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No. 73493-8

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

MICHIKO STEHRENBERGER,

Appellant,

v.

JPMORGAN CHASE BANK, N.A.,

Respondent.

BRIEF OF RESPONDENT JPMORGAN CHASE BANK, N.A.

Fred Burnside, WSBA No. 32491
Hugh McCullough, WSBA No. 41453
Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, N.A.

1201 Third Avenue, Suite 2200
Seattle, Washington 98101
206-622-3150

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Stehrenberger's latest appeal is part of an extended litigation campaign she started shortly after she first defaulted on a loan. The Court should affirm the Superior Court's order denying Michiko Stehrenberger's motion for recusal and to vacate prior orders entered by the Superior Court and by this Court, and should affirm the Court's other orders.

First, the Honorable John P. Erlick was neither required to recuse himself nor to make additional disclosures with respect to de minimis relationships with various financial institutions, some of whom are not even parties to this lawsuit.

Second, Stehrenberger hasn't identified any reason to set aside the Superior Court's rulings under CR 59, CR 60, or otherwise.

Third, the Superior Court properly barred Stehrenberger from continuing her vexatious campaign of litigation with further attacks on the judiciary.

Fourth, the Court should award Chase its fees and costs in connection with this appeal.

II. STATEMENT OF ISSUES

1. Should Judge Erlick, and members of this Court, have recused themselves because of trivial dealings with various financial institutions, including some that are not even parties to this case?

2. Should the Superior Court have vacated or revised its prior orders under CR 59 and CR 60 based on Stehrenberger's allegations of judicial misconduct?

3. Did the Superior Court properly bar Stehrenberger from continuing her vexatious litigation campaign?

4. Should this Court award Chase its fees and costs in responding to this appeal?

III. STATEMENT OF THE CASE

In 2007, Stehrenberger obtained a $50,000 unsecured commercial line of credit from Washington Mutual Bank. Chase later acquired Stehrenberger's loan from the FDIC, as receiver for Washington Mutual Bank. (CP 392 ¶ 2; CP 548 ¶ 70; CP 1131; *see also* CP 911, 939; CP 487; CP 1125.)

In 2010, Stehrenberger stopped making payments on her loan, even though she admits owing money on the loan. (CP 321 ¶ 4, *see also* CP 1115 ¶ 7; CP 1159.) By February 4, 2011, Stehrenberger owed Chase approximately $47,600, including principal, overdue interest, and fees. (CP 302 ¶ 11.)

Due to Stehrenberger's default, Chase filed this breach of contract lawsuit. Stehrenberger litigated aggressively for years, filing many motions and declarations and serving hundreds of discovery requests on

Chase. (CP 553-54; CP 1211.) Nevertheless, the Superior Court entered summary judgment for Chase (CP 1184-94) and denied Stehrenberger's motion to amend the judgment (CP 1221; CP 1217-18). The Superior Court also awarded Chase its fees under Stehrenberger's promissory note and RCW 4.84.330. (CP 1222-23.)

This Court affirmed the Superior Court because Chase is entitled to enforce Stehrenberger's promises under RCW 62A.3-309(a). This Court explained that "in accordance with *Gerard*, the FDIC's transfer of all assets of the failed bank to Chase carried with it the authority to enforce Stehrenberger's note. This is because Chase purchased *all* of WaMu's assets as shown by the purchase and assumption agreement." *JPMorgan Chase Bank, N.A. v. Stehrenberger*, No. 70295-5-I, slip op. at 5 (Wn. Ct. App. April 28, 2014) (emphasis in original). The Court also found the Superior Court did not abuse its discretion in awarding attorneys' fees, and granted Chase its fees and costs on appeal, subject to compliance with RAP 18.1. *Id.* at 11-12.

Stehrenberger filed a petition for review with the Washington Supreme Court. The Washington Supreme Court denied that petition and awarded Chase its fees and costs in the amount of $7,287.22. Stehrenberger then filed a motion asking the Washington Supreme Court

to stay its order awarding Chase its fees and costs. The Supreme Court denied that motion, too.

Unsatisfied, Stehrenberger returned to the Superior Court and filed a motion to set aside the judgment under CR 59 and 60, alleging "new evidence" that the Washington judiciary is biased against her. Stehrenberger alleged Judge Erlick owned Washington Mutual stock. (*See* CP 1354 at 2:17-18.) Notably, Washington Mutual is not and never has been a party to this case. Stehrenberger also alleged that Judge Erlick owned Chase securities through his retirement accounts and mutual funds. (CP 1354 at 2:18-19.) Finally, Stehrenberger alleged that Judge Erlick borrowed money from Chase in connection with various mortgages. (CP 1355 at 3:2-6.)

