigns," the Appellants in this case directly executed their deeds of trust solely in favor of Kitsap. Kitsap then assigned "all beneficiary interests" over to MERS.¹² Per that complete assignment, Kitsap no longer held any

¹¹ If, however, the court determines the assignment was invalid, then all issues before this court are automatically answered in Appellants' favor. BNY-Trust makes no claim to the deeds of trust other than obtaining them through MERS.

¹² Unlike *Bain*, where MERS was said to be both the "named mortgagee" and the "nominee to the mortgagee," in this case MERS can only be the sole mortgagee, or no mortgagee at all. There is no duality of interests.

interests in the deeds of trust, and therefore, it no longer held any security interests (the power of sale) over the debt. Because Kitsap no longer retained any security interests, it provided no security interests to the subsequent debt-owner. (An entity cannot transfer interests greater than what it possesses.) This foundation leads to the second important issue.

ISSUE#2A: Can unsecured debt survive bankruptcy and thereafter be reunited with a deed of trust? -NO.

During the time MERS retained “all beneficiary interests” (and the debt-owner held no security interest), the Appellants discharged the debt in bankruptcy -- January 2010. This means all rights of the debt-owner were fully discharged at that time, and no secured interests survived. From that point forward, whoever subsequently received the deed of trust from MERS (including BNY-Trust), could not simultaneously hold a valid interest in the debt. So consequently, the complete splitting did not render the deed of trust inherently void; instead, the full (100%) splitting ultimately jeopardized the security interests of the debt owner – making it impossible for that entity (or any entity) to become an eligible beneficiary. This is the point the *Bain* Court was making when it said, “resolution of the question before us depends on what actually occurred with the loans before us” [*Bain*, pg. 114]. In this current action, because the loans were discharged, no entity can subsequently claim that it holds the deed of trust

while also having an interest in the underlying debt. Therefore, no entity can ever satisfy the deed of trust act.

The above facts also overcome BNY-Trust's secondary argument of applying *Walker v. Quality Loan Service Corp.* (and other related cases).¹³ Walker tried to directly attack the validity of the deed of trust by claiming if the deed was assigned to MERS, then "it was no longer a valid lien against the property." *Walker* at pg. 728. The court denied Walker's argument as follows:

Walker does not allege a claim to quiet title based upon the strength of his own title. Instead he asks the court to void a consensual lien against his property because of a defect in creating that lien." *Walker* at pg. 729.

The difference between *Walker* and the present case is that Appellants do not claim the deed, or its assignment, is per se invalid. Unlike *Walker*, the "superior claim" here is that Appellants fully discharged all lawful obligations to fulfill the note – while the note was unsecured. As a result, no entity can claim to have any ongoing interests in the debt; and therefore no entity (including BNY-Trust) can claim to be an eligible beneficiary to the deed of trust. Appellants thus have the superior right to remove a permanently unenforceable lien from title.

¹³ BNY-Trust cited new cases in its strict reply, to which Appellants could not timely respond. So appellants only focus on the Walker case.

THIRD ASSIGNMENT OF ERROR:

ISSUE#3A: Does RCW 7.28.300, allow the court quiet title when the default of the underlying secured debt occurred nine years prior, and is subject to limitations? -Yes.

A final cause of action is for application of RCW 7.28.300.

RCW 7.28.300 –

The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

The court's primary goal when interpreting a statute is to effectuate the legislature's intent; *Rivas v. Overlake Hosp. Medical Center*, 164 Wash. 2d 261, 189 P.3d 753,755 (2008). The language of this statute clearly demonstrates that legislature intended to give homeowners the right to clear deeds of trusts from title when the enforcement of the underlying debt would be outlawed by the statute of limitations. See *Walcker v. Benson & McLaughlin P.S.* 79 Wn. App 739, 904 P.2d 1176 (Div. 3, 1995). This is an important legislative act because it directly changes the scope on how a party can apply the statute of limitations. Homeowners can now assert the statute proactively rather than only use it as an affirmative defense.

