Supreme Court Case No. 93771-1
Court of Appeals Case No. 73100-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

BANNER BANK, a Washington corporation,

Respondent/Plaintiff,

v.

JOSEPH R. AND MELANIE W. ELENBAAS,
husband and wife, and the marital community composed thereof,

Petitioners/Appellants/Defendants.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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II. INTRODUCTION

Respondent Banner Bank, a Washington banking corporation ("Banner Bank"), Plaintiff in the Superior Court and also Respondent in the Court of Appeals, by and through its attorneys, HACKER & WILLIG, INC., P.S., respectfully presents this Answer to Petitioners' "Petition for Review by Supreme Court" (the "Petition") pursuant to Washington Rule of Appellate Procedure ("RAP") 13.4(d) and the letter from the Supreme Court Deputy Clerk dated November 30, 2016. On December 21, 2016, Banner Bank has also filed a separate Answer to Petitioner's "Request for Extension of Time to File Petition for Review by Supreme Court," and this Answer is respectfully incorporated herein by reference.

Joseph R. Elenbaas and Melanie W. Elenbaas (the "Petitioners" or the "Elenbaases") filed the Petition on October 24, 2016, three (3) days after the Court's October 21, 2016 deadline stated in the Rules. This late filing is of note because it is, unfortunately, consistent with Petitioners' pattern of late filings and general delays, which began long before Banner Bank's Complaint was filed in this matter in the Whatcom County Superior Court. At its core, this is a simple collection matter: the Elenbaases missed their very first loan payment in May/June of 2009, and Banner Bank undertook exhaustive efforts – and great expense – to try to get the Elenbaases' loan payments back on track over the next five (5)

years. Ultimately, the Elenbaases demonstrated an inability to make their payments in full and on time, and Banner Bank filed its Complaint against the Elenbaases in this matter in September of 2014.

The Elenbaases have raised numerous arguments in the case which were all unpersuasive to the trial court and Court of Appeals. Similarly, for all the reasons set forth below and herein, the Petition does not meet the criteria for consideration set forth in RAP 13.4(b).

III. COURT OF APPEALS OPINION

The Court of Appeals, in its Unpublished Opinion filed August 22, 2016 (the "Opinion"), correctly held that there were no issues of material fact in this case; that there was "no dispute that the Elenbaases failed to make payments in accordance with the schedule, and the bank is entitled to enforce the terms of the Note at the borrower's expense." *See*, Opinion, **Appendix A**, pg. 8. The Court of Appeals further stated in its discussion regarding summary judgment, that in this case "we have a contract dispute with a record of late payments that does not involve the weighing of evidence or witness credibility, regardless of how a party may characterize it." *See*, Opinion, fn. 3, pg. 8. Thus, the Superior Court correctly ruled on summary judgment, and the Court of Appeals correctly applied Washington law and upheld the lower court's orders and Judgment in

favor of Banner Bank.

IV. RESTATEMENT OF ISSUES

Though they are not organized in any particular way, most of the issues raised in the Petition are simply a summary duplication of issues previously ruled upon by the Superior Court, then the Court of Appeals. However, it remains clear that there are no issues of material fact in this case, and the re-raising of these same "issues" now by Petitioners does not merit review under RAP 13.4(b).

Though Petitioners claim they requested "explanation of what legal charges or causes created said charge" (Petition, pg. 1), Banner Bank provided the Elenbaases with multiple such explanations over the course of several years. *See*, Brief of Respondent, dated February 2, 2016, pgs. 16-19.

The Elenbaases were represented by counsel at the hearing on summary judgment in the Superior Court and during the appeal process. *See*, Brief of Appellants, dated January 5, 2016; *see*, Clerk's Papers ("CP") 159. The Elenbaases had the opportunity, independently and through counsel, to raise any issues of discrimination and/or due process rights in those forums. The Elenbaases either chose not to do so *or* had such issues considered and resolved by the various courts. None of the

alleged discrimination requires a different result nor does it warrant consideration by the Supreme Court.

The Elenbaases claim "discrimination," but the record does not bear out any discriminatory action taken by Banner Bank. The Elenbaases are really seeking special treatment, yet they should be bound by the same rules of contract law and court rules as any other party in Washington. In fact, they received numerous accommodations throughout this matter, by way of additional time and continuances to allow them to prepare pleadings and documents, and they have shown themselves to be adept at engaging with the Courts even when unrepresented.

