93972.1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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,

v.

ALBERT E. AVALO and VICTORIA L. AVALO

Petitioner.

AMENDED
PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER(S)

Alberto and Victoria Avalo, pro se, request the Honorable Court to grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in DEUTSCHE BANK TRUST COMPANY AMERICAS AS INDENTURE TRUSTEE FOR THE REGISTERED HOLDERS OF SAXON ASSET SECURITIES TRUST 2005-1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, PLAINTIFF v. AVALO, DEFENDANTS No. 75695-8-1, filed on November 14, 2016. A copy of the Court of Appeal's opinion is attached as Appendix A. [Respondent/Plaintiff hereafter "Deutsche" and Petitioner/Defendant hereafter "the Avalos."]

B. ISSUES PRESENTED FOR REVIEW

1. Pursuant to the provisions of Rule 26, did the Trial Court err by exceeding its discretion when it disallowed the Avalos from obtaining discovery before proceeding with summary judgment, particularly since the Trial Court knew 1) that the Avalos had experienced an unavoidable casualty or misfortune preventing them from putting forth a proper defense in the matter prior to January of 2015, 2) that Deutsche Bank was able to conduct discovery, and 3) that Deutsche Bank offered no objection to the Avalos being able to

proceed with discovery, and did the Appellate Court err by failing to note, opine and rule on the Trial Court's error?

2. Were applicable provisions of the state Constitution violated and/or were the Trial Court and Court of Appeals in conflict with prior decisions of the Court when, on its own discretion and without any objection from Deutsche Bank, the Trial Court disallowed the Avalos from being able to conduct discovery after Deutsche Bank had been able to conduct its own discovery without obstruction?

C. STATEMENT OF THE CASE

In December of 2004, the Avalos signed a note in the amount of $388,218 to Saxon Mortgage, Inc. See Appeals Court opinion, Page 2.

In 2006 the Avalos household income decreased and inquired with Saxon about refinancing. In early 2007, Saxon said that refinancing was not an option due to loan-to-value issues. However, the Avalos were encouraged to seek a modification which the Avalos did in late 2007.

On Page 2 of its opinion, the Appellate Court states that "[t]he Avalos defaulted on their loan and, in May 2009, entered into a loan modification agreement with Deutsche Bank."

That is not accurate. The Avalos had *never* made a single late

payment as of December 2007, when the modification process began. The Avalos NEVER defaulted on their loan or refused to make any payments.

Saxon's work to modify the loan took over 18 months, during which time: Saxon made countless errors, including lost paperwork requiring the Avalos to resend the same and/or updated redundant documentation multiple times; the Avalos could not make payments; the accrual of interest was not suspended during the extended amount of time the modification took to complete; Saxon erroneously began foreclosure proceedings against the Avalos *on 3 separate occasions* during those 18 months; and when Saxon finally presented the Avalos with a modified loan, it included a $70,067.85 add-on to the principal of the loan which represented the interest that had been accumulating the entire 18-month period of time Saxon took to complete the modification.

When the Avalos complained, Saxon agreed to eliminate that $70,067.85 figure, stating that the interest accrual during the modification was a clerical error and should not have happened because the modification had taken so long to complete and acknowledged it was their fault.

The Avalos continued receiving separate statements from Saxon, demanding payment for the added interest in addition to the modified payment. The Avalos continued to complain and demand this get fixed.

The problem was not rectified. Ocwen took over the loan in 2009 after 4 months of on-time payments by the Avalos. But because Saxon had agreed that the $70,067.85 figure was a mistake on their part, the Avalos refused to make payments on that figure. The Avalos kept following up. At one point, an Ocwen representative noticed that they had been charging the Avalos almost three times more than was due for escrow. While that issue was rectified, Ocwen never addressed the $70,067.85 Saxon error.

As proof that neither Saxon nor Ocwen ever rectified this error, we see the exact same figure ($70,067.85) near the bottom of Page 3 of the Deutsche Complaint against the Avalos. Deutsche Bank, without explanation, represents that figure as "the Stated Balloon Amount" and a similar figure – $70,453.35 – is represented near the bottom of Page 4 of the Deutsche Complaint and described as "the deferred principal balance" also with no explanation as to what that means or what business record validates that figure as owed by the Avalos.

