

64121-2

64121-2

NO. 64121-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SCOTT AND KIM SHUMWAY

Appellants,

v.

CHASE HOME FINANCE, LLC,

Respondent.

RESPONDENT CHASE HOME FINANCE, LLC'S BRIEF

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
The Honorable Linda C. Krese

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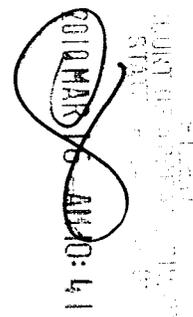


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I. RESTATEMENT OF THE ISSUES

1. Whether the court properly denied the Shumways motion for reconsideration of the order denying the Shumway's motion to vacate summary judgment granted in Chase's favor where the Shumways failed to properly note their motion for reconsideration, were not necessary or indispensable parties to the lawsuit, and their participation in the underlying lawsuit was irrelevant.

2. Whether the court properly applied the doctrine of equitable subrogation.

3. Whether Chase had standing to bring a lawsuit to prevent a junior lien claimant from wiping out its interest in real property.

II. RESTATEMENT OF THE CASE

A. Factual Statement

Scott and Kim Shumway owned real property located at 7117 66th Ave. NW, Marysville, WA 98270.

In 2003, Scott Shumway granted a Deed of Trust on his property to Chase, to secure a loan in the principal amount of \$143,000. CP at 256-261, 3-134. Chase's Deed of Trust was recorded on March 7, 2003, in a first lien position on the property. Id.

In 2004, Mr. Shumway obtained a revolving line of credit from GB Home Equity in the principal amount of \$54,000. CP at 149-156. GB Home Equity recorded its second position Deed of Trust on July 8, 2004. CP at 149. Interest in GB Home Equity's loan was later assigned to West Coast Servicing, Inc. ("West Coast") pursuant to an Assignment of Deed of Trust. CP at 158-160.

In 2007, Chase refinanced Mr. Shumway's existing, first position Deed of Trust, and provided a new loan to Mr. Shumway in the amount of \$206,200.00. CP at 164-182, 256-261. It is undisputed that Chase's new Deed of Trust was intended to pay off West Coast's loan and West Coast had no expectation when it made its loan to the Shumways that it would take priority over Chase's interest.

West Coast's loan was not paid when the loan closed and the Shumways received funds directly. Shortly after the refinance, the Shumways stopped making payments to West Coast. CP at 194.

Eventually West Coast started a foreclosure which threatened to wipe out Chase's first position loan. In response Chase filed a lawsuit under Snohomish County Superior Court Cause No. 08-2-07877-1 seeking to restrain the sale and to determine the priority of Chase's deed of trust. CP at 256-261.

Applying the doctrine of equitable subrogation, the Snohomish County Superior Court granted Chase's motion for summary judgment on January 14, 2009, and determined Chase's deed of trust recorded March 7, 2003, was senior to any and all right, title, lien or claim of interest of West Coast in the amount of \$135,643.38. CP at 76-79. The court further determined that all remaining amounts owed to Chase under its March 15, 2007, deed of trust shall continue to be secured by the property subject only to West Coast's lien. Id.

On January 23, 2009, the trustee of West Coast's deed of trust conducted a trustee's sale. CP at 9. The amount bid at the sale exceeded the amount owed to West Coast and on or about February 12, 2009, surplus proceeds totaling \$43,645.74 were deposited in the court registry. Id.

CHRONOLOGY

2003	Chase Deed of Trust - \$143,000
2004	West Coast's Deed of Trust - \$54,000
2007	Chase Deed of Trust - \$206,200
2009	West Coast's foreclosure sale resulting in excess funds deposit with the registry of the court totaling \$43,645.74

B. Procedural History

After seeing that the sale of the Shumways' property resulted in \$43,645.74 in surplus funds, the Shumways initiated a challenge to those excess funds claiming them as their own.

On May 14, 2009, the court granted Chase's petition for excess funds. CP at 9.¹ On May 27, 2009, the Shumways moved to vacate the court's order on summary judgment which determined the relative lien positions of Chase and West Coast. CP at 59, 49. A hearing occurred on June 9, 2009, and the superior court denied the Shumway's motion to vacate and ordered that the surplus funds be released to Chase. CP at 117.

On June 19, 2009, the Shumways filed a motion for reconsideration. CP at 66, 117. The motion was untimely as Chase received it by email on June 23, 2009, five days *after* the deadline. CP at 117. Furthermore, the Shumways failed to comply with Snohomish County Local Court Rule 59(e)(3)(B) requiring them to file a calendar note setting the motion before the court. No oral argument was held and on August 12, 2009, the court denied the Shumway's motion for reconsideration. CP at 70. This appeal by the Shumways follows.

