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THE BANK OF NEW YORK MELLON as TRUSTEE FOR THE CERTIFICATE HOLDERS CWMBS SERIES 2006-HYBS; Plaintiff and Appellee. vs. Paula a. Mitchell; Defendant and Appellant. AMERICA FIRST CREDIT UNION; and PEPPERWOOD HOMEOWNERS ASSOCIATION; Defendants (not participating in appeal). : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE BANK OF NEW YORK MELLON as TRUSTEE FOR THE CERTIFICATE HOLDERS CWMBS SERIES 2006-HYB5; Plaintiff and Appellee. vs. Paula A. Mitchell; Defendant and Appellant. AMERICA FIRST CREDIT UNION; and PEPPERWOOD HOMEOWNERS ASSOCIATION; Defendants (not participating in appeal)	Appellate Case No. 20180141 District Court Case No. 160902472

APPELLANT'S REPLY BRIEF

Appeal from the Orders of
the Third Judicial District
Court
Issued by the Honorable Todd Shaughnessy

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LACK OF APPELLATE JURISDICTION

As a preliminary matter, this Court must address the fact that it lacks appellate jurisdiction to hear this appeal because there is in fact no final judgment yet.

As Mitchell expressly and openly declared in her Notice of Appeal, she was only bringing this appeal because BNYM and the trial court insisted there is a final judgment:

> While Mitchell is filing this Notice of Appeal in order to preserve her rights to appeal because the trial court is claiming that it has entered a final appealable judgment on November 27, 2017, **the fact of the matter is that the purported "Final Judgment" entered *sua sponte* on November 27th is not a final judgment because it does not resolve all claims against all parties.** It expressly reserves therein for future adjudication the amount of attorney fees it will award based on its preliminary ruling as part of the summary judgment that Plaintiff is entitled to attorney fees. **It also fails to resolve several other claims for damages by Plaintiff, which claims remain open for future adjudication**. And so forth.

REC.1292.

BNYM's Brief does not prove there is actually a final judgment in response to Mitchell's argument that there is no final judgment despite the entry of a purported "Final Judgment" (REC.1027-1031) by the trial court *sua sponte* after granting a motion for partial summary judgment.

Instead, BNYM mistakenly argues that Mitchell is asserting that the "Final Judgment" is not final because post-judgment costs "such as the sheriff's costs attendant to the sheriff's sale which had not yet occurred at the time the Final Judgment was entered" are not included in the "Final Judgment." Appellee's Brief Pg.46.

In fact, BNYM goes so far as to assert this argument is "illogical."

And Mitchell agrees. That would be illogical. But that is not Mitchell's argument.

BNYM totally missed that Mitchell is asserting, quite logically, that there are pre-judgment damages which were awarded in concept in the purported "Final Judgment." But the determination of the amounts of those damages was preserved for future determination since those amounts were not included in the "Final Judgment." And since the determination of those amounts still has not happened, that issue is not resolved. Which means the claim for those damages is not resolved yet.

The purported "Final Judgment" expressly provided in paragraph 9:

> 9. As of **May 31, 2017**, the amount due and owing to Plaintiff under the Note, Rider, and Trust Deed is $1,343,034.81, **plus additional interest, attorneys' fees, costs, taxes, and other fees which continue to accrue after May 31, 2017**.

REC.1029

There is an obvious "pre-judgment" gap in damages from May 31, 2017 to November 27, 2017 (when the "Final Judgment" was entered.)

To be perfectly clear: the issue/controversy which still remains unresolved by the purported "Final Judgment" are the amount of "interest, attorneys' fees, costs, taxes, and other fees which continue[d] to accrue after May 31, 2017" up to the November 27, 2017 "Final Judgment."

Since the amount of the specified damages, from May 31, 2017 to November 27, 2017, have not been decided yet, a controversy between the parties remained open when the purported "Final Judgment" was entered *sua sponte*, namely: How much does Mrs.

Mitchell owe to BNYM for "interest, attorneys' fees, costs, taxes, and other fees" from May 31, 2017 to November 27, 2017?

Since this controversy as to damages owed remains undecided, there is no final judgment yet.

Which means this Court lacks any appellate jurisdiction to hear this appeal, and it must immediately dismiss the appeal, as the Supreme Court recently reaffirmed is "strictly" required:

> As a general rule, an appellate court **does not have jurisdiction to consider** an appeal unless the appeal is taken from a final order or judgment that **"end[s] the controversy between the litigants."** *Anderson v. Wilshire Invs., L.L.C.*, 2005 UT 59, ¶ 9, 123 P.3d 393 (citation omitted); see also *Kennecott Corp. v. Utah State Tax Comm'n*, 814 P.2d 1099, 1101 (Utah 1991) ("The historical rule is that except in a narrow category of situations, no order of a trial court is appealable until a final judgment is entered **on all issues**." (citation omitted)); *Williams v. State*, 716 P.2d 806, 807 (Utah 1986) ("Under traditional principles of appellate review, . . . an appeal may be taken only from a final judgment **concluding all of the issues in the case**." (citation omitted)). This tenet is often referred to as "the final judgment rule."
>
> …. Moreover, **"[s]trict adherence** to the final judgment rule . . . maintains the proper relationship between this Court and the [district] courts." *Powell v. Cannon*, 2008 UT 19, ¶ 12, 179 P.3d 799 (citation omitted) (internal quotation marks omitted).

