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DIVISION II

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STATE OF WASHINGTON

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No. 46293-1-II
COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Maxim Lissak, et al, Appellant

v.

U.S. Bank National Association, et al., Respondent

BRIEF OF APPELLANT LISSAK

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I. INTRODUCTION

Appellant Lissak, hereby appeals February 28, 2014, order of dismissal by Clark County Superior Court of the Appellant's counterclaims for Declaratory Judgment against Respondent U.S. Bank N.A.. (RP 12-13; CP 105-107; CP 111-113).

The record on appeal shows that dismissal of Appellant Lissak's counterclaims for Declaratory Judgment is the result of genuinely egregious errors of law committed by the lower court and therefore this Court should reverse the dismissal.

II. ASSIGNMENT OF ERROR

1. The trial court erred in dismissal of Lissak's counterclaims for Declaratory Judgment against U.S. Bank, N.A. (RP 12-13; CP 105-107; CP 111-113) (CR 12(b)(6)).
2. The trial court erred that it lacked jurisdiction under the Declaratory Judgment Act to adjudicate Lissak's counterclaims. (RP 12-13; CP 105-107; CP 111-113) (RCW 7.24.010; RCW 7.24.050)
3. The trial court erred in granting Respondent U.S. Bank's 12(b)(6) Motion to Dismiss on the grounds that Lissak failed to state facts sufficient to constitute cause of action. (CP 86-91; CP 93-101; CP 102-103; RP 13) (CR 12(b)(6)).

4. The trial court erred that Lissak's counterclaims for Declaratory Judgment demanded modification of the existing contract between Lissak and U.S. Bank N.A. (RP 3-13; CP 105-107; CP 111-113).

5. The trial court erred that Lissak's counterclaims for Declaratory Judgment constituted cause of action for breach of contract. (RP 12-13; CP 105-107; CP 111-113).

6. The trial court erred that Lissak's counterclaims for Declaratory Judgment constituted cause of action for contract formation. (RP 12-13; CP 105-107; CP 111-113).

7. The trial court erred that Lissak's counterclaims for Declaratory Judgment were not related to determination of Lissak's right to be considered for a loan modification process offered by the U.S. Bank N.A. (CP 82-85; CP 105-107; CP 111-113; RP 12-13).

8. The trial court erred that Lissak's counterclaims for Declaratory Judgment demanded the trial court to write a new contract for the parties. (CP 82-85; CP 105-107; CP 111-113).

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Under Chapter 7.24 RCW, did the trial court have jurisdiction over Lissak's counterclaims for Declaratory Judgment asserted against the U.S. Bank, N.A.? (Assignments of Error 1, 2 and 3).

2. Did the trial court err when it ruled that Lissak failed to state cause of action for Declaratory Judgment under Chapter 7.24 RCW? (Assignment of Error 1, 2 and 3).
3. Did the trial court err when it ruled that Lissak's counterclaims demanded modification of the existing contract or formation of a new contract between Lissak and U.S. Bank N.A.? (Assignment of Error 4, 6, and 8).
4. Did the trial court err when it ruled that Lissak's counterclaims constituted breach of contract action, not action for declaration of rights under Chapter 7.24 RCW? (Assignment of Error 5 and 6).

IV. STATEMENT OF THE CASE

Sometime in the spring of 2012 Appellant Lissak telephonically requested a loan modification from the Respondent U.S. Bank, N.A. on his commercial property. Mr. Lissak asserted that he was in position of a distressed borrower. Mr. Lissak explained to a representative of the U.S. Bank that the Vancouver market was not improving and the rate on his borrower's note was well over 7% while other similarly situated borrowers were getting in the 3% range for 5-year on their modified loans.

The U.S. Bank representative explained to Mr. Lissak that the reason the bank would not even consider a modification was because he

was current on his monthly payments, which would be the first criteria the bank would consider whether to decrease the rate on the note or not. However, the bank's representative suggested to Mr. Lissak that only accounts in default are entitled to loan modification consideration under the U.S. Bank's guidelines.