In the end, not a single "issue" raised by the Elenbaases in their Petition is supported in law or fact, and thus the Petition should be denied.

V. RESTATEMENT OF THE CASE

The record is clear that the Elenbaases borrowed over $177,000.00 from Banner Bank and failed to repay their loan (the "Loan") as required by the undisputed loan documents (the "Loan Documents"). CP 92-97. The loan payments that they did make, starting with the very first payment, were late. CP 86. Rather than accept Banner Bank's numerous offers of assistance to reschedule payments, have the payments deducted directly from their bank account, mail the payments in pre-addressed,

stamped envelopes and pay the arrearages over time, the Elenbaases simply continued to pay late, in odd amounts and to fall further behind in their payments. CP 86-90. Based on the fact that Banner Bank demonstrated the actual application of the Elenbaases' payment history and the fact that the Elenbaases' failed to dispute the balance due on the Loan, the trial court was led to conclude that there were no genuine issues of material fact and granted summary judgment as a matter of law. *See generally*, CP 59-79, 186-192.

Despite Banner Bank's exhaustive attempts to assist the Elenbaases in getting back on track prior to filing a lawsuit, their undisputed loan defaults continued over a period of years. CP 86.

The Elenbaases requested this Loan from Banner Bank in approximately April of 2009. CP 84. The Loan went into default when the Elenbaases' very first payment was 25 days late. CP 86. The Loan remained in default due to irregular payments and due to the Elenbaases' failure to pay their 2010 property taxes. *Id*. The Elenbaases again defaulted on their monthly payments beginning in about January of 2011, and these payment defaults were <u>never</u> fully cured. *Id*. Banner Bank attempted to work with the Elenbaases to get their payments back on track for the next three years. *See*, CP 195-196; [253-255, 271-279, 351, 243, 246, 207-215, 240-242, 119, 356 (date order 2011-2014)].

Since its inception, the Loan has been paid sporadically with payments frequently late; many times being three (3) months in default. CP 86. Based on over three years of the Elenbaases' continuing default under the Loan Documents; the resulting delinquent loan balance; having repeatedly demanded payment from the Elenbaases, but receiving no full payment (or response to Banner Bank's offer of a repayment agreement and/or automatic payment withdrawal), Banner Bank was left with no other option but to file its Complaint For Money Judgment On Promissory Note And For Foreclosure Of A Deed of Trust (the "Complaint"). CP 88. The Complaint was filed in the Whatcom County Superior Court on September 9, 2014. CP 16.

Four months prior to filing the Complaint, in approximately May of 2014, after numerous written demands for full payment, Banner Bank began returning all payments (both partial and otherwise) to the Elenbaases, as insufficient to cure the existing and continuing defaults and bring the Loan current or to pay the Loan in full. CP 86-90, 119-138. This was done in part to protect the Elenbaases: the Bank was preparing to commence its judicial foreclosure of the Property. CP 16-44. Banner Bank advised the Elenbaases it would no longer accept partial payments on the Loan. CP 86. Banner Bank demanded full payment of the default amounts due and owing under the Elenbaases' undisputed promissory note

(the "Note"), but no payment completely curing the default were ever paid. CP 86-87.

There was simply nothing further that Banner Bank could reasonably do to assist the Elenbaases with making timely, full payments on their Loan.

The Complaint was finally served on the Elenbaases (who appeared to be evading service) on October 5, 2014 (over three weeks after it had been filed). On October 20, 2014, the Elenbaases filed their Answer to Banner Bank's Complaint. CP 49-50. Contrary to the clear facts as supported by the written record, the Elenbaases merely baldly denied that any defaults existed or that necessary payments were *not* made.

On October 9, 2014, while the Complaint was pending, Banner Bank again returned, this time via hand delivery, all checks being held totaling $20,000.00. CP 87, 81, 197. At that time, demand had been made by Banner Bank for the Elenbaases' past due payments of $26,143.50 (at the time the Complaint was filed) plus costs of $3,248.51 and attorneys' fees and costs incurred (at the time the Complaint was filed) in the amount of $13,498.57. The default balance due at that time was approximately **$42,890.58**. The Elenbaases' checks did not cover even half of that amount. CP 20.

