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 ROYAL POTTAGE ENTERPRISES

RICHARD PEREDNIA, ESQ.
WSBA # 5773
28 W. Indiana, Suite E
Spokane, WA 99205
(509) 325-3508
Attorney for Appellants
Junco Frost and Royal Pottage

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I. INTRODUCTION AND JOINDER.

Appellant Royal Pottage Enterprises, Inc. wishes to join in the Reply Briefs submitted by Appellants Marco T. Barbanti and Junco Frost Lavinia, Inc. without re-presenting their arguments in this Reply Brief. In addition Royal Pottage Enterprises, Inc. submits that it is now the fee title owner of the property at issue in this lawsuit by virtue of the recording of the Fulfillment Deed for the Hooper-Barbanti contract. *See Declaration of Marco T. Barbanti* (hereinafter "Barbanti Declaration"), ¶ 27, Exhibit P (CP 156-309). Consequently Bank of New York has no standing in this lawsuit and the trial court lacked jurisdiction over the subject matter in this case. Dismissal of this lawsuit is the only action justified by the law.

II. SUPPLEMENTARY STATEMENT OF THE CASE.

Bank of New York's Respondent's Brief adopts in its entirety the Statement of Facts from this Court's opinion in the previous litigation between the parties. *Bank of New York v. Hooper*, 164 Wn. App. 295, 263 P.3d 1263 (Div. III, 2011) (Hereinafter "*Bank of New York One*"). In addition to citing *Bank of New York One* for their Statement of the Case, Bank of New

York further cites that case two other times in its Respondent's Brief. The use of the "FACTS" portion of *Bank of New York One* is permissible however due to the two narrow issues decided by this Court in *Bank of New York One*, the other two citations in the Respondent's Brief are misleading.

In *Bank of New York One*, the Bank of New York sought to foreclose judicially a deed of trust that had been given (by Hooper) to secure a promissory note (also given by Hooper). *Bank of New York supra at* p. 299. Sometime after executing the promissory note and deed of trust Hooper sold the subject property under a real estate contract (hereinafter "Hooper-Barbanti contract") to Mr. Barbanti. *Ibid.* Mr. Barbanti took the property "subject to" the deed of trust but did not assume the obligation secured by the deed of trust. *Ibid.* Hooper was to continue to pay on the promissory note with money provided by Mr. Barbanti pursuant to the terms of the Hooper-Barbanti contract. *Ibid.* In addition to funding the payments that were due under the promissory note, Mr. Barbanti also agreed to make a monthly contract payment. *Ibid.* When Bank of New York sought to foreclose the deed of trust for alleged failure to make

payments thereon, the trial court dismissed the lawsuit on the grounds that enforcement of the promissory note was time barred. *Bank of New York supra at* pp. 299-300. Upon motion by Defendant Royal Pottage (the record owner of the subject property) the trial court also quieted title as to the stale deed of trust in favor of Royal Pottage as "fee owner". *Bank of New York supra at* p. 300. The trial court also denied various motions to amend and to make a cross claim and also granted the Defendants' motions for attorney's fees and costs. *Ibid.*

Bank of New York appealed however the appeal did not challenge the part of the trial court's decision declaring the promissory note unenforceable and quieting title as to the stale deed of trust. This Court stated:

> "BNY does not dispute Royal Pottage is the record owner of the property. BNY does not dispute its deed of trust was stale and its foreclosure action was time barred. Thus, considering RCW 7.28.300, BNY properly does not dispute Royal Pottage was entitled to a judgment quieting title against the lien; BNY does not appeal the court's authority and decision to quiet title and dismiss its foreclosure action. But BNY does dispute the trial court's authority under RCW 7.28.300 to declare Royal Pottage the 'fee owner' of the property....Royal Pottage stands in Mr. Barbanti's shoes as a real estate contract vendee by virtue of the 2003 Barbanti-Royal Pottage quit claim deed....it is premature, as BNY argues, to order that Royal

> Pottage is the 'fee owner' when Royal Pottage holds no more than a vendee's interest in the real estate contract."

Bank of New York v. Hooper, 164 Wn. App. 295, 301-2, 263 P.3d 1263 (Div. III, 2011).

