

No. 71913-1

**COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION I**

MORGAN COURT OWNERS ASSOCIATION,

Respondent,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as TRUSTEE
FOR MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-NC2
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2007-NC2,

Appellant.

Appeal from the Superior Court for King County
Cause No. 13-2-14604-5 KNT

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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I. SUMMARY OF ARGUMENT

This case presents the question of whether equity allows a Homeowners' Association ("HOA") to use its statutory "super lien" status to eliminate a lender's otherwise senior Deed of Trust and take free and clear ownership of a condominium unit ("Unit") worth over \$200,000.00 to satisfy an \$8,818.17 judgment when the outstanding principal amount secured by the Deed of Trust was \$241,037.42, and the HOA had notice of an approved \$210,000.00 short sale of the Unit to a third party.

Washington courts recognize that the "court's equity power transcends the mechanical application of property rules." *Proctor v. Huntington*, 169 Wn.2d 491, 501, 238 P.3d 1117 (2010). Carol Obeng owned a condominium in the Morgan Court Owners Association ("Morgan Court"). Morgan Court obtained a \$6,381.88 default judgment against her for unpaid association fees. Morgan Court foreclosed, credit bidding the debt (a total of \$8,818.17) at the Sheriff's sale. Morgan Court then asked the trial court to quiet title in its favor. By doing so, Morgan Court invoked the trial court's equity jurisdiction. The trial court erred in not using that jurisdiction to avoid the resulting elimination of Appellant's \$243,000.00 Deed of

Trust. This is particularly unfair when Morgan Court sent the predecessor of Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-NC2 Mortgage Pass-Through Certificates, Series 2007-NC2 (“Deutsche Bank”) no notice of the Sheriff’s sale and no notice of possible redemption rights.

Moreover, the day before the Sheriff’s sale, Morgan Court received written notice that a third party was approved to purchase the Unit for \$210,000.00 and a request to delay the Sheriff’s sale to allow that sale to close. Even though that offer would have paid off Morgan Court’s judgment and most of Deutsche Bank’s Deed of Trust, Morgan Court ignored the offer. Internal Morgan Court email reveals the reason it did so was to avoid a “challenge” from the “lenders.” As a result, Morgan Court purchased the Unit at 1/23 of the price the third party was willing to pay and Deutsche Bank got nothing. An HOA should not be allowed to use its “super lien” status to achieve such a windfall at the expense of others. HOAs are granted super lien status to protect their ability to collect association fees, not to purchase condominiums free and clear of liens for pennies on the dollar.

The trial court erred by granting summary judgment without even considering an equitable remedy that would have made Morgan Court whole and preserved Deutsche Bank's lien on the Unit. This Court should reverse the trial court and remand with instructions to allow Deutsche Bank to purchase the Unit from Morgan Court for the amount it paid for the Unit, plus reasonable related costs to be determined by the trial court, or such other equitable relief that makes Morgan Court whole, while preserving Deutsche Bank's lien on the Unit.

II. ASSIGNMENT OF ERROR

The trial court misapplied Washington law by refusing to fashion an equitable remedy that made Morgan Court whole, while preserving Deutsche Bank's Deed of Trust on the Unit, using the rationale that price alone is not sufficient to set aside a Sheriff's sale.

III. STATEMENT OF THE CASE

A. Morgan Court Pays \$8,818.17 for a Condominium Unit with a Tax Assessed Value of \$226,000.00.

This case concerns a condominium located at 10935 SE 187th Lane, Unit 10935, Building F, Renton, King County, Washington 98055 ("Unit"). In 2006, Carol Obeng borrowed \$243,000.00 to purchase the Unit, granting a deed of trust to Deutsche Bank's

predecessor, as security (“Obeng Deed of Trust”). CP 283-303. Mortgage Electronic Registration Systems, Inc. (“MERS”) was the original beneficiary on the Obeng Deed of Trust and later assigned that interest to Deutsche Bank on May 6, 2011. CP 289, 154. As of March 24, 2014, the principal amount owed on the Obeng loan was \$241,037.42. CP 282.

