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 ORIGINAL

No. 67177-4-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

DANIEL C. PETERSON and KRISTI J. PETERSON,
husband and wife,

Appellants,

v.

CITIBANK, N.A., AS TRUSTEE ON BEHALF OF HOLDERS OF
THE AMERICAN HOME MORTGAGE ASSETS TRUST 2006-4,
MORTGAGE BACKED PASS-THROUGH CERTIFICATES
SERIES 2006-4 *et al.*,

Respondents.

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 OCT 28 PM 1:45
B.S.D.N.
1581

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A. INTRODUCTION

Appellants Daniel and Kristi Peterson attempted to refinance the subprime negative amortization loan Dan obtained to purchase the family home after their mortgage payment skyrocketed due to the nature of the loan. But the loan servicing agent was not accepting new loan applications or offering refinancing options. When the loan servicing agent informed the Petersons that they would not qualify for a loan modification until they stopped making their monthly mortgage payment, they defaulted on the loan. The servicing agent subsequently denied their modification request. The purported trustee under the deed of trust started foreclosure proceedings.

Dan filed a voluntary petition for bankruptcy, which automatically stayed the pending foreclosure sale. When the bankruptcy court lifted the stay to permit the trustee to pursue its state court remedies, the alleged successor trustee under the deed of trust initiated a new foreclosure action.

The Petersons filed the instant action in the trial court under the Deeds of Trust Act, RCW 61.24 *et seq.* (“Act”), to head off the second nonjudicial foreclosure. Before filing an answer, the alleged beneficiary moved to dismiss the only two claims brought against it under CR 12(c). The trustee, the successor trustee, and the servicing agent filed an answer

and then moved to dismiss the complaint in its entirety under CR 12(b)(6). Both motions were granted.

This Court should reverse the trial court's orders and reinstate the Petersons' complaint where the Petersons proved facts, presumed to be true, that justify their recovery.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error¹

1. The trial court erred on April 22, 2011 when it granted the motion of Mortgage Electronic Registration Systems, Inc. ("MERS") to dismiss the Petersons' complaint for failure to state a claim under CR 12(b)(6), entered judgment in favor of MERS, and dismissed the Petersons' Consumer Protection Act, RCW 19.86 *et seq.* ("CPA"), claim with prejudice.

2. The trial court erred on April 22, 2011 when it granted the motion of Citibank, N.A. ("Citibank"), American Home Mortgage Servicing, Inc. ("American"), and MERS for judgment on the pleadings under CR 12(c), entered judgment in favor of those defendants, and dismissed the Petersons' claims, in their entirety, with prejudice.

¹ The trial court's orders are in the Appendix.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court erroneously grant the alleged beneficiary's motion to dismiss the defaulting borrowers' CPA claim on the pleadings under CR 12(c) where the defaulting borrowers proved facts, presumed to be true, to allow the court to draw the reasonable inference that the alleged beneficiary was liable for the misconduct alleged and they were entitled to relief? (Assignment of Error Nos. 1)

2. Did the trial court erroneously grant a motion to dismiss for failure to state a claim under CR 12(b)(6) where the defaulting borrowers were not collaterally estopped to litigate their claims in state court given the limited nature of the stay relief previously granted by the bankruptcy court, final adjudication of the parties' rights and liabilities had not occurred in the bankruptcy court, and the moving parties did not carry their burden of demonstrating that all four elements of collateral estoppel were satisfied? (Assignment of Error Nos. 1-2)

3. Did the trial court erroneously grant a motion to dismiss for failure to state a claim under CR 12(b)(6) where the court's decision undermines the Act by preventing the defaulting borrowers from pursuing their statutory right to challenge and enjoin the nonjudicial foreclosure sale of their home pursuant to RCW 61.24.310? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

In July 2006, Dan purchased a home in Sammamish, Washington² after obtaining a mortgage loan from American Brokers Conduit ("ABC").³ CP 88. He signed a promissory note ("Note") in favor of ABC

² Although Dan and Kristi were married at the time, Dan purchased the home as his separate estate. CP 40.

³ The loan was a negative amortization adjustable rate mortgage. "Negative amortization" means an increase in the principal balance of a loan caused when the loan agreement allows the borrower to make payments less than the amount needed to pay all the interest that has accrued on the loan. The unpaid interest is added to the loan balance and becomes part of the principal. RCW 19.144.010(8).

secured by the home.⁴ CP 88. He also executed a Deed of Trust (“deed”),⁵ which was recorded in King County on July 14, 2006. CP 40-54. The deed named ABC as the lender, First American Title Company as the Trustee, and MERS as a “nominee” and beneficiary.⁶ CP 40-41.

On June 3, 2008, the Petersons received notice from American⁷ that their loan payments were set to increase substantially because their adjustable rate was set to adjust. CP 71, 88. American was not willing to refinance Dan’s loan, but suggested that the Petersons contact an American loan counselor for assistance if they would not be able to make the increased payment. CP 71, 88.