This Court concluded:

> "And, RCW 7.28.300 is not a mechanism for the court to determine competing ownership interests in the property. The trial court's order went beyond the scope of the issue before it when it included a conclusion that Royal Pottage was the 'fee owner' of the property in addition to clearing the stale lien."

Bank of New York v. Hooper, 164 Wn. App. 295, 303, 263 P.3d 1263 (Div. III, 2011).

The only other issue decided in *Bank of New York One* dealt with the award of attorney's fees and costs to the prevailing Defendants who were not signatories to the promissory note and deed of trust. *Bank of New York v. Hooper*, 164 Wn. App. 295, 303, 263 P.3d 1263 (Div. III, 2011).

The Respondent's Brief cites the decision in *Bank of New York One* in two places however those citations in the Brief are misleading.

The Respondent's Brief states on p. 14:

> "In the related case of *Bank of New York v. Hooper*, 164 Wn. App. 295, 263 P.3d 1263 (2011), this Court stated that 'Mr. Barbanti admitted he had failed to make the

> payments to escrow to pay the underlying deed of trust payments as required by his real estate contract with the Hoopers.

164 Wn. App. at 299 (emphasis added)[sic]."

The **only** admission regarding payments made by Mr. Barbanti in *Bank of New York One* was that the last payment he made on the promissory note referenced in the Hooper-Barbanti contract was on March 8, 2012. *Barbanti Declaration*, ¶ 7-9 (CP 156-309). The date of payment was one of the two relevant facts on the issue of whether the note and deed of trust had become stale (the other relevant fact was the date the lawsuit was filed). Later on the same page of the Respondent's Brief Bank of New York refers to the unpaid principle balance on Escrow Account No. 15206 in documents attached to Mr. Barbanti's Declaration.

Mr. Barbanti never **admitted** that the sum shown in the records attached to his Declaration was the amount that he was in default. In the context of the sole issue presented in the Motion to Dismiss in *Bank of New York One*, the evidence contained in Mr. Barbanti's Declaration was submitted to show when the last payment was made to Hooper on Account 15206 for statute of

limitations purposes.[1] It is also common knowledge that unpaid principle balance does not equal payments in default. If Bank of New York wants to enforce payment of the amount Mr. Barbanti was allegedly in default by judicial foreclosure, then it has the burden of establishing the amount of the default.

As moving party in a summary judgment Bank of New York has the burden to establish the facts material to the summary judgment and to establish that there is no dispute on those material facts. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In an action for breach of contract it is enough that the claimed promise and the sufficiency of the claimed performance each raise genuine issues of material fact such that summary judgment is premature. *Peoples Mortgage Company v. Vista View Builders*, 6 Wn. App. 744, 752, 496 P.2d 354 (Div. I, 1972).

In this case Bank of New York's burden as moving party

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Given that Mr. Barbanti's last "pass-thru" payment under the Hooper-Barbanti contract was made in 2001, any attempt by Hooper to make a cross claim in Bank of New York One would have failed due to a statute of limitations problem. Royal Pottage believes this fact was a consideration in Judge Cozza's denial of Hooper's attempt to assert a cross claim after the court announced its decision in Bank of New York One.

required that it establish the amount that Mr. Barbanti was in default under the Hooper-Barbanti contract. Bank of New York presents the illusion of a default in the Affidavit of OCWEN LOAN SERVICING, LLC (CP 57-58). That affidavit only claimed that OCWEN is the keeper of the records of the real estate contract and loan and that "BNY" hadn't received any payments on the real estate contract since the time the contract was assigned to "BNY". *Affidavit of OCWEN LOAN SERVICING, LLC* (CP 57-58); *See also Defendants' Memorandum in Opposition to Plaintiff's Summary Judgment Motion*, pp. 6-9 (CP 121-155). The "facts" in the OCWEN Affidavit are disputed in the record. *Barbanti Declaration*, ¶ 21-27, Exhibits M, N, O, and P (CP 156-309). However even without any controverting evidence the facts provided by Bank of New York do not satisfy its burden as moving party in a summary judgment.

