

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PATRICE CLINTON,

Appellant,

and RYANSCREST TRUST¹,

Plaintiff,

v.

DEUTCHE² BANK NATIONAL TRUST
COMPANY,

Respondent

MARGUERITE NICKLESS, AMERIQUEST
MORTGAGE SECURITIES INC.,
AMERIQUEST MORTGAGE COMPANY,

Defendants.

No. 41536-4-II

UNPUBLISHED OPINION

Hunt, J. — Patrice Clinton appeals the superior court’s summary judgment dismissal with prejudice of her complaint to rescind the purchase of real property. She argues that (1) Deutsche Bank National Trust Company lacked standing to move for summary judgment; (2) the superior court lacked jurisdiction to rule on the motion for summary judgment because she and the subject

¹ Ryanscrest Trust, a plaintiff in the original suit is not part of the present appeal.

² Although spelled as “Deutche” in the original complaint, “Deutsche” Bank National Trust Company is the spelling used in the present appeal.

property were involved in a bankruptcy proceeding; (3) the superior court erred in granting summary judgment without notice to the bankruptcy trustee and while an automatic stay was pending; and (4) the dismissal should have been without prejudice. We affirm the superior court's grant of summary judgment and its dismissal of Clinton's rescission action, but we remand to the superior court to enter an order dismissing Clinton's complaint without prejudice, instead of with prejudice.

FACTS

In October 2005, Patrice Clinton purchased from Marguerite Nickless real property located at 9316 Glencove Road in Gig Harbor. To finance the purchase, Clinton borrowed money from Ameriquest Mortgage Company, which secured the loan with a deed of trust against the property.

I. State Court Action To Rescind Real Property Purchase

In April 2009, Clinton filed a lawsuit against Marguerite Nickless, Ameriquest Mortgage Securities Inc., Ameriquest Mortgage Company, and "Deutche" Bank National Trust Company in Pierce County Superior Court seeking to rescind her purchase of the property under former RCW 58.17.210 (1974).³ In her complaint, she asserted,

AMERIQUEST MORTGAGE SECURITIES, INC., AMERIQUEST MORTGAGE COMPANY AND *DEUTCHE* BANK NATIONAL TRUST COMPANY have an interest in the property

Clerk's Papers (CP) at 1-2 (emphasis added). Deutsche Bank National Trust Company was

³ Former RCW 58.17.210 allows a purchaser of real property to rescind if the property was not subdivided legally, which Clinton alleges in her complaint on behalf of herself "and as Trustee of Ryancrest Trust." Clerk's Papers (CP) 1, 91. The record contains no evidence, however, that Ryancrest Trust was a "purchaser" who could seek rescission under former RCW 58.17.210.

trustee for the benefit of the trust Certificate holders for Ameriquest Mortgage Securities Trust 2005-R11, Asset-Backed Pass-Through Certificates, Series 2005-R11. Agreeing that Ameriquest Mortgage Securities, Inc. and Ameriquest Mortgage Company (collectively referred to hereafter as “Ameriquest”) no longer had interests in the Glencove Road property, Clinton dismissed them with prejudice from her lawsuit in June 2009. Deutsche Bank⁴ and Nickless remained named defendants.

Also in June 2009, Clinton moved for an order of default and a default judgment against Nickless. Deutsche Bank appeared, opposed the motion, and notified the superior court that (1) Clinton had secured a mortgage loan with the property subject to the litigation, and (2) Clinton was in default on the mortgage and facing foreclosure. In July the Bank filed an answer to Clinton’s complaint.

II. Bankruptcy Petition

On July 10, 2009, Clinton filed a Chapter 11⁵ voluntary petition with the United States Bankruptcy Court. Among the assets she listed was the Glencove Road property, the sale of which, as mentioned above, she was seeking to rescind in state court. On November 18, the bankruptcy court converted Clinton’s petition to a Chapter 7 proceeding.⁶ On June 16, 2010, Deutsche Bank, as trustee for the deed of trust certificates, obtained an order in federal

⁴ Clinton later claimed that “Deutsche Bank National Trust Company” (“Deutsche” spelled with an “s”) lacked standing to move for summary judgment because she had named as a defendant “Deutche Bank National Trust” (“Deutche” spelled without an “s” and no “Company” at the end) in her summons.

⁵ 11 U.S.C. §§ 1101-1174.

⁶ 11 U.S.C. §§ 701-784.

bankruptcy court granting it relief from the automatic bankruptcy stay in order to enforce its security interest and interest accumulating under the deed of trust on the Glencove Road property.

