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,

JOINT BRIEF OF THE APPELLANTS, MARCO T. BARBANTI ROYAL POTTAGE ENTERPRISES AND JUNCO FROST LAVINIA, INC.

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I. ASSIGNMENTS OF ERROR.

1. The trial court erred when it adjudicated Bank of New York's summary judgment motion without addressing Bank of New York's standing or capacity to collect monies allegedly due under the Hooper-Barbanti contract.

2. The trial court erred when it granted Bank of New York's summary judgment motion without any proof that Bank of New York had complied with the requirements of Paragraph 19 (d) of the Hooper-Barbanti contract governing judicial foreclosures.

3. The trial court erred when it entered the "ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT" (hereinafter "Summary Judgment Order") judicially foreclosing the Hooper-Barbanti contract without entry of a judgment for monies owed and an order directing the Sheriff sell the subject property at a foreclosure sale.

4. The trial court erred when it granted Bank of New York's summary judgment motion purporting to foreclose the Hooper-Barbanti contract in light of the undisputed fact that the Hooper-Barbanti contract had been paid in full and the fulfillment deed

for that contract had been recorded.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Any party seeking relief in a court of law must demonstrate that it has the right (capacity) to assert its claim(s) in court. Does Bank of New York have "standing" to collect payments under the Hooper-Barbanti contract? The Seller's Assignment executed by Hooper in favor of Bank of New York *purports* to convey Hooper's rights under the contract to Bank of New York, however at all times after the execution and recording of the Seller's Assignment all payments made under the contract continued to be disbursed to Hooper. Bank of New York's claim in this lawsuit are contradicted by its behavior outside the courtroom. As Plaintiff and moving party in a summary judgment Bank of New York has the burden to prove it has the "standing" or right to prosecute this lawsuit.

2. The Hooper-Barbanti contract contains a provision in Paragraph 19 (d) which requires the contract vendor give the contract purchaser notice of any alleged default(s) and an opportunity to cure said default for fifteen (15) days before the contract vendor may commence a judicial foreclosure based on the default(s). Did Bank of New York

comply with this provision? NO! Mr. Barbanti's undisputed testimony is that he received no such notice and even more telling is that Bank of New York has failed to allege in its Complaint that it issued such a notice.

3. Washington law specifically states that a mortgagee (or real estate contract vendor seeking to judicially foreclose a contract like a mortgage) is prohibited from having title quieted in its favor except after a foreclosure and sale according to the law. The trial court failed to follow the express procedural provisions of the statute governing quiet title actions by mortgagees/contract vendors and summarily changed Bank of New York status with respect to the subject property from secured party to fee owner.

4. In addition to disregarding all the procedural safeguards enacted by the legislature to govern judicial foreclosures, the trial court, in entering the Summary Judgment Order ignored the legal effect of the recording of the fulfillment deed and acted in a manner that is contrary to all established law in Washington by purporting to foreclose a contract for alleged but unquantified defaults when the real estate

contract was fully satisfied and merged into the fulfillment deed.[1]

III. STATEMENT OF THE CASE.

Brian and Lisa Hooper (hereinafter "Hooper") owned a piece of real property commonly known as 5711 N. Division, Spokane, WA 99207 (Clerk's Papers (CP) 1-42; 121-155; 156-309; 109-120). The property at 5711 N. Division, Spokane, WA 99207 is the subject of this litigation (hereinafter "subject property") (CP 1-42; 121-155; 156-309; 109-120). On or about March 25, 1993 Hooper executed and delivered a promissory note (hereinafter "Hooper note") to Metropolitan Mortgage & Securities, Co. Inc.(CP 1-42; 121-155; 156-309; 109-120). The promissory note was secured by a Deed of Trust which was recorded on April 23, 1993 under Auditor's File No. 9304230387 in the records of Spokane County, Washington (hereinafter "Hooper deed of trust")(CP 1-42; 121-155; 156-309; 109-120).

In May, 1996 Appellant Marco T. Barbanti (hereinafter

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[1] The trial court's decision as memorialized in the Summary Judgment Order is a real "head scratcher" because it fails to make any findings or conclusions that either address the requirements for a judicial foreclosure or address the merits (or lack thereof) of the arguments presented in opposition to the summary judgment. The trial court appears to be using a different albeit unnamed set of statutes that are not found in the RCW's.

"Barbanti") purchased the subject property from Hooper for $160,000.00 (CP 121-155; 156-309). The purchase price for the subject property was to be paid as follows: $7,000.00 cash paid at closing; and the balance of $153,000.00 pursuant to a real estate contract (hereinafter "Hooper-Barbanti contract")(CP 121-155; 156-309). The Hooper-Barbanti contract was recorded on May 24, 1996 under Auditor's File No. 960520463 in the records of Spokane County, Washington (CP 121-155; 156-309).