Copper Hills Custom Homes, LLC v. Countrywide Bank, FSB, 2018 UT 42, ¶¶10-11.

This Court has no alternative but to dismiss, regardless of the consequences.[1]

[1] BNYM cannot be heard to complain about dismissal. It was their attorneys, who drafted the post May 31, 2017 reservation in the proposed Order ¶8, REC.1009. They therefore knew all along that they had preserved that issue of these amounts for future determination. And yet they have apparently encouraged their client to proceed with an unlawful sale before there was a final "judgment." And they have frivolously defended against this appeal when this Court lacks any appellate jurisdiction in direct contravention of "Applicable Law." They were obligated to concede the Court's lack of appellate jurisdiction, but failed to do so, electing instead to blatantly mischaracterize Mrs. Mitchell's argument so as to needlessly force this appeal forward.

> Even though we are cognizant of all of these consequences, **we cannot fabricate the power to hear a case simply because it seems more palatable than acknowledging that we lack jurisdiction**. As we have stated in the past, "[t]he lost time and effort occasioned by the briefing and oral argument in this case **is a small price to pay for insisting that the parties comply with the rules of procedure** so that the proper relationship between this Court and the trial courts may be maintained." Accordingly, **as is incumbent upon us when we find that we lack the jurisdiction to hear a case, we dismiss this appeal**.

DFI Props. v. GR 2 Enters, 2010 UT 61, ¶23.

Since there is no final judgment resolving the amount of damages awarded between May 31st and November 27th, this Court lacks appellate jurisdiction and must summarily dismiss this appeal so that the trial court can finish doing its job in the first instance.[2]

I. The trial court erred in holding that BNYM has standing to bring this foreclosure action.

A. Mitchell was not barred from challenging BNYM's lack of standing.

BNYM had the burden to prove all of the elements of its standing to appear as the plaintiff in this case. "Hillcrest, as the party invoking jurisdiction, bears the burden of establishing the elements of standing." *Hillcrest Inv. Co., LLC v. Utah Dep't of Transp*., 2012 UT App 256, ¶ 12. It failed to meet that burden.

In order to prove it has a "legally protectible interest," BNYM must prove it in fact owns the debt secured by the Trust Deed, and therefore is entitled to receive the proceeds

[2] The fallout from the dismissal as to the ramifications of the trial court proceeding to conduct a judicial foreclosure before there was a final "judgment" will have to be dealt with in the first instance by the trial court, which is where the fallout should lie since it was the trial court who adamantly refused to accept that its *sua sponte* "Final Judgment" was not a final "judgment" at all, but merely an interlocutory order.

of any foreclosure of the Trustee's Lien, since that is the only "legally protectible interest" at issue in this case. But BNYM refused/refuses to do so.[3]

Rather, BNYM made the strategic decision to argue that Mitchell was estopped from challenging its standing by falsely asserting that "Mitchell argues that BNYM is impermissibly attempting to assert a claim of some unknown third party. Id. However, in prior litigation, Mitchell already raised these arguments and lost." REC.115

BNYM argued that the courts in Mitchell I determined that BNYM has standing to bring a judicial foreclosure as the successor to MERS as the nominee for the actual beneficiary. See BNYM Opposition to Motion to Dismiss REC.114-118. And the trial court accepted BNYM's issue preclusion argument, denying the Motion to Dismiss solely on the mistaken assumption the Court of Appeals in Mitchell I held that MERS and BNYM (as nominees) had authority to foreclose – even judicially. REC.422-423.[4]

BNYM fails to fully disclose to this Court the actual issue in Mitchell I, which the Court of Appeals itself identified as whether MERS and BNYM had the power to appoint ReconTrust to conduct a non-judicial foreclosure.

> The Mitchells raised claims generally based on a theory that MERS, which was referred to as the nominee of the lender and the beneficiary under the terms of the

[3] The fact BNYM continues to refuse to prove it actually owns the Mitchell Debt, and is therefore the statutory beneficiary as a successor Lender should be a giant red flag for the Court. This should be very easy to prove, if it is true.

[4] The trial court ruled:

> Having satisfied the elements of collateral estoppel, Plaintiff has demonstrated that it has standing to bring this action under Utah Code section 57-1-23 because it has the right to foreclose and sell the property through the trust deed, irrespective of whether it meets the statutory definition of "beneficiary." Accordingly, Defendant's motion to dismiss is denied.

