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Case No. 53747-8

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DANIEL PETERSON AND KRISTI PETERSON

Defendants/Appellants,

v.

CITIBANK N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF NRZ PASS-THROUGH TRUST VI

Plaintiff / Respondent.

RESPONSE BRIEF

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I.RESPONSE TO ISSUES PERTAINTING TO ASSIGNMENT OF ERROR

A. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

ISSUE 1: Fay Servicing has an agency relationship with Plaintiff/Respondent as its loan servicer and can hire an attorney to execute its obligations of servicing the loan.

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II. STATEMENT OF THE CASE

Respondent filed its Complaint for Foreclosure on October 31, 2016. Appellants filed their Answer on October 29, 2018. In their Answer, Appellants alleged that "no copy of any authentic promissory note exists." Appellants also demanded that Plaintiff present the Note. On January 4, 2019, Respondent's law firm, McCarthy & Holthus received the original Note from Respondent. That same day, McCarthy & Holthus notified Appellant that it had the original Note in its possession.

Respondent filed its Motion for Summary Judgment on April 16, 2019. At the hearing, Respondent presented the original Note to the Court and Appellant for review. Filed at the same time as Respondent's Motion for Summary Judgment was a Declaration of Plaintiff in Support. This Declaration was prepared by Fay Servicing LLC, and states that Fay Servicing is the loan servicer for Respondent.

III. ARGUMENT

A. RESPONSE TO ASSIGNMENT OF ERROR NO. 1: Fay Servicing has an agency relationship with Plaintiff/Respondent as its loan servicer and can hire an attorney to execute its obligations of servicing the loan.

Appellants make the argument that the trial court erred in not requiring McCarthy & Holthus ("MH") to present proof of its authority to represent Respondent. However, this argument is based on in incorrect reading of the relevant statute, RCW 2.44.030.

"This statute expressly states that the trial court "may" require an attorney to prove his or her authority. RCW 2.44.030. In other words, RCW 2.44.030 vests authority in the trial court to require a showing of authority by an attorney, but nothing in the statute purports to require the court to do anything." *Kruger-Willis v. Hoffenburg*, No. 45593-5-II, 2015 Wash. App. LEXIS 873, at *4 (Ct. App. Apr. 21, 2015)

As this court determined in *Kruger-Willis v. Hoffenburg,* the permissive word "may" found in the statute grants discretion to the trial court. Therefore, this court would review the trial court decision for abuse of discretion. "'A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.'" *In re Marriage of Valente*, 179 Wn. App. 817, 822, 320 P.3d 115 (2014). It was made clear that a trial court abuses its discretion when it determines that an attorney, "...that states that he has never communicated with his client, it is manifestly unreasonable for the trial court to deny opposing counsel's motion to require counsel to prove the authority under which he appears." *Kruger-Willis v. Hoffenburg*, No. 45593-5-II, 2015 Wash. App. LEXIS 873, at *5 (Ct. App. Apr. 21, 2015). Under that standard, the trial court did not abuse its discretion.

Fay Servicing is a loan servicer for Respondent. A loan servicer is responsible for handling the regular servicing activities of a loan that a loan beneficiary may not have the capability perform. Such actions regularly include collecting payments and enforcing the terms of the Deed of Trust by foreclosing

when the loan enters default. To foreclose, the loan servicer must hire legal counsel. This is the case here with Fay Servicing hiring MH to represent the loan beneficiary, Respondent.

This relationship between the beneficiary, loan servicer, and counsel is well known to the courts. The Supreme Court of Washington discussed at length in *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015) the relationship between a beneficiary and their loan servicer. "Even while the servicer acts on Freddie Mac's behalf to hold the note, to seek to modify the note, and to foreclose on the note, Freddie Mac still *owns* the note." *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 523, 359 P.3d 771, 777 (2015).

Further, Appellants' own Deed of Trust, in paragraph 20, makes the relationship between the Respondent and Fay Servicing clear. It reads in part, "A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law."

Understanding that it is a common relationship and frequent occurrence for a beneficiary to hire a loan servicer and for that loan servicer to then hire an attorney to conduct a foreclosure, it is plain to see that the trial court did not abuse its discretion in not requiring MH to provide proof that it represented Respondent.

Even if this court was to determine that MH was required to provide evidence that it did in fact represent Respondent, the correct course of action would be to remand the matter for further review of the trial court and to allow Respondent to enter proof of representation into the record. “Because the trial court did not require defense counsel to prove the authority under which he appears, defense counsel has not had the opportunity to provide the requisite proof and the trial court has not had an opportunity to consider it. Therefore, we decline the parties' invitation to decide whether defense counsel had authority to appear ...” *Kruger-Willis v. Hoffenburg*, No. 45593-5-II, 2015 Wash. App. LEXIS 873, at *5 (Ct. App. Apr. 21, 2015) Appellants arguments that the judgment should be voided before this is even before the trial court should not be considered.

