

FILED
Court of Appeals
Division II
State of Washington
5/8/2019 4:30 PM

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

NO. 52290-0-II (consolidated with NO. 52310-8-II)

**(Pierce County Superior Court Case Nos. 16-2-06272-1 and
18-2-08721-5)**

BRAD L. BILLINGS and JOHNNITA D. BILLINGS,

Appellants//Plaintiffs in 52310-8-II/Defendants in 52290-0-II,

vs.

**BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW
YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF
THE CWALT, INC. ALTERNATIVE LOAN TRUST 2007-OA17
MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-
OA17, QULIATY LOAN SERVICING OF WASHINGTON, INC.,
and JOHN DOES 1-10,**

Respondents.

**ON APPEALS FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE**

APPELLANTS BILLINGS' OPENING BRIEF

Lucy Gilbert, Esq. WSBA No.31992
Northwest Homestead Law (previously Hermitage Law)
Attorney for Appellants,
10660 NE Manor Lane
Bainbridge Island, WA 98110
(206) 293-0936 (Mobile)
lucy@NWHomesteadLaw.com

TABLE OF CONTENTS

I ASSIGNMENTS OF ERROR

- A. Assignments of Error**
- B. Issues Pertaining to Assignments of Error**

II STATEMENT OF THE CASE

- A. Relevant**
- B. Procedural Facts**

III ARGUMENT

- A. Standard of Review**
 - 1. Standard of Review on a Motion to Dismiss
 - 2. Standard of Review on a Motion for Summary Judgment
- B. The trial court erred in granting Respondent Bank of New York's Motion to Dismiss in Appeal Case No. 18-2-08721-5**
 - 1. Introduction
 - 2. Res Judicata
 - 3. Collateral Estoppel
- C. The trial court in Case No. 16-2-06272-1 erred in granting summary judgment**

IV CONCLUSION

TABLE OF AUTHORITIES

CASES

Page(s)

American Express Centurion Bank v. Stratman, 172 Wn. App. 667, 292 P.3d 128 (2012)

Atwood v. Albertson's Food Ctrs., Inc., 92 Wn. App. 326, 966 P.2d 351 (Wash. 1998)

Barovic v. Cochran Elec. Co., Inc., 524 P.2d 261, 11 Wn. App. 563 (Wash. App. 1974)

Becker v. Cmty. Health Sys, Inc., 359 P.3d 746, 184 Wash.2d 252 (Wash. 2015)

Cameron v. Acceptance Capital Mortg. Corp., No. C13-1707 RSM,1 2013 WF 5664706 at *2 (W.D. Wash. 2013)

Cary v. Allstate Ins. Co., 130 Wn.2d 335, 922 P.2d 1335 (Wash. 1996)

Cascade Auto Glass, Inc. v. Progressive Casualty Ins. Co., 135 Wash. App. 760, 145 P.3d 1253 (Wash. App. 2014)

Christensen v. Grant County Hosp. Dist., 98 P.3d 957, 152 Wash.2d 299 (Wash. 2004).

Civil Service Commn. Of City of Kelso v. City of Kelso, 137 Wash.2d 166, 969 P.2d 474 (1999)

Columbia Asset Recovery Grp. LLC v. Kelly, 177 Wash. App. 475, 312 P.2d 687 (Wash.App. 2013)

Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wash.2d 959, 577 P.2d 580 (1978)

Crafts v. Pitts, 162 P.3d 382, 161 Wash.2d 16 (Wash. 2007)

Department of Labor and Industries of the State of Washington v. Walkenhauer,
No. 28114-7-11 (Wash. App. August 19, 2003, unpublished but filed).....

Eicon Construction, Inc. v. E. Wash. Univ., 174 Wn.2d 157, 273 P.3d 965 (Wash. 2012).....
.....

Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 210 P.3d 308 (Wash. 2009)

Failla v. FixtureOne Corp., 181 Wn.2d 642, 336 P.3d 1112 (Wash. 2014)

Ferrer v. Taft Structural, Inc., 587 P.2d 177, 21 Wn. App. 832 (Wash. App. 1978)

Hadley v. Maxwell, 144 Wash.2d 306, 27 P.3d 600 (2001)

Hanson v. Puget Sound Navigation Co., 52 Wash.2d 124, 323 P.2d 655 (1958)

Harting v. Barton, 101 Wash.App. 954, 6 P.3d 91 (Wash. App. 2000)

Hash v. Children's Orthopaedic Hospital, 49 Wn. App. 130, 741 P.2d 584 (1987).....