REC.423

> trust deed, **lacked authority to appoint BNYM as the successor beneficiary** and that **BNYM thus lacked authority to appoint ReconTrust as the successor trustee**.
>
> …
>
> The Mitchells argue that MERS and its assignee BNYM **lacked the authority to appoint ReconTrust as the successor trustee** for the purpose of foreclosing on the property. In support, they contend that "[o]nly a statutorily defined 'Beneficiary' **may initiate the non-judicial foreclosure** of the trust deed." The Mitchells further contend that MERS did not meet the statutory definition of a "beneficiary" and that BNYM, as MERS's assignee, therefore **could not validly appoint ReconTrust as successor trustee**. Bank Defendants counter that MERS and its assignee had the authority to foreclose **and appoint a successor trustee** under the terms of the trust deed itself. We agree with Bank Defendants.

Mitchell v ReconTrust, 2016 UT App 88, ¶19.

Accordingly, the language in Mitchell I opinion relied upon by BNYM and the trial court only goes to MERS and BNYM's contractual authority to initiate non-judicial foreclosure by appointing a successor trustee.

Nowhere in the Court of Appeals opinion does it address whether BNYM has standing to bring a judicial foreclosure in this case. In fact, the word "standing" never even appears in the Court of Appeals opinion, nor does the phrase "judicial foreclosure." It was never a topic of discussion.

Whether or not MERS/BNYM as "nominees" on behalf of the true beneficiary had the authority to appoint a successor trustee in order to pursue a non-judicial foreclosure is obviously not the same issue as to whether BNYM as a purported successor nominee for the true owners of the Mitchell Debt has standing to bring a judicial foreclosure – under the laws governing standing.

That issue simply has never been decided in Mitchell I.

The power to appoint a successor trustee issue in Mitchell I is not identical to the standing to bring a lawsuit issue in this case.

Therefore, the trial court erred in denying the Motion to Dismiss for lack of judicial standing based on issue preclusion. Its ruling must therefore be reversed.

B. Whether BNYM's complaint sufficiently alleged standing is immaterial since standing was not in fact proven as part of BNYM's claim.

BNYM next argues it does not matter if the trial court got the issue preclusion ruling wrong, it did not error in denying the Motion to Dismiss "because BNYM alleged standing sufficient to withstand a Rule 12(b)(1) challenge."

As a preliminary matter, the trial court never found that standing was sufficiently alleged, and this Court cannot do so for the first time on appeal because standing is not apparent on the record.

Second of all, BNYM fails to understand that once its standing was challenged, it had the affirmative burden to "prove" the elements of standing at trial, not to simply allege them.

As the Supreme Court has explained, while a plaintiff may escape a motion to dismiss based on allegations, it must in the final stage still prove the elements of standing if they are disputed.

> The party invoking . . . jurisdiction **bears the burden of establishing these elements [i.e., the elements of standing]**. Since they are **not mere pleading requirements** but rather **an indispensable part of the plaintiff's case**, each

> element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. **At the pleading stage**, general factual **allegations** of injury resulting from the defendant's conduct **may suffice**, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. …. And at the final stage, those facts (if controverted) **must be supported adequately by the evidence adduced at trial**.

Brown v. Div. of Water Rights, 2010 UT 14, ¶ 14.

Consequently, while simple allegations may defeat a motion to dismiss, (which did not happen here since the trial court never reached that issue), at the final stage, the elements of standing had to be supported by actual evidence of standing adduced at trial. And that clearly did not happen.

BNYM nevertheless asserts that it adequately alleged standing because it was the successor to MERS rights as a nominee, and therefore it "is not required to allege and prove actual ownership of the debt in order to have standing to foreclose, as it **inherited** those same explicit contractual rights **independent of any rights afforded a 'statutory beneficiary.'"** Pg.21. [5]

Of course any contractual right to act as an agent/nominee for the real owners of the Mitchell Debt do not include standing to bring a lawsuit since standing is not a contractual issue. Standing is a juridicial issue. And the governing law on standing expressly limits access to the courts to only those real parties in interest who have "a legally protectible interest." Parties cannot contract around that juridicial limitation.

[5] BNYM cites cases addressing non-judicial foreclosures, none of which address the legal standards for standing to bring a lawsuit. Even then all of the case cited are legally defective since none of them actually address UCA 57-1-22(2)(d)'s explicit requirement that the statutorily defined "beneficiary" must execute and acknowledge any substitution of trustee – with no provision that a "nominee" may do so for the beneficiary.

Since a mere agent/nominee does not have any "legally protectible interest" of its own in a judicial foreclosure action, but rather would be seeking to assert the "legally protectible interest" of another, i.e., the true owners of the Mitchell Debt, an agent/nominee does not have standing to bring a judicial foreclosure. Therefore, the "MERS/BNYM nominee" argument fails as a matter of law.

BNYM next argues: "The endorsement on the Note (R.33) and the Assignment of Deed of Trust (R.35-36) grant BNYM an interest in the Note and Deed of Trust," including the authority to foreclose."

This argument has numerous legal and evidentiary defects.

BNYM fails to address the challenge that MERS could not make an assignment of rights it did not have. No evidence has ever been introduced to prove that MERS in fact had "beneficial interest under that certain deed of trust … executed by Paula Mitchell" to assign to BNYM." Therefore this argument fails for lack of evidence.