Ms. Obeng subsequently failed to pay monthly HOA assessments due to Morgan Court. CP 126-27. On July 28, 2008, Morgan Court filed *Morgan Court Owners Association v. Obeng*, Case No. 08-2-25516-6KNT (“*Morgan I*”) to foreclose on its condominium association assessment lien of approximately \$4,109.71 against Ms. Obeng pursuant to the Washington Condominium Act, RCW Ch. 64.34. *See, e.g.*, CP 126 ¶ 6, 127 ¶ 8, 128 ¶ 3. Morgan Court also named Deutsche Bank’s predecessor, MERS and CitiFinancial, Inc., as defendants, alleging those entities had an interest in the real property and requesting a declaration that Morgan Court’s lien be declared a valid first lien upon the land and premises. *See* CP 125-26 ¶ 2, 129 ¶ 5. Morgan Court served MERS with the Summons, Complaint, and Order Setting Civil Case Schedule. CP 133-34.

On February 10, 2009, Morgan Court obtained a Default Judgment, Order and Foreclosure Decree *ex parte* in *Morgan I*. CP 135-39. The judgment total was \$6,381.88 and listed only Carol Obeng and John Doe Obeng as “Judgment Debtors.” CP 135.

On May 5, 2009, Ms. Obeng filed for Chapter 13 bankruptcy. CP 356. On May 28, 2009, Morgan Court moved for relief from the automatic bankruptcy stay so it could proceed with a Sheriff’s sale of the Unit. CP 381-84. On June 23, 2009, the bankruptcy court granted Morgan Court’s motion. CP 387-89.

On October 14, 2009, an Order of Sale was issued directing the Sheriff to sell the Unit. CP 140-41. On or about October 23, 2009, the King County Sheriff issued a Sheriff’s Notice to Judgment Debtor of Sale of Real Property (“Notice of Sale”) setting the sale of the Unit for December 4, 2009. CP 144-45. Morgan Court’s counsel sent the Notice of Sale to Carol Obeng and John Doe Obeng, but did not send it to MERS, Deutsche Bank, or CitiFinancial. CP 142-43.

Eleven days before the Sheriff’s sale, Morgan Court’s counsel sent it an email noting the Unit’s 2008 tax assessed value (\$226,000.00) and the two existing deeds of trust on the property

(totaling \$258,646.00). CP 275.¹ The email states, “Because the lenders didn’t respond to the Association’s foreclosure lawsuit, it’s our position that the Association’s lien is prior to the lender’s interest in the property. However, the priority of the Association’s lien could be subject to challenge.” CP 275 (emphasis added).

Despite the information regarding the tax assessed value and the existing deeds of trust, Morgan Court’s counsel recommended Morgan Court bid the outstanding amount of its judgment, “approximately \$9,000,” at the Sheriff’s sale, apparently without any attempt to collect the lien amount from the lender. CP 275.

In late November 2009, a realtor informed Morgan Court a sale of the Unit was “in closing.” CP 274. Morgan Court considered delaying the December 4, 2009 Sheriff’s sale to January 8, 2010, but its attorney advised against that. CP 274. He argued the Sheriff’s sale would “not impact the owner’s ability to sell the Unit” and “[t]here would be additional costs of approximately \$50 for continuing the sale [and Morgan Court] would be responsible for any

¹ Joann Doty corresponded with Morgan Court’s counsel on Morgan Court’s behalf. *See, e.g.*, CP 274. Morgan Court has not raised any attorney-client privilege concerns about the correspondence with its counsel.

legal fees associated with extending the writ.” CP 274. Morgan Court proceeded with the December 4, 2009 Sheriff’s sale. CP 273.

On December 3, 2009, one day before the Sheriff’s sale, Ms. Obeng’s attorney sent Morgan Court notice that a third party had agreed to purchase the Unit for \$210,000.00. CP 255-57. She requested that the Sheriff’s sale be postponed to allow that short sale to close. CP 255-72. Ms. Obeng’s notice included an executed purchase and sale agreement (CP 259-71), a loan pre-approval letter for the purchaser (CP 272), and a lender’s approval of short sale (CP 257). The lender’s approval of short sale required that the sale close on or before December 31, 2009, less than a month after the scheduled sale. CP 257. Had Morgan Court agreed to wait for that sale, it would have been paid in full and approximately \$200,000.00 would have been made available to creditors like Deutsche Bank.

Morgan Court’s counsel nevertheless “strongly recommend[ed]” against postponing the Sheriff’s sale. CP 255. His rationale for recommending against postponing the sale was in part to prevent interference from the lenders:

[B]ecause it’s our position that the Association’s lien is in first position, the Association’s best chance for making a full recovery is from the lenders, not the short sale. Continuing the sale

could have provided lenders with additional opportunities to challenge the underlying proceedings and could have impacted the Association's ability to collect post-judgment assessments.