American sent a second notice to the Petersons concerning their loan on July 1, 2008. CP 72. The Petersons contacted American and discovered that their monthly mortgage payment had more than doubled. CP 88.

⁴ The Note changed hands over time. It was allegedly sold to an entity called American Home Mortgage Assets Trust 2006-4. Citibank served as the Trustee.

⁵ A deed of trust differs from a standard mortgage because it involves not only a lender and a borrower, but also a third-party called a trustee. *See Kezner v. Landover Corp.*, 87 Wn. App. 458, 942 P.2d 1003, 1007 n.9 (1990), *review denied*, 134 Wn.2d 1020 (1998). The trustee holds an interest in the title to the borrower’s property on behalf of the lender, who is also called the beneficiary. *Id.* If a borrower defaults on his or her loan, the beneficiary may instruct the trustee to conduct a nonjudicial foreclosure instead of petitioning the court to initiate a foreclosure process. *See id.* at 1006-07.

⁶ The parties to the deed also changed over time. CP 6.

⁷ American served as the servicing agent for Citibank. CP 2.

On July 22, 2008, the Petersons called American to request a loan modification, but were told that they would not qualify until they stopped making their monthly mortgage payment. CP 88. American was unwilling to permit them to refinance the loan. CP 72, 88. As directed by American, the Petersons defaulted on their loan payments to qualify for the loan modification. CP 88. American denied the request. CP 88.

On December 18, 2009, Northwest Trustee Services, Inc. (“Northwest”) transmitted a Notice of Default to the Petersons. CP 60-64. Citibank was identified as the beneficiary (Note/owner) under the deed and Northwest was identified as Citibank’s agent. CP 61-63. However, Citibank had not yet received its interest as a beneficiary under the deed nor had Northwest been appointed as Citibank’s successor trustee. CP 56, 58; RP 6-7. Northwest admitted it transmitted the notice of default before it had been appointed successor trustee. CP 273.

Nearly 45-days later, on February 1, 2010, MERS assigned its interest under the deed to Citibank. CP 56. The same day, Citibank recorded an Appointment of Successor Trustee naming Northwest as the successor trustee under the deed. CP 58. MERS conceded its assignment to Citibank occurred *after* Northwest had initiated the foreclosure process. RP 6-7.

On May 7, 2010, Northwest transmitted a Notice of Trustee's Sale to the Petersons. CP 66-69. The notice of sale confirmed that Northwest transmitted the notice of default to the Petersons before it was appointed as the successor trustee and before the deed was assigned to Citibank. CP 68. The notice of sale also clearly informed the Petersons that they could bring a lawsuit to restrain the sale pursuant to RCW 61.24.130 and that their failure to do so could result in a waiver of any proper grounds for invalidating the trustee's sale. CP 68. Northwest scheduled the foreclosure sale for August 13, 2010. CP 66.

On August 5, 2010, Dan filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, which automatically stayed the pending foreclosure sale. CP 186, 198-236. Citibank moved for relief from the stay on grounds the value of the property was insufficient to secure the Note. CP 237-42. Dan responded, arguing Citibank lacked standing to request the stay. CP 243-68. The bankruptcy court lifted the stay on November 3, 2010 to permit Citibank to pursue its state court remedies. CP 153-55. Northwest, on behalf of Citibank, initiated a new foreclosure action and scheduled the foreclosure sale for December 10, 2010. CP 288.

On December 1, 2010, the Petersons filed this action in the King County Superior Court to head off the nonjudicial foreclosure. CP 1-15,

73-74. They named Citibank, American, Northwest, ABC,⁸ and MERS as defendants. CP 1. In addition to alleging a cause of action for a defective trustee's sale pursuant to RCW 61.24.030, the Petersons plead six other causes of action, including: defective initiation of foreclosure, quiet title, slander of title, breach of contract, violation of the CPA, and unjust enrichment. CP 8-13. They simultaneously moved to restrain the trustee's sale. CP 75-86. Citibank, American, and MERS did not oppose the Petersons' request for a temporary restraining order, provided the Petersons made their monthly payment into the court registry as required by the Act. CP 94.

Rather than answering the Petersons' complaint, MERS moved to dismiss it on February 4, 2011, arguing the two claims asserted against it failed to state a claim for relief. CP 98-106.

Citibank, American, and Northwest answered the complaint on March 11, 2011. CP 107-30. Citibank, American, MERS, and Northwest then moved for judgment on the pleadings under CR 12(c), arguing issue preclusion barred relitigation of Citibank's ability to foreclose and even if it did not, Dan lacked standing to pursue claims against them. CP 167-81, 272-75. The Petersons responded, arguing among other things that the Act applied and provided the exclusive method to contest and enjoin the

⁸ ABC ceased operations in approximately August 2007. CP 2.

foreclosure sale. CP 276-86. They also argued collateral estoppel did not apply to bar their claims. CP 280-83.

