No. 997969

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

PNC BANK, NATIONAL ASSOCIATION,

Plaintiff-Respondent,

v.

LAURA COZZA, et al.,

Defendant-Appellant.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF THE RESPONDENT

Plaintiff-Respondent PNC Bank, National Association ("PNC") respectfully asks this Court to deny the petition for discretionary review (the "Petition") filed by Defendant-Appellant Laura Cozza ("Appellant").

II. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals apply the correct standard of review?

2. Did the Court of Appeals properly apply current Washington foreclosure law when affirming the trial court's order?

3. Did the Court of Appeals correctly affirm the trial court's order following an analysis of all of the issues presented on appeal?

III. STATEMENT OF THE CASE

PNC strongly disagrees with Appellant's attempt to provide a Statement of the Case because it is incomplete, argumentative, and misleading. Much of Appellant's portrayal of the facts and procedural history fails to cite to the record and, instead, provides a skewed version of the lower court proceedings. Accordingly, PNC rejects Appellant's Statement of the Case and provides its own statement to provide an accurate and complete factual background for the Court's consideration.

A. Borrowers Obtained the Subject Loan

In 2007, Appellant and her ex-husband Matthew Cozza (collectively "Borrowers") entered into a construction loan in the approximate amount of $355,000 (the "First Loan") with PNC's predecessor by merger, National City Bank ("NCB").[1] Appellant's Appendix ("App") A1-A2. The proceeds of the First Loan were used to fund the construction of the residential property located at 887 Iowa Heights Road, Sedro Wooley, Washington 98284 (the "Property"). Clerk's Papers ("CP") 125, ¶ 4 and CP 131-148.

On February 12, 2008, Borrowers refinanced the First Loan by executing a promissory note (the "Note") in the principal amount of $378,250 payable to "National City Mortgage a division of National City Bank" as lender (the "Subject Loan"). CP 125, ¶ 5 and CP 149-151; App A2. Borrowers also executed an accompanying deed of trust encumbering the Property (the "Deed of Trust") to secure the Note. CP 125, ¶ 6 and CP 152-166. The proceeds from the Note were used to pay off the principal balance and interest owing on the First Loan, two debts owed by Borrowers to Capital One, the Subject Loan's settlement charges and tax and insurance

[1] National City Bank merged with PNC on or about November 6, 2009. CP 125, ¶ 3 and 128-130.

deposits, and a cash payment to Borrowers for the remaining proceeds of approximately $1,600. CP 125, ¶ 7 and CP 167-170.

The Note was subsequently indorsed from National City Mortgage, a division of NCB, to National City Mortgage Co. a subsidiary of NCB,[2] which then indorsed the Note in blank. Each of those indorsements is reflected on the face of the Note. CP 10.

B. Appellant Defaulted on the Subject Loan in 2011 and Rejected Two Offers to Modify the Subject Loan

Borrowers separated in 2010, and Matthew Cozza moved out of the Property.[3] CP 94, ¶ 4 and CP 105-106; App A2. Shortly thereafter, Appellant began having trouble making payments and missed her January and February 2011 payments. CP 125-126, ¶ 8 and CP 171-172; App A2. She made a payment in March 2011, which PNC returned to her because it was insufficient to bring the account current. CP 125-126, ¶ 8 and CP 171-172. Appellant did not make any other payments in 2011 and has not made a regular monthly mortgage payment since. CP 125-126, ¶ 8 and CP 171-172.

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[2] National City Mortgage Co. merged with NCB on or about October 1, 2008 and became a division of NCB. CP 125, ¶ 3 and 128-130.

[3] On April 22, 2011, as part of Borrowers' divorce, Mr. Cozza signed a quitclaim deed on the Property, transferring his interest to Appellant. CP 34, ¶ 6.

In April 2011, Appellant applied to PNC for a modification of the Subject Loan. Since then, she admittedly has applied "at least 20 times for modifications" with PNC. CP 94, ¶ 4 and CP 114. She was approved for trial payment plans, one of which she accepted and others which she did not. CP 126, ¶ 10. In 2012, she made three payments under a trial loan modification plan, but ultimately rejected the final modification terms she was offered.[4] Appellant was also approved for one other permanent loan modification, but, again, she declined to accept it. CP 126, ¶ 10. She has not made any payments of any kind since the 2012 trial plan payments. CP 126, ¶ 11.

