

64147-6

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No. 64147-6-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ELIABETH BEKKEVOLD

Appellants,

v.

EVERGREEN BANK,

Respondent.

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN -4 PM 4:42

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I. INTRODUCTION

Respondent EvergreenBank funded a loan secured by a deed of trust. That deed of trust was recorded ahead of the deed of trust relied on by Appellant. Appellant received a portion of the proceeds of the loan as the seller. Ultimately the Appellant's interest was extinguished through a Trustee's sale. The trial court granted summary judgment in favor of EvergreenBank. That decision should be affirmed on appeal, because Appellant has not put forth evidence which would overcome the presumption that liens have priority in the order they are recorded.

II. COUNTER STATEMENT OF ISSUES

Was a subordination agreement required to be executed when the deed of trust held by EvergreenBank (Respondent) was recorded *prior to* the deed of trust asserted by appellant?

When the parties have expressly agreed that the vendor's security interest will be junior to the third party lender's security interest, does the "purchase money mortgage" exception to the race-notice statute apply?

May a record junior lien holder that contests the superiority of a prior recorded grant, avoid the express language of RCW 61.24.130(2) which requires an objecting party to seek a restraining order or injunction

at least five (5) days prior to a scheduled Trustee's sale, by commencing an action and filing a lis pendens *one day* before the scheduled sale?

III. COUNTER STATEMENT OF THE CASE

Appellant Bekkevold, as seller, and Wescott Development, LLC, as buyer, entered into a Real Estate Purchase and Sale Agreement ("REPSA") on January 29, 2007, for property located at 4800 49th Avenue South and 4801 50th Avenue South in Seattle, Washington (the "Property"). CP 47-48, 52-57.

The purchase price for the Property was \$1,166,000.00. CP 54. Plaintiff Bekkevold agreed to finance part of the purchase price for Defendant Wescott Development, LLC. Pursuant to the terms of the REPSA, Wescott Development, LLC paid Plaintiff Bekkevold \$366,000.00 in cash at closing and was to make monthly payments thereafter. The entire amount of the principal was to be due on September 1, 2007. CP 52-57.

Pursuant to the terms of the REPSA, Wescott Development, LLC's indebtedness to Plaintiff Bekkevold was to be secured by a second position deed of trust on the Property. CP 52.

On February 28, 2007, Defendant Wescott Development, LLC, as borrower, executed a Promissory Note agreeing to pay EvergreenBank the

principal sum of \$506,222.27. CP 101-103. On February 28, 2007, Defendant Wescott Development, LLC executed a first position deed of trust on the Property in favor of EvergreenBank. CP 98.

On March 2, 2007, Plaintiff Bekkevold signed a “Sellers Estimated Closing Statement” (“Closing Statement”) acknowledging that the Bekkevold deed of trust would be in the second position on title. CP 48, 74.

Plaintiff Bekkevold reviewed the Closing Statement and deed of trust prior to signing and Plaintiff Bekkevold approved her deed of trust with subordination language on the front indicating that her deed of trust was in the second position. CP 48, 77-78.

Appellant Bekkevold transferred her ownership interest in the property pursuant to a Statutory Warranty Deed, recorded under King County Recorder’s Number 20070302002305. CP 215-216. The King County Recorder then recorded EvergreenBank’s deed of trust under recording number 20070302002306 (CP 215-216) and subsequently recorded Plaintiff Bekkevold’s deed of trust after EvergreenBank’s deed of trust under recording number 20070302002307. CP 137.

Defendant Wescott Development, LLC defaulted on its Promissory Note with EvergreenBank. CP 180.

In an effort to collect the outstanding balance due under the Promissory Note, EvergreenBank began non-judicial foreclosure proceedings on the Property pursuant to its deed of trust. CP 98.

EvergreenBank provided proper notice of the Trustee's Sale to all lien holders on the Property. CP 81-82.

Plaintiff Bekkevold was provided proper notice of the Trustee's Sale and failed to contest the Trustee's Sale. *See Ricci Dec.* at ¶¶ 3 and 4. CP 81-82.

EvergreenBank held a Trustee's Sale on May 22, 2009 and EvergreenBank made a minimum bid of \$535,000.00 and purchased the Property. CP 81-82. EvergreenBank's Trustee's sale extinguished all junior lien holders' rights in the Property .

