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Pierce County Superior Court Case 16-2-06272-1

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

BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK
AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE C.
WALT, INC. ALTERNATIVE LOAN TRUST 2007-OA17 MORTGAGE
PASS-THROUGH CERTIFICATE SERIES 2007-OA17,

Plaintiff/Respondent,

v.

BRAD L. BILLINGS and JOHNNITA D. BILLINGS,

Defendants/Appellants.

BRIEF OF RESPONDENTS BANK OF NEW YORK MELLON F/K/A
THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE
HOLDERS OF THE C. WALT, INC. ALTERNATIVE LOAN TRUST
2007-OA17 MORTGAGE PASS-THROUGH CERTIFICATES SERIES
2006-OA17 AND MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.

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I. INTRODUCTION

In these consolidated cases, appellants Brad L. Billings and Johnnita D. Billings (the “Billings”) appeal the dismissal of their civil action challenging the right of Respondent Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificate Holders of the C. Walt, Inc. Alternative Loan Trust 2007-OA17, Mortgage Pass-Through Certificates Series 2006-OA17 (the “Trust”) to enforce a note and deed of trust granted by the Billings and an order of restitution in the Trust’s action for unlawful detainer following a completed nonjudicial foreclosure. The Billings wait until the seventeenth page of their 26-page Opening Brief (the “Opening Br.”) to disclose their prior case against the Trust. Even then, they fail to discuss the facts or allegations in their prior case—a challenge to the nonjudicial foreclosure of their property—or that this Court affirmed dismissal of those claims, thus barring their ability to bring the present action under the doctrine of *res judicata*.

The Billings are also mistaken that their latest attempt to set aside the Trust’s nonjudicial foreclosure is “a case of first impression.” It is not. The Washington Court of Appeals, along with every other court to address the issue, has already ruled that the transfer of a promissory note into a mortgage-backed-securities trust does not change the character of the note or the debt obligation on the note, because the borrower’s loan contract is distinct and separate from any assignment of the note. Therefore, even if the Billings’ latest case was not barred

by *res judicata*—which it is—their basis for setting aside the Trust’s nonjudicial foreclosure nonetheless fails as a matter of law, and the trial court did not err in dismissing the Billings’ request for declaratory relief.

Finally, because the Trust had the right to and properly foreclosed on the Billings’ property, the trial court correctly denied the Billings’ motion to stay and granted the Trust’s request for restitution in the unlawful detainer proceeding. For these reasons, as more specifically discussed below, Respondents the Trust and Mortgage Electronic Registration Systems, Inc. (“MERS”) request that the court affirm the superior court orders.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court in Case No. 18-2-08721-5 properly granted the Trust and MERS’s Motion to Dismiss with prejudice.
2. The trial court in Case No. 16-2-06272-1 properly granted summary judgment in the Trust’s favor and denied the Billings’ Motion to Stay the Trust’s unlawful detainer action.

III. RESPONSE TO ISSUES PRESENTED

1. A trial court properly grants a motion to dismiss where the basis for the plaintiff’s claim fails as a matter of law.
2. A trial court properly grants a motion to dismiss where *res judicata* prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action.

3. A trial court properly grants summary judgment in an unlawful detainer action where the purchaser of the property proves that it complied with all procedural aspects of the Washington Deed of Trust Act, the defendant waived the right to challenge the purchaser's possession of the property, and/or where the defendant's argument that the purchaser is not entitled to possession of the property fails as a matter of law.

IV. STATEMENT OF THE CASE

The Billings executed a Monthly Adjustable Rate Payoption Note (the "Note") in the principal amount of \$674,500.00 in 2006. (Clerk's Papers ("CP") at 134; *see also Billings v. Bank of N.Y. Mellon*, 2 Wn. App. 2d 1063 (table), 2018 WL 1381831 at *1 (Mar. 19, 2018) (unpublished).)¹ The Note was secured by a Deed of Trust on the property located at 802 4th Ave., SW, Puyallup, WA 98371-5852 (the "Property"), in favor of Countrywide Bank, N.A. (CP 122-39; *Billings*, 2018 WL 1381831 at *1.) The Trust is the holder of the Note endorsed in blank and the assignee of the Deed of Trust. (CP 319, 322 n.2, 397; *Billings*, 2018 WL 1381831 at *1-2 & n.2.) The Note and Deed of Trust are collectively referred to herein as the "Loan." In 2011, the Billings stopped making loan payments as they became due and thus defaulted on the Note and Deed of Trust. (CP 319, 394;

¹ *Billings* is the opinion issued by this Court in the prior wrongful foreclosure action, discussed *infra*. The slip opinion is also available at CP 318-23 and CP 393-98.