The Hooper-Barbanti contract provided that Barbanti's purchase of the subject property was done "subject to" the underlying Hooper note and Hooper deed of trust (CP 156-309). The Hooper-Barbanti contract specifically stated that the Hooper note continued to be Hooper's obligation, however Barbanti was to provide Hooper with the funds necessary to discharge the monthly obligation under the Hooper note (CP 156-309). At the time of the sale of the subject property the amount owed by Hooper on the Hooper note was $133,549.83 (CP 156-309) . An escrow account was set up to pass through payments from Barbanti to Hooper to Metropolitan Mortgage & Securities, Inc. to apply on the Hooper note (Allegro Escrow Account Number 15206)(CP

156-309).

The difference between the amount owed by Hooper on the Hooper note and the unpaid balance on the Hooper-Barbanti contract was $19,450.17 as of the closing date of the Hooper-Barbanti purchase and sale (CP 156-309). A separate escrow account (Allegro Escrow Account Number 15208) was set up to collect the monthly contract payment that was payable directly to Hooper (CP 156-309).

Mr. Barbanti stopped making payments to the pass through account (Allegro Escrow Account Number 15206) in 2000 (CP 156-309). The next due date on the pass through account is 1-1-2001 (CP 156-309). The last payment made on the Hooper note was made on March 8, 2003 (CP 156-309). By Quit Claim Deed recorded July 21, 2003 under Auditor's File No. 4929722 in the records of Spokane County, Washington Barbanti quit claimed his interest in the subject property to Appellant Royal Pottage Enterprises, Inc. (hereinafter "Royal Pottage") (CP 109-120). Barbanti did not assign his interest in the Hooper-Barbanti contract nor did Royal Pottage assume the purchaser's obligations under that contract.(CP 1-42; 397-404).

Appellant Junco Frost Lavinia, Inc. (hereinafter "Junco Frost")

is the judgment creditor under Judgment No. 02901497-6 entered in Spokane County Superior Court Case No. 02-2-00486-0 against Barbanti (CP 1-42; 397-404).

On April 16, 2009 Respondent Bank of New York (hereinafter "Bank of New York") filed a lawsuit in the Spokane County Superior Court (Case No. 09-2-01686-5) (hereinafter "Bank of New York 2009")(CP 156-309). The parties in Bank of New York 2009 and the present case are the same (CP 156-309).

In Bank of New York 2009 Bank of New York sought to reduce the unpaid balance on the Hooper note to a judgment and then sought to judicially foreclose the Hooper deed of trust to satisfy the judgment (CP 156-309). In the judicial foreclosure Bank of New York sought to extinguish the interests of all the Defendants that were junior to the Hooper note and Hooper deed of trust (CP 156-309).

In Bank of New York 2009 Defendants Barbanti, Royal Pottage, and Junco Frost moved to dismiss Bank of New York's Complaint on the grounds that the Complaint had been filed after the statute of limitations had expired on the enforcement of the Hooper note (CP 156-309). Royal Pottage also moved to quiet title and have the Hooper deed

of trust reconveyed (CP 156-309). The Defendants' Motions to Dismiss Bank of New York 2009 were granted, the lawsuit was dismissed, the deed of trust was ordered reconveyed and judgments in favor of the Defendants were entered including an award of attorney's fees and costs in favor of the prevailing Defendants (CP 156-309).

Bank of New York filed an appeal in Bank of New York 2009 (Washington State Court of Appeals, Division III Case No. 295851)(CP 156-309). The appeal **did not** assign error to or challenge the Superior Court's decision which ruled that the Hooper note was no longer enforceable because the lawsuit had been commenced after the applicable statute of limitations had expired (CP 156-309). The appeal in Bank of New York 2009 also **did not** assign error to or challenge the Superior Court's order reconveying the Hooper deed of trust (CP 156-309). The appeal in Bank of New York 2009 **only** assigned error to the award of attorney's fees and costs in favor of the prevailing Defendants and to the additional language used by the Superior Court in its order reconveying the Hooper deed of trust where, in Bank of New York's opinion, the Superior Court went beyond reconveying the Hooper deed of trust when it declared that title be quieted in favor of Royal Pottage

(CP 156-309). This Court agreed with Bank of New York and reversed the part of the Superior Court's decision awarding attorney's fees and costs to the prevailing Defendants and reversed the part of the Superior Court's decisions which stated that title was quieted in favor of Royal Pottage (CP 156-309). A Petition for Discretionary Review was filed with the Washington State Supreme Court and that Petition was denied.

