

69746-3

69746-3

NO. 69746-3-I

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

CENTRALBANC MORTGAGE CORPORATION,

Appellant,

v.

SOLUTIONS FINANCIAL GROUP, INC., NORTH AMERICAN  
SPECIALTY INSURANCE COMPANY, CHOICE ESCROW, INC.,  
JULE A. DEKMAN, SLAVA DEKMAN, ALLA PYATETSKAY AND  
DAVID SOBOL,

Respondents,

**BRIEF OF RESPONDENTS  
CHOICE ESCROW, INC.  
AND DEKMAN**

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## **I. COUNTER STATEMENT OF ISSUES PRESENTED**

1. Whether Appellant submitted evidence that raised a genuine issue of fact that it suffered damages as a proximate result of Choice Escrow and Dekman's acts or omissions?
2. Whether Appellant's president, John Delaney, owed any legal duty to personally purchase the subject property to satisfy the corporate Appellant's obligation, or whether he was a volunteer in doing so?
3. Whether the Appellant corporation owed any legal obligation to pay John Delaney for Delaney's personal mortgage on the subject property, or whether it was a volunteer in doing so?
4. Whether Appellant submitted any valid evidence that it repurchased the second Stukov loan?
5. Whether Appellant is allowed to raise the doctrine of equitable subrogation for the first time on appeal?
6. Whether Appellant can claim that the trial court erred by not allowing it to amend the complaint, when it failed to file a motion to amend?

## **II. COUNTER STATEMENT OF THE CASE**

### **A. BACKGROUND AND PROCEDURAL HISTORY**

This litigation arose out of a residential real estate purchase and sale transaction that closed on February 16, 2006. **(CP 605.)** Andrey Stukov was the purchaser of the property, and Sky Benson the seller. The purchase price was \$900,000.00. *(Id.)*

Appellant CentralBanc issued two loans for the purchase; a first loan in the amount of \$720,000.00, and a second loan in the amount of \$125,000.00. **(CP 67.)** Both loans were secured by deeds of trust recorded on the property. Choice Escrow, Inc. closed the transaction. At that time, Julie Dekman worked for Choice Escrow.

CentralBanc claims that it immediately sold these no-income verification loans into the secondary market. **(CP 68, ¶13.)** Apparently, Stukov never made any payment on the loans and, by September, 2006, American Home Mortgage Corporation (AHMC), which purchased the first loan from CentralBanc, commenced non-judicial foreclosure proceedings on the deed of trust securing that first loan. **(CP 778-88.)**

On September 22, 2006, AHMC recorded the Notice of Trustee's Sale. **(CP 783.)** The foreclosure sale was originally scheduled for December 22, 2006. *(Id.)* CentralBanc filed this lawsuit on November 17,

2006, against Solutions Financial Group, Inc. and its bonding company, North American Insurance Company (NAIC). Solutions was the mortgage broker involved in the placement of the loans. CentralBanc filed this action even though it had not sustained any damage. At that time, the foreclosure sale had not occurred and there had not been a demand from AHMC to repurchase the first loan.

In a letter dated January 17, 2007, AHMC demanded that CentralBanc buy back the first loan. **(CP 801-02.)** Nine days later, on January 26, 2007, the trustee's sale occurred. AHMC bid the amount it was owed on the first note. Title to the property was transferred to AHMC by a Trustee's Deed that was recorded on February 15, 2007. **(CP 790-92.)**

Approximately four and one half months after the foreclosure sale, CentralBanc's president, John Delaney, bought the property from AHMC. John Delaney testified: ". . . **I personally purchased** the Property from AHMC after the foreclosure sale. . . ." **(CP 732, Emphasis Supplied.)** Mr. Delaney obtained title to the property under a Bargain and Sale Deed that was recorded on June 8, 2007. **(CP 794-95.)** It is uncontroverted that Mr. Delaney still owns the property, personally.

Two months after Delaney purchased the property, on August 6, 2007, CentralBanc filed an amended complaint, which added claims against the borrower, Stukov, Choice Escrow and Dekman. **(CP 368-81.)** The First

Amended Complaint did not state how CentralBanc was alleged to have suffered damages, and did not mention the foreclosure or that Delaney had personally purchased the property. (*Id.*) On October 22, 2007, CentralBanc dismissed its claims against Stukov. **(CP 1-2.)**

One year later, on August 1, 2008, CentralBanc again amended its complaint, this time to add its former employee, Alla Pyatetskay and her husband, David Sobol, as defendants. **(CP 6-19.)** In the Second Amended Complaint, CentralBanc alleged that it “. . .was injured by having to buy back the loans after Stukov failed to make any payments on the loans. . . .” **(CP 8, Second Amended Complaint ¶3.1.)** It made that allegation even though AHMC had foreclosed and taken title to the property and Delaney had subsequently purchased it. On March 23, 2009, defendants Pyatetskay and Sobol answered, and raised the affirmative defense that CentralBanc failed to join a necessary party. **(CP 26.)**