Billings, 2018 WL 1381831 at *1.) Consequently, the Trust initiated a nonjudicial foreclosure. (CP 116-21; *Billings*, 2018 WL 1381831 at *1.) The trustee’s sale was held on February 12, 2016, and the Trust was the winning bidder. (CP 6-9, 166; *Billings*, 2018 WL 1381831 at *1.)

A. After Foreclosure, the Trust Filed an Action to Evict the Billings, Prompting the Billings to File a Wrongful Foreclosure Action Seeking to Set Aside the Trust’s Foreclosure.

The Billings argue that their appeal arises out of two lower court cases. In fact, this appeal is the culmination of *three* cases. On March 17, 2016, following the foreclosure sale, the Trust filed an unlawful detainer action in Pierce County, Case No. 16-2-06272-1, seeking to evict the Billings (hereinafter, the “Eviction”). (CP 3-5.) The Billings moved for a temporary restraining order, seeking to stay the eviction proceeding. (CP 95-114.) The trial court granted the Billings’ motion, conditioned on the Billings filing a wrongful foreclosure action. (CP 212-13.)

On June 20, 2016, the Billings filed their wrongful foreclosure action, Pierce County Case No. 16-2-08798-7 (hereinafter, the “2016 Action”). (CP 384.) The trial court later granted the Trust’s motion for summary judgment in the 2016 Action and denied the Billings’ request for reconsideration. (CP 295 ¶ 1; *Billings*, 2018 WL 13818 at *1.) After the Billings appealed the 2016 Action, the trial court extended the stay issued in the Eviction “through all appeals by [the] Billings in [the 2016 Action].” (CP 296 ¶ 3.)

On March 19, 2018, the Court of Appeals issued an opinion that affirmed the superior court’s decision. (CP 318-23, 393-98; *Billings*, 2018 WL 1381831 at *3.) It held that the Billings “waived their wrongful foreclosure claim,” and “[t]heir claims that [they] are exempt from waiver either lack merit or were not argued on appeal.” (CP 318, 393; *Billings*, 2018 WL 1381831 at *1.) The Billings neither sought reconsideration of the Court of Appeals’ decision nor filed a petition for review to the Washington Supreme Court. (CP 408.) The Court of Appeals issued its mandate terminating review on May 25, 2018. (*Id.*)

B. The Billings File a New Action, Once Again Seeking to Set Aside the Trust’s Foreclosure.

On June 5, 2018, after the Court of Appeals terminated review, the Billings filed *another* action in Pierce County, Case No. 18-2-08721-5, seeking declaratory relief (hereinafter, the “2018 Action”). (CP 498-508.) In the 2018 Action—which, along with the Eviction, is part of this consolidated appeal—the Billings once again argued that the Trust had no right to foreclose on the Property, contending that the Billings’ “loan contract” (their Note and Deed of Trust) was illegally unilaterally modified when it was transferred to the Trust. (CP 500-08.) The Billings requested an order finding their Note and Deed of Trust void and of no force and effect. (CP 507-08.)

Three days after filing the 2018 Action, the Billings again moved to stay the Eviction arguing that the 2018 Action precluded the Trust from seeking the

remedy of restitution. (CP 340-44.) The Billings asserted, as they do here on appeal, that the claim in the 2018 Action is one “of first impression,” that “enforcement of an illegally unilaterally modified contract is contrary to Washington’s public policy,” and that if the Billings prevailed on that claim, it would preclude the Trust’s right to possession of the Property. (Opening Br. at 14, 22; CP 342-43.)

In response, the Trust filed an opposition to the motion to stay and moved for summary judgment, arguing that the Billings had waived their right to contest the foreclosure and subsequent eviction and, in any case, that the 2018 Action was not an issue of first impression, but rather numerous courts had already rejected their argument that the assignment of a promissory note to a securitized trust somehow affected the borrower’s obligation under the note. (CP 351-57; 383-89.) The Trust also filed a motion to dismiss the 2018 Action, asserting that it failed to state a claim upon which relief could be granted and that it was barred by *res judicata*. (CP 511-21.)

On August 17, 2018, Superior Court Judge Jack Nevin granted the Trust’s motion to dismiss the 2018 Action. (CP 584-85.) On the same day, Superior Court Judge Edmund Murphy denied the Billings’ motion to stay the Eviction and granted the Trust’s motion for summary judgment, finding that the Trust had the right to foreclose, was the winning bidder at the foreclosure sale, and therefore established its right to an order of restitution as a matter of law. (CP 451-53.)

The superior court denied the Billings' motion for reconsideration of its denial of their motion to stay the Eviction, prompting this appeal and the Billings' motion to this Court for an emergency stay of the Eviction pending the appeal. (CP 488.) The Commissioner denied their motion on October 5, 2018 (CP 490), and this Court denied the Billings' motion to modify the Commissioner's ruling on October 24, 2018.