It also fails as a matter of law. UCA 57-1-35 expressly provides "**The transfer of any debt** secured by a trust deed **shall operate** as **a transfer of the security** therefor."

Therefore, as a matter of law, a beneficial interest in a trust deed could not be transferred by an "assignment of trust deed" separately from a transfer of the debt itself. Accordingly, the purported "assignment of trust deed" is a complete nullity as a matter of law.

While BNYM alleged that the Note had been "endorsed" to it, that is not true. That would require a "special endorsement." UCA 70A-3-205(1). The purported endorsement on the Note is in blank. It does not identify BNYM. Endorsement in blank means the instrument becomes payable to bearer. UCA 70A-3-205(2). There is no allegation and no evidence introduced to prove BNYM was the bearer, or even that it had possession of the Note. So BNYM's own theory fails.

But its endorsement theory also fails as a matter of law since possession of a note may be transferred for various purposes unrelated to ownership of the debt it evidences, such as collection, safe keeping, presenting it in court as evidence, etc. In such cases the owner of the debt remains the party ultimately entitled to receive any payment of the debt, even though the note is not in its possession. It is therefore possible a person in possession of a note endorsed in blank still does not own the debt,[6] and therefore does not have any security interest to foreclose. Once again, UCA 57-1-35 is determinative – because the security interest automatically transfers to the owner upon transfer of the debt itself, not upon transfer of possession of the note, which is merely evidence of the debt, a party claiming standing must prove ownership of the Debt itself in order to prove its "legally protectible interest."

Since there has never been any allegation, or any evidence, that BNYM actually owns the Mitchell Debt, including evidence as to how it actually came to own it, BNYM

[6] See 70A-3-301 (referring to "nonholder in possession" and stating "A person may be a person entitled to enforce the instrument even though he is not the owner of the instrument")

has failed to allege the facts necessary to prove standing, and has in fact failed to prove standing.

In any event, BNYM's "sufficient allegation" argument fails since BNYM made the tactical decision to rely on issue preclusion rather than actually prove standing – as was its affirmative burden. It thereby failed to meet its burden to prove part of its prima facie claim. See *Brown supra*.

Since BNYM never proved it has standing to bring a judicial foreclosure action on the Mitchell Debt, the trial court's subject matter jurisdiction over the judicial foreclosure was never fully invoked. Consequently, the purported "Final Judgment" and all other actions taken by the trial court must be vacated as void, since when subject matter jurisdiction has not been properly invoked, the court's "subsequent proceedings are palpably null and void." *Bott v. Bott*, 437 P.2d 682, 685 (Utah 1968).

II. BNYM has waived its judicial foreclosure claim.

Ironically, BNYM complains that there are two cases: *Mitchell I* and *Mitchell II*, when the only reason there are two cases is because BNYM failed to comply with Rule 13(a).

A. This Court may not overturn the longstanding precedent regarding Rule 13(a).

BNYM goes to great lengths to make a policy argument as to why Rule 13(a) should be amended. But that is all it is. Policy arguments. This Court obviously cannot rewrite the Rule to create an exception which does not exist in the Rule or in long established case law.

Fatal to BNYM's attempt to have this Court rewrite the Rule is the fact that in order to do so this Court would have to disregard the precedent recited by Mitchell as to the Supreme Court's interpretation of the Rule to include all available counterclaims without exception.

BNYM totally ignore the "policy" holding in the *Nu-Med USA* case that "the purpose of Rule 13(a) is to ensure that **all relevant claims arising out of a given transaction** are **litigated in the same action**." 2008 UT 50, ¶15 (quoting *Raile Family Trust v. Promax Dev. Corp*., 2001 UT 40, ¶12). The Supreme Court even noted that other jurisdictions view their compulsory counterclaim provisions similarly and explained the judicial economy policy decision it has made:

> **Other jurisdictions view their compulsory counterclaim rules similarly**. E.g., *Linn*, 14 S.W.3d at 504 ("The purpose for [Arkansas' compulsory counterclaim rule] is to require parties to **present all existing claims simultaneously** to the court **or be forever barred**, thus **preventing a multiplicity of suits arising from one set of circumstances**."); *Grynberg*, 148 P.3d at 449. Simultaneous litigation of claims and counterclaims serves judicial economy, because **litigating claims arising out of the same transaction separately duplicates party efforts and wastes judicial resources.**

Id at ¶ 15.

While the *Raile* Opinion similarly made the "fairness" policy decision that

> if the Railes had the authority to pursue any affirmative defenses … **they likewise had the obligation under rule 13(a) to raise any available counterclaims arising out of the same transaction.** To hold otherwise **would eviscerate the purposes of rule 13(a)** and allow a party to gain full advantage of the affirmative defenses afforded a genuine party in interest, while avoiding any obligation to raise counterclaims in the same action.

Raile Family Tr. at ¶12.

The Court may take judicial notice that BNYM and its co-defendants brought 10 affirmative defenses in Mitchell I. see Answer filed March 20, 2012. Therefore, the *Raile* precedent dictates it was obligated to file this judicial foreclosure action as a counterclaim or it was barred forever.