On September 16, 2010 Hooper executed a Deed and Seller's Assignment of Real Estate Contract (hereinafter "Seller's Assignment") which was recorded on September 24, 2010 under Auditor's File No. 5936989 in the records of Spokane County, Washington (CP 59-108; 109-120). In the Seller's Assignment Hooper quit claimed its interest in the subject property to Bank of New York and also assigned and transferred to Bank of New York all of Hooper's right, title and interest in the Hooper-Barbanti contract (CP 59-108; 109-120). The parties to the Seller's Assignment did not do a UCC filing for their transaction (CP 156-309).

On October 28, 2010 the Summons and Complaint in the present case (hereinafter "Bank of New York 2010") were filed by Bank of New York (CP 1-42). In Bank of New York 2010 the Plaintiff, in its

newly acquired status as assignee of the seller's interest under the Hooper-Barbanti contract, sought to foreclose judicially the Hooper-Barbanti contract due to an alleged failure to make payments under the Hooper-Barbanti contract (CP 1-42). The Complaint in this case also sought to extinguish the interests of the other named defendants that were junior to the Hooper-Barbanti contract and to quiet title in favor of Bank of New York at the conclusion of the judicial foreclosure (CP 1-42).

Since the inception of the Hooper-Barbanti contract in May, 1996 and at all times material to this litigation Barbanti has regularly and timely made the monthly payments payable directly to Hooper under the Hooper-Barbanti contract (Allegro Escrow Account No. 15208)(CP 156-309). After the execution and recording of the Seller's Assignment in September, 2010, the records held by Allegro Escrow Services, Inc. for Account No. 15208 continued to show that each monthly payment made by Barbanti was being disbursed to Hooper and not to Bank of New York (CP 156-309). Bank of New York not only failed to file a UCC statement for its Seller's Assignment but it also failed to notify the escrow agent of any assignment of Hooper's interest

in the contract (CP 156-309; 121-155; 320-331).

Barbanti continued to make the regular monthly payment to Hooper under Allegro Escrow Account No. 15208 up to and including the March, 2012 payment (CP 156-309). After making the March, 2012 regular payment, Barbanti requested a payoff quote from Allegro Escrow for the Hooper account (CP 156-309). Pursuant to the payoff quote prepared by Allegro Escrow, on March 26, 2012 Barbanti paid the entire outstanding balance on the Hooper-Barbanti contract **in full** (CP 156-309). The Allegro Escrow Account No. 15208 was closed and Barbanti was given the original Hooper-Barbanti contract marked "ALLEGRO SERVICES, INC. PAID IN FULL" and Barbanti was given the original Statutory Warranty Fulfillment Deed (dated May 21, 1996) which had been held by the escrow agent until such time as the contract was paid in full (CP 156-309). The original Statutory Warranty Fulfillment Deed was recorded on March 26, 2012 under Auditor's File No. 6078471 in the records of Spokane County, Washington (CP 156-309).

On or about June 1, 2012 Bank of New York filed a Motion for Summary Judgment in this case along with supporting documents (CP

54-56; 59-108; 109-120). Bank of New York's Summary Judgment Motion sought: to foreclose the Hooper-Barbanti contract judicially; to extinguish the rights of any person(s) whose interest was junior to the Hooper-Barbanti contact and quiet title in favor of Bank of New York; and to obtain possession of the subject property along with an award of attorney's fees and costs against Mr. Barbanti (CP 54-56).

Defendants Barbanti, Royal Pottage, and Junco Frost opposed the Plaintiff's Summary Judgment on multiple grounds including but not limited to:

1. The Hooper-Barbanti contract had been fully satisfied as evidenced by the release of the original real estate contract stamped "PAID IN FULL" and the release and recording of the Statutory Warranty Fulfillment Deed for the Hooper-Barbanti contract.[2]

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[2] The Defendants (Appellants) had chosen not to submit a competing summary judgment motion for dismissal based on the full satisfaction of the Hooper-Barbanti contract. Instead the Defendants elected to argue that the recording of the fulfillment deed rendered the entire lawsuit moot and that the trial court could and should grant summary judgment in favor of the Defendants *sua sponte* without any need to invest further time sorting out the other issues presented by the motion. *See, Health Ins. Pool v. Health Care Authority*, 129 Wn.2d 504, 919 P.2d 62 (Wash. 1996). After reading the Summary Judgment Order one can't help but wonder if the

2. Bank of New York was barred by the doctrines of *res judicata* and collateral estoppel (arising from the decision in Bank of New York 2009) from attempting to collect any monies allegedly owed under the Hooper note and deed of trust because the earlier litigation between the same parties resulted in a final judgment declaring the Hooper note unenforceable and ordering the Hooper deed of trust reconveyed.

