FILED
Dec 10, 2015
Court of Appeals
Division I
State of Washington

NO. 73829-1-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

KEVIN J. SELKOWITZ, an unmarried individual,

Defendant/Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR GSAA HOME EQUITY TRUST 2007-1, ASSET-BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff/Respondent.

APPELLANTS' OPENING BRIEF

KOVAC & JONES, PLLC
Richard Llewelyn Jones
WSBA No. 12904
1750 112th Ave NE Ste D-151
Bellevue, WA 98004-2976
(425) 462-7322
rlj@kovacandjones.com
Attorney for Appellant

TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES i

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

A. The trial court erred by granting summary judgment on July 24, 2015 1

B. The trial court erred in denying Mr. Selkowitz' Motion to Compel Discovery on March 31, 2015.....2

C. The trial court erred in refusing to permit Mr. Selkowitz relief under *CR 56(f)* 3

III. STATEMENT OF THE CASE.....4

IV. PROCEDURAL HISTORY 8

V. ARGUMENT 11

A. Standard of Review 11

B. U.S. Bank's status and standing to foreclose.....12

C. Additional Legal and Equitable Defenses.....19

D. The testimony of Mr. Kevin Flannigan.....26

E. Mr. Selkowitz' Motion to Compel and request for relief under *CR 56(f)* 30

VI. CONCLUSION 37

TABLE OF CASES AND AUTHORITIES

CASES ..... PAGE

Allen v. Swerdfiger, 14 Wash 461, 44 Pac. 894 (1896) 13

Antonio v. Barnes, 464 F2d 584, 585 4th Cir. 1972 27

Bacon v. O'Keefe, 13 Wash. 655, 43 Pac. 886 (1896) 13

Bain v. Metropolitan Mortgage, 175 Wn.2d 83, 285 P.3d 34 (2012) 6, 8

Baker v. Edwards, 176 N. C. 229, 97 S. E. 16 23

Balise v. Underwood, 62 Wn.2d 195, 381 P2d 966 (1963) 11, 12

Bank of California v. Dyer, 14 Wash. 279, 44 Pac. 534 (1896) 13

Bank v. Doherty, 42 Wash. 317, 84 Pac. 872 (1906) 14

Barnum v. State, 72 Wash. 2d 928, 435 P.2d 678 (1967) 31

Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58,
94 Pac 900 (1908) 14

Blomster v. Nordstrom, Inc., supra 27

Brown v. Dept. of Commerce, (2015 Wash. LEXIS 1191) 13

Buchanan v. First National Bank, 184 Wash. 185,
50 P.2d 520 (1935 (2015) 14

Byrd v. Forbes, 3 Wash.Terr. 318, 13 Pac. 715 (1887) 13

Cashmere Valley Bank v. Dept. of Revenue,
181 Wn2d 622, 334 P.3d 1100 (2014) 13

Casper v. Esteb Enterprises, Inc., 119 Wn.App.
759, 82 P.3d 1223 (2004) 32

Catlin v. Mills, 140 Wash. 1, 247 Pac. 1013 (1926) 14

Chase National Bank v. Hastings, 20 Wash. 433, 55 Pac. 574 (1898); 14

Denny v. Palmer, 26 Wash. 469,67 Pac. 268 (1901) 16

Chase National Bank v. Security Savings Bank, 28 Wash. 150, 68 Pac. 454 (1902) 14

Citizens Savings & Loan v. Chapman, 173 Wash. 539, 24 P.2d 63 (1933) 14

Collins v. Gross, 51 Wash. 516, 99 Pac. 573 (1909) 14

Damascus Milk Co. v. Morriss, 1 Wn.App. 501, 463 P.2d 212 (1969) 14

Doherty v. Municipality of Metro, 83 Wn.App. 464, 921 P.2d 1098 (1996) 11

Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004) 11

Everly v. Wold, 125 Wash. 467, 217 Pac. 7 (1923) 14

Failla v. FixtureOne Corp., 181 Wn.2d 642, 649, 336 P.3d 1112 (2014) 11

FDIC v. Butcher, 116 F.R.D. 196 (E.D. Tenn. 1986) 32

Federal National Mortgage Assoc. v. Carrington, 60 Wn.2d 410, 374 P.2d 153 (1962) 14

Flower v. T.R.A. Industries, Inc., 127 Wn.App. 13, 111 P.3d 1192, review denied 156 Wash.2d 1030, 133 P.3d 474 (2005) 32

Friederichsen v. Renard, 247 U.S. 207, 62 L. Ed. 1075 22

Gerber v. Heath, 92 Wash. 519, 159 Pac. 691 (1916) 14

Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 59, 81 L.Ed.2d 42, 104 S.Ct. 2218 (1984) 24

Hertog v. City of Seattle, 88 Wn.App. 41, 943 P.2d 1153 (1997) 31

Hollingsworth v. Washington Mutual Savings Bank, 37 Wn.App. 386, 396, 681 P.2d 845 (1984) 36

In re Raanan, 181 B.R. 480 (C.D. Cal. 1995)..... 24

In re: New Century TRS Holdings, Inc, et al., Case No. 07-10416 (KJC)..... 15

John Davis & Co. v. Cedar Glen No. Four, 75 Wn.2d 214, 450 P.2d 166 (1969)..... 14

John Doe v. Puget Sound Blood Ctr., 117 Wash.2d 772, 782, 819 P.2d 370 (1991)..... 35

Kennebec, Inc., v. Bank of the West, 88 Wn.2d 718,724-725, 565 P.2d 812 (1977)..... 14

Latman v. Burdette, 366 F.3d 774 (Wash D.C. 2004)..... 22

Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 887 P.2d 898 (1995)..... 21

Lowy v. PeaceHealth, 174 Wash. 2d 769, 280 P.3d 1078 (2012)..... 31

Lyons v. U.S. Bank, 181 Wn.2d. 775, 783, 336 P.3d 1142 (2014)..... 11, 16

McCall v. Smith, 184 Wash. 615, 52 P.2d 338 (1935)..... 14

McDonald v. OneWest, 929 F. Supp. 2d 1079 (2013) 29

McKown v. Driver, 54 Wn.2d 46, 337 P.2d 1068 (1959) 22

Miller v. American Savings Bank & Trust, 119 Wash. 243, 205 Pac 388 (1922)..... 14

Mitsui & Co. v. Puerto Rico Water Authority, 93 F.R.D. 62 (D.P.R. 1981) 32

National Bank of Commerce v. Lock, 17 Wash. 528, 50 Pac 478 (1897) 14

Nichols v. McDougal, 175 Wash. 536, 27 P.2d 699 (1933)..... 14

Norfor v. Busby, 19 Wash. 450, 53 Pac. 715 (1898)..... 14

Norfor v. Busby, supra, at page 452..... 14

Norlin v. Montgomery, 59 Wn.2d 268, 367 P.2d 621 (1961)..... 14

Peters v. Gay, 9 Wash. 383, 37 Pac 325 (1894)..... 13

Presby v. Melgard, 48 Wash. 689, 94 Pac. 94 (1908)..... 14

Puget Sound Service Corp. v. Bush, 45 Wn.App. 312,
724 P.2d 1127 (1986)..... 22

Purdin v. Washington National Building, Loan and Inv. Assoc., 41 Wash.
395, 83 Pac 723 (1906)..... 14

Raymond v. Bales, 26 Wash. 493, 67 Pac. 269 (1901)..... 14

Reid v. Pierce Co., 136 Wn.2d 195, 961 P.2d 333 (1998)..... 11

Rhinehart v. Seattle Times Co., 51 Wn.App. 561, 564,
754 P.2d 1243 (1988)..... 36

Rose v. Rundall, 86 Wash. 222, 150 Pac. 614 (1915)..... 22

Schroeder v. Excelsior Management Group, LLC, 117 Wn.2d 94,
297 P.3d 677 (2013)..... 11

Selkowitz v. Litton Loan Servicing LP., King County Superior Court
Case No. 10-2-24157-4 KNT..... 8, 20

Smith v. Gulf Oil Corp., 239 N.C. 360, 368, 79 S.E. 880 (1954)..... 22

State ex rel Bond v. State, 62 Wn.2d 487, 383 P.2d 288 (1963)..... 11

State ex. Rel. Barb Rest. v. Wash. State Bd. Against Discrimination, 73 Wn.2d
870, 878-79, 441 P.2d 526 (1968)..... 22

