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67177-4

No. 67177-4-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

DANIEL C. PETERSON and KRISTI J. PETERSON,
husband and wife,

Appellants,

v.

CITIBANK, N.A., AS TRUSTEE ON BEHALF OF HOLDERS OF
THE AMERICAN HOME MORTGAGE ASSETS TRUST 2006-4,
MORTGAGE BACKED PASS-THROUGH CERTIFICATES
SERIES 2006-4 *et al.*,

Respondents.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

Appellant Daniel Peterson took out a subprime negative amortization loan to purchase a home for himself and his wife, appellant Kristi Peterson. When the Petersons' mortgage payments skyrocketed a few years later due to the nature of the loan, they defaulted on the loan on the advice of the loan serving agent to try to qualify for a loan modification. They were unable to modify the loan, and the purported trustee under the deed of trust started foreclosure proceedings.¹

Dan filed a voluntary petition for bankruptcy, which automatically stayed the foreclosure sale. When the bankruptcy court lifted the stay to permit the trustee to pursue its state court remedies, the alleged successor trustee initiated a new foreclosure action. The Petersons filed a lawsuit in state court under the Deeds of Trust Act, RCW 61.24 *et seq.* ("Act") to challenge the second nonjudicial foreclosure. MERS and Citibank² successfully moved to dismiss the Petersons' lawsuit.

MERS and Citibank conceded below that their pursuit of their state court remedies, *i.e.*, foreclosure, was governed by the Act once the

¹ Respondent Mortgage Electronic Registration Systems, Inc. ("MERS") was the alleged beneficiary under the deed of trust. Respondent American Home Mortgage Servicing, Inc. ("American") was the loan serving agent for the trustee, respondent Citibank, N.A. ("Citibank").

² American and Citibank will be referred to collectively as "Citibank" unless the context requires otherwise.

bankruptcy stay was lifted. Yet they argue the Petersons are precluded from pursuing their own available state court remedies under the Act to restrain the foreclosure. In essence, MERS and Citibank want to reap the benefits of the Act while prohibiting the Petersons from using it to properly challenge the foreclosure. The Court should reject MERS and Citibank's lopsided application of the Act.

The Act provides the only method by which the Petersons may properly restrain the second foreclosure sale. As the Act provides: "Nothing contained in this chapter shall prejudice the right of the borrower . . . to restrain, on any proper legal or equitable ground, a trustee's sale." RCW 61.24.130(1).

B. RESPONSE TO THE COUNTERSTATEMENT OF THE CASE

Not surprisingly, the counterstatement of the case focuses mainly on the Petersons' default and Dan's subsequent bankruptcy in an effort to camouflage MERS and Citibank's violations of the Act. Neither the Petersons' default nor Dan's bankruptcy vitiate or minimize their claims that MERS and Citibank violated the Act.

MERS and Citibank fail to mention the circumstances surrounding the Petersons' default. When the Petersons discovered their mortgage payments had more than doubled, they contacted American to request a loan modification. CP 71, 88. American informed them that they would

not qualify for a loan modification until they stopped making their monthly mortgage payment. CP 88. The Petersons defaulted on their loan payments, *as directed by American*, in an effort to qualify for the loan modification. CP 88. American did not modify the loan. CP 88. The Petersons remained in default.

On December 18, 2009, Northwest Trustee Services, Inc. (“Northwest”) transmitted a Notice of Default to the Petersons. CP 60-64. The notice identified Citibank as the beneficiary (Note/owner) under the deed and Northwest as Citibank’s agent. CP 61-63. But as MERS and Citibank admit, Citibank *had not yet received its interest as a beneficiary* under the deed *nor had Northwest been appointed as Citibank’s successor trustee*. Br. of Resp’ts at 5. MERS’s assignment to Citibank did not occur until *after* Northwest had initiated the foreclosure process. *Id.*

On May 7, 2010, Northwest transmitted a Notice of Trustee’s Sale to the Petersons. CP 66-69. The notice of sale informed the Petersons that they could bring a lawsuit to restrain the sale pursuant to RCW 61.24.130 and that their failure to do so could result in a waiver of any proper grounds for invalidating the trustee’s sale. CP 68.

