No. 47501-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

ALBERTO & VICTORIA AVALO,

Defendants-Appellants,

v.

DEUTSCHE BANK TRUST COMPANY AMERICAS AS INDENTURE TRUSTEE FOR THE REGISTERED HOLDERS OF SAXON ASSET SECURITIES TRUST 2005-1, MORTGAGE LOAN ASSET BACKED NOTES, SERIES 2005-1,

Plaintiff-Respondent.

AMENDED ANSWERING BRIEF OF RESPONDENT DEUTSCHE BANK AS TRUSTEE

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Defendants Alberto and Victoria Avalo ("Defendants") appeal the Superior Court's grant of summary judgment and decree of judicial foreclosure on property located in Pierce County, Washington. Defendants challenge the routine foreclosure action, claiming Plaintiff Deutsche Bank as Trustee (the "Trust") had no standing to foreclose due to unspecified issues with the chain of title of the loan.

Defendants' arguments reflect a fundamental misunderstanding of the law. In Washington, a party is entitled to enforce the note and foreclose on the related deed of trust when the party establishes that it is the "holder" of the note by proving that it is the party in possession of the original note. *Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 174, 367 P.3d 600 (2016) (citing RCW 62A.3-301). Moreover, a holder is "entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." RCW 62A.3-301. Consequently, Defendants' arguments that there was a "break in the chain of title" or that the Trust may not have legitimately come into possession of the Note are irrelevant to the Trust's standing to foreclose. Rather, the Trust need only show that it is the holder of the Note in order to enforce it.

Here, the Trust's evidence amply demonstrated that the Trust held the Note, and also showed that there was a default justifying foreclosure. Defendants' opposition failed to challenge the existence of the loan, the authenticity of the Note and Deed of Trust, or the fact of their default. Summary judgment was wholly appropriate, and this Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did Defendants submit admissible evidence showing an issue of fact existed, so as to preclude grant of summary judgment to the Trust in its foreclosure action.

2. Do Defendants present a basis for reversal in making an unpreserved challenge to the admissibility of a declaration submitted in support of the final judgment.

3. Does Defendants' argument that the Trust's Motion for Judgment failed to comply with Washington Civil Rule 45(e) present a basis for reversal when Defendants have shown no prejudice resulting from the error.

III. COUNTERSTATEMENT OF THE CASE

The underlying facts and procedure pertinent to this appeal are as follows:

A. Defendants Take Out a Loan to Purchase Property

On December 22, 2004, Alberto E. Avalo and Victoria L. Avalo ("Defendants"), for value received, executed and delivered a Promissory Note (the "Note") for a loan in the amount of $388,218.00 to Saxon Mortgage, Inc. (CP 246 at ¶ 5.) The Note provides that the lender may transfer the Note and that anyone who takes the Note by transfer is the "Note Holder." (CP 250 at ¶ 1.) The Note was later indorsed to Deutsche Bank Trust Company Americas as Indenture Trustee for the Registered Holders of Saxon Asset Securities Trust 2005-1, Mortgage Loan Asset Backed Notes, Series 2005-1 (the "Trust"). (CP 252.)

In the Note, Defendants agreed to pay the amount of $2,794.67 every month for 30 years. (CP 250, ¶ 3(B).) The Note also specified that, if Defendants "do not pay the full amount of each monthly payment on the date it is due, [they] will be in default," entitling the holder of the Note to collect the full amount of the principal, interest, late charges, and attorneys' fees. (CP 251, ¶ 7(B)-(C).)

In order to secure the payments required by the Note, Defendants also executed a deed of trust ("Deed of Trust"), which granted the original

lender and its successors a lien against property owned by Defendants and located in Pierce County, Washington (the "Property"). (CP 256.) The Deed of Trust repeated Defendants' duty to make monthly payments and stated that "if [a] default is not cured... Lender at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law." (CP 268, ¶ 22.) The Deed of Trust also stated, "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (CP 267, ¶20.)