Hisle v. Todd Pacific Shipyards Corp., 93 P.3d 108, 151 Wash.2d 853 (Wash. 2004)

In Re Moi, 184 Wash.2d 575 (Wash. 2015)

Jones v. Best, 134 Wn.2d 232, 950 P.2d 1 (Wash. 1998)

Kahn v. Salerno, 90 Wn. App. 110, 951 P.2d 321 (1988)
Knuth v. Beneficial Washington, Inc., 107 Wash.App. 727, 31 P.3d 694 (Wash. App.2001)

LeMond v. Dep't. of Licensing, 143 Wash. App. 797, 180 P.3d 829 (2008)

Meder v. Ccme Corp., 502 P.2d 1252, 7 Wn. App. 801 (Wash. App. 1972)

Pacific Northwest Group A v. Pizza Blends, Inc., 951 P.2d 826, 90 Wn.App. 273 (Wn. App. 1998)

Rains v. State, 100 Wn.2d 223, 674 P.2d 165 (1983)

Ruff v. County of King, 125 Wn.2d 697, 887 P.2d 886 (Wash.1995)

Seattle First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 588 P.2d 725 (1978)

Schoeman v. N.Y. Life Ins. Co., 106 Wash.2d 855, 726 P.2d 1 (1986)

State Farm Fire & Cas. Co. v. Ford Motor Co., 186 Wash. App. 715, 346 P.3d 771 (Wash. App. 2015)

Triangle Prop. Dev. LLC v. Barton, No. 72113-5-1 (Wash. App. Div. 1, Sept. 28, 2015, unpublished)

Trujillo v. Nw.Tr. Servs., Inc., 183 Wash.2d 820, 335 P.3d 1100 (Wash. 2015)

Wagner v. Wagner, 95 Wash.2d 94, 621 P.2d 1279 (1980)

CIVIL COURT RULES

CR 8(c)

CR 12(b)(6)

CR 56

OTHER AUTHORITIES

Restatement of Contracts, sec. 360

I ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court in Case No. 18-2-08721 erred in granting Respondent Bank of New York's Motion to Dismiss.
2. The trial court erred in granting summary judgment in favor of Respondent Bank of New York Mellon in Case No. 16-2-06272-1.

B. Issues Pertaining to Assignments of Error

1. If a party sufficiently pleads all elements of a cause of action and there are issues which present questions of fact and there is no precedent which justifies dismissal for failure to state a cause of action, does the trial court err in granting a motion to dismiss?
2. Does a trial court err in granting summary judgment in a FED action where there were genuine issues of material fact and the standard for summary judgment was not satisfied?

II STATEMENT OF THE CASES

A. Relevant Facts

This consolidated appeal arises out of two separate lower court cases involving the same real property, the same parties, and the same loan but different factual issues and different claims. Lower Court case number 16-2-06272-1 was an action sounding in Forcible Entry and Detainer (FED, hereafter the "FED action") filed by Respondent BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWALT, INC. ALTERNATIVE LOAN TRUST 2007-OA17 MORTGAGE PASS-

THROUGH CERTIFICATES SERIES 2006-OA17 (hereafter “BNY”). Lower court case number 18-2-08721-5 (hereafter the “Dec action”) was an action filed by Appellants (as Plaintiffs) sounding in Declaratory Relief, which was referred to as the “New action” in filings in the FED action below. Each case was assigned to a different division of the lower court.

Respondent BNY filed a Motion for Summary Judgment (hereafter the “MSJ”) in the FED action and a Motion to Dismiss (hereafter the “MD”) in the Dec action. The hearings on Respondent’s Motions were both set for hearing and argued on the morning of August 17, 2018 before the respective lower court Judges presiding over the cases, with the MD in the Dec action being heard first followed by the hearing on the MSJ in the FED action.

The following facts are taken from Appellants’ Complaint (hereafter the “Complaint”) in the Dec action which was filed on or about June 5, 2018 (Clerk’s Papers hereafter “CP” 498-510). The Complaint was supported by the Affidavit of Appellant Johnnita Billings (CP 498-510) The paragraph numbers below are those which appear in the Complaint:

9. On or about August 6, 2006, Plaintiffs executed a promissory Note and Deed of Trust (hereafter “DOT”) in favor of Countrywide Bank, N.A. (hereafter “CWB”). Certain assets of Countrywide Financial, Inc.

(the parent company of Countrywide Bank, N.A.) were sold to non-party Bank of America during 2009. (CP 501)

10. On June 5, 2011, Defendant MERS purportedly assigned the Note and the DOT to a mortgage securitization trust (the CWALT, Inc. Alternative Loan Trust 2006-OA17, hereafter the “Trust”) of which Defendant BNYTE is the claimed “trustee”. (CP 501)

11. The subject Assignment did not transfer the Note, as MERS has no interest in promissory notes. The subject Assignment was also a legal nullity pursuant to the MERS Terms and Conditions, and could also not legally assign, in mid-2011, a loan to a securitization Trust which closed in 2006. (CP 502)

12. Assuming there was a legal or lawful transfer of either the Note or the DOT, the Note obligation of a mortgage loan sold to a securitization Trust is paid in full upon such sale. The servicer for the Trust thereafter creates a phantom obligation by which the borrower is to make payments “under the Note” despite the Note obligation having been liquidated upon sale thereof to the Trust. The cash flow stream from the monthly payments made as a result of the phantom obligation is used to pay the Trustee, the investors in the MBS, and the expenses of maintaining the Trust, with no such monthly payments being used to reduce principal

or interest under the Note, as the Note was paid in full upon sale thereof to the Trust. (CP 502)