Stare decisis dictates: "a counterclaim not presented to the court on a matter involving the same transaction **is forever barred**." *Todaro v. Gardener*, 285 P.2d 839, 842 (Utah 1955)(and cases cited therein). And so on and so on through the cases cited by Mitchell and ignored by BNYM.

The precedent regarding Rule 13(a) is long, broad, and absolute.

And BNYM totally ignores it.

It does not even mention it, let alone address it, or try to meet its substantial burden to overturn it.

> Stare decisis is "a cornerstone of Anglo-American jurisprudence." *State v. Guard*, 2015 UT 96, ¶ 33, 371 P.3d 1 (citation omitted). Therefore, "[t]hose asking us to overturn prior precedent have **a substantial burden of persuasion**." State v. Menzies, 889 P.2d 393, 398 (Utah 1994). In order to meet this burden, **"we must be 'clearly convinced that' prior caselaw 'was originally erroneous or is no longer sound because of changing conditions**.'" *Scott v. Utah Cnty*., 2015 UT 64, ¶ 23, 356 P.3d 1172 (citation omitted).

Bank of Am. v. Adamson, 2017 UT 2, ¶9.

Obviously BNYM has not met its substantial burden to overturn the absolute precedent when it doesn't even try. Its approach is identical to Bank of America's unsuccessful attempt:

> Bank of America **does not mention this standard**, nor does it offer **any arguments to explain why our decision was either originally erroneous or no longer sound**. Bank of America asserts that "Sundquist was wrongly decided and should be overruled." But the **only authority it cites** as "significant legal developments" in support of its assertion is an unpublished Tenth Circuit opinion and two amici curiae briefs from other cases.
>
> …
>
> **Under this standard**, we hold that Bank of America **has failed to meet its burden of persuading us** that we should overrule Sundquist.

Bank of Am. v. Adamson, 2017 UT 2, ¶¶10-13.

BNYM did not mention the standard to overturn the years of precedent that all counterclaims arising from the same transaction are compulsory and must be presented or they are forever barred. Instead it similarly only presented cases from other courts as to what it wants the rule to be, precedent be damned.

Furthermore, it is perfectly clear under the doctrine of vertical stare decisis that this Court of Appeals cannot reverse the years of Supreme Court precedent as to the absolute application of Rule 13(a) to all possible counterclaims arising out of the same transaction – without exception.

> Vertical stare decisis, the first of these two facets, compels a court to follow **strictly** the **decisions rendered by a higher court**. … Under this mandate, lower courts are obliged to follow the holding of a higher court, as well as any "judicial dicta" that may be announced by the higher court.

State v. Menzies, 889 P.2d 393, 399 n.3 (Utah 1994). See also *Ortega v. Ridgewood Estates*, 2016 UT App 131, ¶ 30 ("Defendants contend that this should not be the rule" – but the rule could not be changed by Court of Appeals because it was "bound by vertical stare decisis to **"follow strictly"** the decisions rendered by the Utah Supreme Court").

And of course the trial court was obligated by vertical stare decisis to "follow strictly" the previous decisions rendered by the Supreme Court regarding Rule 13(a). The trial court erred in not doing so.

Consequently, this Court is obligated by the precedent recited to hold that BNYM waived its judicial foreclosure action by not bringing it as a counterclaim in Mitchell I. There is no dispute that it arose from the same transaction, the alleged default, and that it was available at the time the answer was filed.

B. BNYM's other arguments are meritless.

1. A non-judicial foreclosure sale is not a "pending action" as referred to in Rule 13(a)).

BNYM makes the frivolous argument that a non-judicial foreclosure proceeding is a "pending action" under Rule 13(a)(2)(A) for no other reason than because it simply because it calls it an "action."

When one reads the case law regarding Rule 13(a), as well as the context of the word "action" in the Rule, it is clear that "action" refers to a judicial action, since the goal is to consolidate all judicial actions arising from the transaction into the same case.

Furthermore, BNYM voluntarily halted its non-judicial foreclosure efforts in 2011 when it cancelled the scheduled foreclosure sale – before it filed its answer in 2012.

2. Mitchell is not arguing the outdated "election of remedies" doctrine.

It what can only be considered a blatant attempt to misrepresent Mitchell's argument, BNYM accuses Mitchell of "champion[ing] a view of the 'election of

remedies' doctrine that has long been outdated." Pg 24. It does so by taking a snippet of her brief out of context and changing it to say something she absolutely has not argued.

BNYM states on page 24: "Ms. Mitchell asserts that, having already commenced a non-judicial foreclosure action when the 2011 Mitchell litigation was filed, BNYM 'made its election of remedies and waived any right to bring a judicial foreclosure.'"

Mitchell absolutely made no such argument. What Mrs. Mitchell in fact argued was:

> BNYM **filed an answer** on March 20, **2012**, but it did not assert any counterclaims. In particular, **it did not assert a judicial foreclosure action as a counterclaim**, although it was necessarily asserting the right to pursue a non-judicial foreclosure.
>
> **It thereby** made its election of remedies and waived any right to bring a judicial foreclosure.