On August 5, 2010, Dan filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, which automatically stayed the pending foreclosure sale. CP 186, 198-236. The

bankruptcy court lifted the stay on November 3, 2010 to permit Citibank to pursue its state court remedies.³ CP 153-55. Northwest, on behalf of Citibank, initiated a second foreclosure action. CP 288.

The Petersons filed the underlying action to restrain the nonjudicial foreclosure. CP 1-15, 73-74. In addition to alleging a cause of action for a defective trustee's sale pursuant to RCW 61.24.030, they plead six other causes of action, including: defective initiation of foreclosure, quiet title, slander of title, breach of contract, violation of the Consumer Protection Act, RCW 19.86 *et seq.* ("CPA"), and unjust enrichment. CP 8-13.

MERS moved to dismiss, arguing the two claims asserted against it failed to state a claim for relief under CR 12(b)(6). CP 98-106. Citibank and MERS moved for judgment on the pleadings in part under CR 12(c), arguing issue preclusion barred relitigation of Citibank's ability to foreclose; even if it did not, they argued that Dan lacked standing to pursue the claims against them and that the trial court lacked subject matter jurisdiction based on the bankruptcy proceedings.⁴ CP 167-81, 272-75.

³ The Court is asked to take judicial notice that Dan's bankruptcy was dismissed on July 11, 2011. *In re McGhan*, 288 F.3d 1172, 1175 (9th Cir. 2002) (noting state court had the power to take judicial notice of debtor's bankruptcy proceedings).

⁴ The Petersons acknowledge that they mistakenly identified the bases for the motions to dismiss in several instances in their opening brief. They apologize for any confusion. In any event, the Court's analysis of the motions remains the same because they raise identical issues and are subject to the same standard of review.

The trial court granted the motions only under CR 12(c) and CR 12(b)(6). CP 364-65, 373-78; RP 70-73. The court did not rule on Citibank's arguments that the court lacked jurisdiction or that Dan lacked standing. *Id.* RP 71-72.

C. ARGUMENT IN REPLY

(1) Standard of Review

The parties agree a CR 12(b)(6) motion to dismiss for failure to state a claim and a CR 12(c) motion for judgment on the pleadings raise identical issues and are reviewed *de novo*. Br. of Appellants at 12-13; Br. of Resp'ts at 11-12. They also agree the Court is to accept the allegations in the complaint as true and may consider hypothetical facts outside the record. *Id.* Dismissal here was therefore inappropriate where it is beyond doubt that the Petersons proved facts to justify their recovery.

(2) The Petersons' Complaint Against MERS Was Factually Sufficient And Should Not Have Been Dismissed Under CR 12(b)(6)

As the parties agree, the CPA declares unlawful "unfair or deceptive acts in the conduct of trade or commerce." RCW 19.86.020. It is to be liberally construed. RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

To state a claim under the CPA, a plaintiff must show: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce;

(3) an impact on public interest; (4) an injury to the plaintiff in his or her business or property; and (5) causation. *See, e.g., Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007). Failure to satisfy even one element is fatal to a CPA claim. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986).

MERS mistakenly asserts the trial court properly dismissed the Petersons' CPA claim because they failed to plead facts sufficient to establish all of the required elements. Br. of Resp'ts at 13. Although MERS correctly identifies the five elements required, it does not respond to the Petersons' arguments that its conduct impacts the public interest or that its alleged misconduct occurred in trade or commerce. Br. of Appellants at 15-17. MERS concedes these points by failing to respond to them. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). In any event, the fundamental flaw in MERS's argument is that it considers only the facts alleged in the CPA cause of action section of the Petersons' complaint. It self-servingly ignores facts justifying the Petersons' recovery alleged elsewhere.

The Petersons' CPA claim depends on whether MERS may be the beneficiary (or nominee of the beneficiary) under Washington state law. If MERS violated state law, its conduct may very well be classified as

“unfair” under the CPA. The Petersons presented facts, presumed to be true and construed in their favor, showing that:

- MERS did not hold the Note or the deed, but was merely a registration system that allows its members to change ownership of documents without assuring proper assignment or transfer, CP 4-5;
- MERS did not hold the instant note and was not by statutory definition a “beneficiary,” RCW 61.24.005(2);
- MERS falsely represented itself as a statutory beneficiary with specific powers from the actual beneficiary to assign its interest, CP 6, 56;
- MERS purported to assign or transfer its interest in the note and/or deed without actual authority and without the required documentation, CP 6;
- MERS did not obtain authorization from the beneficiary of record to properly assign any interest it claimed to Citibank, CP 2, 5;
- MERS did not transfer its alleged interest under the deed to Citibank until two months *after* Northwest initiated the foreclosure process, CP 7; and
- Since MERS could not be a beneficiary and had no authority to assign the deed, Citibank’s appointment of Northwest as successor trustee was invalid. CP 6-7.