3. Bank of New York failed to meet its burden as the moving party in a summary judgment because it failed to allege the dollar amount of Mr. Barbanti's default under the Hooper-Barbanti contract. Therefore the Court had no facts before it (either disputed or undisputed) to form a basis for a judgment of foreclosure of the contract.[3]

4. Bank of New York improperly perfected the Seller's Assignment of Real Estate contract obtained from Hooper and

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Defendants and the trial court were in the same room since the trial court never addressed any of these issues.

[3] The Defendants (Appellants herein) further argued that if Bank of New York had met its burden as moving party and alleged the dollar amount of Mr. Barbanti's default then there would have been a dispute of this material fact which would preclude entry of a summary judgment(CP 156-309; 121-155).

as a result Bank of New York lacks standing to collect any monies under the Hooper-Barbanti contract (CP 156-309; 121-155; 320-331).

Much to the puzzlement of the Appellants, the Superior Court ignored all these arguments and entered the Summary Judgment Order which summarily declared that the Hooper-Barbanti contract was foreclosed and title was quieted in favor of Bank of New York (CP 332-336). The Summary Judgment Order reserved the issue of the amount of the attorney fees and costs award against Mr. Barbanti for a later hearing (CP 332-336).[4] This appeal was immediately filed (CP 337-344).

IV. SUMMARY OF ARGUMENT.

The Superior Court committed multiple errors in reaching its decision to grant Bank of New York's summary judgment motion and enter the Summary Judgment Order. Given that the trial court failed to make any findings and conclusions to form a basis for ruling against the Defendants' (Appellants') objections to the summary judgment motion, it is difficult to ascertain which errors are ripe for adjudication given

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4 At a later hearing the Superior Court entered an award of attorney's fees and costs against Mr. Barbanti (CP 410-411).

the present state of the decisional record.

Challenging a party's standing to bring suit is an issue that can be raised at any time since it goes to the jurisdiction of the court to decide the matter. The assignments of error arising from: the Plaintiff's failure to comply with the judicial foreclosure requirements contained in the Hooper-Barbanti contract; the trial court's abandonment of the procedures mandated by the legislature for judicial foreclosures; and the trial court's failure to acknowledge the undisputed fact that the Hooper-Barbanti contract has been fully satisfied are ripe for adjudication on the present record.

After reversal of the trial court's decision, this Court can, if necessary, include instructions with any remand that the issues of *res judicata*, and collateral estoppel be fully addressed in any subsequent proceedings where those issues are properly pleaded and argued before the trial court.[5]

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[5] The Appellants contend that they properly pleaded and argued the defenses of *res judicata* and collateral estoppel in the m summary judgment proceedings before the trial court. Unfortunately the trial court failed to ake any findings or conclusions in its Summary Judgment Order regarding those issues. The omission by the trial court makes the review of these issues more difficult and may raise issues of ripeness. Because

Given the state of the record at this point in the proceedings, the issues are very simple. Bank of New York did not comply with the provisions of the Hooper-Barbanti contact that govern judicial foreclosures and as a result the summary judgment must be reversed. Washington law prohibits a mortgagee from obtaining any quiet title relief until after a foreclosure and sale according to the law.[6] On the claim that Bank of New York never received any payments from Mr. Barbanti after it obtained the Seller's Assignment in September, 2010 from Hooper, the fault lies with Bank of New York because it failed to properly perfect the purported assignment of the right to receive contract payments. Undisputed records from the escrow company that received Mr. Barbanti's payments show that all monies (including the final payoff) were timely paid and routinely disbursed to Hooper.

Lastly the recording of the fulfillment deed for the Hooper-

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reversal of the trial court decision is required due to the trial court's failure to address the issues raised by the assignments of error, the Appellants decided not to cloud these issues with issue or claim preclusion because this case can be resolved fully by addressing the assignments of error listed herein.

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The law also provides that a real estate contract vendor seeking to judicially foreclose the contract may do so provided it follows the procedures for judicial foreclosure that a mortgagee must follow.

Barbanti contract and the acknowledgment that the contract was paid in full merges the contract into the deed and renders this entire lawsuit and the summary judgment motion moot.

The Hooper-Barbanti contract has a provision that allows the prevailing party in any litigation under the contract to recover its attorney's fees and costs. This action is brought to enforce provisions of the Hooper-Barbanti contract. Therefore if Mr. Barbanti prevails he respectfully requests a award of attorney's fees and costs in an amount as shall be proven by later submission of time sheets and other billing records.

V. ARGUMENT.

A. STANDARD OF REVIEW.

Summary judgment is an appropriate means of resolving a case only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004). A material fact is one upon which the outcome of the litigation depends, in whole or in part. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

The standard of review of a summary judgment decision before the Court of Appeals is de novo. The Appellate Court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Association*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Trimble v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993) (Citations omitted).

