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**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' RESPONSE BRIEF
Responding to the brief filed by Bank of New York Mellon

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CORRECTION TO CITATION OF CLERKS PAPERS

At the time Appellants filed their Opening Brief, the Superior Court had not processed the clerk’s papers. As such, Appellants cited the clerk’s papers based on the Index Numbering System used internally by the Superior Court. Such numbering system does not line up with the current clerk’s designations. Appellants apologize for any difficulties this may have caused. Citations herein are consistent with the current designation in the clerk’s papers now filed with this court.

I. ARGUMENT

1. RELIANCE ON FALSE AND UNSWORN EVIDENCE:

The disagreement with material facts is not between the Appellants and the Bank of New York Mellon, as the Trustee for the CWALT Trust (hereinafter BNY-Trust), but rather it is between BNY-Trust and its current loan servicer (Bayview) – who is now providing the defense. The assertions provided by Appellants are in accord with those originally stated by BNY-Trust. The statements provided by Bayview, are not.

In the 2013 complaint, BNY-Trust averred that MERS was the sole beneficiary at that time (CP 62 – 2013 Complaint ¶3). BNY-Trust also asserted that the May 2010 assignment (from MERS to BNY-Trust) contained material errors that prevented title from passing to the Trust (which is why MERS remained the beneficiary), and further caused the original foreclosure to be void (CP 63-64 - Complaint ¶11&15). BNY-Trust then prayed to only reinstate the former assignment from Kitsap Bank to MERS, not the subsequent assignment from MERS to BNY-Trust (CP 65: Prayer for Relief #5). Lastly, BNY-Trust ultimately stated in its pleadings that it did not have standing as the beneficiary, and it was not claiming to be “the beneficiary, in possession of the note, or entitled to enforce the note” (CP 21 - Lines 15-22). As a whole, BNY-Trust

confirmed two important facts with its 2013 pleadings: (1) The beneficiary interests were solely retained by MERS (not by BNY-Trust), and (2) BNY-Trust was not asking to become the beneficiary per that court action.

Fast forward to 2017: BNY-Trust (as the real party in interest) has never revised or altered any of its previous averments. Instead, per a 2017 request for admissions, those averments have been affirmed as being true and correct (Req for Admissions #8). BNY-Trust also verified under oath that it never acquired any interests in the debt (CP 310-312 – Discovery answer #9). Finally, BNY-Trust confirmed that it can no longer receive any interests in the deed of trust or the debt, because those interests could only be acquired during BNY-Trust’s open enrollment period, which closed on March 30, 2007 (CP 310-313 – Discovery answer #9 & 11).¹

These are the facts established by BNY-Trust pursuant to its prior pleadings and current discovery.

[A] statement of fact made by a party in pleading is admission such fact exists and is admissible against such party in favor of his adversary. *Neilson v. Vashon Island School Dist. No. 402*, 87 Wash. 2d 955, 558 P.2d 167 (1976).

¹ Appellants are not arguing the enforceability of the Pooling and Servicing Agreement; instead, they are simply upholding the sworn statement made by BNY-Trust in discovery. The defense admitted under oath that BNY-Trust can only acquire its interests during the enrollment period; no further proof by the Appellants is needed.

Yet the defense now asserts a foundation that is completely different. The cause of this contradiction is twofold: (1) It is not BNY-Trust that is now asserting the defense – it is Bayview, who has its own interests;² and (2) neither Bayview nor its attorneys are basing the defense on the original facts established by BNY-Trust.

The additional problem with the current defense is that the entire presentation of facts violate CR 56(e) (see CP 243–248). The evidentiary requirements of CR 56(e) are straight forward. The evidence must be presented in writing under oath, based on personal knowledge, admissible in court, and show that the affiant is competent to testify to such matters. The defense herein only filed one declaration to support its summary judgment motion; that of Geraldo Trueba (of Bayview) (CP 88 – 104). Mr. Trueba, however, does not establish any personal knowledge;³ he does not claim to be the custodian of BNY-Trust’s records; and he does not claim to have reviewed any records prior to his statement.⁴ Lastly, he directly failed to identify under oath whether BNY-Trust ever acquired any interests in the debt. His declaration provides no admissible

² The attorneys have confirmed that Bayview is their actual client (CP 446 – lines 1-3). Bayview has certified under oath that “the Trust is not a party to this action” (see CP 305 - 330 – Multiple Discovery Answers).

