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WASHINGTON STATE
SUPREME COURT

No. 93777-0

SUPREME COURT
STATE OF WASHINGTON

BYRON BARTON and JEAN BARTON, husband and wife,

Appellants,

v.

JP MORGAN CHASE BANK, N.A., et al.,

Respondents

TRIANGLE PROPERTY DEVELOPMENT, INC.'S RESPONSE TO WAIVER OF RULES AND EXTENSION OF TIME SUBMISSION

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ORIGINAL

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I. INTRODUCTION

Citing RAP 18.8, the Bartons have asserted additional arguments, to supplement their petition for review. None of these additional arguments should impact this Court's analysis and decision.

II. ARGUMENT

1. "Robosigning".

Without citation to the Record of Proceedings to support their allegations with any facts, the Bartons appear to argue that Chase Bank is guilty of so-called "robosigning" offenses. "Rrobosigning" refers to circumstances under which large numbers of mortgage loans in default are processed through foreclosure without individual people investigating historical facts and gaining personal knowledge of facts relevant to the foreclosure, but nevertheless executing documents required in the of mortgage foreclosure process, and reciting those facts as if they are personally known to the agent executing the documents.

The Petitioners' argument does not actually refer the court to any specific document executed by any specific person at Chase Bank, who made factual representations in the foreclosure process that the Petitioners contend the person did not actually know to be true. The closest Petitioners get is to refer to some statement Washington State attorney general Bob Ferguson reportedly made in some unspecified forum,

asserting that his office will require trustees to follow the law in the foreclosure process. This "showing" falls far short of meeting the requirement that Petitioners cite to the record for evidence supporting their claims. And nothing about this particular argument has any apparent bearing on the factors in RAP 13.4, under which the Court decides whether to accept review. Neither the Respondents nor the Court should be asked to scour the record on review, guessing what evidence, if any, tends to support the Petitioners' assertions, and then to make Petitioners' arguments for them, to the effect that one or another of the requirements of RAP 13.4(b) is met, to justify acceptance of review.

2. Lack of Standing.

Referring to a handful of cases from other states, and claiming to be presenting "new evidence", Petitioners make a confusing argument that seems to once again challenge Chase's "ownership" of the promissory note executed by the Petitioners and originally in favor of Washington Mutual. The heading of this section of the Petitioners' submission says "Chase Bank lacks standing", but the first legal authority they cite says the issue is "not an issue of standing but an element of its cause of action, which it must plead and prove".

In the end, this argument is exactly the same argument the

Petitioners have made over and over again, dating back to their first lawsuit, and repeated in their second, and then again in this, their third lawsuit. The Petitioners argue that Chase never properly acquired ownership of, or "holder" status related to, the promissory note under foreclosure. This factual argument was rejected in each of the Petitioners' three lawsuits, including this one. When the Petitioners' second lawsuit was dismissed with prejudice, this claim became *res judicata*, as the trial court and Court of Appeals in this case correctly found. Without admitting any legitimacy to the Petitioners' fact arguments about Chase Bank's ownership of the note, the Petitioners' opportunity to raise that argument has passed.

3. Failure to Comply With Pre-Foreclosure Requirements.

Petitioners claim that they made pre-foreclosure contact with Chase, and attempted to make inquiry and to apply for relief under the federal "HAMP" program, to modify their loan and avoid foreclosure. The new factual recitations contained in this latest submission are not found in any of the declarations filed by the Petitioners at the trial court, and forming the record on review, and the Petitioners fail to cite to any portion of the record to support these allegations. However, just like the previous argument, any failure by Chase Bank to engage in pre-

foreclosure processes dates back to the Bartons' original default (a fact they have never disputed). Hence, any failure to argue a Chase's non-compliance with a HAMP application for loan modification is a claim that was or *could have been* raised in the prior lawsuits. Such a claim is, therefore, *res judicata*, as the trial court in this case correctly found.

4. Res Judicata.

The Petitioners conclude their submission with two short paragraphs, arguing that the present case is a "different case", with "different facts and issues" from its first two lawsuits. Yet, the Petitioners do not list any new or different facts or issues presented in the present action that were not, and could not have been, asserted in the previous actions.

The present lawsuit is based upon the same promissory note as the first two lawsuits. It is based on a single, never-cured default in payment that occurred in 2011. It is based on a single notice of default issued in July, 2012, which precipitated the non-judicial deed of trust foreclosure that concluded in April of 2014, when Triangle Properties purchased the property at a public sale, in exchange for cash consideration.

The only argument the Petitioners could make that was not available to them in their previous actions is the dubious argument that a

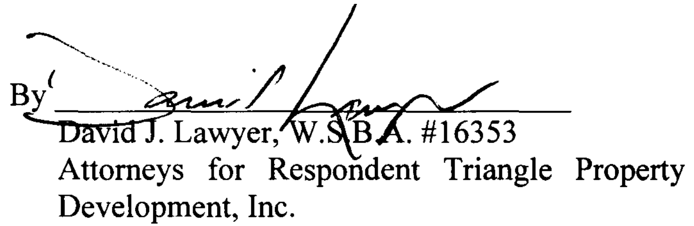
foreclosing holder of a note in default must issue a new notice of default for any new notice of sale it may record to commence a new foreclosure process. As the Court of Appeals correctly noted, that assertion is incorrect. *Leahy v. Quality Loan Serv. Corp of Wash.* 190 Wash. App. 1, 359 P.3d 805 (2015). Where a default is never cured, the foreclosing lender is not required to give the borrower a new notice of default as a condition to initiating a new foreclosure by recording a new notice of sale.

Every other argument the Petitioners advance (even those that are difficult to decipher) is based on facts available to the Petitioners in their previous lawsuits. Each such argument was either raised, argued and rejected, or could have been raised, in the prior lawsuits. There is a concurrence of (1) persons and party, (2) quality of the persons for or against whom the claim is made (3) subject matter, and (4) cause of action. *Loveridge v. Fred Meyer, Inc.,* 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The trial court properly concluded that *res judicata* prevents the Petitioners from raising those arguments here.

The Petitioners' stubborn refusal to accept the unsuccessful judicial outcome of their legal challenges causes continued, ongoing injury to Triangle, and must come to a conclusion.

DATED this 8th day of December, 2016.

INSLEE, BEST, DOEZIE & RYDER, P.S.



By ______________________
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Attorneys for Respondent Triangle Property Development, Inc.

DECLARATION OF SERVICE

I, Jerilyn K. Kovalenko, hereby declare under penalty of perjury under the laws of the State of Washington that on December 8th, 2016, I caused to be served true and correct copies of the forgoing *Response to Waiver or Rules and Extension of Time Submission* to the individuals named below in the specific manner indicated:

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DATED this December 8th, 2016, at Bellevue, Washington.

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Legal Assistant