B. Defendants Default on the Loan and the Trust Initiates Foreclosure

Defendants became delinquent on their Loan at some point prior to May 2009, and entered into a Loan Modification Agreement with the Trust to bring the Loan current. (CP 279.) The Loan Modification Agreement, signed by Defendants, explicitly acknowledged that the "Lender" of the Loan was "Deutsche Bank Trust Company Americas formerly known as Banker's Trust Company, as Trustee." (CP 279-80.) In the Loan Modification Agreement, Defendants promised to make monthly payments on the Loan to the "Lender." (CP 280, ¶ 2.) Defendants also promised that they had "no right of set-off or

counterclaim, or any defense to the obligations of the Note or Security Instrument." (CP 281, ¶ 4(c).)

Notwithstanding the Loan Modification Agreement, Defendants ceased making payments on their Loan in July 2011. (CP 247, ¶ 10.) Consequently, Ocwen Loan Servicing, LLC ("Ocwen"), the servicer of the Loan, sent a letter to Defendants at the address of the Property, advising them of the default. (*Id.* *See also* CP 293-304.) The Notice of Default advised Defendants that they were in arrears in the amount of $9,621.12 and informed them that this amount needed to be paid by August 9, 2011 in order to cure the default. (CP 247, ¶10.) The letter also advised that acceleration of the full amount remaining would result if the delinquency was not timely cured. (*Id.*)

Defendants failed to cure the default and the Trust initiated the present foreclosure action by filing a Complaint on March 24, 2014. (CP 1.) Defendants filed an Answer stating that they did not know if they executed the Note and Deed of Trust because Defendants were "now uncertain as to exactly what happened on or about May 27, 2009 and, therefore, this is denied." (CP 222.) Defendants further stated they were unable to ascertain the accuracy or truthfulness of the Note and Deed of Trust documents and that the documents "may be a forgery." (*Id.*) Defendants also alleged several affirmative defenses challenging standing

and mentioning the securitization of the Loan, among other things. (CP 226-242.)

C. The Trust's Motion for Summary Judgment is Granted

On November 25, 2014, the Trust filed a Motion for Summary Judgment supported by several sworn affidavits. The Motion argued that there was no genuine issue of material fact that (1) Defendants were in default, (2) the Trust provided notice of the default to Defendants, (3) the Trust was the holder of the note entitled to foreclose, and (4) the Trust satisfied all of the preconditions to enforcement of the Note and Deed of Trust through foreclosure. (CP 309, ¶1.) In support of its Motion, the Trust offered the Affidavit of Kristin Frontera, Contract Management Coordinator of Ocwen Loan Servicing, LLC, to authenticate business records made at or near the time of the activity memorialized in the records, and kept in the course of business. (CP 246, ¶2-3.) The Affidavit supported all of the elements of a foreclosure action, and in particular confirmed that the Trust was in possession of a Note, which was specially indorsed to the Trust. The Motion for Summary Judgment was also supported by a Declaration from the Trust's counsel stating that counsel was in actual physical possession of the original Note and Deed of Trust executed by Defendants. (CP 305-06.)

Among the issues Defendants raised in opposition, Defendants claimed that the Trust's counsel did not provide Defendants with a new modification offer on request, and should not have offered a modification if the Trust did not intend to proceed with it. (CP 74-75.) Defendants also argued that the Court should deny summary judgment because the case was in its infancy and Defendants had not had an opportunity to conduct any discovery or obtain a "forensic audit," which they wished to do. (CP 75-76.) The Superior Court held a hearing on the Motion for Summary Judgment on January 16, 2015; however, in light of Defendants' concerns, continued the hearing to February 13, 2015. (Opening Br. at 17.)

On February 9, 2015, less than five days before hearing, Defendants filed an Amended Opposition. (CP 82.) Defendants made the same points as their prior Opposition, but also attached a lengthy document they termed a "forensic audit." (CP 86-169.) Defendants failed to provide any briefing or explanation regarding the forensic audit or the conclusions Defendants expected the Court to draw from the audit.