³ He acknowledges at one point that his statement is based on “information and belief.”

⁴ Appellants pointed out in summary judgment (without any rebuttal) that per BNY-Trust’s PSA, neither the Master Servicer nor the loan servicer serves as the records custodian for BNY-Trust’s assets.

evidentiary support at all. (Which explains why it is not referenced in the defense's appellate brief.)

The greater problem than Mr. Trueba's insufficient declaration, is that there is no other sworn evidence. The bulk of all remaining evidence (all factual statements contained in the summary judgment motion, response, and strict reply) consist of unsworn statements introduced into the record by the attorney. This violates all four elements of CR56(e). Ironically, the defense does not rebut or counter-argue that the attorney's unsworn evidence should be disallowed under CR 56(e). (The defense never even cites CR 56(e).) Instead, the defense simply claims that the Appellants' objection is nothing more than "procedural (and concededly harmless) claims about the evidence." (Res Br, pg. 2 ¶3.)

The above-noted violations are far from "harmless." Take, for example, the defense's constant current claim of "scrivener's error." The argument is that, because the 2010 assignment only contained a scrivener's error, the corpus of the beneficiary rights passed to BNY-Trust, and all that was needed to correct such interests was for the 2010 assignment to be reformed – which occurred with the 2018 corrective assignment. There are two major problems with this argument. First, the entire foundation is based solely upon the unsworn statements made by the

attorney, who has no personal knowledge of such matters. They are assumptions made without any citations to the record and without any proper foundation of admissibility. The attorney developed these claims out of his own head and he repeatedly presented them to the court as being “statements of fact.”

The second (and more egregious) problem is that the statements are also false. The attorney claims that failing to include “of CWALT Inc.” didn’t affect Bank of New York’s (BONY’s) interests. This is a misnomer. BONY is the trustee; and whereas the Trustee’s name was properly identified (as was the tranche designation), the omission of naming “CWALT Inc” failed to identify the actual Trust – a real material failure. Additionally, a party claiming scrivener’s error must prove with objective facts that both entities to the document mutually intended a different meaning. *Berg v. Ting*, 125 Wash.2d 544, at 554, 886 P.2d 564 (Wash 1995). The defense does not even attempt this burden. Being that BNY-Trust filed its 2011 unlawful detainer action also omitting “of CWALT Inc.,” the only objective evidence is that both parties intended to omit “CWALT Inc.” (This interpretation also supports the claim that BONY knew the CWALT Trust could not accept the deed after the closing of its enrollment period.) So, in a nutshell, the claim of “scrivener’s error” has no secondary corroboration and it directly contradicts numerous

underlying facts of this case. BUT THAT'S NOT ALL, the more glaring problem is that the claim also contradicts the statements made by BNY-Trust. BNY-Trust did not claim "scrivener's error;" to the contrary, BNY-Trust claimed the 2010 assignment failed to fully name the assignee (CP 63-64 - Complaint ¶11). Furthermore, BNY-Trust did not claim it received any beneficiary interests; instead it identified MERS as the sole beneficiary, and later stated that it was not claiming to be the beneficiary. Lastly, BNY-Trust never requested reformation of the 2010 assignment (as the defense now suggests); instead it requested to directly reinstate the prior assignment (from Kitsap Bank to MERS), which would have effectively extinguished the 2010 assignment from the record. The underlying point is simple. The attorney's unsworn narratives are not just slightly inaccurate, they wholly contradict the underlying facts already placed into the record by BNY-Trust. The current defense is not trying to produce an accurate depiction of evidence; instead, it is spewing out whatever statements it deems necessary to foster Bayview's own position – truth be damned. This is the reason why the Supreme Court adopted CR 56(e); there is no exception allowing attorneys to introduce their own unsworn evidence, especially when the claims of the attorneys contradict the prior sworn testimony.

The court should take two actions in response to these violations. (1) The court should sustain the Appellants' written objection under CR 56 and strike the defense's pleadings as appropriate. (2) The court should make its own de novo ruling based solely on the proper prior evidence.

