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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. 16-2-08797-7 and  
18-2-08721-5)

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**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.

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

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**APPELLANTS BILLINGS' REPLY BRIEF**

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## **I. SUMMARY OF THE ARGUMENT**

Respondents' Brief is long on rhetoric but short on substance. Respondents:

(a) ignore the unique and particular facts of the actions below;

(b) attempt to pigeonhole the actions below into different and otherwise irrelevant case law decisions, the majority of which are unpublished or from other jurisdictions;

(c) fail to cite any decisional law on the narrow and specific legal and factual issues in the actions below;

(d) make quantum leaps in their arguments; and

(e) fail to support their arguments with evidence (which Respondents cannot otherwise introduce for the first time on appeal).

Judges Nevins and Murphy below wrongfully relied upon Respondents' factually and legally inapplicable arguments and ignored the legal standards and legal restrictions applicable to

motions to dismiss and for summary judgment. The Orders appealed from must thus be reversed.

## **II. ARGUMENT**

### **A. Respondents' (and the lower courts') Errors as to the Facts**

Respondents repeatedly, throughout their Brief, attempt to convince this Court that Appellants' position is that the simple act of securitization of Appellants' loan relieved Appellants of their obligations thereunder. No such allegation was made in either case below, and thus this Court may properly ignore this "argument".

Appellants' position, as made clear in their filings, was that their loan was unilaterally modified and thus unenforceable by Respondents. The actual allegations pled in both cases were that Respondents were legally incapable of seeking to enforce a loan contract which had been unilaterally modified as Washington law does not permit the enforcement of unilaterally modified contracts. *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). Significantly, Respondents fail to cite any decisional law to the contrary.

Respondents also fail to cite any decisional law which addresses the narrow and specific legal issues relating to the unilateral modification of a mortgage loan contract and the effect thereof. That is because there is no decisional law on this issue in Washington or any other jurisdiction; otherwise, Respondents would have cited it in their Brief.

Respondents also cannot skew the actual allegations of Appellants' Complaint in the 2018 Dec action or their filings in the Eviction action in an attempt to provide support for their irrelevant argument, and Respondents do not set forth any law or rule of procedure which would permit such a course of conduct (as there is no such law as the Court must accept the facts actually pled). This Court may thus properly ignore all of the "argument" set forth on pages 11-14 of Respondents' Brief.

**B. Respondents' (and the lower courts') Errors as to the Law**

The lower court in the 2018 Dec action was required, on a motion to dismiss, to accept the allegations of Appellants' Complaint as true. The law in Washington is that the actual facts set forth in the Complaint (not Respondents' skewed version thereof) must be taken as true on a CR 12(b)(6) Motion and with all reasonable inferences therefrom being made in Appellants' 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).

The standard for summary judgment in Washington is equally stringent. It is significant that although Respondents' criticize Appellants' Affidavit of Johnnita Billings as being "belatedly filed" (Respondents' Brief, page 9, footnote 2), Respondents (a) offer no facts to contradict the sworn facts set forth in the Affidavit, and (b) failed to file any opposing

Affidavit to Appellants' Response to Respondents' Motion for Summary Judgment, thus waiving any challenge to the subject Affidavit. Respondents also contend that the Affidavit is "irrelevant" (Brief, page 9, footnote 2), but offer no evidence or decisional law to support this legal conclusion.

Respondents admit, on page 8 of their Brief, that an affidavit (opposing summary judgment) raises a genuine issue of fact if the affidavit sets forth facts which are evidentiary in nature such as information as to what took place, an act, an incident, or a reality, citing *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 954, 247 P.3d 18 (2011). It is without issue that the Affidavit of Johnnita Billings set forth what did (and did not) take place, incidents, and realities which Respondents failed to reply to by any opposing affidavit. It is equally without issue that the facts and matters set forth in the Affidavit of Johnnita Billings raised issues of intent of the parties which issues cannot 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, reversing summary judgment), and thus could not be resolved on a motion to dismiss as again, the lower court (that being Judge Nevins) was bound to accept the allegations of Appellants' Complaint as true with all inferences being made in favor of Appellants. Notwithstanding this obligation, Judge Nevins erroneously "construed" the matter in favor of Respondents.

