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NO. 6610351

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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THOMAS AND SUSAN ARRINGTON,

Appellants,

v.

VISUAL GRAPHICS AND BANK OF AMERICA,

Respondents.

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BRIEF OF RESPONDENT BANK OF AMERICA

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ORIGINAL

BRIEF OF RESPONDENT

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**A. STATEMENT OF THE CASE**

On or about March 6, 2001 Thomas and Susan Arrington entered into a line of credit agreement with Fleet National Bank (hereinafter, "Fleet"). CP 53, 56-61. The line of credit is secured by a Deed of Trust on the property commonly known as 6812 69<sup>th</sup> Pl NE, Marysville, WA (hereinafter, the "Subject Property"). The Deed of Trust was recorded on March 26, 2001 under Snohomish County recording number 200103260674. CP 53, 63-70.

A senior Deed of Trust that was also secured by the Subject Property was foreclosed on June 11, 2010. CP 260-261. The Trustee for the senior foreclosure placed surplus funds in the amount of \$57,381.30 into this court's registry and filed a Notice of Deposit of Surplus Funds on July 8, 2010 under cause number 10-2-06089-6. CP 260-261

Bank of America (hereinafter "BOA") acquired the assets of Fleet in 2004. CP 53. Through its acquisition of Fleet, BOA became the current holder of the promissory note and Deed of Trust recorded under Snohomish County recording number 200103260674. CP 53. According to the Trustee's Notice of Deposit of Surplus Funds and the Exhibits attached thereto, BOA's lien is senior to the interest of Thomas Arrington and Visual Graphics. CP 260-261, 267-279. As of July 21, 2010, the total amount due

and owing under BOA's promissory note and deed of trust was \$25,533.61. CP 53.

The trial court first heard argument on the competing motions to disburse surplus funds on August 24, 2010. CP 244. After considering the argument of the parties, the court requested additional briefing on the question of whether BOA qualifies as an omitted lien holder under RCW 61.24.040(7). CP 99. The court also requested additional briefing as to how surplus funds should be applied to the competing interests of the Arringtons and Visual Graphics. CP 99.

The parties submitted the requested supplemental briefing and oral argument was heard on September 10, 2010. CP 99. After considering the supplemental briefing of the parties and the additional oral argument, the trial court found that BOA was a successor in interest to Fleet and stood in the shoes of Fleet for the purposes of enforcing its lien priority. CP 1. The court accordingly awarded distribution of funds in the amount of \$25,533.61 to BOA in satisfaction of its lien. CP 1. The Arringtons timely appealed the trial court's Order Disbursing Surplus Funds.

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**B. ARGUMENT**

1. Standard of Review

The trial court's ruling on the application of RCW 61.24.040 and RCW 61.24.080 of Washington's Deed of Trust Act is a question of statutory interpretation. A trial court's rulings on issues of statutory interpretation are reviewed de novo. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 908, 154 P.3d 882 (2007).

2. The trial court did not err when it found that BOA was entitled to assert Fleet's lien interest as successor in interest to Fleet.

BOA takes its interest in the property by being the successor in interest to Fleet following BOA's acquisition of the company. A successor in interest is "[o]ne who follows another in ownership or control of property." *One Pac. Towers Homeowners' Ass'n v. Hal Real Estate Invs.*, 148 Wn.2d 319, 327, 61 P.3d 1094 (2002) (citing Black's Law Dictionary at 1283 (5th ed. 1979)). The effect of such an acquisition is also described in RCW 23B.11.050 (1)(a)-(b) as follows:

- (a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;
- (b) The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving

corporation without reversion or  
impairment[.]

In the present case, BOA is the surviving corporation and title to all of the property interests of Fleet are automatically vested in BOA without reversion or impairment as a matter of law. BOA is not required to take any additional steps to perfect its interest in Fleet's property. To find to the contrary would mean that BOA acquired an impaired or unsecured interest in the property that would have to be cured by recording once BOA's acquisition was complete.

The Arringtons contend that BOA's acquisition of Fleet should instead be treated like an acquisition of just the assets of Fleet, rather than as the acquisition of both the assets and liabilities of Fleet pursuant to a merger. Should no merger have occurred, BOA would have received an Assignment of Fleet's Deed of Trust. There is no fact in the record that would support the Arringtons' assertion that a merger of the two companies did not occur.

