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CASE No. 75695-8-1

[PREVIOUSLY No. 47501-4-II]

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGON

ALBERTO & VICTORIA AVALO
Appellants/Petitioners

v.

DEUTSCHE BANK TRUST COMPANY
AMERICAS AS INDENTURE TRUSTEE FOR
THE REGISTERED HOLDERS OF SAXON
ASSET SECURITIES TRUST 2005-1
MORTGAGE LOAN ASSET BACKED NOTES,
SERIES 2005-1,
Respondent/Defendant.

REPLY BRIEF OF APPELLANTS

Respectfully Submitted:

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Victoria L. Avalo
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Puyallup, WA 98373

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I. INTRODUCTION

In the Appellants Initial Brief, we made two principal arguments. First we argued that the initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. We offered a brief explanation of the State Rules of Civil procedure and law that support this argument, particularly in light of the respondent's burden of proof and Appellants right to discovery.

Second, we provided a comprehensive and consistent history of the Declaration of Ms. Boutin's regarding her purported knowledge of the records of Ocwen, their failure to comply with ER 80ER 803(a)(6) and RCW 5.45.020 and her conclusory statement of "personal knowledge" which simply does not meet the requirements of CR 56(e). Blomster v. Nordstrom, Inc., 103 Wn.App. supra; Editorial Commentary to CR 56 (citing Antonio v. Barnes, 464 F2d 584, 585 (4th Cir. 1972).

Appellants continue to state that the Trust did not hold the note at the time the Summary Judgment was issued and did not present such to the Court. Furthermore, default was caused by the actions of the Respondent and due to lack of discovery and the refusal of the court to allow a trial, this evidence was not presented to the court, resulting in prejudice upon the Appellants.

II. ARGUMENT IN REPLY

A. Burden of Proof on Summary Judgment

In January of 2007 the original lender, Saxon Mortgage, Inc., offered the Appellants a loan modification, Appellants were not in default on their loan. Saxon Mortgage, Inc. took 18 months to initiate said modification and refused payments during this time. Additionally, during this 18-month period of time Saxon continued to add interest to the principal. Once a modification agreement was finally offered by Saxon, Appellants noticed that over $70,000, had been added to the principal balance of the loan. Appellants brought this to the attention of their contact at Saxon, pointing out that it should not have taken so long to complete the modification, Appellants had done everything they had been asked to do in getting it completed in a timely fashion, and it only took as long as it did due to Saxon's overly slow processes, which resulted in Appellants having to resend the same or updated material multiple times throughout the process. The Saxon representative told Appellants not to worry and assured Appellants that this figure would be removed from the principal, agreeing that the length of time in processing the modification was Saxon's fault. In July of 2008 Appellants began making modification payments to Saxon Mortgage Inc. Believing these assurances, Appellants made payments to

Saxon Mortgage, Inc. in July, August, September, and October of 2008. In October of 2008 Saxon Mortgage Inc. purported to transfer the servicing rights of the Appellants Mortgage to Ocwen Loan Servicing, LLC (Ocwen). Saxon Mortgage, Inc. neglected to forward the October payment to Ocwen and subsequently, Ocwen refused to accept any further payments from the Appellants, retroactively sending the Appellants into default. Further, Saxon Mortgage, Inc. never corrected the error they made in adding an additional $70,000 to Appellants' principal owed.

The Appellants were, and are, willing and able to accept a modification from the Respondent as evidenced by the fact that they were making their payments as required, even as they expected Saxon Mortgage, Inc. to correct their mistake, which has never been corrected. To this day, Ocwen refused to accept payment from the Appellants and refused to discuss correcting the $70,000 mistake. Respondent statements that Appellants "ceased making payments on their loan in July 20011" are fabricated and untrue.