¹ The Shumways are not appealing the Order Authorizing Disbursement of Funds from the Trustee's Sale filed under Snohomish County Superior Court Cause No. 09-2-02899-9. Rather, the Shumway's only appeal the Order Denying the Shumway's Motion for Reconsideration.

The Shumways were not a party to the underlying lawsuit and consequently lacked standing to raise any objection to the order on summary judgment. The Shumways cite no applicable authority excusing them from intervening in the lawsuit pursuant to Civil Rule 24. Furthermore, they fail to offer any authority for the position that they were necessary or indispensable parties. Nor did the Shumway's explain how their participation in the lawsuit would have changed the outcome. Furthermore, the law of equitable subrogation supports the superior court's decision. The Shumways cite no contrary authority.

III. STANDARD OF REVIEW

The only order on appeal is the superior court's order denying the Shumway's motion for reconsideration. A motion for reconsideration is to be decided by the trial court in exercise of its discretion and its decision will be overturned on appeal only if the court abused its discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175, 1180 (2002). Accordingly, the proper standard of review is abuse of discretion.

IV. SUMMARY OF THE ARGUMENT

The Shumways are not appealing the court's order authorizing disbursement of excess funds from the trustee's sale filed under Snohomish County Superior Court Cause No. 09-2-02899-9. Nor are the Shumway's contesting the court's ruling on equitable subrogation vis a vis Chase and West Coast. Consequently, the only argument the Shumways can squarely attempt to revisit on appeal is whether the court properly denied their motion for reconsideration which sought to unwind the court's ruling on a summary judgment. The Shumways attempt, however, to circumvent procedural steps in an unorthodox effort to obtain a windfall of \$43,645.74 in surplus funds should be denied.

V. ARGUMENT

1. The Superior Court Properly Denied the Shumway's Motion for Reconsideration Because it was Not Timely

CR 59(b) requires a motion for reconsideration to be served and filed no later than "10 days after the entry of the judgment, order, or other decision." *Schaefco, Inc. v. Columbia River Gorge Commission*, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993); *Metz v. Sarandos*, 91 Wn. App. 357, 359, 957 P.2d 795, 796 - 797 (1998); *Jankelson v. Lynn Const., Inc.*, 72 Wn. App. 232, 236, 864 P.2d 9, 11 (1993). A trial court may not extend this time period. CR 6(b).

In *Schaefco* our Supreme Court held the filing and service requirements of CR 59(b), in the absence of a sufficient excuse, to be jurisdictional in nature and dismissed an appeal where the moving party had failed to both file and serve a motion for reconsideration within 10 days after entry of judgment. *Schaefco*, 121 Wn.2d at 367. In *Schaefco* the moving party filed a motion for reconsideration with the superior court within CR 59(b) time limits; however, service on the opposing party was not completed until 4 days later. *Schaefco*, 121 Wn.2d at 367.

Applying the ruling of *Schaefco* to the facts herein, filing and service were not timely completed within the limitations. The Order Denying the Shumway's Motion to Vacate was entered June 9, 2009. Accordingly, the deadline to serve the motion on Chase was June 19, 2009. Like the moving party in *Schaefco*, Chase was not served with the motion until June 23, 2009, five days after the Shumway's deadline.

As the Shumways failed to timely serve their motion for reconsideration the Superior Court correctly denied their motion for reconsideration.

2. The Superior Court Properly Denied the Shumway's Motion for Reconsideration Because a Calendar Note was Not Filed

Under CR 59(b) and SCLCR 59(e)(3)(D) the Shumways were required to file with the superior court a calendar note at the time their motion was filed. SCLCR 59(e)(3)(B) provides as follows:

Oral Argument. At the time of filing a motion under this rule, the moving party shall comply with CR 59(b) by filing a calendar note, setting the motion before the court which heard the motion. Absent order of the court, the motion will be taken under advisement. Oral arguments will be scheduled only if the court requests the same.

SCLCR 59(e)(3)(B). The Shumways failed to comply with this rule as no calendar note setting the motion for reconsideration for hearing was filed. As the motion was not properly noted the trial court correctly denied it.

3. Even if the Motion for Reconsideration was Timely and Properly Noted it Should Have Been Denied

a. The Shumways Were Not a Party to the Underlying Lawsuit and Consequently Lacked Standing to Move to Vacate

CR 24(c) required the Shumways to file a motion to intervene before attempting to vacate the court's order on summary judgment. CR 24(c) provides as follows:

A person desiring to intervene shall serve a motion to intervene upon all the parties as provided in rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Consequently, the Shumway's failure to intervene is fatal to their attempt to vacate the court's decision on summary judgment. The case cited by the Shumways is not on point.

