Supreme Court No. 92135-1

Court of Appeals No. 71724-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARISA BAVAND,

Appellant,

vs.

CHASE HOME FINANCE LLC, et al.,

Respondents.

ANSWER OF RESPONDENT
FLAGSTAR BANK FSB
TO APPELLANT'S PETITION FOR REVIEW

Submitted By:
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I. IDENTITY OF ANSWERING PARTY

Flagstar Bank, FSB ("Flagstar") is a respondent in the appeal and defendant in the trial court action.

II. SUMMARY OF GROUNDS FOR DENYING REVIEW

The Court of Appeals correctly affirmed the trial court's decision to grant summary judgment on Ms. Bavand's claims alleged against Flagstar under CR 56. As to Flagstar, Ms. Bavand's Petition for Review merely quibbles with the Court of Appeals' decision, advancing the same erroneous arguments that the Court of Appeals abused its discretion by denying her request for a continuance of the summary judgment hearing, striking the Declaration of Tim Stephenson, and considering the testimony of Lisa Mahony. Her conviction that the Court of Appeals got it wrong falls far short of showing that its decision: (i) conflicts with a decision of the Supreme Court, RAP 13.4(b)(1); (ii) involves an issue of substantial public interest that should be determined by this Court, RAP 13.4(b)(4); or (iii) conflicts with another Court of Appeals decision, RAP 13.4(b)(2). The Court should deny her Petition for Review.

III. COUNTERSTATEMENT OF RELEVANT FACTS

A. Factual Background

Ms. Bavand's Note. On March 18, 2004, Ms. Bavand borrowed $160,000.00 from Capital Mortgage, and Ms. Bavand's loan was evidenced by a promissory note (the "Note") payable to Capital Mortgage. *See* Clerk's Papers ("CP") 1839 ¶ 3.2; *see also* CP 1502-05. Immediately thereafter, the Note was transferred to Flagstar by Capital Mortgage. CP

1839 ¶ 3.2. The Note bears an endorsement to Flagstar as well as a Flagstar endorsement in blank. CP 1504-05.

The Note defined Capital Mortgage as the initial "Lender" but required Ms. Bavand to acknowledge that she "underst[ood] that the Lender may transfer this Note," and that the "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" CP 1502. The Note explained that the parties entered into a Deed of Trust the same day, and that the Note holder would have certain rights upon Ms. Bavand's default: "In addition to the protections given to the Note Holder under this Note, a . . . Deed of Trust. . . dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note." CP 1503.

Ms. Bavand's Deed of Trust. To secure repayment of the Note, Ms. Bavand executed a deed of trust (the "Deed of Trust") encumbering real property located at 628 168th Place SW, Lynnwood, Washington 98037 (the "Property").

The Deed of Trust names "'Joan H. Anderson, EVP' on behalf of Flagstar" as Trustee. CP 1839 ¶ 3.3; CP 1859 at (D). It also provides—consistent with Washington law, RCW 61.24.010(2)—that Ms. Anderson could be replaced with a new trustee at any time and that any "successor trustee shall succeed to all the title, power and duties conferred upon Trustee." CP 1868 ¶ 24. Thereafter, "on or about the same day that the

Note was executed," Capital Mortgage sold Ms. Bavand's Note to Flagstar making Flagstar the beneficiary of the Deed of Trust. CP 1839 ¶ 3.2; RCW 61.24.005 (beneficiary is note holder).

Ms. Bavand concedes Flagstar's ownership of her loan was short-lived. By April 1, 2004, barely one week after she executed the Deed of Trust, Ms. Bavand admits Federal National Mortgage Association ("Fannie Mae") owned the rights to receive payments from the Note holder on the loan. CP 1842 ¶ 3.12. But Ms. Bavand's Note was quickly transferred to Chase in May 2004, with Chase taking over servicing later that year, such that Flagstar's role ended in 2004. CP 1499 ¶¶ 5-6; CP 1507.

Ms. Bavand Defaulted on Her Loan in September 2010. Ms. Bavand defaulted under the Note and Deed of Trust by failing to make payments starting in September 2010—over four years ago. CP 1887-89. As a result, Chase (***not*** Flagstar) delivered (through its agent) a Notice of Default on or about February 1, 2011, listing total arrears at that point of $8,565.62. *Id.* ¶ D. The Notice of Default also explained that failure to cure the default within 30 days would result in recordation of a Notice of Trustee's Sale and a sale of the property within 120 days after the Notice of Trustee's Sale. *Id.* ¶ G. Finally, the Notice of Default explained Chase (***not*** Flagstar) was beneficiary of the Deed of Trust (as Note holder), it was Ms. Bavand's creditor, and it was also the loan servicer. CP 1889 ¶¶ K, L(2).

