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No. 67370-0-1

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

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.

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

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I. INTRODUCTION

Appellant Bank of New York Mellon (“BNY Mellon”) filed a meritless lawsuit against Scotty’s General Construction, Inc. (“Scotty’s”) which the trial court properly dismissed after reviewing all of the evidence in the light most favorable to BNY Mellon. BNY Mellon wants a do-over of Scotty’s’ mechanics’ lien foreclosure lawsuit because BNY Mellon did not like the outcome.

Scotty’s’ lien foreclosure lawsuit named as defendants every party having an interest in the real property prior to commencement of the action, as required by the mechanics’ lien foreclosure statute RCW 60.04.171. One of the defendants was Centralbanc Mortgage Corporation (“Centralbanc”), which had a Deed of Trust against the property. After Scotty’s commenced its lawsuit, Centralbanc assigned its Deed of Trust to BNY Mellon. In the foreclosure lawsuit, the trial court found that Scotty’s’ lien was superior to the Centralbanc Deed of Trust. BNY Mellon then filed this action claiming that despite the express finding that Scotty’s’ lien is superior to the Centralbanc Deed of Trust, a new judge should undo that ruling and find that the Centralbanc Deed of Trust is superior. BNY Mellon’s position is unsupported by the facts and law. Therefore, the trial court’s dismissal of BNY Mellon’s complaint should be affirmed.

II. STATEMENT OF THE CASE

A. Factual Background.

Gloria and Siavoosh Pazooki are the former owners of property commonly known as 20541 92nd Avenue South, Kent, Washington (the “Property”). CP 33. The Property consists of two parcels: 062205-9036 and 062205-9056.¹ CP 137.

Ms. Pazooki obtained several loans when purchasing the Property, one of which was from Centralbanc. CP 93-117. Centralbanc secured its loan by a Deed of Trust on Parcel 062205-9036, which was recorded in the King County public records under recording number 20050607001227 on June 7, 2005 (the “Centralbanc Deed of Trust”). CP 93-117. The Centralbanc Deed of Trust identified Centralbanc as the lender. CP 94. The Centralbanc Deed of Trust also identified Mortgage Electronic Registration Systems, Inc. (“MERS”) and defined MERS as “acting solely as nominee for Lender and Lender’s successors and assigns.” CP 94.

In May 2007, Scotty’s contracted to provide labor and materials to improve the Property. CP 33. Scotty’s performed work on the

¹ BNY Mellon spends much of its Statement of the Case discussing parcel 062205-9056 and the disposition of that parcel. That parcel and its disposition are irrelevant to this action. It is undisputed that BNY Mellon had no interest in that parcel and that parcel is not affected by this appeal.

Property between May 2007 and October 2008. *Id.* The Pazoookis failed to pay Scotty's \$199,335.06. CP 34.

Scotty's recorded a Claim of Lien on the Property on December 29, 2008. CP 34. Scotty's filed a Complaint for Breach of Contract and for Foreclosure of Mechanic's Lien in King County Superior Court on February 11, 2009. CP 31-37. Scotty's named as defendants the Pazoookis, Centralbanc, and other lenders. CP 31-32. Centralbanc disclaimed any interest in the Property. CP 344-45. At trial, Scotty's obtained a judgment in its favor. CP 38-41. In the judgment, the trial court found that Scotty's interest in the Property "is superior to the interest of all Defendants". CP 40. The trial court ordered that Scotty's "shall be entitled 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.

BNY Mellon is the assignee of the Centralbanc Deed of Trust. CP 30. MERS, as Centralbanc's nominee, executed an Assignment of Deed of Trust on June 17, 2010, which Assignment was recorded on June 29, 2010, assigning Centralbanc's Deed of Trust to BNY Mellon. *Id.*

B. Procedural Background.

BNY Mellon filed its complaint against Scotty's in February 2011 seeking declaratory relief and to quiet title. CP 1-4. BNY Mellon alleged only two grounds for its requested relief: 1) that the Centralbanc Deed of Trust is superior to Scotty's' mechanics' lien because the Centralbanc Deed of Trust was recorded first (CP 3 ¶ 10; CP 4 ¶¶ 13-14); and 2) that Scotty's did not add MERS as a defendant in its foreclosure lawsuit (CP 3 ¶ 11). BNY Mellon did not claim that it should have been joined in the foreclosure lawsuit. CP 1-4.