V. STANDARD

A. Motion to Dismiss Standard.

The Court of Appeals reviews an order granting a motion to dismiss pursuant to CR 12(b)(6) *de novo*. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843, 347 P.3d 487 (2015). CR 8(a) provides that pleadings setting forth a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." However, the "court need not accept legal conclusions as correct." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). Dismissal is warranted where the court concludes that "the plaintiff can prove no set of facts that would justify recovery." *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015); *see also Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005) (dismissal appropriate where proffered facts legally insufficient).

B. Summary Judgment Standard.

The Court of Appeals reviews summary judgment orders *de novo*. *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001). Summary judgment is proper where there is no genuine issue of material fact, thereby making a trial unnecessary. *See* CR 56(c). If the moving party demonstrates the absence of a material fact, the non-moving party must then identify a material fact that creates a genuine issue for trial. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); CR 56(e) (“[A]n adverse party . . . must set forth specific facts showing that there is a genuine issue for trial.”). The non-moving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or its affidavits considered at face value. *Herman v. Safeco Ins. Co. of Am.*, 104 Wn. App. 783, 787-88, 17 P.3d 631 (2001). An affidavit “does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, *i.e.*, information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion.” *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 954, 247 P.3d 18 (2011) (quoting *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002)). “Ultimate facts or conclusions of fact are insufficient.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988), *abrogated on other grounds by Mikkelsen v. Public Util. Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017) .

VI. ARGUMENT AND AUTHORITY

Because the Billings' arguments seeking to stay eviction and opposing summary judgment in the Eviction were contingent on their claim in the 2018 Action, Respondents first address the Billings' arguments in the 2018 Action.

A. The Superior Court Correctly Granted Respondents' Motion to Dismiss the 2018 Action.

On appeal, the Billings contend that the trial court erred in granting Respondents' Motion to Dismiss the 2018 Action because the Billings alleged "each and every element to state a cause of action for [d]eclaratory relief."² (Opening Br. at 13.) As an initial matter, the Billings' claim rests on their allegation that the transfer of the Note to the Trust unilaterally modified the Loan. (Opening Br. at 3, 15.) Because that is a legal conclusion, however, the court need not accept it as true, *Haberman*, 109 Wn.2d at 120, and, as discussed below, it is not supported by Washington law. Therefore, the Billings' claim is legally insufficient. Moreover, the Billings' claim is also barred by *res judicata*. For both of these reasons, the trial court properly dismissed the 2018 Action.

² In their Opening Brief, the Billings also reference the Affidavit of Johnnita Billings, which they belatedly filed in opposition to the motion to dismiss. (Opening Br. at 2.) Because the affidavit merely repeats the allegations in the Complaint, it is irrelevant to the legal issue presented in the motion to dismiss and on appeal for the reasons stated herein.

1. The 2018 Action Was Properly Dismissed as a Matter of Law.

a. The Billings Waived Their Right to Challenge the Trust’s Right to Enforce the Deed of Trust Through Foreclosure.

Although styled as a claim for declaratory relief, the Billings’ 2018 Action is a collateral attack on the 2016 nonjudicial foreclosure of the Property. Indeed, in the 2018 Action, the Billings expressly sought to nullify the transfer of the Note and the assignment of the Deed of Trust to the Trust and to prohibit their eviction from the Property, which is now owned by the Trust. (*See* CP 505-07; Opening Br. at 9 (asserting that Trust did not disclose assignment “for purpose of manufacturing a fraudulent foreclosure of an illegally unilaterally modified loan”).) This Court has already held, however, that the Billings waived their right to challenge the nonjudicial foreclosure by not seeking a stay before the sale. *Billings*, 2018 WL 1381831 at *2 (citing RCW 61.24.127). Because the same principles apply to the 2018 Action, the trial court did not err in dismissing it.

b. The Billings’ Loan Was Not Unilaterally Modified.

Respondents’ motion to dismiss the 2018 Action was also properly granted because the Billings’ claim—that their “loan contract” was unilaterally modified and therefore void—lacks a basis in law. In the trial court and on appeal, the Billings argue that their “loan contract”—*i.e.*, the Note and Deed of Trust— “was unilaterally modified” when it was “sold to a securitization Trust.” (Opening Br. at 3-5.) They contend that, even though the Note and Deed of Trust

stated that the Loan could be sold, it was “incomplete and misleading,” because the Billings did not know that the Loan could be sold to a securitization trust. (Opening Br. at 16.) The Billings further assert that, by “converting the residential mortgage loan transaction into a commercial investment vehicle without notice to or consent of the [the Billings],” the Trust unlawfully unilaterally modified the Loan.³ (Opening Br. at 5 (quoting Complaint (CP 502-03) ¶ 17).) The Billings are incorrect.