In a judicial foreclosure the court is required to render judgment of foreclosure and payment of the mortgage debt shall satisfy the judgment. *RCW 61.12.060.* This means that the payment default is a material fact in a foreclosure. No court can render a judgment for the amount of the mortgage debt without

proof in the record of the amount of default by the defendant(s). The Sheriff cannot conduct the foreclosure sale without first giving notice that specifies the amount of the foreclosure judgment for which the sale is being conducted. *RCW 6.21.040.* The amount of the judgment for the delinquent payments is also necessary to determine whether a deficiency judgment is left after the proceeds from the foreclosure sale of the subject property are applied to the judgment. *RCW 61.12.080.* The amount of a defendant's default is a material fact in a judicial foreclosure because if there are installments that are not yet due or delinquent then the defendant has the statutory right to pay the amounts that are delinquent to the Court before final judgment and obtain a stay of proceedings. *RCW 61.12.130.*

The only thing the OCWEN Affidavit proves is that Bank of New York didn't receive payments on the contract. It provides no evidence regarding Mr. Barbanti's acts or omissions. The evidence submitted by Mr. Barbanti created multiple disputes of an inadequately proven material fact. Mr. Barbanti submitted a copy of the Hooper-Barbanti contract which designates Allegro Escrow as agent to receive all contract payments. *Barbanti*

Declaration, ¶5-6, Exhibit B (CP 156-309). The Hooper-Barbanti contract never mentions OCWEN, LLC in any capacity. In disputing the basis for the claims in the OCWEN Affidavit and OCWEN's purported status as bookkeeper, Mr. Barbanti submitted copies of escrow records from the escrow agent specifically designated in the Hooper-Barbanti contract, Allegro Escrow Services, Inc., showing payments made by Mr. Barbanti and disbursed to Hooper even after Hooper allegedly assigned its contract vendor rights to Bank of New York. *Barbanti Declaration*, ¶ 22-27, Exhibits M, N, O, and P (CP 156-309). That evidence create a dispute of material fact and warranted denying the summary judgment.

At the end of the day the question still remained: how much was Mr. Barbanti's default? Mr. Barbanti only admitted the date of his last payment and never admitted anything with regard to how much he may owe. As of the date of the Defendants' Memorandum in Opposition to Plaintiff's Summary Judgment Motion Mr. Barbanti claimed he owed nothing on the contract because the contract had been stamped "PAID IN FULL" and the Fulfillment Deed released from escrow and recorded. *Barbanti*

Declaration, ¶ 26-27, Exhibits O, and P (CP 156-309).

The dispute of material fact becomes even more apparent when one looks at the provisions of the Hooper-Barbanti contract that were specifically negotiated by the parties. In the Defendants' Memorandum in Opposition to Plaintiff's Summary Judgment Motion, p. 30, (CP 121-155) and *Barbanti Declaration*, ¶ 6, Exhibit B, (CP 156-309), Mr. Barbanti documents that the amount he was required to provide to fund Hooper's payments on the Bank of New York promissory note was subject to change. The Addendum to the Hooper-Barbanti contract executed by the parties states that Mr. Barbanti will make payments to fund the Hooper obligation on the promissory note "...as such amounts may be adjusted." *Barbanti Declaration*, ¶ 6, Exhibits B (CP 156-309).

Due to Mr. Barbanti's efforts in successfully defending in Bank of New York One the amount Hooper owed on the promissory note was "adjusted" to zero. Hooper received exactly what it bargained for in the Hooper-Barbanti contract: Hooper was relieved of all obligation to pay the promissory note. Bank of

New York, who by virtue of *res judicata* cannot collect on the Hooper promissory note, is unable to enlarge its rights by taking over Hooper's contract vendor "seat at the table". When the promissory note was declared unenforceable that also precluded Hooper from collecting the funds from Barbanti to pay toward the promissory note. Ultimately Bank of New York's game of musical chairs got it into a different chair but didn't give it any additional rights.

The other reference to *Bank of New York One* is found on page 16 of the Respondent's Brief:

> "In *Bank of New York v. Hooper*, this Court acknowledged that '[i]f the real estate contract conditions are performed, **BNY** will be obligated to execute and deliver a statutory warranty fulfillment deed.' 164 Wn. App. at 302 (emphasis added)."

Bank of New York's attempt to dodge the silver bullet by citing this language from *Bank of New York One* doesn't work. *Bank of New York One* was limited to deciding only the two issues previously discussed. In *Bank of New York One* this Court did not have before it the proper record to adjudicate issues regarding actions that a contract vendor's assignee must take after a

contract is fully performed. The above quoted passage from this Court's opinion in *Bank of New York One* is merely *dicta,* language unnecessary to the decision in a case, and is not the law of the case or binding precedent. *In re Marriage of Roth*, 72 Wn. App. 566, 570, 865 P.2d 43 (Div. III, 1994); see also *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954).