State v Kane, 23 Wn.App. 107, 594 P.2d 1357 (1979)..... 28

State v. Mason, 31 Wn.App. 680, 644 P.2d 710 (1982)..... 28

State v. Rains, 100 Wn.2d 660, 647 P.2s 165 (1983)..... 21

State v. Smith, 16 Wn.App. 425, 558 P.2d 265 (1976)..... 28

Thweatt v. Hommel, 67 Wn.App. 135, 834 P.2d 1058 (1992) 22, 23

Trujillo v. NWTS, 183 Wn.2d 820, 355 P.3d 1100 (2015) 16

U. S. v. Oregon Lumber Co., 260 U.S. 290, 67 L. Ed. 261 322

United States v. Georgia-Pacific Co., 421 F.2d 92, 95-96
(9th Cir. 1970) 25

Virtue v. Stanley, 87 Wash. 167, 151 Pac. 270 (1915) 14, 32

Washington National Bank of Seattle v. Smith,
15 Wash. 160, 45 Pac 736 (1896) 14

Washington State Physicians Insurance Exchange & Assoc. v. Fisons Corporation, 122 Wn.2d 299, 354, 858 P.2d 1054 (1993) 32, 36

STATUTES ..... PAGE

11 U.S.C. §§365(d) (1) 15

11 U.S.C. §§365(g) 15

11 U.S.C. §§502(g) 15

61.24, et seq 18

62A.3-418(d) 12

RAP 18.1 38

RCW 5.45.020 ..... 28, 30

RCW 61.12, et seq 13, 17, 19, 37

RCW 61.12.040 ..... 1, 9, 12, 14

RCW 61.12.070 24

RCW 61.12.120 ..... passim

RCW 61.24, et. seq. 28

RCW 61.24.005(2) 6, 14, 15

RCW 61.24.010 15

RCW 61.24.030 ..... 6, 20, 23, 24

RCW 61.24.030(8)(c) 20

RCW 61.24.040 7

RCW 61.24.100 24

RCW 61.24.130 ..... 8, 20, 23, 24

RCW 62A, et seq 13

RCW 62A.3-301 13

RCW 62A.3-309 13

OTHER AUTHORITIES ..... PAGE

15 USC §1601 8

15 USC §1962 8

28 USC §1446(a) 8

http://www.scribd.com/doc/59828999/New-Century-Notice-of-Rejection-of-Exec-Con-MERS) 15

Washington Practice: Real Estate: Transactions §18.18, at 334 (2d ed. 2004) 12

RULES ..... PAGE

CR 22 ..... 23, 24

CR 26 ..... 32, 36

CR 26(b)(1) 32

CR 26(c) 36

CR 30(b)(6) ..... passim

CR 56 ..... passim

CR 56(e) ..... passim

CR 56(f) ..... passim

ER 801 ..... 2, 4, 28

ER 802 ..... 2, 3, 5, 27

ER 803(a)(6) 30

I. INTRODUCTION

Appellant, KEVIN SELKOWITZ (hereinafter "Mr. Selkowitz") simultaneously resists a *non-judicial* foreclosure by parties with whom he never contracted, recently considered by this Court under Case No. 725050-0-I, as well as a *judicial* foreclosure (this action) seeking a foreclosure of his home for the same debt and a deficiency judgment brought by yet a separate party, all strangers to his original loan transaction. Ultimately, the factual question is whether the Respondent, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR GSAA HOME EQUITY TRUST 2007-1, ASSET-BACKED CERTIFICATES, SERIES 2007-1 (hereinafter "U.S. Bank") is the "mortgagee" of the subject obligation with clear and undisputed authority and standing to judicially foreclose the subject obligation. However, the record on review of over 2,300 pages does not provide the clear and undisputed answers necessary to affirm the trial court's summary judgment of foreclosure as a matter of law. But the record before this Court does raise many questions of fact. Indeed, virtually every assertion made by U.S. Bank herein to establish its authority to judicially foreclose is legally unsound, unsupported by the record and/or factually questioned.

Reversal is the remedy.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by granting summary judgment on July 24, 2015. CP 2022-2023.

Issues

1. Was the evidence relied upon by the trial court and U.S. Bank, in the form of the testimony of Kevin Flannigan, competent within the terms of *ER 801, ER 802,* and *CR 56(e)?*

2. Were there material issues of fact in dispute on summary judgment concerning U.S. Bank's status and standing to foreclose as a "mortgagee" of the obligation, within the terms of *RCW 61.12.040*?

3. Were there material issues of fact in dispute on summary judgment concerning U.S. Bank's compliance with *RCW 61.12.120,* given the pendency of concurrent non-judicial foreclosure action brought by Mr. Selkowitz as a result of U.S. Bank's agents' attempts to collect on the same debt?

4. Was there evidence that U.S. Bank elected its remedy when its purported agents initiated a non-judicial foreclosure?

5. Was there evidence to establish a basis for applying the equitable estoppel against U.S. Bank?

B. The trial court erred in denying Mr. Selkowitz' Motion to Compel Discovery on March 31, 2015. CP 2029-2031.

Issues

1. Did Mr. Selkowitz clearly and properly designate with reasonable particularity the matters on which he requested examination of an authorized representative of U.S. Bank?

2. Was Mr. Kevin Flannigan a duly authorized representative of U.S. Bank?

3. Was Mr. Kevin Flannigan a competent witness within the terms of *CR 30(b)(6), ER 801, ER 802,* and *CR 56(e)*?

4. Were Mr. Kevin Flannigan's responses to Mr. Selkowitz' discovery requests adequate, based on an objective standard of good faith?

C. The trial court erred in refusing to permit Mr. Selkowitz additional time to obtain the testimony of a competent representative of U.S. Bank prior to summary judgment, pursuant to *CR 56(f),* in view of Mr. Selkowitz' pending Motion to Compel and Mr. Kevin Flannigan's patent incompetence and lack of personal knowledge of the facts offered in his Declaration of March 10, 2015 and in deposition? CR 166-439; CR 1651-1795.

Issues

1. Did Mr. Selkowitz comply with the provisions of *CR 56(f)* through his Motion to Compel (CP 2029-2031), pending at the time of summary judgment, and his request for relief in his moving papers in opposition to summary judgment (CP 723-733)?

2. Were there material issues of fact in dispute on summary judgment concerning U.S. Bank's standing as "mortgagee" of the subject obligation to foreclose, based on the testimony that was submitted to the trial court?

3. Was Mr. Kevin Flannigan a duly authorized representative of U.S. Bank?

4. Was Mr. Kevin Flannigan a competent witness within the terms of *CR 30(b)(6)* and *CR 56(e)*?

III. STATEMENT OF FACTS

On November 1, 2006, Mr. Selkowitz executed a Note in favor of NEW CENTURY MORTGAGE CORPORATION, a California Corporation (hereinafter "New Century") in the amount of $309,600.00. CP 21-30; CP 1500. The Note specifically defines the term "note holder" as the "Lender (New Century) or anyone who takes this Note by transfer and who is entitled to receive payments under this Note." CP 21-30; CP 1500-1501.

To secure repayment of the Note, Mr. Selkowitz executed a Deed of Trust in which FIRST AMERICAN TITLE INSURANCE COMPANY, a Washington Corporation (hereinafter "FATCO") was named trustee and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter "MERS"), was named beneficiary as nominee for New Century. CP 31-55.

Over the course of the related proceedings, both judicial and non-judicial, various parties, including MERS, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation (hereinafter "QLS") and LITTON LOAN SERVICING LP, a Delaware Limited Partnership (hereinafter "Litton"), have alleged themselves or others

to be the "beneficiary" and/or "holder" of the subject obligation. Yet, MERS and Litton, their agents and assigns, have also alleged that at some point between January 1, 2007 to January 30, 2007, Mr. Selkowitz' loan was assigned to U.S. Bank. No evidence of such an assignment has been adduced during the course of these proceedings.[1] Moreover, evidence has been offered that cast doubt that the loan could have been transferred to the Trust as the Note was portrayed in the materials provided during discovery and the requirements for such transfers in the Trust's governing documents. CP 259-267; CP 796-807; CP 1168-1166; CP 1175-1176; CP 1184-1187.

On April 2, 2007, New Century filed for relief under Chapter 11 of the United States Bankruptcy Code. CP 790.

On or about May 5, 2007, all executory contracts of New Century were rejected, including those with MERS. CP 791-792.

