

No. 71098-2-1
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

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ERIC DIETZE and VICTORIA SEEWALDT,

Plaintiff/Appellants,

v.

JAMES V. KELLEY, et al.,

Defendants/Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

Having failed to timely take the steps necessary to prosecute their case at the trial court level, Plaintiffs are now requesting that this Court turn a blind eye to the Trial Court's right to enforce its own scheduling and order(s). Despite being given every opportunity to submit substantive argument, Plaintiffs instead chose to ignore the Court's requests. Not surprisingly, the Plaintiffs have also failed to timely comply with the appellate court deadlines, further dragging out this longstanding dispute.

Plaintiffs' lawsuit was a quiet title action in which they sought a "judgment confirming plaintiffs' easement rights in the platted rights-of-way in the Plat of Chautauqua Beach providing access to their real property." (CP 6: Complaint, Request for Relief, ¶ 1)

Plaintiffs' Complaint properly named all the owners and their lenders over whose lots Plaintiffs sought to quiet title to an access easement. Yet Plaintiffs timely served only one of the lenders. Two were dismissed following unopposed motions. (CP 629; CP 684)

Lenders with deeds of trust are necessary parties to a lawsuit that seeks to quiet title to the real property pledged to secure payment of their loans. The lawsuit was properly dismissed under Civil Rule 19(a).

This appeal brief is filed jointly by Defendants School Employees Credit Union ("Credit Union"), JPMorgan Chase Bank, N.A. ("Chase"), James and Angela Kelley, Christine Tesch-Spiers, Tamara Kittredge, John and Elvera Friars, and Dean and Shirley Strain. Defendant Boeing Employees Credit Union ("BECU") is not joining in this brief because it is

not a party to the present appeal. Although Plaintiffs ask the Court of Appeals to reverse the uncontested order dismissing BECU from the lawsuit because it was not timely served, Plaintiffs did not serve BECU with their notice of appeal.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Plaintiffs list ten separate assignments of error, nearly all of which involve the Trial Court's discretion. The Trial Court did not abuse its discretion when it modified or extended several deadlines (including several at Plaintiffs' request for their benefit). Nor did the Trial Court abuse its discretion when it dismissed Plaintiffs' lawsuit with prejudice because their failure to serve several indispensable parties was due to Plaintiffs' inexcusable neglect.

III. STATEMENT OF THE CASE

A. Background Facts

Plaintiffs filed the present lawsuit on April 8, 2011. (CP 1) Their Complaint named as defendants six neighboring property owners and five of their lenders who had deeds of trust on the properties over which Plaintiffs sought to impose an access easement. The property owners and lenders were all listed in a Litigation Guaranty that Plaintiffs obtained prior to filing suit for the very purpose of identifying every owner, lender, or other person with an interest in the real properties at issue. (CP 364)

Defendant Tamara Kittredge has two loans secured by deeds of trust on her property, one from Defendant Credit Union and one from Defendant Chase. (CP 4: Complaint, ¶¶ 7-8) Defendants James and

Angela Kelly have two deeds of trust on their property, one from American Mortgage Network, Inc., and the other from Countrywide Bank. The nominee for each is Defendant Mortgage Electronic Registration Systems, Inc. (“MERS”). (CP 3: Complaint, ¶¶ 4-5) BECU has a deed of trust on Defendants John and Elvera Friars’ property. (CP 4: Complaint, ¶ 10) Defendant Chase also has a deed of trust on Defendant Christine Tesch-Spiers; property. (CP 4: Complaint ¶ 13)

Of the five lenders who were named in the Complaint as Defendants because they have deeds of trust on properties owned by various Defendants, only Credit Union was served. Chase, BECU, and MERS (for American Mortgage and Countrywide¹) were named but never timely served.