In Reply, the Trust pointed out that the submission of the forensic audit was untimely under CR 56(c), which required the submission of opposition material no later than 11 days before the scheduled hearing. The Trust's counsel also confirmed and provided evidence that there were no ongoing attempts to settle the matter. To the contrary, Defendants had

failed to accept a July 22, 2014 Loan Modification offer, (CP 326, 339-40), and the offer expired. Due to their failure to respond and provide the first required payment required under the modification, Ocwen issued a loan modification rejection, which the Defendants had not appealed. (CP 342.) Finally, the Trust's counsel noted that counsel had not received any discovery requests from Defendants. (CP 316.)[1]

Most pertinent, the Trust's reply emphasized the fact that it had proved that it was in possession of the original Note. In fact, counsel for the Trust brought the original Note – which contained an endorsement to the Trust – to the Motion for Summary Judgment hearing and offered it to the Court for review. (Tr. 11:14-23.) In light of this evidence, the Trust's counsel argued that because it was the holder of the Note, any issues with securitization or assignment documents that Defendants alluded to in order to avoid foreclosure were immaterial under Washington law, which dictates that the party in possession of a note is the holder and entitled to enforce it. (CP 317.)

The Superior Court agreed, finding that Defendants were in default of the Note, that the Note had been indorsed to the Trust and was in

[1] At the February hearing, the Trust's counsel learned that Defendants filed discovery requests with the Court, but did not serve them. (Tr. 9:24-10:1.) Defendants attach unsigned discovery requests to their brief, but the requests do not contain certificates of service confirming when they were served on the Trust's counsel.

possession of the Trust, and that all pre-requisites to foreclosure had been satisfied. (CP 171.) The Court granted Summary Judgment on February 3, 2015. (CP 170-172.)

D. Defendants' Appeal

Defendants filed a Notice of Appeal on April 24, 2015. Their Second Amended Opening Brief (cited to as "Opening Br.") argues that the Trust's evidence was inadequate to support grant of summary judgment and that material issues of fact were in dispute. (Opening Br. at 1.) In particular, Defendants challenge the sworn affidavit submitted with the Motion for Summary Judgment and argue that it was inadequate under Civil Rule 56(e). (*Id.* at 1-2.) Defendants also argue they had inadequate time to conduct discovery and that the trial court erred in allowing Judgment in the matter because the Trust did not provide a form of order or judgment to the Court within 15 days of the Court's decision. (*Id.* at 2.) As discussed further below, these arguments have no merit.

IV. STANDARD OF REVIEW

This Court reviews a trial court's grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 698, *rev. den.*, 181 Wn. 2d 1008 (2014). Summary judgment is appropriate where there is no genuine issue of material fact. *Id.* Although the moving party

has the initial burden of showing there is no issue of material fact, once this is accomplished, the burden shifts to the non-moving party to show why summary judgment should not be granted. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989). To defeat summary judgment, the non-moving party must submit admissible evidence demonstrating the material issues of fact that preclude summary judgment. *Thye v. Zenture Pacific Homes, Inc.*, 153 Wn. App. 1030, 8 (2009).

The Court may affirm a summary judgment order on any ground supported by the record. *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453 (2011).

V. ARGUMENT

A. The Trust Satisfied Its Burden of Showing that Summary Judgment was Warranted and There Were No Issues of Fact

The Uniform Commercial Code Article 3, which is codified in the Revised Code of Washington ("RCW"), is the substantive state law governing negotiable instruments, including promissory notes. Among the persons or entities entitled to enforce a negotiable instrument under the RCW is the "holder." *See* RCW § 62A.3-301. *See also Brown v. Washington State Dep't of Commerce*, 184 Wash. 2d 509, 524-25, 359 P.3d 771 (2015) (citing RCW 62A.3-301.) A person or entity in possession of an instrument qualifies as the "holder" of the instrument if it

is payable to that person or entity. RCW 62A.l-201(b)(21) (stating "Holder" means the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.") *See also Brown*, 184 Wash. 2d at 525 (quoting from statute); *Bain v. Metro Mortg. Group, Inc.*, 175 Wash. 2d 83, 104, 285 P.3d 34 (Wash. 2012) (quoting from statute, previously codified as RCW 62A.1-201(20)(2001)).