---

[1] U.S. Bank relied exclusively on the testimony of Mr. Kevin Flannigan, an Ocwen employee, on summary judgment. CP 166-168. In his Declaration of March 10, 2015, he states that he is "aware" that the Selkowitz loan was "securitized and transferred" to the Trust based on Ocwen "records" that he failed to specifically describe the transfer based on personal knowledge or produce documentary evidence to establish this statement. Accordingly, Mr. Flannigan's statements constitute inadmissible hearsay. *ER 802.* At deposition on March 4, 2015, Mr. Flannigan was completely unfamiliar with the documents pertaining to any transfer of Mr. Selkowitz' loan to the Trust. See Transcript of Deposition of Kevin Flannigan pg. 34 line 5-11 (CP 1685); pg. 56 line 5-9 (CP 1707); pgs. 89-91 (CP 1741-1743), pg. 118 line 18 – pg. 119 line 24 (CP 1770-1771). Nor did Mr. Flannigan have any personal knowledge pertaining to the actual transaction whereby U.S. Bank and the Trust acquired the loan. *Id.,* pg. 107, line 8 – pg. 108 line 1 (CP1759-1760). Finally, Mr. Flannigan admitted that he never spoke to anyone at US Bank to prepare for the deposition, despite claiming to be offering testimony in a representative capacity. *Id.,* pgs. 31-33 line 7 (CP 1682-1684); pg. 94 line 16 – pg. 96 line 9 (CP1746-1748); pg. 98 line 8 – 15 (CP 1750).

On April 23, 2010, QLS issued a Notice of Default pursuant to *RCW 61.24.030,* as agent for "Please Consult Cover Letter, the Beneficiary." CP 760-763. Unfortunately, no cover letter accompanied the Notice of Default served on Mr. Selkowitz. The Notice of Default specifically identified Litton as the "Loan Servicer." CP 760. According to the Notice of Default, "Please Consult Cover Letter, the Beneficiary" was the party who declared Mr. Selkowitz to be in default. CP 760. Nothing in the Notice of Default alerted Mr. Selkowitz to the identity of the true and lawful owner and actual holder of his obligation.

On May 12, 2010, MERS, as purported "beneficiary" and, by implication of *RCW 61.24.005(2),* the holder of the Deed of Trust, executed an Appointment of Successor Trustee, nominating QLS as successor trustee. CP 765-766. It is undisputed that at the time this Appointment of Successor Trustee was executed, MERS was neither the owner nor holder of the subject Note and Deed of Trust, thus making MERS an ineligible beneficiary under *Bain v. Metropolitan Mortgage*, 175 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter "*Bain*"). MERS' representation that it was the beneficiary and holder of the subject Note and Deed of Trust contradicts U.S. Bank's similar allegation herein.

On May 25, 2010, Diana Dixon, as Assistant Vice President of Litton Loan Servicing, LP, "the Loan Servicer/Authorized Agent for Beneficiary", executed a Declaration of Ownership in which she represents that Litton "is the

actual holder of the Promissory Note" and that "the Note has not been assigned or transferred to any other person or entity." CP 768; CP 852. Three matters of interest are evident from this document: (1) Litton is merely the loan servicer acting as an agent for an undisclosed principal; (2) Litton is not the "beneficiary", only at most the agent for the beneficiary, despite alleging to be the "actual holder" of the subject Note; and (3) Litton is apparently acting as "attorney in fact" for the undisclosed principal, but no power of attorney was ever offered the trial court on summary judgment to support this contention. However, Litton's assertion that it "is the actual holder of the Promissory Note" contradicts U.S. Bank's similar allegation herein.

On December 27, 2010, QLS executed, filed, served and posted a Notice of Trustee's Sale pursuant to *RCW 61.24.040*. CP 770-772. In conjunction with the Notice of Trustee's Sale, QLS executed, served and posted a Notice of Foreclosure that falsely states that "[t]he attached Notice of Trustee's Sale is a consequence of defaults(s) in the obligation to Mortgage Electronic Registration Systems, Inc., the Beneficiary of your Deed of Trust, and owner of the obligation secured thereby." CP 774-775. (Emphasis added). It is undisputed that at no time did MERS ever own or hold the Note. QLS' allegation that MERS is the owner of the Note and beneficiary of the Deed of Trust directly contradicts U.S. Bank's similar allegations herein.

IV. PROCEDURAL HISTORY.

On June 24, 2010, Mr. Selkowitz filed suit pursuant to *RCW 61.24.130* against Litton, MERS and QLS, seeking injunctive and declaratory relief, quiet title, relief for violation of the DTA (denominated wrongful foreclosure), libel and defamation of title, malicious prosecution, violation of *15 USC §1601*, violation of the CPA and violation of *15 USC §1962* (FDCPA), in the matter of *Selkowitz v. Litton Loan Servicing LP.*, King County Superior Court Case No. 10-2-24157-4 KNT (herein "non-judicial action").

On July 27, 2010, the non-judicial action was removed to the United States District Court, pursuant to *28 USC §1446(a)*. During the course of the proceedings before the United States District Court, the trial judge, the Honorable John Coughenour, certified three questions to the Washington Supreme Court. These three questions were answered by the Washington Supreme Court in *Bain*.

On or about November 14, 2012, Judge Coughenour remanded the matter back to the King County Superior Court, where, in June of 2014, Litton, MERS and QLS each brought Motions for Summary Judgment against Mr. Selkowitz pursuant to *CR 56*.

On July 11, 2014, the U.S. Bank initiated this action for judicial foreclosure of the same Note and Deed of Trust that was the subject matter of the non-judicial foreclosure action. In its Complaint, U.S. Bank alleged that it was "the current <u>holder</u>" of the loan. CP 6. The allegations regarding status

and standing contained in U.S. Bank's Complaint in this action were expressly contradicted by allegations made by Litton, MERS and QLS in the non-judicial action. Moreover, it is significant to note that at no time relevant to this cause of action has U.S. Bank ever alleged itself to be the "mortgagee" of the obligation, as required under *RCW 61.12.040.*

On July 24, 2014, the trial court in the non-judicial action granted Litton's, MERS' and QLS' Motions for Summary Judgment, largely on their allegations of being the owners and actual holders of the obligation, in direct contradiction to U.S. Bank's identical allegations herein.

On September 18, 2014, Mr. Selkowitz timely filed a Notice of Appeal in the non-judicial foreclosure action to the Washington Court of Appeals, Division I, seeking review of the Court's Orders on Summary Judgment of July 24, 2014, where the matter is pending under Case No. 725050-0-I. This Court entered its unpublished opinion affirming the trial court's dismissal of Mr. Selkowitz' claims in the non-judicial foreclosure action on November 23, 2015.

On February 17, 2015, Mr. Selkowitz, through counsel, issued an Amended Notice of Deposition, pursuant to *CR 30(b)(6),* to U.S. Bank. CP 468-473.

On March 4, 2015, U.S. Bank offered the testimony of Mr. Kevin Flannigan in response to Mr. Selkowitz' *CR 30(b)(6)* Notice of Deposition. CP 475-618. As more particularly discussed below, Mr. Flannigan was not

competent to respond to or knowledgeable about the issues identified in the Amended Notice of Deposition.

On March 13, 2015, U.S. Bank filed a Motion for Summary Judgment, pursuant to *CR 56*. CP 443-451.

On or about March 20, 2015, Mr. Selkowitz filed a Motion to Compel Discovery seeking a stay of U.S. Bank's Motion for Summary Judgment pending presentation of a witness competent and knowledgeable to respond to the issues outlined in Mr. Selkowitz' Amended Notice of Deposition. CP 454-631. Mr. Selkowitz argued to the trial court that without competent and knowledgeable responses to his discovery requests, he could not adequately respond to U.S. Bank's Motion for Summary Judgment. CP 458; CP 723-724.

On March 31, 2015, the trial court denied Mr. Selkowitz' Motion to Compel. CP 2029-2031.

The trial court granted U.S. Bank's Motion for Summary Judgment on July 24, 2014, over Mr. Selkowitz' request for relief under *CR 56(f)*. CP 2022-2023.

On August 12, 2015, Mr. Selkowitz timely filed his Notice of Appeal to this Court seeking review of the trial court's denial of his Motion to Compel Discovery and Order granting summary judgment in this action. CP 2026-2033.