After loan modification, the Avalos never made payments on the $70,067.85 because Saxon acknowledged it as a mistake and not owed. Deutsche Bank ultimately filed a lawsuit to foreclose on the Avalos home due to an illegitimate financial obligation created by a mistake that Saxon, Ocwen, and Deutsche all knew about and all effectively ignored.

In the weeks and months following the initiation of the lawsuit against them, the Avalos did answer the complaint, but simply did not have time to research and formulate their discovery requests. This was due to the fact that for almost the entirety of the 2014 calendar year, the Avalos were in Texas, caring for an ill parent who ended up passing away in late 2014.

The situation confronted by the Avalos in 2014 is best described in the rules of civil procedure as an "[u]navoidable casualty or misfortune preventing the party from prosecuting or defending". See CR 60(b)(9). See also transcript from February 13, 2015 Motion for Summary Judgment Hearing, Pages 7, 8, and 9 where Mrs. Avalo describes why they had been unable to begin their defense of the case sooner.

In the summer of 2014, some months after Deutsche Bank filed their lawsuit against the Avalos, the Avalos did receive from Ocwen, Deutsche Bank's servicer, an offer of a mortgage modification *with a due date for signature and return that had already passed.* The Avalos responded positively to the offer, stating that they were prepared to accept the offer if they would correct the date and resend. In their response, the Avalos also reiterated some of their concerns because Saxon had previously reneged on their promise to remove the aforementioned erroneous $70,067.85 add-on. Ocwen never sent a correctly-dated modification offer.

In the fall of 2014, the Avalos contacted Deutsche to say that the out-of-state family emergency was an ongoing crisis; that they [the Avalos] had limited Internet availability during this time; and that their mail was not being forwarded to them. When the Avalos returned home in mid-December 2014, they learned Deutsche Bank had filed its motion for summary judgment *just days after being called by the Avalos and informed that the Avalos were still in Texas*, attending to the family emergency which had turned into the work of planning a funeral and settling a modest estate.

At the first scheduled summary judgment hearing, held on January 16, 2015, the Avalos explained these circumstances to the Court. Deutsche Bank did not deny any of it, including their decision to file for summary judgment when they [Deutsche Bank] knew the Avalos were out of communication, out of state, and dealing with a death in the family.

At the hearing, the Avalos asked the Court for time to complete two things. The Avalos had ordered a complete a mortgage audit from a company that specializes in investigating financial transactions. It was being conducted on their [the Avalos] entire mortgage transaction, including Deutsche Bank's filings on the public record. So first, the Avalos requested that time be given for that to be completed and entered into the record. And secondly, the Avalos requested time to conduct discovery as

they had not had any time to do any discovery at all in the case. The Court granted only four weeks; not enough time for discovery requests to be researched and created by the Avalos, and responded to by Deutsche Bank.

The record shows that both the professional mortgage audit was completed and the Defendants' first set of discovery requests was completed, but only days before the continued hearing on February 13, 2015, and Deutsche Bank was served with their copies of both. But because the Court had only delayed the proceedings for four weeks, there was no time for Deutsche Bank to even review the material, let alone respond to it.

From the Avalos' Opposition to Summary Judgement to the transcripts of the February 13, 2015 summary judgment hearing, the record clearly shows the Avalos repeatedly requested an appropriate amount of time to conduct discovery and for Deutsche Bank to be able to respond.

The transcripts show the Deutsche Bank counsel opining on the above-described material even though she admitted she had not even examined it, even falsely asserting it was likely part of an Internet scam.

Summary judgment was granted without Deutsche Bank being required to respond to the Avalos discovery.

D. ARGUMENT(S) WHY REVIEW SHOULD BE GRANTED

1. **The Trial Court denied the Avalos' right to obtain discovery. Without any party's motion or objection in opposition to discovery, and on its own initiative and contrary to Rule 26, the Trial Court disallowed the Avalos' discovery from going forward. The Court then granted Deutsche Bank's Motion for Summary Judgment. In its summary of the case, the Court of Appeals' opinion inaccurately deals with this element of the case, treating it as a question of whether the Trial Court was required to allow "additional discovery" when, in fact, the Avalos had not yet, to date, had the ability to conduct ANY discovery at all. Deutsche Bank made their discovery requests to the Avalos, to which the Avalos provided a timely response. At no time did the Trial Court challenge the relevance of Deutsche Bank's discovery requests as it did the Avalos'. Given that the rules of civil procedure promote reciprocity and equal access to evidence, pursuant to Rule 26 the Avalos should have been able to conduct discovery.**

Quoting the Trial Court's May 29, 2015 transcripts: "If the Court of Appeals believes that I've made an error and that discovery is necessary, they will reverse me and they'll send it back down for discovery."