In *State ex rel. Graham v. San Juan County*, 102 Wn.2d 311, 686 P.2d 1073 (1984) the court considered whether a pleading labeled a "reply" filed in response to the County's answer was sufficient to satisfy CR 24(c). The court held the reply was sufficient for a number of reasons but mainly because it gave actual notice of their intent to intervene as well as notice of the substance of their claims. *San Juan County*, 102 Wn.2d at 317. The court also considered that the County had not shown prejudice for the intervener's failure to strictly comply with the requirements of CR 24(c). *San Juan*, 102 Wn.2d at 317.

San Juan County does not apply to the facts of this case. In *San Juan County* the intervenors gave actual notice of their interest in the case at the outset. Here the Shumways waited nearly five months after entry of the order granting Chase's motion for summary judgment to file their motion to vacate. In denying their motion to vacate the summary judgment order the court was satisfied that the Shumways had been on

notice of the litigation in advance of the order being entered and asked that the language regarding their lack of standing for this reason included in the order denying their motion to vacate.

Chase is prejudiced by the Shumway's attempt to re-litigate issues already decided by the superior court vis a vis West Coast and Chase. As the Shumways never moved to intervene or take any other action prior to entry of the order on summary judgment and they had no standing to move to vacate the order on summary judgment. Had the Shumways intervened before the matter had concluded neither Chase nor the court would be burdened with this matter for a second time.

Furthermore, the court did not abuse its discretion by raising the issue of intervention *sua sponte*. To the contrary, Washington authority supports a court's ability to raise an issue *sua sponte* in an effort to meet its obligation to decide cases in accordance with applicable law. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 571, 852 P.2d 295, 305 (1993). In *Maynard Inv. Co., Inc. v. McCann*, 77 Wn.2d 616, 465 P.2d 657 (1970), the court held it would "not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent."

The Shumways failed to intervene and their late attempts to unwind the trial court's decision should be disregarded.

b. The Shumways Were Not Necessary to Determine the Respective Lien Rights Between Chase and West Coast

The Shumways fail to cite any relevant authority supporting their position that they were necessary parties to West Coast and Chase's lien priority dispute.

In *Reitz v. Knight*, 62 Wn. App. 575, 814 P.2d 1212 (1991) cited by the Shumways, the court recognized that where property lines are uncertain, all property owners are necessary parties to a boundary line dispute. This case, however, does not concern a boundary line dispute. This case centers on the relative priorities of two competing lien holders.

Veradale Valley Citizens' Planning Committee v. Board of County Com'rs of Spokane County, 22 Wn. App. 229, 232, 588 P.2d 750, 753 (1978) and *Corbin Dist. Property Owners Ass'n v. Spokane County Bd. of Adjustment*, 26 Wn. App. 913, 915, 614 P.2d 1313, 1314 – 1315 (1980) are likewise irrelevant. The *Veradale* and *Corbin* courts address the issue of whether a person who has acquired a property right as a result of a favorable zoning administration decision must be given notice when judicial review of that decision is sought. These cases do not remotely concern priority lien rights between competing lien holders.

Rather, *Stephens v. Kesselburg*, 19 Wn.2d 427, 143 P.2d 289 (1943) holds that the question to be determined is simply which of two

parties has superior title, a holder of legal title is not a “necessary party.”

Stephens v. Kesselburg, 19 Wn.2d 427, 143 P.2d 289 (1943). The

Stephens court specifically found as follows:

While the holder of the legal title here in question may have been a proper party to the action, she was not a necessary party so far as the respondent was concerned, because the question to be here determined is simply whether the appellant or the respondent has the superior title as between themselves.

Stephens, 19 Wn.2d at 435.

Furthermore, the CR 19 test cited by the Shumways does not support their position here. The test requires the court first consider “whether a party is needed for adjudication.” *Crosby v. Spokane County*, 137 Wn.2d 296, 306, 971 P.2d 32 (1999). The Shumway’s participation was unnecessary as it would not have changed the outcome of the court’s decision on equitable subrogation.

The Shumways have not been prejudiced. Considering they did not object to the foreclosure and never made any attempt to restrain the trustee’s sale their only “interest” in the case could be have been an interest in the excess funds.

The Shumways are not entitled to the excess funds. Those funds were disbursed to Chase to satisfy the Shumway’s obligation under the note and deed of trust. If the Shumways had obtained those funds they

would have received an unearned windfall and Chase would have been immediately entitled to those funds from the Shumways.

The Shumways have failed to establish they were necessary parties to the action which decided the relative lien rights between Chase and West Coast.

c. Even if the Shumways Were a Party to the Action the Superior Court Was Required to Reach the Same Result on Summary Judgment as the Court correctly applied the Doctrine of Equitable Subrogation

Equitable subrogation seeks to maintain the proper order of priorities by keeping the first mortgage first and the second mortgage second. *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 564-65, 160 P.3d 17 (2007). The doctrine works to substitute a later recorded security interest for an earlier recorded security interest:

For example, suppose A, a homeowner, has two mortgages: one recorded first by bank B and one recorded second by bank C. Our recording act says B has a higher priority because it recorded first, putting the world on notice as to its interest in A's land. RCW 65.08.070. If D fully discharges B's debt, then equitable subrogation substitutes D for B, so D has a higher priority than C, even though D recorded after.