V. ARGUMENT

A. Standard of Review

A trial court's summary dismissal of claims under *CR 56* is reviewed *de novo*, taking all inferences in the record in favor of the non-moving party. *State ex rel. Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963) (hereinafter "*Bond*"); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") (citing *Dreiling v. Jain,* 151 Wn.2d 900, 908, 93 P.3d 861 (2004)); *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014) *cert. denied*, 135 S.Ct. 1904, 191 L.Ed.2d 756 (2015); and *Lyons v. U.S. Bank,* 181 Wn.2d. 775, 783, 336 P.3d 1142 (2014) (hereinafter *"Lyons"*). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P2d 966 (1963) (hereinafter "*Balise*"); *Schroeder* and *Lyons,* at page 783. The initial burden on summary judgment falls on the moving party to prove that no material issue is genuinely in dispute. *CR 56.*

Summary judgment is appropriate if reasonable persons can reach but one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Rugg; Doherty v. Municipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996). In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary materials must be taken as true. *Bond*; *Reid v.*

Pierce Co., 136 Wn.2d 195, 961 P.2d 333 (1998). When there is contradictory evidence or the moving parties' evidence is impeached, an issue of credibility is presented that the court cannot resolve on summary judgment. *Balise.*

Based upon the foregoing and the testamentary and documentary evidence that was offered to the trial court on summary judgment, particularly the Declaration of Counsel (CP 776-1810); the Declaration of Tim Stephenson (CP 781-1152) and attachments thereto; the Declaration of Jay Patterson and attachments thereto (1154-1364); Declaration of Mr. Selkowitz and attachments thereto (CP 1499-090-1150); the deposition transcript of Kevin Flannigan of May 16, 2014 (CP 1538-1649); the deposition transcript of Kevin Flannigan of March 4, 2015 (CP 1651-1795), there were genuine issues of material fact before the trial court inconsistent with any summary dismissal of Mr. Selkowitz' claims.

B. <u>U.S. Bank's status and standing to foreclose.</u>

In its unverified Complaint, U.S. Bank claims to be the "the current holder of the original Note and all rights arising thereunder, including enforcement of the Deed of Trust." CP 6. However, as a matter of law, this is insufficient to establish U.S. Bank's standing to initiate a judicial foreclosure.

RCW 61.12.040 provides as follows:

> When default is made in the performance of any condition contained in a mortgage, <u>the mortgagee or his or her assigns</u> may proceed in the superior court of the county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage. (Emphasis added)

RCW 61.12, et seq. does not define the term "mortgagee" nor, for that matter, does *RCW 62A, et seq.* But, Washington case law suggests that the term means something more than a mere "holder" or "PETE" as the term is defined under *RCW 62A.3-301.*[2] Indeed, "the person who can foreclose the mortgage must be the one to whom the obligation is due." William B. Stoebuck and John W. Weaver, *Washington Practice: Real Estate:* Transactions §18.18, at 334 (2d ed. 2004). This echoes the more stringent definition of "note holder" found in the subject Note itself (CP 21) and suggests ownership. See *Cashmere Valley Bank v. Dept. of Revenue*, 181 Wn2d 622, 334 P.3d 1100 (2014); *Brown v. Dept. of Commerce*, (2015 Wash. LEXIS 1191) ("The owner has the right to the economic benefits of the note, such as monthly mortgage payments and foreclosure proceeds.").

Indeed, in the context of judicial foreclosures, our courts have consistently described the "mortgagee" entitled to foreclose as the owner of the obligation and where the term "holder" is used, it is used in conjunction with "ownership" of the obligation.[3]

---

[2] *RCW 62A.3-301* provides as follows: "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

[3] See *Byrd v. Forbes*, 3 Wash.Terr. 318, 13 Pac. 715 (1887); *Peters v. Gay*, 9 Wash. 383, 37 Pac 325 (1894); *Bacon v. O'Keefe*, 13 Wash. 655, 43 Pac. 886 (1896); *Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534 (1896); *Allen v. Swerdfiger*, 14

Here, U.S. Bank has not alleged itself to be the "mortgagee or his or her assigns", but merely the "holder" of the obligation. CP 6. This is simply insufficient to establish standing to judicially foreclose as a matter of law under *RCW 61.12.040.*

Moreover, U.S. Bank was not the only party to this transaction who held itself out to be the "holder" of the obligation, either directly or indirectly by alleging status as "holder" or "beneficiary" within the terms of *RCW 61.24.005(2).*[4] In the materials presented on summary judgment, the trial court was offered and ignored documentation in which at least four (4) separate

---

Wash 461, 44 Pac. 894 (1896); *Washington National Bank of Seattle v. Smith*, 15 Wash. 160, 45 Pac 736 (1896); *National Bank of Commerce v. Lock*, 17 Wash. 528, 50 Pac 478 (1897); *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715 (1898); *Chase National Bank v. Hastings*, 20 Wash. 433, 55 Pac. 574 (1898); *Denny v. Palmer*, 26 Wash. 469,67 Pac. 268 (1901); *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269 (1901); *Chase National Bank v. Security Savings Bank*, 28 Wash. 150, 68 Pac. 454 (1902); *Purdin v. Washington National Building, Loan and Inv. Assoc.*, 41 Wash. 395, 83 Pac 723 (1906); *Bank v. Doherty*, 42 Wash. 317, 84 Pac. 872 (1906); *Presby v. Melgard*, 48 Wash. 689, 94 Pac. 94 (1908); *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 94 Pac 900 (1908); *Collins v. Gross*, 51 Wash. 516, 99 Pac. 573 (1909); Virtue v. Stanley, 87 Wash. 167, 151 Pac. 270 (1915); *Gerber v. Heath*, 92 Wash. 519, 159 Pac. 691 (1916); *Miller v. American Savings Bank & Trust*, 119 Wash. 243, 205 Pac 388 (1922); *Everly v. Wold*, 125 Wash. 467, 217 Pac. 7 (1923);*Catlin v. Mills*, 140 Wash. 1, 247 Pac. 1013 (1926); *Citizens Savings & Loan v. Chapman*, 173 Wash. 539, 24 P.2d 63 (1933); *Nichols v. McDougal*, 175 Wash. 536, 27 P.2d 699 (1933); *Buchanan v. First National Bank*, 184 Wash. 185, 50 P.2d 520 (1935); *McCall v. Smith*, 184 Wash. 615, 52 P.2d 338 (1935); *Norlin v. Montgomery*, 59 Wn.2d 268, 367 P.2d 621 (1961); *Federal National Mortgage Assoc. v. Carrington*, 60 Wn.2d 410, 374 P.2d 153 (1962); *John Davis & Co. v. Cedar Glen No. Four*, 75 Wn.2d 214, 450 P.2d 166 (1969); *Damascus Milk Co. v. Morriss*, 1 Wn.App. 501, 463 P.2d 212 (1969). See also *Kennebec, Inc., v. Bank of the West*, 88 Wn.2d 718,724-725, 565 P.2d 812 (1977), citing to *Norfor v. Busby, supra*, at page 452.

[4] *RCW 61.24.005(2)* provides as follows: "Beneficiary" means <u>the holder</u> of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation."

entities claimed to be owners or holders of the subject obligation at the time U.S. Bank filed its Complaint for judicial foreclosure.

On May 12, 2010, MERS issued an Appointment of Successor Trustee pursuant to *RCW 61.24.010,* representing itself to be the "beneficiary" of the obligation within the terms of *RCW 61.24.005(2).* CP 765. It is unclear whether MERS executed the Appointment of Successor Trustee as nominee for New Century Mortgage (at a time when New Century Mortgage was under the protection of the U.S. Bankruptcy Court and whose executory contracts with entities such as MERS had been rejected), whether MERS was acting in its own right as owner and actual holder of the Note and Deed of Trust or whether it was acting as agent for some undisclosed principal.[5] There was no evidence before the trial court to indicate when MERS became the "beneficiary", other than as nominee for New Century in the Deed of Trust (CP 821), or when MERS transferred its purported interest in the subject obligation. Nevertheless, MERS' representations in its Appointment of

---

[5] MERS purported to act as "nominee for New Century Mortgage Corporation", but any authority that may have existed for MERS to act on behalf of New Century was extinguished when all executory contacts were rejected by the bankruptcy court on or about March 19, 2008. See *In re: New Century TRS Holdings, Inc,* et al., Case No. 07-10416 (KJC), Notice of Rejection of Executory Contract, based on Court Order Docket #388 http://www.scribd.com/doc/59828999/New-Century-Notice-of-Rejection-of-Exec-Con-MERS). CP 789-792. All of MERS' authority as nominee of New Century, if not exercised prior to **March 19, 2008**, ceased to exist after that date as a matter of law and its Appointment of Successor Trustee executed by MERS, dated and notarized on **May 12, 2010,** was invalid because any contractual relationship between MERS and New Century had been voided and rescinded by New Century's Rejection of Executory Contracts. *11 U.S.C. §§365(d) (1), 365(g)* and *§502(g).* CP 789-792.