This lawsuit proceeded at a snail’s pace.<sup>1</sup> CentralBanc changed counsel on numerous occasions, and the case was stayed from May 4, 2009 until November 7, 2010, due to the criminal prosecution and incarceration of defendants Alla Pyatetskay and David Sobol. **(CP 289.)** The case was again continued when CentralBanc’s current counsel appeared on July 29, 2011,

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<sup>1</sup> A brief chronology of the case was filed in response to CentralBanc’s last motion to continue the trial. **(CP 289-90.)**

and the trial was last set to commence on November 19, 2012. (*See*, last Order Amending Case Schedule, **CP 255-56.**)

On May 12, 2013, CentralBanc filed a summary judgment motion on its claims against Solutions. (**CP 28-45.**) That motion was stricken. On October 4, 2012 Choice Escrow and Dekman filed their motion for summary judgment (**CP 577-85.**) CentralBanc re-filed its motion against Solutions that same day. (**CP 559-76.**) On October 5, 2012, the bonding company for Solutions, NAIC, filed its summary judgment motion. (**CP 588-95.**) By that time, counsel for defendant Solutions, and counsel for defendants Pyatetskay and Sobol, had withdrawn. Those parties have not been represented since December, 2010 (Solutions), and February, 2011 (Pyatetskay and Sobol).

The motions of Choice Escrow/Dekman and NAIC were not based on the same four grounds, as represented by Appellant on page 6 of its opening brief. Choice Escrow/Dekman did not raise issues with the agreement between Solutions and CentralBanc or the Mortgage Brokers Practices Act.

In response to Choice Escrow and Dekman's and NAIC's motions for summary judgment, CentralBanc relied on the same evidence, which was presented in four declarations. Three of the declarations were from

CentralBanc's president, Mr. Delaney. They were the original *Declaration of John Delaney in Support of Plaintiff's Motion for Summary Judgment*,<sup>2</sup> **(CP 64-150)**; the *Supplemental Declaration of John Delaney in Support of Plaintiff's Motion for Summary Judgment*, **(CP 935-42)**; and the *Second Supplemental Declaration of John Delaney in Response to Choice Escrow, Inc., Dekman and Solutions Financial Group Inc. Motions For Summary Judgment*. **(CP 943-1023.)** CentralBanc also filed the *Declaration of Mark Herriott in Support of Plaintiff's Motion for Summary Judgment*. However, the Herriott declaration pertained only to claims against Solutions and its bonding company, NAIC. **(CP 403-554.)**

On November 2, 2012, The Honorable Mary Yu granted Choice Escrow and Dekman's motion for summary judgment. **(CP 904-06.)** Judge Yu also granted NAIC's motion that day, but an order on that motion was not entered until November 13, 2012. **(CP 908-10.)** At that point in time, CentralBanc's claims against defendants Solutions, Pyatetskay and Sobol remained set for trial starting November 19, 2012.

Because the motions granted on November 2, 2012 did not resolve all claims against all parties, Choice Escrow and Dekman moved the trial court on November 15, 2012 for CR 54(b) certification. **(CP 174-80.)**

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<sup>2</sup> The original declaration of Mr. Delaney is dated May 8, 2012. However, it was not filed until October 4, 2012 when CentralBanc re-filed its motion for summary judgment against Solutions.

Plaintiff failed to appear at trial on November 19, 2012. On November 27, 2012, Judge Yu granted the CR 54(b) motion, and on that order she interlineated “the trial date of Nov. 19, 2012 came and no one appeared for trial & the Ct. has received no objection to this motion.” **(CP 202.)** Final Judgment in Choice Escrow and Dekman’s favor was also entered on November 27, 2012. **(CP 203-06.)**

On December 26, 2012, CentralBanc filed this appeal. On January 10, 2013, this Court issued a notice setting a hearing on February 8, 2013 to determine whether the orders appealed from were reviewable. Commissioner Neel ruled that, in order for the appeal to go forward, CentralBanc had to dismiss its claims against the remaining defendants, or obtain a final order as to those claims from the trial court. CentralBanc had until March 13, 2013 to do so.

On February 22, 2013, NAIC filed a motion for summary judgment to dismiss all of CentralBanc’s claims against its bond principal, Solutions Financial. **(CP 207-64.)** On March 11, 2013, CentralBanc filed a motion for CR 54(b) certification of the November 13, 2012 order dismissing NAIC. **(CP 297-304.)** Also on March 11, 2013, CentralBanc filed its response to NAIC’s motion to dismiss Solutions, in which it requested that the court continue the trial date of November 19, 2012, the same trial that CentralBanc failed to appear for. **(CP 269-73.)**

On March 22, 2013, Judge Yu dismissed all claims against Solutions, *nunc pro tunc* November 19, 2012, the day of the previously scheduled trial. (CP 338-40.) Judge Yu interlineated on that order:

The original TD (trial date) was Nov. 19, 2012. The Ct. heard nothing from plaintiff until this motion was filed. Absent a reason for allowing the TD to pass without any action, this CT. believes the matter was abandoned for failure to prosecute on Nov. 19, 2012.  
(CP 340.)