13. No disclosure of these facts are ever made to the borrower, and the “Your loan may be sold” language in the mortgage documents is an incomplete and misleading statement as it does not accurately state that upon such sale to the trust, the obligation under the Note is paid and that a new obligation to pay third parties who were not the “lender” will be created, nor is it disclosed to the borrower that what was a residential mortgage loan transaction governed and protected by the Federal government and Federal lending laws will be converted into an unregulated and unprotected private equity investment vehicle. (CP 502)

14. Although the mortgage loan documents claimed that the mortgage loan could be sold, the presumption and understanding of the Plaintiffs, as non-bankers and non-lenders, was that any such sale would be to another Federally-regulated residential mortgage lender in order that the loan retain its character as a Federally-regulated residential mortgage loan and that benefits of such a loan, such as the ability to refinance, modify or restructure the loan, and the ability to deal directly with the lender, would be preserved and maintained. The Plaintiffs were never advised that the loan could (and was in fact predestined by Defendant BNYTE) be sold to a non-regulated private equity or commercial

investment entity, or for the purpose of funding numerous non-parties to the mortgage loan transaction. (CP 502-503)

15. In truth and in fact, the alleged residential mortgage loan was unilaterally modified by which the obligation evidenced by the residential loan promissory Note was converted to a vehicle for the purpose of providing an income stream to fund a commercial investment for the benefit of non-parties to the “loan”, thus unilaterally modifying the Note contract and changing the essential character of the loan without any disclosure to or consent of the Plaintiffs. (CP 503)

16. These facts, which were known to Defendant BNYTE at all times material, were intentionally withheld from the Plaintiffs in order to induce them to make payments on the loan; subordinate their interest in the Property; and for the purpose of manufacturing a fraudulent foreclosure on an illegally unilaterally modified loan. (CP 503)

17. By converting the residential mortgage loan transaction into a commercial investment vehicle without notice to or consent of the Plaintiffs, Defendant BNYTE, with the aid and assistance of Defendants QLS and MERS, has effected a unilateral modification of the mortgage loan contract, and has allegedly made itself a party to the mortgage loan contract without the consent of the Plaintiffs; without any prior notice to the Plaintiffs; and without any new consideration to the Plaintiffs where

Defendant BNYTE's actions (a) eliminated the Plaintiffs rights under Federal lending laws applicable to residential mortgage loan contracts; (b) imposed third-party "servicers"; and (c) eliminated the Plaintiffs' ability to deal directly with the true and actual lender. (CP 503)

18. Washington law prohibits the unilateral modification of a contract without mutual consent. (CP 504)

19. The Plaintiffs never consented to Defendant BNYTE, which is a Wall Street private equity investment entity and is not a Federally-regulated residential mortgage lender, becoming a party to their residential mortgage loan contract or modifying it to convert it into a commercial investment vehicle. (CP 504)

20. At all times material, Defendant BNYTE had actual knowledge that it intended to convert the residential mortgage loan into a commercial investment vehicle for the purpose of providing a revenue stream, together with hundreds of other alleged "residential" mortgage loans, to fund numerous non-residential mortgage loan transactions, including but not limited to:

- (a) payment to the securitization Trustee (Defendant BNYTE);
- (b) payment to the Master Servicer;
- (c) payment to the subservicer;

(d) payment of “expenses” of the securitization Trust; and, if any monies remained after payment of these expenses,

(e) payment to the investors in the MBS (the mortgage-backed securities; here, the “Mortgage Pass-Through Certificates Series 2006-OA17”). (CP 504)

21. Defendant BNYTE intentionally failed to disclose these material facts to the Plaintiffs, doing so in order to induce the Plaintiffs to continue making payments on the loan and for purposes of manufacturing a fraudulent foreclosure on an otherwise illegally unilaterally modified loan, which fraudulent action continues to this day. (CP 504)

22. Once so converted, the Note was pooled with thousands of other loans for the purpose of providing partial collateral security in connection with the issuance of the MBS, resulting in the loan not being owned by any single party and with the rights to the income stream from the loan being purchased and claimed by multiple parties including those identified in paragraph 20 above. This had a negative effect on the Plaintiffs, and this material change in the character of the loan, which was known to Defendant BNYTE at all times material, was never disclosed to the Plaintiffs and was intentionally withheld from them in order to induce them to make payments on the loan; subordinate their interest in the

Property; and for purposes of manufacturing a fraudulent foreclosure on an illegally unilaterally modified loan. (CP 504-505)