Pursuant to the wording of RCW 7.28.300, the moving party's burden of proof is to provide evidence "sufficient to satisfy the court" that an

enforcement action “would be barred by the statute of limitations.”

Appellants fully meet this “sufficiency” standard.

In the present action, there is a six-year statute of limitations period under RCW 4.16.040(1):

- (1) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

Appellants exceed this limitations period because the default occurred on or before March 2009, and the debt was fully accelerated as of April 18, 2009. Lastly, the Appellants have not made any subsequent payment since the original default.¹⁴ (These matters were undisputed before the trial court.) Based on these facts, the final bell on limitations rang on April 18, 2015 (six years after the date of acceleration).¹⁵ Accordingly, Appellants are now entitled to have title over the deeds of trust quieted in their favor. *Walcker v. Benson & McLaughlin P.S.*, 79 Wn. App 739, 904 P.2d 1176 (Div. 3, 1995).

BNY-Trust, in its written response, did not deny the facts nor the application of RCW 7.28.300. Instead, BNY-Trust’s sole defense was to allege “tolling.” This causes the court’s inquiry to shift over to BNY-

¹⁴ Defendant affirmed these points in discovery. Plus, Bayview has provided business records verifying that the default was February 2009, and there have been no subsequent payments since default.

¹⁵ Defendant never argued that the bankruptcy caused a tolling period, but even if it did, the argument is moot because it would only increase the period by 119 days, which provides no additional relief to the Defendants.

Trust. The burden of proof lies with the party seeking tolling; *Rivas* pg.263.

RCW 4.16.005 states tolling must be “prescribed” by statute.

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

The Supreme Court has remained resolute on this issue. “Statutory time bar is a legislative declaration of public policy which courts can do no less than respect, with rare equitable exceptions. [*Bilanko v. Barclay Court Owners Ass’n*, 185 Wash.2d. 443, 375 P.3d 591. The purpose is “to require parties to exercise their rights within a reasonable time;” *Huff v. Roach*, 125 Wash. App 724 106 p.3d 268 (Div. 3 2005), and to “ensure essential fairness to defendants and to bar plaintiffs who have slept on their rights.” [*Rivas*, quoting *Burns v. McClinton*, 135 Wash. App. 285, 143 P.3d 630 (Div 1, 2006) as amended (Feb. 13, 2008)]. Accordingly, BNY-Trust has the burden of proof to cite the tolling statute under which it falls, and then to supply the evidence that adequately proves how it was legally denied the full benefit of the limitation period.¹⁶ BNY-Trust, however, never attempted to satisfy either half of this requirement. It did not assert any specific tolling statute, nor did it present any facts

¹⁶ See *Rivas* at 263; “Tolling provisions by nature, exist to assure all persons subject to a particular statute of limitations enjoy the full benefit of the limitation period.”

establishing how it was improperly prevented from lawfully acting within the limitations period. (Again, BNY-Trust itself, asserts no facts at all.) Based on these omissions alone, BNY-Trust fails to meet the burden of proving statutory tolling. BNY-Trust also fails to meet the Division II requirements for equitable tolling. See, *Trotzer v. Vig*, 149 Wash. App 594, 203 P.3d 1056 (Div 2 2009); equitable tolling should be used “sparingly,” and the asserting party must show (1) bad faith, deception, or false assurances by the defendant; and (2) exercise of diligence by the plaintiff.

ISSUE#3B: Does tolling apply to a void action, or when the party cites no tolling statute or provides any facts? -No.

BNY-Trust’s primary tolling argument is best summed up by the caption it used in its summary judgment pleading.

The Current Foreclosure is Timely Because BONY Took Lawful Enforcement Action Which Tolled the Statute of Limitations.