The transfer of the Note and the assignment of the Deed of Trust to the Trust did not modify the terms of the Note and Deed of Trust, as the Billings allege.⁴ Indeed, this Court, as well as numerous other courts around the country, has rejected similar arguments. For example, in *Velasco v. Discover Mortgage Co.*, the plaintiffs “argue[d] that . . . the transfer of their promissory note into a

³ Although it is not germane to their arguments below or on appeal, the Billings also included in their Opening Brief an allegation that MERS could not assign the Note and Deed of Trust to the Trust. (Opening Br. at 3; CP 501-02.) The Billings’ assertion is factually incorrect as the Deed of Trust and the Assignment make it clear that, MERS, as nominee for the lender, assigned only the Deed of Trust to the Trust. (CP 122-39, 319.) More importantly, it is also legally irrelevant because, under Washington law, the deed of trust follows the note. *See, e.g., Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 327, 387 P.3d 1139 (2016) (“The holder of the note is the beneficiary of a deed of trust securing the note . . .”). And, as this Court recognized in the 2016 Action, it is undisputed that the Trust was “the holder of the [N]ote and as such it was entitled to enforce the [D]eed of [T]rust.” *Billings*, 2018 WL 1381831 at 2 n.2.

⁴ The Billings’ allegation in the Complaint that the assignment modified the Note or Deed of Trust is not a “fact,” which the Court must accept as true for purposes of a motion to dismiss. Rather, it is a legal conclusion and, as discussed below, is not supported by controlling law.

mortgage-backed securities pool discharged the note.” 187 Wn. App. 1003 (table), 2015 WL 1753677, at *11 (Apr. 14, 2015) (unpublished). This Court rejected the contention, noting that a number of other courts had also rejected the argument that a note’s character and the parties’ legal relationship are changed when the note is sold to a securitization trust. *Id.* at *11 & n.8. The court agreed with the reasoning of these decisions, stating that “the borrower’s loan contract (the Note and Trust Deed in this appeal) is distinct and separate from any securities transaction in the “secondary market” encompassing assignment of the contract.” *Id.* at *11 (quoting *In re Nordeen*, 495 B.R. 468, 479-80 (B.A.P. 9th Cir. 2013)); *see also* *Pearse v. First Horizon Home Loan Corp.*, No. C16-5627 BHS, 2016 WL 5933518 at *5 (W.D. Wash. Oct. 12, 2016) (“Securitization merely creates a separate contract, distinct from the Plaintiffs’ debt obligations under the Note, and does not change the relationship of the parties in any way.” (citation omitted)); *cf.* *Lopez v. JPMorgan Chase & Co.*, 198 Wn. App. 1048 (table), 2017 WL 1403679 at *4 (Apr. 18, 2017) (unpublished) (transfer of note to securitized trust “does not afford a basis for [borrower] to avoid responsibility for the \$291,927.37 owed on her note”); *Robinson v. Wells Fargo Bank Nat’l Ass’n*, No. C17-0061JLR, 2017 WL 2311662 at *4 (W.D. Wash. May 25, 2017) (“securitization and any related assignments do not ordinarily constitute a defense to foreclosure under Washington law”); *Hover v. GMAC Mortg. Corp.*, No. C16-1243JLR, 2017 WL 1080968 at *5 (W.D. Wash. Mar. 21, 2017) (“Washington

law does not provide borrowers relief from their mortgages because the deed of trust was assigned or securitized.”); *Deutsche Bank Tr. Co. Americas v. Walmsley*, 277 Or. App. 690, 697, 374 P.3d 937 (2016) (“Plaintiff’s own contractual obligations and privileges under the trust [Pooling and Servicing Agreement] . . . have no bearing on plaintiff[’]s right to enforce the note . . .”).

The same is true here. Indeed, it is this “transaction in the ‘secondary market’” that the Billings take issue with. They assert that, by pooling their Loan with other loans to fund a mortgage-backed security, their Loan “was converted to a vehicle for the purpose of providing an income stream to fund a commercial investment for the benefit of nonparties to the ‘loan.’” (CP 502 ¶ 15; Opening Br. at 5.) But, as this Court explained in *Velasco*, the transfer of their Note to the mortgaged-backed-security pool is “distinct and separate” from their loan contract. Accordingly, the Billings’ Loan was not unilaterally modified and the Trust, as holder of the Note, had the right to enforce the Deed of Trust through foreclosure. The superior court therefore properly dismissed the 2018 Action with prejudice because the Billings’ claim lacked a basis in law. *See, e.g., Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005) (affirming dismissal because plaintiff’s claims were legally insufficient where plaintiffs were not within class of persons covered by statute).

2. The 2018 Action Was Properly Dismissed on the Basis of *Res Judicata*.

The Billings also argue that the superior court erred in dismissing the 2018 Action under *res judicata* or collateral estoppel.⁵ (Opening Br. at 17-21.) Dismissal was appropriate under either theory, however, because (1) the Billings should have litigated their claim for “declaratory relief” in their prior, wrongful foreclosure action (the 2016 Action); and (2) the issue of the enforceability of the Note and Deed of Trust was actually determined in the 2016 Action.