Inexplicably, CentralBanc did not appeal from the March 22, 2013 order.

Choice/Dekman and NAIC subsequently filed motions to dismiss the appeal as untimely. Those motions were denied, and this appeal proceeded.

**B. THE SUBSTANCE OF THE EVIDENCE SUBMITTED IN RESPONSE TO CHOICE ESCROW AND DEKMAN'S SUMMARY JUDGMENT MOTION**

As mentioned above, the evidence submitted by CentralBanc in response to Choice Escrow and Dekman's motion for summary judgment consisted of the three declarations of John Delaney and the declaration of Mark Herriott, and the exhibits therewith. The arguments made in CentralBanc's opening brief are not supported by the actual evidence in this record.

In the original *Declaration of John Delaney in Support of Plaintiff's Motion for Summary Judgment*, (dated May 8, 2012 and filed October 4, 2012, **CP 64-150**), Mr. Delaney stated that CentralBanc sold the Stukov loans to AHMC. (**CP 68, ¶13.**) No evidence of a “sale” was submitted. Mr. Delaney also stated, in paragraph 17:

In order to meet CentralBanc's repurchase obligation to AHMC on the Stukov Loans, I personally purchased the Property from AHMC after the foreclosure sale for \$813,478.00, which was the amount of AHMC's repurchase request and obtained a deed to the Property from AHMC.  
**(CP 69.)**

This statement clearly only applies to the first loan, and not both the first and second. (See, also, the January 17, 2007 repurchase demand from AHMC, **CP 140-41**, which only concerns the first loan.)

Exhibit D to the original Delaney declaration was a copy of the promissory note on the first loan. (**CP 111-19.**) The note for the second loan is not in the record. The “Schedule of Damages” submitted as Exhibit H to that declaration did not include a figure for the second loan. (**CP 139.**) As stated above, AHMC's repurchase demand, a copy of which was included in Exhibit H, pertained only to the first loan. (**CP 140-41.**) There is no evidence of a repurchase demand on the second loan. The original Delaney declaration was entirely silent about the second loan.

The first *Supplemental Declaration of John Delaney in Support of Plaintiff's Motion for Summary Judgment*, (dated October 2, 2012 and filed October 4, 2012, **CP 935-42**), contains the only statement about the second loan that is in this record. In paragraph 9 of that declaration, he stated:

I revised and update my damage statement made in my principal declaration. After reviewing and including the loan payoff of the Stukov second mortgage and tabulating all expenditures related to the repurchase of the Stukov first and second loan, I provide the following summary. . . .

**(CP 937.)**

Attached to the first supplemental declaration is a corporate resolution, **(CP 942)**, a document entitled "Register QuickReport," which has one line entitled "Total 2<sup>nd</sup> loan expense," **(CP 941)**, and a printout of what are alleged to be "Mortgage payments for 2106 Fairmont, Seattle WA 98128." **(CP 939-40.)** That printout appears to show checks made payable to "John Delaney/2106 Fairmont Property," and not to Delaney's lender. *(Id.)*

The corporate resolution, **CP 942**, states that the corporation resolved to assume the liabilities of the mortgage financing on the property and an obligation to Credit Suisse. There is nothing in the record to explain or substantiate that the second loan was purchased by Credit Suisse, or that

it was repurchase by CentralBanc from Credit Suisse. No documents were submitted below regarding the second loan, its sale or repurchase, whether from AHMC, Credit Suisse or any other entity. CentralBanc simply did not submit proof of anything with regard to the second loan.

The last of the Delaney declarations is the *Second Supplemental Declaration of John Delaney in Response to Choice Escrow, Inc. Dekman and Solutions Financial Group Inc. Motions For Summary Judgment*, (dated October 22, 2012, filed February 10, 2014, **CP 943-1023**).<sup>3</sup> In his third declaration, Mr. Delaney addressed the exhibits attached to that declaration, none of which concern the second Stukov loan.

The evidence in this record of the second Stukov loan therefore consists of Mr. Delaney's statement in paragraph 9 of his first supplemental declaration, and the document attached to that declaration showing the alleged "total 2<sup>nd</sup> loan expense."

The declaration of Mark Herriott (**CP 403-06**) does not mention the second loan, and is addressed solely to CentralBanc's unsuccessful summary judgment motion against Solutions.

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<sup>3</sup> See, *Order on Plaintiff's Motion to Allow Corrective or Supplemental Pleadings*, **CP 932-34**.

