

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE

Jan 19, 2017, 1:55 pm

RECEIVED ELECTRONICALLY

Supreme Court No. 93750-8
(Court of Appeals No. 73724-4-I)

SUPREME COURT OF THE STATE OF WASHINGTON

JEFF BAILEY,

Plaintiff-Appellant,

v.

JOSEPH LUCAS, III; U.S. BANK, N.A., AS TRUSTEE FOR OWNIT
MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET BACKED
CERTIFICATES, SERIES 2006-3; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC; AND JOHN DOE 1-50,

Defendant(s)-Respondent(s).

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Cara C. Christensen, WSBA #43198
Emilie Edling, WSBA #45042
Houser & Allison, APC
1601 Fifth Ave., Suite 850
Seattle, WA 98101
Telephone: (206) 596-7838
Fax: (206) 596-7839

*Attorneys for Respondents U.S. Bank
National Association, as Trustee for Ownit
Mortgage Loan Trust, Mortgage Loan Asset-
Backed Certificates, Series 2006-3 and -
Mortgage Electronic Registration Systems,
Inc.*

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED FOR REVIEW.....3

III. STATEMENT OF THE CASE.....3

 A. Borrower Lucas Takes Out a Loan to Purchase Property.....3

 B. Bailey and Borrower Enter into a Real Estate Contract.....3

 C. The Trust Foreclosed.3

 D. Bailey Files a Separate Lawsuit to Challenge the Decree of Foreclosure, Respondents File a Motion to Dismiss and Bailey Fails to Timely Respond.....4

 E. Bailey Appeal.....5

 F. The Court of Appeals Affirms and Bailey Files for Reconsideration, Petitions for Review.....7

IV. REASONS WHY REVIEW SHOULD BE DENIED.....8

 A. The Standard of Review.....8

 B. Bailey’s Appeal Fails to Satisfy the Standards of Review.....8

 1. The Petition Does Not Identify any Conflict.....8

 2. There is No Significant Question of Law Under the Constitution of the State of Washington or of the United States.....9

 3. There are No Other Reasons for the Supreme Court to Accept Bailey’s Petition for Review....11

 a. Bailey Failed to Adequately Brief his Appeal.....12

b. Bailey failed to state a claim.....12

c. Bailey waived his claims by failing to oppose the motion and failing to continue the hearing.....13

d. Reconsideration was properly denied.....18

V. CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

<i>Armstrong v. Manzo</i> , 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed.2d 62 (1965).....	11
<i>Bailey v. Lucas</i> , 195 Wn. App. 1027 (2016).....	7
<i>Barrows v. Jackson</i> , 346 U.S. 249, 260, 73 S. Ct. 1031, 1037, 97 L. Ed. 1586 (1953).....	10
<i>Bldg. Indus. Ass'n of Wash. v. McCarthy</i> , 152 Wn. App. 720, 742, 218 P.3d 196 (2009).....	17
<i>Bohn v. Cody</i> , 119 Wn.2d 357, 368, 832 P.2d 71 (1992).....	12
<i>Deutsche Bank Nat. Trust Co. v. Slotke</i> , 192 Wn. App. 166, 177 (2016).....	13
<i>Deutsche Bank Nat. Trust Co. v. Slotke</i> , 192 Wn. App. 166, 174, 367 P.3d 600 (2016).....	15
<i>Deutsche Bank Nat'l Trust Co. v. Slotke</i> , 185 Wn.2d 1037, 377 P.3d 746 (2016).....	16
<i>Jackson v. Quality Loan Serv. Corp.</i> , 186 Wn. App. 838, 843, 347 P.3d 487, 490 (2015), <i>review denied sub nom. Jackson v. Quality Loan Serv. Corp. of Washington</i> , 184 Wn.2d 1011, 360 P.3d 817 (2015).....	16
<i>JDFJ Corp. v. Int'l Raceway, Inc.</i> , 97 Wn. App. 1, 7, 970 P.2d 343 (1999).....	19
<i>Jeffrey Bailey v. Joseph Lucas, III, et al.</i> , No. 13-01401-MLB (Bankr. W.D. Wash., entered July 22, 2013).....	4
<i>John Davis & Co. v. Cedar Glen No. four, Inc.</i> , 75 Wn.2d at 222-23, 450 P.2d 166 (1969).....	16
<i>Lobak Partitions, Inc. v. Atlas Const. Co., Inc.</i> , 50 Wn. App. 493, 497, 749 P.2.d 716 (1988).....	15
<i>Marintorres</i> , 93 Wn. App. at 452.....	12
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	11
<i>Moore v. Wentz</i> , 11 Wash.App. 796, 799, 525 P.2d 290 (1974).....	9, 19