In its Opinion, the Court of Appeals opined, on Page 6 Discovery, that pursuant to Turner v. Kohler, 54 Wn. App. at 629, "if the party opposing the motion cannot show that it is likely to discover evidence that would create an issue of fact, the court is not required to delay the summary judgment hearing."

The Avalos argue that Turner v. Kohler is not relevant because:

1. With respect to the Deutsche v. Avalo case, the Court of Appeals believed a fact that was not so: that the Avalos had conducted *some* discovery and were, at the time of the summary judgment hearing, seeking to conduct even *more* discovery. See Page 6 of Appellate Court's opinion, Discovery section, first two sentences:

> "The Avalos contend that the trial court should have allowed them to conduct *additional discovery* before ruling on Deutsche Bank's summary judgment motion. Delaying a motion hearing to permit a party to conduct *further discovery*..." [emphasis added]

And the last sentence on Page 6, continued on Page 7:

> "The Avalos claim they needed *additional discovery* in order to support the conclusions of the chain of title analysis and present evidence of breaks in the chain of title." [emphasis added]

In fact, the Avalos had not yet had the opportunity to request of Deutsche Bank *any* discovery at all. In Turner v. Kohler, the party seeking a continuance to obtain material helpful to its case was the Plaintiff. Still, in that case, Turner's request for a continuance *was twice granted* (albeit by the Defendant, Kohler).

2. If the Court of Appeals had known that the Avalos had not yet been able to conduct *any* discovery, by the time summary judgment was upon them, Turner v. Kohler would have provided different guidance. Further, other cases would have shed more light.

For example, in State v. Boehme, 71 Wn.2d 632, 430 P.2d 527 (1967), the Court opined:

> "At this point, we momentarily pause to observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a 2-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage. State v. Robinson, 61 Wn.2d 107, 377 P.2d 248 (1962); State v. Gilman, 63 Wn.2d 7, 385 P.2d 369 (1963); State v. Peele, 67 Wn.2d 893, 410 P.2d 599 (1966)." [Emphasis added.]

In State v. Nelson, the Court cited the above quote from the Boehme case, referring to it as a "beacon of direction to the lower courts". See State v. Nelson, 14 Wn. App. 658, 664, 545 P.2d 36 (1975).

Then in State v. Yates, the Court cited the same quote from Boehme, calling it "*the clear policy* this court expressed over two decades ago." [Emphasis added.] See State v. Yates 111 Wn.2d 793 765 P.2d 291 (1988).

Moreover, the Trial Court lacked the authority to prevent discovery from being done. Pursuant to Rule 26, there are only three specific circumstances under which the court has the authority to limit discovery:

> "(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more

> convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation." See RCP Rule 26 (b)(1)(a),(b), and (c)

Further, pursuant to Rule 26, there is only one specific circumstance in which "the court may act upon its own initiative": if and when "reasonable notice" has been made or "pursuant to a motion under section (c)." See RCP Rule 26 (b)(1)(a),(b), and (c). In the instant matter, no one argued that the discovery sought was unreasonably cumulative or duplicative, or was obtainable from some other more convenient source; no one had argued that the party seeking discovery had had ample opportunity by discovery in the action to obtain the information sought. *It is an established fact that the opposite was the case*. And no one had argued that the discovery was unduly burdensome or expensive. The burden of establishing entitlement to nondisclosure rests with the party resisting discovery, *Anderson*, 103 Wn.2d at 905, which Deutsche Bank did not do.

We now argue what the Avalos believe discovery could reveal.

