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No. 67370-0-I

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

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THE BANK OF NEW YORK MELLON, FKA THE BANK OF NEW  
YORK as Successor in interest to JPMORGAN CHASE BANK, NA  
as Trustee for STRUCTURED ASSET MORTGAGE  
INVESTMENTS II INC. BEAR STERNS ALT-A Trust 2005-9,  
Mortgage Pass-Through Certificates, Series 2005-9,

Appellant,

v.

SCOTTY'S GENERAL CONSTRUCTION, INC., a Washington  
corporation,

Respondent.

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**SUPPLEMENTAL BRIEF OF RESPONDENT SCOTTY'S  
GENERAL CONSTRUCTION, INC.**

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## I. INTRODUCTION

At this Court's direction, Respondent Scotty's General Construction, Inc. ("Scotty's") files this Supplemental Brief addressing the impact of the recently decided Washington Supreme Court case *Bain v. Metropolitan Mortgage Group, Inc.*, --- Wn.2d ---, 285 P.3d 34 (2012). The *Bain* decision eliminates appellant's argument that Scotty's should have joined Mortgage Electronic Registration Systems, Inc. ("MERS") as a defendant in Scotty's' lien foreclosure action. This argument is the only argument properly before this Court on appeal, thus the Court should affirm dismissal of this action.

## II. STATEMENT OF THE CASE RELEVANT TO THIS SUPPLEMENTAL BRIEF

### A. Factual Background

This action stems from a mechanics' lien foreclosure lawsuit Scotty's filed in 2009 against Gloria and Siavoosh Pazooki and their lenders, including Centralbanc Mortgage Corporation ("Centralbanc"). CP 1-4, 31-37. Centralbanc had a security interest in the Pazookis' real property through a Deed of Trust. CP 93-117. That Deed of Trust identified MERS as "acting solely as nominee for Lender and Lender's successors and assigns". CP 94, 93-117. Scotty's did not name MERS as a defendant in its lien foreclosure lawsuit. CP 31. Scotty's obtained a

judgment in its favor, which entitled Scotty's "to foreclosure of its lien as against the subject property and as against the interest of each of the Defendants, and as against any right, title and interest acquired by an[y] person subsequent to May 7, 2007". CP 41.

Appellant The Bank of New York Mellon ("BNY Mellon") is the assignee of the Centralbanc Deed of Trust by way of an Assignment of Deed of Trust dated June 17, 2010. CP 30. While not in the record, BNY Mellon admits in briefing (without authority) that Centralbanc indorsed and transferred the Pazooki promissory note directly to BNY Mellon, thus MERS never held the note. Reply at 3.

**B. Procedural Background**

In 2011, BNY Mellon filed a lawsuit against Scotty's seeking a judgment that its interest in the Pazooki property is superior to Scotty's interest in the property for two reasons: first, because the Centralbanc Deed of Trust was recorded first (CP 3 ¶ 10; CP 4 ¶¶ 13-14); and second, "because the Scotty's Complaint omitted MERS, as beneficiary of the Deed of Trust" (CP 3 ¶ 11).

Scotty's moved to dismiss BNY Mellon's claims with prejudice. CP 45-63. In response, BNY Mellon argued: "MERS had a beneficial interest in the property and should have been joined in the defendant's mechanic's lien foreclosure action." CP 298:13-14. BNY Mellon

devoted nearly all of its response brief to this argument, concluding that “[b]ecause MERS maintained a *beneficial interest* under the Deed of Trust . . . MERS was entitled to be joined as a party to the Scotty’s Complaint.” CP 303:1-4 (emphasis in original); CP 298-303.

The trial court granted Scotty’s’ motion to dismiss, dismissing BNY Mellon’s claims with prejudice. CP 442-43. BNY Mellon appealed dismissal of its claims and filed two Opening Briefs, the first of which contained only one argument: “Because Scotty’s Failed to Give Notice to MERS, Appellant was Consequently Unable to Defend Its Interest Against Scotty’s Complaint, Which Necessitated the Action Below.” Opening Brief at 4. The second, revised brief raised all new arguments and documents not raised before the trial court. CP 1-4, CP 295-306; Revised Brief 1-44. BNY Mellon still maintains, however, that Scotty’s should have joined MERS in the lien foreclosure lawsuit. Reply at 19.