C. Appellant Began Renting the Property to Third-Parties in 2014 and Falsely Represented to PNC that the Property was Her Primary Residence

In 2014, Appellant moved to Pennsylvania. App A2. Over the next two years, she continued to apply for loan modifications, each time falsely representing to PNC that she lived in the Property as her principal residence. CP 126, ¶ 10. While the tone of the Petition is of a borrower facing the loss of her home, this narrative is far from true. Since August 2014, Appellant

[4] Appellant's trial plan payments were insufficient to make three full payments on her loan, so PNC combined them and applied those amounts to her January and February 2011 payments, bringing her current to March 2011. CP 126, ¶ 9 and CP 173-174.

has been profiting from the Property by renting it to third parties for $1,850 per month while not making any payments on the Subject Loan or any payments for taxes and insurance. CP 94, ¶ 4, and CP 104.[5]

D. PNC Initiated Judicial Foreclosure Proceedings Against the Property in 2016

On July 13, 2016, PNC filed its Complaint for Deed of Trust Foreclosure in this matter, which asserted a single claim for judicial foreclosure. CP 1-25. On March 27, 2018, Appellant filed her Answer, which denied virtually every allegation of the complaint, included twenty-four affirmative defenses, and included six counterclaims (not including subparts). CP 29-54. PNC filed its reply to Appellant's counterclaims on April 9, 2018. CP 55-62.

E. PNC Obtained Judgment in Its Favor

On July 30, 2019, PNC filed its Motion for Summary Judgment on its judicial foreclosure Claim ("MSJ") and supporting declarations of PNC

[5] Appellant's many applications for loan modifications, and then ultimate refusal to accept the permanent loan modifications offered to her, is not surprising in light of the fact that she has actually made a substantial profit on the Property since 2008. Appellant made mortgage payments of approximately $2,400 per month from April 2008 to March 2011 for an approximate total of $86,400. As of the date PNC filed its MSJ in March 2019, Appellant had received over $105,000 in rental income ($1,850 per month x 57 months (July 2014-March 2019) = $105,450). CP 66. To PNC's knowledge, she has continued to collect rent since that time, including during the pendency of this appeal. By continually applying for – and then rejecting – loan modifications, she was able to delay foreclosure proceedings for several years while still collecting rent.

and its counsel. CP 63-174. PNC's MSJ also sought summary judgment on Appellant's counterclaims. On August 26, 2019, Appellant filed her Cross-Motion for Summary Judgment on Judicial Foreclosure Claim ("Cross-MSJ") and supporting declarations of Appellant, her counsel, and a purported expert.[6] CP 175-448. Appellant's Cross-MSJ did not request summary judgment on her counterclaims. *Id.*

On September 12, 2019, PNC filed its Response to Appellant's Cross-Motion ("Cross-MSJ Response"). CP 449. On September 13, 2019, Appellant filed her Response to PNC's Motion for Summary Judgment ("MSJ Response") and her and her counsel's declarations. CP 677.

On September 19, 2019, PNC filed its Reply to Appellant's MSJ Response ("PNC's Reply") and Appellant filed her Reply to PNC's Cross-MSJ Response ("Appellant's Reply") and the supporting declaration of Appellant's counsel. CP 747 and 758, respectively.

On September 24, 2019, the trial court heard argument on PNC's MSJ and the Cross-MSJ. Verbatim Report of Proceedings September 24, 2019. At the hearing, PNC's counsel presented the original Note for the Subject Loan signed by Appellant and indorsed in blank. *Id.* at pages 21-25.

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[6] The declaration of Appellant's purported expert, William J. Paatalo, was voluntarily withdrawn by Appellant at the hearing on the MSJ and Cross-MSJ. Verbatim Report of Proceedings September 24, 2019, page 19.

On October 11, 2019, the trial court held a second hearing to announce its ruling on PNC's MSJ and Appellant's Cross-MSJ. Verbatim Report of Proceedings October 11, 2019. At that hearing, the trial court found that there were no genuine issues of material fact precluding summary judgment in favor of PNC and made an oral ruling granting PNC's MSJ and denying Appellant's Cross-MSJ. *Id*. at pages 7-8.

On November 15, 2019, the trial court signed and entered orders granting PNC's MSJ and denying Appellant's Cross-MSJ. CP 790-792 and 787-789, respectively. On December 6, 2019, the trial court signed and entered a Judgment and Decree of Foreclosure ("Judgment"), which included a judgment dismissing Appellant's counterclaims. CP 798-802.

