

71458-9-1

THE COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

THE HEIRS OR DEVISEES OF ALAN E. JAMES, DECEASED, BY
AND THROUGH CAROLANNE STEINBACH, PERSONAL
REPRESENTATIVE, *Appellant (s)*,

v.

BANK OF AMERICA, *Respondent*.

OCT 22 11:15
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

BRIEF OF APPELLANT(S)

N. Brian Hallaq, WSBA #29621
Jan Gossing, WSBA # 31559
BTA Lawgroup, PLLC
Attorney for Appellant(s)
31811 Pacific Hwy. S., Suite B-101
Federal Way, WA 98003
(253) 444-5660

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

A. INTRODUCTION.....4

B. ASSIGNMENTS OF ERROR.....5

C. STATEMENT OF THE CASE.....5

D. ARGUMENT.....7

Standard of Review.....7

Procedure for reviewing claims under RCW 61.24.080(3).....8

1. BANK OF AMERICA’S DEED OF TRUST CANNOT ENCUMBER THE PROPERTY IN QUESTION AS IT DOES NOT COMPLY WITH THE JOINDER REQUIREMENTS OF RCW 26.16.030.....9

E. CONCLUSION.....14

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

<u>Adams v. Black</u> , 6 Wash. 528, 33 P. 1074.....	9,10
<u>Campbell v. Sandy</u> , 190 Wash. 528; 69 P.2d 808 (Wash. 1937).....	9,10
<u>Cerrillo v. Esparza</u> , 158 Wn.2d 194, 199, 142 P.3d 155 (2006).....	8
<u>Dane v. Daniel</u> , 23 Wash. 379, 63 P. 268 (1900).....	9,10
<u>Folsom v. Burger King</u> , 135 Wn.2d 658, 663, 958 P.2d 301 (1998).....	8
<u>In the Matter of the Trustee's Sale of the Real Property of Willard H. Brown et al.</u> , 161 Wn. App. 412; 250 P.3d 134 (2011).....	4,5
<u>Sunnyside Valley Irrigation Dist. v. Dickie</u> , 149 Wn.2d 873, 880, 73 P.3d 369 (2003).....	7
<u>Wilson v. Henkle</u> , 45 Wn. App. 162; 724 P.2d 1069 (1986).....	7,8

Constitutional Provisions

(None)

Statutes

RCW 6.13.060.....	9,10,13
RCW 26.16.030.....	8,10,11,13
RCW 26.16.030(3).....	9
RCW 61.24.....	6,10,11
RCW 61.24.080.....	6
RCW 61.24.080(3).....	4,8,10,13, 14

Regulations and Rules

(None)

Other Authorities

(None)

A. INTRODUCTION

This case centers on the application of RCW 61.24.080(3). RCW 61.24.080(3) is the statute that governs the disposition of surplus funds following a non-judicial foreclosure (i.e. the bid at the foreclosure was greater than the amount necessary to satisfy the foreclosing promissory note creating surplus funds which must be allocated to an appropriate interest holder). Washington's surplus funds statute is an intellectually elegant statute, in that it treats the competing claims to the surplus funds in the same priority as they would have existed against the property prior to the foreclosure. Therefore, the various claimants' claims to the surplus funds are prioritized in terms of the property rights that they possessed in the property prior to the foreclosure. Those property rights could be consensual liens, such as deeds of trust, statutory liens, such as materialman's liens, possessory interests, such as the owner's fee simple, or non-consensual liens, such as a judgment lien.

The surplus funds statute would have the trial court judge imagine that the various claimants were exercising their own rights and remedies as against the property, and prioritize the claims to the surplus funds in terms of which property right would be superior to the other.

At the same time, RCW 61.24.080(3) does not operate in a vacuum. The statute is designed to work in tandem with other statutes related to the foreclosure of real property pursuant to Washington's Deed of Trust Act.

See, In the Matter of the Trustee's Sale of the Real Property of Willard H. Brown et al., 161 Wn. App. 412, 250 P.3d 134 (2011).

