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, STERLING SAVING BANK, JUNCO FROST LAVINIA, INC., UNIFUND CCR PARTNERS, AND BANKERS TRUST COMPANY OF CALIFORNIA,

Appellants.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE 1

II. ARGUMENT 4

1. BNY had Standing to Bring the Underlying Action by Virtue of the Deed and Seller's Assignment of Real Estate Contract dated September 16, 2010 4

2. The Real Estate Contract does not Require the Seller to Provide Written Notice as a Prerequisite to Foreclosure, Furthermore the Remedies Sought in The Complaint Include both Foreclosure and Quiet Title 7

3. The Trial Court's Entry of Summary Judgment was Done in Accordance with Applicable Law 10

4. Mr. Barbanti Failed to Pay the Purchase Price Under the Real Estate Contract. 13

5. BNY is Entitled to an Award of Attorney's Fees and Costs under the Real Estate Contract 18

III. CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Baker v. Murrey
78 Wash. 241, 246, 138 P. 890 (1914) 6

Bank of New York v. Hooper
164 Wn.App. 295; 263 P.3d 1263 (2011) 1, 14, 16

Big Bend Land Co. v. Hutchings
71 Wash. 345, 348, 128 P. 652 (1912) 6

Freeborn v. Seattle Trust & Savings Bank
94 Wn.2d 336, 617 P.2d 424 (1980) 6

Manor v. Nestle Food Co.
78 Wn.App. 5, 8, 895 9.2d 27 (1995), rev'd on other grounds,
131 Wn.2d 439, 932 P.2d 628 (1997) 11

Rahman v. State of Washington
170 Wn.2d 810, 824; 246 P.3d 182 (2011) 5

Tomlinson v. Clarke
118 Wn.2d 498, 504, 825, P.2d 706 (1992) 9

Weikel v. Davis
109 Wash. 97, 186 P. 323 (1919) 12

RULES OF CIVIL PROCEDURE

RAP 9.12 . . . . . 5, 11

STATUTES

RCW 4.08.080 5

RCW 62A.9-101, *et seq.* 7

RCW 65.08.070 7

RCW 7.28.010 9

RCW 7.28.230(1) 10, 11

RCW 61.12 10

RCW 61.12.050. 12

I. STATEMENT OF THE CASE

This Court correctly stated the facts of this case in *Bank of New York v. Hooper*, 164 Wn.App. 295; 263 P.3d 1263 (2011):

> Brian and Lisa Hooper owned a commercial property in Spokane, Washington. On April 23, 1993, the Hoopers executed a promissory note and granted a deed of trust on the property to Metropolitan Mortgage and Securities Co. On May 1, 1996, the Hoopers entered into a real estate contract selling the property to Marco Barbanti. The real estate contract provided for Mr. Barbanti to take the property subject to Metropolitan's deed of trust. The contract provided the underlying obligation would be paid by the Hoopers but funded by Mr. Barbanti through payments to the Hoopers' escrow agent in addition to the contract payment. Mr. Barbanti did not assume the note and deed of trust obligations. Later, Mr. Barbanti made arrangements to make the payments directly to Metropolitan's escrow agent. In April 1997, Metropolitan assigned its interest under the deed of trust to BNY. Later, Mr. Barbanti stopped paying on the deed of trust.
>
> In July 2003, Mr. Barbanti quit claimed the property to Royal Pottage Enterprises, Inc.
>
> In April 2009, BNY sued to foreclose the deed of trust on the property. In its complaint, BNY sought a money judgment and decree of foreclosure against the Hoopers. BNY sought to recover its costs and attorney fees incurred in the foreclosure action from the Hoopers. BNY's complaint named several other persons and entities alleged to have an interest in the property as defendants, including Mr. Barbanti, Royal Pottage, and a judgment lienor, Junco Frost Lavinia Inc. (collectively Respondents). The complaint sought to foreclose any interest in the

property held by Respondents but did not seek attorney fees and costs against them.