### III. ARGUMENT AND AUTHORITIES

#### A. *SUMMARY OF ARGUMENT*

CentralBanc's arguments essentially boil down to two sentences that are on page 30 of its opening brief.

It should makes [sic] no difference to the trier of fact whether CMC fulfilled its contractual duty to pay AHMC in cash, credit, barter, by CMC's own financial undertakings or the undertakings of CMC's principal officer or shareholder. The fact remains: CMC was obligated to repurchase the Stukov loans from AHMC and did so directly, in the case of the second Note and somewhat directly in the case of the first Note.

But, who sustained damages, how they were sustained and whether they were sustained as a direct and proximate result of anything Choice Escrow and Dekman did or did not do certainly does make a difference, as the trial court recognized. The issue here concerns the actual evidence CentralBanc submitted to the trial court to raise a genuine issue of material fact on damages and causation.

CentralBanc alleges that there were errors in the closing process that took place in February, 2006. The loans were immediately sold into the secondary markets and everything was fine until Stukov failed to pay. At that point, CentralBanc had not suffered any alleged damage. AHMC then foreclosed the first deed of trust in January, 2007, effectively eliminating the

first loan. CentralBanc still had not incurred any damage. It is uncontroverted that the first loan was not repurchased. At this juncture, AHMC had the property as compensation, just as any lender in any non-judicial foreclosure situation. Then, Delaney voluntarily purchased the property in June, 2007. And, it is only when CentralBanc subsequently decides that it will voluntarily reimburse Delaney for Delaney's personal mortgage obligations, and will pick up Delaney's expenses on the property, that CentralBanc finally sustains the "damages" it seeks regarding the first loan. Under CentralBanc's theory, this is the unbroken chain of causation leading from the alleged acts and/or omissions of Choice Escrow and Dekman to damages. In reality, the chain is severed in several places. Based on the evidence submitted, and as a matter of law, CentralBanc did not show its alleged damage was a "but for" consequence of the acts or omissions of these Respondents.

Further, there is no competent evidence in this record that shows that CentralBanc repurchased the second loan from AHMC, or any other entity. The only evidence CentralBanc submitted about the second loan is contained in Delaney's first supplemental declaration where he nakedly states that he recalculated damages and was ". . . including the loan payoff of the Stukov second mortgage and tabulating all expenditures related to the repurchase of the Stukov first and second loan. . . ." The second loan was

not even mentioned in CentralBanc's original table of calculated damages. (CP 139.) This record is devoid of actual evidence of the second loan, its alleged "repurchase," or any damage suffered by CentralBanc arising out of the second loan. Sticking a figure into a table of alleged damages is not competent evidence that a loan repurchase was proximately caused by Choice Escrow and Dekman's acts or omissions.

The trial court's dismissal of all claims against Choice Escrow and Dekman should be affirmed.

***B.     STANDARD OF REVIEW***

Review of a trial court's order granting summary judgment is de-novo. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 285 P.3d 854 (2012); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006); *Skinner v. Holgate*, 141 Wn.App. 840, 173 P.3d 300 (2007). The Court considers the materials before the trial court and construes the facts in the light most favorable to the non-moving party. *Greenhalgh v. Dept. of Corrections*, 160 Wm.App. 706, 248 P.3d 150 (2011). Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Loeffelholz, supra* at

271. A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 192 P.3d 886 (2008). If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment. *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 998 P.2d 305 (2000). The issue of proximate cause is reviewable on appeal as a question of law if all inferences from the evidence are incapable of reasonable doubt. *City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Young v. Key Pharmaceutical Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989). A moving defendant can meet this burden by showing that there is an absence of evidence to support the plaintiff's case. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 818 P.2d 1056 (1991). The burden then shifts to the plaintiff to come forward with sufficient evidence to establish the existence of each essential element of the plaintiff's case. *Howell, supra* at 625. If plaintiff does not submit such evidence, summary judgment is appropriate. *Id.* Summary judgment cannot be successfully opposed by nakedly asserting that there are unresolved issues of fact. *Bates v. Grace United Methodist Church*, 12

Wn.App. 111, 529 P.2d 466 (1974). Conclusory allegations, speculative statements or argumentative assertions of the existence of unresolved factual issues are legally insufficient to defeat summary judgment. *McMann v. Benton County*, 88 Wn.App. 737, 946 P.2d 1183 (1997).