This caption, however, is a misnomer. It claims the prior enforcement action was lawful, when in fact, it was not - it was unlawful. (If it was a lawful foreclosure, the sale would not have been declared void.) BNY-Trust fails to recognize or make any argument that explains how a void foreclosure should be given equal effect as a valid one. Even in BNY-Trust’s singular cited case, *Bingham v. Lechner*, 111 Wn. App. 118, 127,

45 P.3d 462 (2002), the court applied tolling only to the valid actions (the court removed the four invalid underlying causes of action). The court also stated that tolling for a valid foreclosure stops upon the trustee's sale or 120 days after the last notified date of the trustee's sale. See Bingham at page 129. This ruling wholly contradicts the implications asserted by BNY-Trust. If Bingham could be applied to this action, its ruling would stop the tolling upon the October 8, 2010 Trustee's sale (one-hundred and forty-eight days from the date the Notice of Foreclosure was recorded with the auditor).¹⁷ This limited tolling period (plus the one hundred and nineteen days for the bankruptcy), would extend the original limitations date from April 18, 2015 to January 10, 2016, which still violates the limitations period by multiple years. (This is BNY-Trust's best case scenario based upon the only case it cited.) However, applying Bingham is academic, because Bingham specifically does not grant tolling to a void foreclosure. The more analogous case is Dowell Co. v. Gagnon 36.Wash. App. 775, 677, P2d 783,785 (Div. 1 2004), where the court ruled that an action commenced seven years earlier, but never completed, did not toll the statute of limitations on a newly filed action over the same debt.

¹⁷ BNY-Trust's attorney claims (unsworn) there were other actions. Appellants denied such matters as being valid actions. Appellants also requested verification, but the attorneys supplied none. Additionally, the Thurston County Auditors records are clear; the only foreclosure action recorded after the May 2010 foreclosure, was recorded June 5, 2010. This recent/current action is well beyond the limitation period.

In these circumstances, where the defendant can no longer utilize the prior action to defend against the later action, the plaintiff should not be permitted to maintain that an action filed over seven years earlier tolled the statute of limitations in its second action. Furthermore, as the majority concisely observes, a contrary result would undermine a primary purpose of the statute of limitations. [Judge Swanson, Concurring Opinion, page 785.]

The court's overriding point in *Dowell* is simple; a party cannot use its own improperly maintained prior action (even though in *Dowell* that prior action was initially a valid action) as a basis for tolling the limitation on a subsequent action. Such self-caused tolling "would undermine a primary purpose of the statute of limitations." [*Dowell*, pg. 785.]

The second fatal flaw to BNY-Trust's position is that BNY-Trust already defined void as, "once something is declared void, it never happened at all for legal purposes," [Quoting *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 427 fn. 2 (2014).] Accordingly, BNY-Trust cannot simultaneously apply a contradictory position to the same foreclosure event. "Judicial estoppel is not limited to assertions of fact and may be applied to questions of law." See *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wash. 2d 861, 281 P.3d 289 (2012). BNY-Trust is trying to re-write the Supreme Court's ruling to now be: "once something is declared void, it never happened for all (*but one*) legal

purpose (. . . *except for potentially superseding the statute of limitations*).”

Such a re-write of a Supreme Court ruling is simply not allowed.

Lastly, the impracticality of BNY-Trust’s position is also highly problematic. If an invalid enforcement action could toll and extend future limitations, then every debt owner with a title problem would commence a non-judicial foreclosure as a means of self-tolling the statute of limitations (especially since the Deed of Trust Act does not allow for damages prior to actual trustee’s sale). An entity without proper authority, would start an action, dismiss it, and then start over with a new one, again and again.

Each time claiming that the prior invalid action barred the statute of limitations from applying. (This is exactly what BNY-Trust is trying to do in this action.) Such a position contradicts the legislature’s intent, because it allows creditors to impinge on the rights of the homeowners solely for the purpose of correcting their own omissions and mistakes. Lastly, this practice would also destabilize the balancing principles of the non-judicial foreclosure process -- which according to our state Supreme Court, includes “the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure.” [*Bain* at pg. 94.]