- That the assignment to BNY-Trust was not a scrivener's error; rather a material titling flaw that failed to name the actual trust.
- That MERS, not BNY-Trust, remained the beneficiary of record after the May 2010 faulty assignment, as averred by BNY-Trust, and later affirmed in the request for admissions.
- That BNY-Trust disclaimed in writing that it had any standing as the beneficiary, or that it was "the beneficiary, in possession of the note or entitled to enforce the note."
- That BNY-Trust still denies, and fails to claim, that it ever held or acquired any interests in the debt. And
- That BNY-Trust verified under oath (in discovery) that it can no longer acquire any interests in the deed or the debt, after the closure of its enrollment period – March 30, 2007.

BNY-Trust had an open forum to present admissible evidence; it chose not to do so . . . and now Bayview makes its own claims without any adherence to CR 56(e) or factual consistency. As such, this court should make a de novo ruling based solely on the evidence noted above.

2. NON-VERIFIED INTERESTS IN THE DEBT

Appellants filed this action under the UDJA because after BNY-Trust disclaimed all relevant interests in the 2013 action, Appellants wanted BNY-Trust to verify whether it had any interests moving forward.

[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.⁵

BNY-Trust itself has never altered from its original averments.

Furthermore, when asked in discovery to identify whether it ever acquired any interests in the debt, BNY-Trust refused to do so. The defense (in its brief) does not produce any real facts to overcome this deficiency.

Instead, the defense now argues that the Appellants lack the standing to question BNY-Trust about its interests.⁶ This argument, however, was never asserted at summary judgment – not a single pleading by the defense contains the word “standing.” As such, making this argument now violates RAP 2.5. “An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.” (*Wash Fed Sav. v. Klein*, 177 Wn.App 22, at 29, 311 P.3d 53 (2013).

The larger problem with this new argument is that the defense deliberately misconstrues its own cited case, *Borowski v. BNC Mortgage*. The defense states that *Borowski* stands for the proposition that a homeowner, as a third party to a debt assignment, has no standing to

⁵ *65 Am. Jur. 2nd Ed.* “Quiet Title” §59.

⁶ The defense also claims that Appellants conceded that BNY-Trust owns the debt when Grahn claimed it didn’t want a free house. This claim is an intentional misquote of the transcript (See Appellants initial argument at CP 263 lines 1 - 9). Defense also claim that having a copy of the promissory notes equates to being the holder of the note – this is ridiculous and needs no further comment.

require the alleged debt-owner to verify its interests. This is wrong; the Borowski court actually ruled that standing is related to whether the UDJA seeks an imminent judicial determination, or an advisory opinion. The court claimed that Borowski failed to meet this standing because:

Plaintiff has not alleged an imminent injury traceable to the Defendants, nor is the controversy in this case of sufficient immediacy to warrant declaratory relief. There is no allegation in the Complaint that any of these defendants have begun or threatened to initiate foreclosure proceedings. Although, at some point, it is possible someone might commence foreclosure proceedings against Plaintiff, there is no evidence that any of the Defendants have done so yet, and there is no allegation showing that the foreclosure proceedings are imminent. The claimed threat of numerous foreclosure actions, from entities that may or may not have the authority to foreclose, is speculative because they are future events that may never occur. The request that the court determine the legal rights of the parties in order to preclude anyone from initiating foreclosure proceedings is in actuality a request for an advisory opinion, which the court may not give. Plaintiff's allegations are insufficient to show there exists a substantial controversy of sufficient immediacy to warrant declaratory relief.

The Borowski court clearly did not rule that homeowners lack the inherent ability to question debt-owners about their interests. It only ruled on the adequacy of needing imminent legal cause. In the present case, the Appellants specifically followed Borowski. After BNY-Trust dismissed the 2013 UDJA action, Appellants waited for BNY-Trust to refile a new action. Instead, BNY-Trust initiated a new foreclosure against the Appellants. This foreclosure gave the Appellants standing to file a UDJA

complaint and ask the court to adjudicate whether BNY-Trust had sufficient beneficiary interests.⁷ So, contrary to the defense's argument, the *Borowski* ruling actually CONFIRMS that Appellants properly met the UDJA standing requirement.

Defendant also quotes *Borowski* for the proposition that a homeowner cannot force a debt-owner to produce evidence of a debt assignment. (This is another new argument that violates RAP 2.5.) This is a mirror argument that is again based on the false application of *Borowski*. The court actually noted that the claim was an,

advanced theory known as the 'show me the note' theory, the Washington Deed of Trust act does not require that a mortgage servicer or mortgagee produce the original note to the borrower on demand or prior to foreclosure.