<i>Mueller v. Miller</i> , 82 Wn.App. 236, 251, 917 P.2d 604 (1996).....	14
<i>New Meadows Holding Co. by Rauquist v. Washington Water Power Co.</i> , 34 Wn. App. 25, 659 P.2d 1113 (1983).....	13
<i>Norcon Builders, LLC v. GMP Homes VG, LLC</i> , 161 Wn. App. 474, 486, 254 P.3d 835 (2011).....	12
<i>Old City Hall LLC v. Pierce County AIDS Found.</i> , 181 Wn.App. 1, 16, 329 P.3d 83 (2014).....	18
<i>Perry v. Hamilton</i> , 51 Wn. App. 936, 938, 756 P.2d 150 (1988).....	18
<i>Raymond v. Robinson</i> , 104 Wn. App. 627, 633, 15 P.3d 697 (2001).....	14
<i>State v. Murdock</i> , 18 Wn.App. 294, 296, 567 P.2d 267 (1977).....	14
<i>State v. Rafav</i> . 168 Wn. App. 734, 843, 285 P.3d 83 (2012).....	12
<i>Tidal Oil Co. v. Flanagan</i> , 263 U.S. 444, 451, 44 S. Ct. 197, 198–99, 68 L. Ed. 382 (1924).....	10
<i>Turner v. Kohler</i> , 54 Wn. App. 688, 693, 775 P.2d 474 (1989).....	18

Statutes

RCW 4.28.320.....6
RCW 2.08.010.....14, 15

Rules

CR 59(b).....9, 19
RAP 5.3.....6, 10
RAP 10.3(6).....7, 12
RAP 2.5.....7, 10, 13
RAP 13.4(b).....8, 9, 12
CR 6.....9, 19
CR 6(b)(2)9, 19
CR 56.....17
KCLR 56.....17
KCLR 7.....18
CR 59.....19
CR 59(a).....19
ER 401.....20
CR 59(a)(4).....20
ER 801 (c).....20

I. INTRODUCTION

This petition arises out of Jeff Bailey's ("Bailey") complaint wherein he alleges wrongful foreclosure and breach of contract. However, Bailey is not a party to, nor an intended beneficiary of, *any* contract with the Respondents. Bailey became involved with the property *after* Joseph Lucas (the "Borrower") obtained the mortgage loan, when Bailey and the Borrower entered into a real estate agreement (the "Real Estate Agreement") for the express purpose of avoiding a foreclosure.

After entering the Real Estate Agreement, the Borrower defaulted on the loan to U.S. Bank National Association, as Trustee for Ownit Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-3 (the "Trust") filed a judicial foreclosure action (the "Judicial Foreclosure Action"). The King County Sheriff foreclosed and sold the property to the Trust.

Instead of contesting the Judicial Foreclosure Action, Bailey filed a *separate* complaint ("Bailey's Action") against the Borrower, Mortgage Electronic Registration Systems, Inc. ("MERS") and the Trust (collectively, "Respondents") to pursue an impermissible collateral attack of the foreclosure judgment. Respondents filed and properly noted a Motion to Dismiss. Bailey did not attend the hearing, did not file an opposition, and did not note a Motion to Continue he filed two days before

the hearing. The Court properly entered an order dismissing Bailey's claims against Respondents.

