

No. 69954-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ADC VENTURE 2011-2, LLC,

Respondent,

v.

MTB ENTERPRISES, INC.; MICHAEL TONY BILANZICH,
JANE DOE BILANZICH, AND HAIRWARE USA, INC.

Appellants,

and

Betty Jean Bilanzich and John Doe Bilanzich, wife and husband;
Prime Pacific Bank, N.A.; Ultimate Survival Technologies,
LLC; John and Jane Does; occupants of the premises,

Defendants.

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REPLY BRIEF OF APPELLANTS

On Appeal from Snohomish County Superior Court

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I. REPLY ARGUMENT

A. ADC HAS FUNDAMENTALLY MISCONSTRUED APPELLANTS' ARGUMENT AND THE CONTROLLING AUTHORITY CONCERNING CONCURRENT ACTIONS.

The Trial Court erred in denying Appellant's Motion for Summary Judgment because under RCW 61.12.120, ADC was precluded from maintaining concurrent actions against MTB for a foreclosure in equity and collection of a debt against the guarantors. As a result, guarantors Michael T. Bilanzich ("Bilanzich") and Hairware USA, Inc. ("Hairware") should have been dismissed. RCW 61.12.120 specifically states:

The plaintiff shall not proceed to foreclose his or her mortgage **while he or she is prosecuting any other action for the same debt or matter which is secured by the mortgage**, or while he or she is seeking to obtain execution of any judgment in such other action; **nor shall he or she prosecute any other action for the same matter while he or she is foreclosing his or her mortgage or prosecuting a judgment of foreclosure.**

RCW 61.12.120 (emphasis added). While ADC purports to reach back into the history of the statute and its predecessors to explain why the guarantors are incorrect, ADC's research actually proves the guarantors' point. *See* Resp't Br. at 38-47.

It has never been disputed that ADC could sue MTB to obtain both a decree of foreclosure and a deficiency judgment. This is why MTB did

not itself join the argument about concurrent actions in the Appellants' opening brief. The legal authority makes clear that ADC is entitled to a deficiency judgment against MTB, and is entitled to pursue other property of MTB to satisfy the deficiency. *See* RCW 61.12.070, 61.12.090. However, the cases relied upon by ADC do not involve a creditor's pursuit of a judgment on an unsecured guaranty, while at the same time pursuing a foreclosure action against the mortgagor. *See* Resp't Br. at 38-44. ADC has not presented any legal authority in support of that contention.

Interestingly, while explaining the problems addressed by RCW 61.12.120, ADC fails to realize that it has done exactly what it claims the statute is designed to prohibit. First, RCW 61.12.120 was passed to "meet the evils coming from a abuse of remedies by mortgagees at common law. Mortgagees might sue for the debt, or maintain ejectment, or go into equity and foreclose. They could maintain these actions severally and at the same time." *Gray v. Davidson*, 78 Wash. 482, 487, 139 P. 219 (1914). Here, ADC is pursuing an action in equity to foreclose on the mortgage against MTB *and* an action on the debt against the guarantors. CP 98-105, 160-167, 524-53. The guarantors are not actual parties to the loan agreement entered into by MTB or the deed of trust that ADC is pursuing;

they are just guarantors of the loan. CP 456-69. As important, the guaranties provided by Bilanzich and by Hairware are unsecured - they are not secured by the real property being foreclosed. CP 466-69. This is a concurrent action on its face and directly prohibited by RCW 61.12.120.

A second purpose of the statute is “**to prohibit a mortgagee securing, by writ of attachment or otherwise, an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting the same by foreclosure and sale.**”

Advance Thresher Co. v. Schimke, 47 Wash. 162, 164, 91 P. 645 (1907) (emphasis added). Suing the guarantors is clearly an effort by ADC to obtain an additional remedy in anticipation of a deficiency judgment against MTB. The Trial Court recognized that ADC was trying to prematurely pursue the guarantors, but rather than dismiss the guarantors as required by RCW 61.12.120, the Trial Court instead prohibited ADC from executing on the judgment until after a deficiency amount had been determined. CP 163-64, 168. Although this confirms the Court’s acknowledgment of the concerns raised by Defendants at the hearing, the **only** remedy called for in RCW 61.12.120 remains dismissal of the guarantors from this litigation; the statute leaves no other alternatives by

its inclusion of the word “shall.” See *Scannell v. Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982) (the statutory use of the word “shall” indicates that the statute is mandatory).

