NO. 96430-1

SUPREME COURT OF THE STATE OF WASHINGTON

TED A. THOMAS and DEBRA A. THOMAS,

Petitioners,

v.

SPECIALIZED LOAN SERVICING, LLC, RTS PACIFIC, INC., a Washington corporation (now in receivership); RMS MORTGAGE ASSET TRUST 2012-1, U.S. BANK as Trustee; RMS RESIDENTIAL PROPERTIES, LLC; RESIDENTIAL MORTGAGE SOLUTION, LLC; PRIME ASSET FUND, LLC,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

HOLLAND & KNIGHT LLP
David J. Elkanich, WSBA No. 35956
Nellie Q. Barnard, WSBA No. 50587
2300 U.S. Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204
(503) 243-2300

Attorneys for Respondents Specialized Loan Servicing, LLC, RMS Mortgage Asset Trust 2012-1, U.S. Bank as Trustee, RMS Residential Properties, LLC, and Residential Mortgage Solution, LLC

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. COUNTER-ISSUES FOR REVIEW 2

III. COUNTER-STATEMENT OF THE CASE 2

IV. REASONS WHY REVIEW SHOULD BE DENIED 3

A. Standard for Review 3

B. The Court of Appeals Unpublished Opinion Applied Settled law to Undisputed Facts 4

C. The Thomases Have Not Identified any Conflict Between the Unpublished Opinion and Any Supreme Court or Other Court of Appeals Decision 6

V. ATTORNEY FEES AND COSTS 6

VI. CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

Cases

Bain v. Metro. Mortg. Grp., Inc.,
175 Wn.2d 83, 285 P.3d 34 (2012) 6

Thomas v. Specialized Loan Servicing, LLC,
76644-9-I, 2018 WL 3853877 (Wash. Ct. App. Aug. 13, 2018) (unpublished) 4, 5

Statutes

RCW 4.84.330 6

RCW 61.24.005(2) 5

Other Authorities

RAP 18.1(a) 6, 7

RAP 13.4(b) 2, 3, 4

I. INTRODUCTION

This Court should deny Appellants Ted A. Thomas and Debra A. Thomas' (the "Thomas' ") Petition for Review. The Thomases have taken advantage of essentially every vehicle provided under Washington law for reviewing the trial court's decision on summary judgment in favor of Respondents Specialized Loan Servicing, LLC ("SLS"), RMS Mortgage Asset Trust 2012-1 ("RMS Trust"), U.S. Bank as Trustee, RMS Residential Properties, LLC and Residential Mortgage Solution, LLC (collectively "Respondents"). The Thomases sought reconsideration before the trial court, filed an appeal with the Court of Appeals, and sought reconsideration of the Court of Appeals opinion. At each level of review, the various courts applied well-settled law to uncontested facts, and affirmed the decision on summary judgement. The issues have narrowed throughout the review process, and now the Thomases present only one issue in their petition: whether the holder of the note initiated the nonjudicial foreclosure at issue herein. The Court of Appeals decision is consistent with this Court's settled case law. There is no reason for this Court to accept review of this case. Accordingly, Respondents respectfully request that this Court deny the petition for review.

//

//

II. COUNTER-ISSUES FOR REVIEW

1. Is there any basis, as required under the Washington Rules of Appellate Procedure ("RAP"), Rule 13.4(b), for this Court to accept discretionary review of this matter?

2. Are Respondents entitled to an award of attorney's fees and costs incurred in responding to the Thomas' Petition for Review?

III. COUNTER-STATEMENT OF THE CASE

The Thomases refinanced their property in 2007 and fell behind on their mortgage payments in 2008. (CP 622, 616.) In 2011, the Thomases resolved their 2008 default by entering into a loan modification. (CP 666–72.) The Thomases defaulted less than a year after modifying their loan. (CP 617.) In December 2013, RMS Trust had acquired the Thomas' loan, and SLS, which was servicing the loan, initiated a nonjudicial foreclosure. (CP 616–17.) Thereafter, the Thomases filed for bankruptcy relief twice, which stayed the foreclosure proceeding, but both petitions were dismissed because the Thomases failed to file required documents. (CP 773-75.) The foreclosure sale occurred on or about July 25, 2014. (CP 702–704.)