Pg.21.

Mitchell was obviously not asserting that the attempted non-judicial foreclosure which was in progress when the lawsuit was filed in 2011 was a binding "election of remedies" by virtue of her filing. She is arguing that when BNYM failed to file a counterclaim in 2012 that it voluntarily made its own free will choice to not pursue a judicial foreclosure, and that that free will choice was binding.

That voluntary choice by BNYM when it elected to not seek judicial foreclosure when it was obligated to by Rule 13(a) – if it wanted to – is totally unrelated to the outdated "election of remedies" doctrine discussed in the *Helf v Chevron* case where a plaintiff long ago was forced to elect between two inconsistent theories when he filed his

complaint. For example, he would have to elect between a breach of contract claim, which requires a contract, and an unjust enrichment claim, which can only exist if there is no contract, and then he could only pursue the theory elected through the litigation. Now a plaintiff may freely include both inconsistent claims in a complaint and then see where the case leads, and only make his election of his theories at the end of the case since the Court still cannot award inconsistent judgments. That doctrine obviously has no role here.

It was BNYM's decision to not file a counterclaim when it was obligated to do so which resulted in its waiver. Not the outdated election of remedies doctrine.

Mitchell recognizes that if BNYM has any rights under the Trust Deed as the owner of the Mitchell Debt, then BNYM had the option between a judicial and a non-judicial foreclosure – right up until Rule 13(a) required it to make a decision as to whether it would pursue a judicial foreclosure or waive it forever, and it chose to waive that option forever by not filing the counterclaim.

BNYM summarily asserts without any legal support that it has an unlimited option between the two remedies that cannot be infringed upon, but that is contrary to the contractual limitation set forth in the Trust Deed. Assuming that BNYM in fact has any rights under the Trust Deed as the owner of Mitchell's Debt, it was nevertheless bound to comply with the "Applicable Law." "If the default is not cured on or before the time specified in the notice, **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 any other remedies permitted by Applicable Law**." Paragraph 22, REC.23.

Since Applicable Law in Utah includes the remedy of a judicial foreclosure pursued in compliance with the applicable judicial rules, including Rule 13(a)'s requirement to bring compulsory counterclaims related to the same transaction if a case is filed or the right to a judicial foreclosure is waived, BNYM's claimed rights under the Trust Deed to pursue a judicial foreclosure action was limited by the Trust Deed itself. So when BNYM made its choice to not file a counterclaim, that was the end of its option, as per the Trust Deed.

3. BNYM slept on its claimed rights until it was too late.

One final note. BNYM tries to blame Mitchell I for its failure to pursue a non-judicial foreclosure before the statute of limitations was about to run out. But this was BNYM's own fault since it was not in any way enjoined from pursuing a non-judicial foreclosure in Mitchell I, it simply elected to not do so. It even had approximately two years after the trial court declared its work finished in Mitchell I to pursue a non-judicial foreclosure sale, and it did not do so. The reality is that BNYM simply slept on its purported rights and realized at the last minute it could no longer do a non-judicial foreclosure, and therefore filed a judicial foreclosure action on the eve of the statute of limitations running out even though it had already waived the right to do so. This is not Mitchell's fault.

III. The trial court improperly dismissed Mitchell's counterclaims based on *res judicata.*

A. The Trial Court did not accept as true the allegations in the counterclaim.

Once again BNYM on page 29 makes a patently false claim that Mitchell has "failed to identify any specific and relevant facts in her counterclaim below that 'directly contradicted BNYM's unsupported factual assertions.'" Mitchell Identified all of the facts contained in the First, Second, and Third counterclaims, and even cited the relevant paragraphs in footnotes 6-8, namely paragraphs 91-150. And the record. REC.565-575

BNYM claims that Mitchell cannot make her claim because she "failed to single out any fact that was not properly accepted by the trial court." But there were all ignored. Every single one of them (except the incorporation paragraphs).

BNYM once again improperly tries to shift the burden to Mitchell when in fact it was BNYM who had the burden when it made its motion to dismiss the counterclaims to prove how, after accepting all of the facts in the counterclaim as true, it was still entitled to summary judgment. Since BNYM's theory was res judicata, it failed to meet its burden to show how accepting those identified facts as true, it was still entitled to res judicata because there were no disputes as to any of the elements of res judicata. *Busch v. Busch*, 2003 UT App 131, P6, 71 P.3d 177 ("The party asserting res judicata has the burden to prove its elements.").

All BNYM did was make conclusory allegations without actually identifying the relevant facts alleged as to finality, res judicata, etc., and without introducing any evidence in support of its conclusory allegations regarding those elements. In fact, its statement of undisputed facts did not even claim the factual allegations it was making

regarding the elements of res judicata. See BNYM's Motion for Summary Judgment. REC 523-530. Accordingly, the evidence was never introduced to prove entitlement to res judicata, and the trial court obviously ignored the explicit factual allegations in paragraphs 91-150 that directly disputed BNYM's conclusory claims, even though Mitchell expressly identified them for the trial court in her Opposition. REC.720.