Successor Trustee contradict U.S. Bank's identical representations that it was the holder of the obligation on July 11, 2015. CP 6.

Twelve days later, in apparent contradiction to MERS' representations in its Appointment of Successor Trustee, Litton also claimed to be the "beneficiary" as "the authorized Agent for the owner and actual holder of the obligation" in its Declaration of Ownership of May 25, 2010. CP 852. This Declaration of Ownership is ambiguous within the terms of *Lyons* and *Trujillo v. NWTS*, 183 Wn.2d 820, 355 P.3d 1100 (2015) (hereinafter "*Trujillo II*") in several respects. First, Litton claims to be the "beneficiary", yet signs the document only as the "authorized agent for the beneficiary". Second, Litton claims to the "actual holder" of the Note and Deed of Trust, yet also claims to be merely the "authorized agent for the . . . actual holder". Third, Litton identifies itself as the "loan servicer" in the signature block, which appears to contradict its representation to be the "beneficiary". Finally, Litton executes the document as attorney in fact. But for whom? No power of attorney was ever presented to the trial court to establish the identity of Litton's principal or the scope of its authority. It is worth noting that Litton's representations of ownership and agency in the Declaration of Ownership were contradicted by Litton's own witness, Kevin Flannigan. CP 1609-1612. See also the testimony of Jay Patterson. CP 1175. Nevertheless, despite Litton's ambiguous representations in its Declaration of Ownership, Litton's

representations contradicted U.S. Bank's identical representations that it was the holder of the obligation.

Another "holder" and claimant to the beneficial ownership interest in the Note and Deed of Trust was identified as "Please Consult Cover Letter." In its Notice of Default, QLS represents that the "current owner/beneficiary of the Note secured by the Deed of Trust is: Please Consult Cover Letter." (Emphasis added) CP 760-763. No cover letter was ever furnished by QLS with the Notice of Default or provided the trial court on summary judgment. CP 1503-1504. While it might be easy to dismiss this as a laughable scrivener's error, it highlights QLS' apparent confusion as to the ownership of the beneficial interest in the Note and Deed of Trust and created a genuine issue of material fact concerning U.S. Bank's status and standing to initiate a judicial foreclosure under *RCW 61.12, et seq.* Who was being referred to in "Please Consult Cover Letter" and were they the true and lawful "mortgagee" of the obligation? The trial court did not inquire. Nevertheless, QLS's representations regarding the owner and holder of the obligation contradicted U.S. Bank's identical representations that it was the holder of the obligation.

Not only did U.S. Bank fail to establish its status and standing as "mortgagee" of the subject obligation to judicially foreclose, there was competent testimony, including the testimony of two separate expert witnesses

offered by Mr. Selkowitz, that refuted U.S. Bank's standing and cast doubt on whether the subject obligation was ever properly assigned and transferred to U.S. Bank in the first instance as alleged: Mr. Tim Stephenson and Mr. Jay Patterson. CP 781-1151; CP 1154-1364.

According to the governing documents that created the Trust and appointed U.S. Bank Trustee (hereinafter "MST Agreement"), all notes and deeds of trust assigned to the Trust had to be assigned between January 1, 2007 and January 31, 2007. CP 235; CP 237; CP 800. According to the MST Agreement, any note assigned was specifically required to be endorsed by New Century (Originator) to Goldman Sachs Mortgage Co. (Sponsor); from Goldman Sachs Mortgage Co. (Sponsor) to GS Mortgage Securities Corp (Depositor); and endorsed by GS Mortgage Securities Corp (Depositor) in blank to be transferred to the Custodian, Deutsche Bank. See CP 258-263; see also testimony of Jay Patterson (CP 1163-1170) and testimony of Tim Stephenson (CP 800-810). These endorsements were required to be affixed to the Note prior to the Trust closing date of January 31, 2007. CP 259-261. Here, the only endorsement that shows up on any version of Mr. Selkowitz' Note offered to the trial court is the endorsement of New Century, in blank. CP 173. Missing are the endorsements of the Sponsor and Depositor. Absent these endorsements, there is substantial and material doubt that Mr. Selkowitz' Note and Deed of Trust were ever

properly assigned and transferred to the Trust. See testimony of Tim Stevenson (CP 800-810) and Jay Patterson (CP 1163-1170). Without proper endorsement and assignment to the Trust, the subject Note and Deed of Trust could never have been accepted by U.S. Bank as Trustee and the Trust could not be a "mortgagee" authorized to initiate a judicial foreclosure within the terms of *RCW 61.12, et seq*.

The trial court had no evidence to establish U.S. Bank's status and standing to foreclose and erred in granting summary judgment over the testimony of Jay Patterson and Tim Stevenson that indicated the subject obligation was never properly assigned to U.S. Bank, as trustee, under the terms of the Trust's governing documents.

C. <u>Additional Legal and Equitable Defenses.</u>

Notwithstanding U.S. Bank's failure to establish its status and standing to foreclose, the trial court erred in granting summary judgment by failing to consider and applying several legal and equitable defenses, including violation of *RCW 61.12.120* and the equitable defenses of election of remedies and equitable estoppel.

RCW 61.12.120 provides as follows:

> The plaintiff shall not proceed to foreclose his or her mortgage while he or she is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he or she is seeking to obtain execution of any judgment in such other action; nor shall he or she prosecute any other action for the same matter while he or she is

foreclosing his or her mortgage or prosecuting a judgment of foreclosure.

On April 23, 2010, U.S. Bank, through its purported agents QLS ("as agent for . . . . the Beneficiary") and/or Litton (U.S. Bank's purported servicer), allegedly authorized issuance of a Notice of Default pursuant to *RCW 61.24.030.* CP 760-763. This set in motion statutorily mandated foreclosure/enforcement procedures that could only be stopped by Mr. Selkowitz filing suit pursuant to *RCW 61.24.130.* This action was taken by Mr. Selkowitz on July 2, 2010 when he filed his Complaint under King County Superior Court Case No. 10-2-24157-4 KNT (Court of Appeals Case No. 725050-0-I). U.S. Bank, through its purported agents QLS, MERS and Litton, filed various pleadings prosecuting their defense to their undisclosed principal's foreclosure actions, alleging, *inter alia*, that the foreclosure proceedings were warranted due to Mr. Selkowitz' alleged default on the Note and Deed of Trust.[6] That QLS, Litton (now Ocwen), and MERS were purported agents of U.S. Bank, for its benefit, during the initial non-judicial foreclosure proceedings is now clearer. CP 1543, page 21, line 14 to CP 1544, pg. 24, line 4.

---

[6] There was no testimony adduced in the non-judicial foreclosure action to establish that the purported owner or actual holder of the obligation, U.S. Bank as trustee for the Trust, ever declared such a default as required under *RCW 61.24.030(8)(c).*

This action was brought on July 11, 2014, while the non-judicial action was pending before the trial court and the appeal of the non-judicial action remains pending before this Court. [7]

It is Mr. Selkowitz' contention that by authorizing a non-judicial foreclosure of his Note and Deed of Trust, forcing him to pursue his defenses to the non-judicial foreclosure through the filing of an action under *RCW 61.24.130,* interposing defenses to Mr. Selkowitz' wrongful foreclosure action through its purported agents, and then, while the wrongful foreclosure action is pending, filing a judicial foreclosure action on the same debt, U.S. Bank has violated the provisions of *RCW 61.12.120.*

There is scant authority on the issue of whether the initiation of wrongful non-judicial foreclosure proceedings – forcing the homeowner to seek remedial intervention of the court under *RCW 61.24.130* – constitutes an action. But, at least one appellate decision suggests the proper approach to the circumstance now before this Court is for the purported owner of the debt being foreclosed and subject to *RCW 61.24.130* to intervene and interpose a counter-

---

[7] In its moving papers, U.S. Bank suggests that Mr. Selkowitz's defenses and claims herein are barred by the doctrine of *res judicata*, which requires the identity of four elements: identical (1) subject matter, (2) cause of action, (3) persons and parties and (4) quality of persons against whom the claims is made. CP 450. See *State v. Rains*, 100 Wn.2d 660, 647 P.2s 165 (1983); *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 887 P.2d 898 (1995). But the doctrine does not apply here as U.S. Bank was not a party to the non-judicial foreclosure action. However, U.S. Bank's suggestion that the doctrine <u>might</u> apply supports Mr. Selkowitz' contention that U.S. Bank acknowledges that it has commenced a second action foreclosure action on the same debt, in violation of *RCW 61.12.120.*

claim for judicial foreclosure in the same action rather than start another. *Thweatt v. Hommel*, 67 Wn.App. 135, 834 P.2d 1058 (1992). This avoids potential prejudice to the borrower and serves judicial economy by avoiding the multiplicity of actions.