These facts are sufficient to permit the Court to draw the reasonable inference that MERS engaged in deceptive and unfair acts or practices in violation of the CPA.

The Petersons were harmed financially by having to initiate a lawsuit to contest and enjoin an unlawful foreclosure predicated on

MERS's deceptive conduct. What MERS seems to forget is that the damages incurred by a plaintiff suing under the CPA do not need to be significant to be considered an "injury" under the statute. The injury requirement is met upon proof that the plaintiff's "property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). *See also, Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 94, 605 P.2d 1275 (1980) (noting plaintiff suffered injuries for purposes of the CPA in part because he was inconvenienced). Moreover, the Petersons were not required to prove they suffered monetary damages; unquantifiable damages are sufficient. *See Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). The Petersons expended funds to challenge the foreclosure, which was based on MERS's initial misconduct, and they experienced a cloud on their title arising from that activity.

The Petersons did not plead their CPA claim in a conclusory fashion. They identified with particularity the unfair or deceptive trade practices in which MERS allegedly engaged. Their allegations, accepted as true, permit the reasonable inference that MERS committed the misconduct alleged and that they are entitled to relief. Based on the

sufficiency of the Petersons' pleading, the trial court erred by granting MERS's motion to dismiss as to the Petersons' CPA claim.

(3) The Petersons' Complaint Against MERS And Citibank Was Factually Sufficient And Should Not Have Been Dismissed Under CR 12(c)⁵

⁵ MERS and Citibank argue the Petersons' appeal from the April 22, 2011 order granting their CR 12(c) motion to dismiss is untimely because the Petersons did not file the amended notice of appeal until June 15, 2011. Br. of Resp'ts at 16-19. What MERS and Citibank seem to forget is that they had the opportunity to raise this issue with the Court months ago but failed to do so.

After the Petersons filed their notice of appeal from the order dismissing MERS under CR 12(b)(6), the Court notified them that it believed the order was not appealable as a matter of right because it appeared to be taken from an order granting partial summary judgment and did not contain the certification and findings required by CR 54(b) and RAP 2.2(d). The Court also noted that it had an independent obligation to determine whether review should be taken at that stage of the proceedings.

The Petersons responded, noting they had filed an amended notice of appeal seeking review of both the order granting MERS's motion to dismiss and the order granting MERS and Citibank's motion for judgment on the pleadings. Given that the trial court had granted both motions and entered judgments in favor of all of the defendants, the Petersons argued that no claims remained to be litigated. Neither MERS nor Citibank responded to this correspondence from the Petersons or objected to the timeliness of the amended notice. Thereafter, the Court sent a letter stating the Petersons had clarified the matter and striking the hearing. If MERS and Citibank thought the amended appeal was untimely, they could have addressed the matter months ago as they have been represented by the same legal counsel. They chose not to do so.

Finally, the Court may apply RAP 18.8(a) to serve the ends of justice. The Court has held that "[t]he purpose of a notice of appeal is to notify the adverse party that an appeal is intended." *State v. Olson*, 74 Wn. App. 126, 128, 872 P.2d 64 (1994), *aff'd*, 126 Wn.2d 315, 893 P.2d 629 (1995). The Petersons' opening brief set forth assignments of error; arguments on the issues raised and references to legal authority specifically relating to the CR 12(c) dismissal order. MERS and Citibank's response brief addresses all of the issues the Petersons have raised. MERS and Citibank will not be unduly prejudiced by this Court's decision to review the CR 12(c) order as presented in the Petersons' brief. See *In re Truancy of Perkins*, 93 Wn. App. 590, 969 P.2d 1101, *review denied*, 138 Wn.2d 1003, 984 P.2d 1033 (1999) (briefs sufficiently set forth basis for challenge to orders so as to notify school district that appeal was intended even though notices of appeal did not include various contempt orders to which students assigned error in their briefs). Review of this issue will best serve the interests of justice. The Court should therefore reach the merits of this issue.