The trial court, the Honorable Susan J. Craighead, heard argument on the motions on April 22, 2011. RP 1. Both motions were granted. CP 364-65, 373-78; RP 70-73. This timely appeal followed. CP 366-67, 371-72.

D. SUMMARY OF ARGUMENT

The trial court erred by granting MERS's CR 12(c) motion to dismiss the Petersons' CPA claim where the Petersons pleaded adequate facts to allow the court to draw the reasonable inference that MERS was liable for the misconduct alleged and that they were entitled to relief. Because of the posture of the motion, the trial court should have taken the Petersons' pleadings at face value and construed them in the light most favorable to the Petersons. It did not.

To state a claim under the CPA, a plaintiff must show: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce; (3) an impact on public interest; (4) an injury to the plaintiff in his or her business or property; and (5) causation. The CPA is to be liberally construed.

The Petersons presented facts on all five CPA elements. They did not plead their CPA claim in a conclusory fashion. Their allegations, accepted as true, were sufficient to survive a CR 12(c) motion to dismiss.

The trial court also erred by granting the CR 12(b)(6) motion of Citibank, American, and MERS to dismiss the Petersons' complaint in its entirety due to the Petersons' alleged failure to state a claim upon which relief could be granted. The trial court's decision to apply collateral estoppel in these circumstances was erroneous. Even if it was not, its decision remains erroneous because Citibank, American, and MERS did not carry their burden of demonstrating that all four elements were satisfied.

No Washington court has addressed whether an order granting relief from stay in a bankruptcy proceeding collaterally estops a plaintiff from pursuing claims in state court brought pursuant to the Act.

An order lifting a stay in bankruptcy court has no preclusive effect on a subsequent action to determine the full merits of the claim, the validity of the security interest, or the legal right to foreclose because: (1) the burdens of proof differ; (2) the elements to be proven differ; and (3) the degrees of proof differ.

Here, the bankruptcy court lifted the stay so that Citibank could pursue its state remedies. It did not conclusively resolve the main issues

asserted by the Petersons in their underlying complaint. Nor did it finally and definitively establish the rights of either Citibank or the Petersons. It merely made an initial determination that Citibank had a “colorable claim” sufficient to lift the automatic stay. This left Citibank and the Petersons free to pursue their state law remedies. The Petersons did so pursuant to RCW 61.24.130.

Given the limited nature of the relief Citibank obtained through its motion for relief from stay and because final adjudication of the parties’ rights and liabilities did not occur in the bankruptcy court, the trial court erred by applying collateral estoppel to bar the Petersons’ claims.

Even if the trial court correctly determined that collateral estoppel should apply under these circumstances, its decision remains erroneous because not all of the elements were satisfied. The party asserting collateral estoppel must prove that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice.

Citibank, American, and MERS failed to carry their burden on three of the four elements. The mere fact that a bankruptcy order has

issued does not require that any and all further oral proceedings be in the bankruptcy court.

Where all four elements are not satisfied, collateral estoppel does not preclude the Petersons' claims against Citibank, American, and MERS. But even assuming without agreeing that Citibank, American, and MERS carried their burden, collateral estoppel precludes only those issues that have actually been litigated and necessarily and finally determined in a prior proceeding. Thus, any issues not litigated and finally determined in the bankruptcy proceedings would not be barred in the instant suit. At a minimum, then, the Petersons' CPA and unjust enrichment claims remain viable and the trial court erred in dismissing them.

The Act establishes the procedures for nonjudicial foreclosures as a time-efficient alternative to judicial mortgage foreclosure proceedings. The three basic objectives of the Act are to ensure that the nonjudicial foreclosure process remains efficient and inexpensive, that the process provides an adequate opportunity for interested parties to prevent wrongful foreclosure, and that the process promotes the stability of land titles.

The trial court's decision to dismiss the Petersons' complaint undermines the Act because it effectively eliminates the only method available to them to contest and enjoin the foreclosure sale once it has

begun. RCW 61.24.130 establishes the only means by which a borrower may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure. The presale injunction remedy is preferred; post-sale challenges are disfavored.

Here, the Petersons would waive their right to challenge the foreclosure sale if they failed to seek their presale remedies as permitted under the Act. The trial court erred by dismissing their permissible statutory challenge.

E. ARGUMENT

(1) Standard of Review

This Court reviews a trial court's decision on a motion on the pleadings *de novo*. See *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006), *review denied*, 158 Wn.2d 1029 (2007). A motion to dismiss for failure to state a claim (CR 12(b)(6)) and a motion for judgment on the pleadings (CR 12(c)) generally raise identical issues and are subject to the same standard of review. See *Gaspar*, 131 Wn. App. at 634-35; *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712, *review denied*, 109 Wn.2d 1005 (1987). In either case, dismissal is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery, considering even hypothetical facts outside the record. See, e.g., *Burton v. Lehman*, 153 Wn.2d 416,

422, 103 P.3d 1230 (2005). In making this determination, the Court must *presume the plaintiff's allegations are true and construe them in the light most favorable to the plaintiff*. See *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998), *cert. denied*, 525 U.S. 1171 (1999); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 122–23, 11 P.3d 726 (2000).

Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is *possible* that facts could be established to support the allegations in the complaint. See *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). A complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery. See *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986). Such motions should be granted “sparingly and with care,” and only in the unusual case in which the plaintiff’s allegations show on the face of the complaint an insuperable bar to relief. See *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998) (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

(2) The Trial Court Erred By Granting the Motions to Dismiss

- a. The trial court erred by granting MERS’s CR 12(c) motion to dismiss where the Petersons’ complaint was factually sufficient

The Petersons alleged two causes of action against MERS: (1) breach of contract; and (2) violation of Washington’s Consumer Protection Act, RCW 19.86 *et seq.* (“CPA”). CP 11-12. MERS successfully moved to dismiss under CR 12(c), arguing the Petersons’ allegations were insufficient to support either claim. CP 101-02. The trial court erroneously granted the motion as to the Petersons’ CPA claim because they pleaded adequate facts to allow the court to draw the reasonable inference that MERS was liable for the misconduct alleged and they were entitled to relief.⁹ Because of the posture of the motion, the court should have taken the Petersons’ pleadings at face value and construed them in the light most favorable to the Petersons. It did not.

The CPA declares unlawful “unfair or deceptive acts in the conduct of trade or commerce.” RCW 19.86.020. Its purpose is to “complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive and fraudulent acts and practices in order to protect the public and foster fair and honest competition.” RCW 19.86.920; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169, 744 P.2d 1032 (1987). The CPA is to be “liberally construed that its

⁹ The Petersons concede the trial court did not err in granting the motion to dismiss as to their breach of contract claim.

beneficial purposes may be served.” RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

To state a claim under the CPA, a plaintiff must show: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce; (3) an impact on public interest; (4) an injury to the plaintiff in his or her business or property; and (5) causation. See, e.g., *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007); *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486, 492 (1998), *review denied*, 137 Wn.2d 1034 (1999). Failure to satisfy even one element is fatal to a CPA claim. See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986).

The Petersons presented facts on all five elements. Like their other claims arising under the Act, the Petersons’ CPA claim depends on whether MERS may be the beneficiary (or nominee of the beneficiary) under Washington state law.¹⁰ MERS’s attempt to serve as the beneficiary

¹⁰ MERS’ status as a proper beneficiary under the Act remains an open question in Washington. See *Dean v. Aurora Bank F.S.B.*, Slip Copy, 2011 WL 3812653 (W.D. Wash., 2011). Indeed, Judge Coughenour from the United States District Court, Western District of Washington certified three questions on this subject to the Washington State Supreme Court. *Id.* See also, *Bain v. Metropolitan Mortgage*, Supreme Court Cause No. 86206-1 (opening brief submitted September 21, 2011).

may therefore have been improper.¹¹ If MERS violated state law, its conduct may very well be classified as “unfair” under the CPA. There is no doubt that MERS’s conduct impacts the public interest. *See Hangman Ridge*, 105 Wn.2d at 790 (noting a private dispute may affect the public interest if it is likely that others have been or will be injured in exactly the same fashion); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1362 (2010) (“Although MERS is a young company, 60 million mortgage loans are registered on its system.”). Clearly the harm the Petersons have suffered because of MERS’s misconduct extends to expending resources to avert an unlawful foreclosure and the cloud of title arising from those foreclosure proceedings. Under the CPA, “injury” is distinct from “damages.” *See Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). Monetary damages need not be proved; unquantifiable damages may suffice. *Id.* (loss of goodwill); *Webb*

¹¹ Courts and commentators across the country have called into question MERS and its business practices with respect to mortgage loans. *See, e.g., Weingartner v. Chase Home Finance, LLC*, 702 F. Supp.2d 1276, 1280-81 (D. Nev., 2010); *Bain v. OneWest Bank, F.S.B.*, 2011 WL 917385 (W.D. Wash., 2011). *See also*, Kevin M. Hudspeth, *Clarifying Murky MERS: Authority to Assign the Mortgage Note in a Standard Illinois Foreclosure Action?*, 31 N. Ill. U. L. Rev. 1 (2010); Peterson, 78 U. Cin. L. Rev. at 1362 (referring to MERS as “the veiled man wielding the home foreclosure axe.”); *Mortgage Registry MERS Sued by Delaware Attorney General*, <http://www.businessweek.com/news/2011-10-27/mortgage-registry-mers-sued-by-delaware-attorney-general.html> (last used 10/29/11).

v. Ray, 38 Wn. App. 675, 688 P.2d 534, *review denied*, 103 Wn.2d 1010 (1984) (loss of use of property).

