SUPREME COURT NO. 92487-2

COURT OF APPEALS NO. 46333-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FRANCES DU JU,

Petitioner,

v.

JPMORGAN CHASE BANK, N.A. and BISHOP, MARSHALL & WEIBEL, P.S.,

Respondents.

ANSWER BY RESPONDENT BISHOP, MARSHALL & WEIBEL, P.S. TO FRANCES DU JU'S PETITION FOR REVIEW TO THE SUPREME COURT OF WASHINGTON

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I. INTRODUCTION

Pro se Petitioner Frances Du Ju requests this Court review Division II's unpublished opinion affirming the Clark County Superior Court's summary judgment of dismissal and Order entering Partial Final Judgment awarded to the foreclosing Trustee of her Deed of Trust, Respondent Bishop, Marshall & Weibel, P.S. f/k/a Bishop, White, Marshall & Weibel, P.S. ("Bishop"). She petitions for review of the same Orders and Judgment awarded to the beneficiary of her Deed of Trust, Respondent JPMorgan Chase Bank, N.A. ("Chase").

In the trial court, Division II, and here, Ms. Ju contests several aspects of the nonjudicial foreclosure conducted by Bishop for Chase. She asserts Bishop violated the Deeds of Trust Act, RCW 61.24, *et seq.* ("DTA"), and that the DTA violations constitute *per se* violations of the Consumer Protection Act, RCW 19.86, *et seq.* ("CPA").

But Ms. Ju never offered admissible evidence or controlling legal authority supporting her several claims. Although her Petition correctly recites the considerations governing acceptance of review and controlling DTA and CPA precedents, it points to no precedential conflicts or constitutional issues requiring this Court accept review under RAP 13.4(b).

Because the trial court did not err in entering summary judgment, and did not abuse its discretion in entering Partial Final Judgment for Bishop, Division II's opinion affirming the appealed Orders and Judgment was correct. And because Ms. Ju's Petition fails to show any conflict in precedent or constitutional issues requiring this Court's review under RAP 13.4(b), her Petition for Review should be denied.

II. ASSIGNMENTS OF ERROR

Bishop assigns no error, as the summary judgment awarding its dismissal, entry of Partial Final Judgment, and Division II's affirmation were all correct.

III. STATEMENT OF THE CASE

A. Facts Underlying and Parties to Unlawful Detainer Suit.

Petitioner Ms. Ju, and her former spouse Chwen-Jye Ju, owned real property in Vancouver, Clark County, Washington (the "Property"), encumbered by a first priority mortgage serviced by Respondent Chase, the holder of their Note. [CP 2-3, 34, 40-41.] Chase appointed Bishop as Successor Trustee of the Ju's Deed of Trust to foreclose the Property. [CP 35, 42-46.] Bishop caused the Trustee's Sale to be conducted, sold the Property to the winning bidder, John O'Neill, and delivered its Trustee's Deed. [CP 35-36, 103-06.]

After purchasing the Property, Mr. O'Neill commenced an unlawful detainer suit in Clark County Superior Court to evict Mr. and Ms. Ju. [CP 242-52.] Ms. Ju cross-claimed against Mr. Ju, and filed a Third-Party Complaint against Third-Party Defendants Bishop and Chase, which was later amended. [CP 1-11, 253-65; RP 2/7/2014, p. 10, ll. 8-14.]

B. Ms. Ju's Claims Against Bishop.

Ms. Ju's third-party claims against Bishop and Chase are premised on the following allegations:

1. Bishop did not inform Ms. Ju after Chase appointed Bishop as Successor Trustee [CP 3-4];

2. Collusive bidding occurred during the Trustee's Sale, resulting in an unfair price and inadequate winning bid [CP 3];

3. Bishop adjusted its calculations of the proceeds after conclusion of the Trustee's Sale [CP 3];

4. Bishop unduly delayed depositing surplus funds from the sale and serving Ms. Ju notice of that deposit [CP 4];

5. The above actions, which allegedly constitute DTA violations, are *per se* CPA violations [CP 3]; and

6. Bishop refused to settle the litigation with Ms. Ju [CP 5].

In summary, Ms. Ju claimed Bishop breached its duty of care to her as foreclosing Trustee, and that its refusal to settle her claims provides an independent cause of action.

