Filed
Washington State
Court of Appeals
Division Two

October 27, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN O'NEILL, Plaintiff, v. CHWEN-JYE JU and FRANCES DU JU, and UNNAMED RESIDENTS, Defendants. FRANCES DU JU, Cross-Claimant pro se, v. CHWEN-JYE JU, Cross-Defendant, and FRANCES DU JU, Appellant, v. JPMORGAN CHASE BANK, N.A. and BISHOP, WHITE, MARSHALL & WEIBEL, P.S., Respondents.	No. 46333-4-II ORDER AMENDING OPINION

On September 1, 2015, this court issued its unpublished opinion in this matter. The court now amends the opinion. It is hereby

ORDERED that the opinion is amended as follows:

On page 8, line 11 and 12, we delete the following sentence that reads:

She mentioned the yelling man for the very first time during oral argument at the summary judgment hearing and offered no evidence in support of the claim.

and we insert the following language in its place:

She mentioned the yelling man for the very first time in her response to summary judgment, but she offered no evidence in support of the claim.

IT IS SO ORDERED.

DATED this ____ day of _____, 2015.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN O'NEILL,

Plaintiff,

v.

CHWEN-JYE JU and FRANCES DU JU, and UNNAMED RESIDENTS,

Defendants.

FRANCES DU JU,

Cross-Claimant pro se,

v.

CHWEN-JYE JU,

Cross-Defendant,

and

FRANCES DU JU,

Appellant,

v.

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

Respondents.

No. 46333-4-II

UNPUBLISHED OPINION

LEE, J. — Frances Du Ju defaulted on her home mortgage, held by JPMorgan Chase Bank (Chase). Bishop, Marshall & Weibel (Bishop), as successor trustee, instituted nonjudicial foreclosure proceedings on the property, ultimately selling it to John O'Neill. Ju refused to vacate

the property and O'Neill brought an unlawful detainer action. Ju brought an amended third party complaint against Chase and Bishop, making various claims that the sale should be set aside. In response to Ju's amended third party complaint, both Chase and Bishop moved for summary judgment. The superior court granted both motions for summary judgment, and granted Chase and Bishop's motion for partial final judgment under CR 54(b).[1]

Ju appeals the orders granting summary judgment and the order granting partial final judgment. Because Ju failed to present evidence of a genuine issue of material fact, we affirm the superior court's orders granting summary judgment to both Chase and Bishop and the superior court's entry of partial final judgment in favor of Chase and Bishop.

FACTS

Ju and her ex-husband owned a home in Vancouver, Washington ("the property"). Chase held the mortgage note, secured by a deed of trust, against the property. In July 2012, Ju defaulted on her mortgage.

In January 2013, Chase appointed Bishop as successor trustee of the deed of trust. Bishop's appointment as successor trustee was recorded at the Clark County Auditor's Office on February 5, 2013.

On February 14, Bishop, acting as successor trustee, sent Ju a Notice of Trustee's Sale (NOTS) and recorded the NOTS at the Clark County Recorder's Office. The NOTS notified Ju of the default and stated that unless Ju cured her default, the property would be sold to satisfy the obligation due to Chase at a trustee's sale on June 21, 2013. The NOTS stated that a purchaser of the property at the trustee's sale would be entitled to possession of the property on the 20th day following the sale. The NOTS identified Bishop as the successor trustee and provided its contact information.

[1] CR 54(b) controls entry of judgments on multiple claims.

On June 21, Bishop conducted the nonjudicial foreclosure sale. Chase made an opening bid in the amount of $95,798.49,[2] the amount of its secured note, as a credit offset bid. O'Neill was the successful bidder and purchased the property for $172,500. Bishop recorded and delivered title of the property to O'Neill. After satisfying Chase's debt, a surplus of $75,819.46 remained. On August 8, Bishop deposited the surplus funds with the Clark County Superior Court.

Following the trustee's sale, Ju refused to vacate the property. On July 22, 2013, O'Neill filed a complaint for unlawful detainer against Ju and her ex-husband. Ju filed an answer and a cross-claim against her ex-husband,[3] and a third party complaint against JPMorgan Chase & Co.[4]

In September, JPMorgan Chase & Co. moved for summary judgment, arguing that it was not involved in the foreclosure. The superior court granted the summary judgment motion and dismissed Ju's claims against JPMorgan Chase & Co. with prejudice.