The bank representative said that the bank was currently offering solutions to all those distressed borrowers who were under water. Mr. Lissak informed the U.S. Bank representative that the commercial property rents and market conditions were adversely affected and that the building was not rentable in the near future.

The representative advised Mr. Lissak that he should temporarily withhold making payments and only then he could be considered by the U.S. Bank for a loan modification. Mr. Lissak fully followed the bank's representative advice in expectation that the bank would offer him loan modification consideration process.

After Mr. Lissak followed such advice, he repeatedly contacted the bank to obtain loan modification information. Mr. Lissak provided all information and documentation requested by the bank for the purposes of loan modification. On numerous occasions Mr. Lissak was assured by various representatives of the bank that his loan modification request was in the process of consideration.

However, every time Mr. Lissak would call the bank, he was transferred to a new representative who was not knowledgeable regarding his loan modification file. Mr. Lissak fully followed the bank's advice and complied with all U.S. Bank's requests for the purposes of the loan modification process. Even so, the bank procrastinated continuously the process to such extent, that the judicial foreclosure lawsuit was filed in Clark County Superior Court under Cause No. 13-2-03255-8 against Mr. Lissak contrary to his expectations.

Defendant Lissak, pursuant to the Uniform Declaratory Judgment Act, Chapter 7.24 RCW, filed counterclaims for Declaratory Judgment against the U.S. Bank seeking determination and declaration of his rights to be considered for a loan modification process, which was offered to him by the U.S. Bank.

The U.S. Bank filed CR 12(b)(6) Motion to Dismiss Lissak's counterclaims for Declaratory Judgment on the following grounds:

- That Lissak's counterclaims were in the nature of breach of contract or contract formation, not an action for declaration of rights pursuant to Chapter 7.24 RCW. (CP 3);
- That the trial court had no jurisdiction to adjudicate Lissak's counterclaims pursuant to the Declaratory Judgments Act. (CP 4);

- That Lissak's counterclaims demanded the trial court to make or to alter existing contract between the parties and Lissak's counterclaims had no relation to the Declaratory Judgments Act. (CP 4);
- That Lissak's counterclaims demanded the trial court to order the plaintiff U.S. Bank, N.A. to offer the defendant a loan modification. (CP 4);
- That Lissak's counterclaims must be dismissed pursuant to CR 12(b)(6) for failure to state a claim upon which relief can be granted. (CP 8).

The trial court agreed with the U.S. Bank and granted CR 12(b)(6) Motion to Dismiss Lissak's counterclaims for Declaratory Judgment. (RP 12-13; CP 105-107; CP 111-113). Lissak timely filed this appeal.

V. SUMMARY OF ARGUMENT

Lissak's counterclaims for Declaratory Judgment under the Uniform Declaratory Judgment Act, Chapter 7.24 RCW were properly pleaded and clearly stated Lissak's causes of action against U.S. Bank. On the day of the motions hearing, Lissak's counsel of record notified the trial court that Lissak's counterclaims against U.S. Bank, N.A. were for Declaratory Judgment, not for breach of contract or contract formation.

Lissak's counsel pointed out to the trial court that respondent's counsel confused the issues in that Lissak's counterclaims for declaratory judgment related not to loan modification by the trial court, but consideration for loan modification by the U.S. Bank, N.A. based on the process designed for distressed borrowers and offered to Mr. Lissak.

Thus, the only issue Lissak presented to the trial court was to declare his rights whether he was entitled for loan modification consideration by the U.S. Bank, N.A. after he had submitted all the required for the process information to the U.S. Bank.

VI. ARGUMENT

A. THE TRIAL COURT DENIED LISSAK'S CONSTITUTIONAL RIGHT TO FAIR TRIAL WHEN IT DISMISSED LISSAK'S COUNTERCLAIMS FOR DECLARATORY JUDGMENT AGAINST U.S. BANK.