As the Petersons noted in their opening brief, no court has specifically ruled that an order granting relief from stay in a bankruptcy proceeding collaterally estops a plaintiff from pursuing claims in state court brought pursuant to the Act. Br. of Appellants at 19. It seems that MERS and Citibank have likewise been unable to locate such authority. Br. of Resp'ts at 20-27. The Court should therefore assume no such authority exists. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978) (a court may assume that where no authority is cited, counsel has found none after search).

But the courts have ruled that collateral estoppel does not apply where the burden of proof in the two proceedings differs. *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 531 (9th Cir. 1987); *Standlee v. Smith*, 83 Wn.2d 405, 407, 518 P.2d 721 (1974). *See also, In re Johnson*, 756 F.2d 738, 740 (9th Cir. 1985), *cert. denied*, 474 U.S. 828, 106 S. Ct. 88, 88 L.Ed.2d 72 (1985) (stay litigation in a Chapter 11 bankruptcy does not address the validity of a claim or contract underlying the claims; stay hearing are thus handled in a summary fashion).

In this case, the first proceeding between the Petersons and Citibank was a bankruptcy hearing to determine whether the automatic stay should be lifted. There, the burden of proof was on Citibank to show only that it had a "colorable claim," *i.e.*, that it appeared to have a right to

proceed with the foreclosure proceeding, and that there would not be irreparable harm if the stay was lifted. *See Johnson*, 756 F.2d at 741. As a matter of law, that was the only matter before the bankruptcy court. *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 33 (1st Cir. 1994). By contrast in this action, the Petersons bear the burden of proving the merits of their claims by a preponderance of the evidence. The trial court's application of collateral estoppel, in light of the parties' different burdens of proof, was erroneous. *See Wilcox*, 815 F.2d at 531.

Collateral estoppel also does not apply when the elements to be proven and the degrees of proof differ. MERS and Citibank's protestations to the contrary, the stay hearing did not involve a full adjudication on the merits of the parties' claims, defenses, or counterclaims. As noted by the Ninth Circuit BAP in *First Fed. Bank of Cal. v. Robbins (In re Robbins)*, 310 B.R. 626, 631 (9th Cir. BAP 2004):

Stay relief hearings do not involve a full adjudication on the merits of claims, defenses, or counterclaims, but simply a determination as to whether a creditor has a colorable claim.

(Emphasis added). Specifically, stay hearings are limited to issues of the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization. *See Johnson*, 756 F.2d at 740. They are handled in a summary fashion. *Id.* (citing *In re*

Cedar Bayou, Ltd., 456 F.Supp. 278, 284 (W.D. Pa., 1978)). The decision to lift a stay is not an adjudication of the validity or avoidability of the claim, but only a determination that the creditor's claim was sufficiently plausible to allow its prosecution elsewhere.

Here, the bankruptcy court lifted the stay so that Citibank could pursue its state remedies. It did not conclusively resolve the main issues asserted by the Petersons in their underlying complaint. The bankruptcy court did not determine the merits of Citibank's right to collect the debt, whether Citibank owned that debt, or whether it had a security interest in the Petersons' property. The bankruptcy court did not finally and definitively establish the rights of either Citibank or the Petersons. It merely made an initial determination that Citibank had a "colorable claim" sufficient to lift the automatic stay. This left Citibank and the Petersons free to pursue their state law remedies, which they both did under the Act.

Given the limited nature of the relief Citibank obtained through its motion for relief from stay and because final adjudication of the parties' rights and liabilities did not occur in the bankruptcy court, the trial court erred by applying collateral estoppel to bar the Petersons' claims.

But even if the collateral estoppel applies, the trial court erred in granting the motion to dismiss because MERS and Citibank did not satisfy all of the required elements. The party asserting collateral estoppel must

prove that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice. *See, e.g., Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730-32, 254 P.3d 818 (2011); *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002). MERS and Citibank did not satisfy the first, second, and fourth elements.