This ruling does not state that a self-claimed debt owner never has to verify its interests. It just notes that such verification must be tied to an immanent legal consequence. Again, the defense's position intentionally misrepresents the facts to the law. It also wholly contradicts the entire underlying premise of the UDJA, which is "to declare rights, status and other legal relations of the parties regarding any question of construction or validity arising under a written instrument" (RCW 7.24.010 & 020).

⁷ Appellants' complaint was filed after the Notice of Default, but before a Notice of Trustee Sale; the foreclosure trustee then agreed to close its foreclosure file without moving forward.

Lastly BNY-Trust also uses *Borowski* to argue that Appellants misconstrue *Bain*. Yet for all of the defense's arguments, it constantly misquotes the Appellants' actual position. Appellants again rely on their opening brief (pages 17-18), to address their actual arguments.

The conclusion to this new line of attack is simple. BNY-Trust deliberately misconstrues *Borowski* to avoid acknowledging that it never held or acquired the note. This defense is not justified. The law is clear; BNY-Trust "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]. The defense cannot argue that homeowners have no standing to apply this law; nor can the defense argue that the court should refuse to enforce it.

3. APPLICATION OF THE STATUTE OF LIMITATIONS:

There is no disagreement that the default occurred by March 2009, that a notice of acceleration was sent to the Appellants, and that the original date of default is now beyond the original six-year limitations period. However, the defense now argues the notice of acceleration did not accelerate the debt. (This is another new argument that BNY-Trust never raised at summary judgment - "acceleration" was never mentioned in BNY-Trust's motion, response, or strict reply.) The defense bases this

new argument on *Merceri v. Bank of New York Mellon* where it claims a notice of acceleration must have additional external verification.

Although the defense points out several consistencies between *Merceri* and the present case, it also fails to acknowledge the more important inconsistencies. In both cases the notice of acceleration stated that the debtor will immediately file for foreclosure. In *Merceri*, the debtor never initiated the foreclosure until six years later.⁸ In the current case, BNY-Trust immediately initiated the foreclosure (thereby confirming its intent). The defense also claims that the Notice of Trustee's Sale (NTS) only stated the homeowners defaulted on \$23,556.89. This too is another (unsworn) false statement of omission. Section III of the NTS notes that the default was based on an arrearage of \$23,556.89 **and/or other defaults**. Then section IV, reads "**the sum owing on the obligation secured by the deed of Trust is: Principal Balance of \$501,216.54, together with interests as provided in the note . . .**"⁹ So in a nutshell, the full wording of the NTS indicates the debt was accelerated.

Appellants also note that they discharged their debt in bankruptcy (as claimed at summary judgment and in their opening brief). This too

⁸ It also continued to accept monthly payments, which contradicted the notice.

⁹ The NTS was never made part of the court record because BNY-Trust did not make this "non-acceleration" argument before the trial court. Therefore the defense's arguments herein are also without evidentiary merit.

terminates the monthly payment obligation; see Edmundson v. Bank of America, 194 Wash.App 920, 378 P.3d 272 (Div. 1, 2016).

[T]he statute of limitations for each subsequent monthly payment accrued on the first day of each month after November 1, 2008 until the Edmundsons no longer had personal liability under the note. They no longer had such liability as of the date of their bankruptcy discharge. (Edmundson, at page 931.)

Ironically, the defense cites Edmundson in its summary judgment pleadings and appellate brief. Additionally, Merceri also quotes Edmundson for this exact purpose. As such, the defense undeniably knows the full Edmundson ruling; yet it still blatantly argues that there are current monthly installments under the note. The defense is intentionally failing to address (or rebut) the bankruptcy discharge just so it can wrongfully pursue its own false claim. The bottom line is simple; there are no more monthly installments. Even in a light most favorable to the defense, the last monthly installment was January 2010 (per discharge). Thus, the latest expiration date for the statute of limitations is February 2016. As of that date, BNY-Trust had no pending enforcement action, and was still actively claiming not to be the beneficiary or to possess the note.