Respondents repeatedly (and simply) deny, without evidentiary support, that Appellants' loan was not unilaterally modified, reciting only a selective portion of the allegations of the Complaint in the 2018 Dec action. Respondents then recite several decisions (including unpublished opinions) beginning on page 11 of their Brief for the proposition that the securitization of a mortgage loan does not avoid the liabilities associated with the loan. Respondents miss, intentionally ignore, and hope that this Court ignores, the actual issue in the cases below.

In granting Respondents' Motion to Dismiss the 2018 Dec action based on Respondents' erroneous and inapplicable arguments and Respondents' distorted version of the actual facts pled, Judge Nevins went beyond the face of the pleadings and considered matters outside of the allegations set forth in the Complaint which constitutes error as a matter of law. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168, 176 (2015). This alone warrants reversal of the Order granting Respondents' Motion to Dismiss.

Respondents attempt to provide support for the rulings of Judges Nevins and Murphy based on collateral estoppel and *res judicata* grounds. Respondents simply ignore or deny, without evidence, that the basis of Appellants' claims, as alleged in their filings, were not available to them in any prior litigation and simply assert, again without any evidentiary support, that the claims of unilateral modification of the loan contract were "available" prior to the filing of the (2018) Dec action. The issue of notice of the presence of a claim is itself one imbued

with issues of fact which are not properly resolved on either a motion to dismiss or motion for summary judgment. *Steward v. Good*, 51 Wn. App. 509, 513, 754 P.2d 150 (Wn.App. 1988)(purchaser has knowledge of a claim where facts are present which are sufficient to put an ordinary prudent person on inquiry and if the inquiry, followed with reasonable diligence, would lead to the discovery of rights). *Steward* thus requires evidence of facts and a determination of reasonableness of diligence in the context of resolving the issue of when a party should have had notice of a claim. No such evidence was presented below, and Respondents provide no such evidence on appeal.

It is equally well-established that questions of reasonableness are also not proper for summary judgment (and thus obviously not properly resolved on a motion to dismiss). *O'Donnell v. Zupan Enters', Inc.*, 107 Wn.App. 854, 860, 28 P.3d 799 (2001)(reasonableness of proprietor's methods of protection is a question of fact); *Ciminski v. Finn Corp.*, 13 Wn.App. 815,

820-21, 537 P.2d 850 (1975). Respondents filed no affidavits or other evidence to challenge Appellants' position that the unilateral modification of their loan contract issues were not available prior to the filing of the 2018 Dec action. There is thus no evidentiary basis for Respondents' otherwise unsubstantiated claim that the unilateral modification of contract claim was allegedly "available" prior to the filing of the 2018 Dec action.

Judge Murphy thus granted summary judgment without adhering to the legally required showing of the absence of any genuine issue of material fact and in contradiction to Washington decisional law as to the issues of notice and reasonableness not being amenable to disposition on summary judgment. The lack of evidence, coupled with the law as to the presence of questions of fact on the issues of notice and reasonableness, warrants reversal of the Orders appealed from.

There is also no issue that the claims in the 2018 Dec action were unique as to the unilateral modification of the loan

contract and thus the “identity of claims” elements of collateral estoppel and *res judicata* were not and could not have been satisfied. Respondents’ attempt to change the standard for application of either doctrine on the basis of a misrepresentation of the holding in another case (Respondents’ Brief, page 16, citing *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)) does not vitiate the express civil standards governing the application of either doctrine, which standards are set forth in Appellants’ Brief.