On August 27, 2010, Mr. Barbanti moved to dismiss BNY's foreclosure action as time barred under the applicable statute of limitations. Royal Pottage and Junco Frost joined in the dismissal motion. 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. Accordingly, the Hoopers moved to amend their answer and to add a cross claim against Mr. Barbanti alleging he breached the real estate contract by failing to pay the amounts to cover the underlying deed of trust payments even though he continued to pay on the contract. Shortly before the dismissal hearing, the Hoopers assigned their sellers' interest in the real estate contract to BNY.

At the dismissal hearing on September 24, 2010, BNY asked the court to deny dismissal and allow it to amend its complaint to assert claims enforcing the real estate contract based upon Mr. Barbanti's breach of his obligations under the contract. The court orally granted the dismissal motion, apparently denying the amendment request. On October 15, 2010, Mr. Barbanti, Royal Pottage, and Junco Frost moved for attorney fees under *RCW 4.84.330*; the same day, Royal Pottage, and Junco Frost moved to reconvey the deed of trust. On October 28, 2010, BNY filed a separate lawsuit to enforce the real estate contract against Mr. Barbanti.

On October 29, 2010, the court entered four orders: (1) Order Granting Motion to Dismiss (dismissing the bank's foreclosure action as barred by the statute of limitations), (2) Order Reconveying Deed of Trust, (3) Judgment For Defendant Marco T. Barbanti (awarding

attorney fees), and (4) Judgment For Defendants Royal Pottage and Junco Frost (awarding attorney fees).

164 Wn.App. 298-300. The following additional facts are relevant to this appeal.

The purchase price for the subject property under the Real Estate Contract is $160,000, which is comprised of three components: 1) a $7,000 cash down payment; 2) the sum of $133,549.83, which represents the principal balance owed on the Hoopers' Note as of the date of the Real Estate Contract; and 3) an additional sum of $19,450.17, plus interest. CP 74.

With respect to the $19,450.17 portion of the purchase price, an escrow account No. 15208 was set up at Allegro Escrow Services, Inc. ("Allegro") to handle collection of the funds. CP 158. In March of 2012, Mr. Barbanti requested a payoff quote from Allegro; and on March 26, 2012, he delivered a cashier's check to Allegro in the amount of $14,790.45 representing the balance owed on account 15208. CP 166, 288-289.

After account No. 15208 was paid off, Mr. Barbanti received the original Real Estate Contract stamped "ALLEGRO SERVICES, INC. PAID IN FULL." CP 167, 173-187. He also received a Statutory Warranty Deed executed by the Hoopers on May 21, 1996, which had

been held in escrow pending full payment of the Real Estate Contract. CP 167-168. The Statutory Warranty Deed was recorded in the land records of Spokane County on March 26, 2012, as document No. 6078471. CP 295-296.

With respect to the $133,549.83 portion of the purchase price, Mr. Barbanti stated in his declaration dated July 9, 2012, that "The last payment I made on the Promissory Note referenced in the Hooper-Barbanti Real Estate Contract was made on March 8, 2003 and was made directly to the Plaintiff [BNY]. The next payment on that Promissory Note was due on April 1 2003. The April 1, 2003 Promissory Note payment was never made." CP 161.

In his declaration dated July 9, 2012, Mr. Barbanti states that an escrow account No. 15206 was set up to handle payments made on the $133,549.83 portion of the purchase price. CP 159-160. Attached to Mr. Barbanti's declaration is an "Account Detail Report" for escrow account No. 15206, dated July 9, 2012, which shows an unpaid balance in the amount of $125,011.72. CP 309.

II. ARGUMENT

1. BNY had Standing to Bring the Underlying Action by Virtue of the Deed and Seller's Assignment of Real Estate Contract dated September 16, 2010.