The defense also argues permanent tolling based on the claim that the Appellants affirmed the debt in writing. This is another meritless argument. Both the cited statute and case law demonstrate that this argument only applies when a debtor re-affirms a continuing obligation to

pay the debt. Because the Appellants merely acknowledge they created the debt back in 2007, they do not confirm a current obligation, especially when the debt has been discharged. The defense’s interpretation of this issue is self-contrived, counter-logical, and renders the entire statute meaningless. (See also App. original response CP 260 lines 10-20).

The final argument supplied by the defense concerns two claims for judicial tolling. The defense claims that:

The Current Foreclosure is Timely Because BONY Initiated Lawful Proceedings Which Tolled the Statute of Limitations. (Rsp. Br. Page 26.)

The alleged “lawful” proceedings are: (1) the 2010 void foreclosure, and (2) the 2013 UDJA action. The defense is wrong on both accounts, because neither matter was a “lawful enforcement action,” nor did BNY-Trust have any beneficiary interests or enforcement rights at that time.

The void foreclosure did not cause tolling because it was not a “lawful” enforcement action as required by both statute and case law. (see App. Br, pgs 19 – 26 for full argument.) BNY-Trust does not refute this fact, nor does it ever cite a relevant statute or case law that applies this affect to a void action.¹⁰ Instead, the defense merely argues that being void only affects the legal consequence of the action, but not the timing. It then cites

¹⁰ All new cases cited by the defense concern valid actions, and are thus factually unrelated.

State ex rel. Reed v. Gormley, 40 Wn. 601, 605, 82 P.929. This case, however, never confirms this point. To the contrary, this argument makes no sense, because if the action had no legal effect, it cannot be a lawful enforcement action . . . and if it was not a lawful enforcement action, then it does not fall under the tolling statute. The Reed v. Gromley case actually stated: “being worthless in itself, all proceedings founded upon it are equally worthless. In neither binds nor bars anyone.”¹¹ Clearly the court was not implying that a void action tolls the statute of limitations. The defense also claims that Dowell v. Gagnon (cited by Appellants) does not apply because it did not deal with a foreclosure. However, the pertinent tolling issue applies equally to judicial and non-judicial actions. As such, the Dowell case holds true; parties cannot cause tolling based on their own ill-fated legal actions. (See Ap.Br. pg 24.)

BNY-Trust’s follow-up argument is that the 2013 UDJA action (dismissed by BNY-Trust) also caused tolling. This argument is equally unsupported by statute and case law. The defense claims that RCW 61.24.030(4) prevented it from being able bring a new foreclosure.

RCW 61.24.030: It shall be a requisite to a Trustee’s sale:
(4) That no action commenced by the **beneficiary** of the deed of trust is now pending **to seek satisfaction of an obligation** secured by the deed of trust. (Bold emphasis added.)

¹¹ This quote was also cited in BNY-Trust brief – pg 10.

The defense deliberately misconstrues this statute. First of all, RCW 61.24.030(4) cannot prevent a party from bringing a valid enforcement action because it only applies when a valid enforcement action is already brought before the court. The sole purpose of the statute is to prevent a beneficiary from simultaneously bringing both a judicial and a non-judicial action at the same time. Secondly, the statute only applies when the plaintiff is the beneficiary. Not only did BNY-Trust verify that it was not the “beneficiary,” it also verified that it did not hold the note and was not trying to enforce the note (CP 21 - Lines 15-22). So, once again, the reality of the situation is the complete opposite from what the defense claims it to be. The statute is not applicable to tolling limitations when the plaintiff does not claim to be the beneficiary and is not asking to enforce a debt.

BNY-Trust then further argues its point by stating:

the pendency of litigation on the underlying nonjudicial foreclosure is intrinsically and inseparably tied to the finality of the nonjudicial foreclosure itself. Indeed, without the litigation, the legal effect of the nonjudicial foreclosure would forever remain in limbo and undecided in the event of a dispute. (Rsp. Br. pg 35.)

The assumption within this argument is that the 2013 action had to cause tolling because it was necessary for BNY-Trust to be able to establish its rights. But that position is a fallacious argument. Tolling does not occur

because a party needs to verify its own rights . . . tolling only occurs when a party already has the rights to bring an enforcement action but is externally barred from doing so. *Rivas v. Overlake Hosp. Medical Center*, 164 Wash. 2d 261, 189 P.3d 753,755 (2008). BNY-Trust cannot use its own unlawful foreclosure as a spring board for three additional years of tolling – especially when during those three years BNY-Trust itself claims it was not the beneficiary and voluntarily dismissed that action. Again, as BNY-Trust quoted in its brief: “being worthless in itself, all proceedings founded upon it are equally worthless.” (Rsp. Br. pg 10, Quoting *Reed*.)