Regardless of how this Court may consider application of *RCW 61.12.120* to the facts of this case, U.S. Bank should be barred from pursuing a judicial foreclosure by application of the equitable doctrine of election of remedies. Elements of the doctrine are: (1) there must be two or more remedies; (2) the remedies must be inconsistent with one another; and (3) a party to be bound must have chosen one of the remedies. *McKown v. Driver*, 54 Wn.2d 46, 337 P.2d 1068 (1959); *Puget Sound Service Corp. v. Bush,* 45 Wn.App. 312, 724 P.2d 1127 (1986). See also *Latman v. Burdette*, 366 F.3d 774 (Wash D.C. 2004). As noted in the case of *State ex. Rel. Barb Rest. v. Wash. State Bd. Against Discrimination*, 73 Wn.2d 870, 878-79, 441 P.2d 526 (1968) (citing to *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E. 880 (1954):

> The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. The plaintiff having made his election it is final and irrevocable: the underlying basis of the rule being the maxim which forbids that one shall be twice vexed for one and the same cause. *Friederichsen v. Renard*, 247 U.S. 207, 62 L. Ed. 1075; *U. S. v. Oregon Lumber Co.*, 260 U.S. 290, 67 L. Ed. 261; 18 Am. Jur., Election of Remedies, Sec. 20; 28 C.J.S., Election of Remedies, Sec. 29. "Where he has two remedies, he may choose between them and select that one which he deems the best for him, but he must abide the result

> of his choice. This is not only legally but morally right." Baker v. Edwards, 176 N. C. 229, 97 S. E. 16.

The case of *Rose v. Rundall*, 86 Wash. 222, 150 Pac. 614 (1915) is on point. There, the plaintiff, the vendor, commenced an action to recover an installment due under a contract. Thereafter he declared the contract forfeited for the non-payment of an installment falling due subsequently, and pursued an action for termination of the contract to final judgment and decree before obtaining judgment in the first action mortgagee, arguing that the commencement of the cause to quiet title and its prosecution for a prior default was separate and distinct from the default and nonpayment of the first installment. The Court disagreed:

> An action may constitute a conclusive election of remedies, in which case its pendency seems to be pleadable as a defense in bar of a subsequent suit. A real estate contract, such as the one in action, is a conditional sale contract, with the absolute title reserved in the vendor. It is one entire contract of sale, though the purchase money is divided into installments for the benefit of the vendee. As to sales of personal property conditionally, it has been uniformly held in this state that in such matters the seller has a choice of remedies. He may either disaffirm the contract and retake the chattel, or he may treat the transaction as an absolute sale and sue on the contract for the purchase price. But, since these remedies are inconsistent, he cannot do both. The assertion of one is an abandonment of the other.
>
> *Id.* at page 425. (Internal citations omitted.)

This comports with the approach taken in *Thweatt v. Hommel, supra.* Moreover, *CR 22* should have encouraged U.S. Bank to interplead its claims into the non-judicial foreclosure case where, as here, Mr. Selkowitz' exposure

to double or multiple liability for the same alleged wrong could be limited.[8] Specifically, in the non-judicial foreclosure action, Mr. Selkowitz was liable only for loss of his home and potential fees and costs to the Defendants named therein. Here, in addition to loss of his home and more potential exposure to fees and costs, Mr. Selkowitz could be liable for a deficiency judgment if his home at sheriff's sale fails to fetch more than the amount alleged due under the Note, which is not available under the DTA. Compare *RCW 61.12.070* with *RCW 61.24.100.*

Moreover, had the Defendants to the non-judicial foreclosure case not taken such great efforts to conceal the identity of their principal, U.S. Bank, through false claims of status as "beneficiary" and "holder", Mr. Selkowitz could have named U.S. Bank and the Trust in that action and effectively joined their claims and defenses under *CR 22*. See CP 760-768 and CP 774-775.

Furthermore, the doctrine of equitable estoppel may also apply to the facts of this case. The doctrine of equitable estoppel is a judicial remedy by which a party may be precluded by its own act or admission, from asserting a right to which it otherwise would have been entitled. *Heckler v. Community Health Servs. of Crawford County, Inc.,* 467 U.S. 51, 59, 81 L.Ed.2d 42, 104 S.Ct. 2218 (1984); *In re Raanan*, 181 B.R. 480 (C.D. Cal. 1995) ("Estoppel

---

[8] *CR 22* provides, in pertinent part: "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability." (Emphasis added).

arises either because that party has taken inconsistent positions or has remained silent in the face of a duty to speak, with resulting adverse consequences for an opposing party."); *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 95-96 (9th Cir. 1970) (The four essential elements of equitable estoppels are: (1) the party to be estopped must know the facts; (2) he must intend that this conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts, and (4) he must rely on the former's conduct to his injury). Certainly, U.S. Bank must have authorized its agents to initiate a non-judicial foreclosure and knew they were representing themselves to be owners and holders of the obligation to conceal U.S. Bank's alleged role in the transaction. Certainly, it was U.S. Bank's intention that Mr. Selkowitz believe the representations of U.S. Bank's alleged agents. Through concealment of its alleged role in the transaction, Mr. Selkowitz was unaware of U.S. Bank's involvement until U.S. Bank filed its Complaint for judicial foreclosure. And, finally, Mr. Selkowitz has been forced to unnecessarily bear the cost of defending against two foreclosure actions and is prejudiced by the different remedies available under each. Clearly, the elements of equitable estoppel are present and the trial court erred in not applying the doctrine on summary judgment.

By application of *RCW 61.12.120* or any of the above-referenced equitable defenses, U.S. Bank should have been denied any relief in this action by the trial court. It is undisputed that the judicial foreclosure process initiated

by U.S. Bank herein seeks to enforce the same rights and seeks the same remedies sought by U.S. Bank, through its agents, in the non-judicial foreclosure process under *RCW 61.24, et. seq.*, except in this action, U.S. Bank now seeks the additional remedy of a deficiency judgment. Since U.S. Bank, through its agents, took action to commence the non-judicial process, including the recordation of various documents adversely affecting title to Mr. Selkowitz' home, U.S. Bank should be bound by the remedy it elected in the non-judicial action and the trial court's summary judgment should be reversed on these grounds.

D. <u>The testimony of Mr. Kevin Flannigan.</u>

U.S. Bank, and apparently the trial court, relied exclusively on the testimony of Kevin Flannigan to support the Motion for Summary Judgment. Mr. Flannigan provided testimony on several occasions in connection with the Selkowitz loan, both in this case and the companion non-judicial foreclosure action (Case No. 725050-0-I). At no time during these proceedings did Mr. Flannigan identify himself as an employee of the U.S. Bank. CP 166-168; CP 1657, lines 1-5. Rather, Mr. Flannigan represents himself to be an employee of Ocwen Financial Corporation, whose "<u>indirect</u> subsidiary Ocwen Loan Servicing, LLC" purportedly services the loan and is a former employee of Litton, a former loan servicer. CP 166-167.

Mr. Flannigan represents in his Declaration of March 10, 2015 that his testimony was based on his "review of the documents and records regarding

the Loan," but Mr. Flannigan does not indicate what documents he reviewed, who created them, why they were created or how they have been maintained. CP 167. At deposition, Mr. Flannigan couldn't even remember the specific documents he reviewed in preparation for his testimony. CP 1664, lines 1-19.

Significantly, while Mr. Flannigan represents in his Declaration of March 10, 2015 that he reviewed the records and files of Ocwen Financial Corporation and Litton, he does not represent or indicate that he reviewed the records and files of U.S. Bank or the Trust – the party that brought this action. CP 166-168. Specifically, at deposition, Mr. Flannigan did not know anything about how US Bank maintains these records nor did he speak to anyone at US Bank to prepare for the deposition, despite being offered by U.S. Bank as its *CR 30(b)(6)* representative. CP 1682-1684; CP 1746, line 16 to 1748 line 9; CP 1750, lines 8 – 15.