B. Procedural History

1. Initial Summary Judgment Hearing

Defendant Credit Union filed a summary judgment motion seeking dismissal under Civil Rule 19(a) because of Plaintiffs’ failure to serve four of the five Defendant lenders. (CP 332) All other served Defendants joined in the motion. (CP 376)

Plaintiffs objected to the motion in part because their lawyer said he needed more time to respond. (CP 441) Following oral argument on April 25, 2013, the Court granted Plaintiffs’ request for additional time to

¹ Countrywide was acquired by Bank of America and was referred to as such in some of the later pleadings.

file a supplemental brief. (CP 518) The Court also continued the trial. (*Id.*)

During oral argument, the Court strongly encouraged Plaintiffs to effectuate service on the other lenders named as Defendants in the lawsuit. Plaintiffs took the hint but instead of filing a supplemental brief on the merits of the summary judgment motion as they had asked and been authorized to do, they instead filed only a motion for leave for additional time to serve the remaining Defendants. (CP 520) The motion was granted. (CP 582) The Court's Order gave Plaintiffs until June 15, 2013, to serve the remaining Defendants. (*Id.*) This was the deadline requested by Plaintiffs in their motion and proposed order. (CP 520)

The Court did not rule on the summary judgment motion at that time.

2. The Trial is Continued a Sixth Time

The original trial date was September 24, 2012, and was continued multiple times to a series of dates in 2013.² It was continued to October 21, 2013 for the sixth and last time. (CP 587)

3. Plaintiffs Missed the June 15, 2013, Deadline to Serve the Other Four Lenders

Plaintiffs missed the June 15 deadline to serve the other lenders. (Plaintiffs' Opening Brief at 16–17) The original deadline to serve Defendants was September 16, 2011, as set forth in the Original Case

² See CP 51, CP 65, CP 324, CP 518, CP 584, and CP 587.

Schedule. (CP 7) At Plaintiffs' request, the deadline was extended by the Court to June 15, 2013. (CP 582)

Plaintiffs apparently made no effort to effectuate service until after the new deadline had passed. (CP 645: Smith Declaration, ¶ 4) During summary judgment oral argument on April 25, 2013, the Court expressly asked Plaintiffs to address, in the supplemental brief they were authorized to file late, whether their failure to serve the other Defendant lenders named in the Complaint was due to inexcusable neglect since that would be grounds for dismissal with prejudice. (See CP 576; CP 518) Plaintiffs failed to do so and their inexcusable neglect continued when they failed to meet the new service deadline of June 15 that the Court had extended at their request.

The untimely service was the basis of the motion for dismissal filed by one of the late-served Defendants, Chase. (CP 608) Plaintiffs did not oppose or otherwise respond to the motion and it was granted. (CP 629)

As a consequence of Plaintiffs' unexplained and inexplicably dilatory conduct, at least one of the named and necessary Defendants, Chase, was no longer a party in the lawsuit.³ Plaintiffs had named Chase as a Defendant when their lawsuit was filed 29 months earlier, on April 7,

³ A second lender, BECU, would soon also be dismissed for the same reason in a motion that Plaintiffs did not oppose. Countrywide Bank was also served late, but agreed not to contest the proceedings. It is unclear whether American Mortgage Network, Inc. was properly served. It never appeared.

2011. (CP 1) The lawsuit sought, in part, an easement across two of the properties on which Chase has security interests. Because Plaintiffs missed both the original and extended service deadlines, Chase was dismissed from the lawsuit in a motion that Plaintiffs did not even bother to oppose. (CP 629)

BECU was one of the other lenders that had not been timely served. It also filed a simple motion to dismiss substantially along the lines of the argument made by Chase in its uncontested motion. (CP 675) Once again, Plaintiffs did not oppose BECU's motion and it was granted. (CP 684) Thus, at this point, two indispensable parties had been dismissed from the case.

4. Summary Judgment is Granted to Dismiss the Lawsuit

Defendants Credit Union and Kittredge filed a supplemental summary judgment brief to advise the Court of the current status of the case and to request that it now rule on their earlier summary judgment motion. (CP 666) The other Defendant property owners also requested dismissal.