B. ASSIGNMENTS OF ERROR

Assignment of Error

No. 1 “The court erred in failing to determine whether the lien created by Bank of America’s deed of trust is statutorily invalid.”

No. 2 “The court erred by determining that Mrs. James’ homestead rights were extinguished when she died and the Estate of Mr. James does not have legal standing to assert her rights or defenses.”

No. 3 “The court erred in basing it’s ruling on whether Mrs. James homestead rights applied (or rather were extinguished) in the instant case instead of determining that a homestead cannot be encumbered by deed of trust unless executed or acknowledged by both, Mr. and Mrs. James, pursuant to RCW 26.16.030.”

Issue Pertaining to Assignment of Error

No. 1 The sole issue in this case is whether Bank of America holds a valid enforceable deed of trust or an unsecured claim without any associated enforceable lien.

No. 2 Mrs. James’ homestead rights are immaterial in the instant case, as the legal issue in this case centers on whether the Bank of America’s deed of trust is valid.

No. 3 RCW 26.16.030 should be the applicable statute in determining whether Bank of America’s deed of trust was valid instead of the homestead statute contained in RCW 6.13.

C. STATEMENT OF THE CASE

On the date of the foreclosure the Estate of Alan James was the owner of real property described as:

Lot 8, Kruse Addition, according to the Plat thereof recorded in Volume 65 of Plats, Page 33, Records of King County, Washington

Commonly known as:

2139 SW 317th Place
Federal Way, WA 98023

Tax Parcel ID No.: 394550008004

(*hereinafter* "property"). CP 40-42, 122-124. The personal representative of the Estate of James Through is Carolanne Steinbach. CP 118-121. There were two recorded deeds of trust against the property.

On June 28, 2013, Northwest Trustee Services, Inc. performed a trustee's sale on the property pursuant to the provisions for a non-judicial foreclosure contained in RCW 61.24 on the senior lien. CP 40-42, 122-124.

The sale yielded funds in excess of those necessary to satisfy the obligation owed to the primary lienholder, and the foreclosing trustee, pursuant to RCW 61.24.080 deposited the surplus funds into the court registry of the King County Superior Court. *Id.* The funds were deposited on August 14, 2013. *Id.*

Bank of America held the second (junior lien) deed of trust recorded against the property. CP 135-183. The property was originally owned by James and Dorathy James. CP 40-42, 122-124. The junior deed of trust, recorded by Bank of America, was signed on November 29, 2006 by Alan James, only (See Trustee Sale Guarantee attached to Notice of Deposit). CP 135-183. The deed of trust was not acknowledged or signed by Dorathy Alan, despite the fact that they were married. CP 40-42, 122-

124, 135-183. In January 2007, Dorathy James died and Alan James commenced probate proceedings. CP 40-42, 118-121, 122-124. Bank of America did not bring a claim against the Estate of Dorathy James. *Id.* On September 6, 2007, (almost 10 months after the signing of the deed of trust), Bank of America recorded its second deed of trust. *Id.* On October 10, 2007, Alan James recorded a Personal Representative's Deed to transfer title in the instant property solely to his name. *Id.*

When this matter was heard before the trial court, the parties argued the matter before Judge Spearman on November 27, 2013. On December 5, 2013, Judge Spearman ruled in favor of Bank of America holding that "Mrs. James' homestead rights were extinguished when she died and the Estate of Mr. James does not have legal standing to assert her rights or defenses." CP 106, 263-265.

The Appellant moved for reconsideration, which was similarly denied on December 19, 2013. CP 289-290. The instant appeal ensued.

D. ARGUMENT

Standard of Review:

This court is reviewing the propriety of an order disbursing surplus funds granted under RCW 61.24.080(3). Such matters are generally reviewed under an abuse of discretion standard. *See, Wilson v. Henkle*, 45 Wn. App. 162, 724 P.2d 1069 (1986). The trial court has broad discretion in

determining the priorities of various lien claimants. Wilson, 45 App. 162 (1986).

The standard of review for legal questions and statutory interpretation, however, is de novo and in this case, there is no dispute as to the facts, but rather the application of the law to these facts. *See*, Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), Cerrillo v. Esparza, 158 Wn.2d 194, 199, 142 P.3d 155 (2006).