C. **CENTRALBANC HAS NO DAMAGES TO ASSERT ARISING OUT OF THE FIRST LOAN, AND FAILED TO SUBMIT EVIDENCE THAT IT SUSTAINED DAMAGE ARISING OUT OF THE SECOND**

CentralBanc alleged that it was damaged because it had to buy back the Stukov loans. The first loan was extinguished by the foreclosure and it was not repurchased. CentralBanc did not sustain any damages as a result of Delaney's voluntary purchase of the property to ostensibly satisfy the corporation's contractual obligations to "repurchase" that loan. The corporation's subsequent payment of Delaney's personal mortgage obligation, and assumption of expenses, is only as a result of the corporation's voluntary decision to pay Delaney, not out of anything Choice Escrow or Dekman did. Regarding the second loan, CentralBanc simply failed to come forward with any evidence to support its claims. Judge Yu correctly dismissed these claims.

1. **THE FIRST LOAN**

CentralBanc failed to connect the dots on causation with respect to its alleged damages arising out of the first loan. It did not present evidence that raised a genuine issue of material fact that it suffered those damages as a proximate result of any anything Choice Escrow or Dekman did or did not do.

The proximate cause of an injury is defined as a cause that, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred.

*Stoneman v. Wick Constr., Co.*, 55 Wn.2d 639, 349 P.2d 215 (1960);

*Fabrique v. Choice Hotels Int'l, Inc.* 144 Wn.App. 675, 183 P.3d 1118 (2008).

Proximate cause consists of two elements: cause in fact and legal causation. [*City of Seattle v. Blume*, 134 Wn.2d [243] at 251-52, [947 P.2d 223 (1997)]. Cause in fact refers to the 'but for' consequences of an act, that is, the immediate connection between an act and an injury. *Blume*, 134 Wn.2d at 251-52. . . . Legal causation rests on policy considerations determining how far the consequences of a defendant's act should extend. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact. *Blume*, 134 Wn.2d 252.

*Neilson v. Eisenhower & Carlson, et al.*, 100 Wn.App. 584, 591, 999 P.2d 42 (2000).

The first loan was secured by a deed of trust that was foreclosed by AHMC in January, 2007. Despite the allegations of the Second Amended Complaint, and CentralBanc's repeated arguments in its opening brief, there was no repurchase of this loan, or effective repurchase of this loan by reimbursements paid to Delaney. The note on the first loan was extinguished by the non-judicial foreclosure.<sup>4</sup> After the foreclosure occurred, there was no loan that could be repurchased. AHMC held title to the property by the Trustee's Deed that was recorded in February, 2007, one year after the closing conducted by Choice Escrow. CentralBanc had suffered no damages at that point.

On June 8, 2007, AHMC sold the property to Delaney, personally. CentralBanc still had suffered no damages. It did not come forward with any evidence showing that Delaney had any legal obligation to buy the property for CentralBanc. The only parties to the contracts between AHMC and CentralBanc were AHMC and CentralBanc. **(CP 958-86.)** There is no evidence that Delaney was a guarantor of CentralBanc's contractual obligations to AHMC. There is no evidence of any other obligation Delaney had to AHMC requiring the repurchase of any loan or requiring that Delaney personally pay for or cover any corporate obligation.

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<sup>4</sup> Under RCW 61.24.100, the non-judicial foreclosure eliminated any possibility of a deficiency judgment against Stukov on the first loan, and the loan was effectively extinguished.

In fact, CentralBanc's corporate entity insulated Delaney from any personal liability to AHMC regarding these loans. Delaney's three declarations are silent as to any legal obligation he owed to the company to step-in and purchase the property.

The corporate resolution dated after Delaney purchased the property does not create a causal connection between Choice Escrow and Dekman's alleged acts and any damage suffered by CentralBanc. A corporate resolution is only a statement of a corporation's actions. It is the equivalent of the minutes of a corporate board meeting. *Lordis v. Corbis Holdings, Inc.*, 172 Wn.App. 835, 292 P.3d 779 (2013). It is a document issued by the board of directors documenting a decision made on behalf of the corporation. The corporate resolution does not create a legal obligation of the corporation on Delaney's personal note. The resolution does not create a causal connection between payments for Delaney's personal mortgage and an escrow closing that occurred a year and a half prior to the resolution's date.

CentralBanc submitted no evidence showing that there was a genuine issue of material fact regarding cause in fact, that is, the immediate connection between the alleged acts and/or omissions in closing the loans, and the alleged injury. That is because there is none. Choice Escrow and Dekman did not cause, in a direct sequence, unbroken by any new,

independent cause, the injury CentralBanc complains of. The “injury” did not come into existence until CentralBanc voluntarily decided to pay Delaney’s personal obligations, and that did not occur until a year and a half after closing.

## **2. THE SECOND LOAN**

Although CentralBanc repeatedly argues in its opening brief that it is undisputed that it repurchased the second loan, the actual evidence it put into this record shows nothing of the kind. As set out above, the only mention of the second loan is in the first supplemental Delaney declaration, where he simply stated that he was adding a sum for the second loan to a table of alleged damages. This is nothing more than an argumentative, conclusory assertion. It fails to raise a genuine issue of material fact as to whether CentralBanc sustained any such damage as a proximate result of anything these Respondents did.