But that's not all. Stehrenberger made similar accusations against members of this Court: the Honorable Ronald E. Cox, the Honorable Linda Lau, and the Honorable Ann Schindler. In this appeal, she repeats those accusations, and insists that the Court must overturn the prior judgment because their investments raise a "public question as to the impartiality of these judges in these proceedings." (Appellant's Br. 11.)

The Superior Court properly denied Stehrenberger's motions under CR 59 and 60, and barred Stehrenberger from continuing her vexatious litigation. This appeal followed.

IV. STANDARD OF REVIEW

"A motion for reconsideration and motion to vacate a dismissal are to be decided by the trial court in exercise of its discretion and its decision will be overturned only if the court abused its discretion." *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 685 (2002). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *Lane v. Brown & Haley*, 81 Wn. App. 102, 105 (1996).

V. ARGUMENT

A. Judge Erlick was not required to recuse himself from this case.

Judge Erlick did not need to recuse himself from this case based on de minimis connections with Washington Mutual and Chase. Nor was Judge Erlick required to make any disclosures with respect to those purported interests.

Judges are presumed to perform their functions "without bias or prejudice." *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841 (2000). The burden is on Stehrenberger to show bias or prejudice. *Id.* "Recusal lies within the sound discretion of the trial court." *In re Marriage of Farr*, 87 Wn. App. 177, 188-89 (1997).

Judges are not required to disqualify themselves if they have insignificant economic interests in the parties to the proceeding. *See*

CJC 2.11(A)(3); *see also Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 25-26 (2013). Notably, the phrase "economic interest" means "ownership of more than a de minimis legal or equitable interest," and it does not include "an interest in the individual holdings within a mutual or common investment fund." CJC 2.11, cmt. 6.

The federal courts have also explained—in commenting on the companion federal rules—that a judge's impartiality cannot reasonably be questioned just because a judge has a mortgage or a line of credit with one of the parties to the proceeding. *See Townsend v. BAC Home Loans Serv., L.P.*, 461 F. App'x 367 (5th Cir. 2011); *In re U.S.*, 158 F.3d 26, 31-33 (1st Cir. 1998); *In re Zow*, 2013 WL 445385, at *1 (Bankr. S.D. Ga. Jan. 24, 2013) (noting also that "recusal statutes are 'not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice. . . . Nor are they intended to be used as a delay tactic or to prevent the timely consideration of cases and controversies.'").

Judge Erlick's de minimis connections with Washington Mutual and Chase did not even merit disclosure, much less recusal. Washington Mutual is not and never has been a party to this case. The outcome of this case could have no conceivable effect on the value of interests in Washington Mutual. Washington Mutual Bank was liquidated in an FDIC receivership, and the bank's parent company was liquidated in bankruptcy.

Just because Chase acquired certain assets of Washington Mutual Bank does not mean that Judge Erlick acquired any interest in Chase. As this Court explained, "WaMu failed, and the Federal Deposit Insurance Corporation placed the bank in receivership." *Stehrenberger*, No. 70295-5-I, slip op. at 1 (Wn. Ct. App. April 28, 2014). Whatever interests Judge Erlick may have had in Washington Mutual stock are presumably worthless. And as the Superior Court noted, Stehrenberger introduced no evidence "that Washington Mutual securities held by Judge Erlick were ever converted to any equity interest in Chase securities." (CP 1365-67.)

Nor did Judge Erlick's connections with Chase require disclosure or recusal. The Code of Judicial Conduct states that general interests in retirement accounts and individual holdings within mutual funds do not require disclosure. CJC 2.11, cmt. 6. If the rule were otherwise, there probably would not be a single judge in the state of Washington that could hear Stehrenberger's case, insofar as each would have a similar interest in the judicial retirement system. Judge Erlick's mortgage loans also did not give rise to any appearance of unfairness or impropriety. Those loans did not give Judge Erlick an "economic interest" in Chase, within the meaning of CJC 2.11. *Id.* In any event, routine mortgage transactions do not give Judge Erlick any reason to be more favorably disposed to Chase.

The facts here are far different from the facts in the cases cited by Stehrenberger. For example, in *Tatham v. Rogers*, the trial court should have disclosed that the judge and one of the party's attorneys had been partners in a law firm, that the attorney served as the judge's campaign manager, and that the judge and the attorney had continuing personal business with each other. 170 Wn. App. 76, 85 (2012). That is much different from the de minimis connections identified in Stehrenberger's motion.

B. The Superior Court properly declined to vacate or revise its prior orders under CR 59 and CR 60.

Stehrenberger has not provided any valid basis for setting aside the Superior Court's prior orders under CR 59 or CR 60. CR 59 requires a motion for a new trial to be brought within 10 days after entry of judgment. *See* CR 59(b). The Superior Court had no discretion to enlarge that time, even if it had been inclined to do so. *See Metz v. Sarandos*, 91 Wn. App. 357, 359-60 (1998). Although CR 60 allows more time to set aside orders, relief under CR 60(b)(11) should be sparingly granted, and only under extraordinary circumstances. *See Flannagan v. Flannagan*, 42 Wn. App. 214, 221 (1985).