In a summary judgment motion, the moving party bears the burden of demonstrating an absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Thereafter, the nonmoving party must set forth specific facts evidencing a genuine issue of material fact. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

As will be discussed in greater detail subsequently in this Brief,

in the proceedings before the trial court Bank of New York failed to meet its burden as moving party because it failed to establish: that it was entitled to collect contract payments; that it had complied with the requirements of the Hooper-Barbanti contract governing judicial foreclosures; it failed to establish the amount of Mr. Barbanti's alleged default; and it failed to address the material fact that no default of the Hooper-Barbanti contract was possible because the contract had been fully satisfied. The trial court committed reversible error when it failed to deny the summary judgment motion on these and other grounds and when it granted summary judgment quieting title despite the prohibition contained in RCW 7.28.230(1).

This case presents a multitude of valid legal bases for denying Bank of New York's summary judgment and therefore reversal of the trial court's decision is required. In addition this case presents one big reason for entering summary judgment in favor of the Appellants even though they are nonmoving parties: the full payment of the Hooper-Barbanti contract and the delivery and recording of the Statutory Warranty Fulfillment Deed. Washington courts have long held that summary judgment may be granted in favor of the nonmoving party if

it becomes clear that s/he is entitled to it. *See, e.g., Rubenser v. Felice*, 58 Wn.2d 862, 866, 365 P.2d 320 (1961). Summary judgment in favor of a nonmoving party may be entered by an appellate court if the material facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992). The undisputed fact that the Statutory Warranty Fulfillment Deed has been recorded justifies entry of summary judgment in favor the Appellants.

B. THE STANDING DILEMMA: IF BANK OF NEW OF NEW YORK IS HOOPER'S LAWFUL ASSIGNEE, THEN WHY WERE ALL PAYMENTS UNDER THE HOOPER-BARBANTI CONTRACT DISBURSED TO HOOPER?

The trial court assumed that Bank of New York was lawfully entitled to enforce Hooper's rights under the Hooper-Barbanti contract by virtue of the Seller's Assignment executed by Hooper and granted Bank of New York the relief it sought. The error made by the trial court was that the facts presented in opposition to summary judgment revealed that even after the execution and recording of the Seller's Assignment by Hooper in favor of Bank of New York, all payments made on the Hooper-Barbanti contract were disbursed to Hooper and NOT to Bank of New York. *See Barbanti Declaration*, ¶ 22-26. (CP

156-309).

This fact is material to the summary judgment motion because Bank of New York claimed, as a basis for foreclosure, that it had never received any payments from Mr. Barbanti after the assignment from Hooper was obtained. *See Affidavit of OCWEN Loan Servicing, LLC* (CP 57-58). The alleged default by Mr. Barbanti is the entire basis for the relief sought by Bank of New York in the summary judgment motion. The dispute as to the material fact of whether Mr. Barbanti made payments on the Hooper-Barbanti contract should have resulted in denial of the summary judgment motion and the matter should have gone to trial. The trial court erred when it overlooked this dispute and granted the motion.

The fact that Mr. Barbanti's payments continued to be disbursed to Hooper even after Hooper purportedly assigned its contract rights to Bank of New York raises the threshold issue of whether Bank of New York actually has the right to receive the contract payments or more to the point whether Bank of New York has standing to prosecute this action. The facts presented in opposition to summary judgment and the actions by the parties contradict the assumptions and claims that

underlie the Plaintiff's pleadings.

Civil Rule (CR) 17controls the determination of who may bring an action or who may defend against an action. In order to bring a lawsuit the plaintiff must have both capacity, under applicable law, as well as a material interest in the outcome, as defined by CR 17(a). *See*, Tegland, *Washington Practice*, Vol. 14, § 11.2, pp. 379-80 (2009). Normally one would not question the capacity of a contract seller's assignee to bring an action to enforce payments under the contract. However in this case the facts that were presented in opposition to the summary judgment motion revealed that since becoming the purported assignee of Hooper's interest in the Hooper-Barbanti contract, Bank of New York had done nothing to collect any of the payments that Mr. Barbanti made and instead allowed Hooper to keep collecting the contract payments. This factual problem raises doubts as to Bank of New York's capacity to bring this action. Since Bank of New York as plaintiff and as moving party in a summary judgment motion bears the initial and ultimate burden of proof, the trial court erred when it granted the summary judgment motion without proof as to the Plaintiff's capacity to prosecute this action.

