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COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

JP MORGAN CHASE BANK, N.A., Appellee/Plaintiff,

v.

F. CHRISTOHER & LYNN PACE, Appellant/Defendants.

CASE NO. 64443-2-I

APPELLANTS' REPLY BRIEF

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ARGUMENT

1. Chase cites 11 cases¹ in its brief interpreting RCW 61.24, the deed of trust statute (Act). The cases discuss procedural/remedy issues involving the conduct of the deed of trust foreclosure statute and the rights of different parties in the sale. But they do not reach the substantive rights of the parties to the contract/note/deed of trust. The issue in this ap-

1. *Hallas v. Ameriquest Mortgage Co.*, 406 F. Supp. 2d 1176 (D. Or. 2005); *Udall v. TD Escrow Services, Inc.* 159 Wn.2d 903, 154 P.3d 882 (2007); *Plein v. Lackey*, 149 Wn.2d 214, 255, 67 P.3d 1061 (2003); *Cox v. Helenius*, 103 Wn.2d 383, 387; 693 P.2d 682 (1985); *Albice v. Premier Mortgage Services of Wash., Inc.* 157, Wn. App. 912; 239 P.3d 1148, 1158-9 (2010); *Brown v. Household Realty Corp.*, 146 Wash. App. 157, 167, 189 P.3d 233 (2008); *In re Marriage of Kaseburg*, 126 Wash. App. 546; 108 P.3d 1278 (2005); *CHD, Inc., v. Boyles*, 138 Wash. App. 131, 157 P.3d 374 (1997), review denied, 162 Wn.2d 1022, 178 P.3d 1033; *Steward v. Good*, 51 Wash. App. 509, 515, 754 P.2d 150 (1988);

peal is whether someone who is not a beneficiary of the note and the deed of trust securing the note can initiate a foreclosure that results in a sale legally sufficient to convey title to the real estate. Chase, in its brief, states that the purpose of the Act is to...promot(e)... efficient, inexpensive and procedurally sound foreclosures and the stability of land titles."² It is difficult to imagine a greater threat to the stability of land titles than allowing someone who is not a beneficiary under RCW 61.24.005(2) to foreclose.

2. This tension between the substantive rights in a contract and the procedural remedies in enforcing a contract such as RCW 61.24 in enforcing the instant contract/mortgage/note is discussed in the case of *Home Bldg. & Loan Asso. v. Blaisdell*, 290 U.S. 398; 78 L. Ed. 413; 54 S. Ct. 231 97 A.L.R. 905 (1934) The decision was 5 to 4. In the majority were Chief Justice Charles Evans Hughes, and Justices Brandeis, Stone, Car-

2. *Udall, supra*,

doza, and Roberts. It and the dissent outline the history and the development of the Contract Clause³ and a discussion of the case law to date. Both the majority at 431, 237, 424 and the dissent at 466, 443, 250 agreed that heretofore any contract incorporated into it the procedural remedies on default as of the date of the contract. In *Blaisdell*, the Minnesota Legislature, in violation of the rule had changed the procedural remedies for existing notes/mortgages/contracts by rewriting the redemption portion of the mortgage foreclosure. The Minnesota Legislature rewrote procedural remedies by, in essence, allowing a Court to extend the redemption period for up to two years to May 1, 1935 if the mortgagor paid "reasonable rent" for the premises. The majority ruled that the changes did not violate the Contract Clause. The dissent contended that since the changes in the redemption law did not exist at the time the parties entered into the now foreclosed mortgage, the new redemption law could

3. U.S. Const. art. I, § 10, cl.1 hereinafter Contract Clause

not apply to it.

The majority, with its analysis, held that the new redemption law applied. It started its analysis with the following language at 430, 425, 237:

"Chief Justice Marshall pointed out the distinction between obligation and remedy. *Sturges v. Crowninshield, supra, p. 200*. Said he: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." And in *Von Hoffman v. City of Quincy, supra, pp. 553, 554*, the general statement above quoted was limited by the further observation that "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, *provided no substantial right secured by the contract is thereby impaired.*" (Emphasis added)

The critical point is that while a state legislature may rewrite the procedural/remedial parts of a contract, it cannot change a contract's substantive parts. In the case at bar, the parties to the contract are a substantive part of the contract. Chase is not a party to the Long Beach note and Deed of Trust. It cannot enforce the Pace's note/deed of trust/contract with Long

Beach.

The Paces do not question the constitutionality of RCW 61.24 on its face. They challenge it as applied to their mortgage. For, as applied to their mortgage, the Act through its procedural/remedial procedures, impairs the substantial rights the Paces gave through the contract/deed of trust/note to Long Beach Mortgage by allowing Chase to enforce them without producing the note endorsed to Chase and without producing the deed of trust assigned to Chase. How and when did Chase become the holder of the note and thereby the beneficiary of the deed of trust under RCW § 61.24.005(2) with the right to initiate a foreclosure? Only Chase knows, for it holds the documents and refuses to produce them. How may someone, not a beneficiary, as defined in RCW 61.24.005(2), assert the contracts rights the Paces granted Long Beach mortgage in the contract/note/deed of trust?