The record in this case demonstrates that the Fulfillment Deed had been executed contemporaneously with the Hooper-Barbanti contract and deposited with the escrow agent until such time as the Hooper-Barbanti contract was paid in full.[2] The fact that Mr. Barbanti had transferred his interest to Royal Pottage does not render the Fulfillment Deed irrelevant as asserted by Bank of New York. The rights that Mr. Barbanti transferred to

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[2] The face of the Fulfillment Deed bears the same excise tax affidavit serial number as the Hooper-Barbanti contract. Recording a real estate contract triggers payment of the Washington State Real Estate Excise Tax and perfects Mr. Barbanti's status as contract vendee. When the contract is recorded, the unrecorded Fulfillment Deed is duplicate stamped so that at some future date when the contract is fully performed the Fulfillment Deed can be recorded immediately without delaying to find old records proving payment of the excise tax. (No deed can be recorded without proof that the excise tax has been paid or that the transaction is tax exempt. *RCW Chapter 82.45*).

Royal Pottage were perfected when the Hooper-Barbanti contract was recorded in 1996. The Quit Claim Deed executed in favor of Royal Pottage contained the "after acquired title" language that is necessary to transfer any rights Mr. Barbanti may acquire after the Quit Claim Deed to Royal Pottage was recorded. *RCW 64.04.050. Barbanti Declaration*, Exhibit H (CP 156-309). Therefore whenever the Fulfillment Deed was released and recorded, **fee ownership title** would automatically vest in Royal Pottage because the Hooper-Barbanti contract is merged into the Fulfillment Deed and the chain of title is complete with fee title ownership vesting in Royal Pottage. *Bank of New York v. Hooper*, 164 Wn. App. 295, 302, 263 P.3d 1263 (Div. III, 2011).

The Deed and Seller's Assignment of Real Estate Contract transferred no greater interest than the transferor/assignor (Hooper) possessed.

> "...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 rights that Hooper transferred to Bank of New York were 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).

The Hooper-Barbanti contract was recorded. *Barbanti Declaration*, Exhibit B (CP 156-309). When the Fulfillment Deed is recorded the contract is merged into the Fulfillment Deed as of the date on the Deed. Hooper's rights are extinguished along with the rights of any person that arise through or under Hooper. No deed is needed from Bank of New York because its interest in the property is extinguished as a result of the extinguishment of Hooper's interest.

III. THE RELEASE AND RECORDING OF THE FULFILLMENT DEED FOR THE HOOPER-BARBANTI CONTRACT DEPRIVES BANK OF NEW YORK OF STANDING IN THIS CASE AND DEPRIVES THE COURT OF SUBJECT MATTER JURISDICTION AND REQUIRES REVERSAL OF THE SUMMARY JUDGMENT AND DISMISSAL OF THIS LAWSUIT.

RAP 2.5 (a) provides, and this Court has held, that

whether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim are issues that may be raised for the first time on appeal. *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) when a petitioner lacks standing, the court is without subject matter jurisdiction to entertain the claim). This issue alone demands reversal of the trial court's order.[3]

Bank of New York lacks standing in this case on multiple grounds. Bank of New York lacks standing due to the facts challenging the sufficiency of the Deed and Seller's Assignment and calling into question Bank of New York's right to enforce the

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On page 6 of its Brief, Bank of New York asserts that Appellants admit the standing argument is moot. That reference is taken out of context and is also wrong. RAP 2.5(a) and the cases cited herein demonstrate that standing is relevant and may be raised at any time because it goes to the question of whether the court has jurisdiction over the subject matter. No party can confer standing on another by admission. The "moot" comment in the Defendants'/Appellants' Brief was at the end of the argument that this lawsuit must be dismissed because the Fulfillment Deed was released and recorded. A lawsuit can only be dismissed once. Bank of New York is welcome to "pick its poison" but at the end of the day it still loses.

provisions of the Hooper-Barbanti contract. Bank of New York also lacks standing in this case because it doesn't satisfy the standing requirements found in *RCW 7.28.010* and *RCW 7.28.230(1)* due to the fact that it has no right to possession of the subject property. An independent basis for concluding that Bank of New York has no standing in this case arises as a result of the release and recording of the Fulfillment Deed. By virtue of the Fulfillment Deed Bank of New York has no valid subsisting interest in and no right to possession of the subject property. *RCW 7.28.010*. The summary judgment should be reversed and this action dismissed.