23. The change in the essential character of the loan from what was represented to be a residential mortgage loan to a commercial investment eliminated benefits associated with Federally-regulated mortgage loans and lenders thereof, including the ability to refinance; the ability to restructure the loan; and the ability to deal directly with the actual lender. These facts, which were known at all times material to Defendant BNYTE, were not disclosed to the Plaintiffs and were intentionally withheld from them in order to induce them to make payments on the loan; subordinate their interest in the Property; and for purposes of manufacturing a fraudulent foreclosure of an illegally unilaterally modified loan. (CP 505)

24. The change in character of the Note from what was represented to be a residential mortgage loan to a commercial investment also involved the addition of one or more third-party “servicers” which destroyed the direct relationship between the Plaintiffs and the alleged true “lender”. These facts, which were known at all times material to Defendant BNYTE, were not disclosed to the Plaintiffs and were intentionally withheld from them in order to induce them to make payments on the loan; subordinate their interest in the Property; and for

purposes of manufacturing a fraudulent foreclosure of an illegally unilaterally modified loan, which fraudulent action continues to this day. (CP 505)

25. The conversion of the Note from what was represented to be a residential mortgage loan to a commercial investment, which was then pooled with thousands of other loans and placed into numerous tranches of a securitization trust together with other loans, resulted in the loan being inextricably intertwined with other loans, resulted in a unilateral change of the character of the Note and resulted in a unilateral modification of the loan contract without mutual assent or any new consideration to the Plaintiffs, which facts were known at all times material to Defendant BNYTE but which were never consented to by the Plaintiffs; never disclosed to the Plaintiffs; and were intentionally withheld from the Plaintiffs in order to induce the Plaintiffs to make payments on the loan; subordinate their interest in the Property; and for purposes of manufacturing a fraudulent foreclosure of an illegally unilaterally modified loan. (CP 506)

26. The fraudulent acts of Defendant BNYTE continue to this day with the perpetration and continuation of a Forcible Entry and Detainer action, where Defendant BNYTE is attempting to appropriate the

Plaintiffs' primary residence through its attempt to enforce the illegal unilaterally modified contract. (CP 506)

B. Procedural Facts.

Respondent BNY filed the FED action on March 17, 2016 in an attempt to evict Appellants from their home (CP 21 -32), and filed their MSJ pursuant to CR 56 therein on July 13, 2018 (CP 383-390). Appellants filed their Response and Opposition to the MSJ on August 14, 2018 (CP 414-421).

Appellants filed the Dec action on June 5, 2018 (CP 498-510). Respondent BNY filed a Motion to Dismiss the Dec action pursuant to CR 12(b)(6) for "failure to state a cause of action", 2018 (CP).

On August 17, 2018, hearings were held on Respondent BNY's Motion to Dismiss the Dec action and on Respondent BNY's MSJ in the FED action. The transcripts of both proceedings have been filed.

The Hon. Jack Nevin, presiding Judge in the Dec action, granted Respondent BNY's MD in the Dec action (CP 584-85). The Hon. Edmund Murphy, presiding Judge in the FED action, thereafter (also on the morning of August 17, 2018), granted Respondent BNY's MSJ in the FED action (CP 439-441) based on Judge Nevins' dismissal of the Dec action. Notices of Appeal were filed in both actions: on August 21, 2018 in the Dec action (CP 586-589), and on August 21, 2018 in the FED action (CP

444-453). The appeal of the ruling in the Dec action was assigned Court of Appeals Case No. 52290-0-II; the appeal of the ruling in the FED action was assigned Court of Appeals Case No. 52310-8-II. This Court consolidated both appeals under Case No. 52290-0-II.

III. ARGUMENT

A. Standard of Review

1. Standard of Review on a Motion to Dismiss

On appeal of a Motion to Dismiss, this Court treats all allegations of a Complaint as true and in favor of the plaintiff. The *actual* facts set forth in the Complaint (not the opposing party's version thereof) must be taken as true on a CR 12(b)(6) Motion and with all reasonable inferences from the factual allegations being made in Plaintiffs' favor. *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wash.2d 820, 355 P.3d 1100 (Wash, 2015)(reversing court of appeals and holding that homeowner's allegations as to an improper foreclosure supported a CPA claim; emphasis supplied). The Washington standard on a Motion to Dismiss is so stringent that the law restricts dismissal as follows: "unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* consistent with the complaint that would entitle him or her to relief, the motion [to dismiss] must be denied." *Becker v. Cmty. Health Sys., Inc.*, 359 P.3d 746, 748, 184 Wash.2d 252

(Wash. 2015)(emphasis supplied), citing *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wash.2d 959, 577 P.2d 580 (1978).

Where there are questions of fact, the trial court should deny a motion to dismiss as it should also deny summary judgment. *Department of Labor and Industries of the State of Washington v. Walkenhauer*, No. 28114-7-II (Wash. App. August 19, 2003, unpublished but filed in the public record pursuant to RCW 2.06.040). Where there are questions of intent concerning obligations under a Note, the parties' intent is the proper standard rendering dismissal inappropriate. *Columbia Asset Recover Grp., LLC v. Kelly*, 177 Wash. App. 475, 312 P.2d 687, 692 (Wash. App. 2013).