More particularly, the Petersons presented facts specifically showing among other things that: MERS did not hold the Note or the deed, but was merely a registration system that allows its members to change ownership of documents without assuring proper assignment or transfer, CP 4-5; that MERS did not obtain authorization from the beneficiary of record (*i.e.*, ABC, a defunct entity) to properly assign any interest it claimed to Citibank, CP 2, 5; and that MERS did not transfer its alleged interest under the deed to Citibank until two months *after* Northwest initiated the foreclosure process. CP 7. Citibank later admitted MERS's assignment was not recorded until well after those proceedings began. CP 170. Based on the recorded documents, Citibank did not have the authority to appoint Northwest as its successor trustee without an assignment by MERS to Citibank of the deed. Since MERS could not be a beneficiary and had no authority to assign the deed, Citibank's appointment of Northwest as successor trustee was invalid. Thus, Northwest had no authority to transmit the notice of default or to record a notice of trustee's sale.

The Petersons did not plead their CPA claim in a conclusory fashion. They identified with particularity the unfair or deceptive trade

practices in which MERS allegedly engaged. Their allegations, accepted as true, permit the reasonable inference that MERS committed the misconduct alleged and that they are entitled to relief. Based on the sufficiency of the Petersons' pleading, the trial court erred by granting MERS's motion to dismiss as to the Petersons' CPA claim.

- b. The court erred by granting the CR 12(b)(6) motion to dismiss of Citibank, American, and MERS because collateral estoppel does not apply under the circumstances

Citibank, American, and MERS moved to dismiss the Petersons' complaint in its entirety due to the Petersons' alleged failure to state a claim upon which relief could be granted. CP 168. They argued, and the trial court apparently agreed, the Petersons' claims were resolved by the bankruptcy court thereby preventing relitigation of those claims in the instant case under principles of collateral estoppel. The trial court's decision to apply collateral estoppel in these circumstances was erroneous. Even if it was not, its decision remains erroneous because Citibank, American, and MERS did not carry their burden of demonstrating that all four elements were satisfied.

Collateral estoppel, perhaps more descriptively denoted as issue preclusion, has the goal of judicial finality. The principle underlying the doctrine is to prevent relitigation of already determined causes, curtail

multiplicity of actions, prevent harassment in the courts, inconvenience to the litigants, and judicial economy. *See, e.g., Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 429 P.2d 207 (1967). No Washington court has addressed whether an order granting relief from stay in a bankruptcy proceeding collaterally estops a plaintiff from pursuing claims in state court brought pursuant to the Act.

Preliminarily, a Chapter 11 petition operates generally as a stay of legal proceedings *against the debtor*. 11 U.S.C. § 362(a)(1). But the stay ordinarily does not apply to litigation *initiated by the debtor*, such as the suit the Petersons filed here. *See McNeil v. Powers*, 123 Wn. App. 577, 587, 97 P.3d 760 (2004) (citing *Rhone-Poulenc Surfactants and Specialties, L.P. v. C.I.R.*, 249 F.3d 175, 180 (3d Cir. 2001)).

In any event, an order lifting a stay in bankruptcy court has no preclusive effect on a subsequent action to determine the full merits of the claim, the validity of the security interest, or the legal right to foreclose because: (1) the burdens of proof differ; (2) the elements to be proven differ; and (3) the degrees of proof differ.

Application of the doctrine of collateral estoppel is precluded where the burden of proof in the two proceedings differs. *See Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 531 (9th Cir. 1987); *Standlee v. Smith*, 83 Wn.2d 405, 407, 518 P.2d 721 (1974). In a

bankruptcy proceeding, the burden of proof is on the party seeking relief from the stay to show that it has a “colorable claim,” *i.e.*, that it appears to have the right to proceed with the foreclosure proceeding and that there would not be irreparable harm if the stay is lifted. *See In re Veal*, 450 B.R. 897 (9th Cir. 2011); *Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 32 (9th Cir. 1994); *In re Johnson*, 756 F.2d 738 (9th Cir. 1985), *cert. denied*, 474 U.S. 828 (1985). By contrast, the burden of proof in a civil case is on the plaintiff to establish the full merits of the case.

Here, Citibank bore the burden of proving it had a colorable claim against the Petersons to successfully lift the automatic stay. As a matter of law, that was the only matter before the bankruptcy court. *See Grella*, 42 F.3d at 31. But as to the underlying issues before this Court, the Petersons bear the burden of proving the merits of their claims by a preponderance of the evidence.