The case law set forth in the original summary judgment motion was clear and had not changed: When a party seeks to quiet title to an easement over real property, the lenders with deeds of trust on the property are necessary parties under Civil Rule 19(a). See Section IV.D below. The Court therefore granted the summary judgment motion to dismiss Plaintiffs' lawsuit. (CP 680)

5. Plaintiffs' Motion for Reconsideration is Untimely

After the summary judgment motion was granted, Plaintiffs filed a motion for reconsideration. (CP 686) It was denied because it was not timely. (CP 691)

6. Plaintiffs Failed to Serve One of the Defendant Lenders with their Notice of Appeal

Plaintiffs then appealed. Plaintiffs argue that the trial court “erred in granting the Order dismissing BECU and later finding that said Defendant was a necessary party.” (Assignment of Error #7)

Yet Plaintiffs did not serve their Notice of Appeal on BECU. (CP 694) BECU is not listed in Plaintiffs’ declaration of service of its appeal nor in any of the other subsequent certificates of service that accompany its various appellate filings.

IV. AUTHORITY AND ARGUMENT

A. The Trial Court Properly Exercised Its Discretion to Extend and Modify Deadlines

Nearly all of Plaintiffs’ assignments of error involve the Trial Court’s exercise of discretion on matters involving timing and calendar deadlines. The Trial Court has discretion to extend or modify deadlines. CR 6(b). The Court properly did so when it originally considered Defendants’ summary judgment motion after the dispositive motion cutoff. Plaintiffs acknowledged that at the same time, the court granted their request for additional time to file supplemental briefing and to continue the trial. (CP 518) The Trial Court also later granted Plaintiffs’

untimely motion for leave to serve the remaining lenders long after the original deadline had passed. (CP 582)

When Plaintiffs failed to timely serve the four other Defendant lenders, the Trial Court did not err when it put the dormant summary judgment motion back on its calendar and allowed the parties to file briefs addressing Plaintiffs' failure to meet the new service deadline.

The Trial Court was well within its authority when it modified various deadlines to ensure there was no prejudice and that the case would be decided on the merits. By considering the motion, the Court saved the Court and all parties' counsel the burden and expense of an unnecessary trial, an important benefit of a summary judgment motion. A court does not abuse its discretion unless the decision is manifestly unreasonable or based on untenable grounds. *Kucera v. Dept. of Transportation*, 140 Wn.2d 200, 209 (2000).

Moreover, Plaintiffs were not prejudiced. Although Plaintiffs' counsel continues to complain bitterly that the original summary judgment motion was untimely and should not have been considered, the Court eliminated any possible prejudice by granting Plaintiffs leave to file an additional brief after oral argument (which Plaintiffs never did) and by continuing the trial date. Most importantly, the Court gave Plaintiffs an opportunity to entirely avoid any risk of dismissal when it granted Plaintiffs' request for additional time to serve the remaining lenders.

When the summary judgment motion was revived after Plaintiffs missed the new service deadline, the motion was timely. When the Court

continued the trial to October 21, 2013, a new case schedule was issued with a new dispositive motion hearing deadline of October 7. (CP 587) The summary judgment motion was granted by order dated October 3, 2013. (CP 680)

B. The Trial Court Did Not Have Ex Parte Communications With Counsel

The Court did not have any substantive ex parte communications. The communications that Plaintiffs object to was an initial email exchange between defense counsel's secretary and the Court's bailiff to ask if the judge was available for a hearing. Plaintiffs' counsel was copied on all substantive communications with the Court. (See CP 416 at Ex. F)

C. The Trial Court Did Not Err When it Granted Unopposed Motions to Dismiss Two of the Lenders Who Were Not Timely Served