IV. SUMMARY OF RESPONSE

A subordination agreement between Appellant Bekkevold and EvergreenBank was not required because EvergreenBank recorded its deed of trust first in time and is therefore first in right. The Appellant did not have a superior purchase money mortgage to EvergreenBank's third-party purchase money mortgage because it is clear from the transaction that Appellant intended her security

interest to be junior to EvergreenBank, and that is how it was recorded.

V. RESPONSE

A. APPELLANT WAS A JUNIOR LIENHOLDER WHOSE RIGHTS WERE EXTINGUISHED AT THE TRUSTEE SALE.

1. **It is undisputed that the deed of trust for the benefit of EvergreenBank was recorded prior to the deed of trust for the benefit of Appellant. Therefore the Appellants' deed of trust was in an inferior position.**

Appellant does not dispute that *junior* interests were extinguished at the Trustee's sale. *See Brief of Appellant* at p. 12. The issue in this appeal is whether or not Appellant's subsequently recorded deed of trust was a junior interest. It was.

It is well settled law in Washington that a deed of trust that is recorded first is prior and superior to a deed of trust that is recorded subsequently. *Bank of Gresham v. Johnson*, 143 Wn. 24, 27, 254 P. 464, 466 (1927).

A conveyance of real property, when acknowledged by the person executing the same...may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as

against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. **An instrument is deemed recorded the minute it is filed for record.**

RCW 65.08.070 (emphasis added). This concept is known as “race-notice.” The purpose of the statute is to make a deed recorded first in time superior to any other conveyance of the property. *Altabet v. Monroe Methodist Church*, 54 Wn.App. 695, 697 (1989) citing *Tacoma Hotel, Inc. v. Morrison & Co*, 193 Wn. 134 (1938). See also, *Hollenbeck v. City of Seattle*, 136 Wn. 508, 514 (1925) (“generally, liens take precedence in order of time; the first in time being the first in right.”) A deed of trust creates a lien against the property it describes. *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 221-22 (1969).

In this case, it is undisputed that when the King County Recorder recorded EvergreenBank’s deed of trust under recording number 20070302002306, Bekkevold held no interest in the property. When Bekkevold’s deed of trust was subsequently recorded under recording number 20070302002307, she took that security interest subject to, and junior to, the recorded interest of EvergreenBank. Therefore, unless a rare

exception applies, the inquiry as to priority should end there.¹

2. The “purchase money mortgage” exception to the race-notice statute does not apply in a situation where it is expressly agreed that the vendor’s interest will be in second position to that of the third party lender (EvergreenBank).

Appellant’s claim that her lien position is superior because she held a “purchase money mortgage” should be rejected. While a purchase money mortgage can be an exception to the race-notice statute, it does not apply in this case.

It is undisputed that loan proceeds supplied by EvergreenBank were used by Wescott to pay Bekkevold the down payment for the property, which allowed Wescott to purchase the property. CP 212. This makes EvergreenBank’s interest in the property a third party purchase money mortgage. RESTATEMENT THIRD OF PROPERTY: MORTGAGES § 7.2(A) cmt. a. If Bekkevold’s position is a purchase money mortgage, she,

¹ Although Appellant Bekkevold spends an extensive portion of her brief discussing the requirements of a subordination agreement and the alleged deficiencies in such an agreement in this case (with which Evergreen disagrees), such an analysis puts the “cart before the horse.” At the time of recording the EvergreenBank deed of trust, Bekkevold held no interest which could be subordinated. Appellant’s analysis might be useful if Appellant were arguing that the intent between the parties was for *EvergreenBank* to subordinate *its* first position. That argument has never been made (and could not be, as there is absolutely no evidence in the record which would support such an assertion, and the evidence is actually to the contrary).

as the seller of the property, would hold a vendor purchase money mortgage. *Id.*

While a vendor purchase money mortgage may be superior to a third party purchase money mortgage, this is subject to modification through agreement of the parties. *Id.* at cmt. d. A statement in the purchase and sale agreement acknowledging the vendor's agreement to take a second position mortgage is sufficient to give priority to the third party lender's mortgage. *Id.* If the evidence indicates that third party lender's mortgage was recorded prior to the vendor's mortgage consciously as a means of establishing priority, it is appropriate for a court to treat the order of recording as evidence of the parties' intent and to adopt the priorities as recorded. *Id.*

It is also well settled law in the State of Washington that the primary factor to be considered in determining the meaning of a contract is the parties' intention. *Fancher Cattle Co. v. Cascade Packing, Inc.*, 26 Wn.App. 407, 409, 613 P.2d 178, 179 (1980). When the language used in a contract is plain and unambiguous, the meaning of the contract is to be deduced from the language alone. *Id.* A clause in a contract is only ambiguous when it is susceptible to two different interpretations that are both reasonable. *Quadrant Corp. v. American States Insurance Co.*, 154

Wn.2d 165, 172, 110 P.3d 733, 737 (2005).