Nonetheless, assuming for the sake of argument that BOA should have received and recorded an Assignment of Fleet's Deed of Trust, an Assignment of a properly recorded mortgage will not cause the assigned mortgage to lose priority as against subsequent mortgages or other liens *even when that Assignment is unrecorded.* (Emphasis added) *Miller v.*

*Am. Sav. Bank & Trust Co.*, 119 Wash. 243, 250, 205 P. 388 (1922). The critical fact from the standpoint of later purchasers or mortgagees is notice the earlier mortgage exists, not that it has been assigned. *See* 18 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 17.21, at 311 (1995). Thus BOA's lien priority relates back to Fleet's properly recorded Deed of Trust, regardless of whether BOA would have recorded an Assignment indicating its interest in the property.

3. The trial court did not err when it determined that the Trustee had provided proper notice of the Trustee's Sale under RCW 61.24.040.

The trial court properly interpreted the service requirements for Notices of Trustee's Sale under RCW 61.24.040. A court's purpose when interpreting a statute is to "discern and implement the intent of the legislature." *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006), *cert. denied*, 127 S. Ct. 436 (2006) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Where the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent. *Id.* In discerning the plain meaning of a provision, courts consider the entire statute in which the provision is found as well as related statutes or other provisions in the same act that disclose legislative intent. *Advanced Silicon Materials, LLC v. Grant*

*County*, 156 Wn.2d 84, 89-90, 124 P.3d 294 (2005); *Ellerman v.*

*Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 519, 22 P.3d 795 (2001).

With regard to junior lien holders, RCW 61.24.040 (1) requires that the Trustee send the Notice of Trustee's Sale to "[t]he beneficiary of any deed of trust . . . or any person who has a lien or claim of lien against the property, that was recorded subsequent to the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale." RCW 61.24.040 (1) (b) (ii). The Trustee is also required to give notice to interested parties "otherwise known to the Trustee." RCW 61.24.040 (1) (b). The trustee is required to transmit the Notice of Trustee's Sale by both first-class and either certified or registered mail, return receipt requested, to the address stated in the recorded document evidencing the party's lien interest. RCW 61.24.040 (1) (b).

In the present case, the record demonstrates that Fleet's interest was of public record at the time of the issuance of the Notice of Trustee's Sale. Asserting its right as successor in interest, BOA did not record any additional evidence of its interest in the Fleet Deed of Trust and there is no evidence in the record to suggest that the Trustee had reason to know of BOA's status as the holder of Fleet's lien interest. Accordingly, the Trustee would have no way of knowing of BOA's successor interest status. To meet its duty under RCW 61.24.040 (1), the Trustee would

therefore be obligated to send notification to Fleet, instead of BOA, of the Trustee's Sale under RCW 61.24.040 (1) (b) (ii) as Fleet appears in the record of title to be the present beneficiary of the Arrington Deed of Trust. Without evidence of BOA's status in the public record or other independent knowledge of BOA's interest, the Trustee was not required to notify BOA of the trustee's sale under the plain language of RCW 61.24.040 (1) (b). Instead, as the record reflects, the Trustee properly sent notification of the Trustee's Sale to the address of record for Fleet.

The Arringtons contend that the trustee was required to provide actual notice of the Trustee's Sale to either Fleet or BOA. Washington's Deed of Trust Act as codified in RCW 61.24 et seq. requires strict compliance with its statutory provisions. *See e.g. Amresco v. SPS Props.*, 129 Wn. App. 532, 119 P.3d 884 (2005). However, nowhere in the Deed of Trust Act does it say that the Trustee is required to provide *actual* notice of the trustee's sale. In fact, construing the statute to require provision of actual notice contradicts to the plain language of the statute.

As discuss above, the statute requires the trustee to provide notice by mailing to the address of record for any person who has a recorded lien interest in the property. If the statute truly contemplated actual notice, the statute would either specifically state that actual notice is required or it would at least require personal service of the Notice of Trustee's Sale and

not simply mailing. When a statute's words are plain and unambiguous, courts apply the statute as written. *Amresco*, 129 Wn. App. at 536. In the case of RCW 61.24.040, there is no need to impute the requirement of actual notice as such requirement is not included in the plain language of the statute.

In furtherance of their argument that actual notice is required, the Arringtons rely upon *Amresco*. However, *Amresco* does not actually stand for that proposition. In *Amresco*, a junior lien creditor sought to set aside a trustee's sale. The creditor claimed it did not receive notice of the sale because notification was sent to its legal representative and not directly to the creditor. *Amresco*, 129 Wn. App. at 535. To set aside a trustee's sale, the moving party is required to demonstrate prejudice. *Amresco*, 129 Wn. App. at 537. The court found the junior creditor could not establish prejudice when the plain language of the statute allows for a Notice of Trustee's Sale to be sent to a creditor's legal representative. *See Amresco*, 129 Wn. App. at 539-540. Thus, even though the creditor claimed that it did not receive actual notice, the court found that no actual notice was required as compliance with RCW 61.24.040 (1) (b) by mailing to the legal agent was sufficient to meet the Trustee's duty of notification under the statute. Accordingly, *Amresco* does not require that the trustee provide actual notice to a junior lien creditor and any lack of actual notice does not

support the Arrington's contention that BOA is not entitled to distribution of surplus funds due to a lack of actual notice.