Scotty's filed a CR 12(b)(6) Motion to Dismiss, seeking dismissal of BNY Mellon's Complaint. CP 45-63. Scotty's included a declaration from its counsel attaching a number of exhibits. CP 64-288. BNY Mellon responded, submitting to the trial court numerous of its own exhibits. CP 295-437. Approximately two months after hearing the parties' argument on Scotty's' motion, the trial court entered an order dismissing BNY Mellon's complaint with prejudice based upon the pleadings and accompanying exhibits. CP 442-43. BNY Mellon appealed and filed two Opening Briefs (the second after BNY Mellon retained new counsel, raising all new arguments).

III. SUMMARY OF ARGUMENT

BNY Mellon raises speculative facts and new arguments in its Opening Brief. Rule of Appellate Procedure 9.12 prohibits consideration of any matters not raised before the trial court.

On appeal, BNY Mellon claims for the first time that it should have been joined in the foreclosure suit. This Court should not consider this new argument. RAP 9.12. Even if the Court considered the argument, the argument has no merit.

Scotty's followed the statutory procedure for foreclosing on its mechanics' lien. Under RCW 60.04.171, Scotty's only had an obligation to join as a party any person who "prior to the commencement of the action, has a recorded interest in the property". Centralbanc, not BNY Mellon, had the recorded interest in the Property. At the time Scotty's filed its lien foreclosure lawsuit, BNY Mellon had no interest in the property and only obtained an interest a year and a half later, as Centralbanc's assignee. As the assignee to Centralbanc's Deed of Trust, BNY Mellon only has whatever rights Centralbanc had to transfer, which was the interest in the Centralbanc Deed of Trust subject to the outcome of the lien foreclosure lawsuit. The court's rulings in the foreclosure lawsuit that Scotty's' lien is superior to the Centralbanc Deed of Trust

and that Scotty's could foreclose on any interest acquired after May 7, 2007 are binding on BNY Mellon.

Scotty's also had no obligation to join MERS in the lien foreclosure lawsuit. MERS was Centralbanc's agent, and Scotty's had named Centralbanc as a defendant. RCW 60.04.171 does not require naming MERS as an additional defendant, especially when the principal party with an interest in the property, Centralbanc, had been joined in the lawsuit.

The trial court in this action considered all of the parties' arguments and determined that BNY Mellon had no legally supportable basis to re-do the foreclosure lawsuit and re-determine lien priority. The trial court properly dismissed BNY Mellon's complaint, and this Court should affirm the dismissal.

IV. ARGUMENT

A. The standard of Review is *de novo*.

Civil Rule 12(b)(6) governs a motion to dismiss for failure to state a claim upon which relief can be granted. CR 12(b) states:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given

reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Scotty's presented matters outside the pleadings in moving for dismissal under CR 12(b)(6) and BNY Mellon presented matters outside the pleadings in opposing Scotty's' motion. CP 45-288, 295-437. The trial court considered these matters outside the pleadings in dismissing BNY Mellon's complaint. CP 442-43. Therefore, Scotty's' 12(b)(6) Motion to Dismiss is treated as one for summary judgment under CR 56.

Summary judgments are reviewed *de novo*; the appellate court engages in the same analysis as the trial court. *See e.g., Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994).

B. Review is limited to the evidence and issues raised before the trial court.

Rule of Appellate Procedure 9.12 states: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." When reviewing a summary judgment order, the Court of Appeals "engages in the same inquiry as the trial court and only considers evidence and issues raised below." *Halbert v. Forney*, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997) (citing *Wash. Fed'n of State Employees v. Fin. Mgmt.*, 121 Wash.2d 152, 157, 849 P.2d 1201 (1993)). "The appellate court may refuse to review any claim of error

which was not raised in the trial court.” RAP 2.5(a). In reviewing an order on summary judgment, theories or contentions made for the first time on appeal are beyond the proper scope of review. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290-91, 840 P.2d 860 (1992); RAP 9.12.