2. Standard of Review on a Motion for Summary Judgment

This court reviews an order granting summary judgment *de novo* and performs the same inquiry as the trial court. *Failla v. FixtureOne Corp*, 181 Wn.2d 642, 649, 336 P.3d 1112 (Wash. 2014). The evidence is to be viewed in the light most favorable to the nonmoving party with the being bound to draw all reasonable inferences in favor of the nonmoving party. *Eicon Construction, Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (Wash. 2012); *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (Wash. 2009); *Kahn v. Salerno*,

90 Wn.App. 110, 117, 951 P.2d 321 (1988). Summary judgment is only appropriate if the moving party demonstrates that there is no genuine issue of material fact and establishes that it is entitled to judgment as a matter of law. *Marincovich v. Tarabouchia*, 114 Wash.2d 271, 274, 787 P.2d 562 (Wash. *en banc* 1990) citing *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

The standard for summary judgment in Washington is also stringent: summary judgment is only proper if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hash v. Children's Orthopedic Hospital*, 49 Wn.App. 130, 132, 741 P.2d 584 (1987). A fact is material if it affects the outcome of the litigation. *Eicon Constr., supra*; *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (Wash. 1995).

Summary judgment should only be affirmed if reasonable persons could reach but one conclusion from all of the evidence. *Atwood v. Albertson's Food Ctrs., Inc.*, 92 Wn.App. 326, 330, 966 P.2d 351 (Wash. 1998). It is established law that the court cannot weigh evidence or assess the credibility of witnesses on summary judgment. *Jones v. State*, 170 Wn.2d 338, 354 n.7, 242 P.3d 825 (2010); *American Express Centurion Bank v. Stratman*, 172 Wn.App. 667, 676, 292 P.3d 128 (2012), and that

issues of intent (here, the question of whether the intent of the parties was that the loan documents constituted the completely integrated contract or whether the integration was not complete) are for the factfinder at trial to decide and are not to be decided on summary judgment. *Barovic v. Cochran Elec. Co., Inc.*, 524 P.2d 261, 11 Wn.App. 563 (Wash. App. 1974, reversing summary judgment).

B. The trial court erred in granting Respondent Bank of New York's Motion to Dismiss in Appeal Case No. 18-2-08721-5

1. Introduction

The Dec Action is a case of first impression, as there is no decisional law as to whether a party can seek to enforce a Note based on a unilaterally modified Note contract, which by law is unenforceable. Cases of first impression present debatable issues of substantial public importance, and a court will not enforce provisions of contracts which are contrary to public policy. *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 347-48, 922 P.2d 1335 (Wash. 1996). The Supreme Court of Washington has consistently held that one party may not unilaterally modify a contract as modification to a contract requires a “meeting of the minds”, and has also held that silence is not acceptance. *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (Wash. 1998, citing *Wagner v. Wagner*, 95 Wash.2d 94, 103, 621

P.2d 1279 (1980) and *Hanson v. Puget Sound Navigation Co.*, 52 Wash.2d 124, 127, 323 P.2d 655 (1958).

Appellants alleged that Respondent BNY not only unilaterally modified their loan contract but also concealed its unilateral modification of the contract which alone precludes summary judgment. *Associated v. Northwest*, 203 P.3d 1077, 149 Wn. App. 429 (reversing summary judgment as genuine issue of material fact existed as to whether party concealed its unilateral modification of a contract). As the issues precluded summary judgment, dismissal was obviously improper as well.

Respondent BNY made no allegation in its MD that Appellants did not set forth each and every element to state a cause of action for Declaratory Relief as required by Washington law. Appellants thus “stated a cause of action” for Declaratory Relief *ab initio*. The matters set forth in the MD consisted purely of defense and avoidance, which are the proper subject of an Answer.

Judge Nevins apparently accepted Respondent BNY’s skewed interpretation of the allegations of the Complaint relating to the unilateral modification of the loan rather than accepting the allegations as true as he was duty-bound to do on a motion to dismiss. The argument is not, as Respondent BNY suggested, that the securitization of the loan alone renders the obligation under the Note satisfied or no longer applicable. As

alleged in the Complaint, it is the fact that the essential character of the obligation was changed from a regulated residential mortgage loan transaction into an unregulated commercial investment transaction with the interjection of additional parties and a fundamental change in the obligation (that being to fund various non-parties to the transaction) through a unilateral modification of the loan contract which was concealed from and not disclosed to Appellants which renders the contract unenforceable, as Washington law is clear that unilaterally modified contracts are unenforceable and it is equally clear that Appellants were never notified of the unilateral modifications to their loan contract. There is nothing alleged in the Complaint as to the unilateral modification of the loan contract having anything to do with “securities” or “securities contracts”.