Plaintiffs' 6th and 7th Assignments of Error are that the Trial Court dismissed two of the lenders because they were not timely served. Plaintiffs did not oppose either motion. And of course, the remaining Defendants did not object because if the motions were granted, Plaintiffs' lawsuit would then be prime for dismissal as a result of Plaintiffs' inexcusable failure to join an indispensable party.⁴

⁴ Only one of the Defendant lenders (Bank of America) entered into a stipulated motion and agreed to be bound by the judgment of the Court, as long as there was no monetary judgment involved. The Bank obviously was willing to rely upon the homeowner to defend its position and security interest. (see CP 621) The other Defendant lenders—including Chase and Credit Union—sought dismissals with prejudice. Certainly, none of the lenders “waived and abandoned any interest in this case by knowingly and voluntarily dismissing themselves from the case” as Plaintiffs argue. (Appeal Brief at 24)

The appeals court generally “do[es] not address issues that a party neither raises appropriately nor discusses meaningfully with citations of authority.” *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008) (citing RAP 10.3(a)(6)). RAP 10.3(a)(6) requires that an appellant’s brief contain not only assignments of error, but also, “[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.”

Here, while Plaintiffs assigned error to the Court’s dismissal of Chase and BECU, Plaintiffs failed to appropriately raise the issue or meaningfully discuss it with citations of authority. In fact, the only mention of this issue is in Assignment Nos. 6 and 7. Plaintiffs fail to offer any facts, argument or authority to support these assignments of error. Moreover, it is not fair to reverse an order favorable to BECU when Plaintiffs failed to serve BECU with the notice of appeal and give it an opportunity to defend as required under RAP 5.4(b).

For these reasons, the Court should decline review of these dismissal orders.

Additionally, Plaintiffs waived their right to challenge the dismissal of Chase and BECU when they failed to oppose the motions to dismiss. RAP 2.5(a) provides in part, “The appellate court may refuse to review any claim of error which was not raised in the trial court.” *See also, Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). “The rule reflects a policy of encouraging the efficient use of

judicial resources and refusing to sanction a party's failure to point out an error that the trial court, if given the opportunity, might have been able to correct to avoid an appeal.” *In re Guardianship of Cornelius*, --- Wn. App. ---, 326 P.3d 718, 728 (2014) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)). For instance, *In re Guardianship of Cornelius*, the Court of Appeals refused to consider objections to a guardian ad litem report which were not asserted before the trial court before the report was approved.

Plaintiffs similarly waived their right to appeal the dismissal of the lenders when they failed to raise any objection with the trial court. On August 13, 2013, Chase filed a motion to dismiss on the grounds that Plaintiffs failed to timely serve Chase in accordance with the trial court’s May 20, 2013 order. (CP 608) BECU filed a similar motion on September 26, 2013. (CP 675) Despite being served with the motions (CP 615 and CP 678), Plaintiffs failed to oppose either motion in any way, thus acknowledging that they failed to comply with the court’s May 20, 2013, order.⁵ The trial court noted “Plaintiffs’ failure to respond” when it granted Chase’s dismissal motion on August 29, 2013. (CP 629) BECU was dismissed on October 7, 2013. (CP 684) Plaintiffs did not seek reconsideration of these dismissal orders.

⁵ In their appeal brief, Plaintiffs admit missing the deadline. (Appeal Brief at 16–17) They offer no explanation or excuse for failing to do so.

By failing to respond to the motions to dismiss, Plaintiffs failed to point out any alleged error or prejudice that the trial court would have been able to address or cure, such as whether another an extension to serve the lenders or another trial continuance was appropriate. Because the motions to dismiss were unopposed, the trial court properly granted the motions. Plaintiffs are prohibited from now claiming any error or prejudice resulting from a motion they did not oppose, and that the trial court had no opportunity to even address because it was not raised. The trial court therefore did not err, and the Court should decline review of the dismissals pursuant to RAP 2.5.

Even if Plaintiffs had opposed the motions, the court would not have abused its discretion in granting them.