There is nothing of any evidentiary substance in this record concerning the second loan. The note is not in evidence. There is no evidence of its sale into the secondary market. There is no evidence of a repurchase demand on the second loan. There is no evidence in this record that CentralBanc, in fact, repurchased the second loan. There is no evidence of any assignment of the loan from AHMC to CentralBanc, or that

AHMC endorsed the note back to CentralBanc. All that exists in this record about the second loan is a figure stuck into a table of alleged damages, and counsel's arguments.

When CentralBanc sold the loans, it must have assigned its interest and endorsed the note. CentralBanc failed to submit evidence of the loan sale. If CentralBanc repurchased the loan or loans, there would likewise be evidence of an assignment and/or endorsement of the note back to CentralBanc. <sup>5</sup> But, nothing was submitted showing that this actually occurred.

CentralBanc simply did not come forward with any actual proof, by admissible documents or testimony, to substantiate or corroborate its arguments about the second loan. As with the first loan, the corporate resolution does not rectify this proof problem. CentralBanc nakedly asserts that there are issues of fact, but that is not sufficient to defeat summary judgment. *Bates, supra*. Conclusory allegations, speculative statements or argumentative assertions of the existence of unresolved factual issues are legally insufficient to defeat summary judgment. *McMann, supra*.

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<sup>5</sup> Although AHMC's foreclosure of the first deed of trust wiped the second deed of trust from the property's chain of title, the second note was not extinguished.

D. CENTRALBANC WAS NOT A PARTY TO THE ESCROW INSTRUCTIONS AND HAD NO PRIVITY WITH CHOICE ESCROW

In order to bolster its standing and real party in interest arguments, CentralBanc claims it was in contractual privity with Choice Escrow, via the escrow instructions. That is false.

The escrow instructions clearly define the parties. The first page provides:

Buyer's Name:           Andrey Stukov

Seller's Name:         Sky Benson

CLOSING AGREEMENT AND ESCROW INSTRUCTIONS  
For Purchase and Sale Transaction

The undersigned buyer and seller (**referred to herein as “the parties”**) hereby designate and appoint: Choice Escrow (referred to herein as “the Closing Agent”) to act as their closing and escrow agent according to the following agreement and instructions.

(CP 988; Emphasis Supplied.)

CentralBanc is not identified as a party to that agreement. It did not sign any agreement with Choice Escrow. Only Stukov and Benson entered into the agreement to close the transaction, and they issued the instructions to Choice Escrow. As always is the case when a purchase is financed, the lender, here CentralBanc, issued closing instructions that set out its

conditions for funding the transaction. It required that all executed closing documents be returned to CentralBanc 48 hours prior to funding, in order that CentralBanc's employees could check that the instructions were satisfied. That occurred as the loans were funded. The parties, Stukov and Benson, agreed that any lender's instructions were accepted by them. (CP 990, "Instructions from Third Parties.") This did not make CentralBanc a party to the escrow instructions and did not put CentralBanc into a position of contractual privity with Choice Escrow.

Moreover, almost six years ago, CentralBanc admitted that it has no written agreement and no privity with Choice Escrow or Dekman. When asked in written discovery to identify any agreement between CentralBanc and Choice Escrow, CentralBanc answered:

**There is no written agreement executed  
between plaintiff and defendants Dekman and  
Choice.**

(CP 898; CentralBanc's May 8, 2008 answer to Interrogatory No. 7 of Choice Escrow and Dekman's First Set of Interrogatories and Requests for Production to Plaintiff.)

CentralBanc had no privity with Choice Escrow or Dekman.

An escrow agent's duties and limitations are defined by the escrow instructions. *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 63 P.3d 125 (2003); *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 506 P.2d 20 (1973). Washington has not imposed any duty upon an escrow agent independent of the parties' instructions. *See, Denaxas, supra*. There is no authority for extending an escrow agent's duties to a lender.

CentralBanc admitted years ago that there is no contract between it and Choice Escrow. Its arguments about how it has standing and privity with Choice Escrow simply have no basis whatsoever.

CentralBanc's cites *Riverview Community Group v. Spencer & Livingston*, 173 Wn.App 568, 295 P.3d 258 (2013), to support its real party in interest and standing arguments. Reliance on that case is misplaced. *Riverview* involved organizational standing of a homeowner's association. This case does not involve the standing of an organization to bring suit on behalf of its members. That case also primarily concerned claims for promissory estoppel, which is not at issue in our case.

*Riverview* does not inform the decision here. The analysis in this case involves whether the evidence CentralBanc submitted was sufficient for summary judgment purposes to show that it suffered damage as a proximate result of Choice Escrow and Dekman's acts or omissions.

CentralBanc's arguments about standing and real party in interest fail to address this gaping hole in its case.