The issue of whether the BNY had standing to bring the underlying action was not raised by the Appellants in their memorandum in opposition to summary judgment (CP 121-155) and therefore this issue cannot be considered on appeal. RAP 9.12 provides in pertinent part that, "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *See Rahman v. State of Washington*, 170 Wn.2d 810, 824; 246 P.3d 182 (2011) ("[T]his case is on appeal from an order granting summary judgment, and our review is appropriately limited to the evidence and issues called to the attention of the trial court.").

Even if the issue had been properly raised below, it is clear that BNY had standing to bring the underlying action by virtue of the Deed and Seller's Assignment of Real Estate Contract dated September 16, 2010, which was recorded on September 24, 2010, under Spokane County Auditor's File number 5936989. CP 105-108. RCW 4.08.080 provides in pertinent part:

> Any assignee or assignees of any judgment, bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, named in such judgment, bond, specialty, book account, or other chose in action . . . .

See also, *Baker v. Murrey*, 78 Wash. 241, 246, 138 P. 890 (1914) (A vendor of a contract to sell land may assign rights thereunder as security for a debt and the assignee may enforce the contract); *Big Bend Land Co. v. Hutchings*, 71 Wash. 345, 348, 128 P. 652 (1912) (An assignee of an option contract for the purchase of land may bring an action in his own name for installment due).

Appellants previously raised the issue that the Deed and Seller's Assignment of Real Estate Contract was recorded in the land records of Spokane County, but was not filed under the Uniform Commercial Code ("U.C.C."). However, after briefly discussing this issue in their memorandum in opposition to summary judgment, Appellants concluded that "While this issue is interesting, it is of no relevance in these proceedings and is moot." CP 154:4-5. Therefore, Appellants did not ask the trial court to consider this issue. BNY agrees that the issue is not relevant.

The failure to make a U.C.C. filing does not affect the validity of an assignment; it affects only the ***priority*** of a lien as against subsequent lien creditors, purchasers and encumbrancers. *In Freeborn v. Seattle Trust & Savings Bank*, 94 Wn.2d 336, 617 P.2d 424 (1980), the Washington Supreme Court stated:

> We further hold that where the vendor in a real estate contract executes a "Deed and Seller's Assignment of Real Estate Contract" by which he or she (a) assigns the contract and (b) conveys the real estate (legal title), as in In re Freeborn, the assignee-grantee must both file pursuant to U.C.C. article 9 (RCW 62A.9-101 *et seq.*) *and* record pursuant to *RCW 65.08.070* in order to have ***priority*** over subsequent lien creditors, purchasers and encumbrancers.

94 Wn.2d at 344 (emphasis added). As the present case does not involve a question of lien priority between competing security interests, the issue of U.C.C. filing is not relevant, as the Appellants admitted in their memorandum.

2. The Real Estate Contract does not Require the Seller to Provide Written Notice as a Prerequisite to Foreclosure, Furthermore, the Remedies Sought in the Complaint Include both Foreclosure and Quiet Title.

Appellants argue that BNY failed to give Mr. Barbanti written notice required under the Real Estate Contract and therefore foreclosure was improper. Appellants point to paragraph 19(d) of the Real Estate Contract, which is set forth below in pertinent part:

> (d) 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); provided, however, such cure period shall be extended for up to thirty (30) additional days to the extent reasonably necessary to complete the cure of a nonmonetary default if the Purchaser commences such cure within fifteen (15) days following in the Seller's notice and pursues it was due diligence. . . .

CP 82 (emphasis added).

A plain reading of paragraph 19(d) indicates that the seller can foreclose the Real Estate Contract as a mortgage, and ***may*** accelerate the debt upon written notice to the defaulting purchaser. The written notice requirement pertains to acceleration, not foreclosure. Further, use of the term "may" indicates that acceleration is discretionary and not mandatory.

The trial court agreed that the 15-day notice provision applies to acceleration of the loan, and noted that with respect to contractual notice provisions the defendants are afforded additional protection by virtue of the court's oversight of the foreclosure. As Mr. Barbanti defaulted on the Real Estate Contract by failing to pay the purchase price, BNY was entitled to judgment foreclosing the Real Estate Contract and the trial court properly entered judgment in favor of BNY.