In the case of *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56; 79 L.Ed. 1298; 55 S. Ct.

555; 97 A.L.R. 905 (1935), Mr. Justice Cardoza, in a unanimous opinion, invalidated an Arkansas statute rewriting a mortgage at 60, 1301, 556-7. There was no issue about the holder of the note or the mortgage. But, the Arkansas legislature had so changed the mortgage foreclosure procedures that the Court was compelled to state the following: "A catalogue of the changes imposed upon this mortgage (by the Arkansas Legislature) must lead to the conviction that the framers of the amendments have put restraint aside." Likewise, is this case where RCW 61.24, as applied, abandons the foundation of stability of land titles, that is the necessity of privity of contract/note/deed of trust as the foundation for any foreclosure.

Another case is *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555; 79 L. Ed. 1593; 55 S. Ct. 854 97 A.L.R. 1106 (1935). There was no issue about the holder of the mortgage. The case considered a Congressional statute which rewrote the mortgage foreclosure procedures for realizing

on a defaulted note by rewriting the payment terms of the note. Mr. Justice Brandeis, writing for a unanimous court, declared the rewriting of the repayment terms of the note unconstitutional and a taking under the Due Process clause of the 5th Amendment. Thus, RCW 61.24 as applied in this case, by allowing a person who is not a party to the contract/note/ deed of trust to assert contract rights which it does not possess, is a taking under both the 5th Amendment and the 14th Amendment Due Process⁴ clauses.

The last case is *In re: Agard*, 2011 Bankr. LEXIS 488 (Bankr. E.D.N.Y. 2011) It is a very important case, for the case involves an organization entitled Mortgage Electronic Registration System ("MERS"), the assignments of mortgages and notes and MERS standing to foreclose. At 29, 30 it discusses MERS. At 33, 34, it discusses "Noteholder Status." It states at 33,34:

...[I]n order to have standing to seek relief from stay, Movant, which acts as representative of U.S. Bank, must show that U.S. Bank holds both the Mortgage and the Note....Although the Motion

4. U.S. Const. amend. V & XIV § 1

does not explicitly state that U.S. Bank is the holder of the Note, it is implicit in the Motion and the arguments presented by the Movant at the hearing. *However the record demonstrates that the Movant has produced no evidence, documentary or otherwise, that U.S. Bank is the rightful holder of the Note. Movant's reliance on the fact that U.S. Bank's noteholder status has not been challenged thus far does not alter or diminish the Movant's burden to show that it is the holder of the note as well as the Mortgage.* Under New York law, Movant can prove that U.S. Bank is the holder of the Note, or by demonstrating that U.S. Bank has physical possession of the note endorsed over to it. (Emphasis added)

See In re Jacobson, 2009 Bankr. LEXIS 709 (Bankr. W.D. Wash. Mar. 10, 2009). The cited language and especially the emphasized language should apply to Chase in this case.

Further at 5, 6 the judge stated the following which again should apply to this case:

"The Court recognizes that an adverse ruling regarding MERS's authority to assign mortgages or act on behalf of its member/lenders could have a significant impact on MERS and upon the lenders which do business with MERS throughout the United States. However, the Court must resolve the instant matter by applying the laws as they exist today. It is up to the legislative branch, if it chooses, to amend the current statutes to confer upon MERS the requisite authority to assign mortgages under its current business practices. *MERS and its partners made the decision to create and operate under a business model that was designed in large part to avoid the requirements of the traditional mortgage recording process.* This

Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is *reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law.*

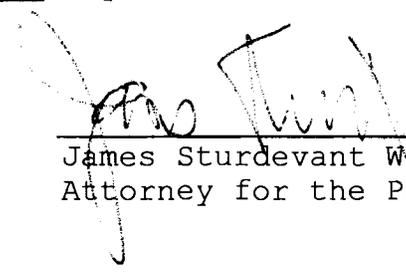
The Paces believe the same comment applies to this foreclosure. JP Morgan Chase could end this appeal by producing the Long Beach note properly endorsed to it and a copy of the mortgage properly assigned to it. By its failure to produce both, it asks this Court not only to rewrite the contract/note and the contract/deed of trust between the Paces and Long Beach, but also to amend RCW 61.24 on who may foreclosure on a deed of trust, RCW § 62A - III on Negotiable Instruments on the creation, negotiation and holding of a note, and RCW 64.04, *et seq.* on the creation, recording, and assignment of mortgages.

CONCLUSION

Because Chase, when it is the only one with the purported possession of the Pace's note endorsed to it and the Pace's mortgage assigned to it, has not produced them, the trustee's deed it received should not be legally recognizable and

it thus had not standing to bring the unlawful
detainer action. The writ should never have been
issued. The Pace's are entitled to the posses-
sion of their property.

DATED this 15th day of March 2011.



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