

66567-7

66567-7

No. 665677

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

---

MARGARET ANN BOSSIE,

Appellant,

v.

BANK OF AMERICA, N.A.,

Respondent.

---

**BRIEF OF RESPONDENT**

---

Rochelle L. Stanford, WSBA #38690  
PITE DUNCAN, LLP  
9311 SE 36<sup>th</sup> Street, #100  
Mercer Island, WA 98040  
619-326-2404  
Attorneys for Appellant U.S. Bank  
National Association as Trustee

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 AUG 16 AM 10:25

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

RESTATEMENT OF THE ISSUES ..... 3

RESTATEMENT OF THE CASE ..... 4

A. Bossie Was First To File A Motion For Disbursement Of Surplus Funds From The Trustee’s Sale Of Her Property. .... 4

B. Before BOA Appeared In The Deposit Action, Bossie Served Her Motion For Disbursement On BOA By Out Of State Mail And Did Not Add 3 Days For Mail Service. .... 4

C. BOA Served Its Motion For Disbursement On Bossie, Which She Signed For On December 11, 2010.. ..... 4

D. On December 16, 2010, Bossie, Through Counsel, Filed A Declaration Stating She Knew Of No Other Liens Or Deeds Of Trust Without Serving BOA.. ..... 5

E. The Commissioner Issued An Order Disbursing Funds In Favor Of Bossie Despite Multiple Errors. .... 5

F. BOA Timely Moved For Revision Of The Commissioner’s Order. .... 5

SUMMARY OF ARGUMENT ..... 6

ARGUMENT ..... 7

A. Standards Of Review. .... 8

B. Review Of The Trial Court’s Order Granting Motion For Revision Of Commissioner’s Order Is Moot Because Bossie Failed To File An Appeal From The Subsequent Final Judgment.. ..... 8

C.	The Trial Court Properly Found That Bossie Failed To Comply With The Notice Provisions Of RCW 61.24.08(3) And CR 6(e) When She Served Her Motion For Disbursement On BOA By Mail To Out Of State Addresses Without Adding Three Days For Service By Mail. . . . .	8
D.	The Trial Court Properly Found Bossie's Unserved December 16, 2010, Declaration Stating She Did Not Know Of Any Other Deeds Of Trust On The Property Was Inconsistent With The Trustee's Sale Guarantee Listing BOA's Deed Of Trust As A Junior Lien And BOA's Pending Motion For Disbursement. . . . .	11
E.	Bossie's Opposition To BOA's Motion For Revision <i>Admitted</i> BOA's Deed Of Trust Took Priority Over Her Interests And Also BOA's Recourse Was Limited To The Surplus Funds From The Sale Of The Property. . . .	12
F.	CONCLUSION . . . . .	14

**TABLE OF AUTHORITIES**

**CASES**

<u>Cockle v. Dep't of Labor &amp; Indus.</u> , 142 Wn.2d 801, 16 P.3d 583 (2001). . . . .	7
<u>In re Isom</u> , 901 F.2d 744 (9 <sup>th</sup> Cir. 1990). . . . .	13
<u>In re Marriage of Moody</u> , 137 Wn.2d 979, 976 P.2d 1240 (1999). . . . .	7, 12
<u>Moore v. Wentz</u> , 11 Wash. App. 796, 525 P.2d 290 (1974). . . . .	8

**STATUTES/COURT RULES**

RCW 61.24.040(1)(b) . . . . . 9

RCW 61.24.080(3) . . . . . 3, 6, 8, 9, 14

CR 6(e) . . . . . 6, 8, 9, 11, 14

CR 5.2(b)(2)(A) . . . . . 10, 11

LCR 7(b)(8). . . . . 2, 6, 8

RAP 2.4(c). . . . . 8

## INTRODUCTION

Margaret Ann Bossie (Bossie) appeals the trial court's revision of a commissioner's order that she return surplus funds from the trustee's sale of her property to the court registry. On November 4, 2010, Northwest Trustee Services (NWT) deposited the funds with the trial court along with a copy of the trustee's sale guarantee, a title policy insuring the trustee's sale, showing Bank of America, N.A. (BOA) held a deed of trust junior to the foreclosed deed of trust.