Deutsche Bank's unexplained $70,067.35 and $70,453.85 figures

Discovery would either authenticate Deutsche Bank's "Stated

Balloon Amount" of $70,067.85, revealing what exactly is meant by that, and/or the $70,453.35 figure, and what is meant by the "the deferred principal balance", OR it would show one or both figures as invalid. This is of material importance 1) because the Avalos argue that these figures are a mistake caused by Deutsche Bank's servicer, and *not* created by the Avalos failure to make timely payments, and 2) because Deutsche Bank refers to this matter as a money judgment. Therefore, if the case is correctly adjudicated and a valid money judgment is still the result, the proper amount can only be ascertained through discovery.

Pertaining to the mortgage audit, a/k/a the chain of title analysis, produced for the Avalos AND the discovery requests they produced: the Appeals Court opined, at Page 7 of their opinion (second sentence), that...

> "They [the Avalos] claim that their discovery requests could have asked Deutsche Bank to explain these alleged breaks in the chain of title and provide details about "the nature of the transaction." As discussed above, the trial court properly concluded the information contained in the chain of title analysis was not relevant."

However, without reliance upon the testimony of an opposition witness qualified to affirm that the information contained in that analysis and discovery was *not* relevant, neither the Deutsche Bank's counsel, nor the trial judge who admitted she had never before laid eyes on a professionally investigated and prepared chain of title analysis, nor the

judges of the Court of Appeals, were in a position to assert that the Avalos' discovery would not reveal anything of relevance. Along with the aforementioned analysis that was completed, an affidavit of fact made by the investigator who conducted the analysis was included. Because the Trial Court disallowed this material in the proceeding, Deutsche Bank did not have to provide a responsive affidavit. The Avalos contend this demonstrated an untenable inequity by the lower courts.

Discovering whether Deutsche Bank is truly the holder in due course

In error, the Trial Court and Appellate Court failed to acknowledge "Note Holder" is more than being in possession of "the Note."

In its summary judgment hearing, the Deutsche Bank counsel cited the Bain case from 2012, suggesting that Bain was one dimensional. The "Bain case that I quoted is very, very clear," she said. See Page 11, February 13, 2015 summary judgment transcript. See also Bain v. Metropolitan Mortg. Group, Inc., 285 P.3d 34, 175 Wn.2d 83 (Wash. 2012).

The Court then immediately agreed, saying,

> "That was my other question is, is your client the holder of the note? And if you're the holder of the note, I think that the argument made by the Avalos fails."

In its opinion, the Appellate Court, also citing RCW 62A.3-301 and

Brown v. Dep't of Commerce, 184 Wn.2d 509, 524-25,359 P.3d 771 (2015)

agreed with Deutsche and the Trial Court, saying,

> "as holder of the note, Deutsche Bank had the authority to enforce the note and commence judicial foreclosure of the deed of trust. *Because no questions of fact exist as to any issue material to the judgment*, we affirm." See opinion Page(s) 1-2. [Emphasis added.]

The Appellate Court again:

> "...we consider the Avalos' contention that a question of fact exists as to Deutsche Bank's authority to enforce the note and deed of trust. Washington law is clear: the holder of an instrument is entitled to enforce that instrument. Deutsche Bank submitted undisputed evidence that it was the holder of the note. While the Avalos deny that Deutsche Bank was the holder of the note, they have submitted no evidence to contradict Deutsche Bank's evidence. The Avalos claim that the chain of title analysis creates an issue of disputed fact. But it does not because the analysis does not dispute that Deutsche Bank was the holder of the note, the only relevant fact about Deutsche Bank's authority to foreclose. Thus, under well-established Washington law, Deutsche Bank was entitled to enforce the note." See opinion Page(s) 4-5.

The Appellate Court again cites Bain when, at the bottom of Page 5 of its opinion, it concludes that,

> "Washington law requires only that Deutsche Bank currently holds the note. Therefore, the Avalos' chain of title evidence has no relevance to Deutsche Bank's authority to initiate foreclosure." See Bain, 175 Wn.2d at 102-04.

In other words, the Deutsche Bank counsel and the Trial Court and the Appellate Court all held the view that being in possession of the note was literally the only relevant fact. In the words of the Trial Court, "[I]f you're the holder of the note... the argument made by the Avalos fails."