Bailey then filed an untimely motion for reconsideration that failed on substantive and procedural grounds. Accordingly, it was denied. Bailey appealed (1) three paragraphs from the order granting the unopposed Motion to Dismiss, (2) the court's failure to consider the Motion to Continue, which was never noted or considered, and (3) the court's refusal to grant his untimely Motion for Reconsideration.

This Court's discretionary review is not warranted. The Court of Appeals' decision was fact-specific and entirely consistent with Washington law. The Court held that Bailey waived his claims when he failed to respond to the motion to dismiss and failed to timely file a motion for reconsideration. Bailey further failed to comply with the Rules of Appellate Procedure. Bailey's petition for review should be denied because the Court of Appeals' decision does not conflict with a decision of the Court of Appeals or the Supreme Court, because there is no significant question of law under the Constitution, and there is no issue of substantial public interest that should be determined by the Supreme Court. Accordingly, this Court should deny review.

II. ISSUES PRESENTED FOR REVIEW

Whether there is any basis, under the Rules of Appellate Procedure (“RAP”) 13.4, for this Court to accept discretionary review of this matter.

III. STATEMENT OF THE CASE

A. Borrower Lucas Takes Out a Loan to Purchase Property

On January 20, 2006, the Borrower obtained a mortgage loan from Ownit Mortgage Solutions, Inc. (“Note”) in the amount of \$225,000.00. [CP 344]. To secure repayment, the Borrower executed a deed of trust (“Deed of Trust”) encumbering the property located at 10743 56th Avenue South, Seattle, WA 98178. [CP 314-333.] MERS assigned its record nominee (agency) interest in the Deed of Trust to the Trust. [CP 371.] Bailey was not a party to the Note, Deed of Trust, or assignment. [*Id.*]

B. Bailey and Borrower Enter into a Real Estate Contract

On January 21, 2006, the Borrower and Bailey entered into a real estate transaction (“Real Estate Contract”) for the “purpose of selling and repurchasing the Property as a viable alternative to avoid foreclosure and the loss of the property.” [CP 298; 298-312.]

C. The Trust Foreclosed

On April 3, 2013, the Trust filed the Judicial Foreclosure Action in King County Superior Court under Cause. No. 13-2-15447-1 SEA due to the Borrower’s default under the terms of the Loan. [CP 335-380].

On September 11, 2014, the Court entered a Judgment and Decree of Foreclosure in favor of the Trust. [CP 391.] On January 9, 2015, the King County Sheriff sold the Property through a sheriff's sale to the Trust. On February 13, 2015, the King County Superior Court entered an Order confirming the sheriff's sale of the Property.¹

D. Bailey Files a Separate Lawsuit to Challenge the Decree of Foreclosure, Respondents file a Motion to Dismiss and Bailey Fails to Timely Respond

On January 7, 2015, Bailey filed a complaint, initiating the underlying action. [CP 1; 270.] Bailey's amended complaint alleged claims entitled (1) breach of contract (against the Borrower for breaching the real estate contract), (2) "void order" (seeking to set aside the judgment in the Judicial Foreclosure Action), (3) "privity of contract," and (4) "impairing contractual relations." On May 12, 2015, Respondents filed a motion to dismiss (the "Motion to Dismiss"). Bailey did not file an opposition and did not appear at the hearing. [CP 410:13-15.] On June 10, 2015, Bailey filed a Motion to Continue the June 12, 2015 hearing. However, he did not note the hearing, and did not serve the motion with the required six days-notice or file a motion for order shortening time. [CP 20-12.] It was mailed to Respondents two days before the hearing.

¹ *Jeffrey Bailey v. Joseph Lucas, III, et al.*, No. 13-01401-MLB (Bankr. W.D. Wash., entered July 22, 2013) [ECF No. 1].

On June 12, 2015, the Court heard Respondent's Motion to Dismiss. Respondents advised the Court of Bailey's verbal request for a continuance, that the parties had not reached an agreement, and that there were no further discussions between Respondents and Bailey. [CP 411:1-13.] The Court entered an Order Dismissing Bailey's Amended Complaint with Prejudice.