In summary, BNY-Trust always had the availability to bring a valid action within the statutory period; it was never denied the full benefits of

that period [Rivas at 263]; it chose to ignore the faulty assignment and proceed with an invalid foreclosure instead.¹⁸ BNY-Trust then failed to clear up its own invalidity because it waited almost three years before filing a corrective court action, and then it voluntarily dismissed that action after it verified that it was not claiming to have any rights to the deed or the debt. It was during that 2013 action that the statute of limitations expired (even when including all potential tolling periods). At the time of expiration (January 10, 2016 at a maximum), BNY-Trust stated that “MERS is the beneficiary,” and prayed for the court to reinstate the deeds of trust back to MERS. [CP33, Exh.16 - relief 5]. Even under this most favorable light, BNY-Trust still cannot claim tolling, because during the entire limitations period (by its own assertions) BNY-Trust did not have adequate standing as a debt owner or a beneficiary.

There is no tolling statute (or case law) that compensates an entity for its own self-inflicted title problems. BNY-Trust is therefore fully subject to the original statutory period. Accordingly, the Appellants are now entitled to have the deeds of trust quieted in their favor.

¹⁸ The fact that BNY-Trust immediately filed the 2011 Unlawful Detainer action under the false name, shows that BNY-Trust knew it had title flaws which it chose to ignore and conceal.

FOURTH ASSIGNMENT OF ERROR

The fourth assignment of error is different from the above three. Whereas, the above three assignments apply to issues brought forward by the Appellants concerning BNY-Trust's lack of verified interests and its inability to be a valid beneficiary and/or enforce the deed of trust, this forth section deals solely with the issues contained in BNY-Trust's summary judgment motion. Appellants call attention to this distinction because regardless of BNY-Trust's claims for reinstatement (as noted below), the facts remains that BNY-Trust has no lawful rights to be a lawful beneficiary (as set forth of the above). Thus the below matters could be seen as harmless errors because they do not change BNY-Trust's ultimate inability to be a lawful beneficiary. Appellants none-the-less include this section, because the issues directly apply to the trial court's final order.

ISSUE #4A: Did the court error by relying on improperly presented grounds that were unfounded, contradictory and created numerous material questions of facts? -Yes.

Appellants primary assertion of error for granting BNY-Trust's summary judgment (and dismissing Appellants' complaint) is that the court predominantly relied upon factual presentations (by BNY-Trust's attorneys) that were improperly constructed, falsely inaccurate, and

riddled with contradictions of material fact.¹⁹ The underlying court should have respected the procedural restrictions against attorneys introducing unsworn facts in place of the actual party in interest.

Cr 56(e): Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.²⁰

Additionally, the court also should have recognized that the factual narratives written by the attorneys created material controversies when compared to BNY-Trust's prior pleadings from 2013. In short, BNY-Trust's entire motion was built on an unsworn, uncorroborated, and improper foundation solely created and presented by the attorneys.

Improper Foundation: The attorneys (in 2017) claimed that when the prior court declared the foreclosure void, the deed of trust was automatically reinstated back to BNY-Trust. This claim cannot be sustained when it is compared to the facts BNY-Trust asserted in its 2013 complaint. When incorporating the averments from BNY-Trust's prior complaint, the attorneys (in 2017) are actually claiming that BNY-Trust

¹⁹ Appellants' filed a written "Objection to Defendant's Factual Statements." (See CP40)

²⁰ At one point, Attorney Soldato went so far as to write his own statement correcting the sworn statements made by Geraldo Trueba in his own declaration. (CP48 – Dec. of Atty Soldato.)

received valid title through the following actions: (1) by admitting MERS is the actual the beneficiary at the time [Complaint ¶3]; (2) by admitting BNY-Trust only received an erroneous assignment of the deed of trust [Complaint ¶11], (3) by admitting the improper assignment caused the original foreclosure to be void [Complaint ¶15], (4) by praying for the court to reinstate the assignment of the deed of trust back to MERS [Complaint –Relief #5], (5) by **not** claiming BNY-Trust had any valid interests in the deed or the debt, (CP21 – BONY Mtn pg. 5.), and (6) by never praying to receive the deed of trust or any other like relief. . . . Based upon these actual averments and assertions (made in the 2013 pleadings), BNY-Trust’s attorneys now claim (in 2017) that it received the deed of trust as a matter of law – as if the law could do no other result. This is unsustainable logic that is only achieved through violating judicial estoppel and not incorporating the prior asserted facts.