The concept of "person entitled to enforce" a note is not synonymous with "owner" of the note. To the contrary, one party may own the right to a note's proceeds, while its servicer or another party may have the ability to enforce it. *Cameron v. Acceptance Capital Mortg. Corp.*, No. C13-1707-RSM, 2013 WL 5664706, at *3 (W.D. Wash. Oct. 16, 2013) ("This Court has repeatedly rejected the theory that only the owner of the Note has the authority to enforce its terms."); *Rouse v. Wells Fargo Bank, N.A.*, No. 13-5706-RBL, 2013 WL 5488817, at *5 (W.D. Wash. Oct. 2, 2013) (same). This has been the law in Washington for 45 years. *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wash. 2d 214, 222-23 (1969) ("The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.") (citation omitted).

When a note is transferred from one entity to another, the successor entity receives both the ability to enforce the note and the ability to enforce the pertinent trust deed. *Am. Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, 61 (1911) *on reh'g*, 67 Wash. 572 (1912) ("There is no doubt that a mortgage, or any other security given for the payment of a bill or note, passes by a transfer of the bill or note to the transferee."). The successor holder therefore has the right to judicially foreclose on the note and trust deed, based on its possession of the note. *Slotke*, 192 Wn. App. at 168 (2016) ("The holder of a note may commence a judicial foreclosure of the deed of trust in the same manner as a mortgage.")

Here, the Trust submitted evidence establishing that it was in possession of the Note, and that the Note was indorsed to the Trust. Defendants failed to present any evidence contesting these facts. Consequently, the Trust proved it was the holder of the Note, and therefore the party entitled to enforce the Note. *Slotke*, 192 Wn. App. at 168 (party proving it was in possession of a note, also indorsed to that party, established it was entitled to foreclose).

This point of Washington law is the primary issue on appeal, as Defendants argue that the Trust mistakenly "believe[s] that anyone who happens to be in possession of the note has the equitable right 'noteholder status' and therefore the right to foreclose." (Opening Br. at 12-13.)

Defendants' observation is oversimplified, but correct: Under clear Washington law, the possessor of a note, to whom the note is also indorsed, is authorized to enforce the note and deed of trust. RCW 62A.3-301. *See also Slotke*, 192 Wn. App. at 168; *John Davis*, 75 Wash. 2d at 222-23; *Brown*, 184 Wash. 2d 509 at 524-25.

Defendants cite RCW 65.08.070 for their position that the "equitable right of 'holder status' must be proven with evidence of a legitimate delivery." (Opening Br. at 13-14.) The statute fails to support their argument. RCW 65.08.070 provides:

> "A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record."

RCW 65.08.070. The purpose of this statute is "to make the deed first recorded superior to any outstanding unrecorded conveyance of the same property unless the mortgagee or purchaser had actual knowledge of the transfer not filed of record." *Kim v. Lee*, 145 Wash. 2d 79, 86 (2001). It does not impose any requirement on how a note is transferred. Further, the statute itself is clear that it only protects subsequent purchasers from

an unrecorded lien. The statute has no relevance to Defendants, who were original parties to the Loan transaction and therefore aware of the lien on the Property.

In sum, clear Washington law dictates that the holder of a Note is entitled to foreclose, and there are no authorities to the contrary. The Trust provided ample evidence that it held the Note, and Defendants failed to provide any contrary evidence. Grant of summary judgment was appropriate.