Respondent states a loan modification was offered in July of 2014. However, Respondent neglected to reveal to the Court that all "proposed modification" offered to the Appellants to date was for $573,000.00 and included $70,453.33 in unexplained fees, which the Respondents refer to as a "deferred principal balance". Respondent explained that the "deferred

principal balance" to the Appellants as fees that accumulated during the 2007-2008 period that Saxon Mortgage, Inc. was processing the modification. The record will show that the figure in question did not represent fees; it was accumulated interest that Saxon had previously agreed was a mistake and said they would waive. If, however, that figure does somehow represent fees, it would be an unconscionable amount of money to charge as "fees" for a modification intended to bring down the principal and/or monthly payment. Furthermore, the loan documents show that the Appellants purchased their home in 2005 for $454,000.00 and made a down payment of approximately $65,000.00, with a loan amount of $388,218.00 with Saxon Mortgage, Inc, for the remaining balance on the purchase price. The "proposed modification" offered by Ocwen has been for an amount almost $200,000.00 more than the original transaction 11 years ago. Current research indicates the property is valued at approximately $400,000. This business practice on the part of Ocwen is unconscionable and would have been brought to the Court's attention if Discovery had been permitted on behalf of the Appellants. Discovery would also reveal that Appellants responded favorably to Respondent's July 2014 loan modification with the proviso that they would be willing to provide a properly dated offer as the July 2014 "offer" was sent and received in August of 2014 and required to be dated and returned by July 24, 2014. Appellants had also indicated that

they wished to revisit the matter of the illegitimately added $70,000 to the principal balance owed and that they not to be forced to endure yet another 18-month fiasco at the hands of an unresponsive servicing company.

A trial court's summary dismissal of claims under CR 56 is reviewed by this Court *de novo*, taking all inferences in the record in favor of the non-moving party. *Hayden v. Mutual of Enumclaw Insurance Co.,* 141 Wn.2d 55, 1 P.3d 1167 (2000); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") (citing *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004); *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002); *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 485, 309 P.3d 636 (2013 (hereinafter "*Bavand*"). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P2d 966 (1963); *Schroeder; Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007); *Bavand*, at page 485.

The initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. *CR 56.* Sworn statements on summary judgment must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and (3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn

statement. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002); *Blomster v. Nordstrom*, 103 Wn.App. 252, II P.3d 883 (2000); *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997).

In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary materials must be taken as true. *State ex rei Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963); *Reid v. Pierce Co.*, 136 Wn.2d 195,961 P.2d 333 (1998).

Summary judgment is appropriate if reasonable persons can reach only one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Shows v. Pemperton*, 73 Wn.App. 107, 868 P.2d 164 (1994; *Doherty v. Municipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996); *Goad v. Hambridge*, 85 Wn.App. 98, 931 P.2d 200 (1997).

B. The Trust did not satisfy Its Burden of Showing that Summary Judgment was Warranted and There Were No Issues of Fact Remaining

Respondents did not present the original security instrument to the Court. Appellants reassert that although Saxon was the initial lender on the Note, there was no credible evidence of a transfer of the obligation from Saxon to anyone prior to December 22, 2004, when the obligation was transferred to an "undisclosed investor". The Note, which it never held, and

the assignment of the Deed of Trust was arguably a legal nullity, based on the lack of credible evidence. The Appellants had an outstanding Request for Production, which requested inspection of said document. Respondent seems to believe that just by stating that they are the "holder" of the Note it is deemed to be true. Furthermore, the "Assignment of Deed of Trust" presented by the Respondent is in question and the Appellants should be afforded the opportunity to authenticate such documents.

When there is contradictory evidence, or the moving parties' evidence is impeached, an issue of credibility is presented and the Court should not resolve issues of credibility on Summary Judgment, but should reserve the issue of credibility for trial. Balise v. Underwood, supra. Based upon the foregoing and the evidence presented to the trial court, there are numerous issues of material fact in dispute (if not undisputed in Appellants' favor) requiring the Order to be reversed and this matter remanded to the trial court for further proceeding or trial.