The Trial Court properly dismissed Chase and BECU as a result of Plaintiffs' repeated and inexcusable failure to timely serve either lender. Plaintiffs ordered a Litigation Guarantee before the case was filed that identified the five lenders with an interest in the subject properties. (CP 364) Plaintiffs, relying on this information, named all five as Defendants in the Complaint filed on April 8, 2011. (CP 1) However, without any excuse, Plaintiffs failed to serve four of the five lenders for over two years.

On April 14, 2013, Defendant Credit Union moved for summary judgment based upon Plaintiffs' failure to serve and join various lenders who were necessary parties. (CP 332) Plaintiffs finally took the Court's advice and filed a motion to extend the time to serve the lenders. (CP 520)

As noted above, the Court granted the motion and set the June 15, 2013 deadline requested by Plaintiffs. (CP 582)

Despite being aware that their claims faced dismissal without the lenders, Plaintiffs inexcusably failed to meet the deadline. Nor did Plaintiffs seek leave for additional time.

Under CR 41(b), a trial court has authority to dismiss an action for noncompliance with a court order. *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 166, 169, 750 P.2d 1251 (1988); *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 37, 823 P.2d 518 (1992) (under the first sentence of CR 41(b), a trial court may exercise its discretion to dismiss an action based on a party's willful noncompliance with a reasonable court order). A trial court also has the discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases. *Wagner v. McDonald*, 10 Wn. App. 213, 217, 516 P.2d 1051 (1973); *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66, 68 (1995). It may impose such sanctions as it deems appropriate for violation of its scheduling orders to effectively manage its caseload, minimize backlog, and conserve scarce judicial resources. *See King County Local Civil Rule 4(h)*.

In this case, the Trial Court appropriately dismissed the claims against Chase and BECU under CR 41(b) because there was a clear failure by Plaintiffs to comply with the May 20, 2013 order. Involuntary dismissal is justified when a party's failure to obey the trial court's order was willful or deliberate and substantially prejudiced the other party.

Johnson v. Horizon Fisheries, LLC, 148 Wn. App. 628, 201 P.2d 346 (2009).

Disregarding a trial court's order without reasonable excuse or justification is considered "willful" for the purposes of determining whether involuntary dismissal is warranted. *Id.* Here, there is no question that Plaintiffs willfully violated the Trial Court's May 20, 2013 order, as they offer no excuse or justification for failing to timely serve the other Defendant lenders. The order was necessitated by Plaintiffs' dilatory conduct in failing to serve four of the lenders for over two years. Fearful that such conduct could result in dismissal, Plaintiffs requested leave until June 15, 2013, to serve the lenders. It cannot be stressed enough that Plaintiffs requested this date in their proposed order.

The Trial Court then gave them one last chance to serve the lenders. Despite knowing the gravity of the situation, Plaintiffs failed to effectuate service before the deadline they selected. There is no excuse or justification for this failure. Plaintiffs offer none. Therefore, the violation of the trial court's order is considered "willful" for purposes of Civil Rule 41.

Additionally, the lenders, including Chase and BECU, were substantially prejudiced by Plaintiffs' repeated failure to timely serve them with the Complaint. The named but unserved Defendant lenders missed over two years of the litigation because they were not added to the lawsuit. Service was late and took place three months before the sixth scheduled trial date of October 21, 2013. Chase and BECU could not reasonably