E. **CENTRALBANC RAISES EQUITABLE SUBROGATION FOR THE FIRST TIME ON APPEAL**

CentralBanc raises for the first time on appeal a claim for equitable subrogation. (Brief of Appellant, pg. 31-33.) The doctrine was not pled, and it was not raised in response to the summary judgment motions below. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. A party may not propose new theories of the case that could have been raised before entry of an adverse decision. *Wilcox v. Lexington Eye Institute*, 130 Wn.App 234, 122 P.3d 729 (2005). CentralBanc's arguments about equitable subrogation should not be considered.

Even if considered, equitable subrogation does not apply. CentralBanc argues that it is the subrogee, ". . . paying for the mortgage obligations of John Delaney. CMC's actions were based upon its contractual obligations to AHMC." (Appellant's Brief, pg 32.) But, AHMC had no claim against CentralBanc for the loan repurchase after AHMC foreclosed and then sold the property to Delaney. Delaney's

mortgage obligation arose solely because he volunteered to purchase the property, even though he had no legal or other obligation to AHMC or CentralBanc to do so. He was actually insulated from personal liability. CentralBanc was a subsequent volunteer because it had no legal obligation to pay Delaney's personal mortgage on the property that he still personally owns today.

Subrogation exists when a party, not a volunteer, pays another's obligation for which the subrogee has no primary liability in order to protect such subrogee's own rights and interests. [*Miller Cas. Ins. Co. v. Briggs*, 100 Wn.2d [9] at 14, 665 P.2d 887 [(1983)]; [*Livingston v. Shelton* 85 Wn.2d [615] at 618-19, 537 P.2d 774 [(1975)]]. One is a 'volunteer' and not entitled to subrogation if, in making payment, he has no right or interest of his own to protect and acts without obligation, moral or legal, and without being requested to do so by a person liable on the obligation. *Livingston*, 85 Wn.2d at 619, 537 P.2d 774; *In Re Farmers & Merchants State Bank*, 175 Wn. 78, 88, 26 P.2d 631 (1933); *Austin v. Wright*, 156 Wn. 24, 30, 286 P. 48 (1930); *Restatement (Second) of Restitution* § 162 (1937); L. Simpson.

*Newcomer v. Masini*, 45 Wn.App. 284, 288-89, 724 P.2d 1122 (1986).

CentralBanc admits it holds no interest whatsoever in the title of the property. It is an accounting mystery how the corporation can claim a property it doesn't own as an asset and a liability on its balance sheet. It had

no obligation on Delaney's mortgage and was a volunteer in reimbursing Delaney for the mortgage payments and assuming other expense payments.<sup>6</sup>

It is curious that CentralBanc now claims that it is entitled to equity. It alleged that its own employee, defendant Alla Pyatetskay, and her husband, were in collusion with Stukov and Solutions in committing loan fraud. This case was delayed for a considerable period of time because Ms. Pyatetskay was charged with, and ultimately pled guilty to, mortgage and bank fraud in a similar scheme. Her incarceration caused further delays. As her employer, CentralBanc is responsible for her actions with regard to the Stukov loans, and it has unclean hands, prohibiting its claim for equity. *Portion Pack, Inc., v. Bond*, 44 Wn.2d 161, 265 P.2d 1045 (1954).

CentralBanc argues that equitable subrogation should be invoked to prevent unjust enrichment. Choice Escrow hardly was enriched. The only sum it received was the customary escrow fee at closing. (CP 110.)

Enrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties to the transaction. *Farwest [Steel Corp. v. Mainline Metal Works Inc.]* 48 Wn.App. [719] at 732. Three elements must be established for unjust enrichment: (1) there must be a benefit

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<sup>6</sup> A couple of pages from an audit, plus one other page purportedly listing corporate assets, were attached to Delaney's second supplemental declaration. (CP 1007-10 .) They hardly explain how this corporation can claim a property it doesn't own and has no legal obligation for.

conferred on one party by another, (2) the party receiving the benefit must have an appreciation or knowledge of the benefit, and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value. *Ballie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 159-60, 810 P.2d 12 (1991).

*Dragt v. Dragt/DeTray, LLC*, 139 Wn.App. 560, 576, 161 P.3d 473 (2007).

CentralBanc has not produced any evidence to establish any of the elements of an unjust enrichment claim.

CentralBanc failed to raise equitable subrogation below, and should not be allowed to do so on appeal. In any event, none of the elements of the doctrine can be satisfied. Delaney was a volunteer in purchasing the property, and CentralBanc was a follow-on volunteer in apparently reimbursing him for his personal loan obligations. Equitable subrogation does not apply to volunteers.

**F. CENTRALBANC FAILED TO FILE A MOTION TO AMEND**

CentralBanc's third assignment of error is that the trial court erred in failing to allow it sufficient time to amend to add Delaney as a plaintiff. But, CentralBanc neglects to mention that it did not file such a motion. It therefore has no basis to claim that this was error.