Almost every single one of BNY Mellon’s arguments on appeal are contentions it never raised in the trial court. These new arguments include: BNY Mellon should have been joined in Scotty’s’ mechanics’ lien foreclosure lawsuit; BNY Mellon was denied due process by not being joined in the foreclosure suit; BNY Mellon has long been the holder of the Pazooki promissory note thus was required to be joined in the foreclosure action; the foreclosure judgment is void or voidable because BNY Mellon was not party to the suit; Scotty’s had actual or constructive knowledge of the assignment of the Centralbanc Deed of Trust to BNY Mellon so Scotty’s had an obligation to join BNY Mellon; the Centralbanc Deed of Trust did not lose priority by being held under an unrecorded assignment; Centralbanc was not BNY Mellon’s representative in the foreclosure suit; BNY Mellon has standing to seek declaratory relief; the mortgage follows the note; and BNY Mellon is entitled to attorneys’ fees in this action based on the Centralbanc Deed of Trust.

The Court of Appeals should not consider these new arguments on appeal. RAP 9.12; *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 814 P.2d 243 (1991) (contentions not made in the trial court in summary judgment hearing may not be reviewed on appeal). This Court also should not consider the documents in the Appendix attached to BNY Mellon's Opening Brief, all of which BNY Mellon failed to present to the trial court. RAP 10.3(a)(8).

C. Scotty's properly followed RCW 60.04.171 in pursuing foreclosure of its mechanics' lien.

RCW 60.04.171 governs foreclosure of mechanics' liens 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." Scotty's followed this statute, which is the only statute governing the parties to be joined in a mechanics' lien foreclosure lawsuit. Scotty's named as defendants all parties having an interest in the Property at the time it commenced its lawsuit. CP 31-32. Those parties included Centralbanc, which was the lender on the Centralbanc Deed of Trust assigned to BNY Mellon. *Id.*; CP 30, 93-131. Because Scotty's included as defendants the parties having an interest in the real

property prior to commencement of the action, Scotty's satisfied RCW 60.04.171.

D. Scotty's had no obligation to join BNY Mellon in the foreclosure lawsuit.

BNY Mellon raises for the first time on appeal its argument that it should have been given notice of the foreclosure lawsuit and joined as a defendant. The Court should not consider this argument. RAP 9.12. Even if the Court considers this argument, the argument is without merit.

1. RCW 60.04.171 does not require joining BNY Mellon.

RCW 60.04.171 states that the only parties that need to be added to a foreclosure lawsuit for them to be bound by the foreclosure are those parties "who, prior to the commencement of the action, [have] a recorded interest in the property" (emphasis added). BNY Mellon's entire Opening Brief ignores the key phrase "prior to the commencement of the action".

Scotty's commenced its action in February 2009. CP 31-37. The Assignment of Deed of Trust assigning the Centralbanc Deed of Trust to BNY Mellon is dated June 2010. CP 30. Because BNY Mellon had no secured interest in the Property prior to the commencement of the action, no statutory basis exists for BNY Mellon claiming that it should have been joined as a defendant.

Alternatively, if BNY Mellon claims its interest stemmed from the original Centralbanc Deed of Trust which existed prior to commencement of the foreclosure suit, the interest in that Deed of Trust was adjudicated when Centralbanc was joined in the foreclosure suit (as discussed below).

2. BNY Mellon is bound to the judgment in the foreclosure lawsuit.

The Washington Supreme Court has held that a party who obtains an interest in property after commencement of a lien foreclosure lawsuit is bound to the outcome of that lawsuit even if not joined as a party. *McLaughlin v. Zarbell*, 29 Wn.2d 817, 190 P.2d 114 (1948).

In *McLaughlin v. Zarbell*, *supra*, a mechanic installed a new motor in a car owned by Clarence Wheeler. *Id.* at 817. The mechanic executed a lien for the materials and labor, and then assigned the lien to Iver Zarbell. *Id.* Clarence Wheeler then sold the car to a used car dealership which then sold it to a buyer. *Id.* at 817-18. After these assignments, Zarbell (the mechanic's assignee) filed a lawsuit against Clarence Wheeler to foreclose the lien. *Id.* at 818. When commencing the action, the public records showed that Clarence Wheeler was still the owner of the car. *Id.* Zarbell obtained a default judgment and a decree of foreclosure of the lien. *Id.* In between Zarbell filing suit and

obtaining the decree of foreclosure, the transfers of the title to the car were registered. *Id.* The assignees of title to the car then filed a new lawsuit to have the lien foreclosure decree adjudged of no effect to them because they were not joined as parties in the lien foreclosure suit. *Id.*