Bank of America, N.A., 160 Wn.2d at 564-65.

“Subrogation is the substitution of one person in place of another . . . so that he who is substituted succeeds to the rights of the other in relation to

the debt or claim, and its rights, remedies, or securities.” *Bank of America, N.A.*, 160 Wn.2d at 564-65, quoting *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 510, 2 N.E. 103, 104 (1885).

In *Bank of America*, Washington Mutual held a first priority lien that was recorded on the property owner’s personal residence in 1994. *Bank of America, N.A.*, 160 Wn.2d at 561. Bank of America held a second priority lien that was recorded on the property owner’s personal residence in 1999. *Bank of America, N.A.*, 160 Wn.2d at 561. In 2001, the home owner secured a loan from Wells Fargo, again using the personal residence as security. *Bank of America, N.A.*, 160 Wn.2d at 561. The Wells Fargo loan paid off the first position Washington Mutual loan, and was held to be equitably subrogated into the position of the Washington Mutual loan. *Bank of America, N.A.*, 160 Wn.2d at 582.

In the present case, West Coast had a second position Deed of Trust. In 2007, Chase refinanced its pre-existing first position Deed of Trust. Equitable subrogation prevented West Coast from leapfrogging into first position. West Coast always had a second lien position on the Shumway’s property, and that did not change by virtue of Chase’s refinance. By virtue of equitable subrogation, Chase was prior to West Coast’s second lien position by the amount of its original loan. Adjusting the relative lien priorities of the parties did not require Chase to lose security for the remaining balance of its

loan. Therefore, the court correctly determined that the remainder of Chase's loan balance would continue to be secured by the Shumway's property subject to West Coast's lien.

The Shumways apparently concede that the theory of equitable subrogation places Chase in a first lien position to the extent of its original loan. Rather, the Shumways make a technical or procedural objection, without support of legal authority, that remaining amounts owed to Chase under its deed of trust should not have remained secured by the property subject to West Coast's lien.

To essentially write off the remaining loan balance would certainly be convenient for the Shumways as it would have entitled them to pocket excess funds rather than applying those funds to the unpaid balance of their Chase loan. The Shumways already pocketed the loan proceeds obtained in their Chase refinance rather than paying West Coast's second mortgage. Paying the Shumways the excess funds would result in another windfall. This result is contrary to any line of authority and was certainly not an outcome that was contemplated by the court in *Bank of America, N.A.*, 160 Wn.2d 560.

d. Chase had standing to bring this lawsuit.

The Shumways are not a party to this lawsuit and they lack standing to raise this issue.

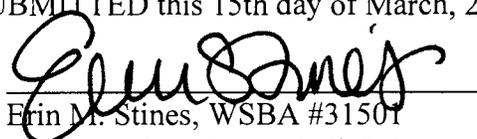
Contrary to the Shumway's claim, Chase Home Financing LLC has standing to bring this lawsuit. Chase Home Finance LLC is a wholly owned subsidiary of JP Morgan Chase NA as is Chase Bank USA NA. CP 38-39. Chase Home Finance, LLC services loan originated by Chase Bank USA, NA including the loans Chase made to Scott Shumway which is the subject of this lawsuit. Id. Chase Home Finance LLC was authorized to file and maintain this lawsuit and protect Chase Bank NA's interest in loan. Id.

The Shumways cite no authority undermining the court's decision. As there is no evidence to support the claim that the trial court abused its discretion in denying the Shumway's motion for reconsideration the trial court's decision should be affirmed.

VI. CONCLUSION

Chase respectfully requests this Court affirm the Superior Court's order denying the Shumway's motion for reconsideration. The Superior Court did not abuse its discretion in denying the Shumway's motion for reconsideration.

RESPECTFULLY SUBMITTED this 15th day of March, 2010.



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Case No. 64121-2-I

AFFIDAVIT OF
SERVICE

COUNTY OF KING)
) ss
STATE OF WASHINGTON)

The undersigned being first duly sworn upon oath, deposes and says:

That on the 15th day of March, 2010, she caused to be delivered copies of Respondent Chase Home Finance, LLC's Brief, to the following parties in the manner indicated:

Via U. S. Mail
Jan Gossing
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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 MAR 16 AM 10:41

Dated this 15th day of March, 2010.



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SIGNED AND SWORN TO (or affirmed) before me on the 15th day of
March, 2010.



Ana I. Todakonzie
Notary Public in and for the
State of Washington.
Residing in Seattle, Washington.
My appointment expires: 2/28/2011.