The mandate of the appellate courts is to decide the law, and the appellate courts review de novo rulings on pure legal questions. The "de novo" or "error of law" standard of review permits the appellate court to substitute its judgment for that of the decisionmaker whose decision is being reviewed.¹

The Washington State Constitution, article 1, section 21 provides that the right to a jury trial shall remain inviolate. We have consistently

¹ *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

interpreted this constitutional provision as guaranteeing those rights to trial by jury which existed at the time of the adoption of the constitution.² Accordingly, there is a right to a jury trial where the civil action is purely legal in nature. Conversely, where the action is purely equitable in nature, there is no right to a trial by jury.³ The overall nature of the action is determined by considering all the issues raised by all of the pleadings.⁴

RCW 7.24.090 provides when a proceeding involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions, in the court in which the proceeding is pending.⁵

Mr. Lissak in his counterclaims clearly presented factual basis for his action for declaratory judgment. Mr. Lissak's factual allegations in support of his counterclaims for declaratory as to whether he was entitled to a loan modification consideration process should be decided by the jury, not by summarily dismissal by the trial court. Dismissal by the trial court of Mr. Lissak's counterclaims for declaratory judgment was clearly in

² *Brown v. Safeway Stores, Inc.*, 94 Wash.2d 359, 365, 617 P.2d 704 (1980) (citing *In re Marriage of Firchau*, 88 Wash.2d 109, 114, 558 P.2d 194 (1977); *Watkins v. Siler Logging Co.*, 9 Wash.2d 703, 116 P.2d 315 (1941)).

³ *Brown*, at 365, citing *Peters v. Dulien Steel Prod. Inc.*, 39 Wash.2d 889, 239 P.2d 1055 (1952); *Dexter Horton Bldg. v. King County*, 10 Wash.2d 186, 116 P.2d 507 (1941); *Knudsen v. Patton*, 26 Wash.App. 134, 137, 611 P.2d 1354 (1980).

⁴ *Brown*, at 365, citing *Seattle v. Pacific States Lumber Co.*, 166 Wash. 517, 530, 7 P.2d 967 (1932); *Santmeyer v. Clemmancs*, 147 Wash. 354, 266 P. 148 (1928).

⁵ *RCW 7.24.090*. (Also see *CR 57* "the right to trial by jury may be demanded under the circumstances and in the manner provided in rules 38 and 39").

violation of his constitutional and statutory right to jury trial.

Consequently, this Court should reverse the dismissal.

B. LISSAK PROPERLY STATED COUNTERCLAIMS
PURSUANT TO THE DECLARATORY JUDGMENT ACT.

The purpose of the Declaratory Judgment Act is to declare rights rather than to execute them.⁶ The Uniform Declaratory Judgments Act is designed to settle and afford relief from insecurity and uncertainty with respect to rights, status and other legal relations and is to be liberally construed and administered.⁷ Declaratory Judgment Act was enacted to permit parties to resolve disputes before cause of action has accrued,⁸ but not to require them to do so.⁹ Declaratory Judgment Act is to be liberally construed, and court may determine issues of fact necessary or incidental to declaration of legal relations.¹⁰

Lissak argues that this "controversy" falls under the act because Lissak and U.S. Bank, N.A. need to know their rights and liabilities under the U.S. Bank's loan modification process. In his counterclaims, Lissak presented

⁶ *Peoples Park and Amusement Ass'n v. Anrooney*, 200 Wash. 51, 59, 93 P.2d 362 (1939).

⁷ *Dinino v. State ex rel. Gorton*, 102 Wash.2d 327, 330, 684 P.2d 1297 (1986).

⁸ *Maryland Casualty Co. v. Hubbard*, 22 F. Supp. 697, 699 (1938).

⁹ *Brennan v. Hawley Products Co.*, 182 F.2d 945, 949 (7th Cir.).

¹⁰ *Progressive Cas. Ins. Co. v. Cameron*, 45 Wash.App. 272, 283, 724 P.2d 1096 (1986).

facts causing his insecurity and explained the nature of the controversy presented to the trial court for determination.

Although, Lissak clearly stated his factual position for the purposes of determination of his rights and his counsel of record argued that Mr. Lissak's counterclaims were for declaratory judgment, the U.S. Bank argued that Lissak's counterclaims must be dismissed pursuant to CR 12(b)(6) because the U.S. Bank believed or assumed that Lissak's claims were for breach of contract or contract formation, not declaration of rights. As perplexing as it may seem, the trial court adopted the U.S. Bank's assumptive argument and dismissed Lissak's counterclaims.