In the 2018 Action, the Billings argue that the Trust did not have the right to initiate foreclosure proceedings because their Loan was illegally unilaterally modified when the Note was transferred and the Deed of Trust assigned to the Trust. (CP 502-03.) The Billings sought an order declaring their Note and Deed of Trust void and of no force and effect. (CP 507-08.)

The 2016 Action was also predicated on the Billings’ assertion that the Note and Deed of Trust were not properly assigned to the Trust and therefore that the Trust was not the holder of the Note and did not have authority to initiate a nonjudicial foreclosure proceeding pursuant to the Deed of Trust. (*See* CP 322, 397; *Billings*, 2018 WL 1381831 at *2.) The superior court granted the Trust’s

⁵ “The generic term ‘*res judicata*’ may include both *res judicata* or claim preclusion **and** collateral estoppel or issue preclusion. Because ‘*res judicata*’ is a general term, a court may look to both claim and issue preclusion to determine whether there is an ‘identity’ of the actions.” *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 43, 321 P.3d 266 (2014) (emphasis in original; footnote omitted).

motion for summary judgment in the 2016 Action and this Court affirmed, holding that the Billings waived their right to challenge the Trust's right to foreclose by not seeking preliminary relief before the foreclosure sale. *Billings*, 2018 WL 1381831 at *2. The court further stated that it was "undisputed that the [Trust] was the holder of the note and as such it was entitled to enforce the deed of trust through the nonjudicial foreclosure procedure set out in the [Deed of Trust Act]." *Id.* at *2 n.2.

As discussed below, because both the 2016 and 2018 Actions centered on whether the Trust had the right to enforce the Note and initiate a nonjudicial foreclosure proceeding, the 2018 Action was properly dismissed based on *res judicata*.

a. Claim Preclusion.

For claim preclusion to apply, "a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." *Civil Serv. Comm'n v. City of Kelso*, 137 Wn.2d 166, 171, 969 P.2d 474 (1999) (internal quotation marks and citation omitted). "The following criteria [are] considered" in determining whether concurrence exists between the two causes of actions: (1) whether the prosecution of the later action would impair the rights established in the earlier action, (2) whether the evidence in both actions is substantially the same, (3) whether infringement of the same right is alleged in

both actions, and (4) whether the actions arise out of the same transactional nucleus of facts. *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983) (citing *Abramson v. Univ. of Haw.*, 594 F.2d 202, 206 (9th Cir. 1979)). Finally, there must be a final judgment on the merits in the original matter. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). An order granting summary judgment constitutes a final judgment on the merits. *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

On appeal, the Billings argue that the superior court erred in granting Respondents' motion to dismiss on the basis of claim preclusion because (1) *res judicata* "is an affirmative defense to be pleaded in a subsequent action"; and (2) claim preclusion does not apply because (a) "the issue of [the Trust's] unilateral modification of the loan contract was [not] actually or necessarily litigated in any prior proceedings," and (b) the cases involved different people and parties. (Opening Br. at 17-19.) The Billings are incorrect.

i. Respondents Properly Raised Claim Preclusion in Their Motion to Dismiss Under CR 12(b).

The Billings' first contention is without merit. The Court of Appeals has expressly held that "[r]es judicata is an affirmative defense that is waived if it is 'not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties.'" *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 680, 319 P.3d 868 (2014) (emphasis added; citation omitted).

Accordingly, because Respondents properly asserted their defense of claim preclusion in a motion to dismiss under CR 12(b), Respondents' motion was procedurally proper.

ii. The 2016 and 2018 Actions Are Part of the Same Cause of Action.

“Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action.”

Pederson v. Potter, 103 Wn. App. 62, 67, 11 P.3d 833 (2000) (emphasis added); *see also Kelly-Hanson v. Kelly-Hanson*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (“[A] matter may not be relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable due diligence should have been raised, in the prior proceeding.”). Thus, while the Billings 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, that claim is nonetheless barred.

In “determining whether a matter should have been litigated in a prior proceeding,” the court “consider[s] a variety of factors, including . . . whether the present and prior proceedings arise out of the same facts, whether they involve substantially the same evidence, and whether rights or interests established in the first proceedings would be destroyed or impaired by completing the second proceeding.” *Sound Built Homes, Inc. v. Windermere Real Estate/S., Inc.*, 118

Wn. App. 617, 628, 72 P.3d 788 (2003) (internal quotation marks and citation omitted). In *Barton v. JP Morgan Chase Bank, N.A.*, 196 Wn. App. 1007 (table), 2016 WL 5369630 at *2 (Sept. 26, 2016) (unpublished), the court held that the cause of action and subject matter of the borrowers' subsequent action were identical to their prior action where both lawsuits arose out of the same loan transaction, involved the alleged infringement of the plaintiffs' rights regarding the foreclosure of their home, and the same evidence would be necessary in each, namely the note, deed of trust, and purchase and assumption agreement between the transferee and transferor of the note.