As noted by the state Supreme Court, BNY-Trust has the obligation to cite a proper statute and then verify (with admissible evidence) that pursuant to that statute, it was unfairly prevented from bringing a lawful enforcement action within the original statutory period. (*Rivas* at 263.) BNY-Trust does not even attempt to meet this burden (or to present admissible evidence). It has never once tried to explain why it couldn’t timely bring a valid enforcement action. . . because the only reason is that BNY-Trust never had the legal rights or the proper authority to do so.

The real underlying point to this case is clear: BNY-Trust improperly chose to engage in an unlawful non-judicial foreclosure, and then got caught. It thereafter had to file the UDJA action to redefine the nature of its rights and interest. But in that UDJA action BNY-Trust directly

disclaimed having any beneficiary interests. BNY-Trust cannot use its own **non-lawful** (void) activity and subsequent dismissive litigation (that it also dismissed) as a means of self-tolling the statute of limitations. This approach squarely contradicts legislative intent.

“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.]

Lacking the required rights and interests to be a proper beneficiary is not an acceptable “equitable exception.”

4. CAN BNY-TRUST EVER BECOME THE BENEFICIARY?

The above question is an interesting one. According to the defense, reinstatement “indisputably” occurred in 2013 when the Trustee’s Sale was first declared void. The defense argued this at summary judgement:

The “security interest was indisputably ‘reinstated’ as a matter of law after the order on summary judgment in the prior quiet title case.” [CP109 - BNY Mtn for SJ]

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,” [CP 110 - BNY Mtn for SJ].

The defense also restates this position in its appellate brief:

The Voiding of the October 2010 Sale Reinstated BONY’s Interests in the Deed. (Rsp. Br. pg 10.)

Judge Tabor, however, twice denied BNY-Trust's motion, and affirmatively denied reinstating the deed of trust. He ruled:

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.) (CP 163 - Transcript Nov 21, 2014 hearing: pg 13, lines 2-13).

Despite the defense constantly asserting automatic reinstatement, the defense now concedes that Judge Tabor denied it.

the trial court in that case **denied summary judgment of the title reinstatement** based on material issues of fact, therefore leaving the question of reinstatement open for trial. The trial court did not 'absolutely deny reinstatement' – it simply denied the issue at the summary judgment stage. (Rsp Br. pg 40. Emphasis added.)

Although the defense states the denial was “only at the summary judgment stage,” it does not argue that there has ever been another ruling on the matter (because there has been none). BNY-Trust initially claimed it was already the beneficiary, it swore to this in its request for admissions, and it even initiated another new foreclosure while the 2017 court action was pending.¹² There is no doubt that every statement, every discovery

¹² Initiated in December 2017 – three-plus months before summary judgment. It has subsequently been dismissed by the foreclosure trustee. As such, there is now no pending foreclosure action at this time.

response, and every action taken by the defense has been based upon its absolute claim that BNY-Trust was already reinstated as the beneficiary. But now, the defense admits that Judge Tabor denied reinstatement. As such, the defense's entire foundation is baseless. As noted by attorney Soldato, this effectively defeats their entire case: "Grahns seem to want the denial of the motion to reinstate issue to be admitted, so that it effectively ends this case." [App Br. pg 31 - quoting BONY's Response Filed Oct. 25, 2017, pg 7.] Attorney Soldato was correct.

To side-step this problem, BNY-Trust dedicates multiple pages of its appellate brief to argue why automatic reinstatement **should** be applied. This argument is a misdirect; the matter was already argued, adjudicated, and denied in 2013. Review of Judge Tabor's decision is now many years past due. The scope of this court is to make a de novo review of the recent summary judgment ruling. The facts before the 2017 court are clear: BNY-Trust argued that Judge Tabor never ruled upon reinstatement, and therefore it occurred as a matter of law. BNY-Trust cannot admit to the falsity of its foundation and still argue for the same outcome.

Another related problem is that the defense now concedes MERS was the beneficiary during the 2013 action.