On June 29, 2015, Bailey filed an untimely Motion for Reconsideration.² [CP 26.] On July 6, 2015, Respondents opposed the Motion for Reconsideration, arguing that it was untimely, was based on conclusory statements that contradicted the terms of the Deed of Trust and Real Estate Contract, and failed on substantive grounds because the "forensic audit" Bailey submitted with his motion (1) did not constitute new evidence, (2) was not relevant or admissible evidence, and (3) was inadmissible hearsay. [CP 263-264; 264-266.] On July 8, 2015, the Court denied Bailey's Motion for Reconsideration, finding it was untimely and the forensic audit inadmissible. [CP 22-25.]

E. Bailey's Appeal

On Appeal, Bailey challenged (1) paragraphs 7-9 of the Order granting Motion to Dismiss, (2) the failure to rule on the Motion for

² In his Petition for Review, Bailey argues that he filed the motion for reconsideration on June 26, 2016. However, this allegation is contradicted by the docket, and, even if true, the motion would still be untimely as it was filed more than ten days after entry of the order. CR 59(b).

Continuance, and (3) the Order of Denial for Motion for Consideration. Bailey's Opening Brief made four challenges. First, Bailey challenged the dismissal of the (second) Amended Complaint. Second, Bailey challenged the trial court's "termination of the Real Estate Contract," which was actually a cancellation of the Lis Pendens.³ Third, Bailey assigned error to the "failure to grant Appellant's Motion for Continuance. Last, Bailey assigned error to the trial court for "failing to exercise its discretion" in determining that the motion for reconsideration was untimely.

Respondents argued that the dismissal was proper on procedural and substantive grounds. Specifically, Respondents argued that Bailey's complaint failed to allege that Respondents breached a contract with Bailey or damaged him,⁴ that Bailey's claim for "void order" was an impermissible collateral attack on the underlying Judicial Foreclosure Action, that Bailey lacked standing to argue "privity of contract," that the Trust had the authority to foreclose, and that Bailey's claim for interference was not supported by law. Respondents further argued that Bailey failed to note his motion to continue the hearing as required, that

³ Bailey challenges the cancellation of the lis pendens pursuant to RCW 4.28.320. However, Bailey waived his right to challenge those provisions when he limited his appeal to the specific findings in Paragraphs 7-9 of the Order of Dismissal. RAP 5.3. References to the lis pendens and recordation of the Real Estate Contract were contained in Paragraphs 10-12 of the Order.

⁴ [CP 271-272].

his motion for reconsideration was untimely, and that it had no merit because it was not based on newly discovered evidence.

F. The Court of Appeals Affirms and Bailey Files for Reconsideration, Petitions for Review

The Court of Appeals affirmed on procedural grounds. The Court noted that Bailey's briefs on appeal "violate numerous rules of appellate procedure." Further, the Court held that Bailey's "contentions lack supporting authority as required by RAP 10.3(6), and virtually all of them lack any mention or meaningful analysis of the applicable standards of review." *Bailey v. Lucas*, 195 Wn. App. 1027 (2016). The Court found that because Bailey filed no response to the motion to dismiss below, did not appear at the hearing and filed an untimely motion for reconsideration, it did not need to consider his challenges under RAP 2.5 because those challenges were raised for the first time on appeal. [*Id.*] The Court further noted that the motions made by Bailey below were not properly presented, because he failed to note his motion for a continuance as required by the local rules, did not argue it at the hearing on the motion to dismiss, and did not timely seek a ruling on his motion for reconsideration. [*Id.*]

On August 22, 2016, Bailey filed a Motion for Reconsideration. On August 25, 2016, it was denied. On September 26, 2016, Bailey filed a Petition for Review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Standard of Review

Pursuant to the Washington Rules of Appellate Procedure, a petition for review to the Washington Supreme Court is accepted only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Bailey fails to contend that any of these factors apply. As discussed below, Bailey's Petition for Review has no merit, and also is not supported by any of the RAP 13.4(b) factors.