Banner Bank spent five years in this "default - partial payment - further default" cycle created by the Elenbaases. *See*, Section IV(E) of the Respondent's Brief. Banner Bank sent repeated demands for full payment, and requested in-person and/or telephone conferences with the Elenbaases to discuss either a repayment plan or an automatic payment plan, to which the Elenbaases failed to appear, as agreed, but rather responded with rambling, inconsequential letters and notes, without cure payment, and further delayed efforts to collect full payment or set up an agreeable repayment plan. CP 89.

Time and again, Banner Bank provided the Elenbaases with a full and accurate accounting of their Loan. Beginning in 2011, Banner Bank has repeatedly provided loan histories and individual spreadsheets in an attempt to explain the default [CP 253-255, 271-279, 351, 243, 246, 207-215, 240-242, 119, 356 (date order from 2011 through 2014)].

These writings are all in the record before the Court, and are summarized in Respondent's Brief, dated February 2, 2016, at pgs. 16-19.

VI. REASONS WHY REVIEW SHOULD BE DENIED

RAP 13.4 (b) provides the following strict criteria for the acceptance of review by the Supreme Court of Washington:

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> **Considerations Governing Acceptance of Review**. A petition for review will be accepted by the Supreme Court **only**:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
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> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4 (b) (West 2016 ed.).

The Elenbaases raise no issues whatsoever under RAP 13.4(b). As in the lower court, the Elenbaases again seem to have filed the Petition as yet another "bite at the apple," simply to rehash issues already raised and overruled in the lower court, and on appeal; together with an entirely new issue related to citizen's rights and/or "discrimination." The record is conclusive: Banner Bank tried everything with the Elenbaases, making every conceivable accommodation for years to try to coax the Elenbaases' pattern of late and inadequate payments back on track. Thus, as the trial court and Court of Appeals found, Banner Bank was entitled to its Judgment against the Elenbaases, which should be upheld. The

Elenbaases offer no substantive basis whatsoever for the Petition, which should be denied.

A. The Decision Below Is Not In Conflict With Any Decision of This Court.

There is no evidence presented that the decision of either the trial court or the Court of Appeals is in conflict with any decision of the Washington State Supreme Court. This matter involved a relatively straightforward breach of contract and subsequent collection. The Elenbaases for many years failed to make their Loan payments on time and in full. The Loan was declared in default, the payments were never fully made up, and Banner Bank refused to continue to accept partial payments that were insufficient to cure the existing defaults. There is no law in this state to excuse Petitioners' ongoing pattern of late and insufficient payments.

In Washington, a party is responsible for knowing the contents of the documents they sign, **including loan documents**. *Skagit State Bank v.*

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Rasmussen, 109 Wn.2d 377, 380 (1987).[1]

Again, this case is a straight-forward collection matter. The Elenbaases obtained a loan from Banner Bank to refinance the Whatcom State Bank loan. CP 84-85. The Elenbaases almost immediately defaulted by failing to make the very first payment in a timely manner. This pattern then continued over the course of years where the Elenbaases would default and Banner Bank would work diligently in an attempt to assist them in getting the loan back on track. At some point, however, the

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[1] The relevant principles are neatly summarized in *National Bank v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973):

> It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P.2d 661 (1934). One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand. [The plaintiff], being not only a person of ordinary understanding but one with more than ordinary experience in land transactions and instruments of conveyance and security, and with time and opportunity both to consult with an attorney and to inspect the instruments before signing, cannot now be heard in law to repudiate his signature. The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs. As we said in *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 480, 256 P.2d 301 (1953):
>
> > Appellant had ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons. Under these circumstances, he cannot be heard to deny that he executed the contract, and he is bound by it.

Id. at 913.

Elenbaases simply failed to cure the existing defaults and failed to meet the terms of the Loan Documents.

Both the Note and Deed of Trust executed by the Elenbaases require that all payments be timely made, and specifically provide that the failure to do so constitutes a default under the Loan Documents. The Note states that the Elenbaases were to pay Banner Bank "60 monthly consecutive principal and interest payments of $2,139.36 each, beginning May 25, 2009" followed by "59 monthly consecutive principal and interest payments . . . of $2,126.55 each, beginning May 25, 2014" and one final "principal and interest payment of $2,126.31 on April 25, 2019[.]" CP 96. Regarding default, the Note could not be clearer: "Each of the following shall constitute an event of default . . . Borrower fails to make any payment when due under this Note." CP 96. Upon default, Banner Bank was legally entitled to "declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount." CP 97.