F. Appellant Filed the Underlying Appeal and the Court of Appeals Affirmed the Trial Court's Orders Granting PNC's MSJ and Denying the Cross-MSJ and Entry of Judgment in Favor of PNC

On January 6, 2020, Appellant filed her Notice of Appeal of the Judgment and the orders granting PNC's MSJ and denying Appellant's Cross-MSJ. CP 803-820. On March 15, 2021, the Court of Appeals affirmed the trial court's rulings and entry of Judgment in favor of PNC. App. A1-A17. The Court of Appeals underwent a detailed analysis of Appellant's arguments, but did not find any error on the trial court's part. *Id*. Subsequently, Appellant moved for reconsideration ("Motion for Reconsideration") of the Court of Appeals' March 15, 2021 opinion. App.

A18. On April 21, 2021, the Court of Appeals denied the Motion for Reconsideration. *Id.* This Petition followed.

IV. ARGUMENT

A. Legal Standard

This Court may grant review of a decision of the Court of Appeals under the limited circumstances set forth in Rules of Appellate Procedure 13.4(b). Review is appropriate only if (1) the Court of Appeals' decision conflicts with a decision by this Court; (2) the Court of Appeals' decision conflicts with a published decision of the Court of Appeals; (3) there is a "significant question of law" under either the Washington Constitution or the United States Constitution involved; or (4) if "the petition involves an issue of substantial public interest that should be determined by" this Court. RAP 13.4(b).

For the reasons set forth below, the Petition does not satisfy any of the four criteria set forth in RAP 13.4(b). The Court of Appeals' affirmation of the trial court's order and entry of judgment does not conflict with any opinion by this Court nor any published decision by the Court of Appeals. Appellant's due process arguments are without merit and unpersuasive. Finally, despite Appellant's attempts to gain sympathy for her loss of the rental Property to foreclosure, there is no substantial public interest at issue in this matter. Appellant's campaign to delay foreclosure and to profit off

her mortgage and expense-free ownership of the Property, on which she has been collecting rental payments, should be put to an end.

B. Appellant's Petition Fails to Demonstrate That Either the Trial Court or the Court of Appeals Erred and Instead Focuses on Irrelevant and Unsupported Arguments Regarding Equity Jurisdiction

It is well-established that a motion for summary judgment is properly granted where the evidence establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(e); *see also Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (motion for summary judgment should be granted "only if, from all the evidence, a reasonable person could reach only one conclusion"). That is precisely what the trial court did here. It determined that there was no genuine issue of material fact and that PNC was entitled to entry of summary judgment in its favor as a matter of law, and that Appellant was not.

When an order granting or denying a motion for summary judgment is appealed, as here, a reviewing court applies a de novo standard of review and "engages in the same inquiry as the trial court[.]" *Id.* There is no authority that stands for the proposition that if a trial court exercises equitable jurisdiction, the standards for reviewing a motion for summary judgment, at the trial court level or on appeal, are any different.

Here, the Court of Appeals properly reviewed the trial court's order granting PNC's MSJ and denying the Cross-MSJ by examining each of the factual and legal issues raised on appeal as if it were the trial court. App A3-A17. Having done so, the Court of Appeals found no error by the trial court and confirmed trial court's summary judgment decisions. In her Petition seeking discretionary review, Appellant largely ignores her burden to demonstrate that the trial court erroneously granted PNC's MSJ and denied the Cross-MSJ, and instead focuses on irrelevant and unsupported arguments regarding equity jurisdiction.

Although it is hardly clear from her Petition, Appellant's first argument appears to be that the Court of Appeals was obligated to determine whether equity jurisdiction was applied by the trial court in deciding the respective summary judgment motions and, if so, to then review the "fashioning of equitable remedies under an abuse of discretion standard." Superior courts in Washington "are courts of general jurisdiction and have power to hear all matters legal and equitable in all proceedings known to the common law, except in so far as those have been expressly denied . . ." *In Re Parentage of LB*, 155 Wn. 2d 679, 697, 122 P. 2d 161 (2005) (internal citations omitted). Under Washington law, a state court "will invoke its equity jurisdiction only when there is no plain, adequate or speedy remedy at law." *Tombari v. Griepp*, 55 Wn. 2d 771, 778, 350 P. 2d 452 (1960),

citing *Roon v. King County,* 24 Wn. 2d 519, 166 P. 2d 165 (1946). Appellant provides no evidence as to whether the trial court invoked or exercised equity jurisdiction, or that the trial court fashioned any equitable remedies which required review by the Court of Appeals.