B. Bailey's Appeal Fails to Satisfy the Standards of Review

1. The Petition does not identify any conflict

This Court will accept a petition for review if the decision of the Court of Appeals is in conflict with either a decision of this Court or a decision of any other Washington Court of Appeals. RAP 13.4(b)(1-2). Bailey, however, fails to identify such a conflict. It is clear there is none. Interestingly, Bailey's Petition also fails to address the Court of Appeals' decision and reasoning, other than to argue that his motion for

reconsideration was timely.⁵ However, Washington law is clear that a motion for reconsideration must be filed within 10 days and that the trial court may not extend the time period for filing a motion for reconsideration. CR 6(b)(2); *Moore v. Wentz*, 11 Wash.App. 796, 799, 525 P.2d 290 (1974). The order granting the Motion to Dismiss was entered on June 12, 2015. [CP 22]. Accordingly, Bailey was required to file the motion for reconsideration by June 23, 2015.⁶ CR 59(b), CR 6. However, Bailey did not file his Motion for Reconsideration until June 29, 2015 and again on June 30, 2015. Accordingly, this argument is unavailing.

2. There is No Significant Question of Law Under the Constitution of the State of Washington or of the United States

The Supreme Court will accept a petition for review if the case involves a “significant question of law” under the Washington or United States Constitution. RAP 13.4(b). The unpublished appellate decision in this case does not involve a significant constitutional issue and Bailey’s constitutional challenges fail.

On appeal, Bailey argues that the trial court erred by violating the U.S. Constitution, Article 1, Section 10, when it “stripped appellant of his right to enforce and defend the contract between Appellant and [borrower]

⁵ Instead, the majority of Bailey’s Petition for Review was copied and pasted from his Appellate Brief. See App. Br. The only references to the decision by the Court of Appeals span three lines in Paragraph 9 and three lines in Paragraph 22 of the Conclusion.

⁶ Ten days from June 13, 2015 is June 23, 2015.

through the order granting Respondent’s motion to dismiss. [Petition for Review ¶10.]⁷ As a preliminary matter, this argument was first raised in Bailey’s untimely motion for reconsideration and therefore is an improper argument on appeal. RAP 2.5. In addition, Bailey waived any challenge to the cancellation of the lis pendens when he filed his notice of appeal. Bailey limited his appeal to Paragraphs 7-9 of the Order of Dismissal.⁸ RAP 5.3. The lis pendens and recordation of the Real Estate Contract were addressed in Paragraphs 10-12 of the Order.

Furthermore, there is no valid constitutional question of law because the Impairments Clause does not apply to judicial action. Article 1, section 10, of the Federal Constitution provides that “No state shall... pass any... Law impairing the Obligation of Contracts...” U.S. Const. art. I, § 10, cl. 1. Accordingly, by its own terms, this provision applies to legislation, not court action. It is well settled that the impairments clause is directed, as its terms indicate, against legislative action only and not judgment by the courts. *Barrows v. Jackson*, 346 U.S. 249, 260, 73 S. Ct. 1031, 1037, 97 L. Ed. 1586 (1953). *See also, Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451, 44 S. Ct. 197, 198–99, 68 L. Ed. 382 (1924).

Bailey also argues that because the Court did not grant his request for a continuance, his right to due process was violated. [App. Br. §7].

⁷ There are no page numbers on Bailey’s Petition for Review.

⁸ Ntc. Appeal 1; Am. Ntc. Appeal 1, 4.

When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The opportunity to be heard must be “at a meaningful time and in a meaningful manner,” appropriate to the case. *Id.* at 333, 96 S.Ct. 893 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). In this case, Bailey received notice of the Motion to Dismiss. [CP 396-397]. Bailey had several weeks to submit a written opposition to the Motion to Dismiss, but failed to do so. [CP 410-411]. Bailey knew of the hearing, but chose not to appear. [CP 20-22, 411]. Bailey has not and cannot demonstrate that he was denied due process when he was given appropriate notice, had an opportunity to respond, and failed to do so. Accordingly, there is no significant question of law under the Constitution that would support Bailey’s Petition for Review.