The Elenbaases absolutely, unequivocally, and contractually obligated themselves to repay Banner Bank according to the regular schedule.[2] The Elenbaases failed to timely make payment as required,

[2] The Elenbaases argued unsuccessfully that Banner Bank was somehow compelled to accept late, incomplete, partial payments – at any time – that would then somehow "cure" existing defaults, regardless of any time limitations in the

which are clear events of default. Accordingly, there is no basis to further review the Judgment and Orders entered in the trial court and upheld by the Court of Appeals.

There were no material disputes in fact and as a matter of law, Banner Bank was entitled to the relief sought, including summary judgment on its Complaint.

The purpose of summary judgment is to avoid useless trials when there is no issue of any material fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). If there is no issue as to any material fact, the trial court may grant summary judgment as a matter of law. *State Farm General Insurance Co. v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984).

To avoid summary judgment, the nonmoving party must present specific facts to demonstrate that genuine issues of material fact exist. *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490 (1983); *Tokaz v. Frontier Federal Savings & Loan Association*, 33 Wn. App. 456, 656 P.2d 1089 (1982). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having

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Loan Documents. *See*, Appellants' Brief, pg. 20; CP 155. There is no such obligation under the Loan Documents, and the Loan Documents most certainly contain payment deadlines (among other temporal restrictions on the Elenbaases). In any event, full payment necessary to "cure" or reinstate the Loan was never made.

its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008). Conclusory statements are insufficient to overcome a summary judgment motion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

The Petitioners failed to present any specific facts to demonstrate that there were any issues of material fact and failed to establish that any discovery would yield any dispute in facts. Summary judgment was appropriately granted in this matter.

For all the reasons set forth herein, and based upon Banner Bank's review of all applicable authority, there is no conflict in laws at any level as to the summary judgment standard, whether it was appropriately applied here, and/or as to any other claim raised by Petitioners in this case.

B. The Decision Below Is Not In Conflict With Any Decision of the Court Of Appeals.

Likewise, there is no evidence that the decision of the trial court and or of the Court of Appeals conflicts with any other decision of the Court of Appeals in any Division. This case involves a straight-forward application of existing contract law as applicable to banking, and the

decision reached was appropriate given that there are no material disputes. While the Elenbaases claimed, without evidence, that there was no default, they did not dispute the payment history presented by Banner Bank which showed a continued pattern of late and irregular payments that failed to cure existing loan defaults. Summary judgment was appropriately granted and the decision of the trial court was appropriately upheld.

C. This Case Does Not Involve Any Significant Issues of Constitutional Law.

The Elenbaases raise a red herring that they have somehow been discriminated against by the Courts in this matter because Mr. Elenbaas allegedly suffers from a "cognitive impairment." No actual, credible evidence was ever offered of any impairment, Petitioners clearly have the ability to read and respond to all pleadings (though consistently late), and Petitioners appear to have read and understood the Court Rules. There is simply no evidence at all that the Petitioners suffered from discrimination at any point in the process of obtaining the Loan, negotiating with Banner Bank, failing to repay the Loan according to its terms, and in any of the court proceedings that followed.

The Petitioners cite to RCW 49.60.010-030 and 42 U.S.C. § 12101-02 for the proposition that the law provides for protection against

discrimination. None of these statutes are applicable here.

RCW 49.60.010, *et seq*., are known as the "law against discrimination," and the statute does implicate discrimination in lending, but such sections are not applicable here.

RCW 49.60.030 provides in relevant part as follows:

> (1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:
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> ***
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> (c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;
>
> (d) The right to engage in credit transactions without discrimination;
>
> ***

See, RCW 49.60.030 (West 2016 ed.).

There is no evidence in the record of any discrimination by Banner Bank, period, including as to the credit transaction here or the Elenbaases' grant of real estate to secure the loan transaction. The allegation of "discrimination" here appears to arise from the mistaken belief that the Court's failure to continue the hearing on the motion on summary

judgment was somehow a discriminatory act. It was not.