C. Award of Summary Judgment to Bishop.

Bishop moved for and was awarded summary judgment on all claims. [CP 22-32, 221-23; RP 4/4/2014.] Bishop argued and proved it satisfied its RCW 61.24.010(4) good faith duty to Ms. Ju and complied with the DTA by:

1. Timely and appropriately serving Ms. Ju with all DTA-required foreclosure notices [CP 27-28; RP 4/4/2014, p. 12, ll. 4-15];

2. Absent satisfaction of Ms. Ju's default, a continuance request, and/or entry of a restraining order under RCW 61.24.130, proceeding to sale as allowed [CP 28, 35];

3. Relying on RCW 61.24.050(2)(a)(i)'s requirement that only the Trustee, beneficiary, or beneficiary's authorized agent – not Ms. Ju as the Deed of Trust Grantor – may declare a Trustee's Sale void for an "erroneous opening bid amount" [CP 28-29];

4. Including recitals in the Trustee's Deed as *prima facie* evidence that the Trustee's Sale was "conducted in compliance with all of the requirements of [the DTA] and of the deed of trust," under RCW 61.24.040(7) [CP 30, 103-06];

5. Applying the sale proceeds to the expenses of sale under RCW 61.24.080(1) [CP 29; RP 4/4/2014, p. 12, l. 16 – p. 13, l. 3]; and

6. Depositing the surplus funds and serving Ms. Ju notice of that deposit on a date of its choosing, as allowed by RCW 61.24.080(3) [CP 30-31; RP 4/4/2014, p. 13, ll. 14-21].

Bishop also argued it violated no duty and breached no contract with Ms. Ju by refusing to abide by a settlement offer she made to Mr. O'Neill when Bishop was not a named party, of which Bishop had no knowledge, and which Bishop never entered. [CP 31-32.]

Awarding Bishop summary judgment, the trial court found no triable fact issue existed and no evidence supported that Bishop: (1) breached its RCW 61.24.010(4) good faith duty to Ms. Ju; (2) violated the DTA; and (3) thereby committed any *per se* CPA violation. [CP 221-23; RP 4/4/2014, p. 11, l. 15 – p. 14, l. 10; p. 16, ll. 18 – p. 17, l. 13; p. 30, l. 18 – p. 31, l. 21; p. 32, ll. 3-9.]

D. Ms. Ju's and Bishop's Post-Award Communications.

After summary judgment was granted, Ms. Ju demanded Bishop settle the litigation. [CP 455, 464-66.] She asserted Bishop's counsel had improper motives, fabricated information, and treated her discourteously. [CP 455, 464-66.] Bishop's counsel politely and professionally responded

to each such communication. [CP 454-55, 467-69.] Bishop declined to settle the litigation on the terms Ms. Ju proposed. [CP 455, 468.]

E. Entry of Partial Final Judgment for Bishop and Chase.

By joining Chase's CR 54(b) motion [CP 178-82], Bishop moved for entry of Partial Final Judgment dismissing Bishop [CP 183-85]. Bishop contended that Ms. Ju was a prolific *pro se* litigant, who filed lengthy redundant pleadings. Bishop asserted it was representing itself and had clients who required its attention to other litigation. It asked to be relieved of the time and expense of further participation in the remaining claims by Mr. O'Neill against Mr. Ju, in which Bishop was not involved and not a party. [CP 184, 437; RP 5/2/2014, p. 4, l. 22 – p. 5, l. 6.]

In response, Ms. Ju again asserted Bishop's counsel had improper motives, misrepresented facts, and treated her discourteously and abusively. [CP 191-93; RP 5/2/2014, p. 6, ll. 1-16.] She accused Bishop of "recklessly and willfully includ[ing] ... a statement and accusation in [its] Proposed Order" [CP 193] that Ms. Ju "filed several redundant pleadings in this action," asserting Bishop's counsel's "biased and abusive personal opinion should not be included in this Court's order" [RP 5/2/2014, p. 6, ll. 1-16].

Bishop's written response denied any abusive behavior towards Ms. Ju and apologized to the extent she felt disrespected. [CP 451-52, 454.] At oral argument, Bishop's counsel reiterated her apology and invited the trial court to strike the allegedly abusive, unfair, and disrespectful proposed order language that Ms. Ju was a "prolific *pro se* litigant who has filed several redundant pleadings in this action." [RP 5/2/2014, p. 7, l. 11-17.] Judge Gregerson concluded:

> I don't find that the request for that language is abusive or unprofessional in any way on the part of Ms. Bollero. In fact, this Court is very familiar with this case and has been privy through multiple hearings filed by Ms. Ju. At every single hearing the Court has attempted to point out some of the procedural and substantive deficiencies in her filings and has strongly advised -- I cannot even count how many times I've advised Ms. Ju to get a competent attorney on board to help her. And there is definitely a redundant flavor to many of the motions that are here and the arguments made. So we'll keep that language in [Bishop's] order.

