No. 47755-6-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

MUFG UNION BANK, N.A., successor-in-interest to the Federal Deposit Insurance Corporation, as the Receiver of Frontier Bank,

Appellant,

v.

RANDY CAMPADORE, a single person; RAYMOND E. PELZEL, and the marital community composed of RAYMOND E. PELZEL and MERRILEE PELZEL; WILLIAM RILEY and ALTHEA RILEY, husband and wife, and the marital community composed thereof,

Respondents.

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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT MUFG UNION BANK, N.A.

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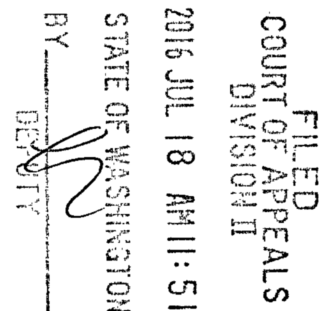

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STATUTORY AUTHORITIES

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I. INTRODUCTION

Three decisions, published after the filing of the opening briefs in this case,[1] require reversal of the trial courts' Cross Summary Judgment and then entry of summary judgment in Union Bank's favor. In *Umpqua Bank v. Shasta Apartments, LLC,* No. 47224-4-II, 2016 WL 3457726 (June 21, 2016), this Division rejected the proposition relied on by the trial court that the Receivership Act, by its silence, precludes a deficiency judgment against a guarantor when a receiver sells property that serves as collateral for the guaranteed indebtedness. In *Union Bank v. Blanchard*, No. 72802-9-I, 2016 WL 3190504 (June 6, 2016), guarantors who knew about and participated in a receivership case, like Guarantors did, were bound by the receivership court's order selling the property and could not challenge it in trying to avoid their liability under their guaranties. In *Frontier Bank v. Bingo Investments*, 191 Wn. App. 43, 361 P.3d 230 (November 2, 2015), *review denied*, 185 Wn.2d 1027 (June 1, 2016), guaranties virtually identical to those here were strictly enforced following a receiver's sale of such property.

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[1] This case was stayed from November 6, 2015, until June 3, 2016, as a result of the bankruptcy filing of Respondents Riley until the bankruptcy court granted relief from the automatic stay.

II. <u>THIS DIVISION'S JUST PUBLISHED OPINION IN *UMPQUA BANK V. SHASTA* REQUIRES REVERSAL OF THE TRIAL COURT'S CROSS SUMMARY JUDGMENT</u>

The trial court, in an unprecedented decision, granted the Cross Summary Judgment on the ground that the Receivership Act, by its silence, precluded a deficiency judgment against Guarantors. CP 448-449. The trial court said that, because the Receivership Act does not expressly provide for deficiency judgments, Union Bank could not sue Guarantors for the deficiency remaining after the Receiver's sale of the Property (RP 49-52):

> THE COURT: I am going to grant the defendants' motion....
>
> ***
>
> MR. THORESON: It's an end [of] the case until it's decided by the Court of Appeals.
>
> MR. HELSDON: It's a dispositive ruling.
>
> MR. THORESON: It's dispositive of all the issues.
>
> THE COURT: Yeah, it just bothers me because their claim is for breach of contract, and the guarantee is in fact a contract.
>
> MR. BUTLER: And for monies due.
>
> MR. HELSDON: Well, you made the right decision.
>
> THE COURT: I have no idea. I can see the word "reversed" coming my way in the future.

***

> THE COURT: I don't really rely on that. I don't think it's a factual issue. I think *it is a legal issue.*
>
> ***
>
> THE COURT: *I am concluding that the receiver—that having sold the property through a receivership foreclosed their right to sue on the guarantee.*
>
> ***
>
> MR. BUTLER: And *on what basis*? Wording in the contract or some argument that defendants have made?
>
> THE COURT: *It is the arguments made by the defendants as to the receivership statute not allowing that as a remedy.* (Emphasis added.)

The Brief of Respondent Randy Campadore[2] repeats and relies on this proposition: "Washington law does not permit deficiency judgments after property is sold by a general receiver pursuant to Washington's Receivership Act....[T]he right to a deficiency judgment is <u>*statutory*</u> in nature....Had the Legislature intended to permit deficiency judgments after a receiver's sale, the Legislature certainly knew how to draft—and would have drafted—Washington's Receivership Act to permit for deficiency judgments; but it didn't." Campadore Brief at 2, 10, 12-20, 25, 29.