The facts in the record establish that on March 26, 2012 the entire remaining balance owing on the Hooper-Barbanti contract was paid in full to the escrow agent designated in the contract. *Barbanti Declaration*, ¶ 27, Exhibit P (CP 156-309). After that payment the escrow agent released the original Hooper-Barbanti contract stamped "ALLEGRO SERVICES, INC. PAID IN FULL" to Mr. Barbanti along with the original Statutory Warranty Fulfillment Deed that had been held in escrow pending

full payment of the Hooper-Barbanti contract. *Barbanti Declaration*, ¶ 26, Exhibit B (CP 156-309). The Fulfillment Deed was recorded on March 26, 2012 under Auditor's File No. 6078471 in the records of Spokane County, Washington. *Barbanti Declaration*, ¶ 27, Exhibit P (CP 156-309).

The foregoing facts create a dispute of all the facts which are material in the summary judgment. The summary judgment motion is based on Mr. Barbanti allegedly failing to pay monies allegedly due under the contract. The statement from the designated escrow agent that the contract is "PAID IN FULL" and the release of the Fulfillment Deed to Mr. Barbanti for recording not only disputed all of the underlying material facts in the summary judgment motion, but also divested the trial court of jurisdiction to hear this case. The significance of the Fulfillment Deed's release and recording goes beyond creating a factual dispute. The Fulfillment Deed's release and recording eliminates Bank of New York's standing to pursue a quiet title or any other remedy requested in its Complaint. As a result of Bank of New York's standing being eliminated, the trial Court's subject matter

jurisdiction is also eliminated thereby requiring that this action be dismissed. *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) when a petitioner lacks standing, the court is without subject matter jurisdiction to entertain the claim).

The general rule of law in Washington is that the provisions of a real estate contract, and all prior negotiations and agreements, are considered merged in a deed made in full execution of the real estate contract. *Black v. Evergreen Land Developers*, 75 Wn.2d 241, 248, 450 P.2d 470 (1969). See also *Kunkel v. Meridian Oil, Inc.*, 54 Wn. App. 675, 678, 775 P.2d 470 (Div. III, 1989), *rev'd on other grounds*, 114 Wn.2d 896, 792 P.2d 1254 (1990); and *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 423, 843 P.2d 545 (Div. III, 1993).

In light of the general rule of law in Washington regarding merger, the Hooper-Barbanti contract was merged into the Fulfillment Deed and ceased to exist. There is no longer a

contract to enforce because the contract vendee has fully performed all his obligations and as a result of the recording of the Fulfillment Deed the contract vendee's rights in the property (such as possession) have been supplemented with the title that was being held by the vendor as security for the performance of the contract's obligations. Hooper's security interest in the property has been extinguished and neither Hooper nor its assignee Bank of New York have any contract rights or rights in the subject property because the Fulfillment Deed transferred all rights in the property as of the date the contract was executed.

RCW 7.28.010 requires that anyone seeking to quiet title must have a valid and subsisting interest in the subject property. Hooper's security interest in the subject property, which by itself is not enough to confer standing to prosecute a quiet title action (RCW 7.28.010 and RCW 7.28.230(1)), was extinguished when the Fulfillment Deed was recorded. The title that Hooper held as security was transferred to the contract vendee as of March 26, 2012. Hooper has no standing to bring this action because the recording of the Fulfillment Deed extinguished any interest

Hooper had in the subject property. As Hooper's assignee, Bank of New York stands in Hooper's shoes and therefore it too lacks any interest in the subject property in order to have standing to quiet title. *Washington Practice*, Vol. 18, § 21.13, p. 478 (Stoebuck and Weaver 2004).