[RP 5/2/2014, p. 12, ll. 1-14.]

On May 2, 2014, the trial court entered Orders granting Partial Final Judgment to Bishop and Chase. [CP 392-95, 482-85; RP 5/2/2014, p. 9, l. 21 – p. 11, l. 24; p. 12, ll. 16-25.] On the same day, it entered both Partial Final Judgments of Dismissal of Bishop and Chase under CR 54(b), dismissing them with prejudice. [CP 486-87, 492-94; RP 5/2/2014, p. 11, ll. 9-14; 5-10; p. 12, ll. 16-19.]

F. Ms. Ju's Appeal and Division II's Unpublished Opinion.

Ms. Ju timely filed her Notice of Appeal on May 30, 2014. [CP 215-36.] She appealed six orders, three each for Bishop and Chase:

1. Both summary judgment Orders entered April 4, 2014;

2. Both Partial Final Judgment Orders entered May 2, 2014; and

3. Both Partial Final Judgments entered May 2, 2014.

On September 1, 2015, Division II issued its unpublished opinion affirming all appealed Orders because Ms. Ju did not show the existence of any triable fact issues or support her arguments of law with authorities (the "Opinion"). On September 18, 2015, Ms. Ju filed motions to reconsider and to publish the Opinion. Both motions were denied by Divisions II's Orders entered October 27, 2015. The same day the appellate court issued an Order Amending its Opinion, clarifying that Ms. Ju argued unsupported evidence for the first time in her summary judgment opposition, rather than at oral argument as originally stated.

Ms. Ju timely filed her Petition for Review.

IV. ARGUMENT

A. Summary Judgment Awards are Reviewed *De Novo*.

The appellate standard of review for summary judgment is *de novo*, with the reviewing court performing the same inquiry as the trial

court. *Del Guzzi Constr. Co. v. Global Northwest Ltd.,* 105 Wn.2d 878, 882, 719 P.2d 120 (1986); *Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

B. Ms. Ju has Failed to Show Appropriate Grounds for Review.

RAP 13.4(b) identifies the only four grounds on which this Court will accept review. They include an issued opinion which: (1) conflicts with a Supreme Court decision; (2) conflicts with another appellate court decision; (3) involves a significant question of constitutional law; or (4) involves an issue of substantial public interest.

1. No Conflicting Supreme Court Decisions are Identified.

Ms. Ju asserts review should be granted because Division II's decision conflicts with this Court's opinions, citing *Klem v. Wash. Mutual Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013); *Lakey v. Puget Sound Energy, Inc.,* 176 Wn.2d 909, 296 P.3d 860 (2013); *Wash. St. Physicians Ins. Exch. & Ass'n. v. Fisons Corp.,* 122 Wn.2d 299, 858 P.2d 1054 (1993); *Trujillo v. Northwest Trustee Services, Inc.,* 183 Wn.2d 820, 355 P.3d 1100 (2015); *Lyons v. U.S. Bank Nat'l. Ass'n.,* 181 Wn.2d 775, 336 P.3d 1142 (2014), and other cases. But her Petition does not point to any portion of Division II's opinion that conflicts with any of this Court's jurisprudence.

Ms. Ju cites *Klem* for the proposition that false notarization of foreclosure documents *may* be the proximate cause of a borrower's damages.

[Petition, p. 10.] But Division II never mentioned *Klem* and there was no evidence that any documents were falsely notarized; accordingly, there is no conflict in the decisions.

Similarly, she cites *Lakey* to support the trial court must draw all reasonable inferences in her favor regarding the alleged collusive bidding. [Petition, p. 10.] But Ms. Ju offered no evidence concerning the bidding – nor could she, since she was not present at the Trustee's sale. She asserted her daughter was present, but never bothered to obtain her Declaration, have her appear and testify, or request time to present that evidence. As Division II noted: "Ju did not argue any specific facts or violations – her argument was simply that the sale was unfair." [Opinion, p. 9.]

Ms. Ju quotes *Trujillo, Lyons,* and *Klem* regarding the Trustee's good faith duty. She argues the duty was violated because Bishop corrected Chase's opening bid by adding an omitted cost of $16.33 after the sale, and did not deposit the surplus funds with the Superior Court until 48 days after the Trustee's sale. [Petition, pp. 10-12.] But as Division II correctly observed, RCW 61.24.080 provides *no* time limit by which the trustee must deposit surplus funds. [Opinion, p. 11.] The court also remarked on the absence of any evidence supporting "that there was any irregularity that occurred in the conduct of the trustee's sale." [*Id.*, p. 8.] Accordingly, no conflict with any Supreme Court opinion has been shown, and none exists.