Application of the collateral estoppel doctrine is also precluded where the elements to be proven and the degrees of proof differ. As the Ninth Circuit has explained, “a bankruptcy court must make a preliminary determination as to whether the claim is valid.” *In re Hubbel*, 427 B.R. 789, 796 (N.D. Cal., 2010). But a relief from stay hearing does not involve a full adjudication on the merits of claims, defenses, or counterclaims. The process by which relief from an automatic stay is to

be considered is not a full adversary proceeding encompassing all possible collateral issues. Stay litigation is limited to issues of the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization. *See Johnson*, 756 F.2d at 740. Moreover, hearings on relief from the automatic stay are handled in a summary fashion. *Id.* (citing *In re Cedar Bayou, Ltd.*, 456 F.Supp. 278, 284 (W.D. Pa., 1978)). The validity of the claim or contract underlying the claim is not litigated. *Id.* The action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert a counterclaim. *Id.* (citing *In re Essex Properties, Ltd.*, 430 F.Supp. 1112 (N.D. Cal., 1977)).

The Ninth Circuit has explained that “the desired expedition of stay litigation . . . may not always be conducive to any final determination of questions going to the merits which are so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for more deliberative investigation.” *In re Bialac*, 694 F.2d 625, 627 (9th Cir. 1982) (quoting *United Cos. Financial Corp. v. Brantley*, 6 B.R. 178, 187 (Bankr.N.D. Fla., 1980); other citations omitted). Consequently, stay relief litigation has very limited preclusive effect, in part because the ultimate resolution of the parties' rights is often reserved for proceedings under the law governing the parties' specific transaction or occurrence.

For example, stay relief involving a mortgage is often followed by proceedings in state court or actions under nonjudicial foreclosure statutes to finally and definitively establish the lender's and the debtor's rights. *See Veal*, 450 B.R. at 914. An order which lifts the automatic stay simply returns the parties to the legal relationships that existed before the stay became operative. Whatever non-bankruptcy law governed the transactions and relationships of the parties prior to the application of the Bankruptcy Code is the law which controls the conduct of the parties once the stay is lifted. *See In re Matter of Winslow*, 39 B.R. 869, 871 (B.R. 1984).

Here, the bankruptcy court lifted the stay so that Citibank could pursue its state remedies. It did not conclusively resolve the main issues asserted by the Petersons in their underlying complaint. For example, the bankruptcy court did not determine the merits of Citibank's right to collect a debt, whether Citibank owned that debt, or whether it had a security interest in the Petersons' property. The bankruptcy court did not finally and definitively establish the rights of either Citibank or the Petersons. It merely made an initial determination that Citibank had a "colorable claim" sufficient to lift the automatic stay. This left Citibank and the Petersons free to pursue their state law remedies.

Given the limited nature of the relief Citibank obtained through its motion for relief from stay and because final adjudication of the parties' rights and liabilities did not occur in the bankruptcy court, the trial court erred by applying collateral estoppel to bar the Petersons' claims. Accordingly, the trial court's order should be reversed.

But even if the trial court correctly determined that the doctrine should apply under these circumstances, its decision remains erroneous because not all of the elements were satisfied. The party asserting collateral estoppel must prove that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice. *See, e.g., Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730-32, 254 P.3d 818 (2011); *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002).

Citibank, American, and MERS failed to carry their burden on three of the four elements. First, the instant case and the bankruptcy case did not involve the same issue. The sole issue before the bankruptcy court was whether Citibank had a colorable claim sufficient to lift the stay and allow it to pursue its state law remedies. Given the nature of the stay hearing, the trial court's decision was limited to issues involving

Citibank's alleged lack of adequate protection, Dan's equity in the property, and the necessity of the property to an effective reorganization. *See Johnson*, 756 F.2d at 740. The mere fact that a bankruptcy order has issued does not require that any and all further civil proceedings be in the bankruptcy court. *See Hinduja v. Arco Prods. Co.*, 102 F.3d 987, 989-90 (9th Cir. 1996). Second, the bankruptcy court did not come to a final judgment on the merits of the claims the Petersons have brought in this lawsuit. The bankruptcy court did not conduct a full adjudication on the merits of *any* party's claims or defenses. The stay simply returned Citibank and the Petersons to the legal relationships that existed before the stay became operative. Finally, it would be unjust to prevent the Petersons from adjudicating their claims in state court where the bankruptcy court rejected their request for an evidentiary hearing to seek discovery, depose witnesses, and present live testimony.

Where all four elements are not satisfied, collateral estoppel does not preclude the Petersons' claims against Citibank, American, and MERS. Accordingly, this Court should reverse the order dismissing the Petersons' complaint in its entirety. Even assuming without agreeing that Citibank, American, and MERS carried their burden, collateral estoppel precludes only those issues that have actually been litigated and necessarily and finally determined in a prior proceeding. *See Christensen*

v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 307, 96 P.3d 957 (2004). Thus, any issues not litigated and finally determined in the bankruptcy court would not be barred in the instant suit. At a minimum, then, the Petersons' CPA and unjust enrichment claims remain viable and the trial court erred in dismissing them. *See id.*

(3) The Trial Court Erred by Granting the CR 12(b)(6) Motion to Dismiss Because Its Decision Undermines the Act

The Act establishes the procedures for nonjudicial foreclosures as a time-efficient alternative to judicial mortgage foreclosure proceedings.¹² *See Glidden v. Municipal Auth. of Tacoma*, 111 Wn.2d 341, 346, 758 P.2d 487 (1988). A proper foreclosure action extinguishes the debt and transfers title to the property to the beneficiary of the deed or to the successful bidder at a public foreclosure sale. *See In re Marriage of Kaseburg*, 126 Wn. App. 546, 558, 108 P.2d 1278 (2005). The three basic objectives of the Act have been articulated as follows:

First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.

Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)

(citation omitted).

¹² MERS, Citibank, and American conceded below that the foreclosure action proceeds under the Act. RP 12, 26.

The trial court's decision to dismiss the Petersons' complaint undermines the Act because it effectively eliminates the only method available to them to contest and enjoin the foreclosure sale once it has begun.

The Act contains safeguards to ensure that the nonjudicial foreclosure process is fair and free from surprise. *Cox*, 103 Wn.2d at 387. RCW 61.24.040 sets forth the procedural requirements for a nonjudicial foreclosure, including the contents for a notice of trustee's sale:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

RCW 61.24.040(1)(f)(IX).

RCW 61.24.130 establishes the only means by which a borrower may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure.¹³ That rule allows a court to issue a restraining order or an injunction to halt the sale on any proper ground. The Act "manifests a legislative preference for the presale injunction remedy." Joseph L. Hoffman, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust In Washington*, 59 Wash. L. Rev. 323, 327 (1984)

¹³ The only other way to halt a foreclosure sale is to cure the default before the sale. RCW 61.24.090.

(“Hoffman”). Post-sale challenges are disfavored. *Glidden*, 111 Wn.2d at 348.

Here, the Petersons would waive their right to challenge the foreclosure sale if they failed to seek their presale remedies as permitted under the Act. *See Plein v. Lackey*, 149 Wn.2d 214, 227, 229, 67 P.3d 1061 (2003); *Peoples Nat’l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971).

Citibank, American, and MERS should not be allowed to scurry under the protective cover of the bankruptcy court when the Petersons responded to the foreclosure action by seeking to restrain the sale as they were permitted to do under RCW 61.24.130. The trial court erred by dismissing the Petersons’ statutory challenge to the sale. Accordingly, this Court should reverse.

F. CONCLUSION

A homeowner’s failure to make payments should not grant lenders, trustees, and so-called beneficiaries like MERS license to ignore state law and foreclose using any means necessary.

The Petersons’ complaint stated claims upon which relief can be granted. Motions to dismiss pursuant to CR 12(b)(6) are sparingly granted; it must appear beyond doubt that the plaintiffs can prove no set of facts consistent with the complaint which would entitle them to relief.

See, e.g., Halvorson, 89 Wn.2d at 674. The Petersons' complaint states a cause of action against Citibank, American, and MERS.

Accordingly, this Court should reverse the trial court orders granting the motions to dismiss, reinstate the Petersons' claims, and remand for further proceedings consistent with the Court's opinion. Costs on appeal should be awarded to the Petersons.

DATED this 29th day of October, 2011.

Respectfully submitted,



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APPENDIX

THE HONORABLE SUSAN J. CRAIGHEAD

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DANIEL C. PETERSON and KRISTI J.
PETERSON, husband and wife,

Plaintiffs,

v.

CITIBANK, N.A., AS TRUSTEE ON
BEHALF OF HOLDERS OF THE
AMERICAN HOME MORTGAGE
ASSETS TRUST 2006-4, MORTGAGE
BACKED PASS-THROUGH
CERTIFICATES SERIES 2006-4;
NORTHWEST TRUSTEE SERVICES,
INC.; AMERICAN HOME MORTGAGE
SERVICING, INC.; AMERICAN
BROKERS CONDUIT; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC., ALL PERSONS
UNKNOWN, CLAIMING ANY VALID
SUBSISTING INTEREST, AND RIGHT
TO THE POSSESSION IN THE
PROPERTY DESCRIBED IN THE
COMPLAINT ADVERSE TO
PLAINTIFFS' TITLE, OR ANY CLOUD
ON PLAINTIFFS' TITLE THERETO; and
DOES I-X, INCLUSIVE,

Defendants.

No. 10-2-41583-1 SEA

~~[PROPOSED]~~ ^{SJ} ORDER GRANTING
DEFENDANT MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.'S MOTION TO
DISMISS

[PROPOSED] ORDER GRANTING DEFENDANT MERS'
MOTION TO DISMISS (No. 10-2-41583-1) - 1

The Motion to Dismiss of Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") pursuant CR 12(b)(6) came on for hearing at 10:00 a.m. on April 22, 2011.

MERS moves to dismiss with prejudice all claims asserted against it in the Complaint on the grounds that Plaintiffs have failed to state a claim for relief. A trial court should grant a motion to dismiss for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief" against the moving defendant. *Bowman v. Doe*, 104 Wn.2d 181, 183 (1985).