The Washington State Supreme Court has held that proceedings held in a court of law under the rules applicable to such case, when such court has jurisdiction, and the defendants having the opportunity to be heard, meet the requirements for due process of law. *See, Tieton Hotel Co. v. Manheim*, 75 Wash. 641 (1913), which held in a case similar to the one at bar:

> There is no merit in this contention [of alleged deprivation of property without due process]; for what we have heretofore said upon the case indicates quite clearly that the appellants were brought into court by regular process; they appeared in the action and submitted their claim to a court of competent jurisdiction; they have prosecuted an appeal to this court; they have asserted their claim of right, and it has been found that they have no claim of right. It has been said by the supreme court of the United States:
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> > "A trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice -- the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard -- met the requirements of due process of law." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 234.

Tieton Hotel, 75 Wash. 645-46.

The Petitioners have had full access to the Courts and all due process rights were preserved. The Elenbaases were represented by counsel at both the trial court and at the Court of Appeals. They clearly

understood and pursued all rights. There is simply no evidence of any substantive or procedural due process violations in this matter.

D. The Petition Does Not Involve Any Issue of Substantial Public Interest.

This case involves nothing more than a simple collection matter upon the obligor's failure to repay an undisputed loan according to its terms.

The trial court conducted a careful analysis of the Elenbaases' payment/default history on the Loan. CP 268-270. This document depicts the loan/default history by each payment and demonstrates that the Elenbaases never fully made up their late/incomplete and/or partial payments on the Loan. *Id*. Since inception, the Loan was always in default. *Id*. *See also*, CP 293-295.

For this reason alone, this matter was originally resolved on summary judgment and was then upheld in an unpublished decision by the Court of Appeals. There are no genuine issues of material fact here, and there is no reasonable question that Banner Bank is entitled to its Judgment against the Elenbaases upon their default. There is no issue of substantial public interest involved in this matter.

VII. CONCLUSION

Consistent with their established pattern in both the superior court and the Court of Appeals, the Petitioners have submitted no new evidence to contradict that which was before both of the lower courts. The decision below is not in conflict with any decision of this Court. The decision below is not in conflict with any decision of the Court of Appeals. The Petitioners were represented by counsel at the summary judgment hearing in the trial court and on appeal - no constitutional issues were raised in either of the lower courts. The Petition does not involve any issues of substantial public interest.

For all of these reasons, the Petition for Review by Supreme Court should be denied.

DATED this 27th day of December, 2016.

Respectfully submitted,

HACKER & WILLIG, INC., P.S.

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VIII. APPENDIX A

Court of Appeals Opinion

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

JOSEPH R. AND MELANIE W. ELENBAAS, husband and wife, and the marital community composed thereof, Appellants, v. BANNER BANK, a Washington corporation, Respondent.	)	No. 73100-9-I DIVISION ONE UNPUBLISHED OPINION FILED: August 22, 2016

SPEARMAN, J. —Joseph and Melanie Elenbaas appeal a trial court order granting summary judgment in favor of Banner Bank. They contend that there are genuine issues of material fact regarding the timing and existence of their default. Finding none, we affirm.

FACTS

In 1997, appellants Joseph and Melanie Elenbaas (collectively, the "Elenbaases") borrowed $123,500.00 from Whatcom State Bank, the predecessor of respondent Banner Bank. The Elenbaases executed an adjustable rate note secured by a deed of trust on the Elenbaases' property located at Lot 11, Defiance Park, V-19, P-79-80, Bellingham, Washington.

In 2009, the Elenbaases refinanced the loan with Banner Bank and executed a new promissory note for $177,529.00 (Note). The Note would mature on April 25, 2019 and required the Elenbaases to make 60 monthly payments of

$2,139.36. The first payment was due on May 25, 2009. After the first 60 months, the Note would require 59 payments of $2,126.55, and one final payment of $2,126.31. The Elenbaases also executed a modification of the deed of trust and an assignment of rents.

The Note permitted borrowers to pre-pay without penalty, but early payments would not, unless agreed to in writing, "relieve [the Elenbaases] of [their] obligation to continue to make payments under the payment schedule." Clerk's Papers (CP) at 30. If a payment was 16 or more days late, Banner Bank would impose a late charge. Under the Note, the failure to make any payment when due would be an event of default. Additionally, any failure to comply with or perform any other term, obligation, covenant, or condition contained in the Note or any related documents or any other agreement between the Elenbaases and Banner Bank, would also be considered an event of default. Upon default, Banner Bank had the ability to declare the entire unpaid principal balance and interest immediately due and payable. The Note also permitted Banner Bank to delay or forego enforcing any of its rights or remedies under the Note without losing them.