Here, there can be no question that the Billings could have raised and litigated their unilateral modification theory in the 2016 Action. Like the borrowers in *Barton*, the cause of action and subject matter of the two suits are completely identical: both arise out of the 2006 loan transaction, both involve the alleged infringement of the Billings' rights through foreclosure of their home, and the same evidence would be necessary for each suit, namely the Note and Deed of Trust and their transfer/assignment to the Trust. Finally, the Trust's right to foreclose on the Property, which was established in the 2016 Action, would undeniably be destroyed or impaired by the 2018 Action. In sum, because the Billings could have, and should have, raised and litigated their unilateral modification argument in the 2016 Action, the trial court did not err in dismissing the 2018 Action.

In response, the Billings contend that they could not have raised their unilateral modification claim in the 2016 Action, because they were unaware of it until after the decision in that case. (Opening Br. at 18.) This argument is baseless. First, the Billings' awareness of the existence of this claim does not change the fact that the 2016 and 2018 Actions arise out of the same facts and involve the same evidence, and that rights established in the 2016 Action would be destroyed or impaired by the Billings' claim in the 2018 Action. Each factor for determining whether claim preclusion applies is met in the case.

Second, the Billings were aware that the Note had been transferred and that the Deed of Trust had been assigned to the Trust, which is a securitized trust. Indeed, that information was included in the record of the 2016 Action and discussed in this Court's prior opinion. *Billings*, 2018 WL 1381831 at *1-2 & n.2. The assignment and the Trust's existence as a mortgage securitization trust are the bases of their current suit. Therefore, the 2018 Action was a blatant attempt to split claims that involve the same facts and, through the exercise of due diligence, could have and should have been brought in the same suit. *Bank of N.Y. Mellon v. Tashiro-Townley*, 186 Wn. App. 1008 (table), 2015 WL 890830 at *4 (Mar. 2, 2015) (unpublished opinion) (finding that, despite plaintiffs' argument that they did not discover evidence supporting their fraud claim until after disposition of prior action, their fraud claim involved same evidence already presented, and, in any case, plaintiffs did not "demonstrate that they could not

have discovered the alleged experts and new evidence before the federal district court's decision by the exercise of due diligence"). In short, the 2016 and 2018 Actions involve the same cause of action.

iii. The 2016 and 2018 Actions Involve the Same Parties.

Finally, there can be no dispute that the 2016 Action involves the same parties and quality of persons as the 2018 Action. In the 2016 Action, the Billings named the Trust, among other parties, which they also named in the 2018 Action. *See Barton*, 2016 WL 5369630 at *2 (holding that, where same plaintiffs sue same party in both actions, "among other defendants," identity of parties exists).

While MERS was not a party to the 2016 Action, because MERS and the Trust are in privity, the parties are the same. "[D]ifferent defendants between suits [are] the same party as long as they are in privity." *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995). "A nonparty is in privity with a party if that party adequately represented the nonparty's interest in the prior proceeding." *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wn.2d 214, 224, 164 P.3d 500 (2007). In the prior proceeding, the Billings argued MERS, as the nominee for the lender, had no right to assign the Deed of Trust to the Trust. *Billings*, 2018 WL 1381831 at *2. Therefore, the first suit "turned on the propriety of" MERS's "conduct." *Kuhlman*, 78 Wn. App. at 122; *see also Breinholt v. Aegis Wholesale Corp.*, No. 10-cv-00466-EJL, 2012 WL

2865969, at *3 (D. Idaho July 11, 2012) (holding that MERS and OneWest were in privity with each other because MERS acted as nominal beneficiary for lender under deed of trust and as agent for originating lender and its successors and assigns), *aff'd*, 670 F. App'x 566 (9th Cir. 2016). Because the Trust defended MERS's position in the 2016 Action, it essentially acted as MERS's representative for purposes of claim preclusion. "Under these circumstances, the parties must therefore be viewed as sufficiently the same, if not identical." *Kuhlman*, 78 Wn. App. at 122.

Last, because there is privity between MERS and the Trust, the requirement of same quality of persons is also met. *See Ensley v. Pitcher*, 152 Wn. App. 891, 905, 222 P.3d 99 (2009) ("[T]he 'identity and quality of parties' requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus all persons in privity with such parties." (quoting 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35.27, at 464 (1st ed. 2007))). Therefore, the concurrence of people and parties that is necessary to show claim preclusion plainly existed between the 2016 and 2018 Actions.