Grahns repeatedly cry foul with the fact that MERS was identified as a beneficiary in previous pleadings . . . But

simply because MERS was a beneficiary at one point in time does not preclude BONY from acquiring interests at a later point. [Rsp. Br. pg 39.]

Despite making this claim, the defense does not establish how this alleged transfer of interests ever took place.¹³ The defense always asserted that BNY-Trust initially received its interests from the 2010 assignment (as per its “scrivener’s error” argument). Now it confirms that this is no longer true . . . because, as of 2013, MERS was the sole beneficiary (as initially claimed by BNY-Trust and then later affirmed in discovery) . Based on this concession (plus no judicial reinstatement) the defense cannot show how it ever legally received any beneficiary interests.

As for the March 2018 Corrective Assignment, the document had no legal effect because all parties previously stipulated that MERS no longer held any interests in the deed of trust.¹⁴ The defense tries to circumvent stipulation by claiming the assignment was just corrective in nature, and that no actual interests were transferred. However, if no interests were transferred, then BNY-Trust never received any beneficiary interests. No matter how the defense argues this position, it always causes a paradox. The facts are static. BNY-Trust claimed MERS was the sole beneficiary in 2013. Since then, there has never be any judicial action or valid

¹³ Establishing this fact with proper evidence is the absolute burden of BNY-Trust.

¹⁴ NOTE: The defense also does not deny that this assignment was executed by the vice president of Bayview, nor that he ever had any authority to execute this document.

assignment that has transferred those rights from MERS to BNY-Trust.¹⁵ Simply put, BNY-Trust has never received a valid beneficiary interests in the name of the trust. There is no such transfer established in the court record . . . nor does BNY-Trust itself ever claim there has been one.

II. CONCLUSION

For over five years the defense attorneys have been repeating the mantra that Appellants are trying to get a free house. Over that time BNY-Trust itself has never once asserted under oath that it is the actual beneficiary, or that it ever held or acquired any interests in the debt. To the contrary, BNY-Trust actually disclaimed these interests, affirmed it in discovery, and now refuses to participate in this action or claim otherwise. That is the irony in this case; the current defense casts constant aspersions against the Appellants, but not once does it address how BNY-Trust is entitled to seize collateral for a debt that it claims it never held or acquired. Instead the defense continuously attacks the appellants with numerous unworn and uncorroborated arguments that contradict its own prior sworn statements and violate CR 56(e). In short, the defense has

¹⁵Even if such rights were transferred, BNY-Trust is still an ineligible beneficiary because it never held or acquired any interests in the debt, and (according to its sworn discovery responses), it cannot acquire those interests after closing its enrollment period.

offered no procedurally compliant evidence at all . . . all it has provided is overly embellished assumptions and uncorroborated arguments.

The current defense is now arguing (for the first time) that Appellants have no standing to attack BNY-Trust's lack of self-claimed interests. This is a ruse. The Appellants rightfully filed their action under the UDJA for this explicit purpose. The defense does not directly argue there is no "justifiable controversy;" instead, it misconstrues *Borowski*. The defense is essentially arguing that the court should turn a blind eye to the fact that BNY-Trust does not meet the statutory requirements of being a lawful beneficiary. This argument defies logic, precedent, and legislative intent.

The law already gave BNY-Trust six years to verify its interests. This matter is now over nine years from the date of acceleration (eight-plus years from discharge). Despite this lengthy time, BNY-Trust still fails to claim and/or prove any of its own interests. BNY-Trust had the full opportunity to verify its required interests in this action (and in the prior action). Instead, it did just the opposite – it disclaimed having such interests and now refuses to state otherwise. As such, it is time for this litigation to end. If BNY-Trust does not want to establish its own rights, and if the defense claims that the Trust is not even a party to this action,

then there is no justification to give BNY-Trust more time to prove what it has already disclaimed.

This court has the authority to expunge a deed of trust when the debt has been discharged in bankruptcy and there is no entity that can legally serve as the beneficiary. This court also has the authority to remove an unenforceable lien from real property. Lastly, this court can quiet title over the deed of trust pursuant to the statute of limitations and RCW 7.28.300.

Appellants therefore, request this court to reverse the ruling of the trial court and grant Appellants their full summary judgment relief.

Respectfully submitted this 5th day of November, 2018.



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On behalf of Appellants

PRO SE

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