3. There are No Other Reasons for the Supreme Court to Accept Bailey’s Petition for Review.

There is no public policy or other reason why the Supreme Court should accept Bailey’s petition for review. The Supreme Court will accept a petition for review if the petition “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

Bailey has no genuine grievance affecting the public interest. He does not even have a legally recognizable private grievance. His complaint alleged the following causes of action: (1) breach of contract (against the Borrower), (2) “void order,” (3) “privity of contract and (4) “impairing contractual relations.” Each claim is based on the private contract between Bailey and the Borrower, which does not affect the public. In addition, each claim fails as a matter of law and was waived.

a. Bailey Failed to Adequately Brief his Appeal

Bailey’s petition should not be considered because he failed to adequately brief his arguments in the Court below, and is not entitled to re-brief inadequate arguments before this Court. The contentions raised in his briefing below lacked the required supporting authority under RAP 10.3(6) and lacked analysis of the applicable standards of review. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (the Court of Appeals “will not consider an inadequately briefed argument.”) (quoting *Bohn v. Cody*, 119 Wn.2d 357, 368, 832 P.2d 71 (1992)); *State v. Rafav*. 168 Wn. App. 734, 843, 285 P.3d 83 (2012) (rejecting claim due to absence of meaningful argument or authority to support conclusory claim); *Marintorres*, 93 Wn. App. at 452 (holding appellate court need not consider pro se arguments that are conclusory). Bailey’s Petition does not attempt to rectify this problem, nor could it.

Deutsche Bank Nat. Trust Co. v. Slotke, 192 Wn. App. 166, 177 (2016) (noting that even briefing an argument for the first time in a Reply, rather than a subsequent Petition for Review, is too late).

In addition, as pointed out by the Court of Appeals, because Bailey filed no response to the Motion to Dismiss below, did not appear at the hearing on the motion, and filed an untimely motion for reconsideration, his challenges on appeal have been waived under RAP 2.5. See also *New Meadows Holding Co. by Rauquist v. Washington Water Power Co.*, 34 Wn. App. 25, 659 P.2d 1113 (1983) (because defendant did not contest summary judgment it waived any claim it may have asserted against the moving party). Taken together, these rule violations alone are fatal to Bailey's appeal. Review is simply not warranted.

b. Bailey Failed to State a Claim

Bailey's breach of contract claim failed to set forth a single allegation against Respondents, let alone allegations that Respondents had entered into a contract with him or that Respondents breached such a contract. [CP 271-272]. The complaint identified a single contract, to which Respondents were not parties. [*Id.*].

Bailey's claim for void order, which sought to challenge the judgment in the Judicial Foreclosure Action, failed as an impermissible collateral attack. The general rule is that judgments cannot be collaterally

attacked. *State v. Murdock*, 18 Wn.App. 294, 296, 567 P.2d 267 (1977). While a limited exception permits collateral attack, the exception applies only when the judgment is challenged as void for lack of jurisdiction because the court does not have personal or subject matter jurisdiction, or “lacks the inherent power to enter the order involved.”⁹ That exception is not relevant here.

Specifically, the Court had personal jurisdiction because the Borrower obtained the loan in King County Washington¹⁰ and the security was located in King County, Washington.¹¹ *Raymond v. Robinson*, 104 Wn.App. 627, 633, 15 P.3d 697 (2001). Similarly, there is no violation of the fundamental notions of fairness because the Borrower was residing in King County when the Judicial Foreclosure Action was filed. [CP 11].

Furthermore, there is no doubt that the Superior Court had subject matter jurisdiction over the Judicial Foreclosure Action. Pursuant to RCW 2.08.010, the superior court has original jurisdiction in all cases that involve the title or possession of real property. Accordingly, the King County Superior Court had jurisdiction in the Judicial Foreclosure Action and the judgment cannot be collaterally attacked. To the extent Bailey

⁹ *Mueller v. Miller*, 82 Wn.App. 236, 251, 917 P.2d 604 (1996) (citations omitted).