First, the underlying case and the bankruptcy case did not involve the same issue. The only issue before the bankruptcy court was whether Citibank had a colorable claim sufficient to lift the stay and allow it to pursue its state remedies. That court's decision was thus limited to issues involving Citibank's alleged lack of adequate protection, Dan's equity in the home, and the necessity of the home to an effective reorganization. *See Johnson*, 756 F.2d at 740.

Second, the order lifting the stay did not provide a final judgment on the merits of the Petersons' claims in this action. The bankruptcy court did not conduct a full adjudication on the merits of *any* party's claims or defenses. The stay merely returned Citibank and the Petersons to their pre-bankruptcy relationship. Both parties are entitled to pursue their state court remedies.

Finally, it would be unjust to prevent the Petersons from litigating their claims in state court. As the Petersons noted in their opening brief and reiterate below, the Act unquestionably permits them to file a lawsuit to restrain the second foreclosure. MERS and Citibank have provided no authority to the Court to suggest otherwise. Where the Petersons have done what the Act permits, it would be unjust to prevent them from litigating their claims and enjoining the foreclosure sale.

Collateral estoppel does not preclude the Petersons' claims because MERS and Citibank failed to satisfy all of the required elements. But even if MERS and Citibank carried their burden, collateral estoppel precludes only those issues that were litigated and necessarily and finally determined in the prior proceeding. *See Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 307, 96 P.3d 957 (2004). Any issues not litigated and finally determined in the bankruptcy court should not be barred in the instant suit. *See id.*

(4) The Court Should Reject MERS and Citibank's Alternative Arguments

MERS and Citibank make several alternative arguments in a last ditch effort to convince this Court to affirm. Br. of Resp'ts at 27-33. They argue the Petersons' claims were an asset of the bankruptcy estate and that only the bankruptcy trustee has standing to pursue them. They

also argue Dan should be estopped from pursuing his claims because he failed to identify them as an asset in the bankruptcy action. Finally, they argue the trial court lacked subject matter jurisdiction. *Id.* But the trial court did not rule on those matters. Instead, the court's ruling on the motion was limited to a determination of the collateral estoppel issue. RP 71-72. Accordingly, this Court should decline to consider MERS and Citibank's alternative arguments. *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000) (noting the courts generally will not review a matter on which the trial court did not rule). But even if the Court considers these arguments, they should not persuade this Court to affirm.

a. Dan has standing to pursue his claims

MERS and Citibank first argue Dan lacks standing to bring his claims in state court because he failed to disclose them as an asset in the bankruptcy action. Br. of Resp'ts at 30. They are mistaken. Dan has standing to pursue his claims.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). The doctrine serves three purposes: (1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn

testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005). The courts will generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during the bankruptcy proceedings, but then pursue the claim after the bankruptcy discharge. *Bartley-Williams*, 134 Wn. App. at 98. But the doctrine may not be applied in situations where a party can reasonably explain the differing positions. *Garrett v. Morgan*, 127 Wn. App. 375, 379, 112 P.3d 531 (2005) (overruled in *Arkison* only on grounds that judicial estoppel cannot be applied to bankruptcy trustees); *see also, New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L.Ed.2d 968 (2001) (judicial estoppel may be inappropriate when a party's prior position was based on inadvertence or mistake).

Here, the cases upon which MERS and Citibank rely are easily distinguishable because they involve non-Chapter 11 bankruptcies where the debtors had already been discharged. *See, e.g., Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (judicial estoppel did not bar a bankruptcy trustee from pursuing a debtor's personal injury claim filed after debtor's Chapter 7 discharge); *Cunningham*, 126 Wn. App. at 225 (debtor estopped to file a personal injury claim after being discharged

out of Chapter 7 bankruptcy); *Linklater v. Johnson*, 53 Wn. App. 567, 768 P.2d 1020 (1989) (debtor lacked standing where he had already been discharged and right of action accruing prior to bankruptcy was neither disclosed to nor administered by trustee in bankruptcy).

By contrast here, Dan filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101. He had not yet been discharged from the bankruptcy and was in the process of amending his bankruptcy schedules when the Petersons filed their lawsuit. The argument that he lacks standing becomes a moot point once the bankruptcy schedules are amended. More to the point, the bankruptcy has been dismissed rather than discharged. In addition, the Petersons brought their lawsuit as a defensive action under the Act to restrain the second foreclosure sale. Unlike the Petersons, the debtor in *Arkison* made an offensive claim to seek recovery for a personal injury claim.