In February 2014, Ju filed an amended third party complaint against Chase and Bishop. Her amended third party complaint acknowledged that she was in default on her mortgage payments and that she had received a Notice of Trustee's Sale (NOTS). She alleged that (1) the trustee's sale violated the Consumer Protection Act (CPA), chapter 19.28 RCW, because of an erroneous opening bid, (2) O'Neill, Chase, and Bishop failed to send written notice of the successful sale, (3) Bishop did not timely deposit the surplus funds and Chase did not provide her information or help her file a motion for disbursement of the funds, and (4) Bishop was not clearly identified as the successor trustee and she was unable to contact Charter Title Corporation, the

[2] Chase bid $95,798.49. Ultimately, Chase received $95,814.82. The $16.33 increase is attributed to the cost of conducting the sale and is of no consequence to the issues.

[3] Ju's ex-husband is not a party to this appeal, and the issues raised in Ju's cross-claim against her ex-husband are not at issue here.

[4] JPMorgan Chase & Co is the parent company of Chase.

original trustee. Ju requested that the sale be set aside and that she be entitled to sell the property without her ex-husband's signature.

Chase moved for summary judgment, arguing that Ju failed to present evidence to support her claims. Bishop also moved for summary judgment, arguing that Ju did not raise a triable issue of material fact as to whether Bishop met its statutory duty of good faith as trustee. The superior court granted both parties' motions for summary judgment.

Chase and Bishop then moved for entry of partial final judgment under CR 54(b). In response, Ju requested declaratory judgment to remove foreclosure records from her credit report and argued that the motion for partial final judgment was actually a summary judgment motion. The superior court granted the CR 54(b) motion, finding that partial final judgment was appropriate because the claims against Chase and Bishop had been resolved and there was no reason for delay. Ju appeals both orders granting summary judgment and the order for partial final judgment.

ANALYSIS

Ju appeals the superior court orders granting Chase's and Bishop's motions for summary judgment and the superior court's order granting partial final judgment and dismissal in favor of Chase and Bishop. Ju argues that summary judgment was improper because Chase and Bishop did not address her allegations that the trustee's sale was defective, the superior court should have allowed Ju to present an affidavit from her daughter, and the superior court judge was biased. Ju's arguments fail.[5]

[5] Ju argues that O'Neill violated RCW 61.24.060 and RCW 61.24.135. To the extent that Ju asserts claims against O'Neill, we do not address those claims. Ju did not assert a claim against O'Neill in her amended third party complaint and O'Neill is not a party to this appeal. Therefore, any claim against O'Neill is not properly before this court, and a claim that O'Neill failed to comply with applicable statutes is not properly asserted against Chase or Bishop.

A. SUMMARY JUDGMENT

1. Legal Standard

We review summary judgment rulings de novo. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). In reviewing an order for summary judgment, we perform the same inquiry as the superior court. *Lyons*, 181 Wn.2d at 783. "Summary judgment is appropriate only if the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Lyons*, 181 Wn.2d at 783.

On summary judgment, the moving party bears the initial burden of showing the absence of an issue of material fact. *Wash. Fed. Sav. & Loan Ass'n v. McNaughton*, 181 Wn. App. 281, 297, 325 P.3d 383 (2014). If the moving party meets this burden, the burden then shifts to the party with the burden of proof at trial to demonstrate the existence of an element essential to that party's case. *Id.* If the nonmoving party fails to demonstrate the existence of an essential element, then the court should grant summary judgment. *Id.* We interpret all of the facts, and inferences from those facts, in favor of the nonmoving party. *Lyons*, 181 Wn.2d at 783. We may affirm on any grounds established by the pleadings supported by the record. *Lane v. Skamania County*, 164 Wn. App. 490, 497, 265 P.3d 156 (2011).

2. Alleged Defects In Trustee's Sale

a. Appointment of successor trustee

Ju argues that the trustee's sale was defective because she was not provided notice of the prior trustee's, Charter Title Corporation, resignation or of Bishop's appointment as successor trustee. We disagree.

RCW 61.24.010(2) provides that a trustee is not required to resign from its trustee position; rather, a beneficiary can choose to replace a trustee with a successor trustee. However, the

appointment of a successor trustee must be recorded with the county clerk before the successor trustee is vested with powers of an original trustee. RCW 61.24.010(2).

Furthermore, if a trustee chooses to resign, RCW 61.24.010(2) requires the trustee to give written notice only to the beneficiary. Thus, even if the prior trustee was required to resign before a successor trustee is appointed, which it was not, Ju, as a borrower, would not have been entitled to notice under RCW 61.24.010.