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[2] Respondents Pelzel and Riley declined to file briefs.

The very same argument was unsuccessfully made to this Court by the borrower and the guarantor in *Umpqua Bank v. Shasta Apartments*: "Shasta and Johnson argue that a secured creditor's right to a deficiency judgment is statutory and that chapter 7.60 RCW's (Receivership Statute), silence on the issue of a deficiency judgment precludes Umpqua from obtaining a deficiency judgment after the court ordered and approved receiver's sale of Shasta's property that secured the loan." This Court replied: "We disagree." Slip op. at 7-8.

Rejecting that argument, this Court said:

> The issue is whether the plain language of the Receivership Act precludes a secured creditor from obtaining a deficiency judgment against a grantor and a guarantor after a court-ordered and approved receiver's sale of the grantor's property securing the loan. It does not....The legislature intended the Receivership Statute to "benefit creditors" having interests in property administered by the courts. Thus, absent law or persuasive policy to the contrary, we do not read a provision into the statute that inhibits a secured creditor from obtaining satisfaction of the debt in a deficiency judgment. Such reading would be contrary to the legislature's intent of providing a "more comprehensive, streamlined and cost-effective" procedure for the "benefit of creditors." Accepting Shasta's and Johnson's argument requires that we read language into the Receivership Statute that is not there. *If the legislature had wanted to preclude a deficiency judgment after a receiver's sale under the Receivership Statute, it would have included that language in the statute. Thus, we hold that the plain language of the Receivership Statute does not preclude a secured creditor from pursuing a post-sale deficiency*

> *judgment against a grantor whose property secured the loan or against a guarantor on the loan.* (Emphasis added.)

Slip op. at 8-10 (citations omitted). This holding controls and completely resolves this case, and requires reversal of the trial court's Cross Summary Judgment and entry of summary judgment for the deficiency in Union Bank's favor.

The decision in *Umpqua Bank v. Shasta Apartments* also disposes of Respondent Campadore's argument about the DTA:

> Washington's Deed of Trust Act (the specific statute) supersedes Washington's Receivership Act (the general statute) as it relates to the sale of collateral secured by a deed of trust. Accordingly, creditors cannot circumvent the protections afforded to borrowers and guarantors under Washington's Deed of Trust Act simply by having a general receiver sell collateral secured by a deed of trust pursuant to Washington's Receivership Act. To that end, Union Bank had no right to strip Defendants of the protections afforded to Defendants under Washington's Deed of Trust Act by having a general receiver sell the Property secured by the Deed of Trust pursuant to Washington's Receivership Act.

Campadore Brief at 12.

This Court explained why that argument is incorrect and must be rejected.

> In a nonjudicial foreclosure initiated under the DTA, the borrower relinquishes the right to redemption, allowing the property to be sold at the trustee's sale more quickly that in

> a judicial foreclosure. This more efficient process precludes secured creditors from obtaining deficiency judgments when they foreclose nonjudicially. But even with the provisions of the DTA, secured creditors retain the right to judicial foreclosures, preserving the right to obtain a deficiency judgment. A deficiency judgment arises if the amount of the judgment in a judicial foreclosure exceeds the value of the security sold at the foreclosure sale. Unless it elects to foreclose on the deed of trust [nonjudicially] pursuant to RCW 61.24.040, a creditor is not precluded from obtaining a deficiency judgment....Washington case law has long established that an appointed receiver is an officer of the court subject to the court's control. As an officer of the court, a receiver's sale is a judicial sale.

Slip op. at 12-13 (citations omitted.)

Because Union Bank did not sell or attempt to foreclose on the Property nonjudicially through a trustee's sale, because Receiver's sale of the Property pursuant to the Sale Order is not a nonjudicial foreclosure sale but a judicial sale, and because the Receivership Act does not preclude a deficiency judgment against Guarantors and in favor of Union Bank after the Receiver's sale of the Property, Union Bank is entitled to a deficiency judgment on the remaining amount of the Indebtedness. The trial court's Cross Summary Judgment should be reversed, and summary judgment in favor of Union Bank entered against Guarantors for the deficiency.