CP 254 (emphasis added); *see also* CP 275 (advising against delaying the sale and noting that “the priority of the Association’s lien could be subject to challenge” by the lenders). Completing the sale was important for eliminating the lenders’ interest and preventing a lender challenge because Morgan Court’s position is that the lenders have no redemption rights following the Sheriff’s sale. CP 331 (citing *Summerhill Village Homeowners Ass’n v. Roughley*, 166 Wn. App. 625, 289 P.3d 645, 648-49 (2012)).²

² The Washington State Supreme Court recently overturned the *Summerhill* case in *BAC Home Loans Servicing, LP v. Fulbright*, 180 Wn.2d 754, 328 P.3d 895 (2014). In that case, Morgan Court’s appellate counsel, Michael Fulbright, purchased a condominium unit for \$14,481.83 at a Sheriff’s sale resulting from the unit owner’s failure to pay association assessments. 328 P.3d at 896. Bank of America was the beneficiary on a deed of trust on the unit, which secured a \$277,000.00 loan to the unit owner. *Id.* There, Mr. Fulbright objected to Bank of America’s attempt to redeem the unit claiming that the Bank was not a “qualified redemptioner.” *Id.* The State Supreme Court rejected Mr. Fulbright’s attempt to obtain free and clear title to a condominium he purchased for \$14,481.83, and reversed the trial court’s order quieting title in his favor and the Court of Appeals’ order affirming. *Id.* at 901.

On December 4, 2009, Morgan Court purchased the Unit for an \$8,818.17 credit bid at a Sheriff's sale. CP 58-59, 148-150. The Sheriff's sale resulted from the \$6,381.88 default judgment that Morgan Court obtained for unpaid association fees and costs. CP 135-39, 140-41.

By refusing to delay the Sheriff's sale, Morgan Court was able to purchase the Unit for \$201,181.83 less than the \$210,000.00 a third party had agreed to pay for the Unit. *Compare* CP 146 *with* CP 259.

The Sheriff's sale occurred on December 4, 2009, so the redemption period under RCW 6.23.020(1)(b) expired on December 4, 2010. On January 18, 2011, the Sheriff issued a Sheriff's Deed to Real Property conveying the Unit to Morgan Court. CP 152.

Since the Sheriff's sale, Morgan Court has received over \$12,000.00 renting the Unit and continues to collect monthly rental income of \$1,165.50. CP 186, 178-82. Accordingly, the rental income alone from the Unit has satisfied the "approximately \$9,000" outstanding judgment amount.

B. Morgan Court's Suit to Quiet Title.

On March 26, 2013, more than two years after issuance of the Sheriff's Deed to Real Property, Morgan Court filed this case to quiet title in the Unit ("*Morgan II*"), naming MERS³ and Deutsche Bank as defendants. CP 1-4. The Complaint sought an order awarding Morgan Court title to the Unit, free and clear of Deutsche Bank's interest, for its \$8,818.17 credit bid at the December 2009 Sheriff's sale. CP 1-4.

On February 14, 2014, Morgan Court moved for summary judgment asking the trial court to eliminate Deutsche Bank's Deed of Trust (Obeng Deed of Trust) and require Deutsche Bank to reconvey the deed of trust on the Unit. CP 106-115. Morgan Court argued summary judgment was appropriate because the February 10, 2009 Default Judgment, Order and Foreclosure Decree was binding on Deutsche Bank and eliminated the Obeng Deed of Trust; the December 4, 2009 Sheriff's sale was confirmed in accordance with RCW 6.21.110; and the statutory redemption period expired without any redemption, resulting in the issuance of the February 16, 2011

³ MERS was subsequently dismissed based on its assignment to Deutsche Bank. CP 76.

Sheriff's deed (purportedly) extinguishing any interest Deutsche Bank had in the Unit. CP 112-13.

Deutsche Bank opposed the motion, arguing that quiet title claims are equitable in nature, its equitable interest in the unit was superior to Morgan Court's interest, and the trial court should use its equitable power to fashion an equitable remedy that made Morgan Court whole without extinguishing Deutsche Bank's Deed of Trust. CP 311-12.

Deutsche Bank also moved to amend its Answer to challenge the constitutionality of the notice provisions of RCW 6.21.030(1) and RCW 6.23.030(1). CP 316-18, 321-23. Deutsche Bank challenged the provisions because they only require notice to the "judgment debtor" allowing the Sheriff's sale to proceed and the redemption period to expire without any notice to other record lienholders.⁴ CP 317-18. Notwithstanding the fact that the *Morgan I* Complaint and subsequent Sheriff's sale intended to foreclose and extinguish the Deutsche Bank Deed of Trust, Morgan Court did not provide

⁴ Deutsche Bank has elected to not pursue its appeal of the denial of its Motion to Amend.