Under Washington law the seller's interest in a real estate contract has real property elements (retained legal title subject to the rights of the contract purchaser) and personal property elements (the right to receive payments). *See* Stoebuck and Weaver, *Washington Practice*, Vol. 18, p. 468 (2004). The right to receive real estate contract payments is considered personal property in Washington. *Freeborn v. Seattle Trust*, 94 Wn.2d 336, 340, 617 P.2d 424 (1980). A proper assignment of a seller's interest in a real estate contract (assigning the seller's retained title and the seller's right to receive contract payments) in Washington requires the execution and recording of a Deed and Seller's Assignment **and** a UCC filing in order to properly perfect the assignment. *Freeborn v. Seattle Trust*, 94 Wn.2d 336, 344, 617 P.2d 424 (1980).

In the summary judgment proceedings before the trial court, Mr. Barbanti offered the results of his research in Department of Licensing UCC filing records which showed no UCC filing covering the assignment from Hooper to Bank of New York. *See Barbanti Declaration*, ¶ 28, Exhibits Q, R, and S (CP 156-309). This material fact favored the nonmoving parties and was undisputed in the summary

judgment proceedings before the trial court.

The Appellants don't care about what went wrong between Hooper and Bank of New York and this Court need not waste any time trying to figure out what happened between Hooper and Bank of New York. The only fact material in this case is that Mr. Barbanti made all payments due under the Hooper-Barbanti contract including paying the contract in full. If Bank of New York didn't receive those payments that is the subject of another lawsuit that will involve Bank of New York and Hooper but not the Appellants. The fact that Hooper continued to collect contract payments even after a Seller's Assignment was recorded and the fact that no UCC filing was made regarding the contract payments does raise the inference that Bank of New York may not have the right to prosecute this lawsuit (i.e. no standing). That inference in a summary judgment context when all facts are to be viewed in the light most favorable to the nonmoving party or parties means that the trial court erred when it granted the summary judgment motion. The Hooper-Barbanti contract has been paid in full and Hooper got all the money. If Bank of New York has a claim it needs to go visit Hooper because it has no standing to prosecute this lawsuit.

C. THE TRIAL COURT'S DECISION MUST BE REVERSED BECAUSE BANK OF NEW YORK FAILED TO COMPLY WITH THE HOOPER-BARBANTI CONTRACT'S PROVISIONS REGARDING JUDICIAL FORECLOSURE.

Paragraph 19 (d) of the Hooper-Barbanti contract, *See Exhibit B, Declaration of Marco T. Barbanti in Opposition to Plaintiff's Summary Judgment Motion* (CP 156-309), states in pertinent part:

> "Judicial Foreclosure. To the extent permitted by any applicable statute, the Seller may judicially foreclose this contract as a mortgage, and in connection therewith, may accelerate all of the debt due under this contract if the defaults upon which such action is based are not cured within fifteen (15) days following the Seller's written notice to the Purchaser which specifies such defaults and the acts required to cure the same (within which time any monetary default may be cured without regard to the acceleration)..."

It is axiomatic that compliance with the express terms of a real estate contract is a material fact in any summary judgment motion seeking to enforce the provisions of the contract. In this case it is undisputed that Mr. Barbanti never received the notice required by Paragraph 19 (d) of the Hooper-Barbanti contract. *See Barbanti Declaration*, ¶ 29 (CP 156-309). Even more revealing about the Plaintiff's failure to comply with the contract is the fact that the Plaintiff **never** gave such a notice because if it had done so, its Complaint in this case would have

contained an allegation regarding the issuance of the notice.

This defect alone should have made Bank of New York's summary judgment motion "dead on arrival". The trial court ignored this issue. Its Summary Judgment Order fails to make any finding on this issue and those two defects are errors of law that demand reversal of the trial court's decision.

D. THE TRIAL COURT FAILED TO FOLLOW THE LAW WHEN IT ENTERED THE SUMMARY JUDGMENT ORDER THEREFORE THE ORDER IS VOID.

The Summary Judgment Order summarily declares that the Hooper-Barbanti contract is foreclosed and that all right, title, and interest of any person(s) claiming by, through or under Mr. Barbanti or Royal is extinguished. In addition the order quiets title in favor of Bank of New York and gives Bank of New York the right to possession of the subject property.

Bank of New York asserts that it is the assignee of the Seller's rights under the Hooper-Barbanti contract that previously belonged to Hooper by virtue of the Seller's Assignment of Real Estate Contract executed by Hooper on September 16, 2010 and recorded on September 24, 2010 under Auditor's File No. 5936989 in the records of Spokane

County, Washington.[7] In its capacity as assignee of the seller's interest Bank of New York has elected to judicially foreclose the Hooper-Barbanti contract.

The judicial foreclosure of a real estate contract is permitted under Washington law. RCW 61.30.020(1) provides in pertinent part:

> "At the seller's option, a real estate contract may be foreclosed in the manner and subject to the law applicable to the foreclosure of a mortgage in this state."