The Washington Supreme Court found that the mechanic's lien was properly filed, so that the assignees were on constructive notice of the lien. *Id.* at 819. The Court held that "persons who acquire interest, by conveyance or encumbrance, after the foreclosure action is instituted, are not necessary parties, but are bound by the decree in the foreclosure action." *Id.* at 820 (citing *Whitney v. Higgins*, 10 Cal. 547, 70 Am.Dec. 748). The Court also quoted Story's Equity Pleading sec. 194, stating:

encumbrancers, who become such pendent lite, are not deemed necessary parties, although they are bound by the decree; for they can claim nothing except what belonged to the person under whom they assert title, since they purchase with constructive notice; and there would be no end to suits, if a mortgagor might, by new incumbrances, created pendent lite, require all such incumbrancers to be made parties.

Id. In other words, a party that does not obtain an interest in property subject to foreclosure until after the foreclosure lawsuit is filed is not a necessary party to the action and is bound by the foreclosure decree.

The same analysis applies here. Scotty's filed its lien foreclosure suit before BNY Mellon had any interest in the Property. BNY Mellon

acquired its interest in the Property by conveyance of the Centralbank Deed of Trust. BNY Mellon was on constructive notice of Scotty's' lien by virtue of it having been recorded in the King County public records in December 2008. BNY Mellon was not a necessary party to Scotty's' lien foreclosure lawsuit, but was bound by the outcome of the foreclosure action. *Accord McLaughlin*, 29 Wn.2d at 819-20.

3. BNY Mellon's "dispositive rule" that a foreclosure decree cannot bind a nonparty is not supported by Washington law.

BNY Mellon relies upon the recent *Diversified* cases to claim that a foreclosure decree cannot bind a nonparty with an interest in the property. *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 251 P.3d 293 (2011) ("*Diversified I*"); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 891, 251 P.3d 908 (2011) ("*Diversified II*"). These cases, however, address joining an owner, or alleged owner, of real property under RCW 60.04.171. The cases do not address the situation here, where a non-owner acquires an interest in the property after commencement of the mechanics' lien foreclosure suit, and whether that party must be joined. Indeed, RCW 60.04.171 is clear on that point: there is no requirement to join a party that does not have an interest prior to commencement of the foreclosure suit.

RCW 60.04.171 states that in an action “to foreclose a lien, the owner shall be joined as a party” and also states that the interest of a party existing prior to the commencement of the action shall not be foreclosed unless that party is joined in the action. Citing RCW 60.04.171, this Court in *Diversified II* stated: “The consequence of nonjoinder of the owner or any other person who has a prior recorded interest in the property is not lack of jurisdiction. . . [it] is that the interest of a person not joined may not be foreclosed or otherwise affected.” *Diversified II*, 161 Wn. App. at 903 (emphasis added). Simply put, the *Diversified* cases do not support BNY Mellon’s argument that its interest in the Centralbanc Deed of Trust could not be addressed without BNY Mellon being joined in the foreclosure suit.

BNY Mellon also claims that because it was not a party to the prior lawsuit it was denied due process. But again, BNY Mellon had no interest in the Centralbanc Deed of Trust or the Property until a few weeks before judgment was entered in the foreclosure suit.² CP 30, 38-42. BNY Mellon did not need its day in court when its assignor,

² At one point BNY Mellon claims, without any support, that Centralbanc lost authority over its Deed of Trust sometime before the mechanics’ lien lawsuit. Opening Brief at 28. Nothing in the record supports that claim. Centralbanc had the only record interest in its Deed of Trust until its Deed of Trust was assigned to BNY Mellon in June 2010.

Centralbanc, had the opportunity to have its day in court to determine priority of the Centralbanc Deed of Trust.

BNY Mellon also claims that it is entitled to seek a declaratory judgment to find its lien superior to Scotty's' lien based on *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 246, 46 P.3d 812 (2002), which states that the lien first in time is first in right unless the holder of the first lien voluntarily subordinates it. Opening Brief at 31-32. But that case is no longer good law regarding the "volunteer rule" in the context of a commercial loan. See *Columbia Community Bank v. Newman Park, LLC*, ---P.3d--- Wn. App. Div. 2 (2012); *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007). Further, in that case the commercial lender lost its declaratory judgment action to have its lien declared superior to a creditor's judgment lien and the lender was unsuccessful in its attempt to appeal that ruling. Therefore, this argument fails.