Appellant likewise provides no authority for her contention that the Court of Appeals was required to determine whether equity jurisdiction was or should have been applied by the trial court. Appellant argues incorrectly that the Court of Appeals' decision in this case conflicts with the court's opinion in *Borton & Sons, Inc. v. Burbank Props., LLC*, 196 Wn.2d 199, 471 P.3d 871 (2020). In *Borton*, the court did not, as Appellant suggests, hold that a reviewing court such as the Court of Appeals was required to determine de novo whether equity jurisdiction was or should have been applied by a trial court. The court in *Borton* instead held that the standard of review for a summary judgment order or an order granting an equitable remedy is de novo, while the standard of review for the fashioning of an equitable remedy is abuse of discretion. *Id.* at 205-06. Contrary to Appellant's suggestion otherwise, the Court of Appeals did, in fact, apply a de novo standard to its review of the trial court's ruling in this case, which is entirely consistent with the court's decision in *Borton*. The Court of Appeals did *not* acknowledge, as Appellant claims, that different standards apply to motions for summary judgments brought pursuant to a court's

equity jurisdiction. Also, contrary to Appellant's bald assertions, the Court of Appeals did not blindly affirm the trial court's ruling, ignore disputed facts, or stretch the facts to find in favor of PNC. Rather, the Court of Appeals provided a lengthy analysis of PNC's MSJ and addressed each purported issue of material fact that Appellant raised on appeal. App A3-A17. Appellant's equity jurisdiction arguments are irrelevant and provide no support for Appellant's Petition for discretionary review.

Finally, even if the trial court had applied equity jurisdiction and weighed the equities in addition to applying the normal standards governing consideration of motions for summary judgment, Appellant provides no evidence or even argument that the results would have been any different. In fact, any balancing of equities in this case would dictate a decision in favor of PNC. There is no dispute that Appellant defaulted on the Subject Loan in 2011, and that she has thereafter profited from the Property by renting it to third-parties and pocketing the rental income, while requiring PNC to pay taxes and insurance in order to protect PNC's interest in the Property. Appellant has received $1,850 each month from her tenants since August 2014 which, over the past several years, amounts to tens-of-thousands of dollars more than the approximately $86,400 Appellant paid to PNC on the Subject Loan.

Moreover, while Appellant was renting out the property, she applied for loan modifications ("at least 20 times" by her own testimony) and, on all of those modification applications, falsely represented that she was still living in the Property. Shockingly, Appellant was approved for a modification several times, but she rejected those offers. Equities do not, and would not, favor a borrower who takes a steady stream of rental income from a property, continually applies for modifications to forestall foreclosure proceedings, and then, when approved for a modified loan, rejects the offered modification.

Accordingly, for all of the above reasons, the Court of Appeals' decision is consistent with Washington law and there is nothing presented in Appellant's Petition to warrant this Court's discretionary review.

C. There is No Basis to Apply Washington Foreclosure Law from 2008 and PNC is Not Obligated to Prove Ownership of the Note to Pursue Foreclosure

Appellant's second argument is that the equity and impairment of contracts clauses of the United States and Washington Constitutions required the trial court to apply the law of mortgages that was in effect at the time the Subject Loan was obtained (2008) when ruling on PNC's MSJ and the Cross-MSJ. Petition 14-17. Specifically, Appellant argues that this Court's holding from *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) should have been applied to this case, apparently, for the

proposition that a foreclosing lender needs to prove ownership of the promissory note to establish standing to foreclose. Put differently, it appears that Appellant incorrectly believes that the Deed of Trust is unenforceable because PNC does not "own" the Note, which "split" the Note from the Deed of Trust.

However, *Bain* is irrelevant to this case. In *Bain*, this Court held that Mortgage Electronic Registration Systems' ("MERS") status as a nominee of a lender or beneficiary did not render MERS a lawful beneficiary when MERS did not hold the promissory note. *Bain*, 175 Wn.2d at 88-89. Here, MERS is not the foreclosing entity and PNC does hold the Note. *See* App A4-A5. Moreover, *Bain* does not stand for the proposition that PNC, as holder of the Note, lacks standing to foreclose unless it can prove that it owns or purchased the Note. Therefore, *Bain* has no relevance and does not support Appellant's argument.

The Court of Appeals rejected Appellant's argument based on well-established Washington authorities and found that the entity that holds the note is entitled to enforce it. App A4 (citing *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016), review denied 185 Wn.2d 1037, 377 P.3d 746 (2016)).

In *Slotke*, the Court of Appeals applied the Washington Deed of Trust Act ("DTA"), as it existed in 2016, to a loan that originated in 2006.