Once a seller elects to judicially foreclose the real estate contract, it must abide by the law applicable to the foreclosure of a mortgage in this state which is found in RCW Chapter 61.12.

RCW Chapter 7.28 governs the remedies of quiet title and ejectment. The statute specifically prohibits a mortgagee from maintaining a quiet title or ejectment action until after a foreclosure and sale according to the law. Specifically RCW 7.28.230(1) states in pertinent part:

"A mortgage of any interest in real property shall not be deemed

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[7] This part of the Appellants' argument operates under the premise that the assignment executed by Hooper is sufficient to convey to Bank of New York the rights that it claims to have regardless of the arguments previously advanced by the Appellants.

> a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to the law...."

A mortgagor (in this case real estate contract vendee)[8] does not lose his right to the possession of mortgaged real property by failing to make payment on the mortgage, or by moving out of the community, or by abandonment. *Howard v. Edgren*, 62 Wn.2d 884, 885, 385 P.2d 41 (1963). Nor does a mortgagee have any right to possession of mortgaged real property without a foreclosure and sale according to law. *Id.* The mortgage upon a piece of real property is merely a lien upon the property to secure payment of the mortgage debt, and in no sense is a conveyance entitling the mortgagee to possession or enjoyment of the property as

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[8] Real estate contracts and mortgages in Washington are more similar than they are different. A mortgage can only be foreclosed judicially whereas a contract may be forfeited according to RCW Chapter 61.30. The Washington Supreme Court has noted: "We find no relevance in the historical distinction between real estate contracts and other forms of real property security devices. There is no valid reason to distinguish between those cases in which legal title is conveyed to secure the payment of a debt and those cases in which legal title is retained to secure the payment of a debt." *Tomlinson v. Clarke*, 118 Wn.2d 498, 509-10, 825 P.2d 706 (1992). The *Tomlinson* Court, *supra at* p. 509 cited the following analysis with approval from *In re McDaniel*, 89 Bankr. 861 (Bankr. E.D. Wash. 1988): "This analysis leads to the inexorable conclusion that Washington treats the seller's interest under a real estate installment sales contract as a lien/mortgage-type security interest in real property."

owner. *Western Loan & Building Co. v. Mifflin*, 162 Wash. 33, 39, 297 Pac. 743 (1931). Likewise the Courts have recognized that the title retained by a seller in a real estate contract is merely a lien upon the property to secure payment of a debt. In either case, the contract seller or the mortgagee, may only obtain possession of the property after a foreclosure and sale according to the law. *RCW 7.28.230(1) and 61.30.020(1).*

The Washington Supreme Court has stated:

> "The law is well settled in this state that a mortgagee of real property is not entitled by virtue of the mortgage, either prior or subsequent to default, to the possession of the mortgaged property."
>
> *State ex rel. Gwinn, Inc. v. Superior Court*, 170 Wash. 463, 467, 16 P.2d 831 (1932).

The language of the statute, RCW 7.28.230(1) is clear, unambiguous and unmistakable in its mandate. As if that was not enough, the decisional law echoes the same conclusion regarding a lien holder's right to possession absent a foreclosure and sale according to the law. The Supreme Court best summarized the state of the law:

> "There is no decision that we know of, under our code or any other code of civil procedure, that allows one to bring an action to quiet title, or in ejectment, and obtain the relief by foreclosure

of a mortgage."

Womach v. Harding, 132 Wash. 184, 187, 231 Pac.949 (1925).

The **only** decision that runs contrary to the statute and to the decisions of the Supreme Court is the trial court's decision in this case.

Even though the law states that a real estate contract can be judicially foreclosed according to the law governing mortgages, the trial court in this case ignored the law governing mortgages and failed to render a judgment for the amount of the default, RCW 61.12.060. The trial court failed to order a sale of the subject premises to satisfy the debt, RCW 61.12.060. The trial court failed to take judicial notice of economic conditions and set an upset price, RCW 61.12.060. The trial court failed to make any provisions for a deficiency judgment, RCW 61.12.070-.080. The trial court failed to make provisions for the execution on the judgment and order a sale by the Sheriff, RCW 61.12.090. Lastly and most important the trial court failed to make provisions for the stay of foreclosure upon payment of the sums due, RCW 61.12.130 and failed to acknowledge the statutory redemption rights that the Defendants (Appellants) possessed, RCW 6.21.080 and RCW 6.23.010.