Deutsche Bank with any notice of the Sheriff's sale or the redemption rights. CP 142-43.

The parties argued their respective motions on April 4, 2014. CP 402. Following arguments, the Court issued its oral ruling denying Deutsche Bank's Motion to Amend and granting Morgan Court's Motion for Summary Judgment quieting title in its favor. RP 28-33. The trial court found that service of the *Morgan I* complaint provided adequate notice to Deutsche Bank's predecessor-in-interest, MERS. RP 29-31. The trial court also rejected Deutsche Bank's laches argument, finding that Morgan Court followed the statutory redemption waiting requirements and did not unreasonably delay in pursuing the quiet title action. RP 31-32.

Finally, the trial court determined that quieting title in Morgan Court was the appropriate equitable remedy because "defendants failed to protect the deed of trust before this sheriff's sale -- and that the deed of trust was eliminated because of defendant's inaction to protect it" and the conclusion that "the sole issue of the amount of the sale by itself is not -- is not the reason to set aside a foreclosure." RP 31-33.

Following argument, the trial court entered its written order granting Morgan Court's motion for summary judgment, ordering title quieted in Morgan Court's favor, extinguishing Deutsche Bank's Deed of Trust, and ordering Deutsche Bank to reconvey the Deed of Trust. CP 397-401. The summary judgment order provided no additional analysis supporting the trial court's decision. CP 397-401. The trial court also denied Deutsche Bank's motion to amend. CP 395. This appeal followed. CP 403-13.

IV. LEGAL ARGUMENT

By filing suit to quiet title, Morgan Court invoked the court's equitable jurisdiction and submitted to the court's exercise of its equitable powers. An action to quiet title is an equitable action. *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001).

The trial court quieted title in favor of Morgan Court based on the premise that "the sole issue of the amount of the sale by itself is not -- is not the reason to set aside a foreclosure." The court, however, failed to consider whether additional circumstances warranted such equitable relief. RP 31-32. Based on the equities in this case and the case law on which the trial court relied, the trial court should have ordered Deutsche Bank to pay Morgan Court the

amount required to make it whole in return for Morgan Court's interest in the Unit. This would make Morgan Court whole on its lien, preserve Deutsche Bank's lien on the Unit, and serve equity.

A. Standard of Review.

The trial court's authority to fashion an equitable remedy is generally reviewed for an abuse of discretion. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). However, in *Ray v. King County*, this Court applied the "usual" summary judgment standards in reviewing a summary judgment quieting title; namely, "whether there are genuine issues of material fact and the moving party was entitled to summary judgment as a matter of law." 120 Wn. App. 564, 571, 86 P.3d 183 (2004). The standard from *Ray* should apply here because the trial court failed to fashion an equitable remedy or even consider equitable alternatives to quieting title in Morgan Court. Regardless of which standard is applied, the trial court committed reversible error through its improper and incomplete analysis regarding setting aside a foreclosure sale and abused its discretion in failing to fashion an equitable remedy based on the circumstances.

B. The Trial Court's Incomplete Application of Washington Law Warrants Reversal.

Quieting title in real estate is an equitable remedy that requires equity be done. *See Malo v. Anderson*, 62 Wn.2d 813, 817-18 (1963) (citing 2 Pomeroy's Equity Jurisprudence (5th ed.) § 385, p. 52)). The “court’s equity power transcends the mechanical application of property rules.” *Proctor*, 169 Wn.2d at 501, 238 P.3d 1117. Equity “requires the court to distribute benefits equally between claimants with equal rights of participation.” *Michelson Bros., Inc. v. Baderman*, 4 Wn. App. 625, 628, 483 P.2d 859 (1971) (citing *State ex rel. National Bank of Commerce v. Stacy*, 198 Wash. 708, 90 P.2d 264 (1939); 2 J. Pomeroy, A Treatise on Equity Jurisprudence § 406 (5th ed. 1941)).

The courts are authorized to “step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.” *Proctor*, 169 Wn.2d at 500, 238 P.3d 1117 (quoting *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800, 450 P.2d 815 (1969)). For example, the court has the power to redraw boundary lines and order the encroacher to pay damages rather than removing the encroaching buildings when the cost of removal greatly exceeds

the value of the encroached property. *Proctor*, 169 Wn.2d at 504, 238 P.3d 1117.