Chase Appoints a New Trustee and Initiates Foreclosure. After Ms. Bavand defaulted on her loan, Chase (***not*** Flagstar) recorded its appointment of Northwest Trustee as successor trustee—replacing the Flagstar officer initially named as Trustee under the Deed of Trust. CP 1583; CP 1842 ¶ 3.11; & CP 1891. As required by the Deed of Trust Act, RCW 61.24.030(7), Chase (***not*** Flagstar) executed and delivered to Northwest Trustee a declaration (the "Beneficiary Declaration"), stating Chase was "the actual holder of the promissory note or other obligation evidencing the above-referenced loan" or "has requisite authority under RCW 62A.3-301 to enforce said obligation." CP 1598; *see also* CP 261:12-15.

Northwest Trustee Schedules a Trustee's Sale. Because Ms. Bavand did not cure her default, Northwest Trustee initiated foreclosure on Chase's behalf through a May 2012 Notice of Trustee's Sale—8 years after Flagstar's role ended. CP 1842 ¶ 3.13 & CP 1895-1900. To delay the trustee's sale, Ms. Bavand filed a Complaint in August 2012 suing every party involved with her loan and the foreclosure process. *See* CP 1836-51. But Ms. Bavand's Complaint is generally based on one legal theory—that none of the "Defendants had any right to initiate the non-judicial foreclosure procedures set out in [the DTA]." CP 1845 ¶ 4.6. Ms. Bavand's Complaint sought damages and injunctive relief because ***defendants other than Flagstar*** allegedly tried to wrongfully enforce the Note and Deed of Trust. CP 1844 ¶ 3.17.

B. Procedural Background

Flagstar's Motion for Summary Judgment. On January 28, 2014, Flagstar filed its summary judgment motion. CP 1515-31. The motion was supported by the declaration of Lisa L. Mahony, a Flagstar employee, who based her testimony on personal review of Flagstar's business records. CP 1498-1500. Attached to the Mahony Declaration were copies of the indorsed Note and a screen-shot from Flagstar's document management system showing the transfer of the loan to Chase. CP 1501-07. On the same date, Chase, Fannie Mae, MERS, and Northwest Trustee filed motions from summary judgment. CP 1604-1706.

On February 14, 2014, Ms. Bavand filed a memorandum in opposition to Defendants' motions. CP 1449-97. Instead of providing evidence disputing the facts presented in Defendants' motions, Ms. Bavand submitted a Declaration of Tim Stephenson—with a purported "forensic audit" of Ms. Bavand's loan—consisting almost entirely of legal conclusions. CP 1368-86.

Defendants moved to strike the Stephenson Declaration. CP 305-10. Moreover, Flagstar's reply brief pointed out that Ms. Bavand does not dispute that: (i) Ms. Anderson took ***no*** action as Trustee; (ii) Flagstar made ***no*** misrepresentations about the loan to Ms. Bavand; (iii) Flagstar had ***no*** involvement with nonjudicial foreclosure efforts; and (iv) Flagstar did not otherwise affect Ms. Bavand in any way. CP 131-47. The evidence in the record established Flagstar's involvement with Ms. Bavand's loan was short-lived, and that Flagstar had no involvement with

her loan after 2004. *Id.* It was Chase and Northwest Trustee that initiated foreclosure, not Flagstar. Flagstar's active role ended over 10 years ago.

The Trial Court Granted Summary Judgment. Finding no controverting evidence had been presented, the trial court awarded summary judgment to Defendants on March 26, 2014. CP 52-56. On the same date, the trial court entered an order striking the Stephenson Declaration. CP 57-59. On April 3, 2014, Ms. Bavand filed a Notice of Appeal. CP 41-51.

The Court of Appeals Affirmed Summary Judgment. On July 20, 2015, the Court of Appeals, Division I, affirmed the trial court's order granting Flagstar summary judgment. The Court of Appeals correctly considered the testimony of Lisa Mahony, who submitted a declaration as an officer of Flagstar, because it satisfied the requirements of RCW 5.45.020. The Court of Appeals also correctly excluded the testimony of Ms. Bavand's proffered expert witness because it was inadmissible under ER 702 and contained almost entirely impermissible legal conclusions. Finally, the Court of Appeals correctly affirmed the trial court's denial of a continuance of the summary judgment hearing because Ms. Bavand failed to file any motion or affidavit that identifies any genuine issue of material fact that would justify a continuance.