¹⁰ [CP 317, 330, 344.]

¹¹ [CP 317-330.]

wanted to challenge the judicial foreclosure, he should have filed a timely challenge in the Judicial Foreclosure Action.

Bailey's claim entitled "privity of contract" sought to challenge the foreclosure by asserting that Respondents interfered with the Real Estate Contract by redefining the terms of the note and otherwise improperly foreclosing on the property without authority of the "Certificateholders." The claim was properly dismissed because Bailey had no standing to seek protection under the mortgage contract, to which he was not a party and because there were no grounds for alleging the foreclosure had been improper. Under ordinary circumstances, a stranger to a contract may not sue. *Lobak Partitions, Inc. v. Atlas Const. Co., Inc.*, 50 Wn.App. 493, 497, 749 P.2d 716 (1988). Furthermore, even the borrower lacks standing to challenge a note holder's authority to enforce the note, based on the note holder's alleged noncompliance with the trust's Pooling and Servicing Agreement, where the borrower was not a party to, or an intended third party beneficiary of, that agreement. *Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 174, 367 P.3d 600 (2016), *review denied sub nom. Deutsche Bank Nat'l Trust Co. v. Slotke*, 185 Wn.2d 1037, 377 P.3d 746 (2016). In addition, Bailey's argument that the investors/certificate holders are the true parties in interest has been rejected by Washington courts. *Id.* at 172 (citing *John Davis & Co. v. Cedar Glen No. four, Inc.*,

75 Wn.2d at 222-23, 450 P.2d 166 (1969)(“The holder of a negotiable instrument may sue thereon in his own name... It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.”) (citation omitted.); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843, 347 P.3d 487, 490 (2015), review denied sub nom. *Jackson v. Quality Loan Serv. Corp. of Washington*, 184 Wn.2d 1011, 360 P.3d 817 (2015). As a matter of clear Washington code and case law interpreting the code, the Trust was entitled to foreclose as the holder of the Note; and Bailey, who had no contractual relationship with the Respondents, lacked standing to challenge compliance with the Pooling and Servicing Agreement. [*Id.*]

Similarly, Bailey’s claim for Impairing Contractual Obligations was properly dismissed. Bailey argues “it is not legally possible for Trustee to have had interest conveyed to it by the assignment from MERS...Respondent Trustee is asserting rights that it never received.” [Pet. Rev. §14]. Bailey further argues that “the court erred in upholding an assignment by an “unlawful beneficiary” pursuant to Washington State law to trust without standing by hearing” and that “MERS shall serve as mortgage of record with respect... to mortgage loans... in an administrative capacity, for the beneficial owner or owners thereof from time to time.” [Pet. Rev. §18.] However, the Trust was entitled to

foreclose because it was the Note Holder. The Deed of Trust automatically followed the Note it secured and the assignment simply made that fact a matter of public record. The assignment was not necessary to foreclose and Bailey, who is neither a party to the assignment, nor an intended third party beneficiary thereof, lacks standing to challenge it.

c. Bailey waived his claims by failing to oppose the Motion and failing to continue the hearing

In this case, Bailey failed to respond to the Motion to Dismiss. Motions under Civil Rule 12(b) are subject to the scheduling requirements of CR 56 and KCLR 56. CR 56 requires that a party opposing the dispositive motion file an opposition no later than 11 days before the motion hearing. The court may order a continuance “if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions or conduct discovery.” *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 742, 218 P.3d 196 (2009); CR 56(f). However, a superior court does not abuse its discretion if it denies a motion for a continuance because “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence would be established through the additional discovery, or (3) the desired evidence will not raise a genuine issue of material fact.” *Old City Hall LLC v. Pierce County*

AIDS Found., 181 Wn.App. 1, 16, 329 P.3d 83 (2014) (quoting *Turner v. Kohler*, 54 Wn.App. 688, 693, 775 P.2d 474 (1989)). A motion must be filed six court days before the date the party wishes the motion to be considered. KCLR 7. A Note for Motion is required. LCR 7(b)(4)(A).