Finally, however, this Court should affirm judgment for two other reasons not addressed by the Superior Court, but supported by the record. *Blue Diamond Grp., Inc.*, 163 Wn. App. at 453 (2011) (noting court may affirm on any grounds supported by the record). First, the Defendants entered into a Loan Modification Agreement in which they explicitly promised to make payments to "Deutsche Bank Trust Company Americas . . . as Trustee," and acknowledged that this entity was the "lender" of their loan. (CP 40-41, ¶2, 4(c).) They also promised in the Loan Modification Agreement that they had "no right of set-off or counterclaim, or any defense to the obligations of the Note or Security Instrument." (CP 41, ¶ 4(c).) They obtained a substantial benefit from the agreement and should, at this point, be contractually estopped from denying Deutsche Bank as Trustee's status. *Ivy Press v. McKechnie*, 88 Wash. 643, 652

(1915) (where a party enters into a contract with a corporation, it should be estopped from denying its existence). Second, Defendants' challenge to the Trust's standing appears to rely on a theory that Plaintiff did not receive a valid assignment of the Deed of Trust, possibly due to securitizaton. However, a borrower "lacks standing to raise that issue because she is not a party to or intended third-party beneficiary of [any assignment] agreement." *Slotke*, 192 Wn. App. 166, 367 P.3d at 606.

B. Defendants' Assertion that the Parties Were Close to Reaching a Loan Modification Agreement is Irrelevant

Defendants argue that the Superior Court should not have allowed summary judgment because the parties were close to reaching a loan modification agreement that would have resolved the matter. (Opening Br. at 15.) Defendants also argue that issues of fact precluded grant of summary judgment, and that the Trust's counsel agreed this was the case when counsel stated "She [Mrs. Avalo] made several issues of fact where my clients were not under the belief that she [Mrs. Avalo] would be accepting the loan modification." (*Id.*)

Neither argument could reasonably have precluded summary judgment. First, any prior settlement discussions between the parties is irrelevant as to whether summary judgment should be granted. Moreover, a lender is not required to restructure a loan agreement and it is

inconsequential that Defendants are disappointed they did not receive loan modification terms they desired. *Badgett v. Security State Bank*, 116 Wn. 2d 563, 569, 807 P.2d 356 (1991).

Second, the fact that Defendants told the Trust's counsel that there were factual issues causing Defendants to hesitate in accepting a loan modification is entirely different from whether Defendants, on summary judgment, submitted "admissible evidence sufficient to create a triable issue of fact" as to whether summary judgment was appropriate. *Fulton v. State Dpt. Of Social & Health Svs.*, 169 Wn. App. 137, 163 (2012). Here, Defendants failed to raise any issues of fact – let alone submit evidence contesting – whether they had executed the Note and Deed of Trust or whether they were in default. Consequently, grant of summary judgment was appropriate. *See, e.g., Workman v. Bryce*, 50 Wash. 2d 185, 190 (1957) (decree of foreclosure was properly entered where mortgage was established as valid, the past due debt was unpaid, and the borrower had defaulted).

C. The Court's Decision to Grant Summary Judgment in Spite of Defendants' Request for Time to Conduct Discovery was Appropriate

Defendants argue on appeal that grant of summary judgment was unfair and improper because they did not have adequate time to conduct discovery. (Opening Br. at 17.) However, they admit that the Court held

two summary judgment hearings in order to accommodate their request to conduct discovery, continuing the initial January 16, 2015 hearing to February 13, 2015. (*Id.*) In spite of the continuance, Defendants did not serve the Trust's counsel with discovery. Further, Defendants failed to submit any evidence in opposition to the summary judgment motion other than the forensic audit, which was unauthenticated, irrelevant, hearsay evidence, which the Superior Court properly noted offered legal conclusions and probably constituted the improper practice of law. (Tr. 6:16-24.) Even Defendants appear clear that the document was not adequate evidence and needed corroboration, admitting in their Opening Brief that "if proven accurate as it was attested to . . . [it would show] breaks in the chain of title . . . ." (Opening Br. at 18-19.)