Furthermore, the relief sought in the complaint and the motion for summary judgment is not limited to foreclosure, but includes the following: 1) judgment foreclosing the Real Estate Contract and canceling any and all rights in the subject property held by Mr. Barbanti, Royal

Pottage Enterprises, Inc. ("Royal Pottage") and/or any person claiming through them; 2) judgment foreclosing and extinguishing any claim or interest in the property by the defendants; 3) ***judgment quieting title*** in the property in BNY and extinguishing any right, claim or interest of all other persons; 4) judgment ejecting defendants Barbanti and Royal Pottage from the property and ordering them to surrender the property to BNY; 5) immediate possession of the property; and 6) an award of attorneys' fees and costs. CP 1-42, 54-56.

RCW § 7.28.010 governs quiet title actions, and provides in pertinent part:

> Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title . . . .

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

Tomlinson v. Clarke, 118 Wn.2d 498, 504, 825 P.2d 706 (1992). Therefore, BNY was entitled to summary judgment quieting title to the property in BNY.

The Order Granting Plaintiff's Motion for Summary Judgment foreclosed the Real Estate Contract and quieted title to the property in favor of BNY. CP 334-335. Assuming *arguendo* that BNY was required to give Mr. Barbanti 15-day written notice under paragraph 19(d) of the Real Estate Contract, BNY was still entitled to judgment quieting title in its favor, therefore, the trial court properly granted summary judgment in favor of BNY.

3. The Trial Court's Entry of Summary Judgment was Done in Accordance with Applicable Law.

Appellants advance two separate arguments in support of their contention that the trial court failed to follow the law when it entered the summary judgment order. First, Appellants contend that RCW 7.28.230(1) prohibits a mortgagee from maintaining a quiet title action or ejectment action. Second, Appellants contend that the trial court failed to comply with the requirements of RCW Chapter 61.12 by failing to render a monetary judgment against Mr. Barbanti.

With respect to the Appellants first argument concerning RCW 7.28.230(1), Appellants failed to raise this issue in their memorandum in opposition to summary judgment and it was not brought to the attention of

the trial court, therefore this issue cannot be considered on appeal. "Under RAP 9.12, only the evidence and issues called to the attention of the trial court may be considered on appeal." *Manor v. Nestle Food Co.,* 78 Wn.App. 5, 8, 895 P.2d 27 (1995), rev'd on other grounds, 131 Wn.2d 439, 932 P.2d 628 (1997).

Even if the issue had been brought to the attention of the trial court, there is no merit to Appellants' argument. RCW 7.28.230(1) provides in pertinent part that, "A mortgage of any interest in real property shall not be deemed 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 law . . . ." This section does not apply to the present case because BNY is not a mortgagee holding a mere security interest in the property; BNY is the fee title ***owner*** of the property by virtue of the Deed and Seller's Assignment of Real Estate Contract. Furthermore, the plain language of RCW 7.28.230(1) indicates that it applies only to actions to "recover possession" and not to quiet title actions.

With respect to the Appellants second argument, that the trial court failed to render a monetary judgment against Mr. Barbanti, there is no requirement under Washington law that a court enter a monetary judgment in a foreclosure action. In fact, there is no requirement under Washington law that a mortgage be supported by a debt or that the mortgagor be

personally liability under the mortgage. In the case of *Weikel v. Davis*, 109 Wash. 97, 186 P. 323 (1919) the Washington Supreme Court held that a mortgage was valid even though there was no debt and the mortgagors were not personally liable under the mortgage:

> It is first contended by the respondents that the instrument of March 27, 1917, being the mortgage sought to be foreclosed, is, in fact and in law, not a mortgage, because there was no debt and because the mortgagors at no time became personally liable. This position is untenable. It is not necessary that there should be a personal liability of the mortgagor in order for there to be a mortgage. It is a common practice in the state of Washington for mortgages to be drawn which specially provide that the mortgagee shall look exclusively to the mortgaged lands and that there shall be no personal liability of the mortgagor, and, so far as we are aware, it has never before been questioned that such instruments were mortgages. Our statutes recognize such mortgages. Section 1117, Rem. Code, provides that, "when there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged."