Further, the multitude of cases presented by ADC do not support its claim that “RCW 61.12.120 does not prevent a single action for foreclosure of the collateral and judgment on the debt, *including guaranties*.” Resp’t Br. at 43 (emphasis in original). In fact, the only support for ADC’s “*including guaranties*” language is that ADC either inserted its own favorable language into case quotes or took quotes out of context without providing the actual facts of the cases relied upon. *Id.* For example, the Court in *Hinchman v. Anderson*, 32 Wash. 198, 72 P. 1018 (1903), did not hold that the statute “does not ‘prevent the [creditor] [sic] from making all the [debtors on] [sic] the notes parties to the action and proceeding against all in one action’” as claimed by ADC. Resp’t Br. at 43. The *Hinchman* court actually stated the statute does not “prevent the plaintiff from making all the **parties to the notes** parties to the action and proceeding against all in one action.” 32 Wash. at 206, 72 P. 1018 (emphasis added). The guarantors are not “parties to the notes.” CP 456-65. Similarly, ADC’s reliance on *Fed. Land Bank v. Miller*, 155 Wash.

479, 284 P. 751 (1930) is misplaced, as the quoted section clearly states that in a foreclosure lawsuit, a deficiency personal judgment can be obtained against “**those liable upon such covenant.**” *Id.* at 483, 284 P. 751. Bilanzich and Hairware are only liable on the guaranties they executed, **not a covenant** in the deed of trust, as was the case in *Fed. Land Bank*. *See id.*; CP 466-69.

Michael Bilanzich and Hairware should have been dismissed from the case pursuant to RCW 61.12.120 and it was error for the Trial Court not to do so.

B. MATERIAL QUESTIONS OF FACT EXIST AS TO WHETHER THE FDIC BREACHED ITS DUTY OF GOOD FAITH AND FAIR DEALING WITH MTB.

The Trial Court erred in granting ADC’s Motion for Summary Judgment because a reasonable jury could examine all the competing evidence presented and determine that the FDIC breached its duty of good faith and fair dealing with MTB. Accordingly, the factual questions of whether the FDIC breached its duty of good faith and fair dealing was not appropriate for summary judgment. In particular, ADC misconstrues MTB’s reliance on *Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991). MTB agrees that the FDIC initially had no obligation to

negotiate a modification of its loan with MTB. Were MTB to argue otherwise, it would run afoul of *Badgett*. However, MTB's position is that since the FDIC agreed to negotiate a modification of the Monroe Loan, and then proceeded to negotiate a modification *pursuant to the language in the loan agreement*, the FDIC thereafter had an obligation to act in good faith towards MTB in the conduct of those negotiations. See *Badgett*, 116 Wn.2d at 569, 807 P.2d 356; CP 377, 404, 432. This is an uncontroversial proposition, as recognized by *Badgett*.

In reviewing ADC's Motion for Summary Judgment on the issue of the FDIC's liability and breach, there are four specific flaws in ADC's argument that the Trial Court erroneously accepted.

1. **ADC Seeks to Deprive MTB of All Reasonable Inferences from the Factual Record.**

The Trial Court erred in granting ADC's Motion for Summary Judgment because it construed facts in favor of ADC instead of MTB. However, it is well settled that when reviewing a motion for summary judgment, the trial court is required to grant the non-moving party all reasonable inferences from the facts:

Facts and all reasonable inferences therefrom must be considered **in the light most favorable to the non-moving party**, and summary judgment should be granted only if a reasonable person would reach but one conclusion.

Int'l Ass'n. Of Firefighters v. Spokane Airports, 146 Wn. 2d 207, 223, 45 P.3d 186 (2002) (emphasis added). Similarly, summary judgment is not proper if “reasonable minds could draw **different conclusions** from the undisputed facts or if all of the facts necessary to determine the issues are not present.” *Schwindt v. Lloyd's of London*, 81 Wn. App. 293, 298, 914 P.2d 119 (1996) (emphasis added). Here, the Trial Court did not grant MTB, as the non-movant, the reasonable inferences to which it was entitled, even though different conclusions can be drawn from the facts presented.

2. **Questions of Fact Exist as to Whether the FDIC Agreed to Modify the MTB Loan in October 2008.**

The evidence that is part of the factual record indicates that there is a material question of fact whether the FDIC agreed in writing to extend the due date for the Monroe Loan. Interpreting the writing relied on by MTB in ADC's favor, ADC has argued that the writing expired by its own terms when payment was not made on October 31, 2008. *See* Resp't Br. at 12-18. However, when the full factual history of the Monroe Loan is

considered, it is entirely reasonable for a jury to conclude that the FDIC agreed to again modify the Monroe Loan in the same manner as it previously had.