Defendants' uncertainty about the forensic audit is understandable. This type of proposed expert material is regularly rejected by courts. *See Fidel v. Deutsche Bank Nat'l Trust Co.*, No. C10-2094 RSL, 2011 WL 2436134, at *1 (W.D. Wash. Jun. 4, 2011) (disregarding forensic audit because plaintiff cannot rely on legal conclusions from a report); *Abarquez v. OneWest Bank, FSB*, No. C11-0029RSL, 2011 WL 1459458, *1 (W.D. Wash. Apr. 15, 2011) (same); *In re Butler*, 512 B.R. 643, 655 (Bankr. W.D. Wash. 2014) (same). The Washington Attorney General and the Federal Trade Commission warn borrowers not to pay for these kinds of

reports. *Hanson v. Wells Fargo Bank N.A.*, No. C10-1948Z, 2011 WL 2144836, *3 at n.6 (W.D. Wash. 2011) (noting credibility of reports was dubious and the Federal Trade Commission had issued a consumer alert "regarding forensic mortgage loan audit scams.").[2] Here, however, the Court need not consider the hypothetical question of whether a "forensic audit" could ever be admitted as expert evidence, because the evidence is clearly inadmissible due to the fact that it provides legal conclusions (rather than expert evidence on facts), and because the evidence is irrelevant. Nothing in the audit disputes the only relevant fact regarding the Trust's standing to foreclose, which is that the Trust was the holder of the Note. *Slotke*, 192 Wn. App. at 172-78 (rejecting numerous arguments regarding securitization and ownership of the note and finding plaintiff need only prove it was holder of the note.)

For the same reason, Defendants' argument that they were unable to obtain discovery pertinent to the forensic audit (Opening Br. at 19) is immaterial. As the Superior Court correctly noted, a Washington Civil Rule 56(f) Motion to Continue Summary Judgment for the purpose of taking additional discovery requires a showing the party can obtain new evidence creating a genuine issue of material fact. *Christofferson v.*

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[2] *See also* the website of the Washington State Office of the Attorney General, entitled "Mortgage and Foreclosure Scams," available at http://www.atg.wa.gov/mortgage-and-foreclosure-scams.

Miller, 87 Wn. App. 1096 (1997). Here, Defendants admit on appeal that they intended to obtain additional discovery supporting the forensic audit. Because the forensic audit was irrelevant to any of the elements of foreclosure, the Court appropriately refused to continue the summary judgment proceedings.

D. Defendants' Objection to the Boutin Affidavit Fails to Provide a Basis for Reversal

Defendants challenge the Affidavit of Nicole Boutin, executed on April 21, 2015, as insufficient to support judgment, for various reasons. The Superior Court entered its Order Granting Summary Judgment on February 13, 2015. (CP 170-72.) At that point, the Superior Court determined that (1) the Trust was the holder of the Note; (2) all conditions precedent to foreclosure have occurred; and (3) the Trust was entitled to foreclosure. (*Id.*) The only remaining detail was the submission of a judgment and a showing of proof to the Court regarding the outstanding amount of the lien.

The Trust provided that information in the Affidavit of Nicole Boutin, submitted on September 8, 2015 in support of its Motion for Entry of Judgment and Decree of Foreclosure. (CP 345-350.) Defendants did not object to the Affidavit, and the objection was therefore not preserved for appeal. Wash. R. App. P. 2.5(a). Moreover, a review of the figures

provided in the Affidavit shows that Boutin carefully set forth different amounts chargeable to the Loan, many of which can be independently confirmed. For instance, her Affidavit provides the remaining Unpaid Principal Balance and Interest after calculating Defendants payments made under the Loan Modification, and the deferred principal balance of $70,453.35, which is set forth explicitly in the Loan Modification Agreement. (*Compare* CP 348-49, ¶ 11 *with* CP 384-86.) The other amounts appear reasonable, and Defendants offer no reason to disbelieve them. A party opposing judgment must do more than ask a Court to disbelieve admissible evidence submitted by a party, but must offer evidence showing a dispute regarding the facts. *Maldonado v. Holdren*, 167 Wash. App. 1044 (2012) (party opposing summary judgment may not "merely recite the incantantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof.") Defendants failed to do so.