Appellants alleged in the Complaint that the “your loan may be sold” language constituted a “disclosure” which was incomplete and misleading, which allegation must be taken as true on a motion to dismiss. Issues of modification of a contract involve issues of intent which are not even properly resolved on a motion for summary judgment much less a motion to dismiss. *Jones v. Best, supra; Associated v. Northwest, supra.* Judge Nevins thus erred in dismissing Appellants’ Complaint on a CR 12(b)(6) motion, especially as Respondent BNY never took the position

that Appellants did not set forth or allege all of the necessary elements of an action for Declaratory Relief (which elements are in fact set forth in the Complaint).

2. Res Judicata and Collateral Estoppel

A. Res Judicata

Respondent BNY claimed (and Judge Nevins apparently accepted) that Appellants' Dec action was barred by the doctrine of *res judicata*, which Washington decisional law has repeatedly held is an affirmative defense to be pleaded in a subsequent action. *Hisle v. Todd Pacific Shipyards Corp.*, 93 P.3d 108, 114, 151 Wash.2d 853 (Wash. 2004) *Civil Serv. Commn. Of City of Kelso v. City of Kelso*, 137 Wash.2d 166, 172, 969 P.2d 474 (1999); *Meder v. Ccme Corp*, 502 P.2d 1252, 7 Wn.App. 801, 806 (Wash. App. 1972). Matters of defense and avoidance, including contractual provisions, are to be set forth in a pleading. *Harting v. Barton*, 101 Wash. App. 954, 6 P.3d 91, 95 (Wash. App. 2000)(a party shall affirmatively *plead* any matter constituting an avoidance or affirmative defense, citing CR 8(c), emphasis supplied).

Further (and significantly), *res judicata* does not bar claims arising out of different causes of action and is not intended "to deny the litigant his or her day in court". *Schoeman v. N.Y. Life Ins. Co.*, 106 Wash.2d 855, 860, 726 P.2d 1 (1986). One who seeks to rely upon *res judicata* as to a

particular issue involved in the pending case bears the burden of proving, by competent evidence consistent with the record in the former cause, that such issue was involved and actually determined where it does not appear from the record that the matter as to which the rule of *res judicata* is invoked as a bar was necessarily adjudicated in the former action. *Meder, supra*, 7 Wn. App. At 807 (emphasis supplied), citing *Rufener v. Scott*, 46 Wash. 2d 240, 280 P.2d 253 (1955).

There is no evidence or record that the issue of Respondent BNY's unilateral modification of the loan contract was involved or actually or necessarily litigated in any prior proceedings, and could not have been as the claim was raised by Appellants for the first time, through their new counsel, in the Dec action. Respondent BNY's CR 12(b)(6) motion was a vehicle specifically designed to deny Appellants their day in court where the claims in the Dec action are (a) different from the claims in any prior litigation, and (b) where different evidence would be needed in connection with these claims.

The party asserting the affirmative defense of *res judicata* bears the burden of proof. *Hisle v. Todd Pacific Shipyards Corp., supra*. Washington law requires four (4) distinct elements to be satisfied in order for *res judicata* to apply. *Knuth v. Beneficial Washington, Inc.*, 107 Wn.App.727, 31 P.3d 694 (Wash.App. 2001). In the event of an entry of a

final judgment on the merits in a prior action, the application of *res judicata* in a subsequent action requires concurrence of (a) subject matter; (b) cause of action; (c) people and parties; and (d) “quality of persons for or against whom the claim is made”. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983), citing *Seattle First Nat’l Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978). The absence of any one of these elements renders *res judicata* inapplicable.

Elements (b) and (c) were not and could not be satisfied below. First, the causes of action in the Dec action are different, and based on different facts, than any prior litigation upon which Respondent BNY (and apparently Judge Nevins) relied. There are different parties in the Dec action than the prior action, and a different set of circumstances which give rise to the claim are present in the Dec action which were not present in any prior action. The MD should thus have been denied.

B. Collateral Estoppel

Respondent BNY also took the position that Appellants’ Dec action was barred by collateral estoppel, which Washington law has also consistently held is an affirmative defense. *State Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wash. App. 715, 722, 346 P.3d 771 (Wash. App. 2015)(reversing application of collateral estoppel as error). Affirmative

defenses are to be asserted in a pleading (such as an answer). *Harting v. Barton, supra*.

The first element of the doctrine is that the issue sought to be precluded is identical to that involved in the prior action; the fourth element of collateral estoppel which must be proven is that the application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Hadley v. Maxwell*, 144 Wash.2d 306, 311-12, 27 P.3d 600 (2001). The failure to establish any one of the four elements is fatal. *LeMond v. Dep't of Licensing*, 143 Wash.App. 797, 805, 180 P.3d 829 (2008). As with *res judicata*, the party asserting collateral estoppel bears the burden of proof. *In Re Moi*, 184 Wash.2d 575, 579 (Wash., 2015).