The original due date for the Monroe Loan was February 27, 2008. CP 456. On April 9, 2008, after the original due date had passed, MTB and ANB entered into a loan modification agreement that extended the due date to April 27, 2008. CP 470. After this date passed, the FDIC and MTB again agreed to another modification, as before. CP 509. Even after issuing a default notice in December of 2008, the FDIC still wanted to discuss a payoff of the Monroe Loan. CP 271. These facts demonstrate, when viewed in MTB's favor, that a jury could find that the FDIC, through its actions, extended the due date for the Monroe Loan with only the date of final payoff left uncertain. Thus, the Trial Court erred in granting ADC's Motion for Summary Judgment because in order to do so, it denied MTB the reasonable inferences to be drawn from the evidence which points to modification of the Monroe Loan. *Int'l Ass'n. Of Firefighters*, 146 Wn. 2d at 223, 45 P.3d 186.

3. **Questions of Fact Exist as to Whether the FDIC Reneged on Its Agreement to Modify the Monroe Loan.**

Based on the factual record, a reasonable juror could conclude that

the FDIC acted in bad faith when it linked the unrelated Kuna Loan to the Monroe Loan - a blatant attempt to gain leverage in the Kuna Loan lawsuit that was pending in Federal District Court in Idaho. In arguing that the FDIC did not renege on its agreement to modify the Monroe Loan, ADC assumes a factual conclusion, ignoring the opposite conclusions that could be drawn in MTB's favor from all the surrounding facts. *See* Resp't Br. at 19-22.

The facts show that at the same time MTB and the FDIC had agreed to modify the Monroe Loan in the Fall of 2008, MTB filed an Amended Complaint in the litigation on the Kuna Loan on November 10, 2008. CP 299. It was only *after* the filing of this Amended Complaint that the FDIC, through Situs, began to link the Kuna Loan to the Monroe Loan in connection with the discussions about the Closing Date for the Monroe Loan modification. *See* CP 267-269. More specifically, a reasonable jury could conclude that Situs' pretense that it needed to go back to the FDIC to get approval for the loan modification it had already approved was simply that - a pretense. *See* CP 269. This conclusion is even more logical when one considers that immediately after informing MTB that it needed to go back to the FDIC to get approval for something

the FDIC had already approved, Situs then attempted to have MTB give up its rights in its Kuna Loan litigation. *See* CP 414, 417-21. Of particular interest in that regard is Situs' insistence that MTB sign a form waiving its rights in the Kuna Loan even though the FDIC's CR 30(b)(6) witness, Bruce Meacham, testified at deposition that signing such a form was not required by FDIC policy. *See* CP 279, 297-98, 310-14. A jury hearing this testimony could reasonably conclude that the FDIC reneged on its agreement to modify the Monroe loan in order to obtain concessions in the unrelated litigation of the Kuna Loan. This, in turn, would present a further fact question to the jury about whether the FDIC was acting in good faith.

ADC reveals the flaw in its analysis when it complains that "Defendants overstate the record regarding the Kuna loan." Resp't Br. at 19. Of course, the record is what it is and it is up to the jury, not the Trial Court or ADC, to decide whether the record has been overstated or not. The jury could easily determine that Situs, whom ADC does not deny was the FDIC's agent, acted in bad faith toward MTB. From that, the jury could then determine that the FDIC breached its obligations to MTB. Thus, the Trial Court erroneously deprived MTB of the opportunity to

present such matters to the jury.

4. ADC is Liable for the FDIC's Actions.

ADC misstates MTB's arguments about successor liability. The language of Section 2.2 of the Asset Contribution Agreement between the FDIC and its affiliate, ADC, indicates that ADC is assuming the FDIC's liabilities for the Monroe Loan. CP 362. Further, at least two of the criteria required for successor liability are satisfied. See *Cambridge Townhomes v. Pacific Star Roofing*, 166 Wn.2d 475, 482, 209 P.3d 863 (2009). Moreover, focusing on MTB's defenses to the Note rather than its liability under the Note, even if the transfer from FDIC to ADC were a mere transfer of a negotiable instrument under the UCC, ADC's claim on the Note would be similarly subject to all available defenses and claims against FDIC. RCW 62A.3-305(a)(2).

Under the UCC, a holder's right to enforce a note is generally subject to all defenses "that would be available if the person entitled to enforce the instrument [here, ADC] were enforcing a right to payment under a simple contract." *Id.* These defenses are barred only if the holder is a "holder in due course." RCW 62A.3-305(b).