Defendants' objections regarding the business records attached to the Affidavit are also unpreserved, and moreover, without merit. Washington Civil Rule 56(a) allows a claimant to move for summary judgment with or without affidavits, and does not provide any restrictions regarding who signs any supporting affidavits. RCW 5.45.020 allows the submission of business records by a "custodian or other qualified

witness," and does not require the witness to state explicitly that he or she is a "custodian" – indeed, such testimony is likely a legal conclusion. Ms. Boutin's Affidavit explained that she was an Ocwen employee with access to records and that she had regular contact with the records in the performance of her job functions. (CP 346, ¶1.) She described how the records were kept and that it is the regular practice of Ocwen to keep the records. (*Id.*) The details provided were more than adequate to establish personal knowledge sufficient to introduce the business records. Finally, even if there was any merit to Defendants' arguments (there isn't), the introduction of these records with Ms. Boutin's Affidavit was immaterial given the records had already been submitted and accepted (without objection) in support of summary judgment with the Affidavit of Kristin (*See* CP 245- 304.) Consequently, Defendants were not prejudiced by the admission of the business records in the Boutin Affidavit, and their claim of error on this ground therefore has no merit. Wash. R. Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .")

E. Defendants' Objection to Belated Presentation of Judgment is Not a Basis for Reversal

Defendants complain that, after the Court granted summary judgment, the Trust's counsel did not submit a Motion for Judgment until

nearly three months later, in violation of Washington Civil Rule 54(e), which requires presentation within 15 days. Judgments entered in spite of a procedural impropriety are not invalid unless the complaining party can show prejudice resulting from the judgment. *See Burton v. Ascol*, 105 Wash.2d 344, 715 P.2d 110 (1986) (holding judgment entered without the notice required by CR 54(f)(2) is not invalid where the complaining party shows no resulting prejudice); *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 332 P.3d 1099 (2014) (holding failure to file motion to enlarge time within ten days after entry of judgment did not result in waiver of right to seek supplemental judgment for fees and costs, though belated). Here, Defendants were not prejudiced by the Court's wholly appropriate entry of judgment, and this Court should affirm.

VI. ENTITLEMENT TO ATTORNEY FEES

The Trust respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14. The Trust also requests an award of its reasonable attorney fees on appeal pursuant to RCW 4.84.330 and RAP 18.1. It is undisputed that the deed of trust and note provide for an award of attorney fees to the prevailing party who is required to litigate to enforce or interpret the provisions of the contract. Here, the Trust's foreclosure action and defense of this appeal constitute litigation to enforce the provisions of the contract. Attorney fees are

therefore appropriately awarded to the Trust pursuant to RCW 4.84.330. *Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wn. App. 1 (2012) (awarding attorney fees to prevailing party on appeal where contract allowed fees); *IBF, LLC v. Heuft*, 141 Wn. App. 624, 638-39 (2007) ("[a] contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.")

VII. CONCLUSION

For the reasons set forth above, the Trust requests that the Court affirm the Superior Court's grant of summary judgment.

Dated: June 1, 2016

HOUSER & ALLISON, APC

By _*/s Emilie K. Edling*_____
Emilie K. Edling, WSBA # 45042
Robert W. Norman, WSBA # 37094
Of Attorneys for Respondent Deutsche Bank Trust Company Americas as Indenture Trustee for the Registered Holders of Saxon Asset Securities Trust 2005-1, Mortgage Loan Asset Backed Notes, Series 2005-1

CERTIFICATE OF SERVICE

I certify that on the 1st day of June, 2016, I caused a true and correct copy of this AMENDED ANSWERING BRIEF OF RESPONDENT to be served on the following via first class mail, postage prepaid:

Dated: June 1, 2016

HOUSER & ALLISON, APC

By _/s Emilie K. Edling_____
Emilie K. Edling, WSBA # 45042
Robert W. Norman, WSBA # 37094
Of Attorneys for Respondent Deutsche Bank Trust Company Americas as Indenture Trustee for the Registered Holders of Saxon Asset Securities Trust 2005-1, Mortgage Loan Asset Backed Notes, Series 2005-1

HOUSER & ALLISON APC

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