The second problem with BNY-Trust’s argument is that the attorney’s claims also contradict the actual court rulings. The attorneys claimed that Judge Tabor (2013) never made an order on reinstatement, “the court found that executing the agreement was in fact the easiest means to void the sale and thereby ordered as such without making any finding as to reinstatement,” [CP36 - BNY Mtn for SJ – pg. 6]. This

claim is dead-wrong. The transcripts show that Judge Tabor affirmatively denied reinstatement, at both hearings.

[CP 38 Ex. "A" Transcript of SJ hearing, Pages 20 & 21]

I think the Defendant [Grahn] has raised some issues that are going to have to be further argued and there is going to have to be testimony and/or evidence So, what I am doing today is, I'm going to void the sale and I'm going to indicate that the deed of trust is still an issue."

[CP 38 Ex. "B" Transcript of Reconsideration hearing, Page 13.]

You [BNY-Trust] have argued to me in your motion that the effect of law should be that when a trustee sale is rescinded, that that automatically reinstates the deed of trust. And then you've argued that, because of that, I should simply say that the deed of trust has been reinstated. The context of my previous ruling was, as Mr. Grahn has indicated, I denied summary judgment. I indicated that there were material issues of fact, there still are in my opinion. **I am not convinced that the deed of trust is automatically reinstated when the trustee sale has been rescinded.** (Bold emphasis added.)

To make matters more egregious, Judge Tabor and the 2013 attorney for BNY-Trust had additional discussions which further verified BNY-Trust's full understanding of the ruling: [see Transcript, Pages 13 – 16]

Attorney McINTOSH (for BNY-Trust): "You say there's a number of issues, and I don't know what issue there is. In other words, if I'm going to bring another motion for summary judgment what else am I – what are we –

The COURT: All right, I am not here to bring you up to speed on all the issues, I found there were material issues of fact last time.

Attorney McINTOSH: But you didn't specify with what.

The COURT: Okay. You've told me you're frustrated about that. You can read the brief by defense [Grah], and there are issues in my opinion.

Attorney McINTOSH: Is it possible to vacate the motion for summary judgment and dismiss this case. You are putting us in a place where there is an order out there that's saying the trustee's sale --.

The COURT: I've already heard your argument, and you may be frustrated with my decision. If you don't like it appeal it. Okay?

Attorney McINTOSH: That's fine.

There are four undeniable conclusions to be made here: 1) the court absolutely denied the reinstatement, twice; 2) BNY-Trust had absolute clarity that Judge Tabor denied the reinstatement both times; 3) BNY-Trust never appealed the prior order; and 4) the new attorneys (who had the court transcripts) intentionally claimed an opposite result occurred. The apparent motivation for this false claim was previously surmised by Attorney Saldato in his discovery pleading: "Grahns seem to want the denial of the motion to reinstate issue to be admitted, so that it effectively ends this case." [BONY's Opp to Grah's MTC – Filed October 25, 2017, page 7.]

In summary, BNY-Trust's entire summary judgment motion was written in a vacuum. A vacuum where BNY-Trust refused to assert any of its own facts; a vacuum where the statements were unsworn and uncorroborated; and a vacuum where BNY-Trust's previous claims and

averments were wholly ignored, and then contradicted. These verified facts provided the court with ample grounds to dismiss BNY-Trust's summary judgment motion in full. In the alternative, the trial court minimally should have determined there were material questions of fact and allowed the Appellants to proceed to trial.