This Court's decision in *Magart v. Fierce*, 35 Wn. App. 264, 666 P.2d 386 (Div. III, 1983) is directly on point and requires dismissal of this lawsuit. In that case Magart conveyed a lake frontage lot (Lot 21) to Fierce by Warranty Deed. *Magart supra at* pp. 264-5. Subsequently Magart conveyed his remaining real property (Government Lot 5) to McCallum. *Magart supra at* p. 267. Lot 21that was conveyed to Fierce was located within Government Lot 5 conveyed to McCallum. *Ibid.*

Magart sued Fierce claiming that he (Magart) had retained a strip of land in between the waterfront and the front of Fierce's lot 21 and sought to quiet title to that strip of land. *Magart supra at* p. 265. The trial court ruled for Fierce and quieted title in Fierce's favor. *Magart supra at* pp. 265-6.

On appeal by Magart, this Court dismissed the action on

the grounds that Magart lacked standing because he had no valid and subsisting interest in the property and no right to possession of the property because the disputed strip of land would be within the property sold to McCallum and Magart was not the owner or real party in interest:

> "RCW 7.28.010 sets forth the requirement regarding who may maintain an action to quiet title: 'Any person having a *valid and subsisting interest* in real property, *and a right to possession thereof* ...' (Italics ours.) CR 17(a) provides in part: 'Every action shall be prosecuted in the name of the real party in interest.' **If Magart's claim of ownership fails, he lacks standing** to attack Fierce's claim, as the plaintiff in an action to quiet title must succeed on the strength of his own title and not on the weakness of his adversary....Under the above cited authority, Magart has the burden of proving ownership of the land in question and standing as a real party in interest....Magart sold government lot 5 to a Mr. McCallum and lot 21 is situated withing said government lot 5. The trial court found that Magart did not reserve any portion of government lot 5 to himself....**Since the disputed strip would be within the property sold to McCallum, Magart has no standing to bring this action as he is not the owner and real party in interest**....Accordingly, we hold this action to quiet title must be **dismissed** for failure to join an indispensable party."

Magart supra at pp. 266-7. (Emphasis added except where otherwise noted) (Citations omitted).

The decision by this Court in *Magart* is dispositive of the present litigation without any further need to address the disputed

material facts.[4] Neither Bank of New York nor Hooper have any interest in the subject property therefore the present lawsuit must be dismissed because Bank of New York doesn't have standing to bring a quiet title action according to *RCW 7.28.010.* As of March 26, 2012 the Hooper-Barbanti contract had been fully performed and satisfied as evidenced by the release and recording of the Fulfillment Deed. The contract merged into the Fulfillment Deed and Hooper's security interest, and likewise any interest Hooper's assignee possessed, were extinguished on that date. Neither Hooper nor Bank of New York have a valid and subsisting interest in the property nor did they have any right to possession of the property. They have no standing under *RCW 7.28.010* and in addition there is no longer any Hooper-Barbanti

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[4] The record before this Court in *Magart* did not reveal whether Magart had sold the property to McCallum on a real estate contract. *Magart supra at* p. 267. In *dicta* this Court opined as to the significance of whether Magart was a contract vendor or grantor under a deed: "It is possible Magart may have a reversionary interest to protect **in the event of forfeiture**, and this might grant standing. However, we need not decide that issue at this time **since McCallum was not made a party to this action and is presumably an indispensable party to a quiet title action involving property of which he is purchaser and owner.**" *Magart supra at* p. 267. (Emphasis added).

contract to enforce. This case is finally over.

IV. 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.

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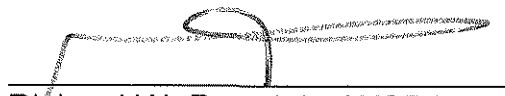
V. CONCLUSION.

The summary judgment order should be reversed because the trial court had no legal basis for granting the motion. However in light of the fact that the Fulfillment Deed for the Hooper-Barbanti contract has been released and recorded, Bank of New York has no valid subsisting interest in the subject property nor does it have a right of possession. As a result Bank of New York lacks standing to seek the remedy of quiet title and

this entire lawsuit must be dismissed.

Respectfully Submitted, on
January 28, 2013.



Richard W. Perednia, WSBA #5773
Attorney for Appellants
Royal Pottage and Junco Frost

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 ROYAL POTTAGE ENTERPRISES to the following:

Craig Peterson, WSBA #15935
Scott Crigsby, WABA #41630
Robinson, P.S.
710 Second Avenue, Suite 710
Seattle, Washington 98104

Marco T. Barbanti