On November 29, 2010, Bossie filed a motion for disbursement noted for hearing twenty-one days later, on December 20, 2010. That same day, Bossie served the motion on BOA by mailing it to several out of state addresses for BOA listed in the trustee's sale guarantee.

On December 8, 2010, BOA filed and served on Bossie a notice of appearance. BOA filed its own motion for disbursement on December 9, 2010, noting a hearing date on January 7, 2011. BOA served Bossie with its motion for disbursement by certified mail, return receipt requested, for which Bossie signed on December 11, 2010.

Despite Bossie's actual notice of BOA's motion for disbursement, on December 16, 2010, Bossie signed a declaration under penalty of perjury stating she had "no knowledge as to the current status of any other liens or deed of trust on this property . . ."

Despite the listing of BOA in the trustee's sale guarantee as a junior lien holder, BOA's notice of appearance and pending motion for disbursement, and lack of notice to BOA's counsel of record, the commissioner signed an order for disbursement of the surplus funds to Bossie.

BOA timely moved for revision of the commissioner's order pursuant to LCR 7(b)(8). On January 14, 2011, the trial court issued an order granting revision of the commissioner's December 20, 2010, order and ordering Bossie to return the funds to the court registry within 10 days, or BOA would be entitled to a judgment equal to the amount of the disbursement. Bossie appealed from this order.

Bossie did not return the funds to the court registry as ordered by the trial court. Accordingly, on March 3, 2011, BOA obtained without any opposition from Bossie a final judgment from the trial court. Bossie did not appeal from this judgment.

This Court should either dismiss this appeal as moot for Bossie's failure to file an appeal from the final judgment, or affirm the trial court's revision order.

## **RESTATEMENT OF THE ISSUES**

1. Is review of the trial court's Order Granting Motion for Revision of Commissioner's Order moot where Bossie failed to appeal the subsequent Findings of Fact, Conclusions of Law and Judgment?
2. Did Bossie fail to comply with the notice provisions of RCW 61.24.080(3) and CR 6(e) when she served her motion for disbursement on BOA by mail to out of state addresses without adding three days for service by mail?
3. Was Bossie's unserved December 16, 2010, Declaration stating she did not know of any other deeds of trust on the property inconsistent with the trustee's sale guarantee listing BOA's deed of deed of trust as a lien junior to the foreclosed deed of trust and BOA's pending motion for disbursement?
4. After Bossie's bankruptcy discharge, did the property remain liable under the deed of trust?
5. Did Bossie's receipt of the surplus funds pursuant to the erroneous commissioner's order transmute them into her personal funds?

## RESTATEMENT OF THE CASE

### **A. Bossie Was First To The Courthouse.**

On November 4, 2010, NWT filed and served a notice of deposit of surplus funds from trustee's sale pursuant to RCW 61.24.080. CP 1-24. The deposit included a copy of the trustee's sale guarantee, which listed BOA's deed of trust, recorded April 18, 2005, under King County Auditor's File no. 20050418000928, as junior to the foreclosed deed of trust. CP 8-17. Bossie was the first to file a motion for disbursement of the surplus funds. CP 30-33.

### **B. Before BOA Appeared In The Deposit Action, Bossie Served Her Motion For Disbursement On BOA By Out Of State Mail And Did Not Add 3 Days For Mail Service.**

The motion for disbursement of surplus funds requires twenty days notice. RCW 61.24.080(3). On November 29, 2010, Bossie filed a motion for disbursement noted for hearing twenty-one days later, on December 20, 2010. That same day, Bossie served the motion on BOA by mailing it to several out of state addresses for BOA listed in the trustee's sale guarantee. CP 12, 39-40.

### **C. BOA Served Its Motion For Disbursement On Bossie, Which She Signed For On December 11, 2010.**

BOA filed a notice of appearance on December 8, 2010. CP 41. On December 9, 2010, BOA filed and served its motion for disbursement of surplus funds noting a hearing date of January 7,

2011. CP 42-68. BOA served Bossie with its motion for disbursement by certified mail, return receipt requested, for which Bossie signed on December 11, 2010. CP 121-124.