There is no legitimate argument that the trial court did not ignore paragraphs 91-150 when it improperly dismissed the counterclaims. Its total ruling on the issue was as follows: "The motion to dismiss the First Amended Counterclaim is granted. All of the issues and claims set forth in the First Amended Counterclaim were, or could have been, asserted in the Mitchell I case." REC.752. It never addressed, or even acknowledged, any of the facts in its ruling. It also never made any of the factual determinations necessary to find the elements of res judicata. It simply failed all around.

B. BNYM failed to meet its burden to prove the factual elements of res judicata.

BNYM tries to argue res judicata was properly granted without actually proceeding through each element and demonstrating how that factual element was proven by it in its motion to dismiss. It simply cannot be done because *res judicata* is an affirmative defense, which BNYM has to prove with actual evidence introduced into the record. BNYM actually expends more effort on the issue here on appeal than it did below, but it still does not prove that res judicata was appropriate.

As this case proves, a Rule 12(b)(6) motion to dismiss is not the proper vehicle to assert a *res judicata* defense, unless it is "apparent on the face of the complaint" itself:

> [A] motion to dismiss pursuant to Rule 12(b)(6) **was not the proper vehicle** in this case. We held in *Bethel v. Jendoco Constr. Corp*…, that if a statute of limitations "bar is **not apparent on the face of the complaint**, then **it may not** afford the basis for a dismissal of the complaint under Rule 12(b)(6)." This holding applies not only to a statute of limitations defense, but also **to any affirmative defense** raised pursuant to Rule 8(c), **including res judicata** and the Entire Controversy Doctrine.

Rycoline Products v C&W Unlimited, 109 F.3d 883, 886 (3rd Cir. 1997); *Hoffman v. Nordic Naturals*, 837 F.3d 272, 280 (3rd Cir. 2016)("**The ultimate purpose of this rule is to avoid factual contests at the motion to dismiss stage**.")

BNYM's *res judicata* defense obviously is not apparent on the face of the Complaint or the Counterclaims. BNYM's complaint does not say anything about res judicata, and as noted above, the Counterclaims are rife with factual allegations that explicitly preclude any possible conclusion that res judicata was apparent on the face of the counterclaim. Just the opposite.

But the simple test is, where is the evidence of all of the rulings on the merits on the various issues in Mitchell I? Why doesn't BNYM quote them and cite to the record in this case as to where they were presented to the trial court. It can't, because they weren't.

It now gives a list of issues supposedly previously litigated, which are simple summaries, but it fails to quote the rulings thereon to show that they were in fact identical and were in fact resolved on the merits.

There simply is no evidence in the record to support a finding as to each of the elements of res judicata. The Trial Court merely speculated. And never bothered to make the required findings on the elements – in particular there is no finding of issue

preclusion where the identical issue is identified by the court and the ruling is identified by the court. Therefore, its dismissal is based on nothing more than speculation and must be reversed and remanded so that Mitchell may resume her quest to get the answers she still has never gotten.

Otherwise her constitutional right to an open court to assail the mistakes made by the courts in Mitchell I will be denied her. As the Utah Supreme Court has made clear, the courts must be open to allow challenges to their own orders:

> Our Constitution (article 1, section 11) provides:
>
> > "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party."
>
> **This means that courts are open for the purpose of having any order or judgment assailed** in the proper manner and at the proper time, **precisely the same as they are open for the redress of wrongs and for the enforcement of rights**.

In re Thomas, 190 P. 952, 955 (Utah 1920).

C. There is no record of trial court's summary dismissal of the collateral attack on Mitchell because the trial court did it sua sponte.

BNYM complains that there is no citation to the record to demonstrate the trial court's error in summarily dismissing the collateral attack on Mitchell I. That is because the Court did it sua sponte. BNYM did not even move to dismiss the counterclaims raising the collateral attack, it missed them altogether. REC.523-529. So there was no opposition. The court simply improperly acted on its own.

As to the merits of the right to bring a collateral attack, BNYM once again misstates that no legal basis is provided, even though it is. Contrary to BNYM's summary assertion, *State v. Bates* does provide the legal support for bringing a collateral attack on a void judgment when it states in the final line that a void judgment: "may be impeached in any action, direct or collateral."

Mitchell does not need to prove the merits of doing so at this stage, and the trial court plainly erred when it assumed it had discretion to simply not entertain them. "The court finds no legal, factual, or logical support for such claims and declines to entertain them in this case." REC.752. This is obviously not the standard for dismissing claims in a Rule 12(b)(6) motion. BNYM had the burden to prove that Mitchell cannot possibly prevail on them at trial, and it made absolutely no attempt to do so.

Once again, Mitchell's open court rights are at issue and the sua sponte dismissal must be reversed and her collateral attacks restored.