### III. ARGUMENT

**A. The *Bain* decision nullifies BNY Mellon’s argument that MERS should have been joined in the Scotty’s lien foreclosure lawsuit.**

In August 2012, the Washington Supreme Court issued its decision in *Bain v. Metropolitan Mortgage Group, Inc.*, --- Wn.2d ---, 285 P.3d 34 (2012). The Court considered the following certified

question:

Is Mortgage Electronic Registration Systems, Inc., a lawful “beneficiary” within the terms of Washington’s Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust?

*Id.* at \*37. The Washington Supreme Court answered this question: no.

*Id.* at \*37, \*47. When “MERS does not hold the note, it is not a lawful beneficiary.” *Id.* at \*37. The Court also stated that “if MERS is not the beneficiary as contemplated by Washington law, it is unclear what rights, if any, it has to convey” in a deed of trust. *Id.* at \*48.

There is no evidence before this Court that MERS ever held the Pazooki-Centralbanc promissory note. In fact, BNY Mellon claims that Centralbanc transferred the note to BNY Mellon directly. Reply at 3. Under *Bain*, because MERS never held the Pazooki-Centralbanc note, MERS is not a beneficiary to the Centralbanc Deed of Trust and had no rights in the Deed of Trust. *See Bain*, 285 P.3d at \*47-48. Therefore, any argument that Scotty’s had an obligation to name MERS as a defendant in the lien foreclosure lawsuit fails.

The Washington Supreme Court’s ruling in *Bain* endorses Scotty’s’ position throughout this case. Scotty’s followed RCW 60.04.171 when it named as defendants all persons having a recorded interest in the property prior to the commencement of the action in

February 2009, including BNY Mellon's predecessor-in-interest Centralbank.<sup>1</sup> RCW 60.04.171; CP 31-37. BNY Mellon's argument that Scotty's did not comply with RCW 60.04.171 because it did not join MERS as a defendant fails because, according to *Bain*, MERS is not a beneficiary under a Deed of Trust and had no rights therein. *Bain*, 285 P.3d at \*47-48. Scotty's had no obligation to join MERS. Scotty's also had no obligation to join BNY Mellon because BNY Mellon had no record interest in the Property until June 2010, a year and a half after commencement of the lawsuit. CP 30-37. Scotty's named all of the appropriate parties in its foreclosure lawsuit, including Centralbank, and the court adjudged that Scotty's was entitled to foreclose its lien against the property, against Centralbank, and against any person claiming a right or interest in the property after May 7, 2007, which includes BNY Mellon. CP 41.

**B. Because *Bain* nullifies BNY Mellon's only arguments properly before this Court, the Court should affirm dismissal of BNY Mellon's complaint.**

BNY Mellon's principal argument before the trial court was Scotty's "omitted MERS, as a beneficiary of the Deed of Trust" in the

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<sup>1</sup> RCW 60.04.171 governs parties in an action to foreclose on a mechanics' lien and states: "The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party."

lien foreclosure lawsuit, thus denying BNY Mellon its right to assert superiority. CP 3 ¶ 11; CP 298-303. On appeal, BNY Mellon raised new and improper arguments which, as Scotty's has briefed previously, should not be considered by this Court under RAP 9.12. Brief of Resp. at 7-9, 23-24. Because those arguments should not be considered by this Court, *Bain* is dispositive as to the remaining arguments and based on *Bain*, this Court should find BNY Mellon's appeal without merit.

#### IV. CONCLUSION

For all of the reasons in this Supplemental Brief, and those in the Brief of Respondent, this Court should apply *Bain* and affirm the trial court's dismissal of BNY Mellon's claims and award Scotty's its attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of October, 2012.

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**DECLARATION OF SERVICE**

I declare that on the 12<sup>th</sup> day of October, 2012, I caused to be served the foregoing document on counsel of record at the following addresses:

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Dated: October 12, 2012

Place: Seattle, WA