On October 4, 2012, Choice Escrow filed its answer to the Second Amended Complaint, and raised as an affirmative defense that “Plaintiff did not buy back the loans, is not the real party in interest and suffered no damages.” (CP 402.)<sup>7</sup> That same day, Choice Escrow and Dekman’s Motion for Summary Judgment was also filed. The hearing on the summary judgment motion did not occur until November 2, 2012. CentralBanc had plenty of time to file a motion to amend to add Delaney as a plaintiff. It failed to do so.

Delaney’s claims are barred by the statute of limitations. Relation-back to avoid a statute of limitations will be permitted only if the lack of prosecution by the real party in interest was the result of an honest or understandable mistake. *Rinke v. Johns-Mansville Corp.*, 47 Wn.App. 222, 734 P.2d 533 (1987). A party’s failure to timely name a necessary party cannot be remedied if the failure resulted from inexcusable neglect. *Teller v. APM Terminals Pac. Ltd.*, 134 Wn.App. 696, 142 P.3d 179 (2006). “Generally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record.” *Teller, supra* at 706. The failure to name a party who is apparent, or ascertainable upon reasonable investigation, is inexcusable. *Id.*

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<sup>7</sup> As noted above, On March 23, 2009, defendants Pyatetskay and Sobol raised the affirmative defense that CentralBanc failed to add an indispensable party.

The inexcusable neglect standard of CR 15(c) has been applied where a change in plaintiffs is made. *Beal v. City of Seattle*, 134 Wn.2d 769 954 P.2d 237 1998. When the change in plaintiff is only in the representative capacity in which the suit is brought, i.e., a personal representative substituted for a guardian, or a bankruptcy trustee for the debtor, then the Court's have relaxed the inexcusable neglect standard. *Beal, supra; Miller v. Campbell*, 164 Wn.2d 539, 192 P.3d 352 (2008). Here, adding Mr. Delaney would not be a mere change in representative capacity such as the substitution of a guardian for a personal representative.

When the summary judgment motions were heard on November 2, 2012, the trial was set to begin 17 days later, on November 19, 2012. This case had been ongoing since November, 2006. The complaint had been amended twice. Whether the amendment would have been granted at that late stage of the trial court proceeding is unknown because CentralBanc failed to file a motion. Even after Choice Escrow filed its answer to the last complaint, filed a summary judgment motion, and co-Respondent NAIC filed its summary judgment motion, CentralBanc did not file a motion to amend to add Delaney.

After Choice Escrow/Dekman and NAIC were dismissed, CentralBanc still did not attempt to amend the complaint for the trial starting

on November 19, 2012, against the remaining defendants. CentralBanc did not bother to appear for trial.

The argument that the trial court did not allow CentralBanc sufficient time to amend is disingenuous, at best. It has no basis to claim that the trial court erred in failing to allow sufficient time to amend when it did not file a motion to amend.

**G. THE REQUEST FOR ATTORNEYS FEES IS WITHOUT MERIT**

CentralBanc's request for an award of fees is without merit. It cites a provision in the escrow instructions as the basis for such an award. It admitted years ago that there is no contract between it and Choice Escrow. It ignores that admission throughout its brief, and also in this request for fees. CentralBanc did not sign the closing agreement and escrow instructions, was not a party to that agreement and has no grounds to invoke any of its provisions.

CentralBanc has no contract, statute or other recognized equitable ground upon which to base its request for an award of fees. *See, Thompson v. Lennox*, 151 Wn.App 479, 212 P.3d 597 (2009); *Landberg v. Carlson*, 108 Wn.App. 749, 33 P.3d 406 (2001) *rev. den.*, 146 Wn.2d 1008 (2002). Its request for fees is frivolous.

#### **IV. CONCLUSION**

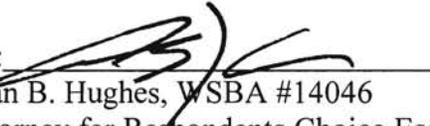
CentralBanc failed to come forward with evidence establishing that Choice Escrow and Dekman's acts or omissions proximately caused it damage. The evidence, construed in the light most favorable to Appellant, did not raise a genuine issue concerning a "but for" connection between the complained of acts and the alleged damages.

CentralBanc was not in privity with Choice Escrow or Dekman. Its attempt to raise equitable subrogation for the first time on appeal should be rejected. It should not be heard to claim that the trial court erred by not allowing it to amend when it failed to file a motion to do so.

Respondents Choice Escrow and Dekman respectfully request that this Court affirm the dismissal of all claims against them with prejudice.

**RESPECTFULLY SUBMITTED** this 31<sup>st</sup> day of March, 2014.

**ALAN B. HUGHES, P.S.**

By:   
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