The Avalos argue that the Appeals Court opinion is not entirely accurate. Washington law does not require *only* that Deutsche Bank holds the note. In reaching the Bain decision, the High Court also obtained guidance from William B. Stoebuck & John W. Weaver's, Washington Practice: Real Estate: Transactions (2d ed. 2004) which was quoted thusly:

> "[a] general axiom of mortgage law is that obligation and mortgage cannot be split, meaning that the person who can foreclose the mortgage *must be the one to whom the obligation is due.*" See Volume 18 Stoebuck & Weaver, Washington Practice: Real Estate: Transactions (2d ed. 2004), at 334. [Emphasis added.]

This goes to the distinction between "holder in due course" and merely being a party in possession of the purported note. If the party claiming to be in physical possession of the note has not yet shown that they are the holder in due course, that party's status as note holder is an open question. See RCW 62A.3-302.

So, in response to Deutsche Bank citing Bain, four side notes by way of comparison become relevant in the instant matter: 1) In Bain's case against MERS, Kristin Bain was permitted to conduct discovery; 2) the Washington State Supreme Court heard the case on her appeal after the lower court had granted summary judgment to her opponent who was seeking to foreclose; and 3) ultimately, the homeowner's position was largely vindicated when the Court ruled that MERS could not be an actual

beneficiary because MERS did not hold the note and only the note holder could enforce the note. But 4) Bain went further. It affirmed that "holder" must mean "holder in due course," not just being in current physical possession of the subject note.

Discovery should help establish whether Deutsche Bank is the "holder in due course" pursuant to RCW 62A.3-302.

More specifics about what discovery could and should reveal

Discovery could reveal whether there exist undisclosed promises or orders, pursuant to RCW 62A.3-106; and/or whether the "instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity," pursuant to RCW 62A.3-302(a)(1); and/or whether the "holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in RCW 62A.3-306, and (vi) without notice that any party has a defense or claim in recoupment described in RCW 62A.3-305(a)," pursuant to RCW 62A.3-302(a)(2).

Further, pursuant to RCW 62A.3-302(e)...

> "If (i) the person entitled to enforce an instrument has only a security interest in the instrument and (ii) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured."

... the Avalos should be afforded the right to investigate the full measure of any defenses that may be available to them, or claims in recoupment, or claim to the instrument that may be asserted against Deutsche Bank or another party. These, along with determining "holder in due course" status, are specifics that could only possibly be ascertained through discovery.

2. **The Avalos argue for the fair administration of justice. Specifically, they argue that had the Trial Court and the Appellate Court followed the facts of the case, and the rules, by allowing the Avalos to properly defend themselves without obstruction, justice would be served. They argue that this position is widely supported beginning with the rules of civil procedure, extending to the laws of the state and up to the constitution and the case law that carves the contours of the enforcement authority to rightly enforce all of the above.**

The Washington State Constitution states that "[j]ustice in all cases shall be administered openly and without unnecessary delay." WASH. CONST. art. I, § 10. The Trial Court's decision to disallow Avalos'

discovery constrained an open proceeding *and* created an unnecessary delay in the service of justice.

The main function of the judicial system is to ensure the "fair and proper administration of justice." See Major Prods. Co. v. Northwest Harvest Prods, 979 P.2d 905, 907 (Wash. Ct. App. 1999), review denied 989 P.2d 1141 (Wash. 1999). The High Court exercises its authority "to promote justice by ensuring a fair and expeditious process." WASH. ST. CT. GENERAL. R. 9(a). Accord WASH. EVID. E.R. 102 (stating that the rules of evidence "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"); WASH. R. SUPER. CT. CIV. R. 1 (stating that Civil Rules for superior court are to be interpreted to the end of achieving a "just... determination of every action"); WASH. REV. CODE § 2.04.180 (2005) (the court's affirmative responsibility to adopt rules "most conducive to the due administration of justice").

A trial court abuses its discretion if the decision is arbitrary, manifestly unreasonable, or based upon untenable grounds. Washington Fed'n of State Employees v. State, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983).

E. CONCLUSION

The Avalos present this Petition pursuant to RAP 13.45 (b)(1), (3), and (4), arguing that the Court of Appeals' opinion is in conflict with decisions of the Supreme Court. They have cited those cases.