BNY Mellon also claims that Scotty's had constructive or actual notice of the assignment to BNY Mortgage four weeks before judgment was entered, thus should have joined BNY Mortgage in the lawsuit. Opening Brief at 9-11. Whether or not Scotty's had constructive or even

actual notice is irrelevant.³ Scotty's had no obligation to monitor record title to the Property after having commenced its lawsuit. *See generally McLaughlin*, 29 Wn.2d 817. Monitoring is unnecessary when a new person claiming an interest in property is the assignee of a party already joined in the lawsuit, and is on constructive notice of the lawsuit. *Id.* As discussed in Section D.4. below, the assignee's rights are only as good as its assignor's rights. Simply put, Washington law does not impose a duty on a plaintiff foreclosing on a lien to search record title after commencement of its lawsuit. RCW 60.04.171; *McLaughlin, supra*, 29 Wn.2d 817.

4. BNY Mellon's rights under the Centralbanc Deed of Trust are limited to whatever rights Centralbanc had to assign.

BNY Mellon claims that two "dispositive rules" give it priority over Scotty's lien. One "rule" is that the Centralbanc Deed of Trust was recorded before Scotty's had any interest in the Property, so the Deed of

³ BNY Mellon's argument for actual notice relies upon new evidence of a letter Scotty's counsel wrote in a case concerning Parcel 062205-9056 (not the parcel at issue in this lawsuit). Opening Brief Appx. E. BNY Mellon speculates that because Scotty's counsel said it reviewed record title to the property Scotty's must have had notice of the assignment of the Centralbanc Deed of Trust to BNY Mellon. BNY Mellon also claims that Scotty's counsel's references in a fee and cost application somehow show that it had actual notice of the assignment to BNY Mellon. Opening Brief Appx. J. All of this is new evidence the Court should not consider under RAP 9.12. Moreover, BNY Mellon's theories are purely speculative, which speculation is exactly the type of evidence not allowed under CR 56. *McMann v. Benton County*, 88 Wn. App. 737, 740, 946 P.2d 1183 (1997) (quoting *Ruffer v. St. Frances Cabrini Hospital*, 56 Wn. App. 625, 628, 784 P.2d 1288, rev. denied, 114 Wn.2d 1023 (1990)); *Young v Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); CR 56(e).

Trust must be superior to Scotty's' lien. The other "rule" is that the priority of the Centralbanc Deed of Trust is not lost when held by an unrecorded assignment. These arguments miss the basic premise that BNY Mellon is an assignee of the Centralbanc Deed of Trust, and therefore only has whatever rights Centralbanc had to assign.

BNY Mellon admits that through the Assignment of the Deed of Trust, BNY Mellon is the "lender's assign" with the right to enforce the mortgage. Opening Brief at 36. An assignee stands in the shoes of the assignor "but acquires no right in excess of what the [assignor] had to transfer." *Morse Electro Prods. Corp. v. Beneficial Indus. Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978); *Young v. Am. Can Co.*, 131 Wash. 374, 376, 230 P. 147 (1924) ("assignor can assign no greater interest in the contract than he himself has"). The assignee has the same rights that the assignor had prior to assignment. *Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994); see generally Restatement (2nd) of Contracts § 317 (1979).

BNY Mellon is the assignee of the Centralbanc Deed of Trust. CP 30. Centralbanc was properly served with notice in the lien foreclosure action. Centralbanc's rights in the Property, by way of its Deed of Trust, were adjudicated in that action. BNY Mellon, standing in the shoes of Centralbanc, has no greater rights in the Deed of Trust than

Centralbanc. At the time of the assignment, Centralbanc's lien priority was subject to the outcome of the pending lien foreclosure suit. The court in the foreclosure suit found that Scotty's' lien was superior to Centralbanc's lien. CP 40. BNY Mellon's lawsuit seeking a declaration that Scotty's' lien is junior is an attempt to have a do-over of the prior lawsuit. The parties' lien priorities were determined in the prior suit, and no amount of speculation by BNY Mellon will change the prior adjudication that Scotty's' lien is superior to BNY Mellon's lien.

5. BNY Mellon's claims for priority are barred by the language in the judgment stating that Scotty's is entitled to foreclosure "against all parties which claim to have acquired an interest subsequent to May 7, 2007."