prepare for trial in this period of time and the trial date had already been continued six times by the Trial Court. Under the Amended Case Schedule, the deadlines for witness disclosures, the deadline to change the trial date, and the deadline to file a jury demand had already passed by the time Chase was served. (CP 587) Moreover, despite over two years of litigation, the case schedule would have required Chase to complete discovery by September 3, 2013, just five weeks away, and to file its summary judgment motion in early September to meet the October 7, 2013 dispositive motion cut-off. (CP 587) Chase simply could not have reasonably investigated the claims, concluded discovery, filed a dispositive motion, and prepared for an October 21, 2013 trial in this extremely limited timeframe. See, *Johnson*, 148 Wn. App. at 640 (affirmed trial court's finding of substantial prejudice when noncompliance with court order and case schedule prejudiced party's ability to prepare for trial because substantial time had passed since the incident when witnesses were still available and memories were still clear). Here, like in *Johnson*, Plaintiffs' dilatory conduct in joining Chase and BECU prevented them from adequately preparing for trial because substantial time had passed from when the action was first filed in April 2011. Therefore, there was substantial prejudice to Chase and BECU by Plaintiffs' dilatory conduct and violation of the May 20, 2013 order, in addition to the original deadline of September 16, 2011 to serve parties. (CP 7)

The Trial Court considered less severe remedies, but properly concluded that dismissals of Chase and BECU were warranted. See

Johnson, 148 Wn. App. at 638-39 (“The trial court must indicate on the record that it has considered sanctions less harsh than dismissal.”) While Credit Union’s motion for summary judgment (based upon Plaintiffs’ failure to serve the lenders) was pending, Plaintiffs sought to avoid dismissal by seeking leave to serve the lenders. In the May 20, 2013 order, the Trial Court wrote that it would allow the late joinder of the parties, but that “Defendant’s [sic] may indicate their preference re: trial date, and may also seek terms as may deemed appropriate by the Court.” (CP 583, emphasis added) In other words, rather than dismissal, the Trial Court would allow late joinder, but would consider appropriate terms to the lenders and would consider a continuance of the trial date. This consideration of less severe sanctions was on the record, as it is contained in the May 20, 2013 order. (CP 583) Despite this generous concession of the trial court, Plaintiffs proceeded to willfully violate the Trial Court’s May 20 order.

Furthermore, the record on Chase’s motion to dismiss presented the trial court with a less severe alternative of a 120-day continuance. (CP 608) In the Trial Court’s order, it expressly removed reference to the alternative request for relief. (CP 630) Thus, the Trial Court indicated on the record that it considered a less severe remedy but was not warranted given that the Plaintiffs made no objection to dismissal by that point, nor did they request a seventh continuance of the trial date. (*Id.*)

In sum, the trial court properly granted the two lenders’ unopposed motion to dismiss under CR 41(b). Plaintiffs’ repeated dilatory conduct

necessitated the Trial Court's May 20, 2013 order, which gave Plaintiffs one last chance to properly serve the lenders. In that order, the Trial Court explicitly considered less severe sanctions, such as a continuance and terms. Inexplicably, and consistent with the pattern of inaction, Plaintiffs failed to comply with the trial court's order without excuse or justification. Plaintiffs then failed to oppose the motion. Under these facts, the Trial Court did not err and properly exercised its discretion in dismissing Chase and BECU, and such dismissals should be affirmed.

D. The Trial Court Did Not Err in Dismissing the Lawsuit Based on Plaintiffs' Failure to Join Indispensable Parties

The Trial Court did not abuse its discretion when it eventually granted the remaining Defendants' joint summary judgment motion based on Plaintiffs' failure to join indispensable parties.

The standard of review of a trial court's dismissal for failure to join an indispensable party under CR 19 is abuse of discretion. *Gildon v. Simon Prop. Group*, 158 Wash.2d 483, 493, 145 P.3d 1196 (2006). Any legal conclusions underlying the decision are reviewed de novo. *Id.*

Credit Union asserted the affirmative defense of failure to join an indispensable party, namely that "Plaintiffs have failed to join as party defendants all the other lenders who have an interest in the real properties

over which Plaintiffs seek an easement.” (CP 108, Affirmative Defense #4)⁶

Civil Rule 19(a) provides:

Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be joined as a party in the action* if (1) in his absence complete relief cannot be accorded among those already parties, or (2) *he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest* or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. . .