4. The trial court did not err when it found that BOA is not an omitted junior lien holder for the purposes of RCW 61.24.040 (7).

BOA is not an omitted lien holder as provided in RCW 61.24.040 (7) and is entitled to distribution of the surplus funds in satisfaction of its extinguished lien. To protect a junior lien holder in the case of a Trustee's failure to notify them of a Trustee's Sale, RCW 61.24.040 (7) provides the following:

these recitals shall not affect the lien or interest of any person **entitled to notice under subsection (1) of this section, if the trustee fails to give the required notice to such person.** In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;

(emphasis added) RCW 61.24.040 (7).

The Arringtons contend that BOA was an omitted lien holder under RCW 61.24.040(7) and, as such, is not entitled to the surplus funds because its lien has not been eliminated. As previously discussed, Fleet was the proper part to which the Trustee owed the duty to provide notification of the Trustee's Sale. There is no evidence in the record to

suggest that the Trustee did not meet its obligation to send notice to Fleet of the Trustee's Sale.

With regard to BOA, the Trustee was not obligated to notify BOA for the reasons set forth above. Further, because BOA was not identified in the public record as having a lien interest in the property and because the Trustee had no knowledge of BOA's interest, BOA would not be entitled to assert the protection of RCW 61.24.040 (7) because it was not entitled to notice of the Trustee's Sale. Because BOA was not entitled to notification, it is not an omitted lien holder and does not come within the exception provided for under RCW 61.24.040 (7). As such, BOA's lien was extinguished by the trustee's sale and BOA is entitled to first priority in the distribution of the surplus funds.

5. The trial court did not err in finding that BOA is entitled to disbursement of funds under RCW 61.24.080 (3), as BOA is the senior-most remaining lien creditor.

As the holder of the most senior remaining lien, BOA is entitled to have the surplus funds applied in satisfaction of its lien before that of other lien creditors. Pursuant to R.C.W. 61.24.080 (3), "...interests in, or liens or claims of liens against the property eliminated by the sale under this section shall attach to such surplus in the order of priority that it had attached to the property." The record supports that BOA's interest

attached to the property prior to the interests of the Arringtons or Visual Graphics.

The Arringtons base their claim to the surplus funds on their homestead interest in the foreclosed property. However, the Homestead Act provides that the homestead exemption “is not available against an execution or forced sale in satisfaction of judgments obtained on debts secured by . . . mortgages or deeds of trust on the premises [.] See RCW 6.13.080 (2). See also *In re Trustee's Sale of Upton*, 102 Wn. App. 220, 224, 6 P.3d 1231 (2000). As BOA’s lien priority stems from its status as the beneficial interest holder of a Deed of Trust on the foreclosed property, its interest is senior to that of the Arringtons.

Additionally, BOA’s lien interest is also senior to that of Visual Graphic’s. In Washington, priority between creditors is determined in order of time, first in time being the first in right. *Homann v. Huber*, 38 Wn.2d 190, 228 P.2d 466 (1951); *Hollenbeck v. Seattle*, 136 Wash. 508, 240 P. 916 (1925). As BOA’s deed of trust was recorded in 2001 and Visual Graphic’s lien was recorded in 2009, BOA’s lien is first in time and therefore first in right as to Visual Graphic’s lien.

**C. CONCLUSION**

The trial court did not err when it concluded that, under the application of RCW 61.24.040 the Trustee was not required to notify BOA

of the Trustee's Sale and therefore BOA is not an omitted junior lienor with a retained lien in the subject property. The trial court properly determined that BOA's lien was extinguished by the senior lien holder's Trustee's Sale and that BOA's lien interest is superior to both the Arringtons' and Visual Graphic's interest in the foreclosed property. Pursuant to RCW R.C.W. 61.24.080 (3), surplus funds were properly awarded in satisfaction of BOA's lien prior to disbursal to the other remaining lien creditors.

Dated this 11<sup>th</sup> day of March, 2011.



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CERTIFICATE OF SERVICE

I, Allison Heuschele, 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 to Rhonna Kollenkark and Jennifer Tait, attorneys for Respondent, Bank of America, and am competent to be a witness herein.

On March 11, 2011, I caused to be served via first class, U.S. Mail a true and correct copy of RESPONDENTS' BRIEF to the following:

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