As such, this matter presents a significant question of law under the Constitution of the State of Washington and involves issues of substantial public interest that should be determined or affirmed by the Supreme Court.

The Avalos argue that discovery will show whether Deutsche Bank is, in fact, the holder in due course pursuant to RCW 62A.3-302, not merely in possession of the note. The Avalos had a right to seek documentary confirmation that Deutsche Bank's allegations of itself can be proven.

There are significant recent examples where Washington State courts have affirmed that being the holder of the note status must be shown. Discovery is required to confirm the status as "holder in due course", a term discussed in Bain; a case cited by Deutsche in oral argument.

To affirm the Avalos right to conduct discovery, 1) would be well within the rules, 2) was not within the Trial Court's authority to prevent since no discovery by the Avalos had yet been conducted when the Trial Court disallowed the Avalos from being able to conduct discovery, 3) would affirm that both parties to this controversy have the right to conduct

discovery (not just one side) and 4) would not cause undue delay as it would promote the exercise and administration of justice, which is what each case before each court in the State of Washington has a constitutionally imposed duty to pursue.

Further, the Avalos have thus far been denied the ability to prove that the source of the default Deutsche Bank alleges – that ostensibly grants Deutsche the right to foreclose on their home – was due to an error that Deutsche Bank's own servicer long ago took responsibility for; a figure that the Avalos never owed. Pursuant to RCW 19.144.010(12), the Avalos simply want the modification they ostensibly received years ago, without the accrued interest *the servicer promised to remove*.

For all the cited and supported reasons outlined above, the Avalos argue that the matter should be sent back to the Trial Court where the Avalos should be ordered to be allowed to proceed with discovery.

Respectfully submitted this 10th day of February, 2017

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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, Respondents, v. ALBERTO E. AVALO; VICTORIA L. AVALO, Appellants, WELLS FARGO FINANCIAL WASHINGTON 1, INC.; ALSO ALL PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT HEREIN, Defendants.	No. 75695-8-I DIVISION ONE UNPUBLISHED OPINION FILED: November 14, 2016

LEACH, J. — Alberto and Victoria Avalo appeal the summary judgment entered in favor of Deutsche Bank Trust Company Americas. After the Avalos defaulted on a loan, Deutsche Bank commenced a judicial foreclosure. The Avalos claim that questions of fact exist about Deutsche Bank's authority to foreclose. However, as holder of the note, Deutsche Bank had the authority to enforce the

note and commence judicial foreclosure of the deed of trust. Because no questions of fact exist as to any issue material to the judgment, we affirm.

BACKGROUND

In December 2004, the Avalos signed a promissory note in the amount of $388,218 for a loan from Saxon Mortgage Inc. A deed of trust encumbering the Avalos' property secured the loan. Saxon endorsed the note to Deutsche Bank. Assignment of the deed of trust to Deutsche Bank was recorded on June 25, 2010.

The Avalos defaulted on their loan and, in May 2009, entered into a loan modification agreement with Deutsche Bank. In July 2011, the Avalos again stopped making payments on their loan. In response, the loan servicer sent a notice of default to the Avalos. This notice told the Avalos that to cure default they needed to pay $9,621.12 by August 9, 2011. The Avalos failed to cure the default. Deutsche Bank filed an action to enforce the note and foreclose the deed of trust.

Deutsche Bank moved for summary judgment. Deutsche Bank supported its motion with an affidavit attesting to its possession of the note and beneficial interest in the deed of trust. At the summary judgment hearing, Deutsche Bank also produced the original promissory note. In opposition to the summary judgment motion, the Avalos submitted a document called "Chain of Title Analysis & Mortgage Fraud Investigation" (chain of title analysis) prepared for the Avalos by a company called Mortgage Compliance Investigators (MCI). The chain of title analysis summarized MCI's forensic audit of the Avalos' individual mortgage.

The trial court granted summary judgment to Deutsche Bank. The Avalos appeal.

DISCUSSION

Standard of Review

We review an order granting summary judgment de novo, performing the same inquiry as the trial court.[1] The initial burden is on the moving party to show no genuine issue of fact exists.[2] The burden then shifts to the nonmoving party to "set forth specific facts to rebut the moving party's contentions and show that a genuine issue as to a material fact exists."[3] A material fact is one on which the outcome of the litigation depends.[4] "The nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations."[5] Summary judgment is appropriate when, taking all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[6]

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[1] Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000).