A purported misunderstanding resulted in the Elenbaases failing to make the first payment when due. The Elenbaases explained that they were under the impression that the first payment was due June 25, 2009, instead of May 25, 2009 as stated in the Note. They made their initial payment on June 19, 2009, four days before what they assumed was the due date, but more than 16 days after the actual due date. Banner Bank informed the Elenbaases that they were

behind in their payments and charged late fees accordingly. The Elenbaases continued to make payments behind schedule and consistently be at least one payment in arrears. While this was technically a default under the Note, Banner Bank continued to accept the late payments until 2011.

In March 2011, Banner Bank sent a demand letter and a Notice of Default, indicating that it had not received payments for the months of December, January, or February. The Elenbaases only made a partial payment. Banner Bank sent a demand letter regarding the payments and the Elenbaases' failure to pay the property taxes. The parties corresponded multiple times between 2011 and 2013 regarding payments and late fees.

In October 2013, Banner Bank sent a notice to the Elenbaases accepting their late September payment. In this letter, the bank notified them that they still had an outstanding balance of $3,763.32, which included the October payment due on the 25th. The letter also stated that if the total outstanding amount was not received by November 10, 2013, an additional late charge would be added.

The Elenbaases sent a payment of $2400 sometime in early November, but it was not received on or before November 10, 2013. On November 12, 2013, Banner Bank sent another letter notifying the Elenbaases that the full amount of $3,763.32 was to be paid on or before November 22, 2013 or Banner Bank would be taking further action to collect. At this point Banner Bank began to return the partial payments to the Elenbaases. The checks appeared to cross in the mail; on November 21, 2013, Banner Bank returned the Elenbaases' check # 1505 for $2400, dated November 3, 2013. The Elenbaases sent another check

for $1400 (No. 1513) dated November 24, 2013, but it was not received before the next payment became due. While the Elenbaases tendered checks totaling $3800, the outstanding balance increased to $5,902.68. As a result, the Elenbaases remained in arrears.

On December 3, 2013, the Elenbaases attempted to retender check No. 1505.[1] Banner Bank returned both checks on December 19, 2013, indicating that the total amount due as of that date, including late charges and attorneys' fees, was $7,449.14.

From December 2013 to February 2014, the Elenbaases continued sending monthly payments of $2300-2400, albeit late, and made two payments in January. On February 12, 2014, the payment records show that the Elenbaases were only short $1,824.68; the remaining amount consisted of late charges and attorneys' fees. This was the closest the Elenbaases came to being current on their account.

On March 5, 2014, Banner Bank sent the Elenbaases another letter notifying them that they had failed to make payments when due. CP 240-241. The letter stated that the Elenbaases owed $3,964.04 on the 2009 Note balance (prior balance of $1,824.68 plus February payment of $2,139.36), and that Banner Bank had also incurred additional attorneys' fees totaling $10,542.42.[2]

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[1] The record references a letter sent from the Elenbaases on December 3, 2013, with check No. 1505 for $2,400. The actual correspondence does not appear to be in the record, however.

[2] The fees are listed as "Accrued", which suggests that the $10,542.42 includes the prior amount of $1,332.52 incurred from September–December 2013. CP at 241, 244. Banner Bank's subsequent letter dated April 25, 2014, provides a breakdown of the legal fees.

In this letter, Banner Bank stated that it was holding the $9300 in payments received from December through February. These payments would be applied to the outstanding balance if the Elenbaases remitted the remaining amount on or before March 19, 2014. Banner Bank also notified the Elenbaases that if they failed to bring their account current or contact the bank by the 19th, it would begin to foreclose on the Deed of Trust.

In early April the Elenbaases contacted Banner Bank about the possibility of a loan modification or a reduction in interest. Banner Bank declined and provided the Elenbaases with a breakdown of assessed collection fees, including attorneys' fees and appraisal costs for the property. On May 20, 2014, Banner Bank returned the checks and money orders received from December 2013 to May 2014. As of that date, $17,863.67 (including late fees) was owed on the loan; the total amount of returned funds was $13,800. Banner Bank also sent a proposed repayment agreement under which the Elenbaases would pay a minimum of $19,234.21 on or before May 25, 2014, continue to make monthly payments as scheduled, and pay an additional $400 on the 10th of each month. The agreement would also have required the Elenbaases to open a Banner Bank account from which payments could be transferred automatically.