III. BECAUSE GUARANTORS KNEW ABOUT AND PARTICIPATED IN THE RECEIVERSHIP, THE JUST PUBLISHED OPINION IN *UNION BANK V. BLANCHARD* REQUIRES REVERSAL OF THE TRIAL COURT'S CROSS SUMMARY JUDGMENT

Respondent Campadore argues that Guarantors are not bound by the Sale Order and there are factual issues about the price obtained for the Property by the Receiver (which they repeatedly call "Union Bank's general receiver") and approved by the Receivership Court in the Sale Order, notwithstanding Guarantors' actual and constructive notice of the Receivership, and their participation in the Receivership, including the filing of the Objection to the Sale Motion. Campadore Brief at 20, 26, 27.

The guarantors in *Union Bank v. Blanchard* made the same arguments, complaining about "Union Bank's receiver." Slip op. at 18. Division I of this Court rejected the arguments by pointing out that a receiver is an agent of the court and subject to its control, and the court "ratified each of the challenged decisions." Slip op. at 19, 20. It cited RCW 7.60.190 of the Receivership Act saying "[t]he guarantors' claims regarding actions taken in the receivership and bankruptcy cases also fail because they actively participated in those proceedings by, among other things, filing proofs of claim and opposing any sale of the property...Because the guarantors filed proofs of claim in both the

receivership and the bankruptcy cases and because they contested both attempts to obtain authorization to sell the property, they are bound by the actions taken in each case and cannot challenge them here." Slip op. at 20, n.15.

Likewise, Guarantors cannot complain about or re-litigate the sale of the Property or the sale price obtained by the Receiver, which were ratified by the Receivership Court. Each Guarantor received notice, had actual knowledge of and participated in the Receivership. The order appointing the general receiver was an "Agreed Order" and, when it was amended, the two orders of amendment were signed by Guarantors themselves in their own handwriting. CP 561-566. They were given written notice of the pendency of the receivership in accordance with RCW 70.60.210. CP 485, 487, 490, 491-521, 523-556. After the Receivership was commenced, Guarantors communicated with Receiver and actually met with Receiver at the Property itself. CP 370. Notice of the Sale Motion was served on Guarantors, and they filed a written Objection to the motion. CP 199-212, 372. Accordingly, the sale made pursuant to the Sale Order of the Receivership Court and the sale price are binding on Guarantors pursuant to RCW 7.60.190.

IV. **BECAUSE GUARANTORS GAVE ABSOLUTE AND UNCONDITIONAL GUARANTIES, THE OPINION IN *UNION BANK V. BLANCHARD* AND THE RECENT OPINION IN *FRONTIER BANK V. BINGO* REQUIRE REVERSAL OF THE TRIAL COURT'S CROSS SUMMARY JUDGMENT**

The Guaranties are absolute and unconditional. They contain extensive authorizations and waivers of defenses, setoffs, and counterclaims. They are virtually identical to the guaranties enforced by Division I of this Court[3] in *Union Bank v. Blanchard* and *Frontier Bank v. Bingo*.

The holding in those two cases could not be clearer on the outcome in this case: "there can be no serious dispute" that the Guaranties must be enforced unconditionally and their waiver provisions upheld. *Union Bank v. Blanchard*, Slip op. at 8-11; *Frontier Bank v. Bingo*, 191 Wn. App. 53-54.

V. **CONCLUSION**

Union Bank respectfully asks this Court to reverse the trial court, remand this case to the trial court with instructions to grant summary judgment in Union Bank's favor against Guarantors for the deficiency, and

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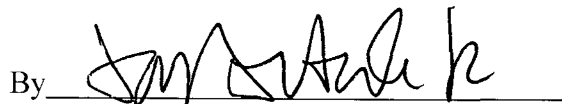
[3] "It must be remembered that Washington has one Court of Appeals with three divisions....The three divisions of the Court of Appeals of Washington are co-equal and part of one court." *Union Bank v. Vanderhoek Associates*, 191 Wn. App. 836, 847, 365 P.3d 223 (Div. II 2015).

award attorneys' fees and costs to Union Bank in connection with this appeal.

RESPECTFULLY SUBMITTED this 13th day of July, 2016.

RIDDELL WILLIAMS P.S.

By 

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CERTIFICATE OF SERVICE

I, Veronica I. Magda, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent MUFG Union Bank, N.A., in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On July 13, 2016, I served a true and correct copy of the foregoing document on the following persons for Appellant, via email, U.S. Mail, and hand-delivery as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 13th day of July, 2016.

Veronica I. Magda

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