In this matter, the parties' intentions are clear. Bekkevold agreed to sell the Property to Wescott Development, LLC and chose to do so pursuant to the terms of the REPSA and closing documents. The REPSA states in plain, unambiguous language that Wescott Development, LLC's indebtedness to Bekkevold, "...shall be evidenced by a Promissory Note and a second position Deed of Trust...." CP 212, 238.

Further, Bekkevold continued to approve, *and signed*, additional documentation noting that her deed of trust was to be held in a second position. Specifically, on March 2, 2007, Bekkevold signed the Seller's Estimated Closing Statement which clearly states that Bekkevold's deed of trust is to be held in the second position on title. CP 212, 238. Finally, Plaintiff Bekkevold approved the deed of trust as to content and form and the deed of trust clearly states, "This deed of trust is junior and subordinate to deed of trust recorded under number 20070302002306" (the EvergreenBank deed of trust). CP 212, 241-242. Plaintiff Bekkevold agreed to her deed of trust being held in the second position on the Property.

The situation at hand is exactly the situation contemplated by THE RESTATEMENT THIRD OF PROPERTY as to priority between third party

purchase money mortgage holders and vendor purchase money mortgage holders. Bekkevold's vendor purchase money mortgage could have potentially been superior to EvergreenBank's third party purchase money mortgage; however the parties modified that outcome through agreement. Specifically, the Real Estate Purchase and Sale Agreement (REPSA) between Bekkevold and Wescott contains an unambiguous term which states that Plaintiff Bekkevold agrees that her deed of trust will be held in the second position: "This indebtedness shall be evidenced by a Promissory Note and a *second position* Deed of Trust, as set forth below." (emphasis supplied).

As both the estimated closing statement and the deed of trust contain the same unambiguous term providing that Bekkevold's deed of trust will be held in the second, junior position, the intention of the parties is clear. Pursuant to the agreement reached by the parties as evidenced in the REPSA, Closing Statement and deed of trust, EvergreenBank's deed of trust was recorded prior to and superior to Plaintiff Bekkevold's deed of trust.²

² It is telling that nowhere in Appellant's brief does she point to any evidence indicating a contrary intention (i.e. an intention that her deed of trust be recorded in first position).

3. Evergreen was not required to obtain a “subordination agreement” in order to preserve its position as first recorded lien holder.

As discussed in footnote 1 *supra*, the only evidence presented at the trial court level supports Respondent’s contention that the respective parties always understood that the Evergreen deed of trust would be superior to Appellant’s deed of trust.

Appellant’s reliance on the alleged statutory “deficiencies” of the “subordination agreement” is misguided. Evergreen’s summary judgment motion was not based on its contention that a subordination agreement somehow changed the effect of the race-notice statute or was somehow an unrecorded conveyance. Rather, the plethora of evidence submitted shows the Appellant’s intent to hold a junior position, and is offered as an “exception to an exception” to the statute. Respondent is aware of no case law or analysis requiring recording of such intent.

As the Appellant’s claim is based on the “purchase money mortgage” exception to the race-notice statute, which deals with priorities between lenders with notice of each other, it is logical that evidence supporting (or defending against) such a claim would probably not be recorded.

B. INDEPENDENT OF THE MERITS OF APPELLANT'S ARGUMENTS REGARDING TITLE, APPELLANT WAS REQUIRED TO COMMENCE AN ACTION PURSUANT TO RCW 61.24.130(2), AND HER FAILURE TO DO SO IS A WAIVER OF DISPUTES REGARDING PRIORITY BASED ON UNRECORDED FACTORS.

Three goals of the Washington deed of trust act are: (1) that the non judicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles. *Plein v. Lackey*, 149 Wn.2d 214, 225 (2003). Under RCW 61.24.040, and the form it mandates for a notice of trustee's sale, recipients are advised that

The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the Grantor of all their interest in the above-described property. Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

RCW 61.24.040(1)(f)(VIII-IX) (emphasis added).