The Elenbaases did not enter into the proposed Repayment Agreement and sent two payments in June 2014 totaling $6900. Banner Bank returned these payments on June 25, 2014, and reiterated that it would no longer accept partial payments. The total amount due as of June 25, 2014, including accrued fees,

was $35,009.98. Banner Bank suggested that the parties meet in a "final attempt to resolve this matter prior to foreclosure. . . ." CP at 356.

During June and July 2014 the Elenbaases sent a number of letters to Banner Bank. Banner Bank responded on July 2 and on July 23, stating that the Elenbaases would need to pay the reduced amount of $23,918.20 and enter into the proposed Repayment Agreement in order to reinstate their loan. The letter of July 23, 2014 indicated that the Elenbaases' "prior partial payments... [would] not be discussed further" and that there "[would] be no further negotiation regarding any of [the Elenbaases'] other delinquent loan payments." CP at 359. Banner Bank also sent letters to the Elenbaases informing them about the assessed legal fees. The Elenbaases responded on July 24, 2014, explaining their circumstances and requesting an explanation of the legal fees and appraisal charges.

Banner Bank filed suit for a money judgment and a judicial foreclosure on September 9, 2014. The Elenbaases first responded via letter on September 29, 2014, stating that the summons and complaint had not been delivered to them. They contended that Banner Bank had checks in its possession that totaled $39,400, when only $26,744.84 had come due under the Note. The Elenbaases requested that Banner Bank post the checks and provide proof that other checks they submitted had been returned. On October 7, 2014, Banner Bank mailed a copy of the summons and complaint to the Elenbaases and returned $19,900 in checks.

The Elenbaases resubmitted the returned checks on October 18, 2014, and included an additional payment for the month of October. In this letter, they indicated that Banner Bank should have another $20,000 in its possession. Id. The Elenbaases answered the summons and complaint on October 20, 2014. On October 29, 2014, they wrote another letter demanding that the bank "ascertain the location of some $40,000 in checks that [had] been provided [to Banner Bank]." CP at 558. The Elenbaases' indebtedness as of October 29, 2014 totaled $30,594.10 in outstanding loan payments and late charges, $3,248.51 in appraisal fees, and $18,965.63 in attorneys' fees and costs.

Banner Bank responded to the Elenbaases' letter on November 12, 2014, after filing a motion for summary judgment. The Elenbaases filed a notice of absence/unavailability and later moved to continue the hearing in order to obtain counsel. Counsel for the Elenbaases entered a notice of appearance on November 26, 2014. The Elenbaases argued that they sent payments to Banner Bank totaling $41,600, more than the amount that had come due under the Note.

Banner Bank's motion was heard on December 5, 2014, and the trial court granted summary judgment in Banner Bank's favor. The Elenbaases filed a motion to reconsider on December 15, 2014, which was denied.

Banner Bank filed a partial satisfaction of judgment applying funds of $24,400 in partial payments. On January 28, 2015, the bank filed a Motion for Decree of Foreclosure, which was granted on February 4, 2015. On February 12, 2015, the Elenbaases filed their notice of appeal. The Elenbaases moved for a

preliminary injunction to halt the sale on March 25, 2015. The trial court denied the injunction and the property was sold on April 10, 2015.

DISCUSSION

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). We review an order granting summary judgment de novo; all facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

The Elenbaases argue that they were never in default because they made timely payments, notwithstanding the fact that the payments were not in accordance to the schedule required by the Note.[3] They insist that any alleged default resulted from Banner Bank "arbitrarily beg[inning] to refuse their payments." Reply Br. at 9. Banner Bank argues that the loan went into default when the very first payment was late, and remained in default due to the Elenbaases' irregular payments and failure to pay the 2010 property tax.

The Note defines events of default as "the failure to make any payment when due," as well as any failure "to comply with or to perform any other term,

[3] The Elenbaases describe this dispute as one involving "he said, she said," and cite Barker v. Advanced Silicon Materials, LLC, (ASIMI), 131 Wn. App. 616, 128 P.3d 633 (2006) in support. But Barker is easily distinguishable. That case involved an employment dispute and claims of sex discrimination and retaliation. Here, we have a contract dispute with a record of late payments that does not involve the weighing of evidence or witness credibility, regardless of how a party may characterize it.

obligation, covenant, or condition contained in the Note or any related documents or any other agreement between [the Elenbaases] and [Banner Bank]." CP at 30. The Elenbaases argue that Banner Bank "never established when their breached occurred." Reply Br. at 10. The record shows that the Elenbaases were at least a month behind in their payments from the Note's inception, and therefore consistently in default.[4] Banner Bank may have continued to accept late and partial payments for an extended period of time, but that did not cure the Elenbaases' breach. Banner Bank did not waive its right to maintain a default by retaining the Elenbaases' checks.