2. No Conflicting Appellate Court Decisions are Identified.

Ms. Ju cites only four appellate court opinions to support her argument that review should be accepted under RAP 13.4(b)(2). Similar to *Lakey,* in *Sutton v. Tacoma School Dist. No. 10, et al,* 180 Wash. App. 859, 324 P.3d 763 (2014), the court emphasized the requirement to draw all reasonable inferences in the non-moving party's favor, even from a self-serving Declaration.

Ms. Ju filed only two of her own Declarations to oppose Bishop's and Chase's summary judgment motions. The only assertion in either of them against Bishop is that it waited 48 days to deposit the surplus funds. [CP 121-23, 144-46.] There is no reason to presume the trial and appellate courts did not accept this allegation as true, especially since Bishop admitted the sale and deposit dates. [CP 276.] Nothing in Division II's decision conflicts with the holding in *Sutton.*

Appellant also cites *Blake v. Federal Way Cycle Center,* 40 Wash. App. 302, 698 P.2d 598 (1985), and *Albice v. Premier Mortg. Svcs. of Wash., Inc.,* 157 Wash. App. 932, 239 P.3d 1148 (2010), asserting that rules were broken during the foreclosure process and the Trustee's sale price was inadequate. But she makes no arguments tying these cases to the present facts, only mere assertions. The trial and appellate courts here both relied on *Albice* for the proposition that "[g]enerally, a foreclosure sale price is

inadequate when it is less than 20 percent of the fair market value." [Opinion, p. 10.] Because the undisputed evidence was that the property sold for nearly three-quarters of its fair market value, Ms. Ju has not shown any conflict with the *Albice* – or any other appellate opinion.

The remaining appellate opinions cited by Ms. Ju as conflicting concern judges' recusal determinations. Any claimed error that Judge Gregerson should have recused himself was not asserted in the trial court, and should not be grounds for review now. Regardless, as with all other claims, it is unsupported by any evidence. Ms. Ju's recent assertion that "[t]he superior court had to modify the CD of the hearing to some degrees *(sic)* to cover up Judge Gregerson's red face" [Petition, p. 14], is devoid of all foundation, knowledge, and smacks of conspiracy theory. It is also belied by Judge Gregerson's patience and encouragement to Ms. Ju, after her multiple appearances before him, reflected in his remarks quoted at page 7, *supra.*

No conflict between Division II's opinion and other appellate court decisions exists.

3. No Significant Constitutional Law Question is Identified.

Ms. Ju again relies on Judge Gregerson's alleged bias to support her constitutional issues argument. But "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because

the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (citing *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986)). Instead, at issue here is the purported appearance of impropriety. When utilizing that standard, the trial judge "is presumed to perform his or her functions regularly and properly without bias or prejudice" (*Kay Corp. v. Anderson,* 72 Wn.2d 879, 885, 436 P.2d 459 (1967); *Jones v. Halvorson-Berg,* 69 Wash. App. 117, 127, 847 P.2d 945 (1993)), because "[a] different rule could reward groundless tactical attacks" (*Tatham v. Rogers*, 170 Wash. App. 76, 87, 283 P.3d 583 (2012)).

The appearance of fairness doctrine focusses on whether there is "evidence of a judge's or decisionmaker's actual or potential bias." *State v. Post,* 118 Wn.2d 596, 619, n. 9, 826 P.2d 172, *as modified,* 837 P.2d 599 (1992). "A party asserting a violation of the [appearance of fairness] doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker; *mere speculation is not enough.*" *In re Pers. Restraint of Haynes,* 100 Wash. App. 366, 377, n. 23, 996 P.2d 637 (2000) (emphasis supplied). Thus, when the tribunal may have a personal financial interest in the outcome, the doctrine is violated. *Chicago, M., St. P. & P. R. Co. v. Wash. St.*

Human Rights Comm'n., 87 Wn.2d 802, 806, 557 P.2d 307 (1976) (tribunal member had a job application pending with the Commission while tribunal was deciding this case).

But simply because the trial court rules against a party and that ruling is overturned on appeal "does not establish evidence of actual or potential bias." *Santos v. Dean*, 96 Wash. App. 849, 857, 982 P.2d 632 (1999), *as amended* (Aug. 10, 1999). A party claiming bias and prejudice must support that claim – prejudice is not presumed as it is when a party files an affidavit of prejudice under RCW 4.12.050 (*Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash. App. 836, 841, 14 P.3d 877 (2000)), nor are "bald accusations" sufficient to prove bias (*In re Marriage of Meredith*, 148 Wash. App. 887, 903, 201 P.3d 1056 (2009)).