Clearly, Mr. Flannigan's testimony at deposition (CP 1650-1795) and his several declarations (CP 166-168; CP 1609-1648) fail to demonstrate sufficient personal and testimonial knowledge of the facts offered the trial court and this Court, on *de novo* review, beyond conclusory statements and statements based exclusively on hearsay. *ER 801, ER 802, CR 56(e).* Under *CR 56(e),* conclusory statements or "mere averment" that the affiant has personal knowledge are insufficient to support a motion for summary judgment. *Blomster v. Nordstrom, Inc., supra.;* Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 4th Cir. 1972).

All Mr. Flannigan says about the basis of his knowledge is that he has reviewed "the documents and records regarding the loan" and that "Ocwen has custody and control of the business records as they relate to the Loan, including Litton's loan servicing records." CP 167. Glaringly absent from the records and files that should have been reviewed, are the records of U.S. Bank and the Trust's records. As to the records and files Mr. Flannigan did review, he fails to provide the Court facts that would establish (1) how the documents he refers to are maintained, whether in hard copy or electronic; (2) if the records are maintained by electronic means, whether the computer document retrieval equipment used is standard; (3) the original source of the materials maintained; (4) the identity of person who compiled the information contained in the files or computer printouts; (5) when the entries were made and whether they were made at or near the time of the happening or event; and (5) how Ocwen, his current employer, relies on these records. See *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979).

The records Mr. Flannigan relies upon were necessarily generated initially by New Century, Litton and/or others. But, there is no assurance that the information allegedly obtained by Ocwen by these other entities is reliable without verification by the entity the provided the information as to the means by which the information was created and maintained. See *State v. Mason*, 31 Wn.App. 680, 644 P.2d 710 (1982).

Mr. Flannigan did not offer the trial court on summary judgment the sort of personal and testimonial knowledge required under *CR 56(e)*. There were simply no facts offered the trial court that would justify its reliance on the information provided by Mr. Flannigan. This sort of careless and conclusory testimony by mortgage lenders and loan servicers is all too common and has been roundly criticized by other trial courts in Washington.

In *McDonald v. OneWest*, 929 F. Supp. 2d 1079 (2013) (hereinafter "*McDonald*"), Judge Robert Lasnik was offered testimony by representatives of loan servicers on summary judgment similar to that offered by Mr. Flannigan here. In *McDonald,* Judge Lasnik observed:

> The testimony of Mr. Boyle and Mr. Corcoran confirmed what this Court has long suspected: defendants have not taken their obligations as litigants in federal court seriously enough. *Rather than obtain declarations from individuals with personal knowledge of the facts asserted or locate the source documents underlying its computer records, defendants chose to offer up what can only be described as a "Rule 30(b)(6) declarant" who regurgitated information provided by other sources.* Rule 30(b)(6) is a rule that applies to depositions in which an opposing party is given the opportunity to question a corporate entity and bind it for purposes of the litigation. *A declaration, on the other hand, is not offered as the testimony of the corporation, but rather reflects – or is supposed to reflect – the personal knowledge of the declarant.*
>
> Not surprisingly given the fact that his counsel apparently did not understand the difference between a declaration based on personal knowledge and a Rule 30(b)(6) deposition, Mr. Boyle's declarations consist of sweeping statements, a few of which may be within his ken and admissible, but most of which are assuredly hearsay. When he was asked to sign a declaration in this case, he thought he was responding on behalf of OneWest and therefore felt justified in questioning co-workers, running computer searches, and reviewing other sources before reporting their statements as his own. Nothing in his declarations

> would alert the reader to the fact that Mr. Boyle was simply repeating what he had heard or read from undisclosed and untested sources. When his statements turned out to be untrue, Mr. Boyle conveniently blames inaccuracies in the underlying documentation, computer input errors, or faulty reporting. Had defendants made the effort to produce admissible evidence in the first place, these errors may have been uncovered and avoided before they could taint the discovery process in this case.
>
> *McDonald,* 929 F. Supp. at 1090-1091 (Emphasis added.)

The same criticisms can be lodged against the testimony of Mr. Flannigan in all forms offered to the trial court herein.

We know nothing about Mr. Flannigan's actual work activities or how he is conceivably qualified to speak to the issues he attempts to address. Absent a proper foundation, Mr. Flannigan's testimony constituted rank hearsay and should not have been considered or given any weight by the trial court and should be given no weight by this Court on *de novo* review. See *ER 803(a)(6)* and *RCW 5.45.020.* Absent credible and competent evidence to support U.S. Bank's claims, the trial court's summary judgment should be reversed and this matter remanded for further hearing.

E. Mr. Selkowitz' Motion to Compel and request for relief under *CR 56(f).*

In view of Mr. Flannigan's incompetent testimony at deposition, Mr. Selkowitz brought a Motion to Compel Discovery and, on summary judgment, requested relief under *CR 56(f).* CP 454-631; CP 723-724. Both were denied by the trial court.

The Rules of Civil Procedure are to be liberally construed in order that full discovery proceedings will be afforded in all instances where factual inquiries are in order. *Barnum v. State*, 72 Wash. 2d 928, 435 P.2d 678 (1967). The scope of discovery under the Rules of Civil Procedure is broad and is subject to narrow exceptions. *Hertog v. City of Seattle*, 88 Wn.App. 41, 943 P.2d 1153 (1997). "Good cause" for discovery is present if the information sought is material to the party's trial preparation. The justification for specific discovery requests is ordinarily satisfied by a factual allegation showing that the requested information is necessary to establishment of the party's claim or that denial of the information would work a hardship or injustice on the party. *Id.* The limitations on discovery presented by recognized privileges or defined in the discovery rules remain narrow because the right to discovery under the Washington Constitution is tied to the fundamental right of access to the courts. *Lowy v. PeaceHealth*, 174 Wash. 2d 769, 280 P.3d 1078 (2012).

CR 30(b)(6) requires an organizational/institutional party to produce a witness competent to testify regarding the subject matter of a deposition. The party seeking discovery need only "designate with <u>reasonable particularity</u> the matters on which examination is requested." *CR 30(b)(6)* (Emphasis added.). Mr. Selkowitz exceeded this standard as his Amended Notice of Deposition contained extensive descriptions of those matters subject to examination. CP 468-473. Each area of examination was relevant to the claims asserted by U.S.

Bank or was "reasonably calculated to lead to the discovery of admissible evidence." *CR 26(b)(1).*

Upon a request for deposition under *CR 30(b)(6),* the organizational/institutional party must not only produce such number of persons as will satisfy the request, but must prepare them so that they may give complete, knowledgeable, and binding answers on behalf of the corporation. *Flower v. T.R.A. Industries, Inc.*, 127 Wn.App. 13, 111 P.3d 1192, review denied 156 Wash.2d 1030, 133 P.3d 474 (2005). See also See *FDIC v. Butcher*, 116 F.R.D. 196 (E.D. Tenn. 1986); *Mitsui & Co. v. Puerto Rico Water Authority*, 93 F.R.D. 62 (D.P.R. 1981). If a party disagrees with the scope of production, or wishes not to respond, it must first move for a protective order and cannot withhold discoverable materials – a mere written objection is insufficient. *CR 26; Washington State Physicians Insurance Exchange & Assoc. v. Fisons Corporation*, 122 Wn.2d 299, 354, 858 P.2d 1054 (1993) (hereinafter "*Fisons*").