Stehrenberger could not obtain relief under CR 59 because her motion was filed more than 10 days after judgment was entered.

Stehrenberger was also not entitled to relief under CR 60(b) because she did not provide evidence of the extraordinary circumstances necessary to justify relief. Stehrenberger described a series of de minimis connections between Judge Erlick and various financial institutions, some of whom are not even parties to this case. They certainly did not justify setting aside the Superior Court's prior orders under CR 60(b)(11).

Stehrenberger also failed to comply with CR 60(e), which requires a CR 60 motion to be served "in the same manner as in the case of summons in a civil action . . . ." As reflected in her certificate of service, Stehrenberger e-mailed a copy to Chase's attorneys. There is no evidence that they agreed to accept service of process under CR 4—by e-mail or otherwise—on behalf of Chase.

C. The Superior Court properly barred Stehrenberger from further frivolous filings.

The Superior Court recognized that Stehrenberger is a vexatious litigant. Having taken her case all the way up to the Washington Supreme Court, she has apparently decided to start over again by attacking the Superior Court, this Court, and the entire judicial-retirement system. The Superior Court properly recognized that an award of fees was not a sufficient deterrent insofar as the Superior Court, this Court, and the Washington Supreme Court all awarded fees against Stehrenberger before.

The Superior Court acted properly and with restraint by barring Stehrenberger from further frivolous filings.

D. The Court should award Chase its fees and costs.

The Court should deny Stehrenberger's request for fees on appeal under RAP 18.1, and should instead award Chase its fees on appeal. "RAP 18.1(a) permits [this Court] to award attorney fees and costs on appeal if applicable law grants a party the right to recovery attorney fees or expenses." *Martin v. Johnson*, 141 Wn. App. 611, 623 (2007). Stehrenberger seeks fees under RCW 4.84.330 and her promissory note. (Appellant's Br. at 31-32.) Stehrenberger effectively concedes she must be a prevailing party to obtain such fees, however. (*See* Appellant's Br. at 32 (citing *Kaintz v. PLG, Inc.*, 147 Wn. App. 782 (2008) (prevailing party in contract action may seek fees even if party prevailed in establishing contract was unenforceable)).) "In general, a prevailing party who is entitled to attorney fees below is entitled to attorney fees . . . if [she] prevails on appeal." *Martin*, 141 Wn. App. at 623. But Stehrenberger did not prevail in the trial court and will not prevail here, so she has no right to seek fees on appeal. *See id.* The Court should therefore deny her fee request.

Meanwhile, the Court should award Chase its fees on appeal. Unlike Stehrenberger, Chase may obtain these fees under RCW 4.84.330

because it is the prevailing party and because, as Stehrenberger acknowledges (*see* Appellant's Br. at 31-32), the note contains a fee provision, under which she agreed to pay Chase's fees incurred in collecting on the note. CP 306, 307 (bank and its assigns may seek fees incurred in collecting on note); CP 392 (Chase acquired WaMu's loans from FDIC by operation of law under FIRREA). "A provision in a contract providing for the payment of attorneys' fees in an action to collect any payment due under the contract includes both fees necessary for trial and those incurred on appeal as well." *Boyd v. Davis*, 127 Wn.2d 256, 264 (1995) (affirming award of fees on appeal under RCW 4.84.330).

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's order denying Stehrenberger's motion under CR 59 and CR 60, and each of its other orders. The Court should also award Chase its fees and costs in responding to this appeal.

RESPECTFULLY SUBMITTED this 2nd day of October, 2015.

Davis Wright Tremaine LLP
Attorneys for JPMorgan Chase Bank, N.A.

By _____
Fred Burnside, WSBA No. 32491
Hugh McCullough, WSBA No. 41453

1201 Third Avenue, Suite 2200
Seattle, Washington 98101
206-622-3150

CERTIFICATE OF SERVICE

I certify that on October 2, 2015, I caused the foregoing document to be filed with the clerk of the Court and served on the parties in this manner:

Steven K. Linkon, Esquire RCO Legal, P.S. 13555 SE 36th Street, Suite 300 Bellevue, WA 98006-1489 *slinkon@rcolegal.com*	☐ Messenger ☑ U.S. Mail, postage prepaid ☐ Federal Express ☐ Fax ☑ Electronic
Ms. Michiko Stehrenberger 215 S. Idaho Street Post Falls, ID 83854 *document.request@gmail.com*	☐ Messenger ☑ U.S. Mail, postage prepaid ☐ Federal Express ☐ Fax ☑ Electronic

Dated this 2nd day of October, 2015.

Melanie Kent

MELANIE KENT