**D. On December 16, 2010, Bossie Filed A Declaration, Through Counsel, Stating She Knew Of No Other Liens Or Deeds Of Trust Without Serving BOA.**

Despite Bossie's actual notice of BOA's motion for disbursement, on December 16, 2010, Bossie signed a Declaration under penalty of perjury stating she had "no knowledge as to the current status of any other liens or deed of trust on this property . . ." CP 69-71.

**E. The Commissioner Issued An Order Disbursing Funds In Favor Of Bossie Despite Multiple Errors.**

On December 20, 2010, Bossie attended a hearing on her motion for disbursement, which counsel for BOA did not attend due to the absence of notice. Despite the listing of BOA in the trustee's sale Guarantee as a junior lien holder, BOA's notice of appearance and pending motion for disbursement, and lack of notice to BOA's counsel of record, the commissioner signed an order for disbursement of the surplus funds to Bossie. CP 73-74.

**F. BOA Timely Moved For Revision Of The Commissioner's Order.**

BOA timely moved for revision of the commissioner's order pursuant to LCR 7(b)(8). CP 89-138. On January 14, 2011, the trial court issued an Order Granting Motion for Revision of Commissioner's Order which ordered Bossie to return the funds to the court registry within 10 days, or BOA would be entitled to a judgment equal to the amount of the disbursement. CP 243-244. Bossie appealed from this order.

Bossie did not return the funds to the court registry as ordered by the trial court. Accordingly, on March 3, 2011, BOA obtained without any opposition from Bossie Findings of Fact, Conclusions of Law and Judgment in favor of BOA from the trial court. CP 245-256. Bossie did not appeal from this final judgment in the case.

**SUMMARY OF ARGUMENT**

Initially, review of the trial court's order granting revision is moot because Bossie failed to appeal the final judgment. Even if the Court were to review it, the Court should affirm the order granting revision for three principle reasons: 1) the commissioner erred by failing to notice Bossie's lack of compliance with the notice provisions of RCW 61.24.08(3) and CR 6(e) by not adding three days for service by mail; 2) the commissioner erred by failing to notice Bossie's unserved

Declaration of December 16, 2010, which she signed after receiving BOA's motion for disbursement on December 11, 2010, stating she had no knowledge of any other deed of trust on the property, was inconsistent with the trustee's sale guarantee in the record and BOA's pending motion for disbursement and 3) the trial court was properly unpersuaded by the arguments *Bossie* raised in opposition to BOA's motion for revision, but not presented to the commissioner, that the combined effect of her bankruptcy discharge and receipt of the surplus funds transmuted the surplus funds into personal funds BOA may not pursue.

For these reasons, this Court should either dismiss this appeal as moot because of *Bossie*'s failure to file an appeal from the final judgment, or affirm the trial court's order granting revision.

### **ARGUMENT**

#### **A. Standards Of Review.**

A superior court judge's review of a commissioner's ruling is limited to the evidence and issues presented to the commissioner and is *de novo*. *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999). To the extent that the inquiry requires construction of applicable statutes, the standard of review is *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

**B. Review Of The Trial Court's Order Granting Motion For Revision Of Commissioner's Order Is Moot Because Bossie Failed To File An Appeal From The Subsequent Final Judgment.**

Bossie neither opposed issuance of the final judgment nor appealed it. Accordingly, this Court's review of the order granting revision is moot.

Further, this Court will not review a final judgment not designated in the notice of appeal unless it designates an order deciding a timely *post-trial* motion based on certain Court Rules which do not include LCR 7(b)(8) applicable to motions for revision of a commissioner's order. RAP 2.4(c). Thus, this Court would not have jurisdiction to review the Judgment even if Bossie sought one, which she did not. See e.g. Moore v. Wentz, 11 Wash. App. 796, 800, 525 P.2d 290 (1974).

Because Bossie failed to file an appeal from the final judgment in the case, this Court should dismiss this appeal as moot .