For collateral estoppel to apply, the following four elements must be established:

- (a) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding;
- (b) the earlier proceeding ended in a judgment on the merits;
- (c) the party against whom collateral estoppel was asserted was a party to, or in privity with a party to, the earlier proceeding; and
- (d) the application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen v. Grant County Hosp. Dist., 98 P.3d 957, 961, 152 Wash.2d 299 (Wash. 2004). Elements (a) and (d) were not and could not have been satisfied below. There is no “identity of issues” in the prior case and the Dec action. Judge Nevins’ apparent application of collateral estoppel worked an injustice upon Appellants, who are the only parties who are in danger of losing their home.

Judge Nevins also, in accepting Respondent BNY’s position, weighed evidence and determined the credibility of witnesses (including weighing the sworn testimony of Appellant Johnnita Billings as set forth in her Affidavit) on a motion to dismiss, which is improper as a matter of law as all inferences from the evidence are to be made in favor of the non-moving party. This error alone warrants reversal of the dismissal.

C. The The trial court in Case No. 16-2-06272-1 erred in granting summary judgment

The FED Action, being intertwined with the Dec action, is also a case of first impression, as there is no decisional law as to whether a party can seek FED relief based on a unilaterally modified contract which is legally unenforceable. Cases of first impression present debatable issues of substantial public importance, and a court will not enforce provisions of contracts which are contrary to public policy. *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 347-48, 922 P.2d 1335 (Wash. 1996).

Depriving Appellants of their primary residence before a determination can be made as to the alleged ability of Respondent BNY to seek to enforce the illegally unilaterally modified contract presented a debatable issue of substantial public importance. Enforcing the contract prior to the determination, via appellate review, of the Dec action amounted to a significant injustice and a situation where irreparable harm occurred, as a specific parcel of land is regarded as unique and impossible of duplication by the use of any amount of money. *Crafts v. Pitts*, 162 P.3d 382, 387, 161 Wn.2d 16 (Wash. 2007, citing Restatement (Second) of Contracts sec. 360.

The damage from an eviction cannot be undone, and thus enforcement of judgment of FED results irreparable harm. The enforcement of an illegally unilaterally modified contract is contrary to Washington's public policy, embodied in the decisional law, that unilaterally modified contracts are unenforceable as modifications to contracts must be agreed to by both sides, and any unilateral modification of a contract is ineffective even if the other party acquiesces or fails to object as such conduct cannot effect a modification. *See generally Cascade Auto Glass, Inc. v. Progressive Casualty Ins. Co.*, 135 Wn.App. 760, 769, 145 P.3d 1253 (Wash. App. 2014); *Ferrer v. Taft Structural, Inc.* 587 P.2d 177, 21 Wn.App. 832, 835 (Wash.App. 1978). This is

consistent with the Washington Supreme Court's pronouncement in *Jones v. Best* that "silence is not acceptance".

Appellants alleged in the Dec action that the unilateral modification of the loan contract was concealed and was not disclosed to them. Genuine issues of material fact are present when a party conceals its unilateral modification of a contract knowing that the other party would reject it if the modification were disclosed. *Associated v. Northwest*, 203 P.3d 1077, 1082, 149 Wn.App. 429 (Wash.App. 2009). The Affidavit of Johnnita D. Billings specifically recites that had the numerous material issues related to the modification of the contract been disclosed, the Billings would never have agreed to enter into the loan transaction. As these genuine issues of material fact were raised in the Dec Action and the FED action, enforcement of FED relief before the Dec action had been decided on appeal the merits resulted in a denial of due process. Judge Nevins' grant of dismissal when there were substantial issues of fact and public importance rendered Judge Murphy's ruling improper as well.

One Washington court has addressed the issue of staying an unlawful detainer proceeding pending the outcome of a separate suit against the "lender". The court in *Triangle Prop. Dev., LLC v. Barton*, No. 72113-5-I (Wash. App. Div. I, Sept. 28, 2015, unpublished), did state that a stay of an FED action pending the outcome of a separate lawsuit

against the lender “generally requires a showing that success would impact” the plaintiff’s right to possession, citing to *Cameron v. Acceptance Capital Mortg. Corp.*, No. C13-1707 RSM, 2013 WL 5664706 at *2 (W.D. Wash. 2013).

There is no question that if Appellants prevailed in the Dec action (and prevail in this appeal), this would impact Respondent BNY’s claimed right of possession. Although the court in *Triangle Props.* stated that the moving party therein did not provide any authority for a stay of a FED proceeding pending the disposition of a separate action, the *Triangle Props.* court nonetheless provided that authority. Appellants set forth matters in the Dec Action which demonstrate success in that action would affect Respondent BNY’s right of possession.