In sum, because each element of claim preclusion was present,⁶ the superior court properly dismissed the 2018 Action with prejudice. *Ensley*, 152

⁶ On appeal, the Billings do not challenge that the Trust satisfied the other element of claim preclusion, a final judgment on the merits, as the granting of

Wn. App. at 894 (dismissing with prejudice because plaintiff's suit was barred by claim preclusion).

b. Issue Preclusion.

Issue preclusion or collateral estoppel “precludes relitigation of an issue in a subsequent proceeding” if the following elements are met: (1) the issue that was decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom issue preclusion is asserted was a party to or in privity with a party in the earlier proceeding; and (4) application of issue preclusion would not work an injustice on the party against whom it is applied. *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 43, 321 P.3d 266 (2014). Issue preclusion “precludes only those issues that have actually been litigated and determined.” *McDaniels v. Carlson*, 108 Wn.2d 299, 305, 738 P2d 254 (1987).

Here, as explained above, the 2016 Action ended in a judgment on the merits. Moreover, the Billings were undeniably a party to the earlier 2016 Action. Third, no injustice would be worked against the Billings because they have had a full and fair opportunity to adjudicate the issue of the Trust's right to enforce the Loan and the Trust's ensuing right to nonjudicially foreclose on the Property. *See Thompson v. State, Dep't of Licensing*, 138 Wn.2d 783, 799, 982 P.2d 601 (1999)

summary judgment in the Trust's favor in the 2016 Action undeniably satisfies this requirement. *Estate of Black*, 153 Wn.2d at 170 (explaining that an order granting summary judgment constitutes a final judgment on the merits).

(explaining that definition of injustice for purposes of issue preclusion does not mean that previous court erred but only that party against whom issue preclusion is applied “received a full and fair hearing of the issues”).

Finally, there can be no question that the issue of the Note and Deed of Trust’s enforceability—which the Billings challenge in this action—was decided in the earlier proceeding. Specifically, whether the transfer of the Note and the assignment of the Deed of Trust to the Trust rendered them unenforceable was essential to the trial court’s and this Court’s ruling in the 2016 Action that the Trust had the right to “to enforce the deed of trust through the nonjudicial foreclosure procedure set out in the [Deed of Trust Act].” *Billings*, 2018 WL 1381831 at *2 & n.2. Therefore, the enforceability of the Note and Deed of Trust was actually determined in the 2016 Action, and the 2018 Action, which raises the same issue, is consequently barred by issue preclusion.

B. The Superior Court Correctly Granted the Trust’s Motion for Summary Judgment in the Eviction.

The Billings contend that the trial court erred in granting summary judgment to the Trust in the Eviction because that action also presented an issue of first impression—namely, whether restitution was appropriate when the Loan had been purportedly unilaterally modified. (Opening Br. at 21.) As discussed above, the Billings’ unilateral modification theory is both legally insufficient and barred by claim and issue preclusion. Moreover, it is also not the proper standard

for determining whether to grant summary judgment and the remedy of restitution in an unlawful detainer action. The superior court properly granted the Trust's motion and denied the Billings' requests to stay restitution of the Property to the Trust.

1. Because the Trust Complied with All Procedural Requirements of the Deed of Trust Act, It Was Entitled to Summary Judgment.

“The purchaser at [a] trustee’s sale [is] entitled to possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust” RCW 61.24.060(1). In seeking to obtain possession, “RCW 59.12.032 authorizes the purchaser at a deed of trust foreclosure sale to bring an unlawful detainer action to evict the previous owner of the home, provided the sale complied with the statutory foreclosure rules.” *Fed. Nat’l Mortg. Ass’n v. Ndiaye*, 188 Wn. App. 376, 381, 353 P.3d 644 (2015). An unlawful detainer action is a narrow proceeding brought pursuant to RCW 59.12.030, which provides generally for a “summary proceeding designed to facilitate the recovery of possession of . . . property.” *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012). There is a “presumption that the sale was conducted in compliance with the procedural requirements of the [Deed of Trust] [A]ct.” *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 570-71, 276 P.3d 1277 (2012) (citing RCW 62.24.040(7)) (discussing fact that Deed of Trust Act

favors purchasers over property owners and other borrowers once property is sold and in so doing, “at minimum,” creates “a rebuttable presumption that the sale was conducted in compliance with the procedural requirements of the act”).

In *Savings Bank of Puget Sound v. Mink*, the purchaser initiated an unlawful detainer action in an effort to obtain possession of real property it purchased at a trustee’s sale. 49 Wn. App. 204, 205-06, 741 P.2d 1043 (1987). There, the borrowers defaulted, and a notice of default was properly and timely noticed. *Id.* at 205. After the borrowers failed to cure the default, the beneficiary initiated a nonjudicial foreclosure and was the sole bidder at the trustee’s sale. *Id.* at 205-06. About a month after the trustee’s deed was recorded, the beneficiary/purchaser initiated the unlawful detainer proceeding. *Id.* In response, the defendant asserted a number of affirmative defenses and counterclaims, including breach of contract. *Id.* at 206, 209.