Inadequate preparation of corporate designee for deposition testimony can be sanctioned, based on the lack of good faith, prejudice to the opposing side, and disruption of the proceedings. *Casper v. Esteb Enterprises, Inc.*, 119 Wn.App. 759, 82 P.3d 1223 (2004) (hereinafter "*Casper*"). At deposition, Mr. Flannigan was unable or unwilling to provide an answer to over 112 relevant questions that a reasonably competent representative of U.S. Bank would have been able to answer, responding with "I don't know" or some derivative

thereof. See CP 475-618, pgs. 9, 16, 20, 21, 26, 27, 28, 31, 32, 33, 34, 35, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 63, 64, 66, 68, 71, 73, 74, 78, 80, 81, 82, 84, 85, 87, 89, 90, 94, 95, 98, 99, 103, 104, 105, 105, 107, 108, 109, 11, 112, 114, 115, 117, 121, 122, 123, 124, 126, 129, 130, 132, 134, 135, 136, 138 and 139. Moreover, Mr. Flannigan produced none of the requested documents at deposition, counsel of U.S. Bank, Ms. Edling, asserting that whatever was to be produced by Mr. Flannigan of U.S. Bank's records to be "an attorney decision" - - not his. CP 496; CP 658-675. Simply put, Mr. Flannigan was unable or unwilling to address most of the material areas of inquiry outlined in the Amended Notice of Deposition and questions asked by Mr. Selkowitz' counsel. For instance:

> When asked questions regarding the specific mechanism that transferred Mr. Selkowitz' loan to the Trust, Mr. Flannigan did not have any specific information and relied on documents presumably in the possession of US Bank, the creation of which he had no knowledge. CP 497-498. Additionally, based upon his answer and statements of U.S. Bank's counsel, Ms. Edling, it appears that documents were not produced under Request for Production, Item 3, of the Amended Notice of Deposition. CP 498, lines 13-22.
>
> When asked about the mortgage loan schedule upon which he based his conclusions regarding Mr. Selkowitz' involvement in the Trust, Mr. Flannigan had no knowledge about its author, where any

information included in the document came from or any other specific information regarding the document. CP 501-502. Additionally, Mr. Flannigan had no knowledge of how U.S. Bank maintains these records nor did he speak to anyone at US Bank in preparing for the deposition, despite claiming to be offering testimony in a representative capacity. CP 507-508, line 7; CP 569, line 16 to CP 571, line 9; CP 573, lines 8 – 15.

Despite the explicit directives contained in the Amended Notice of Deposition, Mr. Flannigan was completely unfamiliar with the documents pertaining to any transfer of Mr. Selkowitz' loan into the Trust. CP 509, lines 5-11; CP 531, lines 5-9; CP 564-566, CP 593, line 18 to CP 594, line 24. Nor did Mr. Flannigan have any knowledge pertaining to the actual transaction whereby the trust acquired the loan. CP 582, line 8 to CP 583, line 1. These were crucial issues before the trial court as U.S. Bank only had standing to initiate a judicial foreclosure if Mr. Selkowitz' loan was properly transferred to the Trust pursuant to the Trust's governing documents. CP 205-431. In fact, Mr. Flannigan apparently relied solely upon publicly recorded documents rather than records of US Bank for the transfer of the Selkowitz loan to the Trust and was in no position to provide personal knowledge as to the authority, source of information or the party responsible for these publicly recorded documents. *CR 56(e)*. CP 533-535.

Item 14 of the Amended Notice of Deposition calls for information regarding the circumstances surrounding the endorsement on the Note, but Mr. Flannigan had no such information and apparently only reviewed a copy of the Note in advance of the deposition on this issue. CP 549, lines 15-21. Remarkably, Mr. Flannigan did not view the original Note in preparing for the deposition. CP 489, line 24 to CP 490, line 6.

As noted in *John Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 782, 819 P.2d 370 (1991), "[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." Good faith discovery is essential to our judicial process. Based upon Mr. Flannigan's conduct at deposition, his inability or unwillingness to provide complete answers to the questions asked, as well as comments of U.S. Bank's counsel, it appears that relevant information was intentionally withheld from Mr. Selkowitz.[9]

If U.S. Bank had objection to the scope of the *CR 30(b)(6)* deposition noted by Mr. Selkowitz and his counsel, it had a duty to seek a protective order prior to the date set for deposition rather than providing an incompetent witness who had no personal knowledge of the matters under examination and

[9] CP 496; CP 620-627; CP 658-675; Ms. Edling's apparently intentional withholding of discoverable information and open taunting invitation to filing a motion to compel demonstrates a lack of good faith.

withholding requested documentary evidence. As noted in the case of *Rhinehart v. Seattle Times Co.*, 51 Wn.App. 561, 564, 754 P.2d 1243 (1988), failure to timely respond and object to a discovery request or seek a protective order pursuant to *CR 26* effectively waives all objections. *CR 26(c)*. See also *Hollingsworth v. Washington Mutual Savings Bank*, 37 Wn.App. 386, 396, 681 P.2d 845 (1984).

Under *Fisons*, the rules of discovery are intended to reduce delaying tactics, procedural harassment and legal costs, and to foster a spirit of cooperation and forthrightness during the discovery process. A parties' compliance with these objectives are judged on an objective standard of good faith. *Fisons*, at page 343. Based upon this standard, and the refusal of U.S. Bank to provide a competent witness, or in the alternative to seek a protective order, U.S. Bank and its attorneys of record failed to demonstrate good faith in the discovery process.

It appears from the deposition transcript that Mr. Flannigan ignored the Amended Notice and that U.S. Bank simply offered only those documents and testimony that it and its counsel deem pertinent and relevant to further their version of the facts, events and claims – deeming Mr. Selkowitz' claims and defenses irrelevant and immaterial. This violates both the letter and the spirit of the discovery rules. In the absence of seeking a protective order, U.S. Bank's discovery behavior constituted a gross abuse of the discovery process and U.S. Bank's failure to provide full and complete responses to Mr. Selkowitz'

reasonable discovery requests prejudiced his ability to prepare for trial and effectively thwarted Mr. Selkowitz' ability to adequately defend against U.S. Bank's claims on summary judgment. *CR 56(f).*[10]

In view of U.S. Bank's failure to conduct discovery in good faith and the clear need for additional discovery to flesh out U.S. Bank's status and standing to initiate and prosecute a judicial foreclosure under *RCW 61.12, et seq.*, the trial court's denial of his Motion to Compel and refusal to provide him additional time to conduct discovery on the areas of inquiry outlined in his Amended Notice of Deposition (CP 468-473) pursuant to *CR 56(f)* constituted manifest error for which reversal is the remedy.

VI. CONCLUSION

Defending simultaneous foreclosure actions brought by different parties on the same Note and Deed of Trust is the ultimate evil against which no homeowner should have to contend.

There was no competent evidence to establish U.S. Bank's status and standing as a "mortgagee" of the subject obligation to justify its judicial foreclose of Mr. Selkowitz' Note and Deed of Trust. The trial court completely misread or misunderstood the requirements of *RCW 61.12, et seq.*

---

[10] *CR 56(f)* provides as follows: "Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Given the pendency of the non-judicial action by its agents, the trial court should have denied U.S. Bank's Motion for Summary Judgment under the terms of *RCW 61.12.120* and/or by application of the equitable doctrines of election of remedies or equitable estoppel.

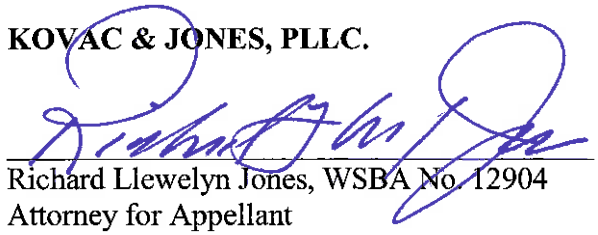
Moreover, the trial court accepted, without question, the incompetent testimony of U.S. Bank's only witness, Kevin Flannigan. Mr. Flannigan's testimony failed to meet the requirements of *CR 30(b)(6), CR 56(e),* was based on rank hearsay and was accepted by the trial court over Mr. Selkowitz' Motion to Compel and duly noted request for relief under *CR 56(f).*

In view of the trial court's manifest error on summary judgment, reversal is the remedy.

Finally, Mr. Selkowitz should be awarded taxable costs, expenses and reasonable attorney's fees on appeal, pursuant to *RAP 18.1,* based on the terms of the subject Note and Deed of Trust.

REPECTFULLY SUBMITTED this 9th day of December, 2015.

KOVAC & JONES, PLLC.



Richard Llewelyn Jones, WSBA No. 12904
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct. On December 10, 2015, I arranged for service of the foregoing Initial Brief of Appellant on the following parties in the manner(s) indicated:

Emilie Edling Houser & Allison, APC 9600 SW Oak St, Suite 570 Portland, OR 97223 Phone: (503) 914-1382 Facsimile: (503) 914-1383	_____ _____ _____ _____ X	Facsimile Messenger U.S. 1st Class Mail Overnight Courier Electronic

SIGNED this 10th day of December, 2015, at Bellevue, Washington.

Susan L. Rodriguez

Susan L. Rodriguez
Legal Assistant