MERS and Citibank next erroneously argue that Dan lacks standing to bring claims on behalf of the bankruptcy estate in a Chapter 11 filing. Br. of Resp'ts at 28-29. Again, they are mistaken. Dan has standing to bring the claims raised in the Petersons' complaint as the debtor-in-possession of his Chapter 11 bankruptcy estate.

Pursuant to 11 U.S.C. § 1107, a debtor filing for Chapter 11 bankruptcy protection is placed in possession of the bankruptcy estate.

The debtor is called a debtor-in-possession. It is well-settled that unless a bankruptcy trustee is appointed, the debtor-in-possession has the rights and powers of a bankruptcy trustee. *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061, 1066 (9th Cir. 2001) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 n.3, 120 S. Ct. 1942 147 L.Ed.2d 1 (2000)). *See also, McGuire v. United States*, 550 F.3d 903, 914 (9th Cir. 2008) (only bankruptcy trustees, debtor-in-possession, or a bankruptcy court have standing to sue on behalf of the estate).

Dan was the debtor-in-possession for purposes of his Chapter 11 bankruptcy estate. In addition, a bankruptcy trustee had not been appointed over his estate. Dan thus has the full authority of a bankruptcy trustee to act on behalf of the estate as the debtor-in-possession and he is the proper party to bring these claims in state court.

b. The trial court had jurisdiction

Finally, MERS and Citibank argue the Petersons' claims should be dismissed because the bankruptcy court had exclusive jurisdiction over their claims. Br. of Resp'ts at 32. On the contrary, the mere fact that a bankruptcy order has issued does not require that any and all further civil proceedings be in the bankruptcy court. *See Hinduja v. Arco Prods. Co.*, 102 F.3d 987, 989-90 (9th Cir. 1996).

State courts have concurrent jurisdiction with the bankruptcy court to hear matters related to state law that have not been decided in the bankruptcy court. MERS and Citibank's argument that the trial court could properly decline jurisdiction as a matter of judicial comity fails because the bankruptcy court did not issue a final judgment on the merits of the Petersons' claims. Judicial comity applies only when there is already a decision rendered by a federal court. *In re Application of Lonergan*, 23 Wn.2d 767, 770-71, 159 P.2d 397 (1945). But here, the bankruptcy court only addressed whether Citibank had a colorable claim sufficient to lift the automatic stay and allow it to pursue state remedies and nothing more. The bankruptcy court made no final determination on the merits of the claims the Petersons raised in their complaint.

State courts and bankruptcy courts have concurrent jurisdiction over all proceedings that arise under the Federal Bankruptcy Code. 28 U.S.C. § 1334(b); *In re Watson*, 192 B.R. 739, 746 (9th Cir. 1996). In addition, a bankruptcy court may, where the interests of the estate and the parties will best be served, consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483, 60 S. Ct. 628, 84 L.Ed. 876 (1940). In this case, the trial court had jurisdiction over the issues raised

in the Petersons' complaint. Their complaint involves unsettled issues of state law with respect to the second foreclosure, namely the intersection of the Bankruptcy Code and the Act.

(5) MERS and Citibank Concede that the Trial Court's Decision to Dismiss the Petersons' Complaint Undermines the Act

As the Petersons noted in their opening brief, the trial court's decision to dismiss their complaint undermines the Act because it eliminates the only method available to them to restrain the second foreclosure sale once it began. Br. of Appellants at 25-27. MERS and Citibank ignore this argument and thereby concede it. *Am. Legion Post No. 32*, 116 Wn.2d at 7.

The Act establishes the procedures for nonjudicial foreclosures as a time-efficient alternative to judicial mortgage foreclosure proceedings. *See Glidden v. Municipal Auth. of Tacoma*, 111 Wn.2d 341, 346, 758 P.2d 487 (1988). The Act "manifests a legislative preference for the presale injunction remedy." Joseph L. Hoffman, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust In Washington*, 59 Wash. L. Rev. 323, 327 (1984) ("Hoffman"). Post-sale challenges are disfavored. *Glidden*, 111 Wn.2d at 348.