[2] Deutsche Bank Nat'l Tr. Co. v. Slotke, 192 Wn. App. 166, 171, 367 P.3d 600, review denied, 185 Wn.2d 1037 (2016).

[3] Allard v. Bd. of Regents of Univ. of Wash., 25 Wn. App. 243, 247, 606 P.2d 280 (1980).

[4] Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

[5] Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

[6] Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary Judgment

First, we address the Avalos' claim that the trial court committed evidentiary error. The Avalos contend that the trial court should not have considered the affidavit of Nicole Boutin and the attached business records because she did not demonstrate personal knowledge as required by CR 56(e).[7] However, the trial court could not have considered this affidavit at summary judgment because it was not part of the record when the court granted the motion. The trial court granted summary judgment on February 13, 2015. Deutsche Bank submitted the Boutin affidavit on May 4, 2015, in support of its motion for entry of judgment and decree of foreclosure. Because this affidavit was submitted to the court after the court decided the summary judgment motion, it could not have influenced the court's decision on the motion.

Next, we consider the Avalos' contention that a question of fact exists as to Deutsche Bank's authority to enforce the note and deed of trust. Washington law is clear: the holder of an instrument is entitled to enforce that instrument.[8] Deutsche Bank submitted undisputed evidence that it was the holder of the note. While the Avalos deny that Deutsche Bank was the holder of the note, they have submitted no evidence to contradict Deutsche Bank's evidence. The Avalos claim that the chain of title analysis creates an issue of disputed fact. But it does not

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[7] See Barkley v. GreenPoint Mortg. Funding, Inc., 190 Wn. App. 58, 67, 358 P.3d 1204 (2015), review denied, 184 Wn.2d 1036 (2016).

[8] RCW 62A.3-301; Brown v. Dep't of Commerce, 184 Wn.2d 509, 524-25, 359 P.3d 771 (2015); Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 104, 285 P.3d 34 (2012).

because the analysis does not dispute that Deutsche Bank was the holder of the note, the only relevant fact about Deutsche Bank's authority to foreclose. Thus, under well-established Washington law, Deutsche Bank was entitled to enforce the note.

The Avalos challenge Washington law, asserting that how a note is acquired is also relevant. They contend that Deutsche Bank is not entitled to enforce the note unless it has established its chain of title. They contend that the holding of Bain v. Metropolitan Mortgage Group, Inc.[9] and other Washington case law—that the security follows the holder of the note—should not apply in cases of fraud and "egregious errors," including breaks in the chain of title. They rely on RCW 65.08.070 for the proposition that holder status must be proved with evidence of a legitimate delivery. But the Avalos misunderstand the significance of this law. RCW 65.08.070, Washington's recording act, "'make[s] the deed first recorded superior to any outstanding unrecorded conveyance of the same property unless the mortgagee or purchaser had actual knowledge of the transfer not filed of record.'"[10] This statute does not require that a note be recorded before the holder of that note can enforce it. Washington law requires only that Deutsche Bank currently holds the note.[11] Therefore, the Avalos' chain of title evidence has no relevance to Deutsche Bank's authority to initiate foreclosure. Undisputed

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[9] 175 Wn.2d 83, 285 P.3d 34 (2012).

[10] Hu Hyun Kim v. Lee, 145 Wn.2d 79, 86, 31 P.3d 665 (2001) (quoting Tacoma Hotel, Inc. v. Morrison & Co., 193 Wash. 134, 140, 74 P.2d 1003 (1938)).

[11] Bain, 175 Wn.2d at 102-04.

evidence shows that the trial court properly granted summary judgment in favor of Deutsche Bank.