(emphasis added). Plaintiffs were aware of the several lenders’ interests in the Defendants’ properties. (CP 364-67, the Litigation Guaranty) While all were named, only one lender (Credit Union) was served.

A party’s allegations are deemed to be admissions. *See Neilson v. Vashon Island School Dist. No. 402*, 87 Wn.2d 955, 958, 558 P.2d 167 (1976) (“A statement of fact made by a party in a pleading is an admission the fact exists as such and is admissible against him in favor of his

⁶ As Plaintiffs note, Credit Union’s Answer and Affirmative Defenses was filed well into the lawsuit. When Plaintiffs filed their confirmation of joinder on September 14, 2011, they acknowledged that a party remains to be served and the parties that have been served have not filed answers. Plaintiffs’ failure to request the Answer earlier does not create a material issue of fact. Plaintiffs did not file a motion to strike it (nor would they have had a basis to do so). The timing of the affirmative defense had no impact on the resolution of the lawsuit. Moreover, the Trial Court gave Plaintiffs all the additional time they requested to avoid dismissal by serving the remaining named Defendant lenders.

adversary.”). Accordingly, the other lenders’ interests in the properties, as alleged in Plaintiffs’ Complaint—and as shown in their Litigation Guaranty—was undisputed.

“In quiet title actions, all persons, known or unknown, who have or claim an interest in the property must be joined.” Tegland, 3 *Washington Practice*, Rules Practice CR 19 (7th Ed.); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 79 Wn. App. 221, 228, 901 P.2d 1060 (1995) (“All owners of an interest in property are presumably indispensable parties to an action involving that property. Failure to join an indispensable party requires the dismissal of an action to quiet title.” (citation omitted)), *aff’d*, 130 Wn.2d 862 (1996). In *PUD No. 1 of Pend Oreille County v. Inland Power & Light Co.*, 64 Wn.2d 122, 390 P.2d 690 (1964), the Washington State Supreme Court recognized the United States as a necessary and indispensable party to condemnation proceedings initiated by a public utility district in light of the United States’ status as lender with a mortgage on the condemned property. *See id.* at 125 (relying on RCW 8.12.060); *see also Grigsby v. Miller*, 144 Or. 551, 558, 25 P.2d 908 (1933) (mortgagee is necessary party in action to condemn land for public use).

Plaintiffs have never made any attempt to argue that their failure to serve the other lenders was not the result of inexcusable neglect, the standard for determining whether the dismissal should be with or without prejudice. As noted above, during oral argument on April 25, 2013, the court expressly asked Plaintiffs to explain, in the supplemental brief they

were granted leave to file, why their failure to timely serve the Defendants was not due to inexcusable neglect. Plaintiffs did not file a supplemental brief at that time or when the summary judgment motion was revived several months later. When the Court agreed to put the summary judgment motion back on its calendar, Plaintiffs were given an opportunity to file a supplemental or responsive brief. They did not do so, thus leaving uncontested the evidence of their inexcusable neglect in failing to meet the original and extended deadlines to serve the other lenders.

Because Chase, BECU, and MERS (for American Mortgage and Countrywide/Bank of America) are indispensable parties and Plaintiffs' failure to serve them was the result of inexcusable neglect, the Trial Court did not abuse its discretion when it dismissed Plaintiffs' lawsuit with prejudice. *See generally Nat'l Homeowners Ass'n v. City of Seattle*, 82 Wn. App. 640, 643, 919 P.2d 615 (1996); (“[I]t is inexcusable neglect to fail to join property owners if their identity is a matter of public record at the time the action is commenced; dismissal for failure to join affirmed[.]” (citing in accord, *Fed. Way v. King Cnty*, 62 Wn. App. 530, 540, 815 P.2d 790 (1991) (it is inexcusable neglect to fail to join property owners if their identity is a matter of public record at the time the action is commenced; dismissal for failure to join affirmed), superseded by statute on other grounds); *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 8, 828 P.2d 7 (dismissal is required where indispensable party who was subject to process was not joined due to inexcusable neglect), *review denied*, 119 Wn.2d 1024 (1992).