Slotke, supra, 192 Wn. App. at 173-74. In doing so, the *Slotke* court rejected the exact argument that Appellant raises in her Petition, *i.e*., that a foreclosing lender must prove that it is the owner of beneficial interest in the note. *Id.*

Indeed, as the *Slotke* court observed, this Court rejected Appellant's argument in 1969 in *John Davis & Co. v. Cedar Glen # Four*, 75 Wn.2d 214, 222-223, 450 P.2d 166: "The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. *See* RCW 62.01.051. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds. 12 Am. Jur. 2d *Bills and Notes* §§ 1069, 1071, 1072, 1075."

Appellant presents no other argument in support of her argument that a prior version of the DTA should apply to foreclosures commenced after amendments to the DTA. Nor does she even identify which provisions of the 2008 version of the DTA should apply. Regardless, prior versions of the DTA, as far back as 1969, did not require a foreclosing lender to prove ownership of the note. *See John Davis*, *supra,* 75 Wn.2d at 222-23.

Consequently, the Court of Appeals' decision does not conflict with Washington law or present any "significant question of law" or "issue of substantial public interest" that warrants further review by this Court.

D. There Was No Violation of the Party Presentation Principle

Appellant's final argument is that the Court of Appeals violated the party presentation principle under federal law because the Court of Appeals did not address Appellant's arguments regarding equity and judicial neutrality to Appellant's satisfaction. Petition 17-19.

This argument is based on a clear misunderstanding of the principle. As the Supreme Court of the United States explained, "[i]n our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). Put differently, this principle recognizes the fact that the American adversary system is built on the "premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* (internal quotes and citation omitted).

Based on this principle, courts do not, and should not, proactively search for issues to decide or "wrongs to right." *Greenlaw*, 554 U.S. at 244. (internal quotes and citation omitted). Therefore, when cases arise and issues are presented, courts normally only decide the questions that the parties present to them. *United States v. Sineneng-Smith*, 140 S.Ct. 1575,

1579 (2020). Essentially, the purpose of the party presentation principle is to prevent a reviewing court from interjecting and ruling on issues that were not raised by the parties themselves.

The party presentation principle is illustrated by the unwritten "cross-appeal rule" under which "an appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw*, 554 U.S. at 244. A cross-appeal is necessary to justify a remedy in favor of the nonappealing party. *Id.*

The principle was also applied in *Sineneng-Smith* where the Ninth Circuit had invited three *amici* to brief and argue issues that were not raised by the parties on appeal, including the constitutionality of a statute. *Sineneng-Smith*, 140 S.Ct. at 1580-81. The Ninth Circuit ultimately concluded that the statute was unconstitutional. *Id.* at 1581. Essentially, by virtue of the Ninth Circuit's adjudication, appellant's arguments "fell by the wayside, for they did not mesh with the panel's overbreadth theory of the case." *Id.* The Supreme Court of the United States found that there were no "extraordinary circumstances" that justified the Ninth Circuit's deviance from the "party-presented controversy" and remanded the case for reconsideration of the case as "shaped by the parties." *Id.* at 1581-82.

Here, it is indisputable that the Court of Appeals did not violate the party presentation principle in its decision. Unlike the Ninth Circuit in

Sineneng-Smith, the Court of Appeals did not interject issues that were not raised by Appellant on appeal. Nor did the Court of Appeals invite third-party briefing and then issue a decision solely based on issues raised in an amicus brief. Rather, the Court of Appeals considered and provided a well-reasoned analysis of each of the issues that Appellant raised on appeal. App A8, A13, & A15-A17. Therefore, there was no violation of the party presentation principle and the Petition should be denied.

V. CONCLUSION

The Petition is nothing more than the latest manifestation of Appellant's ongoing strategy to delay foreclosure while keeping 100% of her profits from renting the Property. Her "issues" for review are not even proper arguments and mainly consist of Appellant's misreading of various cases and precedent coupled with her presentation of an overly biased and skewed perspective on the Washington legal system. Ultimately, the Court of Appeals did not deviate from any established law and there are no issues that warrant the Court's review. Furthermore, the Petition fails because there is a glaring issue with Appellant's arguments: none of the three issues in the Petition establish a genuine issue of material fact and PNC would still

prevail on its MSJ and be entitled to a judgment of foreclosure. Therefore, based on all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

Dated: June 21, 2021.

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CERTIFICATE OF FILING

I certify that on, June 21, 2021, I filed the foregoing ANSWER TO PETITION FOR DISCRETIONARY REVIEW with the Appellate Court Clerk using the appellate court's electronic filing system.

CERTIFICATE OF SERVICE

I certify that on June 21, 2021, service of the foregoing ANSWER TO PETITION FOR DISCRETIONARY REVIEW will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system.

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