Similarly, RCW 61.12.050 provides "When there is no express agreement in the mortgage nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged." Therefore, under Washington law, there is no requirement that a court enter a monetary judgment in a foreclosure action.

The trial court's entry of summary judgment in this case was in accordance with applicable law.

4. Mr. Barbanti Failed to Pay the Purchase Price Under the Real Estate Contract.

The purchase price for the subject property under the Real Estate Contract is $160,000, which is comprised of three components: 1) a $7,000 cash down payment; 2) the sum of $133,549.83, which represents the principal balance owed on the Hoopers' promissory note ("Note") as of the date of the Real Estate Contract; and 3) an additional sum of $19,450.17, plus interest. CP 74.

The Real Estate Contract required Mr. Barbanti to take the Property subject to the Hoopers' loan obligation. The contract provided that, "If this contract is being executed subject to any Prior Encumbrance, the Purchase Price is partially comprised of the principal due under the Prior Encumbrance ***as of the date hereof***." CP 77 at ¶ 3. (emphasis added). In this regard the Real Estate Contract states that the "current principal balance" due under the Note is $133,549.83. CP 74 at Section "C." Therefore, the portion of the purchase price attributable to the Note became a fixed principal sum of $133,549.83 as of the date of the Real Estate Contract. Mr. Barbanti did not assume the Note and he did not have any obligations under the Note itself. His obligation to pay the

principal sum of $133,549.83, plus interest, arises under the Real Estate Contract and is independent of the Note. Thus, it is immaterial that the deed of trust securing the Note later became unenforceable due to the statute of limitations.

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).

Mr. Barbanti made the same admission to the trial court in this case. He stated in his declaration dated July 9, 2012, that "The last payment I made on the Promissory Note referenced in the Hooper-Barbanti Real Estate Contract was made on March 8, 2003 and was made directly to the Plaintiff [BNY]. The next payment on that Promissory Note was due on April 1 2003. The April 1, 2003 Promissory Note payment was never made." CP 161. Mr. Barbanti further stated that an escrow account No. 15206 had been set up to handle payments made on the $133,549.83 portion of the purchase price. CP 159-160. Attached to Mr. Barbanti's declaration is an "Account Detail Report" for escrow account No. 15206, dated July 9, 2012, which shows an unpaid balance in the amount of $125,011.72. CP 309.

Nowhere in Mr. Barbanti's opposition to summary judgment did he allege that he paid the full $160,000 purchase price for the property. Incredibly, Mr. Barbanti attempts to transform his prolonged breach of the Real Estate Contract (which resulted in the Note becoming unenforceable) into performance under the Real Estate Contract:

> The Hoopers got exactly what they contracted for in the Hooper-Barbanti Real Estate Contract namely: $7,000.00 cash at closing; $19,450.17 plus interest at 7% per annum up to the date of final payment (March 26, 2012); and they got relieved of their obligation to pay the Hooper promissory note either by monies Mr. Barbanti paid or by Mr. Barbanti's successful efforts to defend against Bank of New York's attempt to collect on the Hooper note.

CP 150:18 - CP 151:1. As Mr. Barbanti did not pay the $160,000 purchase price, he was in default under the Real Estate Contract and the trial court properly entered summary judgment.

Mr. Barbanti makes much of the fact that he paid the sum of $19,450.17, to Allegro Escrow and received a Statutory Warranty Deed ("Warranty Deed"). The Warranty Deed was executed by the Hoopers on May 21, 1996, and was recorded in the official records of Spokane County on March 26, 2012 as document number 6078471. The Warranty Deed recites in pertinent part that:

> THE GRANTORS, BRIAN R. HOOPER and LISA M. HOOPER, husband and wife, for and in consideration of ONE HUNDRED SIXTY THOUSAND DOLLARS AND

> NO/100 ($160,000.00) and other good and valuable consideration in hand paid, convey and warrant to the GRANTEE, MARCO T. BARBANTI, a single person, the following described a real estate, situated in Spokane County Washington . . .