Respondents assert that the holding in *Rains* sets forth that certain criteria which “[are]” considered in determining whether there is concurrence between two causes of action, which is a material misrepresentation. The actual holding states that certain factors “have been” considered (*Rains*, 100 Wn.2d at 664), and the holding does not state that the “have been considered” factors are either exclusive or determinative. Respondents’ wrongful misrepresentation of the holding of at

least one case upon which Respondents rely justifies this Court rejecting Respondents' arguments.

Respondents also admit that Appellants "may not have alleged in the 2016 Action that a purported unilateral modification of a loan somehow precludes the Trust from enforcing the Note and Deed of Trust" (which Appellants in fact did not allege as those facts were not available at the time), and that "in determining whether a matter should have been litigated in a prior proceeding" that the court "consider[s] a variety of factors...". (Respondents' Brief, page 17). One of these factors, as set forth above, is the reasonableness of whether Appellants had prior knowledge of the claim, which issue cannot even be resolved on summary judgment. Again, Respondents cite no facts whatsoever to support their otherwise bald claim that Appellants should have been on notice of their unilateral modification of contract claim in 2016 or at any time prior to the filing of the 2018 Dec action. The Orders below must thus be reversed.

Respondents next interject issues as to MERS being “in privity with” Respondents and that because Respondent Trust “essentially” acted as MERS’ representative (a/k/a “agent”) that MERS and the Trust are the same party (Respondent’s Brief, pages 20-21). Respondents miss the point, and by interjecting the term “essentially” into their claim, Respondents “essentially” admit that there are evidentiary issues as to the claimed agency. It is settled law in Washington that questions of agency are questions of fact which are not resolved on summary judgment. *Strachan v. Kitsap County*, 616 P.2d 1251, 27 Wn.App. 271, 274 (Wn. App. 1980) (reversing summary judgment due to presence of issues of material fact as to agency status); *O’Brien v. Hafer*, 122 Wn.App. 279, 284, 93 P.3d 930 (Wn. App. 2004) (agency is a question of fact unless facts are undisputed). Further, Respondents cite no law which provides that questions of agency may be resolved on a motion to dismiss. The Orders appealed from must thus be reversed.

Respondents next expend approximately 2.5 pages of their Brief on a discussion of how the Trust allegedly “Complied with All Procedural Requirements of the Deed of trust Act”, etc. (Respondents’ Brief, pages 24-26). Appellants’ claims below do not involve any issue with procedures under the Deed of Trust Act. This Court may thus ignore this otherwise irrelevant section of Respondents’ Brief.

Finally, Respondents claim that Appellants “Waived Their Ability to Challenge the Trust’s Right to Foreclose...” (Respondent’s Brief, page 26-28). The very decisional law cited by Respondents vitiates their position.

Respondents admit that in *Fed. Nat’l Mortg. Ass’n v. Ndiaye*, 188 Wn.App. 376, 382, 353 P.3d 644 (Wn.App. 2015) the court held: “Failure to pursue presale remedies can, *in some circumstances*, constitute equitable waiver of those defenses”. (Respondents’ Brief, page 26, emphasis added). Respondents thus admit that the failure to pursue any presale remedies does not result in an absolute waiver, under any circumstances, of

any particular defenses, and there is no issue that *Ndiaye* did not concern a claim of unlawful enforcement of a unilaterally modified contract. Respondents have thus provided support for reversal of the Orders appealed from.

### **III. CONCLUSION**

Respondents and Judges Nevins and Murphy below ignored the unique and particular facts and applicable standards of law in granting Respondents' Motions to Dismiss and for Summary Judgment. There is no evidentiary support for Respondents' arguments or the rulings below, which are in derogation of applicable law as to the standards on motions to dismiss and for summary judgment and on the issues of agency and reasonableness. There is no decisional law in Washington applicable to the unique facts and issues in the cases below,

which are thus cases of first impression in Washington. The

Orders appealed from must thus be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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