B. RESPONSE TO ASSIGNMENT OF ERROR NO. 2: Fay Servicing's agency relationship with Plaintiff/Respondent allow it to incur costs that are ultimately reimbursed by Plaintiff/Respondent as beneficiary of the loan.

Appellants’ arguments regarding attorney’s fees are brief but flawed. First, the argument is premised on MH not actually being the attorneys for Respondent. That is addressed *supra.*

Second, Fay Servicing, as loan servicer, is acting on behalf of Respondent to foreclosure on the note. However, Respondent is still the owner of the note and receives all economic benefit of the payments on the note. Fay Servicing collects

the payments and forwards them on to Respondent, minus a fee. The natural corollary of that is that Respondent is also then responsible for any costs and fees incurred by Fay Servicing in foreclosing on the note. Therefore, Respondent is entitled to attorney's fees and costs may have initially been paid by Fay Servicing to MH.

C. RESPONSE TO ASSIGNMENT OF ERROR NO. 3: Since Defendant/Appellant is still living, the burden of proving the Note was fraudulent lies on Defendant/Appellant.

Appellants allege that they did not sign the Note and signed declarations attesting to this. Appellants further argue that the trial court ignored this testimony. Respondent argues that the trial court did in fact consider the Appellants' testimony and found it lacking.

Appellants entire argument appears to be based on an incomplete reading of the statutory language provided under RCW 62A.3-308. To support their arguments, Appellants cite only the first portion of RCW 62A.3-308(a):

> In any action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity . . .

This ignores the rest of the statute that reads:

> …but the signature is **presumed to be authentic and authorized** unless the action is to enforce the liability of the purported signer

> **and the signer is dead or incompetent at the time of trial** of the issue of validity of the signature. (emphasis added)

It is clear that Mr. Peterson was alive as he appeared at the summary judgment hearing. Since he was alive and well, the law states that the presumption is that the signature of Mr. Peterson on the Note is authentic. The burden shifts to the party making the claim that their signature is forged because they are in the best position to find evidence to support that claim. Under RCW 62A.1-206, if there is a statutory presumption of a fact, the trial court must find the existence of that fact barring clear evidence that the signature was forged or unauthorized. Respondent does not need to prove that the signature is valid.

Furthermore, Appellant's evidence that their signatures were forged was deficient. Their declarations must fail because they only assert that the signatures were forged, under their mistaken interpretation of RCW 62A.3-308(a), and do not provide any substantive evidence of fraud. All that is left are self-serving declarations with no supporting evidence.

Finally, Appellants cite the unpublished opinion from *21st Century v. Robertson,* **Appellants' Brief page 20**, stating that it is analogous to the case at hand. In that case, the Note was examined and presumably credibly claimed to be a copy. This bears little resemblance to this matter. Appellant never examined the original Note that Respondent's counsel had in their possession in their Seattle office. Respondent also presented at the summary judgment hearing the original

Note, with a wet ink signature of Mr. Peterson. This Note was examined by the court and was available for Mr. Peterson to examine. There is no issue of triable fact because Appellants never took a step to examine the Note or to present credible evidence of the Note being a copy or the signatures being fraudulent.

D. RESPONSE TO ASSIGNMENT OF ERROR NO. 4: The Note and Deed of Trust were never split, Plaintiff/Respondent holds the original Note, and chain of title is irrelevant to enforcing the obligation under the Note.

Again, Appellants base their arguments on a faulty reading of RCW 62A.3-308. Appellants argue that Plaintiff is responsible under the statute to prove that each signature on the included endorsements is by someone with authority to make such signatures. Appellants do not support their arguments with case law, so we are left applying the plain language of the statute. As stated *supra*, RCW 62A.3-308(a) states that the signatures on the Note are presumed valid barring enough evidence from the denying party to overcome that presumption.

Appellant's arguments that Respondent is not entitled to enforce the Note because of defects within the endorsements on the Note are not supported factually. Once again, Appellants make their arguments based on a review of the copy of the Note provided in Respondent's Complaint and Motion for Summary Judgment. Appellants failed to review the original Note and such alleged claims could have been resolved if that step had been undertaken.