The Elenbaases argue that "neither the Note nor the Deed prevented [them] from paying the full amount due... with a series of smaller checks that together totaled the amount then due and owing." Br. of Appellant at 23. Instead, they contend that Banner Bank's decision to "arbitrarily stop[ ] accepting what it deemed 'partial payments'" was not permitted by the Note or the Deed of Trust. Br. of Appellant at 21.

Nothing in the Note obligated Banner Bank to accept partial payments or payments made on an alternate schedule.[5] The Note clearly states that "[s]ubject

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[4] While not designated as an assignment of error, the Elenbaases also argue that they should have had time to engage in discovery before Banner Bank brought its motion for summary judgment. They did not move for a continuance to conduct the desired discovery under CR 56(f), however. While the Elenbaases initially proceeded pro se, they did obtain counsel to oppose Banner Bank's motion for summary judgment, and could have moved for a continuance at that time. Their failure to do so precludes them from raising it as a ground for appeal.

[5] At oral argument, counsel for Banner Bank made statements that purported to add terms to the Note and the Deed of Trust. He first stated that the bank was required to accept partial payments, which is not set forth in the documents. Later, he characterized the bank's practice of holding payments as keeping them "in suspense," for which he cited no provision of the loan documents nor to any other portion of the record. We therefore disregard counsel's statements and consider only the evidence in the record.

to any payment changes resulting from changes in any index for this loan, Borrower will pay this loan in accordance with the following payment schedule," and sets forth the amounts, due dates, and interest rates. CP at 30. The failure "to make any payment when due under this Note" is an event of default. The Note allows for prepayment, but early payments would not relieve any obligation to continue to make payments under the payment schedule. The bank could therefore accept the partial payments that were made ahead of schedule and the Elenbaases were still required to make the monthly payments as they came due.

The Elenbaases claim that Banner Bank accumulated and held checks that in total, comprised more than the amount that was due.[6] According to them, Banner Bank caused the default by refusing to accept the payments they submitted. The Elenbaases further argued if the bank had properly credited the payments as they had been received, the records would have shown that they prepaid their amounts due.

The Elenbaases disregard the fact that none of their payments were made in accordance with the schedule set forth in the Note. The terms of the Note dictate the circumstances that give rise to the default. Even if Banner Bank had credited every payment it received from the Elenbaases, and the Elenbaases would have been "prepaid," they were still obligated to make subsequent payments in accordance with the schedule, and they often failed to do so. The Elenbaases' comparison is also misleading because it excludes any and all late

[6] Although the Elenbaases complaints about whether the checks were returned in a timely manner or held for an unreasonable length of time do not appear to be completely unfounded, they have not shown that it had any effect on the status of their loan.

fees, attorneys' fees, and other collection fees in their comparison. Under the terms of the Note, the Elenbaases are required to pay these additional charges and they become part of the total indebtedness.[7]

The Elenbaases argue that there would have been no late fees, attorneys' fees, or the like if Banner Bank had only credited the payments as they received them. But the record shows that even if the payments would have been credited, they would have been appropriately applied towards the amount due resulting from earlier missed payments, and the Elenbaases would have incurred some additional late fees regardless. Regarding the attorneys' fees incurred, the Note permits Banner Bank to hire an attorney to collect if the Elenbaases did not pay. There is no dispute that the Elenbaases failed to make payments in accordance with the schedule, and the bank is entitled to enforce the terms of the Note at the borrower's expense.

Both parties request an award of fees under RAP 18.1, the Note and the Deed of Trust. Under the terms of the Note and the Deed of Trust, Banner Bank is entitled to an award of fees and costs as the prevailing party on appeal.

Affirmed.

WE CONCUR:

[7] At oral argument, the Elenbaases claimed for the first time that they were under the impression that fees and costs would be tacked on "at the end." But they cite no contractual or legal basis for this assumption; we therefore do not consider it.

HACKER & WILLIG, INC., INC

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