Here, Chase, as beneficiary, appointed Bishop as the successor trustee, and Ju was notified that Bishop was the successor trustee when Bishop sent Ju the NOTS on February 14, 2013. The NOTS identified Bishop as the successor trustee and provided contact information for Bishop. Moreover, the appointment was recorded at the Clark County Auditor's Office on February 5, 2013. Upon recording the appointment of successor trustee, Bishop became vested with the powers of an original trustee, which included the power to initiate the nonjudicial foreclosure process. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012); RCW 61.24.010.

Ju fails to cite any authority that requires Bishop to do more than record its appointment as successor trustee with the county clerk. Because Ju failed to present authority supporting her argument that she was entitled to notice that the original trustee had resigned or that a successor trustee had been appointed, her claim fails.

b. Defect in notice of trustee's sale

Ju claims that Bishop violated the CPA by deceptively listing Charter Title Corporation as the trustee on the NOTS. We disagree.

RCW 61.24.040(1)(f) provides a form for a NOTS, which requires identifying the trustee in the property description. In conformance with the notice form provided in RCW 61.24.040(1)(f), the NOTS listed Charter Title Corporation as the trustee at the time of the sale in the original recorded deed of trust. The NOTS also listed Bishop as successor trustee. Ju has not

offered any authority or argument to support the claim that the NOTS was erroneous or violated the CPA. Accordingly, her claim fails. [6]

c. Irregularities at the trustee's sale

Ju argues that the trustee's sale is void under RCW 61.24.050(2)(a)(i) because she challenged the sale. We disagree.

RCW 61.24.050(2) provides:

> (a) Up to the eleventh day following the trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the trustee's sale and trustee's deed void for the following reasons:
>
> (i) *The trustee, beneficiary, or authorized agent for the beneficiary* assert that there was an error with the trustee foreclosure sale process including, but not limited to, an erroneous opening bid amount made by or on behalf of the foreclosing beneficiary at the trustee's sale.

(Emphasis added). Thus, to the extent Ju argues that her challenge to the trustee's sale should void the trustee's sale pursuant RCW 61.24.050(2)(a)(i), Ju's claim fails. RCW 61.24.050(2)(a)(i) does not provide for Ju, as a borrower, to declare the trustee's sale and deed void, or assert an error with the foreclosure sale process.

d. Collusion at the trustee's sale

Ju also argues that the trustee's sale violated the CPA and that a "mistakenly low opening bid price; and the erroneous, unfair or deceptive sale process resulted in or contributed to a grossly inadequate sale price." Br. of Appellant at 42. Ju's claim has no merit.

[6] To the extent that Ju claims that the superior court judge erred by not asking Bishop what evidence Bishop had in complying with RCW 61.24.040, her argument fails for lack of a legal or factual basis. Ju did not allege that Bishop's service of the NOTS was insufficient or that Bishop otherwise violated RCW 61.24.040 in her third party complaint. Accordingly, Bishop did not address RCW 61.24.040 in its motion for summary judgment. Thus, the superior court judge had no obligation to ask Bishop what evidence it submitted on an issue not raised on summary judgment.

RCW 61.24.135(1) states in part:

> (1) It is an unfair or deceptive act or practice under the consumer protection act, chapter 19.86 RCW, for any person, acting alone or in concert with others, to offer, or offer to accept or accept from another, any consideration of any type not to bid, or to reduce a bid, at a sale of property conducted pursuant to a power of sale in a deed of trust. The trustee may decline to complete a sale or deliver the trustee's deed and refund the purchase price, if it appears that the bidding has been collusive or defective, or that the sale might have been void.

Ju argues that a man yelling, "Wow! Wow! Wow! Stop! Stop!" demonstrates irregularities in the conduct of the Trustee's sale. Br. of Appellant at 16. But Ju fails to support her argument with evidence or authority. She mentioned the yelling man for the very first time during oral argument at the summary judgment hearing and offered no evidence in support of the claim. There is no evidence in the record to support, or even raise a genuine issue of material fact, that there was any irregularity that occurred in the conduct of the trustee's sale.

e. Evidence regarding collusion at trustee's sale

Ju claims the superior court violated ER 103[7], 601[8], and 901[9] by not allowing her "to ask her daughter to write an Affidavit," which Ju alleges would have supported her argument that irregularities occurred at the trustee's sale. Br. of Appellant at 36. Because Ju did not properly offer evidence, there was no evidence for the superior court to consider, and her claim that

[7] ER 103(a), (2) states: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and" when the ruling is excluding evidence, the "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

[8] ER 601 states: "Every person is competent to be a witness except as otherwise provided by statute or by court rule."