The court granted summary judgment in the purchaser’s favor and, in doing so, explained that prior cases recognized “two bases for post-sale relief: defects in the foreclosure sale itself, *i.e.*, failure to observe the statutory prescriptions, and” breach of fiduciary duty on the part of the trustee. *Id.* at 209. Because neither applied, the court affirmed summary judgment in favor of the purchaser, which awarded it possession of the foreclosed property. *Id.* at 210.

Here, the Billings’ only argument is that the Loan was “unlawfully unilaterally modified” when it was sold and transferred to the Trust. They do not

dispute that, as in *Mink*, the trustee’s sale was conducted in compliance with the procedural requirements of the Deed of Trust Act. In fact, this Court already resolved that issue in the 2016 Action, concluding that the Billings “fail[ed] to make any meritorious argument that the trustee failed to ‘materially comply with the provisions of [the DTA].’” *Billings*, 2018 WL 1381831 at *2 n.2 (second brackets in original) (quoting RCW 61.24.127(1)(c)). Since that is the only issue in an unlawful detainer action, the superior court did not err in granting the Trust’s summary judgment motion, ordering restitution, and denying the Billings’ stay request.

2. The Billings Waived Their Ability to Challenge the Trust’s Right to Foreclose and, in Any Case, Their Argument in Support Lacks Legal Support.

Next, even if the Billings’ unilateral modification argument were relevant to the unlawful detainer action—which, as explained in Section VI.B.1, *supra*, it is not—the Billings waived their right to challenge the Trust’s right to possession of the Property. “Failure to pursue *presale* remedies can, in some circumstances, constitute equitable waiver of those defenses.” *Fed. Nat’l Mortg. Ass’n*, 188 Wn. App. at 382 (emphasis added) (citing RCW 61.24.040(1)(f)(IX)). Here, the Billings did not raise their unilateral modification defense prior to the trustee’s sale, and this Court has already ruled that the Billings waived any challenge to the Trust’s right to foreclose. *Billings*, 2018 WL 1381831 at *2. Accordingly, the issue of whether the Billings can challenge the Trust’s power to initiate

foreclosure or, instead, whether they have waived any such claim has already been conclusively determined by this Court. Therefore, the trial court properly concluded that the Trust was entitled to possession of the Property.

Moreover, contrary to the Billings' suggestion, *Triangle Property Development, LLC v. Barton*, 190 Wn. App. 1017 (table), 2015 WL 5682838 at *2 (Sept. 28, 2015) (unpublished), demonstrates that the trial court correctly granted the Trust's summary judgment motion and denied the Billings' request for a stay.⁷ In *Triangle Property*, not only did the Court of Appeals affirm the superior court's *rejection* of the defendants' stay request, based upon a finding—as multiple courts have found here—that the defendants waived their right to challenge the purchaser's right to possession and that the purchaser complied with all procedural requirements of the Deed of Trust Act, but the court also noted that, “even if waiver does not apply,” the defendants “provide no authority” for their argument that the purchaser was not entitled to possession of the property because it was not a bona fide purchaser. *Id.*

Here, the Trust likewise complied with all procedural requirements of the Deed of Trust Act, and the Billings waived their right to challenge the sale by not timely raising their objections. Moreover, as in *Triangle Property*, even if waiver

⁷ On appeal, the Billings do not assign error to the superior court's order denying their motion to stay the Eviction. (Opening Br. at 1.) But, even if they had, as discussed herein, the superior court properly denied their motion to stay the Eviction.

did not apply, the Billings did not present a cognizable claim that would avoid the Trust's right to possession. To the contrary, as discussed above, the Billings' unilateral modification theory has already been rejected by this Court and every other court that has addressed the argument. (*See* §VI.A.1.b, *supra.*) Therefore, as in *Triangle Property*, the Billings have no legal basis for challenging the Trust's right to foreclose and to possession of the Property. The superior court order should be affirmed.

VII. CONCLUSION

For the foregoing reasons, the Trust respectfully requests that the Court (1) affirm the superior court's order in the 2018 Action (Pierce County Case No. 18-2-08721-5), which granted the Trust's motion to dismiss with prejudice; and (2) affirm the superior court's order in the Eviction (Pierce County Case No. 16-2-06272-1), which granted the Trust's motion for summary judgment and denied the Billings' motion for a stay of the unlawful detainer action.

DATED: June 7, 2019.

STOEL RIVES LLP

/s/ Amy Edwards
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Oregon that, on June 7, 2019, I caused the **BRIEF OF RESPONDENTS BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE C. WALT, INC. ALTERNATIVE LOAN TRUST 2007-OA17 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-OA17 AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.** to be filed with the Court of Appeals, and caused a true and correct copy of same to be served upon the following parties in the manner indicated below:

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