CP 296.

However, at the time the Warranty Deed was recorded neither the Hoopers nor Mr. Barbanti had any interest in the property because they had already transferred their interests to other parties. Mr. Barbanti transferred his interest in the property to Royal Pottage by Quit Claim Deed dated July 17, 2003, which was recorded in the official records of Spokane County on July 21, 2003 as document number 4929722. CP 217-218. Similarly, the Hoopers had transferred their interests in the property to BNY by virtue of the Deed and Seller's Assignment of Real Estate Contract dated September 16, 2010, which was recorded on September 24, 2010, under Spokane County Auditor's File number 5936989. CP 105-108. The Warranty Deed from the Hoopers could not convey any interest in the property to Mr. Barbanti because the Hoopers did not have any interest to convey. 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 fulfillment deed." 164 Wn.App. at 302 (emphasis added). Therefore, the warranty deed

recorded by Mr. Barbanti did not convey any interest in the property. Accordingly, the trial court properly entered judgment in favor of BNY.

Furthermore, BNY did not receive any of the payments that Mr. Barbanti made to Allegro Escrow. *See* Affidavit of Ocwen Loan Servicing, LLC in Support of Plaintiff's Motion for Summary Judgment. CP 57-58. In spite of the fact that Mr. Barbanti knew BNY was entitled to receive payments under the Real Estate Contract, he continued to make payments to Allegro Escrow knowing that Allegro was remitting the payments to the Hoopers. Marco Barbanti (WSBA #16952) is an active member of the Washington State Bar who was admitted to practice law on June 9, 1987. Mr. Barbanti was well aware that the Hoopers had transferred their interests in the Real Estate Contract to BNY. The complaint filed in the underlying action on October 28, 2010, clearly states that BNY is the owner of the sellers' interests under the Real Estate Contract by virtue of a Deed and Seller's Assignment of Real Estate Contract dated September 16, 2010, which was recorded on September 24, 2010. CP 1-42 at ¶ 4.7. Attached to Mr. Barbanti's declaration dated July 9, 2012 are 18 receipts from Allegro Escrow spanning a period from 9/3/2010 to 3/6/2012, which clearly designate "Lisa Olsrud Hooper" as the recipient of Mr. Barbanti's payments. CP 276-281. Under what legal theory do Mr. Barbanti's payments to Allegro Escrow constitute payments

to BNY? Not only did Mr. Barbanti fail to pay BNY the $133,549.83 portion of the purchase price, he also failed to pay BNY the $19,450.17 portion of the purchase price.

5. BNY is Entitled to an Award of Attorneys' Fees and Costs under the Real Estate Contract.

BNY is entitled to an award of its attorneys' fees and costs from Mr. Barbanti pursuant to Paragraph 23 of the Real Estate Contract. CP 83.

III. CONCLUSION

By virtue of the Deed and Seller's Assignment of Real Estate Contract, BNY is the fee owner of the subject property and the assignee of the Real Estate Contract. As such, BNY has the right to bring an action to foreclose the Real Estate Contract and quiet title to the property. Mr. Barbanti admitted to the trial court that he failed to pay the purchase price for the property, and consequently the trial court properly entered summary judgment foreclosing the Real Estate Contract and quieting title in favor of BNY.

Dated this 21ST day of December, 2012.

Scott Grigsby

Scott Grigsby, WSBA #41630
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Robinson Tait, P.S.
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Isabelle Evans, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a paralegal at Robinson Tait, P.S., attorneys for Respondent, and am competent to be a witness herein.

On December 26, 2012, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing RESPONDENT'S BRIEF to the following:

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