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FILED
SUPERIOR COURT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

ERIK MOSEID, an individual, and
DIANNA MOSEID, an individual,

Appellants,

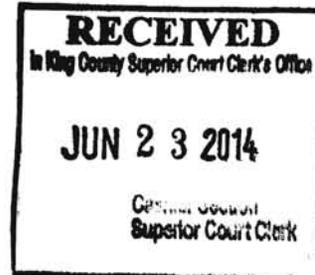
vs.

U.S. BANK, N.A., a national banking
association, as trustee for SERIES
#2011-1 CERTIFICATES and
successor in interest to CREDIT
SUISSE FINANCIAL
CORPORATION, a business entity,
form unknown, LAW OFFICES OF
KAREN L. GIBBON P.S., a business
entity, form unknown, and DOES 1
through 15, inclusive,

Respondents.

Court of Appeal No. 70823-6-1

(Superior Court Case # 13-2-19543-7 SEA)



FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JUN 23 AM 10: 56

Appeal From a Judgment of the Superior Court, County of King

The Honorable Monica Benson, Judge Presiding

APPELLANTS' REPLY BRIEF

Erik and Dianna Moseid
12708 167th Place, Northeast
Redmond, Washington 98052
Phone (206) 849-5365
Self-represented Appellants

1. Introduction and Synopsis.

This appeal arises from an action to set aside a trustee's sale, or alternatively, for damages for wrongful foreclosure of Plaintiffs'/Appellant's home, 12708 167th Place, Northeast, Redmond, Washington 98052 ("the Property").

In their opening brief, Appellants argued: 1) the trial court erred by granting Respondent's CR 12(b)(6) motion without leave to amend in contravention of CR 15(a), Wilson v. Horsley, 137 Wash. 2d 500 (1999) and the "failure to explain" rule set out in Rodriguez v. Loudeye Corp., 144 Wash. App. 709 (2008); 2) the waiver rule set out in RCW 61.24.040 does not bar Appellant's claims, at least at the pleading stage because waiver presents a question of fact; and, 3) Washington's doctrine of claim preclusion does not bar Appellant's action given their prior federal action was not an adjudication upon the merits and the elements for claim preclusion are factual in nature and therefore beyond the office of a CR 12(b)(6) motion.

Respondents argue: 1) CR 15 is not applicable because Appellants never requested leave to amend the complaint; 2) citing only federal pleading decisions, the trial court properly granted the CR 12(b)(6) motion because the complaint failed to state a cause of action; 3) all Appellants' claim are barred by the waiver doctrine; 4) issue preclusion was appropriate because this action arose from the "same nucleus of facts" as Appellants' federal action; and, 5) the trial court did not misinterpret case law.

The Respondent's Brief attaches about 40 additional pages as an Appendix without any indication this material was presented to the trial court or considered in its decision.

The Respondent's Brief also makes several erroneous factual statements, which Appellants will address *infra*.

2. Summary of Argument in Appellants' Reply.

- ◆ Whether or not Appellants requested leave to amend their Complaint (they did), the trial court should have "freely granted leave" to amend; the trial court's failure to state reasons for failure to grant leave is an abuse of discretion, and Respondents do not argue to the contrary.
- ◆ Respondent's Brief utterly misanalyzes CR 12(b)(6) motions under Washington law; Washington, per McCurry v. Chevy Chase Bank, FSB, 169 Wash 2d 96 (2010), does not follow the U.S. Supreme Court's standards for *Fed. R. Civ. P.* 12(b)(6) motions and hence Respondent's discussion is completely irrelevant. Appellants do state sufficient facts to constitute a claim for relief for damages even if any other claims fail.
- ◆ Albice v. Premier Mortgage Services of Washington, Inc., 174 Wash. 2d 560, 570 (2012) teaches that under Washington's trust deed act, "we apply waiver only where it

is equitable under the circumstances and where it serves the goals of the act.” As such a determination is inherently factual, Appellants’ claims survive a CR 12(b)(6) motion.