The Summary Judgment Order in addition to being illegal under RCW 7.28.230(1) is simply *gibberish*. The trial court couldn't enter a judgment for an amount due under the Hooper-Barbanti contract because Bank of New York failed to plead or prove that amount in its summary judgment motion. If the Summary Judgment Order had been delivered to the Spokane County Sheriff, the Sheriff would have been unable to act upon the order because the Order fails to specify the amount of the judgment for which the sale is being conducted. Therefore the Sheriff can't accept any bids and can't determine what deficiency, if any, is left after a successful bid is accepted at the sale. Likewise redemption rights and deficiency judgment are in limbo because there is no judgment amount for the alleged default.

The Summary Judgment Order is a nullity because the trial court failed to follow the statutes that govern judicial foreclosures. The Summary Judgment Order must be reversed.

E. THE "PAYMENT IN FULL" OF THE HOOPER-BARBANTI CONTRACT AND THE RECORDING OF THE STATUTORY WARRANTY FULFILLMENT DEED MEANS THAT THE TRIAL COURT HAD NO CHOICE BUT TO DENY BANK OF NEW YORK'S SUMMARY JUDGMENT MOTION AND DISMISS THIS ENTIRE LAWSUIT *SUA SPONTE.*

For reasons that are still a mystery to the Appellants the trial court ignored the one undisputed fact, presented by the non-moving parties in the summary judgment proceedings, that disposes of this entire lawsuit. The undisputed fact in this record is that the Hooper-Barbanti contract has been paid in full and the Statutory Warranty Fulfillment Deed was delivered to Mr. Barbanti for recording and was recorded.

The *Declaration of Marco T. Barbanti in Opposition to the Plaintiff's Summary Judgment Motion* (CP 156-309) contains several material facts which were never disputed and which eliminate not only the basis for the summary judgment motion but also the entire Plaintiff's Complaint in this case.

Paragraphs 22 through 26 of the *Barbanti Declaration* and the Exhibits referenced therein provide undisputed material facts regarding the events preceding the recording of the Statutory Warranty Fulfillment Deed for the Hooper-Barbanti contract. Exhibit M to the *Barbanti Declaration* contains copies of the individual receipts issued by the escrow agent for the payments made by Mr. Barbanti on the Hooper-Barbanti contract along with a chronological pay history for the account which covers all times relevant to this lawsuit. This record shows that

Mr. Barbanti made each and every payment he was contractually obligated to make.

Exhibit N to the *Barbanti Declaration* contains a copy of the "Payoff Quote" prepared by the escrow agent at Mr. Barbanti's request along with a copy of the cashiers check payable to Allegro Escrow for the full amount shown on the "Payoff Quote". Exhibit O to the *Barbanti Declaration* contains a copy of the Disbursement History for the payments received by the escrow agent on the Hooper-Barbanti contract. This record shows that at all times material hereto, the payments made by Mr. Barbanti were disbursed to Hooper.

The previously referenced exhibits provide the background that led to the documents found in Exhibits B and P to the *Barbanti Declaration*. Exhibit B contains a copy of the original Hooper-Barbanti contract stamped "ALLEGRO SERVICES, INC. PAID IN FULL" and Exhibit P contains a copy of the Statutory Warranty Fulfillment Deed that was delivered to Mr. Barbanti upon full and final payment of the Hooper-Barbanti contract and that he recorded.

The provisions of a contract for the sale of real estate, and all prior negotiations and agreements, are considered merged in the

execution and delivery of the deed. *People's Nat. Bank v. Nat. Bank of Commerce*, 69 Wn.2d 682, 689, 420 P.2d 208 (1966). Citation of more cases that state the same obvious point of law that is horn-book law in Washington would be superfluous. Recording the fulfillment deed means the real estate contract has been fully performed by the contract purchaser.

The "material" nature of these facts in the context of Bank of New York's summary judgment motion is self-evident. The record in these proceedings also demonstrates that the material facts regarding the contract payments, the final payoff and the recording of the fulfillment deed were not in dispute. With these facts the trial court had no legal basis for granting the summary judgment motion and conversely had sufficient legal and factual basis for dismissing the entire complaint. The trial court's decision is wrong on the facts and wrong on the law and must be reversed.

F. APPELLANTS ARE ENTITLED TO FEES ON APPEAL.

Based on the attorney fee clause, found at Paragraph 23, in the real parties' estate contract, Appellants are entitled to attorney fees for this proceeding. Appellants request fees consistent with the provisions

of RAP 18.1.

VI. CONCLUSION.

Based on the errors committed by the trial court its ruling on summary judgment should be reversed. The matter should be remanded for further proceedings.

Respectfully Submitted, on
November 16, 2012

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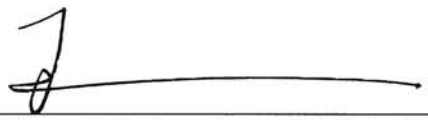

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