C. RCW 7.24.010 AND RCW 7.24.050 CONFER
JURISDICTION ON SUPERIOR COURT FOR ADJUDICATION
OF ACTIONS FOR DECLARATORY JUDGMENT.

A court has jurisdiction over an issue under the Uniform Declaratory Judgments Act (this chapter) if there is an actual or probable dispute between parties having genuine and opposing interests that are direct and substantial, and a judicial determination will be final and conclusive.¹¹

¹¹ *Martire v. Borjessan* 19 Wash.App. 556, 560, 577 P.2d 596 (1978).

RCW 7.24.010 provides:

“Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.”¹²

RCW 7.24.050 provides:

The enumeration in RCW 7.24.020 and 7.24.030 does not limit or restrict the exercise of the general powers conferred in RCW 7.24.010, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.¹³

Here, Lissak’s counterclaims for declaratory judgment were properly brought before the trial court and the court was in position to determine Lissak’s counterclaims pursuant to RCW 7.24.010 and RCW 7.24.050. Lissak presented specific facts and controversy that he was facing with U.S. Bank’s loan modification process. In his pleadings Lissak stated that upon submission of all of the required documents and information to the U.S. Bank, he expected that the U.S. Bank would give

¹² *RCW 7.24.010.*

¹³ *RCW 7.24.050.*

him consideration for a loan modification process as was offered to distressed borrowers in similar position. Lissak's expectation that his information and documentation would be given consideration was induced by the U.S. Bank loan modification program offered to the distressed property owners. Instead, Lissak was served with judicial foreclosure action without getting any answer or response to his loan modification consideration request.

However, as implausible as it may seem, the trial court ruled that it lacked jurisdiction to adjudicate Lissak's counterclaims for declaratory judgment, i.e. to determine whether Lissak had right to consideration for loan modification as was offered to him by the U.S. Bank, N.A. Consequently, because the language of RCW 7.24.010 and RCW 7.24.050 clearly confer jurisdictional power on the trial court, the trial court improperly declined adjudication of Lissak's counterclaims for declaratory judgment against U.S. Bank, N.A.

D. THE TRIAL COURT IMPROPERLY DISMISSED
PURSUANT TO CR 12(b)(6) LISSAK'S COUNTERCLAIMS FOR
DECLARATORY JUDGMENT.

"A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only 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.’ ”¹⁴

CR 12(b)(6) motions should be granted only “sparingly and with care.”¹⁵ “[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.”¹⁶ Hypothetical facts may be introduced to assist the court in establishing the “conceptual backdrop” against which the challenge to the legal sufficiency of the claim is considered.¹⁷

We have held that in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, *including facts alleged for the first time on appellate review* of a dismissal under the rule.¹⁸ (Emphasis original). *Neither prejudice nor unfairness is deemed to flow from this rule, because the inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived.* (Emphasis added).¹⁹

A CR 12(b)(6) motion must be denied unless it appears the plaintiff could prove no set of facts consistent with the complaint which

¹⁴ *Bravo v. Dolsen Companies*, 125 Wash.2d 745, 750, 888 P.2d 147 (1995), citing *Haberman v. WPPSS*, 109 Wash.2d 107, 120, 744 P.2d 1032 (1987) (quoting *Bowman v. John Doe*, 104 Wash.2d 181, 183, 704 P.2d 140 (1985); *Orwick v. Seattle*, 103 Wash.2d 249, 254, 692 P.2d 793 (1984)).

¹⁵ *Haberman*, 109 Wash.2d at 120, 744 P.2d 1032 (citing *Orwick*, 103 Wash.2d at 254, 692 P.2d 793).

¹⁶ *Halvorson v. Dahl*, 89 Wash.2d 673, 674, 574 P.2d 1190 (1978).

¹⁷ *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 298 n. 2, 545 P.2d 13 (1975).

¹⁸ *Halvorson*, 89 Wash.2d at 675, 574 P.2d 1190.