The original Note is five pages, but the copies presented include six pages. This is easily explained by the fact that the first endorsement was on the back of the fifth page. A copy of the back of the fifth page would create a sixth page. That first endorsement is from the original lender First Magnus Financial Corporation to Countrywide Document Custody Services. A second endorsement is from Countrywide Document Custody Services to Countrywide Home Loans, Inc. who then endorsed it in blank. Since the Note is in endorsed in blank and in the possession of Respondent, Respondent is clearly the holder of the Note and entitled to enforce its terms. RCW 62A.1-201(b)(21)(A), 62A.3-301. The trial court reviewed the original Note and determined this to be accurate. Appellants do not contest that Respondent is in physical possession of the Note and that it is endorsed in blank. Therefore, Respondent is "…the holder of the Note as a matter of law" and entitled to enforce it. *Zalac v. CTX Mortg. Corp.*, No. C12-01474, 2013 U.S. Dist. LEXIS 20269, at *8-9 (W.D. Wash. Feb. 14, 2013.)

Any arguments that there are two different allonge pages can easily be explained that two different copies of the same Note were used. One had generated text running along the top and that text contained the loan number which must be redacted. Again, the original Note was presented to the trial court. No material language was missing from either copy. This does not rise to the level of a triable fact.

Appellants' final argument is that the Note and Deed of Trust were somehow split and this prevents Respondent from foreclosing. Appellants argue that no evidence was ever presented that MERS returned the deed of trust to the original lender or a subsequent note holder. This argument is based on the claim that the recorded assignments of the Deed of Trust do not align with the endorsements and that Respondent never provided an explanation. This argument is not supported by facts.

Both Respondent's Complaint and its *Declaration of Plaintiff in Support of Motion for Default and General Judgment of Foreclosure* contained a complete chain of assignments from MERS to Respondent. The Deed of Trust was first assigned to Bank of America, N.A., who was successor by mergers and name changes to Countrywide Home Loans, a specific endorsee of the Note. Bank of America, N.A. then assigned the Deed of Trust to Respondent, who is the current holder of the Note. The Note was never split from the Deed of Trust.

Furthermore, when the Note was transferred to Respondent, and every intervening party that ever held the Note, the Deed of Trust was transferred with it by operation of law. It is black letter law in Washington that the Deed of Trust follows the transfer of the debt:

> The statute merely codifies the longstanding common law rule that the deed follows the debt: "Transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." *In re Jacobson*, 402 B.R. 359, 367 (noting that "this principle is neither new nor unique to Washington")

> (quoting *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872)); see also *Fid. & Deposit Co. of Md. v. Ticor Title Ins. Co.*, 88 Wn. App. 64, 68-69, 943 P.2d 710 (1997) (noting "the maxim that the mortgage follows the debt"). *Flagstar*, as the Note-holder and beneficiary, properly appointed MTC.

Myers v. MERS, No. 11-cv-05582, 2012 U.S. Dist. LEXIS 30891, at ***11** (W.D. Wash. Feb. 24, 2012)

> As it is well-established that the "security instrument will follow the note," *Bain*, 285 P.3d at 44, <u>CitiMortgage's possession of the original Note imparts the authority to enforce the terms of the Deed of Trust</u>. See *Lynott v. Mortgage Electronic Registration Systems, Inc.*, 2012 U.S. Dist. LEXIS 170607, 2012 WL 5995053 (W.D. Wash. 2013) (explaining that the Deed of Trust Act merely codifies "the longstanding principle that the 'deed follows the debt'") (citing *Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313 (1872)). Thus, Plaintiffs' argument that CitiMortgage lacks standing to enforce the Deed as a valid contract between the parties is unavailing.

Johnson v. CitiMortgage, Inc., No. 2:13-cv-00037, 2013 U.S. Dist. LEXIS 177065, at *10-11 (W.D. Wash. Dec. 17, 2013) (emphasis added).

It cannot be disputed that Respondent at all times during this foreclosure action has had standing to enforce the terms of the Note and foreclose.

IV. <u>CONCLUSION</u>

This Court should uphold the decision of the superior court. No evidence was provided by Appellant at summary judgment that rises to the level of creating a dispute about factual issues. Appellants' should not be awarded attorney's fees.

DATED November 25, 2019

/s/ Warren Lance
Warren Lance, WSBA # 51586
Attorney for Respondent CITIBANK N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF NRZ PASS-THROUGH TRUST VI

CERTIFICATE OF SERVICE

I, Jacob Flatau, certify that on November 25, 2019, I served a copy of the foregoing document, described as **RESPONDENT'S RESPONSE BRIEF**, on the following person by U.S. First Class Mail and E-Mail:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this Declaration was executed in Seattle, Washington.

DATED: November 25, 2019
MCCARTHY & HOLTHUS LLP
Legal Assistant: /s/__Jacob Flatau____

MCCARTHY HOLTHUS

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