Here, Bailey did not oppose the Motion to Dismiss, did not timely file his Motion to Continue (or move to shorten time), did not note the matter for hearing, and did not appear at the Motion to Dismiss to present oral argument or request the hearing be continued.¹² [CP 410:10-15.] Accordingly, the Motion to Continue was not heard and the Court did not rule. In addition, Bailey's Motion to Continue failed to identify facts, depositions, or discovery required to respond and therefore did not meet the standard to continue the hearing. [CP 20]. Even if the Court had denied Bailey's Motion to Continue, such a ruling would have been justified.

d. Reconsideration was properly denied

Bailey's motion for reconsideration was properly denied. Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988). CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry

¹² Bailey has never claimed he could not appear at the hearing. [CP 20].

of an adverse decision. *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wash.App. 1, 7, 970 P.2d 343 (1999). A motion for reconsideration shall be filed not later than 10 days after entry of the judgment, order, or other decision. CR 59(b). A trial court may not extend the time period for filing a motion for reconsideration. CR 6(b)(2); *Moore v. Wentz*, 11 Wash.App. 796, 799, 525 P.2d 290 (1974).

Here, the order granting the Motion to Dismiss Amended Complaint was entered on June 12, 2015. [CP 22]. Accordingly, Bailey was required to file and serve a motion for reconsideration on or before Tuesday, June 23, 2015.¹³ CR 59(b), CR 6. However, Bailey did not file his Motion for Reconsideration until June 29, 2015 and again on June 30, 2015. Accordingly, the Court properly denied the motion.

Even if Bailey's Motion for Reconsideration had been timely, denial was still warranted on substantive grounds. CR 59(a) limits the grounds for reconsideration to nine identified causes. CR 59(a)(1)–(9). Here, the only category implicated in Bailey's Motion to Continue is his claim that there was newly discovered material evidence that he could not with reasonable diligence have discovered and produced at the hearing. CR 59(a)(4). However, the Forensic Audit he produced did not satisfy CR 59(a)(4) because it was not relevant and it was inadmissible hearsay. The

¹³ Ten days from June 13, 2015 is June 23, 2015.

Forensic Audit did not have any tendency to make the existence of any fact that is of consequence more or less probable. ER 401. The conclusory allegations regarding the securitization of the loan are not only speculative, they are irrelevant to Bailey, who is not a party to the loan and who did not contest the Judicial Foreclosure Action. Furthermore, the Forensic Audit is hearsay because it is a written statement that was not made while testifying at a trial or hearing, offered in evidence, to prove the truth of the matter asserted. ER 801(c). As the Motion for Reconsideration was based on the Forensic Audit which is neither evidence, nor admissible at trial, the Motion for Reconsideration was properly denied. CR 59(a)(4).

V. CONCLUSION

For the reasons set forth above, discretionary review is not warranted, and should be denied.

RESPECTFULLY SUBMITTED this 19th day of January, 2016.

HOUSER & ALLISON, APC

By: /s/ Cara C. Christensen

Cara C. Christensen, WSBA #43198

cchristensen@houser-law.com

Respondents U.S. Bank National

Association, as Trustee for Ownit Mortgage

Loan Trust, Mortgage Loan Asset-Backed

Certificates, Series 2006-3 and Mortgage

Electronic Registration Systems, Inc.

CERTIFICATE OF SERVICE

I the undersigned declare as follows: I am over the age of 18 years and am not a party to this action. I certify that on the 19th day of January 2017, I caused a true and correct copy of RESPONDENTS' ANSWER TO PETITION FOR REVIEW to be served on the following via UPS Overnight:

Jeff Bailey
10743 56th Ave.
Seattle, WA 98178

Gregory J. Jalbert
1001 4th Ave 3200
Seattle, WA 98154

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

Dated: January 19, 2017

/s/ Shawn Williams
Shawn Williams