Plaintiffs admitted that Tegland 3 *Washington Practice*, Rules Practice CR 19, “does state that persons who have an interest in the property in a quiet title action must be joined.” (CP 434) Plaintiffs do not cite a single case from any jurisdiction in which a lender was not considered an indispensable party when a plaintiff sought to impose an easement or otherwise burden the property on which the lender had a deed of trust. Procedural due process requires that an individual have notice and an opportunity to be heard before he can be deprived of an established property right. Const. Art. 1, § 3.⁷ To avoid application of these cases, Plaintiffs simply asserted that Credit Union “and the other alleged lenders do not have an interest in the property involved in this lawsuit.” (CP 434)

This factual assertion has no basis and is contrary to Plaintiffs’ prior admissions. Plaintiffs’ Complaint alleged that the lenders have deeds of trust on the property over which they seek an easement. (CP 1: Complaint, ¶¶ 4, 5, 7, 8, 10). These allegations are admissions. *See also* the Litigation Guaranty obtained by Plaintiffs shortly before filing suit. (CP 364)

Plaintiffs argue that no lenders were joined in some earlier quiet title actions involving some of the same parties so therefore the Defendant lenders in the present appeal must not be indispensable parties. Plaintiffs do not explain why lenders were not named or joined in other quiet title

⁷ This due process concern is also applicable to BECU, a Defendant lender who was not made a party to this appeal.

lawsuits, but Credit Union will. Most of those cases were to vacate the surrounding streets. Doing so would expand the plaintiffs' properties, not take away their land or impose an easement over them. (CP 450)

In any event, whether a lender was or was not a necessary party in a different lawsuit in which the issue was not raised did not create an issue of fact in the present lawsuit or affect the Court's analysis, especially when the courts that have squarely been asked to address the issue have uniformly held that a lender is an indispensable party.

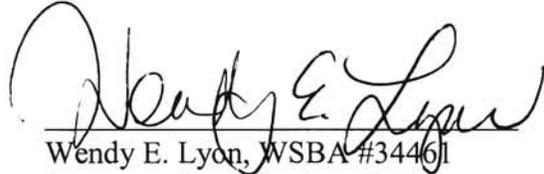
V. CONCLUSION

Plaintiffs knew they needed to join all parties with an interest in the properties over which they sought to quiet title to an easement. They got a Litigation Guaranty and their Complaint named them as Defendants and described their legal interests. Nevertheless, Plaintiffs served only one of the five lenders. Even after the Trial Court gave Plaintiffs an opportunity to avoid dismissal, they failed to meet the Court's new service deadline. As a consequence, two of the four lenders were dismissed in response to uncontested motions.

The Trial Court did not abuse its discretion in considering or granting the Defendants' dismissal motions. The Trial Court should be affirmed.

Dated this 10th day of September, 2014.

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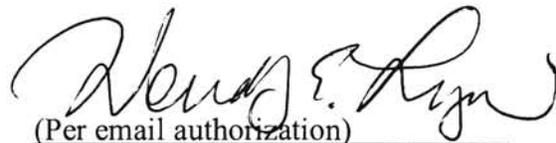
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A handwritten signature in black ink, appearing to read "Wendy E. Ryan". The signature is fluid and cursive, with a large initial "W" and a long, sweeping tail.

(Per email authorization)

Adam R. Asher, WSBA #35517
Attorneys for Defendant JPMorgan/
Chase Bank, N.A.

CERTIFICATE OF SERVICE

I, Susan E. Miller, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent School Employees Credit Union of Washington in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On the date below written, I served a true and correct copy of the foregoing document on the parties as follows:

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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.

SIGNED at Seattle, Washington, this 10th day of September, 2014.



Susan E. Miller