The Thomases initiated this litigation on December 24, 2015. (CP 1.) Respondents noted their motion for summary judgment on November 28, 2016. (CP 1549.) The Thomases waited until December 6, 2016 to serve their first discovery requests (the original discovery cutoff was October 31,

2016). (CP 1473–74.) Following the trial court's grant of Respondents' Motion for Summary Judgment, the Thomases moved for reconsideration, which was denied on March 1, 2017. (CP 1370, 1510.) This appeal followed.

The Court of Appeals affirmed the trial court's decision on summary judgment in an unpublished opinion on August 13, 2018. The Thomases timely moved for reconsideration, which was denied on September 18, 2018.

The Thomases filed a petition for review in this court, which was rejected on October 29, 2018 for exceeding the page limitation. The Thomases filed the present petition for review on November 8, 2018.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard for Review

Pursuant to the Washington Rules of Appellate Procedure, Rule 13.4(b), 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.

The Thomases contend that review is warranted because the Court of Appeals unpublished opinion is in conflict with "this Court's binding decisions and the applicable statutes." Petition for Review at 17. The Thomases are mistaken. And in any event, review is not warranted under any of the criteria established in RAP 13.4(b).

B. The Court of Appeals Unpublished Opinion Applied Settled law to Undisputed Facts.

The lone issue presented in the Petition for Review is whether the beneficiary/noteholder initiated the foreclosure at issue herein. The foreclosure was properly commenced by RMS Trust, the entity that held the note, which was endorsed in blank, at that time. Whether other entities held the note at other times is irrelevant.

The Thomases claim that the Court of Appeals held "that conflicting statements about noteholder status, unsupported by documentation, complies with the DTA and that any supposedly related entity without noteholder status may foreclosure non-judicially." Petition for Review at 19. The Thomases mischaracterize the Court of Appeals opinion, which held as follows:

> Under the DTA, the beneficiary is the entity that holds the note. RCW 61.24.005(2); *see also Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012). Before conducting a foreclosure sale, a trustee must have proof that the beneficiary actually holds the note on which the trustee is foreclosing. *Bain*, 175 Wn.2d at 102. "A declaration by the beneficiary made under the penalty of

> perjury stating that the beneficiary is the actual holder of the promissory note. . . shall be sufficient proof." *Former* RCW 61.24.030(7)(a) (2009).
>
> Ward testified that RMS acquired the loan from the original lender in 2007. The note was subsequently transferred to RMS Properties and later to RMS Trust. Ward declared that, as servicer for the RMS Entities, SLS received the "wet ink" note from them. In response to an interrogatory seeking information on the whereabouts of the original note, the RMS Entities stated that the original note was in possession of U.S. Bank per a custodial agreement with that entity.
>
> Documents in the record support Ward's testimony. The note was indorsed in blank by Imperial Lending, making it payable to the bearer. *See* RCW 62A.1-201(21)(a); RCW 62A.3-205(b). A sworn declaration executed February 11, 2011, identifies RMS Properties as the holder of the note. A declaration executed on August 21, 2013, identifies RMS Trust as the noteholder on that date. A custodial agreement between RMS and Wachovia Bank, predecessor in interest to U.S. Bank, authorizes the bank to hold physical possession of RMS's residential mortgage loans. Thomas points to nothing in the record that contradicts this evidence and thus fails to raise a question of material fact on this point.