- ◆ Washington’s claim and issue preclusion doctrines, even to the extent they recognize a common nucleus of facts as an element, are factual in nature and therefore beyond the office of a CR 12(b)(6) motion.
- ◆ Even if the trial court did not misinterpret case law, it clearly misapplied case law, and its judgment should be reversed.

3. THIS COURT SHOULD STRIKE RESPONDENT’S APPENDIX FOR LACK OF COMPLIANCE WITH APPELLATE RULES 9.1, 9.10, AND 10.3.

Washington Appellate Rule 10.3(a)(8) provides, in relevant part:

An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4©.

Respondent’s appendix is submitted without leave from this Court and does not comply with any provision in Rule 10.4.

The appendix further does not comply with Rule 9.1(a) concerning composition of the record on appeal. It also does not comply with Rule 9.10 as it is neither a designation of record or a statement of arrangements. There is no authority for inclusion of this Appendix, and it should be

struck.

4. RESPONDENT'S BRIEF MISLEADS THIS COURT ON SEVERAL MATERIAL POINTS.

1. Respondent argues Appellants have continued to reside in the Property without payment. This is completely false. Appellants are paying the equivalent of their mortgage payment as a condition of staying the underlying unlawful detainer proceeding.

2. Respondent assumes the dismissal of the federal lawsuit was "with prejudice." There is no evidence showing the dismissal was "with prejudice."

3. This action is an original complaint in this state court action. (See, Respondent's Brief at 5).

4. Appellants were denied a loan modification after being promised a trial modification.

That Respondents make such false statements undermines their credibility before this Court.

5. THE TRIAL COURT SHOULD HAVE GIVEN APPELLANTS LEAVE TO AMEND THEIR COMPLAINT IN THE FIRST INSTANCE.

Generally, amendments to pleadings should be allowed in the furtherance of just to permit the correction of errors and omissions by the

pleader and to insure that every case, so far as possible, is determined on its real facts. Refusing leave to amend is justified only upon a showing of undue delay, undue prejudice to the opposing party, bad faith, failure to cure deficiencies by amendments previously allowed, or futility of amendment. 61A *American Jurisprudence 2d* “Pleading,” § 693, p. 687 (2010). Factors which weigh in favor of allowing amendment to a complaint include: (1) a preference for rules that permit courts to render decisions on the merits; (2) avoidance of piecemeal litigation; and, (3) avoiding harm to the plaintiff that would be caused by denying leave to amend. Denial of leave to amend without any justifying reason appearing for the denial is an abuse of discretion. Id. at 688.

Washington courts are clear that a trial court’s failure to explain its reason for denying leave to amend may amount to abuse of discretion unless the reasons are apparent in light of the circumstances shown in the record. Rodriguez v. Loudeye Corp., 144 Wash. App. 709, 729 (2008). Here, 1) there is no explanation in the order granting the motion to dismiss and 2) the trial court’s reasoning is not “apparent” in light of the hearing transcript. This amounts to an abuse of discretion and requires reversal.

Respondent’s argument that no request for leave is therefore 1) irrelevant under the cited authorities, and 2) misleading as Mr. Moseid did indicate to the trial court that amendment was possible.

Further, it is objectively certain amendment could cure any error. Even granting full force, for sake of argument only, to Respondent’s

arguments before the trial court (they were not “true”) Appellants had and have a viable claim for damages for wrongful foreclosure for violation of the Washington Trust Deed Act. That claim should be allowed to proceed. The trial court erred in failing to grant leave to amend, and this Court should reverse that decision.

To the extent Respondent relies upon federal law interpreting *Fed. R. Civ. P.* 15, the Ninth Circuit, in Silva v. Di Vittorio, 658 F. 3d 1090, 1105 states: “Dismissal of a *pro se* complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” [internal quotations omitted].