¹⁹ *Halvorson*, 89 Wash.2d at 674-75, 574 P.2d 1190.

would entitle him to relief.²⁰ The factual allegations of the complaint must be accepted as true for the purposes of the motion.²¹

In reviewing an order entering judgment on the pleadings, we examine the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, which would entitle the claimant to relief.²²

A motion to dismiss pursuant to Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint, *not the merits of the case*. (Emphasis added).²³

To survive a Rule 12(b)(6) motion to dismiss, the complaint first must comply with Rule 8(a) by providing “a short and plain statement of the claim showing that the pleader is entitled to relief”, such that the defendant is given “fair notice of what the claim is and the grounds upon which it rests.”²⁴ Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the “speculative level,”

²⁰ *Dennis v. Heggen*, 35 Wash.App. 432, 434, 667 P.2d 131 (1993), citing *Halvorson v. Dahl*, 89 Wash.2d 673, 674, 574 P.2d 1190 (1978).

²¹ *Corrigal v. Ball & Dodd Funeral Home*, 89 Wash.2d 959, 961, 577 P.2d 580 (1978).

²² *North Coast Enterprises v. Factoria Partnership*, 94 Wash.App. 855, 859, 974 P.2d 1257 (1999), citing *Moses Lake*, 39 Wash.App. at 258, 693 P.2d 140, citing *Gould v. Mutual Life Ins. Co.*, 37 Wash.App. 756, 759, 683 P.2d 207 (1984).

²³ *Gardunio v. Town of Cicero*, 674 F.Supp.2d 976, 983 (2009); See *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir.1990).

²⁴ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

assuming that all of the allegations in the complaint are true.²⁵ “Detailed factual allegations” are not required, but the plaintiff must allege facts that, when “accepted as true, ‘state a claim to relief that is plausible on its face.’ ”²⁶ “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”²⁷ “[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”²⁸ The Court accepts as true all of the well-pleaded facts alleged by the plaintiff and all reasonable inferences that can be drawn therefrom.²⁹

“[P]leadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted.”³⁰

Here, the record reflects colloquy that the trial court and the respondent’s attorney got preoccupied in speculating and deciding the nature of Lissak’s counterclaims to such extent that both disregarded the pleadings and argument of Lissak’s counsel. Apparently, Lissak’s

²⁵ *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir.2007) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

²⁶ *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

²⁷ *Iqbal*, 129 S.Ct. at 1949.

²⁸ *Twombly*, 550 U.S. at 563, 127 S.Ct. 1955.

²⁹ *Barnes v. Briley*, 420 F.3d 673, 677 (7th Cir.2005).

³⁰ *Northwest Line Constructors Chapter of the National Electrical Contractors Association v. Snohomish County Public Utility District No. 1*, 104 Wash.App. 842, 848, 17 P.3d 1251 (2001).

pleadings and his counsel's representations were simply ignored. Nevertheless, review of the record clearly show that U.S. Bank, N.A. entirely failed to meet any of the requirements under CR 12(b)(6) and failed to demonstrate that U.S. Bank, N.A. was entitled to dismissal under this rule.

VII. CONCLUSION

For the reasons set out above, Mr. Lissak respectfully requests that the Court of Appeals find that the trial court erred in dismissing Lissak's counterclaims and remand the case to the trial court for further proceedings.

Respectfully submitted this 15th day of September 2014.



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FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY: Cm
DEPUTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MAXIM LISSAK,

Appellant,

vs.

U.S BANK NATIONAL ASSOCIATION,

Respondent,

NO. 46293-1-II

CERTIFICATION OF SERVICE

The undersigned STATES that:

1.1 I am a resident of the State of Washington, I am over the age of 18 years.

1.2 On September 17, 2014, I personally hand delivered, addressed to U.S. Bank N.A. and their attorney Benjamin D. Petiprin, at 1100 Dexter Ave., Ste. 100., Seattle, WA 98109-3598 the following document(s)/pleadings(s)

Brief of Appellant Lissak.

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

Dated: September 17, 2014, at Bellevue, Washington.



Signature

Boris Petrenko, Attorney for Appellant

Name and Title