But ADC cannot be a holder in due course. A holder in due course

must take an instrument under certain conditions, which include in relevant part: (a) for value, (b) in good faith, and (c) without notice that any party has a defense described in RCW 62A.3-305(a). RCW 62A.3-302(a)(2). ADC was a new entity specifically created and majority-owned by the FDIC after this litigation commenced, and ADC must be charged with the same knowledge of Defendants' defenses and claims that the FDIC had. Here, ADC took the instrument from the FDIC on December 20, 2011, with full knowledge that the lawsuit had been filed on February 8, 2011, that Defendants had answered and asserted defenses on May 20, 2011, and that this litigation was pending.

C. THE FDIC'S DELAY IN PURSUING CLAIMS REPRESENTED A FAILURE TO MITIGATE ITS DAMAGES.

Ultimately, ADC fails to address a fundamental concept of long-standing under Washington law: **“Equity will not enforce a contract where the result will be harsh and oppressive.”** *In re Arland's Estate*, 131 Wn. 297, 299, 230 P. 157 (1924) (emphasis added). It is for this reason that ADC's reliance on the fact that it is seeking to collect a debt rather than contract damages is unavailing. *See* Resp't Br. at 30-33. The interest it seeks to collect, which is nearly as much as the underlying debt

itself, is a function of the contract between MTB and ANB Bank and is therefore a form of contract damages. As such, the equitable principle articulated above is applicable in this case and should be enforced.

With respect to the delay in bringing an action against MTB, ADC does not recount the factual history correctly. Situs recommended that the FDIC pursue foreclosure in May 2009. CP 295. The FDIC waited until February 2011. CP 524-34. The FDIC's representative, Bruce Meacham, stated that he wanted to pursue settlement. CP 295. However, Situs failed to contact MTB during this lengthy period of time. *See* CP 262.

Moreover, to the extent there is a dispute about whether the FDIC's delay in pursuing foreclosure was due to a settlement offer that was not responded to, such a dispute is material to the issue of mitigation and therefore the Trial Court erred in granting summary judgment on MTB's claim regarding mitigation.

Finally, ADC ignores MTB's argument that distinguishes the outcome in *Farm Credit Bank v. Tucker*, 62 Wn. App. 196 (1991). MTB argued that *Tucker* was different from this case because the *Tucker* Court found no unreasonable delay on the part of the bank, as plaintiff.

Appellant Br. at 23. In contrast, it was the FDIC that delayed foreclosure

unreasonably for 21 months; at a minimum, then, when viewed most favorably to Defendants, a jury could have found that the situation in this case was substantially different than that found in *Tucker*. Accordingly, *Tucker* is not controlling.

II. CONCLUSION

The Trial Court erred in finding that RCW 61.12.120 did not require a dismissal of the loan guarantors. Further, the Trial Court should have denied ADC's Motion for Summary Judgment because there were material issues of fact on the issues of breach and mitigation that, when construed in favor the Defendants, should have gone to the jury.

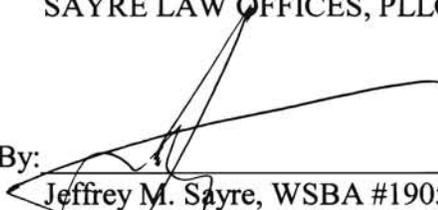
Accordingly, Defendants seek a reversal of the Trial Court's Order in its entirety and a remand to the Trial Court for a resolution of the following issues:

- A reversal of the judgment against the guarantors because the Trial Court failed to dismiss them pursuant to RCW 61.12.120;
- Whether the FDIC and its successor ADC breached their contractual obligations to MTB;
- What amount the interest award to ADC, if any, should be reduced by because of the failure on the part of the FDIC to timely bring an action for foreclosure; and
- An award of attorney's fees as provided for in RAP 18.1.

DATED this 16TH day of September, 2013.

Respectively submitted,

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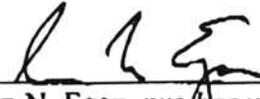
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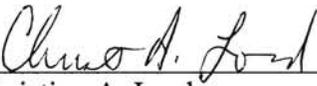
GR 17(a)(2) DECLARATION OF
RECEIPT OF FACSIMILE FOR
FILING

I, the undersigned, hereby declare that I received the attached page 15 of the Reply Brief of Appellants by facsimile. I have examined said document, determined that it consists of 3 pages including this declaration pages, and said document is complete and legible.

GR 17(a)(2) DECLARATION OF RECEIPT
OF FACSIMILE FOR FILING- 1

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 16th day of September, 2013, at Seattle, Washington.



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GR 17(a)(2) DECLARATION OF RECEIPT
OF FACSIMILE FOR FILING- 2

CERTIFICATE OF MAILING

I certify that on September 16, 2013, I sent via email, and mailed, postage prepaid, a copy of the foregoing Reply Brief of Appellants to:

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