V. BNYM failed to provide mandatory evidence to support its summary judgment.

A. The Denmon Affidavit was inadmissible on the most critical issue, ownership.

BNYM claims it provided sufficient evidence of its claim to be entitled to summary judgment, but it didn't. The most obvious deficiency is that it never proved that it actually owns the Mitchell Debt. As discussed above, the purported assignment from MERS did not transfer anything because the security is automatically transferred to a new owner. And merely holding a note does not prove one owns it.

But BNYM has an even more fundamental problem in that the purported evidence of its theory is the Denmon Affidavit. But as to the two critical declarations in paragraphs 10 and 11, Denmon is simply making conclusory statements in 10 as to BNYM's status

as the "current beneficiary" based on a legal conclusion, and in 9 as to its status as the "current holder." These are ultimate legal conclusions, not basic facts. Therefore the court should have ignored them.

Affidavits in support of a Rule 56 Motion "must be of evidence which would be competent and material and thus admissible at the trial." *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977). See also *Murdock v. Springville Mun. Corp*, 1999 UT 39, ¶ 27, 982 P.2d 65 (Where affidavits in support of summary judgment assert facts "not based on personal knowledge, lack foundation, are conclusory, and contain hearsay," they are properly excluded); *Dairy Prod. Servs. v. City of Wellsville*, 2000 UT 81, ¶ 54, 13 P.3d 581 ("[A]n affidavit in opposition to a motion for summary judgment must set forth specific facts that would be admissible in evidence.").

Not only does Denmon simply make inadmissible conclusory statements in paragraphs 10 and 11, he also does not set forth any subsidiary facts to show that he even has any personal knowledge to support them. There is no statement he has seen the original endorsed note in BNYM's possession, or that he has any personal knowledge how BNYM is the "current holder."

But most critical is that there simply are no facts testified to which shows that BNYM in fact owns the Mitchell Debt so as to the "current beneficiary."

Accordingly, his affidavit is inadmissible and BNYM did not prove entitlement to judgment as a matter of law. At best, BNYM made naked assertions which were disputed by Mitchell's Answer and Counterclaim. Therefore the summary judgment must be reversed on this defect alone.

B. BNYM failed to defeat Mitchell's defenses as a matter of law, and therefore was not entitled to summary judgment.

BNYM asserts without any legal authority that it simply does not need to defeat Mitchell's affirmative defenses, despite Mitchell's legal support to the contrary.

Obviously if there are still unresolved defenses, the trial court cannot logically conclude that BNYM is entitled to judgment as a matter of law.

BNYM therefore had the obligation to prove not only that it was entitled on its prima facie case, but also that Mitchell cannot possibly prevail on her affirmative defenses in order for the court to be able to take away her opportunity to present them to a jury.

The fact that Mitchell would have the burden at trial on her affirmative defenses does not make any difference if there is no actual motion by BNYM to defeat the affirmative defense. In Mitchell I, there was a motion challenging her claims. Here there is not. So, this Court's ruling in Mitchell I obviously does not save BNYM from its failure to bring any motions for summary judgment on her affirmative defenses.

The affirmative defenses stand unchallenged, and thereby prevented the trial court from ruling as a matter of law that BNYM is entitled to summary judgment.

VI. There is no "Final Judgment" and any post judgment activity is void.

As noted above, there is no final judgment yet because the amount of damages from May 31st to November 27th have not been determined yet.

BNYM concedes that attorney fees were not included in the November 27th "Final Judgment" but then argues that since an amount of fees was subsequently awarded, the question is moot. It obviously is not.

As McQuarrie demonstrates, if attorney fees are awarded by summary judgment, but the amount is not determined yet, there is no final judgment. Consequently, the sua sponte document called a "Final Judgment" was not a "judgment."

There has not been a Rule 58A "judgment" entered since the determination of the fees. It is not simply a question of deciding issues, until there is actually a separate document under Rule 58A, there is no final appealable judgment. A proper Rule 58A document marks the end of the case.

B. The Order of Foreclosure Sale is void.

Since there is no final judgment, the Court did not yet have any supplemental jurisdictional authority to enforce the judgment yet. See *Cheves v Williams*, 1999 UT 86.

So the Order was void.

Dated this 27th day of June, 2019.

/s/ Douglas R. Short

CERTIFICATE OF COMPLIANCE

This Brief contains 6,999 words. This brief complies with requirements of Rule 21.

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IN THE UTAH COURT OF APPEALS

THE BANK OF NEW YORK MELON Appellee, v. PAULA A. MITCHELL, Appellant.	CERTIFICATE OF SERVICE FOR REPLY BRIEF Case No.: 20180141

Paula Mitchell hereby certifies that a copy of her Reply Brief was served upon counsel of record, Brigham Lundberg, for Appellee, Bank of New York Mellon, by email when it was originally filed by email with the Court on June 28, 2019. A bound copy was also served on Mr. Lundberg by hand delivering a copy at his office on July 8, 2019.

DATED this 8th day of July, 2019.

/s/ Douglas R. Short

CERTIFICATE OF SERVICE

Service of the forgoing has been served by means of electronic filing upon counsel of record:

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