Discovery

The Avalos contend that the trial court should have allowed them to conduct additional discovery before ruling on Deutsche Bank's summary judgment motion. Delaying a motion hearing to permit a party to conduct further discovery may be appropriate where "'the party cannot present by affidavit facts essential to justify the party's opposition.'"[12] But if the party opposing the motion cannot show that it is likely to discover evidence that would create an issue of fact, the court is not required to delay the summary judgment hearing.[13] We review a trial court's decision to grant or deny a request for a continuance to conduct discovery for abuse of discretion.[14]

Here, the Avalos requested additional time to conduct discovery. The trial court delayed the summary judgment hearing for nearly a month to give the Avalos time to respond to Deutsche Bank's motion. This gave them time to obtain the chain of title analysis that they submitted with their amended opposition to summary judgment on February 9. The trial court refused to continue the hearing further because it concluded that the Avalos had not identified what additional evidence they hoped to discover.[15] The Avalos claim they needed additional

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[12] MRC Receivables Corp. v. Zion, 152 Wn. App. 625, 628-29, 218 P.3d 621 (2009) (quoting CR 56(f)).

[13] Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

[14] MRC Receivables Corp., 152 Wn. App. at 629.

[15] The Avalos contend that what evidence they hoped to discover was apparent from the chain of title analysis attached to their opposition to the summary

discovery in order to support the conclusions of the chain of title analysis and present evidence of breaks in the chain of title. They claim that their discovery requests could have asked Deutsche Bank to explain these alleged breaks in the chain of title and provide details about "the nature of the transaction." As discussed above, the trial court properly concluded that information contained in the chain of title analysis was not relevant. Thus, discovery to confirm the conclusions of this document would not create an issue of fact. The trial court did not abuse its discretion by denying the Avalos addition time for discovery.

CR 54(e) Violation

The Avalos contend that the trial court should have required Deutsche Bank to refile its motion because it presented the court with a proposed order too late to satisfy the rules. CR 54(e) requires the attorney for the prevailing party to "prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct." The trial court granted summary judgment on February 13, 2015. Deutsche Bank did not present the court with a proposed order until May 4, 2015, nearly three months later.

Deutsche Bank does not dispute the delay but contends that the remedy for this error is not reversal. CR 54(e) provides a remedy when the prevailing party does not present a proposed order in a timely manner: "any other party may do

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judgment motion, but they do not reference specific evidence that would create an issue of fact.

so." When Deutsche Bank did not submit a timely proposed order, the Avalos were free to submit their own proposed order. But they did not.

Further, judgments entered in spite of procedural error are valid unless the complaining party shows resulting prejudice.[16] A party is not prejudiced if it is able to timely appeal and argue any issues it wishes to raise.[17] Under this standard, the Avalos do not show prejudice.

Attorney Fees

Deutsche Bank requests an award of costs and fees as the prevailing party based on RCW 4.84.330 and RAP 18.1. RAP 18.1 allows this court to award attorney fees when applicable law authorizes them. "RCW 4.84.330 permits a party to recover reasonable attorney fees and costs in any action on a contract where the contract provides for this award."[18] Here, the deed of trust provides, "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument." Because the deed of trust authorizes a fee award and Deutsche Bank is the prevailing party, we award reasonable attorney fees and costs on appeal, subject to its compliance with RAP 18.1.

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[16] Burton v. Ascol, 105 Wn.2d 344, 352, 715 P.2d 110 (1986) ("A judgment entered without the notice required by CR 54(f)(2) is not invalid, however, where the complaining party shows no resulting prejudice.").

[17] Burton, 105 Wn.2d at 352-53.

[18] Slotke, 192 Wn. App. at 179.

CONCLUSION

The Avalos have not demonstrated the existence of any genuine issue of material fact relevant to Deutsch Bank's authority to foreclose. Accordingly, we affirm.

WE CONCUR:

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALBERTO E. AVALO, Pro se, and VICTORIA L. AVALO, Pro se, Appellants,	)	No. 939721
vs.	)	CERTIFICATE OF SERVICE
DEUTSCHE BANK TRUST COMPANY AMERICAS,	)	
Respondent	)	

WE, the Appellants, Alberto E. Avalo and Victoria L. Avalo, Pro Se, HEREBY CERTIFY that a true and correct copy of APPELLANTS' PETITION FOR REVIEW has been filed with the Clerk of the Court and served by email/US Mail upon the following party: Emilie Edling at Houser & Allison, APC 9600 Oak St., Ste 570, Portland, OR 97223, on this 10th day of January, 2017.

ALBERTO E. AVALO

VICTORIA L. AVALO

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