[9] ER 901(b)(1) states: "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

(1) *Testimony of Witness with Knowledge*. Testimony that a matter is what it is claimed to be."

"[p]ursuant to ER 103(a)(2), ER 601, and ER 901(b)(1), [the superior court] should have allowed [Ju] to tell her daughter to write an Affidavit" fails. Br. of Appellant at 37.

We generally review evidentiary rulings for an abuse of discretion, but we review evidentiary rulings made in conjunction with summary judgment de novo. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 662-63, 958 P.2d 301 (1998) (holding that an appellate court reviews all evidence presented to the trial court, conducts the same inquiry, and reaches its own conclusion about admissibility of evidence)).

In opposition to Chase's and Bishop's summary judgment motions, Ju claimed that both Chase and Bishop violated RCW 61.24.135, the CPA, during the trustee's sale.[10] Ju did not argue any specific facts or violations—her argument was simply that the sale was unfair. At the summary judgment hearing, the superior court asked Ju whether she had offered any evidence supporting her contention that misconduct occurred at the trustee's sale. Ju responded that she had not offered any evidence to support her claim, but that she could ask her daughter, who Ju said was present at the sale, to write an affidavit. The superior court responded that the evidence was not before the court and that Ju had "ample opportunity" to offer sufficient evidence and that she made "no formal request for additional time. And the factual record as presented, simply cannot substantiate [the existence of a genuine issue of material fact]." Verbatim Report of Proceedings (April 4, 2014) at 30-31.

CR 56(c) provides that an adverse party may file documentation "not later than 11 calendar days before the hearing." Ju provides no basis upon which the superior court was required to allow Ju additional time to get an affidavit to support an argument she raised for the first time at the

[10] RCW 61.24.135, the "Consumer protection act—Unfair or deceptive acts or practices," prohibits collusive and defective bidding at a trustee sale.

summary judgment hearing. Accordingly, her claim fails and the superior court did not err by not considering evidence that Ju did not offer.[11]

f. Sale price

Ju further argues that the sale price was inadequate. We disagree.

Generally, a foreclosure sale price is inadequate when it is less than 20 percent of the fair market value. *Albice v. Premier Mortg. Services of Wash, Inc.*, 157 Wn. App. 912, 932-33, 239 P.3d 1148 (2010), *aff'd*, 174 Wn.2d 560, 276 P.3d 1217 (2012). Here, Clark County assessed the value of the property at $239,543 for purposes of 2013 taxes. A real estate broker assessed the value of the property at $258,811 in 2013. Ju agrees that the property sold at 74.1 percent of the fair market value. Ju has presented no evidence or argument to support her claim that the sales price was inadequate. Therefore, her claim that the sale price was inadequate fails.

g. Surplus funds

Ju further claims that Bishop failed to comply with some duty to timely deposit the surplus funds. Ju presents no factual or legal support for her contention that Bishop did not properly deposit the funds or mail notice.[12] Instead, Ju relies on RCW 61.24.080, which states in part:

> Disposition of proceeds of sale—Notices—Surplus funds.
> . . .
>
> (3) The surplus, if any, less the clerk's filing fee, shall be deposited, together with written notice of the amount of the surplus, a copy of the notice of trustee's sale, and an affidavit of mailing as provided in this subsection, with the clerk of the superior court of the county in which the sale took place. The trustee shall mail copies of the notice of the surplus, the notice of trustee's sale, and the affidavit of mailing to each party to whom the notice of trustee's sale was sent pursuant to RCW 61.24.040(1). The clerk shall index such funds under the name of the grantor as set

[11] To the extent that Ju's argument could be construed as arguing that the trial court should have granted a continuance for her to collect evidence, she has not offered authority or argument to support her claim that the trial court erred by not granting a continuance that Ju did not request.

[12] Ju states that she lives far away from her P.O. Box and that she was not able to retrieve her notice of the deposit until September 2013. She makes no cognizable argument that this statement is relevant to Chase and Bishop's legal duties.

> out in the recorded notice. Upon compliance with this subsection, the trustee shall be discharged from all further responsibilities for the surplus.