The Court has reviewed the pleadings and papers herein, including MERS' Motion to Dismiss; Plaintiffs' Response; MERS' Reply; any other papers properly submitted in connection with the Motion to Dismiss, and having considered the arguments of counsel, and good cause appearing therefore:

IT IS HEREBY ORDERED that MERS' Motion to Dismiss is GRANTED, and it is further

ORDERED that judgment be, and the same hereby is, entered in favor of MERS on all claims against MERS in the Complaint.

SO ORDERED this 22nd day of April, 2011.

Susan J. Craighead
Honorable Susan J. Craighead
King County Superior Court Judge

Presented by

F.R. Rivera

Fred Rivera WSBA 23008

Attorney for Defendants
CitiBank, AIRRSE and MERS

[PROPOSED] ORDER GRANTING DEFENDANT MERS' MOTION TO DISMISS (No. 10-2-41583-1) - 2

Approved

Rodney L. Kee
Rodney L. Kee
attorney for Plaintiff

John Sam
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THE HONORABLE SUSAN CRAIGHEAD

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DANIEL C. PETERSEN and KRISTI J.
PETERSON, husband and wife,

Plaintiffs,

v.

CITIBANK, N.A., AS TRUSTEE ON
BEHALF OF HOLDERS OF THE
AMERICAN HOME MORTGAGE
ASSETS TRUST 2006-4, MORTGAGE
BACKED PASS-THROUGH
CERTIFICATES SERIES 2006-4;
NORTHWEST TRUSTEE SERVICES,
INC.; AMERICAN HOME MORTGAGE
SERVICING, INC.; AMERICAN
BROKERS CONDUIT; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC., ALL PERSONS
UNKNOWN, CLAIMING ANY VALID
SUBSISTING INTEREST, AND RIGHT
TO THE POSSESSION IN THE
PROPERTY DESCRIBED IN THE
COMPLAINT ADVERSE TO
PLAINTIFFS' TITLE, OR ANY CLOUD
ON PLAINTIFFS' TITLE THERETO; and
DOES I-X, INCLUSIVE,

Defendants.

No. 10-2-41583-1 SEA

~~PROPOSED~~ ORDER GRANTING
DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS

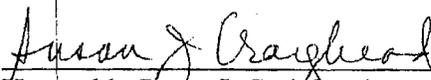
1 The Motion for Judgment on the Pleadings of Defendants Citibank, N.A., as Trustee
2 of the American Home Mortgage Assets Trust 2006-4, Mortgage Backed Pass-Through
3 Certificates Series 2006-4; American Home Mortgage Servicing, Inc.; and Mortgage
4 Electronic Registration Systems, Inc. (collectively "Defendants") pursuant CR 12(c) came
5 on for hearing at 10:00 a.m. on April 22, 2011. Defendants move to dismiss with prejudice
6 all claims asserted against it in the Complaint on the grounds that the pleadings failure to
7 state a claim for relief. A trial court should grant a motion for judgment on the pleadings if
8 it is beyond doubt that the plaintiff can prove no facts that would justify recovery. *Gaspar v.*
9 *Peshastin Hi-Up Growers*, 131 Wn. App. 630 (2006), *review denied*, 158 Wn.2d 1029
10 (2007).
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20 The Court has reviewed the pleadings and papers herein, including Defendants'
21 Motion to Dismiss; the Declaration of Frederick B. Rivera in Support of Defendants'
22 Motion and exhibits thereto; Plaintiffs' Response; Defendants' Reply; any other papers
23 properly submitted in connection with the Motion, and having considered the arguments of
24 counsel, and good cause appearing therefore:
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30 IT IS HEREBY ORDERED that Defendants' Motion for Judgment on the Pleadings
31 is GRANTED, and it is further
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33 ORDERED that judgment be, and the same hereby is, entered in favor of Defendants
34 on all claims against them in the Complaint.
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37 SO ORDERED this 22nd day of April, 2011.
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43 _____
44 Honorable Susan J. Craighead
45 King County Superior Court Judge
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Presented by:

PERKINS COIE LLP

By: /s/ Frederick B. Rivera

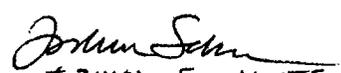
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Attorney for Defendants Citibank, N.A.,
as Trustee of the American Home Mortgage
Assets Trust 2006-4, Mortgage Backed
Pass-Through Certificates Series 2006-4;
American Home Mortgage Servicing, Inc.;
and Mortgage Electronic Registration Systems, Inc..


Rodney L. Knesel
Attorney for Plaintiff


31441 For NWTS

DECLARATION OF SERVICE

On this day set forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Brief of Appellants in Court of Appeals Cause No. 67177-4-I to the following parties:

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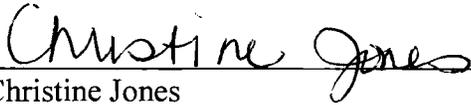
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Original and copy filed with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 28, 2011, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick