NO. 310345

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

BANK OF NEW YORK, AS TRUSTEE PURSUANT TO THE TERMS OF THAT CERTAIN POOLING AND SERVICING AGREEMENT DATED AS OF NOVEMBER 1, 1996 RELATED TO METROPOLITAN ASSET FUNDING, INC., MORTGAGE PASS-THROUGH CERTIFICATES SERIES 1996-A,

Respondent,

v.

MARCO T. BARBANTI, ROYAL POTTAGE ENTERPRISES; JUNCO FROST LAVINIA, INC.

Appellants.

REPLY BRIEF OF THE APPELLANT JUNCO FROST LAVINIA

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I. INTRODUCTION AND JOINDER.

Appellant Junco Frost Lavinia, Inc. is a judgment creditor of Mr. Barbanti, *Complaint* (CP 1-42) and is participating in this litigation in order to preserve its right to enforce its judgment against the subject property. Junco Frost Lavinia, Inc. wishes to join in the Reply Briefs submitted by Appellants Royal Pottage Enterprises, Inc. and Marco T. Barbanti.

II. THE TRIAL COURT HAD NO AUTHORITY TO GRANT THE PLAINTIFF'S SUMMARY JUDGMENT THEREFORE THIS LAWSUIT SHOULD BE DISMISSED BY THIS COURT.

Junco Frost Lavinia, Inc. submits that for reasons outlined and briefed by the other Appellants the trial court had no authority to grant the summary judgment quieting title in favor of Bank of New York. In addition, due to the fact that Bank of New York lacks standing to bring a quiet title action, this lawsuit should be dismissed by this Court.

The statutes governing quiet title actions in Washington are very clear and unambiguous. RCW 7.28.010 states that any person seeking to quiet title to real property must have "...a valid subsisting interest in real property, and a right to possession thereof..." in order to have standing to maintain the action. Since

the execution and recording of the Hooper-Barbanti contract in May, 1996 the right to possession of the subject property has belonged to Mr. Barbanti or his assignee(s). *See Hooper-Barbanti Contract*, ¶ 6 in, p.6 in *Barbanti Declaration*, Exhibit B (CP 156-309).

Hooper transferred the right to possession of the subject property by contract to Mr. Barbanti. Therefore when Hooper assigned its contract vendor's rights to Bank of New York, Hooper could not assign more than it had. *Washington Practice*, Vol. 18, § 21.13, p. 478 (Stoebuck and Weaver 2004). Hooper's vendor's rights were circumscribed by the provisions of the Hooper-Barbanti contract which specifically gave the right to possession to Mr. Barbanti or his assignee(s).[1] *Ibid*. As a result neither Bank of New York nor Hooper has standing to quiet title because neither of them has any right to possession of the subject property. Since a party's standing directly implicates the court's subject matter jurisdiction, this Court has no choice but to dismiss the present lawsuit. *Magart v. Fierce*, 35 Wn. App. 264,

[1] Of course all of the parties rights are ultimately circumscribed by Washington law.

666 P.2d 386 (Div. III, 1983). *See also Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939-44, 206 P.3d 364 (Div. III, 2009) (citing: *RAP* 2.5(a); and *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556-7, 958 P.2d 962 (1998).

Appellant Royal Pottage Enterprises, Inc., the current fee title owner of the subject property due to the recording of the Fulfillment Deed, makes the argument that Bank of New York and/or Hooper also lack standing because they no longer have a valid subsisting interest in the subject property. This argument is amply briefed by Royal Pottage Enterprises, Inc. and will not be repeated here except to say that Junco Frost Lavinia, Inc. agrees with the legal analysis in Royal Pottage's Reply Brief.

Bank of New York's Respondent's Brief is off the mark and ineffective. Junco Frost posits that the fundamental problem with Bank of New York's nonsensical argument is that Bank of New York doesn't understand the law of real estate contracts in Washington. This problem is somewhat understandable given that the vast majority of real property financing is done using promissory notes secured by deeds of trust. This Reply Brief will

highlight some errors in Bank of New York's understanding of real estate contract law in Washington and also discuss the flaw in the trial court decision which allows a senior lienholder to circumvent the statutory rights of a junior lienholder.

III. THE HOLDER OF THE SELLER'S INTEREST IN A REAL ESTATE CONTRACT IS NOT ENTITLED TO HAVE TITLE QUIETED IN ITS FAVOR UNLESS THE CONTRACT IS FORECLOSED ACCORDING TO THE LAW.

A real estate contract purchaser promises to pay the agreed consideration over a period of time, and the vendor promises to convey title when the contract is fully paid. *See Washington Practice*, Vol. 18, § 21.2, p. 442 (Stoebuck and Weaver 2004). It has been said that a transaction involving a real estate contract acquires a certain "mystique" because it is a vehicle for financing real property sales. *Ibid.* Because title to the real property is not transferred until the contract price for the property is paid in full, it is said that in a contract vendor "retains" title to the real property as "security" for the buyer's performance of its contractual obligations. *Ibid.*

Contrary to the theme that runs throughout Bank of New York's brief, the statement that a contract vendor "retains title as

security" means just that. A contract vendor has a security interest in the property and is not an owner of the property even though s/he retains "title".

Bank of New York does not understand the law of real estate contracts in Washington. The linchpin for Bank of New York's entire argument in this appeal is found on page 9 of its Brief wherein it states:

> "BNY has a valid subsisting interest in the subject property by virtue of the Deed and Seller's Assignment of Real Estate Contract, by which the Hoopers quit claimed their **ownership** interests in the property to BNY. As BNY is the fee title owner of the property, BNY has a right to bring an action to quiet title. Conversely, Mr. Barbanti never acquired legal title to the property because he failed to pay the full purchase price.

See Tomlinson v. Clarke, 118 Wn.2d 498, 504, 825 P.2d 706 (1992)." (Emphasis in original).

With all due respect to Bank of New York and its counsel, the previously quoted language from page 9 of the Respondent's Brief is dead wrong and runs contrary to "horn book" law in Washington.

The first axiom of "horn book" real estate contract law in Washington is that a transferee or assignee of the vendor's

interest in the contract acquires no greater interest than the transferor/assignor possessed.

> "As a general proposition, the vendor's grantee has no greater interest or rights as to the purchaser than did the vendor."

Washington Practice, Vol. 18, § 21.13, p. 478 (Stoebuck and Weaver 2004).

The second axiom of "horn book" real estate contract law in Washington is that the contract vendor's interest in the property is subject to the rights of the contract purchaser:

> "A person who acquires any interest in the land from the vendor subsequent to a real estate installment contract (REK) takes that interest subject to the purchaser's rights, provided the contract is recorded..."

Washington Practice, Vol. 18, § 21.13, p. 478 (Stoebuck and Weaver 2004).

It is undisputed that the Hooper-Barbanti contract was recorded. *Barbanti Declaration*, Exhibit B (CP 156-309). Therefore the Deed and Seller's Assignment, in favor of Bank of New York, can **only** transfer the rights that Hooper had subject to the Hooper-Barbanti contract and Bank of New York cannot acquire any greater rights than Hooper possessed. The question

then becomes: What rights did Hooper have in the subject property?

Bank of New York incorrectly labels Hooper's rights as "**ownership**" and incorrectly assumes that Hooper had all the incidents that are customarily associated with the generic term "**ownership**". The excerpts from Washington Practice explain that a contract vendor or its assignee's rights are limited by both the contract and the law in Washington. A synopsis of the decisions in Washington will explain the basis for the statements in Washington Practice and show that Bank of New York's claim of "ownership" is wrong.

Real estate contracts grant substantial rights or covenants in favor of the contract purchaser. In this case the Hooper-Barbanti contract contains covenants and rights in favor of the contract purchaser or its assignees such as: the right to possession of the subject property and all the related rights that come with the right to possession; a covenant as to the status of title as of the date the contract is executed; a covenant to provide title insurance for the contract purchaser; and a covenant to give

a fulfillment deed when the contract purchaser has fully performed its duties.

Decisional law at one time in Washington did recognize the "ownership" theory advanced by Bank of New York. Those cases have been overruled and Bank of New York's "ownership" theory carries as much weight as the overruled cases do in this lawsuit. In *Ashford v. Reese*, 132 Wash. 649, 233 P. 29 (1925) the Washington Supreme Court held that a contract purchaser had the right to rescind a real estate contract due to destruction of the improvements on the subject property because the risk of loss was on the contract vendor. The *Ashford* decision relied heavily on an earlier decision, *Schaefer v. E. F. Gregory*, 112 Wash. 408, 192 P. 968 (1920), which had held that a contract purchaser had no right to any part of a condemnation award but that the contract vendor's inability to convey the part of the property taken by condemnation entitled the purchaser to reimbursement of all contract payments. These two early decisions were based on the grounds that a contract purchaser has no title or interest (either legal or equitable) in the subject property.

Bank of New York's use of the term "**ownership**" when referring to the interest that it allegedly acquired from the Hoopers and its defense of the quiet title order that was erroneously granted in this case stems from its implicit assumption that neither Mr. Barbanti nor Royal Pottage have any substantial rights in the subject property. Had *Ashford* not been overruled, see *Cascade Security Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977) (*Ashford* overruled prospectively) and *Tomlinson v. Clarke*, 118 Wn.2d 498, 825 P.2d 706 (1992) (*Ashford* overruled), Bank of New York's argument may have had some basis. However *Ashford* was overruled in *Cascade Security Bank* and *Tomlinson* because the *Ashford* Court's interpretation of the relative rights of a contract vendor and contract purchaser was not only intuitively wrong but it was also contradicted by the overwhelming weight of decisional law from the Supreme Court.

The ink for the *Ashford* decision was not yet dry and the Washington Supreme Court began the analytical journey toward the conclusion that the contract vendor's rights are circumscribed

by the contract and the law. First the Supreme Court held that a contact purchaser could claim homestead rights in the subject property. *Desmond v. Shotwell*, 142 Wash. 187, 252 P. 692 (1927). A mere two years later in *State ex rel. Oatey Orchard Co. v. Superior Court*, 154 Wash. 10, 280 P. 350 (1929) the Supreme Court held that a contract purchaser's interest is subject to attachment as **real property**. A concurring opinion in *Oatey* already started to call for *Ashford* to be overruled. In *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946) the Court held that even though a contract purchaser has no legal or equitable title in the property, he does have standing to defend a quiet title action.[2] The Supreme Court went on to rule in *Eckley v. Bonded Adjustment Co.*, 30 Wn.2d 96, 190 P.2d 718 (1948) that a judgment lien attaches to the contract purchaser's equitable

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The *Turpen* decision is especially instructive in the present litigation. The decision in *Turpen* that a contract vendee has standing to defend a quiet title action logically means that the contract vendee has a valid subsisting interest in the property and the right to possession thereof. By negative implication this means that the contract vendor does not have standing to defend in a quiet title action.

interest or estate.[3] In its ever broadening challenge to the *Ashford* principles, the Supreme Court ruled in *Pierce County v. King*, 47 Wn.2d 328, 287 P.2d 316 (1955) that a contract purchaser has sufficient interest in the subject property to defend a condemnation action.[4] *Nelson v. Bailey*, 54 Wn.2d 161, 338 P.2d 757 (1959) held that a contract purchaser had an interest in the property that could be mortgaged and *Kendrick v. Davis*, 75 Wn.2d 456, 452 P.2d 222 (1969) held that the contract purchaser's interest in the property could be conveyed or mortgaged.

This Court understood the clear meaning of the decisional law regarding the real property rights that contract purchasers possessed when it held in *Chelan County v. Wilson*, 49 Wn. App.

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None of the rulings in these cases would have been possible unless there was a tacit recognition by the Washington Supreme Court that the contract purchaser acquires a real property interest in the subject property by virtue of the real estate contract.

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The *King* decision was starting to directly contradict the *Schaefer* decision from 1920 which had formed the basis for *Ashford*. This is no surprise since other Supreme Court decisions had openly referred to the "unfortunate choice of language" used in *Ashford*. *Griffith v. Whittier*, 37 Wn.2d 351, 223 P.2d 1062 (1950).

628, 632, 744 P.2d 1106 (Div. III, 1987) that contract vendees had an identifiable interest in the subject property, even if their interests were not recorded. This Court based its holding on the long line of precedent culminating in *Cascade* wherein a vendee's interest in real estate was described as substantial, valid and subsisting. *Ibid.* This view of the law is uniform in the other Divisions of the Court of Appeals in Washington. See *In re Marriage of Harshman*, 18 Wn. App. 116, 567 P.2d 667 (Div. I, 1977) (contract purchaser's interest acquired before marriage is separate property after the marriage); and *Bays v. Haven*, 55 Wn. App. 324, 777 P.2d 562 (Div. II, 1989) (the requirement for unity of title in an action to establish an implied easement is satisfied where one parcel was owned outright and one parcel was owned by the same person as a contract purchaser).[5]

The Supreme Court's analytical journey ended when it overruled *Ashford*, first prospectively in *Davis* and then

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[5] The *Bays* decision is especially useful in the present case because Bank of New York's entire defense rests on an overabundance of reverence for the contract vendor's retained title when in fact the *Bays* Court found unity of **title** even though title to one parcel still resided with the contract vendor.

completely in *Tomlinson*. The end of *Ashford* also means the end of Bank of New York's defense of the legally incorrect decision that resulted in the quiet title order in this case. Bank of New York's entire defense of the trial courts erroneous decision stems from its unsubstantiated claim that it acquired "**ownership**" interest in the subject property from Hooper and from its legally untenable premise that the contract vendor's retained title is something more than a simple security interest.

The contract vendor's interest in the subject property has effectively been deemed a personal property interest even though the contract vendor technically retains "title" to the property.[6] The contract vendor's interest in the subject property has been treated as personal property for purposes of probate administration such that probate is had over the vendor's interest at his domicile and not where the property is located if the two are different. *In re Eilermann's Estate*, 179 Wash. 15, 35 P.2d

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In attempting to provide some uniformity in the area of Real estate contract transactions the Courts have described the title retained by a contract vendor's as title held in trust for the contract purchaser's benefit and subject to the provisions of the Real estate contract. *Meltzer v. Wendell-West*, 7 Wn. App. 90, 96-7, 497 P.2d 1348 (Div. I, 1972).

763 (1934). In holding that the contract purchaser had the right to challenge the formation of a local improvement district the Court of Appeals, Division I held that when an owner of real estate enters into an executory contract for the sale of land and the contract vendee enters into possession, the interest that remains to the seller is personal property and the seller holds legal title in trust for the vendee's benefit with an obligation to convey title when the contract was fulfilled. *Committee of Protesting Visitors v. Val Vue Sewer Dist.*, 14 Wn. App. 838, 545 P.2d 42 (Div. I, 1976).

Bank of New York mistakenly continues to cling to the claim that:

> "...BNY is the fee title **owner** of the property by virtue of the Deed and Seller's Assignment of Real Estate Contract."

Respondent's Brief, p. 11. (Emphasis in original).

The fact that Bank of New York's brief fails to cite any statutory or case law in support of its "**ownership**" claim is sufficient grounds to summarily dismiss the argument. After all it is at best disingenuous and at worst dishonest to present the one argument that is central to the Respondent's position and central

to the trial court's decision without any supporting legal authority. The Deed and Seller's Assignment is nothing more than a fancy way to play musical chairs. Bank of New York took over Hooper's chair, however that event still limits Bank of New York to the rights that Hooper had at the time of the transfer.

IV. THE PROVISIONS OF RCW 7.28.230(1) ALSO PROTECT THE RIGHTS OF THE JUNIOR LIENHOLDER.

Assuming *arguendo* but without admitting that Bank of New York had a valid subsisting interest in the real property it could have attempted to obtain the right to possession of the subject property by foreclosure. *RCW 7.28.230(1)*. If Bank of New York became the successful bidder at a sheriff's foreclosure sale then Bank of New York would be in line to seek the relief of quieting title if necessary.

The judicial foreclosure process is governed by RCW Chapter 61.12 and RCW Chapter 6.23. In a judicial foreclosure a junior lienholder such as a judgment lien creditor has the right to redeem the subject property. *RCW 6.23.010*. The junior lienholder has the statutory right to redeem the real property that was the subject of the judicial foreclosure by paying the amount

RCW 61.12.060. The "process" used by the trial court in this case, in addition to being contrary to the law, also subverts the statutory safeguards that exist to protect the rights of the junior lienholder and other parties.

Bank of New York and Mr. Barbanti argue about the meaning of ¶ 19 (d) of the Hooper-Barbanti contract in the context of a judicial foreclosure. Is the contract vendor required to give notice of acceleration before commencing a judicial foreclosure action? Bank of New York makes a good argument that it has the option of not accelerating the entire contract balance in a foreclosure action. As a junior lienholder who can only redeem the property by paying the amount bid to satisfy the foreclosure judgment, Junco Frost welcomes Bank of New York's generosity when it claims that it can foreclose on an obligation for less than the full amount owed. The trial court's order ignores the issue of interpreting ¶ 19 (d) of the Hooper-Barbanti contract.

Lastly the Appellants, Defendants below, argued that the *res judicata* and collateral estoppel effect of the decision in the earlier litigation between the parties, wherein Judge Cozza found

that the Hooper promissory note and deed of trust were stale and could no longer be enforced, bars any recovery by Bank of New York in this case. The trial court ignored these arguments which created disputes of material fact. These arguments won't be repeated here but are incorporated herein for the record.

The *res judicata* and collateral estoppel arguments, when viewed in the light most favorable to the nonmoving party, created more than an inference that there was a material fact dispute regarding whether one part of the payment provisions under the Hooper-Barbanti contract was even enforceable. *Trimble v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). Looking at all of this evidence, a reasonable person would be unable to reach but one conclusion, therefore summary judgment should have been denied. *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

If Bank of New York had standing in this case and if the Fulfillment Deed had not been recorded, it would be interesting to litigate the interpretation of ¶ 19 (d) of the Hooper-Barbanti

contract or the factual underpinnings of the *res judicata* and collateral estoppel defenses raised by the Defendants/Appellants below. However standing and jurisdiction come first and Bank of New York has no standing and the court had no jurisdiction in this case. Therefore this action must be dismissed and the other defenses are rendered moot by the dismissal.

V. THE APPELLANTS ARE ENTITLED TO FEES ON APPEAL.

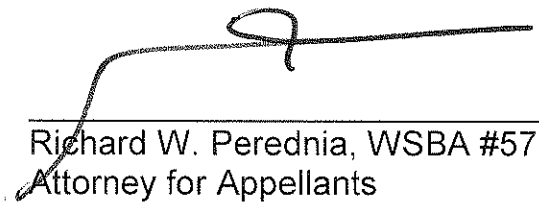
Based on the attorney fee clause, found in Paragraph 23 of the Hooper-Barbanti contract, and on the provisions of RCW 61.16.030, the Appellants are entitled to attorney's fees for this proceeding. Appellants request fees consistent with the provisions of RAP 18.1.

VI. CONCLUSION.

Bank of New York's lack of standing and the court's lack of jurisdiction are dispositive of this case and require immediate dismissal. The other defenses raised by the Appellants raise disputes on material facts such that if the lawsuit wasn't dismissed, the summary judgment would have to be reversed nevertheless because Bank of New York did not meet its burden

as moving party in a summary judgment.

Respectfully Submitted, on
January 28, 2013.



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CERTIFICATE OF SERVICE

I, Marco T. Barbanti, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On January 28, 2013, I cause to be served via first class, U.S. Mail a true and correct copy of the foregoing REPLY BRIEF OF THE APPELLANT JUNCO FROST LAVINIA to the following:

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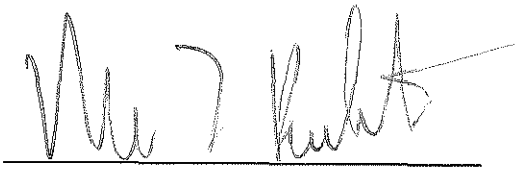

Marco T. Barbanti