A junior lien holder who has received timely notice of the foreclosure sale and who fails to properly object is precluded from seeking

to set aside the Trustee's sale. *Woolworth v. Micol Landy Co.*, 55 Wn.App. 671, 677, 780 P.2d 264, 267 (1989). Junior lien holder's rights in the property are extinguished by completion of non-judicial foreclosure sale. *Id.*

It is undisputed that Appellant is a junior lienholder of record, and that any claims to security she makes are based on the deed of trust granted by Wescott (the Grantor). She was presumably aware of her claim that the race-notice statute was trumped by her unrecorded status as a vendor-mortgagee.

The proper method for objecting to the Trustee's sale is to seek a restraining order or injunction of the sale at least five days prior to the scheduled sale. RCW 61.24.130(2). RCW 61.24.130(2) is clear that even "filing" a lawsuit within five days is not enough.³ Rather, the lawsuit must be served on the trustee by a "sheriff...or by any person eighteen years of age or over..." RCW 61.24.130(2).

For some reason, Appellant failed to follow the procedure set forth in RCW 61.24.130. Rather, she has attempted to circumvent the purpose of the statute by bringing a declaratory judgment action and filing a *lis pendens*. To permit a party with notice to ignore the express time

³ The lawsuit in this case was filed literally on the day before the Trustee's sale.

requirements of RCW 61.24.130(2) by filing (and not even serving) a lawsuit on the eve of a scheduled Trustee's sale would defeat the spirit and the intent of the trust deed act. *See e.g. CHD, Inc. v. Boyles*, 138 Wn.App. 131 (Div. 3 2007)(filing a declaratory judgment action and *lis pendens* held inadequate to restrain the sale).

C. EVERGREENBANK DID NOT TAKE TITLE AT THE TRUSTEE'S SALE SUBJECT TO THE LIS PENDENS, AND APPELLANT'S FAILURE TO FOLLOW THE PROCEDURES PRESCRIBED BY RCW 61.24.130 WAIVED ANY OBJECTIONS.

As discussed *supra*, the proper method for objecting to the sale would have been to seek a restraining order or injunction of the sale at least 5 days prior to the scheduled sale date. RCW 61.24.130(2). Simply bringing an action will not forestall a trustee's sale that occurs before the end of the action is reached. *Plein v. Lackey*, 149 Wn.2d 214, 227 (2003). To hold that a Trustee and others who take title from a Trustee's sale are bound by an unadjudicated *lis pendens* would render the requirements of RCW 61.24.130 meaningless "because it would be unnecessary to obtain an actual order restraining the sale or to provide five days' notice to the trustee..." *See e.g. Plein*, 149 Wn.2d at 227.

Further, the issue of whether the *lis pendens* bound the Trustee is moot, as the *lis pendens* was ordered to be released within thirty days of

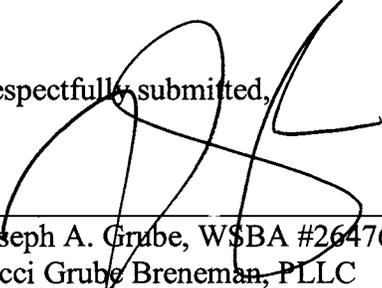
the trial court's summary judgment order. As no bond has been posted by Appellant, the former *lis pendens* would have no effect on subsequent purchasers in good faith.

VI. CONCLUSION.

This Court should recognize the priorities as recorded and grant affirm the trial court's grant of summary judgment in favor of EvergreenBank.

DATED this 4th day of January 2010.

Respectfully submitted,



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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date indicated below that I caused the **Respondent's Brief** and the **and this Certificate of Service** to be filed as follows:

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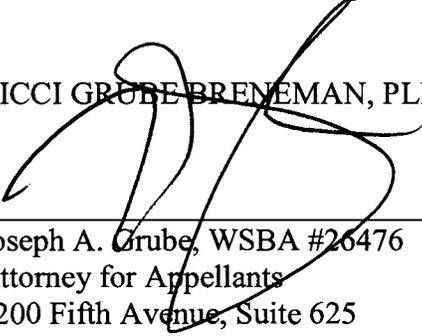
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