**C. The Trial Court Properly Found That Bossie Failed To Comply With The Notice Provisions Of RCW 61.24.08(3) And CR 6(e) When She Served Her Motion For Disbursement On BOA By Mail To Out Of State Addresses Without Adding Three Days For Service By Mail.**

The commissioner erred by failing to notice that Bossie did not comply with the notice provisions of RCW 61.24.08(3) and CR 6(e) when she served her motion for disbursement on BOA by mail to out

of state addresses without adding three days for service by mail, and the trial court properly found he erred.

Bossie violated RCW 61.24.08(3) and CR 6(e) by failing to serve her motion (on parties not including counsel for BOA) at least twenty days prior to the December 20, 2010, hearing. RCW 61.24.08(3) provides:

A party seeking disbursement of the surplus funds shall file a motion requesting disbursement . . . Notice of the motion shall be personally served upon, or mailed in the manner specified in RCW 61.24.040(1)(b), to all parties to whom the trustee mailed notice of the surplus, and any other party who has entered an appearance in the proceeding, *not less than twenty days prior to the hearing* on the motion. . . . (Emphasis added.)

Coupled with CR 6(e), requiring three days be added for service by mail, the earliest Bossie's motion could be heard, based upon service thereof by mail on November 29, 2010, was December 22, 2010. Accordingly, Bossie's December 20, 2010, hearing was held on defective notice.

Bossie's response to BOA's motion for revision revealed apparently sincere ignorance of the requirement of adding three days

for service by mail. CP 216-217. “If the legislature had intended to add three days to the notice period in regards to Civil Rule 6, then legislature would have specified twenty-three days. As such BOA’s argument that Ms. Bossie should have provided an extra three days notice fails, as the statute simply does not require twenty-three days of notice.” Id. However, Bossie fails to appreciate that BOA *did not receive twenty days notice* of her motion for disbursement because the motion was not personally served on November 29, 2010. By mail serving her motion for disbursement by mail, particularly to out of state addresses, Bossie’s service was not complete until December 2, 2010: CR 5.2(b)(2)(A) provides:

Service by Mail. (A) How Made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. *The service shall be deemed complete upon the third day following the day upon which they are placed in the mail*, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the third day. (Emphasis added.)

Under the combined effect of CR 5.2(b)(2)(A) or CR 6(e), the earliest Bossie's motion for disbursement could be heard was December 22, 2010. As such, Bossie's December 20, 2010, hearing was held on defective notice. For this reason alone, the trial court properly granted BOA's motion for revision of the commissioner's order, and the order should be affirmed.

**D. The Trial Court Properly Found Bossie's Unserved December 16, 2010, Declaration Stating She Did Not Know Of Any Other Deeds Of Trust On The Property Was Inconsistent With The Trustee's Sale Guarantee Listed BOA's Deed Of Trust As A Junior Lien And BOA's Pending Motion For Disbursement.**

Bossie filed but did not serve a December 16, 2010, Declaration stating she had no knowledge of any other deed of trust on the property. CP 69-71. Bossie's representation was inaccurate, as she had signed a return receipt for BOA's motion for disbursement on December 11, 2010. CP 208-211. Bossie takes exception to the possibility that the trial judge may have considered Bossie's lack of candor with the court in rendering his decision. However, the record before the commissioner indicated that Bossie's representation was inconsistent with the trustee's sale guarantee filed a exhibit B with the deposit. CP 8-17. The trustee's sale guarantee listed BOA's deed of trust as a lien junior to the foreclosed deed of trust. Id. But, the commissioner erroneously failed to notice. The commissioner also

failed to notice BOA's pending motion for disbursement noted for hearing January 7, 2011. Both of these reasons constituted good cause for revision of the commissioner's order, and the trial court's order granting revision should be affirmed.

**E. Bossie's Opposition To BOA's Motion For Revision Admitted BOA's Deed Of Trust Took Priority Over Her Interests And Also BOA's Recourse Was Limited To The Surplus Funds From The Sale Of The Property.**

A superior court's review of a commissioner's ruling is limited to the evidence and issues presented to the commissioner and is *de novo*. In re Marriage of Moody, 137 Wn.2d at 992-93. In her opposition to BOA's motion for revision, Bossie raised an issue outside the scope of issues presented to the commissioner - that BOA's claim and motion were moot due to her alleged bankruptcy discharge. CP 214-224.