6. RESPONDENT’S BRIEF MISSTATES THE LAW UNDER CR 12(b)(6) AND THE McCURRY DECISION.

In McCurry v. Chevy Chase Bank, FSB, 169 Wash. 2d 96, the state supreme court was urged to adopt the standards of the U.S. Supreme Court in analyzing CR 12(b)(6) motions. The Washington state supreme court rejected the argument at ¶ 12:

Currently, this court lacks the type of facts and figures (specific to Washington trial courts) that were presented to, and persuaded, the United States Supreme Court to alter its interpretation of Fed. R. Civ. P. 12(b)(6). We thus have not similar basis to fundamentally alter our interpretation of CR 12(b)(6) that has been in effect for

nearly 50 years.

¶ 13 Even if such facts and figures had been presented, this court would be hesitant to effectively rewrite CR 12(b)(6) based on policy considerations. The appropriate forum for revising the Washington rules is the rule-making process.

Respondent's argument is predicated entirely upon federal law, which McCurry expressly repudiates. Respondent's argument therefore fails as a matter of Washington law, to support its argument.

7. RESPONDENT'S WAIVER ARGUMENT IS A NON-STARTER UNDER ALBICE.

RCW. 61.24.040 doesn't apply to the third claim for relief in the Complaint, which seeks money damages only. Second, it further doesn't apply because it requires an action to stay the trustee's sale be filed before the sale, and that's exactly what Appellants did here.

Third, the trial court misread the state supreme court's decision in Albice v. Premier Mortgage Services, 174 Wash. 2d 560, ___ 276 P. 3d 1277 (2012). The state supreme court observed:

Waiver, however, cannot apply to all circumstances or types of postsale challenges. . . . The word "may" indicates the legislature neither requires nor intends for courts to

strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.

174 Wash. 2d 560, _____, 276 P. 3d at 1283.

Since Albice makes clear that waiver applies only where it is equitable under the circumstances, an analysis of circumstances is necessarily fact-specific and thus not cognizable on a motion to dismiss. Kelm v. Washington Mutual Bank, 176 Wash. 2d 771 (2013) confirms Albice. There, in Footnote 7, the court noted:

But we have rejected the argument that, under Plein, the failure to seek a presale injunction acts as a per se bar to any postsale challenge.

Id. at 783, n. 7.

The waiver rules, even if they apply to this action (they don't), cannot form the basis for dismissal of the complaint. Respondent's Brief cites only to the appellate court's decision in Albice, and is thus not relevant. The trial court's judgment should be reversed.

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8. NEITHER CLAIM PRECLUSION NOR ISSUE PRECLUSION BARS APPELLANTS' CLAIMS AS THOSE ARE FACTUAL ISSUES BEYOND THE SCOPE OF A CR 12(b)(6) MOTION.

Claim preclusion in Washington requires the concurrence of identity in four respects in a subsequent action. There must be identity of subject matter, cause of action, persons and parties, and the quality of persons for or against whom the claim is made. Seattle-First Nat'l Bank v. Kawachie, 91 Wash. 2nd 223 (1978), Loveridge v. Fred Meyer, Inc., 125 Wash. 2nd 759 (1995).

Here, it is clear there is no "identity" as to cause of action at least as to the wrongful foreclosure cause of action. That itself is sufficient to justify denial of the motion to dismiss.

Even beyond that, the other elements of claim or issue preclusion are fact specific and justify denial of the motion to dismiss.

9. THE TRIAL COURT MISAPPLIED THE LAW.

To the extent Respondents argue the trial court did not "misapply" the law concerning Albice v. Premier Mortgage Services of Washington, Inc., they are incorrect because they cite only to the appellate level opinion, and not the state supreme court. Again, Respondents are citing this Court to the wrong opinion and the wrong statement of the law.

Conclusion

Respondents attempt to submit an Appendix which does not conform to the rule of this Court. Respondents make multiple errors of fact in citing to this Court. Respondents are simply wrong as to the standards for a motion under CR 12 (b)(6). Appellants are entitled to have their case heard on the merits. This appeal should be allowed and the judgment of the trial court reversed.

10. Certificate of Compliance.

The signatures on this brief confirm that it consists of 2,067 words and was composed on Word Perfect X6 and then published to Adobe Acrobat.

Dated: June 19, 2014

Respectfully submitted,



Erik Moseid, Self-represented Appellant



Dianna Moseid, Self-represented Appellant