Reading Ms. Ju's assertions charitably, the most she has shown is that the trial judge may have looked at her with an odd expression. But the facts that Ms. Ju did not prevail before him and that he repeatedly suggested she retain counsel have nothing to do with Judge Gregerson's temperament, demeanor, prejudice, and/or bias and everything to do with Ms. Ju's unsupported and circuitous pleadings and arguments. Petitioner's assertion of bias and prejudice does not amount to a constitutional issue which merits this Court's review.

Ms. Ju's second claimed constitutional error is that "the Washington legislative *(sic)* should review the issue regarding no deadline for the trustee to file the Surplus Funds[.]" [Petition, p. 16.] But other than asserting her personal belief that RCW 61.24.080's failure to state a deadline for the surplus funds deposit is unconstitutional [*id.*, pp. 17-18], Ms. Ju cites only two opinions, neither having anything to do with handling of surplus funds after nonjudicial foreclosure.[1]

Because no constitutional issues are raised by Ms. Ju, review should be denied.

4. No Issue of Substantial Public Interest is Identified.

Ms. Ju's arguments under RAP 13.4(b)(4) concerning substantial public interest grounds repeat her unconstitutional arguments under a

[1] *Davis v. Cox*, 183 Wn.2d 269, 274, 351 P.3d 862 (2015), held unconstitutional parts of the Washington Act Limiting Strategic Lawsuits Against Public Participation (anti-SLAPP statute), RCW 4.24.525. *League of Women Voters of Washington v. State*, -- Wn.2d --, 355 P.3d 1131, 1133 (2015), *as amended on denial of reconsideration* (Nov. 19, 2015), found unconstitutional certain portions of Initiative 1240 (I–1240) (Charter School Act), RCW 28A.710.

different caption, and are equally unpersuasive. Only two reported opinions specifically discuss RAP 13.4(b)(4)'s substantial interest grounds.

In *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005), this Court found substantial public interest to grant review where "[t]he Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue." The second, *In re Marriage of Ortiz*, 108 Wn.2d 643, 645-46, 740 P.2d 843 (1987), involved whether another Supreme Court decision regarding child support escalation clauses was retroactive and rendered such clauses voidable or void. Citing RAP 13.4(b)(4) without discussion, for obvious reasons – given the pervasiveness of child support orders – this Court remarked: "This case involving, as it does, an issue of substantial public interest, we granted discretionary review." *Id.*

The lynchpin of Ms. Ju's substantial public interest claim is that "it took 284 days from the Trustee's Sale to the superior court's mailing the check of her Surplus Funds."[2] [Petition, p. 19.] But that assertion, even if

[2] As Bishop argued on appeal, any delay by the Superior Court in distributing the surplus funds to Ms. Ju after Bishop deposited the funds is not relevant to whether Bishop breached its good faith duty to her and whether the trial court property awarded Bishop summary judgment.

true, fails to explain how Division II's correct interpretation that RCW 61.24.080 states no deadline for the surplus funds deposit is somehow of substantial public interest, akin to criminal sentences and child support escalation.

Of the nearly 30 reported and unreported decisions referencing RCW 61.24.080, *none* (other than Division II's Opinion) either allege or address any delay in surplus funds deposit or distribution. If the "timely" deposit issue is of substantial import to the public, one wonders why no one other than Ms. Ju has raised it. Regardless, if indeed the public is substantially interested in more prompt surplus funds deposits, even Ms. Ju recognizes that it is within the legislature's province to amend the statute – not this Court's.

Because no issue of substantial public interest has been identified or exists, the Petition for Review should be denied.

V. CONCLUSION

Because Ms. Ju has failed to meet her burden of showing any grounds exist under RAP 13.4(b) for this Court to accept review, Respondent Bishop, Marshall & Weibel, P.S. respectfully requests her Petition for Review be denied.

RESPECTFULLY SUBMITTED this 2nd day of December, 2015.

MARSHALL & WEIBEL, P.S.

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DECLARATION OF SERVICE

I, Barbara L. Bollero, upon oath and duly sworn, states the following is true and correct:

On December 2, 2015 I caused to be delivered in the U. S. Postal Service, the foregoing Answer by Respondent Bishop, Marshall & Weibel, P.S. to Petition for Review, addressed to the following parties:

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DATED this 2nd day of December, 2015, at Seattle, Washington.

s/ Barbara L. Bollero
Barbara L. Bollero, WSBA No. 28906

OFFICE RECEPTIONIST, CLERK

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