C. Sufficiency of Declaration of Nicole Boutin

Appellants reaffirm that the Affidavit of Ms. Boutin prejudice their case. The submission of said Affidavit was a supporting document to the Respondents Motion for Summary Judgment. Ms. Boutin did not affirm that she had person knowledge of the Appellants' records, only that she is "familiar with business records maintained by Ocwen (herein after

"Ocwen") and that based on this familiarity she believes that the business records submitted with this declaration are all records made at or near the time of the events and acts recorded by the individual with personal knowledge. Based upon her own statement, she admits that she does not know all facts she states pertaining to the Appellants' records to be true. She apparently did not create any of the documents herself. Nor was she apparently involved in the creation, custody or maintenance of these records. Her conclusory statement of "personal knowledge" simply does not meet the requirements of *CR 56(e). Blomster v. Nordstrom, Inc.*, 103 Wn.App. supra; Editorial Commentary to CR 56 (citing *Antonio v. Barnes*, 464 F2d 584, 585 (4th Cir. 1972).

If Ms. Boutin had actual knowledge of the Appellants documents, she would have been aware of the misappropriation of the $70,000 in funds from Saxon Mortgage Inc. to Ocwen and therefore, the reason for the Appellants default. If she had properly maintained these records, then the Appellants would not be in this situation. Simply put, there was no factual basis upon which to gauge the reliability of Ms. Boutin's affidavit at summary judgment. Where personal knowledge is lacking, Ms. Boutin's Declaration should have been given no consideration by the trial court on summary judgment. *See Loss v. DeBord*, 67 Wn.2d 318, 407 P.2d 421 (1965).

III. APPELLANTS' OBJECTION TO ATTORNEY FEES

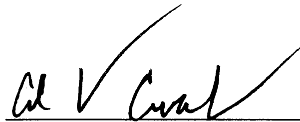
Appellants strongly Object to the issuance of any Attorney fees in this action. Based on the foregoing argument and analysis, the trial court had numerous genuine issues of material fact in dispute before it when it entered Summary Judgment, dismissing Appellant's claims on February 13, 2015. Pursuant to the Washington State Constitution, Article 1 Section 3 "No person shall be deprived of life, liberty, or property, without due process of law", the Appellants should not be penalized for exercising their rights in pursuing this appeal. The Washington Supreme Court has stated unequivocally that the right to appeal provided by the state constitution must be accorded "the highest respect" by the courts. Appellants have also incurred fees and significant financial hardship by exercising their Constitutional Right in the pursuit of Justice by this Honorable Court.

IV. CONCLUSION

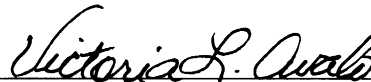
On summary judgment, the trial court's first order of business should have been determining the identity of the true and lawful owner and holder of the subject obligation. But, based on the evidence it had before it, the trial court did not do that. Only when the identity of the true and lawful owner of the obligation is established can the trial court evaluate the efficacy of its successor trustee and its compliance with its fiduciary duties of good faith to Appellants.

Appellants once more ask and request that this Honorable Court immediately reverse the order that denied Appellants' Motion to Cancel Sale and Vacate the Final Judgment. Appellants also ask that this action be remanded to the lower Court for further proceedings on the issues raised herein.

RESPECTFULLY SUBMITTED this 6th day of September, 2016.



Alberto Avalo



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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. We are now, and have been at all times mentioned herein, residents of the State of Washington, over the age of eighteen years, and we are competent to testify herein.

2. That on September 6th, 2016, we caused a copy of the foregoing APPELLANT'S REPLY BRIEF to be served to the following in the manner indicated:

Emilie K. Edling	______ Facsimile
Houser & Allison, APC	______ Messenger
9600 SW Oak St., Ste 570	__X__ U.S. 1st Class Mail
Portland, OR 97223	

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