The relevant portion of RCW 61.24.080 does not provide a time frame in which the trustee must deposit surplus funds. Here, the trustee's sale occurred on June 21, 2013. CP at 36, 102. After settling expenses, the surplus funds were deposited with the Clark County Superior Court on August 8. Under the facts of this case, Ju's claim that Bishop failed to timely deposit the surplus funds fail as a matter of law.

B. CR 54(B) AND DECLARATORY JUDGMENT

Ju contends that the trial court erred by granting Chase's and Bishop's motions for partial final judgment. Specifically, Ju argues that "Chase and Bishop's motions for partial final judgment should have been raised as a Motion for Summary Judgment" and is a "dispositive [m]otion in disguise." Br. of Appellant at 5, 47. Ju also contends that her request for declaratory judgment was ignored. We disagree.

We review a superior court's entry of final judgment under CR 54(b) for abuse of discretion. *Hulbert v. Port of Everett*, 159 Wn. App. 389, 404, 245 P.3d 779, *review denied*, 171 Wn.2d 1024 (2011). CR 54(b) controls entry of judgments on multiple claims and provides that the superior court must meet four elements: "'(1) more than one claim for relief or more than one party against whom relief is sought; (2) an express determination that there is no just reason for delay; (3) written findings supporting the determination that there is no just reason for delay; and (4) an express direction for entry of the judgment.'" *Id.* at 405-06 (quoting *Fluor Enters, Inc. v. Walter Constr., Ltd.*, 141 Wn. App. 761, 766-67, 172 P.3d 368 (2007)).

Ju cites no authority for and makes no argument to support her contention that any of her claims against Chase and Bishop survived summary judgment, or that the trial court otherwise improperly granted Chase and Bishop's motion for partial judgment under CR 54(b). And "[w]here no authorities are cited in support of a proposition, the court is not required to search out

authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); *see* RAP 10.3(a)(6). Accordingly, Ju's argument that the superior court erred by granting Chase and Bishop's CR 54(b) motion fails.

C. JUDICIAL BIAS

Ju claims that the superior court judge should have recused himself because he was biased against her. As support for her claim, she states that the superior court judge advised her to seek legal counsel and ruled against her, and that the superior court judge may have been prejudiced against her race and national origin. Ju's claims fail for lack of factual or legal basis.

As a threshold matter, Ju raises the issue of judicial bias for the first time on appeal. Ju contends that her due process rights were affected by the superior court judge's bias. Presumably, Ju is arguing that this impairment of her constitutional rights triggers RAP 2.5, allowing her to raise her claim of judicial bias for the first time on appeal. However, "even constitutional rights can be waived by failing to utilize the machinery available for asserting them." *Henriksen v. Lyons*, 33 Wn. App. 123, 128, 652 P.2d 18 (1982), *review denied*, 99 Wn.2d 1011 (1983). And pro se litigants are expected to comply with procedural rules. *State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn. App. 299, 310, 57 P.3d 300 (2002). Because Ju failed to raise these issues below and did not utilize the available procedures by seeking the superior court judge's recusal, she has waived the issue. *See Henriksen*, 33 Wn. App. at 128.

A "trial judge is fully informed and is presumed to perform his or her functions regularly and properly without bias or prejudice." *Tatham v. Rogers*, 170 Wn. App. 76, 87, 283 P.3d 583 (2012). A party alleging judicial bias must present evidence of actual or potential bias. *In re Guardianship of Wells*, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009). Without evidence of actual or potential bias, a claim of judicial bias is without merit. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992).

Ju fails to point to any evidence that the superior court judge was biased against her. And, nothing in the record supports Ju's claims that the superior court judge had a "preference of dealing with attorneys, instead of [the] merit of the case," or that the superior court judge discriminated against Ju based on her race and national origin. Br. of Appellant at 16, 39. In her opening brief, Ju claims that while she was filing an ex parte motion, the superior court judge "unusually walked past her and looked at her at least twice." Br. of Appellant at 5, 31. Ju fails to demonstrate how this conduct amounted to or reflected judicial bias towards her. Ju also alludes to the superior court judge being biased in favor of Chase and Bishop. However, other than citing to the superior court judge's rulings against her, Ju presents no evidence to support her inference of bias. Ju's dissatisfaction with the outcome of the summary judgment hearing does not amount to judicial bias against her, and without evidence of actual or potential bias, her claim fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.