IV. ARGUMENT

Review is appropriate in only four narrowly prescribed circumstances. RAP 13.4(b). The Washington Supreme Court accepts a

petition for review only if: (1) the Court of Appeals' decision conflicts with a decision of the Supreme Court; (2) the decision conflicts with another appellate decision; (3) the case involves a significant question of constitutional law; or (4) the decision involves "an issue of substantial public interest." *Id.*

The Court should not accept review under RAP 13.4(b). The issues here are narrow, discrete, and specific to the facts of this particular matter and covered by established case law.

A. This Court Does Not Need to Review the Court of Appeals' Treatment of Certain Evidentiary Rulings.

1. The Declaration of Lisa Mahony was Correctly Allowed into Evidence.

Ms. Bavand contends that the Declaration of Lisa Mahony and its supporting documents should not have been allowed into evidence and considered by the trial court because Ms. Mahony's "mere averment" of personal knowledge of how Flagstar's records are kept fails to satisfy the business records statute, RCW 5.45.020. Pet. at 9-12. Ms. Bavand argues that while Ms. Mahony claims to have personal knowledge of all the facts contained within her declaration as well as familiarity with Flagstar's record-keeping practices, Ms. Mahony's testimony is "rank hearsay" because no evidence was submitted indicating how the records she refers to were prepared, compiled, or maintained. *Id.* at 10.

The Court of Appeals did not abuse its discretion in affirming the trial court's decision to admit the Mahony Declaration; and this decision

does not conflict with any decision of the Supreme Court. As a result, this Court should deny review of this issue.

CR 56(e) requires competent declarants with personal knowledge:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Thus, under CR 56(e), affidavits have three substantive requirements: (i) they must be made on personal knowledge, (ii) be admissible in evidence, and (iii) show affirmatively that the declarant is competent to testify to the information contained in the declaration. CR 56(e). The requirement of personal knowledge might require someone who signed or witnessed the signing of a document to establish its authenticity. Nevertheless, Washington courts consider the requisite of personal knowledge to be satisfied if the proponent of the evidence satisfies the business records statute. *Discover Bank v. Bridges,* 154 Wn. App. 722 (2010); *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 674-75 (2012) (rejecting challenge to bank employee declaration, holding that affiant's personal knowledge of how records are kept generally was sufficient for business records exception). Indeed, the identical argument made by the same counsel for Plaintiff here, was recently rejected on this same basis. *See Barkley v. Greenpoint Mortg. Funding, Inc.*, --- Wn. App. ---, 2015 WL 4730175, *3-*4 (Aug. 10, 2015), *publication req. granted* Sep. 11, 2015.

Washington's business records statute, RCW 5.45.020, states:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

In support of her argument that Ms. Mohony's testimony was inadmissible hearsay, Ms. Bavand's cites *State v. Fricks,* 91 Wn.2d 391 (1979). Pet. at 11. In *Fricks*, this Court determined that a gas station manager's testimony concerning the contents of a tally sheet of receipts kept by gas station employees was inadmissible hearsay where the tally sheet itself was not produced, and the manager's testimony was the only proof offered as to the contents of the tally sheet. *Fricks,* 91 Wn.2d at 397. Under these circumstances, the Supreme Court determined that the testimony of the manager as to the contents of the tally sheet was inadmissible hearsay and not an acceptable method of proof because the tally sheet itself was hearsay, and thus not necessarily admissible under Washington's business records statute, RCW 5.45.020. *Id.*

Contrary to Supreme Court's decision in *Fricks*, none of Ms. Mohony's testimony was offered to prove the contents of an inadmissible document. Indeed, the Court of Appeals determined that Ms. Mahony's testimony satisfied the requirements of RCW 5.45.020 because she declared under penalty of perjury that: (1) she was an employee or officer

of Flagstar, (2) she had personal knowledge of her employer's practice of maintaining business records, (3) she had personal knowledge from her own review of the relevant records related to Ms. Bavand's note, and (4) the supporting documents attached to her declaration were true and correct copies of documents made in the ordinary course of business at or near the time of the transaction. *See id.*

Furthermore, Ms. Mahony's declaration is indistinguishable from evidence the Court of Appeal has approved previously. For instance, in *Discover Bank v. Bridges*, Discover Bank relied on three affidavits from employees of DFS, an affiliated entity that assisted Discover Bank in collecting delinquent debts. The three affiants stated in their respective affidavits that (1) they worked for DFS, (2) that two of the affiants had access to the Bridges' account records in the course of their employment, (3) the same two affiants testified based on personal knowledge and review of those records, and (4) the attached account records were true and correct copies made in the ordinary course of business. *Discover Bank*, 154 Wn. App. at 726. Division II of the Court of Appeals rejected the Bridges' contention that the trial court improperly admitted the affidavits into evidence. *Id.* And in *Barkley*, Division One just last month rejected the same arguments, for the same reasons. *Barkley*, --- Wn. App. ---, 2015 WL 473015, at *3-*4.