III. Ongoing State Court Rescission Action

Also on June 16, 2010, Deutsche Bank moved in Pierce County Superior Court for summary judgment dismissal of Clinton's rescission lawsuit. Deutsche Bank asserted that, because the Glencove Road property was part of Clinton's bankruptcy estate in the still-pending Chapter 7 federal proceeding, she lacked standing to continue to prosecute the state court lawsuit. On July 22, 2010, no longer represented by counsel, Clinton filed a pro se motion to strike Deutsche Bank's motion for summary judgment, asserting that (1) she had not been served with the motion; (2) the superior court lacked jurisdiction because of her pending federal bankruptcy proceeding; and (3) Deutsche Bank had no interest in the Glencove Road property. Nickless orally joined in Deutsche Bank's motion for summary judgment, which the superior court granted when Clinton failed to appear for the hearing.

Once again represented by counsel, Clinton filed a CR 60 motion to vacate the order granting summary judgment. After a dispute over whether Clinton had received notice of the summary judgment hearing, on October 29, the parties agreed to vacate the summary judgment order and to hold a new hearing. At the new hearing on November 5, the superior court orally granted Deutsche Bank's motion for summary judgment, stating:

I think the bottom line here is that the plaintiff, Patrice Clinton, is a debtor in bankruptcy and any claims of the debtor are property of the trustee. Therefore, she no longer has standing in this matter on the rescission, and this property is part of the bankruptcy estate subject to that in rem jurisdiction in the federal court. I don't see any claims in this lawsuit by either Ryancrest Trust or Ryanscrest Trust, so it would be appropriate to dismiss as requested by the defendant bank.

Report of Proceedings (Nov. 5, 2010) at 19. That same day, the superior court filed an order stating, “[P]laintiffs’ Complaint is hereby *DISMISSED WITH PREJUDICE.*” CP at 182. (emphasis added). Clinton appeals.⁷

ANALYSIS

I. Standing

Clinton first contends that Deutsche Bank lacked standing to bring a motion for summary judgment because (1) her summons and complaint named “Deutche Bank National Trust” (“Deutche” spelled without an “s”) and, therefore, “Deutsche Bank National Trust Company” (“Deutsche” spelled with an “s”) did not have standing to intervene; and (2) Deutsche Bank did not demonstrate that it had an interest in 9316 Glencove Road.

A. Scrivener’s Error–“Deutche” Bank

Clinton asserts that she named “Deutche” Bank National Trust (“Deutche” spelled without an “s”) in her summons. Reply Br. of Appellant at 2. The record on appeal does not support this assertion: The summons is not part of the designated clerk’s papers before us on appeal.⁸ Accordingly, we do not address this part of Clinton’s argument because it is based on a matter outside the record and, thus, not properly before us. *State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in a party’s brief, but not included in the record, will not be considered on appeal).

⁷ A commissioner of this court initially considered Clinton’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

⁸ Clinton also asserts that she attached a copy of the summons to her reply brief; but no such attachment is included in our copy of her reply brief. Even if there were such an attachment, we could not consider it because she did not move to supplement the record under RAP 9.10.

Clinton similarly asserts that she named “Deutche Bank National Trust” (“Deutche” spelled without an “s” and without “[C]ompany” following “Trust”) in her complaint. Reply Br. of Appellant at 2, 3. Contrary to Clinton’s assertion, she named “Deutche Bank National Trust *Company*” (“Deutche” spelled without an “s” but with “Company” following “Trust”) in her complaint; and in the other court documents that Clinton filed, she listed “Deutsche Bank National Trust” (“Deutche” spelled with an “s” and “Company” omitted) in the caption.⁹ These inconsistencies show that Clinton’s use of “Deutche” (without an “s”), instead of “Deutsche” (with an “s”), and her omission of “Company” from the titles of the documents that she filed appear to have been the result of a scrivener’s error. Moreover, Clinton fails to show how such scrivener’s error had any relevance to the issue of Deutsche Bank’s standing here.

B. Deutsche Bank’s Security Interest in Glencove Road Property

The bankruptcy court determined that (1) as Trustee for the benefit of the Certificate holders for Ameriquest, “Deutsche Bank National Trust Company” had a security interest in Clinton’s Glencove Road property; and (2) it could pursue state remedies to enforce its security and deed of trust interests in the property. CP at 64. Because Deutsche Bank had a “security interest” in the Glencove Road property, it had standing to move to dismiss Clinton’s complaint. CP at 64. Accordingly, we need not address Clinton’s argument that “Deutche” Bank National Trust, and not Deutsche Bank National Trust Company, had standing.

II. Jurisdiction

Clinton next argues that the superior court lacked jurisdiction to hear Deutsche Bank’s motion for summary judgment because the federal bankruptcy case trustee had not yet decided

⁹ See CP at 1, 119, 131, 134, and 140 (emphasis added).

whether to abandon or to pursue Clinton's claim against Nickless and Deutsche Bank on behalf of the bankruptcy estate to satisfy some of the bankruptcy creditors' claims. This argument also fails.

Clinton asserts that "[d]uring the duration of a bankruptcy[,] actions are stayed . . . to determine what interest the Trustee may have on the claims." Br. of Appellant at 10. Clinton is only partially correct; she is incorrect that the bankruptcy court's automatic stay applied to her pre-existing state court action. On filing a petition for bankruptcy, a debtor is immediately protected by the automatic stay provisions of the bankruptcy code, which prohibits both continuation of a judicial action against a bankruptcy debtor and any act "to exercise control over property of the [bankruptcy] estate."¹⁰ Such automatic stay, however, does not prevent "persons whom the bankrupt has sued from protecting their legal rights," even if the "cause of action is an asset of the [bankruptcy] estate." *Martin-Trigona v. Champion Fed. Sav. and Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989).¹¹

Contrary to Clinton's assertion, the bankruptcy court deems that the state court "retains jurisdiction [over such previously filed action] unless the action is properly removed" to federal court. *See In re White*, 186 B.R. 700, 702 (9th Cir. BAP 1995) (citing Fed. R. Bankr. P. 9027). Therefore, when Deutsche Bank moved to dismiss (bankruptcy debtor) Clinton's state court rescission action, the superior court had jurisdiction to grant summary judgment and to dismiss

¹⁰ 11 U.S.C. §§ 362(a)(1),(3). The policy behind such automatic stay is to protect the bankruptcy estate from being depleted by creditors' lawsuits and seizures of property before the bankruptcy trustee has a chance to distribute assets from the bankruptcy estate. *In re White*, 186 B.R. 700, 704 (9th Cir. BAP 1995).

¹¹ *See also Cobb v. Aurora Loan Services, LLC*, 408 B.R. 351, 354-55 (E.D. Cal. 2009); *White*, 186 B.R. at 704.

Clinton's action.

Clinton also argues that the trial court erred in hearing Deutsche Bank's motion for summary judgment because no notice of the summary judgment motion was given to the bankruptcy trustee. Clinton contends that, because the bankruptcy trustee is the real party in interest to the cause of action asserted in the complaint, the Bank's summary judgment motion was improperly served because a copy was not served on the trustee. Deutsche Bank responds that, because Clinton never attempted to ratify or to join the trustee as a party to the action, it was not required to ratify or to provide the trustee with notice of the motion for summary judgment. Because Clinton has failed to cite legal authority to support her notice to the bankruptcy trustee argument, we do not further consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). RAP 10.3(a)(6).

III. Dismissal with Prejudice

Clinton further argues that, in granting summary judgment, the superior court erred in dismissing her complaint for rescission of her property purchase with prejudice. We agree.

We review an order granting summary judgment de novo. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008). When reviewing a summary judgment, we consider and perform the same inquiry as the trial court. *Ames v. Fircrest*, 71 Wn. App. 284, 289, 857 P.2d 1083 (1993). Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). We must view all facts and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005).

When a court dismisses a lawsuit without reaching the merits of the controversy, the dismissal should be without prejudice. Former RCW 4.56.120(8) (1929); *Parker v. Theubet*, 1 Wn. App. 285, 291, 461 P.2d 9 (1969); *Linton v. State*, 185 Wash. 97, 99-100, 52 P.2d 1239 (1936). The superior court dismissed Clinton's rescission action on ground that she lacked standing to prosecute it because she and the property at issue were involved in a pending bankruptcy proceeding; in so doing, the superior court did not reach the rescission action's merits. Therefore, the dismissal of Clinton's action should have been without prejudice.¹²

We affirm the superior court's grant of summary judgment to Deutsche Bank and its dismissal of Clinton's rescission action; but we vacate the dismissal with prejudice and remand

¹² Deutsche Bank argues that (1) actions in equity may be dismissed with prejudice even if the court does not reach the merits of the controversy; and (2) because rescission is an equitable remedy, the superior court did not err in dismissing Clinton's complaint with prejudice. Br. of Resp't at 11 n.2 (citing *Graff v. Geisel*, 39 Wn.2d 131, 138, 234 P.2d 884 (1951)). This argument fails. Because Clinton's state court rescission action was statutory, under former RCW 58.17.210, not an action in equity seeking rescission of a contract, dismissal should have been without prejudice. See *Busch v. Nervik*, 38 Wn. App. 541, 547, 687 P.2d 872 (1984).

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to the superior court to enter an order dismissing Clinton's complaint without prejudice.

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.

Hunt, J.

We concur:

Worswick, C.J.

Quinn-Brintnall, J.