In her opposition to the motion for revision, Bossie admitted BOA's deed of trust took priority over her interests. CP 216. In so doing, she admitted that had the commissioner noticed BOA's pending motion for disbursement, he would not have issued the order disbursing funds to her. However, Bossie's opposition claimed, as she does here, that her alleged bankruptcy discharge of her personal liability for the loan rendered BOA's claim to the surplus funds moot.

The applicable standard is:

[A] discharge in bankruptcy prevents the [creditor] from taking any action to collect the debt as a personal liability of the debtor . . . however, [the debtor's] property remains liable for a debt secured by a valid lien.”

In re Isom, 901 F.2d 744, 745 (9<sup>th</sup> Cir. 1990).

Bossie agrees. Without citing to any authority, Bossie's opposition to BOA's motion for revision admitted this is the controlling principle. “Thus, a lien holder only has recourse against the collateral. If the collateral is sold at a non-judicial foreclosure sale, then a junior lien holder's recourse is limited to the surplus funds.” CP 222.

Bossie's argument seems to be that her receipt of the surplus funds pursuant to the erroneous commissioner's order transmuted the surplus funds into her personal funds such that BOA's claim constituted pursuit of a deficiency. However, the trial court was properly unpersuaded by the arguments, either on the merits or because they were outside the scope of issues presented to the commissioner, or both. Regardless, the trial court ordered Bossie to return the surplus funds to the court registry. She failed to do so. BOA obtained a final judgment, which Bossie did not appeal.

**F. CONCLUSION.**

This Court's review of the trial court's order revising the commissioner's order is moot because Bossie failed to appeal the subsequent final judgment in the case. Even if the Court were to review it, the Court should affirm the order revising the commissioner's order because: 1) the commissioner erred by failing to notice Bossie's lack of compliance with the notice provisions of RCW 61.24.08(3) and CR 6(e) by not adding three days for service by mail; 2) the commissioner erred by failing to notice Bossie's unserved Declaration of December 16, 2010, which she signed after receiving BOA's motion for disbursement on December 11, 2010, stating she had no knowledge of any other deed of trust on the property, was inconsistent with the Trustee's Sale Guarantee filed with the deposit and that BOA's motion for disbursement was pending; and 3) the trial court properly found unavailing arguments *Bossie* raised in opposition to BOA's motion for revision, but not presented to the commissioner, that the combined effect of her

bankruptcy discharge and receipt of the surplus funds transmuted the surplus funds into personal funds BOA may not pursue.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of August, 2011.

PITE DUNCAN, LLP

  
Rochelle L. Stanford, WSBA 38690  
9311 SE 36<sup>th</sup> Street, #100  
Mercer Island, WA 98040  
Attorneys for Respondent  
Bank of America, N.A.

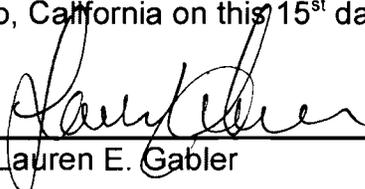
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 15, 2011, I arranged for service of Bank of America, N.A.'s Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division 1 One Union Square 600 University Street Seattle, WA 98101 Fax: (206) 389-2613	<input type="checkbox"/> <i>Fasimile</i> <input type="checkbox"/> <i>Messenger</i> <input type="checkbox"/> <i>U.S. Mail</i> <input checked="" type="checkbox"/> <i>Federal Express</i> <input type="checkbox"/> <i>E-Mail</i>
Jan Gossing, Esq. BTA LAW GROUP PLLC 31811 Pacific Highway South, B-101 Federal Way, WA 98003 jgossing@btalawgroup.com <i>Attorney for Appellant(s)</i>	<input type="checkbox"/> <i>Fasimile</i> <input type="checkbox"/> <i>Messenger</i> <input type="checkbox"/> <i>U.S. Mail</i> <input checked="" type="checkbox"/> <i>Federal Express</i> <input type="checkbox"/> <i>E-Mail</i>

**DATED** at San Diego, California on this 15<sup>th</sup> day of August, 2011.

  
\_\_\_\_\_  
Lauren E. Gabler