Another Washington court has held that there were questions of fact as to whether a lease was modified: questions of whether there was a meeting of the minds for the modification involved credibility issues which cannot be resolved on summary judgment. *Pacific Northwest Group A v. Pizza Blends, Inc.*, 951 P.2d 826, 90 Wn.App. 273, 281 (Wn. App. 1998). These issues are set forth within the Affidavit of Johnnita Billings which was filed both in the Dec Action and the FED action. The issues of the intent of the parties and meeting of the minds as to the modification of

the loan contract could not be resolved on summary judgment as a matter of law.

Barovic v. Cochran Elec. Co., Inc., 524 P.2d 261, 11 Wn.App. 563 (Wash. App. 1974) is instructive in the context of the proceedings below. In reversing summary judgment and remanding for trial, Division I of the Court of Appeals found that whether a specific document was intended by the parties to be the sole agreement is a disputed question of fact, and that Barovic should be given the opportunity to prove, if he can, that it was the intent of the parties that the document be supplemented by a subsequent and separate agreement.

Here, Appellants have contended that it was the intent of Respondent BNY to unilaterally modify the loan contract, and to do so without notice to or consent of Appellants. BNY contends that the loan agreement was a complete contract. The parties dispute the scope and effect of the “your loan may be sold” clause in the loan contract, with Appellants contending that the language constituted an incomplete and misleading “disclosure”, and thus the contract was not complete. Appellants should be given the opportunity to prove their position, which opportunity was denied by Judge Nevins which resulted in further prejudice to Appellants as Judge Murphy based his grant of summary judgment on Judge Nevins’ ruling.

There were numerous genuine issues of material fact, including facts pertaining to the unilateral modification of the loan contract which renders the contract unenforceable as a matter of law, which rendered both dismissal of the Dec action and a grant of summary judgment in the FED action improper. Under the stringent Washington standards for summary judgment, Respondent BNY failed to meet even its initial burden on summary judgment, demonstrating that the lower court erred in granting BNY's MSJ. Judge Murphy's ruling must thus be reversed.

IV CONCLUSION

Appellants satisfied all elements to assert a claim for Declaratory Relief in the Dec action, and thus dismissal for "failure to state a claim" was error requiring reversal. The lower court in the FED action erred by

granting summary judgment where there were genuine issues of material fact, requiring reversal.

Respectfully submitted

/s/ Lucy B. Gilbert

Lucy Gilbert, Esq. WSBA No.31992
Northwest Homestead Law (previously Hermitage Law)
Attorney for Appellants, Brad and Johnitta Billings
10660 NE Manor Lane
Bainbridge Island, WA 98110
(206) 293-0936 (Mobile)
lucy@NWHomesteadLaw.com

Jeff Barnes, Esq. (to seek admission PHV) W.J. Barnes, P.A Co-counsel for Appellants 1515 North Federal Hwy., Ste. 300 Boca Raton, Florida 33432 Tel: (561) 864-1067 Fax: (561) 338-4840	Lucy B. Gilbert, Esq. WSBA No. 31992 Northwest Homestead Law (previously Hermitage Law) Local counsel for Appellants 10660 NE Manor LN Bainbridge Island, WA 98110 Tel: 206.293.0936 (Mobile) lucy@NWHomesteadLaw.com
--	---

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2019, I filed the foregoing with the Court using the Washington State Court of Appeals Secure Portal that will send notification to the following:

Amy Edwards, WSBA No. 37287
Logan Altieri
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000 Portland, OR 97205
503.224.3380
amy.edwards@stoel.com
logan.altiere@stoel.com
Attorneys for Respondent Bank of New York Mellon as Trustee

Dated this 8th day of May, 2019.

/s/ Lucy B. Gilbert
Lucy Gilbert, Esq. WSBA No.31992
Northwest Homestead Law (previously Hermitage Law)
Attorney for Appellants,
10660 NE Manor Lane
Bainbridge Island, WA 98110
(206) 293-0936 (Mobile)
lucy@NWHomesteadLaw.com

HERMITAGE LAW

May 08, 2019 - 4:30 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52290-0
Appellate Court Case Title: Bank of New York Mellon, Respondent v. Brad L. Billings & Johnita D. Billings, Appellants
Superior Court Case Number: 16-2-06272-1

The following documents have been uploaded:

- 522900_Affidavit_Declaration_20190508162553D2230312_8629.pdf
This File Contains:
Affidavit/Declaration - Other
The Original File Name was Declaration of LBG RE MOET 5.8.19.pdf
- 522900_Briefs_20190508162553D2230312_8294.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was OpeningBrief as Amended 5.8.19.pdf
- 522900_Motion_20190508162553D2230312_3911.pdf
This File Contains:
Motion 1 - Extend Time to File
The Original File Name was MOET 5.8.19.pdf

A copy of the uploaded files will be sent to:

- amy.edwards@stoel.com
- logan.altiere@stoel.com

Comments:

Sender Name: Lucy Gilbert - Email: lucybgilbert@msn.com
Address:
10660 NE MANOR LN
BAINBRIDGE ISLAND, WA, 98110-1120
Phone: 206-293-0936

Note: The Filing Id is 20190508162553D2230312