V. FINAL SUMMARY

As noted in the introduction, the pivotal issue to this action is determining the "rights, interests, and status" of the parties relative to the deed of trust. According to our state Supreme Court, BNY-Trust is an unlawful beneficiary because it never held (and does not claim to have held) any interests in the underlying debt. BNY-Trust cannot escape this result. Additionally, BNY-Trust cannot correct this problem because the full splitting of the deed from the debt was rendered permanent by Appellants' bankruptcy discharge. Lastly, the statute of limitations has already tolled, multiple years ago – during which time, BNY-Trust affirmatively asserted that it claimed no rights in the deed or the debt. These prior assertions cannot now be ignored or reversed by BNY-Trust – no matter how hard the attorneys try to argue otherwise

BNY-Trust's attorneys argue that their "matter of law" position is supreme, and no other argument can be overlaid on top of its single claim. This, however, is wrong; the court has the obligation to determine the rights, interests, and status of the parties. Such matters are "justifiable controversies" under the UDJA, because each issue concerns an actual determination of substantive interests between two opposing parties, which could have been fully and conclusively cleared up by the court's ruling. [See *To-Ro Trade Shows v. Collins*, 114 Wash.2d 403, 27 P.3d 1149 (2001).] This is the reason why Appellants brought its action under the UDJA; the Defendant cannot just dismiss it simply because it is unable to disprove that such determinations are factually correct. Once the rights and interests of BNY-Trust are reviewed, it is inescapable that BNY-Trust does not meet the requirements of the deed of trust act. Our Supreme Court has made it clear that under these circumstances, BNY-Trust bears the consequences of own improprieties.

"[MERS argues that] the Legislature certainly did not intend for home loans in the State of Washington to become unsecured, or to allow defaulting home loan borrowers to avoid non-judicial foreclosure, through manipulation of the defined terms in the [deed of trust] Act." Resp. Br. of MERS at 23 (Bain). One difficulty is that it is not the plaintiffs that manipulated the terms of the act: it was whoever drafted the forms used in these cases. There are certainly significant benefits to the MERS approach but there may also be significant drawbacks. [*Bain*, page 108-109]

Appellants ask the court to declare the relative rights of each party, and also declare the proper disposition of the deeds of trust. In doing so, this court should declare that BNY-Trust has no right to be a lawful beneficiary when it failed to ever acquire any interests the debt. This court should also declare that the deeds of trust were rendered initially unenforceable due to being physically split from the debt, and then rendered permanently unenforceable due to Appellants' discharge of the debt in bankruptcy. Lastly, this court should declare that pursuant to RCW 7.28.300, title over deeds of trust are quieted in the Appellants' favor, because the underlying debt is outlawed by the statute of limitations (multiple years over). Upon making these determinations, there are no further issues for the court to decide; because there are no other entities who can possess the rights necessary to enforce the deeds of trust. As such, the court should reverse the prior ruling of the trial court and grant Appellants their full summary judgment request.

Respectfully submitted this 8th day of August 2018.



Gregory Grahn, Pro Se, Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 51976-3-II

COURT OF APPEALS, OF THE STATE OF WASHINGTON
DIVISION II

9 GREGORY E. GRAHN, and SUSAN M.)
10 GRAHN, Husband and Wife;)
11 Appellants)
12 v.)
13 THE BANK OF NEW YORK MELLON)
14 CORPORATION, as Trustee for the Certificate)
15 holders of CWALT, INC., Alternative Loan)
16 Trust 2007-9T1 Mortgage Pass-Through)
17 Certificates, Series 2007-9T1)
18 and)
19 NISQUALLY BLUFF HOMEOWNER'S)
20 ASSOCIATION.)
21 Defendants.)

NOTICE OF SERVICE
Of Opening Brief

TO: The CLERK OF THE COURT and Counsel for Defendants

COMES NOW, Plaintiffs, Gregory Grahn, and swears under the penalty of perjury that on this date, he provided a copy of Appellants' Opening Brief to opposing counsel as follows:

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Respectfully submitted, this 8th day of August 2018, in Thurston County, Washington.



Gregory E. Grahn, Appellant / Pro Se