Thomas v. Specialized Loan Servicing, LLC, 76644-9-I, 2018 WL 3853877, at *2 (Wash. Ct. App. Aug. 13, 2018) (unpublished). The Thomases do not now, and did not before the Court of Appeals, point to anything in the record that contradicted the evidence submitted by Respondents demonstrating that RMS Trust was the holder of the note, endorsed in blank, when it initiated foreclosure in December 2013. There is no legal error that warrants review of the Court of Appeals' unpublished opinion.

C. The Thomases Have Not Identified Any Conflict Between the Unpublished Opinion and Any Supreme Court or Other Court of Appeals Decision.

The decision of the Court of Appeals is consistent with *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012), which held in pertinent part, "only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." The Court of Appeals properly concluded, consistent with *Bain*, that the holder of the note endorsed in blank, RMS Trust, was empowered to initiate a nonjudicial foreclosure. The Deed of Trust Act is in accord. RCW 61.24.005(2). There is no conflict between the Court of Appeals and any other appellate decision or statute of this state that warrants this Court's review.

V. ATTORNEY FEES AND COSTS

Washington Rules of Appellate Procedure allow an award of fees where supported by law. RAP 18.1(a). Pursuant to RCW 4.84.330, an award of attorney fees is permitted in this case because paragraph 26 of the deed of trust executed by the Thomases includes a provision awarding attorney's fees, including appellate fees, to a prevailing party. (CP 636.) Consequently, if this Court denies the Thomases' Petition, Respondents respectfully request that the Court award reasonable attorney's fees and

costs pursuant to RAP 18.1(a) for time spent preparing an Answer to the Petition.

VI. CONCLUSION

The issue presented by the Thomases does not merit review. The Court of Appeals applied settled law to undisputed facts. Respondents respectfully request that the Court deny the Petition for Review and award Respondents' attorney fees.

DATED this 13th day of December, 2018.

HOLLAND & KNIGHT, LLP

By: *s/ Nellie Q. Barnard*

David J. Elkanich, WSBA No. 35956
Email: david.elkanich@hklaw.com
Nellie Q. Barnard, WSBA No. 50587
Email: nellie.barnard@hklaw.com
2300 U.S. Bancorp Tower
111 SW Fifth Avenue
Portland OR 97204-3626
Telephone: 503.243.2300
Fax: 503.241.8014

Attorneys for Respondents Specialized Loan Servicing, LLC; RMS Mortgage Asset Trust 2012-1, U.S. Bank as Trustee; RMS Residential Properties, LLC; and Residential Mortgage Solution, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I caused to be served a true and correct copy of the foregoing ANSWER TO PETITION FOR REVIEW on the below-listed attorney(s) of record by the method(s) noted:

☒ First-class United States mail, postage prepaid, to the following:

Melissa A. Huelsman
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
Of Attorneys for Appellants Ted A. Thomas and Debra A. Thomas

DATED this 13th day of December, 2018.

s/ Nellie Q. Barnard
Nellie Q. Barnard

HOLLAND AND KNIGHT LLP

December 13, 2018 - 4:19 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96430-1
Appellate Court Case Title:	Ted A. Thomas, et ano. v. Specialized Loan Servicing, LLC., et al.
Superior Court Case Number:	15-2-31360-6

The following documents have been uploaded:

- 964301_Answer_Reply_20181213155248SC456921_8691.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 20181213 Answer to Petition for Review Thomas.pdf

A copy of the uploaded files will be sent to:

- Mhuelsman@predatorylendinglaw.com
- david.elkanich@hklaw.com
- paralegal@predatorylendinglaw.com
- patrick.mcbirde@sls.net

Comments:

Sender Name: Teresa Armendariz - Email: teresa.armendariz@hklaw.com
Filing on Behalf of: Nellie Quinn Barnard - Email: nellie.barnard@hklaw.com (Alternate Email: kathy.kurdna@hklaw.com)

Address:
2300 U.S. Bancorp Tower
111 SW Fifth Avenue
Portland, OR, 97204
Phone: (503) 243-2300

Note: The Filing Id is 20181213155248SC456921