Procedure for reviewing claims under RCW 61.24.080(3):

RCW 61.24.080(3) provides for the procedure for adjudicating claims related to surplus funds resulting from a non-judicial foreclosure. In ascertaining the relative priorities of competing claimants, RCW 61.24.080(3) provides in relevant part that: “[i]nterests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property.” RCW 61.24.080(3).

Consequently, the first analysis that must be performed is whether or not the potential claimant held a valid property interest in the property that was foreclosed. In the case of lien claimants, that analysis requires the court to determine whether the lien was statutorily perfected. Generally, the determination of the relative priorities under RCW 61.24.080(3) is within

the discretion of the Superior Court judge. *See, Wilson*, 45 Wn. App. 162 (1986).

1. BANK OF AMERICA'S DEED OF TRUST CANNOT ENCUMBER THE PROPERTY IN QUESTION AS IT DOES NOT COMPLY WITH THE JOINDER REQUIREMENTS OF RCW 26.16.030

Washington State law is quite clear on the subject of community property. Unless the property was acquired before the marriage, or via enumerated exceptions such as gift, bequest, devise, decent, or inheritance, then all real property acquired during the marriage is considered community property. *See, RCW 26.16.030.*

RCW 26.16.030 provides in relevant part that:

Neither person shall sell, convey, **or encumber** the community real property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and **such deed or other instrument must be acknowledged by both spouses or both domestic partners.**

RCW 26.16.030(3) emphasis added.

Similarly, RCW 6.13.060 clearly states:

The homestead of a spouse or domestic partner cannot be conveyed or encumbered **unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both spouses or both domestic partners**, except that either spouse or both or either domestic partner or both jointly may make and execute powers of attorney for the conveyance or encumbrance of the homestead.

RCW 6.13.060 (emphasis added).

When examining the predecessor for Washington's current iteration of the homestead law, the Washington Supreme Court clearly found a mortgage lien to be void if it was not signed or acknowledged by both parties to a marriage:

While the record is somewhat meager, it sufficiently appears that the Sandys had maintained the marital relation within this state. **By exercising reasonable diligence, appellant could have ascertained not only that fact, but also the fact that they had not been divorced.** For Mrs. Sandy was then living with their children within fifteen miles of the place where the mortgage was executed. Instead of making inquiry, appellant was content to accept the word of Sandy that he was "a single man by divorce."

Under the rule of *Dane v. Daniel*, supra, appellant cannot be held to be a bona fide encumbrancer of the property. **His mortgage is invalid, not only as against Mrs. Sandy, but as against respondent, a subsequent encumbrancer.** See *Adams v. Black*, 6 Wash. 528, 33 P. 1074; *Dane v. Daniel*, supra.

Campbell, Appellant, v. Sandy 190 Wash. 528; 69 P.2d 808 (Wash. 1937) (emphasis added).

Unfortunately, there is no case law on point that applies RCW 6.13.060 and 26.16.030 in the context of RCW 61.24. However, the plain meaning of the statute leaves no other conclusion than that a deed of trust against community property is void as a matter of law if both spouses do not join in its execution. Any lien that is void as a matter of law is unperfected, and cannot form the basis of a valid property claim under RCW 61.24.080(3).

Joinder is a pre-requisite to perfecting a deed of trust:

The application of the joinder statute hinges first on the fact whether a property is community property under RCW 26.16.030. Secondly,

RCW 6.13.060 does not allow the encumbrance of a homestead if joinder is not present. The question of whether a property is a homestead has to be made at the time of execution of the document encumbering the community property real estate. The deed of trust was signed on November 29, 2006. Dorathy James died in January 2007. On September 6, 2007 Bank of America recorded the deed of trust. The operative date was the date of execution (November 29, 2006), for which both the husband and wife should have signed in order to perfect the deed of trust. Bank of America raised a novel argument which is that Dorathy James' death (after the execution of the document) negated the requirement for both parties to sign the deed of trust, since her death essentially negates her homestead protections. However, the provisions of RCW 6.13.060 are secondary to those contained in RCW 26.16.030.