RCW 61.24.130 establishes the *only* means by which a borrower may restrain a sale once a nonjudicial foreclosure action has begun. A

borrower who fails to seek his or her presale remedies under the Act waives the right to challenge the foreclosure sale. *See Plein v. Lackey*, 149 Wn.2d 214, 227, 229, 67 P.3d 1061 (2003) (noting a party waives any objection to sale where presale remedies are not pursued). *See also, Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971).

MERS and Citibank seem to suggest elsewhere in their brief that the stay order blankets the Act and operates to prevent the Petersons from filing a defensive action to the second foreclosure. Not so. The bankruptcy court's stay order does not, and cannot, restrict the Petersons' rights under the Act. The stay order is specific to the bankruptcy court and does not supersede any aspect of the Act, including the Petersons' right to enjoin the sale.

Once the bankruptcy court lifted the stay, Citibank had authority to pursue its state court remedies. It did so by initiating a second foreclosure action under the Act. As provided for under RCW 61.24.130, the Petersons filed the underlying lawsuit as a defensive measure to restrain that sale. It would be unjust to allow MERS and Citibank to use the stay order to pursue their state remedies but then use that same order to prevent the Petersons from taking legitimate defensive action to avoid the second foreclosure. The trial court erred by dismissing the Petersons' statutory

challenge to the sale. Failing to reverse that order effectively overrides the statutory protections afforded the Petersons under the Act. That is not something this Court should permit.

(6) Attorney Fees Are Not Appropriate

MERS and Citibank spend an unwarranted amount of time arguing the Petersons are not entitled to their attorney fees because they did not make a proper request in their opening brief as required by RAP 18.1. Br. of Resp'ts at 34-35. They misunderstand the Petersons' request because the Petersons did not request attorney fees, only costs.

In Washington, a court has no authority to award attorney fees unless authorized by contract, statute, or recognized equitable grounds. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986); *Herzog Aluminum Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984); *Bongirno v. Moss*, 93 Wash. App. 654, 657, 969 P.2d 1118 (1999). Pursuant to RAP 18.1(b), a party seeking attorney fees on appeal must devote a section of the opening brief to a request for such fees. A party who fails to comply with this procedure is not entitled to an award of attorney fees. *See, e.g., Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162 P.3d 1153 (2007).

The Petersons did not request fees in their opening brief because no grounds exist to support such a request. Instead, they request costs on appeal if they prevail. RAP 14.2 provides in pertinent part that costs will be awarded to the party that substantially prevails on review. The party seeking costs must request those costs in a separate cost bill, not in a separate section of the opening brief. RAP 14.4. MERS and Citibank's arguments are meaningless where they misinterpret the Petersons' request.

Finally, RCW 4.84.330 is a mutuality provision. Because the Petersons would not have been entitled to attorney fees against MERS or Citibank, RCW 4.84.330 does not provide a basis for those parties to recover attorney fees against the Petersons. More to the point, Citibank fails to offer any authority for the proposition that it "stands in the shoes" of the original lender, American Brokers Conduit, and is therefore entitled to recover its fees if it prevails. Br. of Resp'ts at 35. The Court should assume no such authority exists where Citibank fails to cite any. *Young*, 89 Wn.2d at 625. Citibank's request for fees should be denied.

D. CONCLUSION

The Petersons' complaint stated claims upon which relief can be granted because they proved facts, presumed to be true, that would entitle them to relief. *See, e.g., Halvorson*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). Collateral estoppel does not apply to preclude their claims. The

Court should decline to consider MERS and Citibank's alternative arguments where the trial court did not rule on them.

This Court should reverse the trial court orders granting the motions to dismiss, reinstate the Petersons' claims, and remand for further proceedings consistent with the Court's opinion. MERS and Citibank's request for attorney fees and costs should be denied. Costs on appeal should be awarded to the Petersons.

DATED this 20th day of January, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day set forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Reply Brief of Appellants in Court of Appeals Cause No. 67177-4-I to the following parties:

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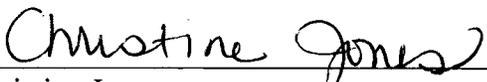
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 31, 2012, at Tukwila, Washington.



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