Similar to *Barkley* and *Discover Bank,* Ms. Mahony stated in her declaration that she has personal knowledge of and access to Ms. Bavand's

loan documents. Moreover, Ms. Mahony states she personally reviewed those records. CP 1499 ¶ 3. She has personal knowledge of how Flagstar's business records were "ma[d]e, collect[ed], and maintain[ed] ... and how each "document attached to [her] declaration was retrieved." *Id.* While Ms. Mahony does not expressly state she was a custodian of the records, neither did the affiants in *Discover Bank.* Thus, the Court of Appeals decision does not conflict with a decision of the Supreme Court or with another appellate decision.

2. The Declaration of Tim Stephenson was Correctly Excluded from Evidence.

Ms. Bavand's Petition for Review argues that review should be granted to determine whether the trial court's striking of Ms. Bavand's proffered expert, Tim Stephenson, was proper. Pet. at 14. Conspicuously absent from the Petition for Review, however, are any arguments showing that the trial court's striking of the Stephenson Declaration conflicts with a decision of the Supreme Court under RAP 13.4(b)(1). As a result, review should be denied.

As the Court of Appeals correctly determined, the trial court did not abuse its discretion in striking the Stephenson Declaration determining that it "contains almost entirely impermissible legal conclusions, is not helpful in resolving the claims alleged in the Complaint, offers no admissible evidence refuting Chase's evidence that it holds Plaintiff's Promissory Note, and is inadmissible under ER 702." *See* Opinion at 8; *see also State v. Clausing*, 147 Wn.2d 620, 628 (2002) ("Each courtroom

comes equipped with a legal expert, called a judge," and only the judge gets to decide "the relevant legal standards.") (citation and quotations omitted); *Orion Corp. v. State*, 103 Wn.2d 441, 461 (1985) ("Experts are not to state opinions of law."); ER 704 cmt. ("experts are not to state opinions of law or mixed fact and law"); *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 791-92 (2007) ("Courts will not consider legal conclusions in a motion for summary judgment.") Therefore, because the trial court determined that entirety of the Stephenson Declaration consisted of legal conclusions, the trial court did not abuse its discretion to disregard it.

B. This Court Should Not Review the Court of Appeals' Decision Regarding Petitioner's Continuance Request.

Without explaining how her request for a continuance involves an issue of substantial public importance justifying review under RAP 13.4(b)(4), Ms. Bavand's Petition for Review argues that the Supreme Court should review the trial court's denial of her request for a continuance of the summary judgment hearing.

In reviewing the trial court's denial of Ms. Bavand's request for a continuance, the Court of Appeals held that: "[a] trial court may deny a motion for continuance when: (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of

fact." *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369 (2007) (quoting *Butler v. Joy,* 116 Wn. App. 291, 299 (2003)).

Because Ms. Bavand failed to file any motion or affidavit providing a good reason for her delay in obtaining the evidence desired, the Court of Appeals determined that the trial court did not abuse its discretion in denying her request. Opinion at 16. *See also Barkley* --- Wn. App. ---, 2015 WL 4730175, *5-*6 (rejecting the same argument by the same lawyer).

V. CONCLUSION

For these reasons, Flagstar requests the Court deny review.

RESPECTFULLY SUBMITTED this 18th day of September, 2015.

Davis Wright Tremaine LLP
Attorneys for Flagstar Bank, FSB

By: *s/ Fred B. Burnside*
Fred B. Burnside, WSBA #32491
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on this day I caused a copy of the foregoing **Answer of Respondent Flagstar Bank FSB To Appellant's Petition For Review** to be served upon the following counsel of record:

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Dated at Seattle, Washington this 18th day of September, 2015.

s/ Lisa Bass
Lisa Bass

OFFICE RECEPTIONIST, CLERK

To: Bass, Lisa
Cc: Burnside, Fred; Abadir, David
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Subject: Bavand v. Chase Home Finance LLC, et. al., Washington State Supreme Court No. 92135-1 -- Answer of Respondent Flagstar Bank, FSB to Appellant's Petition for Review

Re: Marisa Bavand v. Chase Home Finance LLC, et al.,
Washington State Supreme Court No. 92135-1
Answer of Respondent Flagstar Bank, FSB to Appellant's Petition for Review

Dear Clerk:

Please find attached for filing with the Court in .PDF format, ***Answer of Respondent Flagstar Bank, FSB to Appellant's Petition for Review.***

This Answer is being submitted by:

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Thank you.

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