Scotty's also is entitled to foreclose against BNY Mellon's interest because of the express language in the judgment which states that Scotty's is entitled to foreclose its lien "against any right, title and interest acquired by an[y] person subsequent to May 7, 2007". CP 41. BNY Mellon did not have an interest in the Deed of Trust or the Property until the Assignment of Deed of Trust dated June 17, 2010. CP 30. BNY Mellon did not acquire an interest in the Property until well after May 7, 2007. Therefore, BNY Mellon is barred from claiming a superior lien interest in the Property.

6. BNY Mellon had several options available to pursue its claims, and chose not to pursue them.

BNY Mellon accuses everyone else of wrongdoing but has failed to look in the mirror to see the actions it could have taken under RCW 60.04.171 to protect its interest in the Property.

RCW 60.04.171 states:

A person shall not begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a party plaintiff or defendant to the prior action, he or she may apply to the court to be joined as a party thereto, and his or her lien may be foreclosed in the same action.

(Emphasis added.)

The statute allows a party not already named in the mechanics' lien foreclosure lawsuit to apply to the court to be joined as a party and to have its own lien foreclosed. BNY Mellon, seeking to foreclose on its own lien as evidenced by the Notice of Trustee's Sale recorded on July 22, 2010 (Opening Brief Appx. G), could have applied to join in Scotty's' mechanics' lien lawsuit. BNY Mellon failed to apply to join its interest.

BNY Mellon also could have sought recourse against Centralbanc for failure to disclose Scotty's lien lawsuit, but there is no evidence that BNY Mellon has done that, either.

Essentially, BNY Mellon did not take the statutorily authorized action of joining in Scotty's' lien foreclosure lawsuit and did not pursue any claims against its assignor, instead hoping that the trial court and now this Court would allow it a do-over so that it could regain the priority that its Deed of Trust lost in the lien foreclosure lawsuit. BNY Mellon should not be rewarded for its failure to join in the prior action and should not be rewarded for seeking a do-over when one is not authorized under Washington law.

E. Scotty's had no obligation to join MERS in the foreclosure lawsuit.

BNY Mellon claims that the beneficiary status of MERS is a "red herring" and that this Court need not address the issues related to MERS's status. Opening Brief at 34-39. BNY Mellon, however, predicated its entire argument before the trial court in this action on the grounds that MERS was a beneficiary and entitled to notice of the mechanics' lien lawsuit.⁴ CP 1-4, 298-303. Now BNY Mellon apparently has abandoned its claim that MERS had a beneficial interest in the Property and should have been joined in the foreclosure lawsuit.

Scotty's agrees with BNY Mellon that MERS need not have been joined in the foreclosure suit. Scotty's also agrees that MERS does not

⁴ Whether MERS was a beneficiary entitled to notice also is the primary argument in BNY Mellon's first Opening Brief.

have standing to enforce the Deed of Trust and that MERS divested any rights it had under the Centralbanc Deed of Trust when it signed the Assignment of the Deed of Trust, transferring Centralbanc's interest in the Deed of Trust to BNY Mellon. Because of the parties' agreement on these issues related to MERS, the Court's inquiry should end there.

Even if this Court considers whether MERS is a beneficiary, it should decide that MERS is not a beneficiary entitled to be joined in the mechanics' lien foreclosure lawsuit. The Centralbanc Deed of Trust defines MERS as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." CP 94 (emphasis added). MERS is not a legal beneficiary because RCW 61.24.005(2) defines a "beneficiary" of a deed of trust as "the holder of the instrument or document evidencing the obligations secured by the deed of trust". The statute requires MERS to be the "holder" of the promissory note between Pazooki and Centralbanc, but there is no evidence before this Court that MERS was indeed the holder of that note. Therefore, MERS does not meet the statutory definition of a beneficiary under the Centralbanc Deed of Trust.

Instead of being a beneficiary, MERS was Centralbanc's agent. Scotty's joined Centralbanc as a defendant, and did not need to add

Centralbanc's agent. If the principal already has been joined in an action, it is nonsensical to require the agent to be joined as well. RCW 60.04.171 does not require every entity identified on a Deed of Trust to be added to a lien foreclosure lawsuit. For example, a trustee need not be added. Instead, RCW 60.04.171 only requires that the person with an interest in the real property to be joined. The entity with the real interest in the Property was Centralbanc, and although MERS was identified as Centralbanc's agent in the Deed of Trust, the statute does not require the lender's agent to be joined as well.