In this case, it is quite clear from the record that Dorathy James did not join in acknowledging or signing the deed of trust (while she was alive and when the deed of trust was executed). The property was always held as community property, as the property was purchased while they were married and the property was titled in both of their names. Additionally, the parties were married at the time of the execution of the deed of trust and the parties lived in the property at the time of execution. As Washington's homestead laws apply automatically pursuant to RCW 6.13.080, it is quite clear that the

property was not only community property real estate but also the homestead of both parties at the time of execution. Finally, Dorathy James did not join in the execution or acknowledgment of the deed of trust, thus the deed of trust remained unperfected. Simply recording a defective document does not reform that document. Accordingly, Bank of America's second deed of trust is invalid under the community property statute, as it does not meet the joinder requirement of RCW 26.16.030. Additionally, Bank of America's second deed of trust is also invalid under the homestead statute, as it does not meet the joinder requirement under RCW 6.13.060.

The court erred in focusing on the homestead rights:

The court incorrectly concluded that Mrs. James' death and the extinguishment of her homestead rights would somehow serve to validate Bank of America's deed of trust. In fact, Mrs. James' homestead rights are only of secondary importance as the community property statute alone serves to invalidate the deed of trust. Additionally, Mr. and Mrs. James' homestead rights are really only an issue at the time of the execution of the deed of trust. If the community property in question was a homestead at the time of execution of the deed of trust then the joinder requirement must be observed pursuant to RCW 6.13.060. Mrs. James death in fact foreclosed Bank of America's the opportunity to reform the invalid deed of trust, as the person

required to join in its execution could no longer sign the instrument. What is more, Bank of America failed to reform the document, after Mrs. James passed and Mr. James completed probate proceedings and recorded his personal representative deed. The document was drafted by Bank of America and is the sophisticated party in this transaction, thus it is completely acceptable to hold Bank of America to the full legal standard and construe all terms in favor of Mr. James.

Instead the court should have focused its inquiry on whether the property in question was a) community property and b) whether the joinder requirement in either RCW 26.16.030 and/or RCW 6.13.060 were observed. If the requirements were not observed, then Bank of America was not a proper claimant (i.e. someone having a property interest) under RCW 61.24.080(3).

The court applied the incorrect legal standard in reaching its conclusion. It is clear from the record that the property in question was community property at the time of execution of Bank of America's the deed of trust and that the joinder requirement was not observed. Accordingly, Bank of America's deed of trust cannot serve as a valid encumbrance on the property in question.

It follows then that Bank of America's deed of trust was never a perfected lien and never valid in the first place. Thus it cannot have been eliminated by operation of the foreclosure sale (because it was not

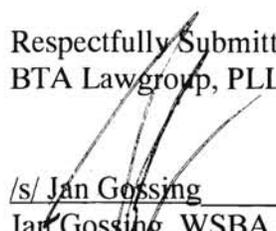
a valid lien) and Bank of America cannot have a claim against the surplus funds. *See*, RCW 61.24.080(3). Alternatively, Bank of America cannot have a claim against the surplus funds as its lien was never properly perfected against the property for lack of joinder. The Bank has failed to obtain a judgment against the estate, assert a claim in the probate case, or take any other action to assert its claim. As it stands, Bank of America is left with an unliquidated, unsecured claim that the bank cannot assert against the surplus funds in question.

E. CONCLUSION

It was an abuse of discretion for the court to rule in favor of Bank of America. Bank of America's deed of trust was statutorily invalid for lack of joinder, thus precluding application of that claim under RCW 61.24.080(3). As such, the Estate of Alan James by and through Carolanne Steinbach (ExPR) respectfully requests that the court overturn the judgment of the King County Superior Court in favor of Bank of America and rule that the Estate has the highest priority claim to the surplus funds pursuant to RCW 61.24.080(3).

Dated this 28th day of October, 2014

Respectfully Submitted by:
BTA Lawgroup, PLLC


/s/ Jan Gossing
Jan Gossing, WSBA #31559
Attorney for Appellants