BNY Mellon cites to *Vawter v. Quality Loan Service Corporation of Washington*, 707 F.Supp. 2d 1115 (W.D. Wash. 2010), and various unpublished cases to claim that MERS should be considered a beneficiary. In *Vawter*, the Court dismissed a claim against MERS because the plaintiff had relied solely on legal conclusions in their complaint and such legal conclusions were not sufficient to withstand MERS' motion to dismiss. The other cases are not binding precedent on this Court. Ultimately, whether or not MERS is a beneficiary is a question that has been certified to the Washington Supreme Court (*Bain v. Metropolitan Mortgage Group, Inc.*, No. 86206-I (Wash.))⁵ and if this

⁵ The question certified to the Washington Supreme Court in this action is: "Whether Mortgage Electronic Registration Systems, Inc., a corporation formed to provide a

Court finds that issue to be dispositive, then it should follow the Washington Supreme Court's ultimate decision in the matter.

F. BNY Mellon's factual arguments about the King County Recorder's index are new arguments raised in violation of RAP 9.12 and should not be considered.

BNY Mellon raises several factual arguments related to the King County public records for the first time on this appeal, which should not be considered by this Court. These arguments include: 1) that the King County Recorder's index identifies MERS as the grantee; 2) that the King County Recorder's index does not show Scotty's' lien under Parcel 062205-9036 but only under the other parcel 062205-9056; and 3) that Scotty's did not file a lis pendens. Even if the Court considers these arguments, they are without merit.

First, BNY Mellon argues that because MERS is identified as a grantee in the Centralbanc Deed of Trust and is designated as the grantee in the King County Recorder's index, that identification is dispositive of MERS's status with respect to the Centralbanc Deed of Trust. But indexing is not determinative of a party's status. Moreover, the statutes BNY Mellon cites as support, under RCW Chapter 65.04 (Opening Brief

national electronic registry to track the transfer of ownership interests and servicing rights in mortgage loans, and nominated by many lenders as mortgagee of record and beneficiary under deeds of trust, may lawfully serve as beneficiary under the Washington Deed of Trust Act where it never held the underlying promissory note." *Bain v. Metropolitan Mortgage Group, Inc.*, No. 86206-I (Wash.).

at 6-8), relate only to the duties of county auditors, not duties with respect to others reviewing the public records.

Second, the legal description of the Property included in Scotty's Claim of Lien identifies both parcels to the property, parcel 062205-9036 and 062205-9056. Opening Brief at Appx. I. The fact that the King County Recorder made a mistake and did not index the lien under parcel 062205-9036 does not invalidate Scotty's lien.

Third, the fact that Scotty's did not file a lis pendens is irrelevant. RCW 4.28.320 governs filing a lis pendens and states that upon filing an action affecting title to real property, the plaintiff "may file with the auditor" a lis pendens (emphasis added). The statute is permissive, not mandatory. Scotty's had no legal obligation to file a lis pendens.

G. BNY Mellon is not entitled to its attorneys' fees.

BNY Mellon seeks an award of attorneys' fees. First, BNY Mellon is not entitled to any fees because it should not prevail in its appeal. Second, BNY Mellon bases its claim for fees on the DOT, a contract to which Scotty's is not a party. Third, BNY Mellon's complaint is based on two theories, the Uniform Declaratory Judgment Act and Washington's quiet title statute, neither of which have attorneys' fees provisions. There is no basis for awarding BNY Mellon any attorneys' fees or costs.

H. Scotty's is entitled to an award of its costs on appeal.

Rule of Appellate Procedure 14.2 authorizes an award of costs "to the party that substantially prevails on review". Scotty's requests an award of its costs as the substantially prevailing party in this action.

V. CONCLUSION

BNY Mellon has not and cannot prove that it is entitled to a do-over of Scotty's mechanics' lien foreclosure lawsuit so that BNY Mellon can attempt to regain the priority of the Centralbank Deed of Trust. This Court should affirm the trial court's dismissal of BNY Mellon's claims against Scotty's and award Scotty's its costs.

RESPECTFULLY SUBMITTED this 23rd day of March, 2012.

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DECLARATION OF SERVICE

I declare that on the 23rd day of March, 2012, I caused to be served the foregoing document on counsel of record at the following addresses:

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Susan Smith

Dated: March 23, 2012

Place: Seattle, WA