Likewise, the court's equity power allows it to set aside an otherwise proper Sheriff's sale if the price paid is grossly inadequate and there are additional circumstances indicating unfairness. *Casa del Rey v. Hart*, 110 Wn.2d 65, 71-72, 750 P.2d 261 (1988) (listing cases); *Miebach v. Colasurdo*, 102 Wn.2d 170, 174, 685 P.2d 1074 (1984). The fact that the party challenging the sale received notice of the underlying action and failed to act to preserve its rights prior to the sale or during the redemption period does not bar the court from invalidating the sale in the proper circumstances. *Miebach*, 102 Wn.2d at 174-75, 685 P.2d 1074.

Here, the extent of the trial court's equity analysis was its conclusion that "Also I -- defense position that there is this proportionality in -- and that this is a windfall, that issue has been brought before the courts in other cases and the sole issue of the amount of sale by itself is not -- is not the reason to set aside a foreclosure." RP 32-33. In reaching this conclusion, the trial court failed to apply the entire rule, because it failed to consider whether

there were additional circumstances indicating unfairness that warranted an equitable alternative to quieting title in Morgan Court.

As stated in *Miebach v. Colasurdo*, “Generally, ‘mere inadequacy of price, unless so gross as to shock the conscience, it is not enough to set aside a judicial sale...’ However, ‘when there is great inadequacy, slight circumstances indicating unfairness will be sufficient to justify a decree setting the sale aside’ on equitable grounds.” *Miebach*, 102 Wn.2d at 177-78, 685 P.2d 1074 (emphasis added) (citations omitted). The trial court made no determination regarding whether the inadequacy of the price here, shocked the conscience, or whether there were “slight circumstances indicating unfairness sufficient to justify” setting the sale aside on equitable grounds.

While this case does not involve the appeal of a court order confirming or refusing to confirm a Sheriff’s sale, Morgan Court and the trial court cited at least part of the rule from the cases analyzing when it is proper to set aside a Sheriff’s sale. Morgan Court objected to Deutsche Bank’s request for an equitable remedy based on the premise that “inadequate price alone is not a sufficient basis to set aside a judicial foreclosure sale.” CP 331 (citing *Home Owners’*

Loan Corp. v. Callahan, 2 Wn.2d 604, 98 P.2d 810 (1937); *Washington Mut. Sav. Ass'n v. Taylor*, 190 Wash 535, 69 P.2d 810 (1937); *Washington Mut. Sav. Bank v. Horn*, 186 Wash. 75, 56 P.2d 995 (1936)). The trial court adopted this same reasoning in granting summary judgment to Morgan Court. RP 32-33.

Washington cases analyzing whether to set aside Sheriff's sales illustrate circumstances in which a trial court should use its authority to fashion an equitable remedy. Like a court considering a quiet title action, the court's discretion to confirm or set aside a Sheriff's sale rises from its authority to apply equity. *See Wash. Mut. Sav. Bank v. Horn*, 186 Wash. 75, 77, 56 P.2d 995 (1936) (citing *Mellen v. Edwards*, 179 Wash. 272, 37 P.2d 203, 207 (1934)). Furthermore, Washington precedent regarding setting aside a judicial sale demonstrates that quieting title in favor of Morgan Court contradicted equity.

In *Miebach*, like here, the appellants sought reversal of a trial court decision that quieted title in real property following a Sheriff's sale. 102 Wn.2d at 171-72, 685 P.2d 1074. There, the appellant admitted notice of the Sheriff's sale, but failed to attend the sale and did not attempt to redeem the property during the statutory

redemption period. 102 Wn.2d at 173. The *Miebach* court's analysis demonstrates that the trial court erred by failing to fashion an equitable remedy.

1. Morgan Court was Not a Bona Fide Purchaser.

The *Miebach* case establishes that a purchaser with notice of defendant's claim is not a bona fide purchaser. 102 Wn.2d at 175-76, 685 P.2d 1074. Without "bona fide" status, the application of equitable principles is even more compelling. See *Malo*, 62 Wn.2d at 815, 38 P.2d 867 (quoting *Thisius v. Sealander*, 26 Wn.2d 810, 818, 175 P.2d 619 (1946)).

The plaintiff in *Miebach* was a successor-in-interest to the purchaser at the Sheriff's sale. 102 Wn.2d at 173-74, 685 P.2d 1074. The purchaser had notice of the defendants' claim to the property. 102 Wn.2d at 176-77, 685 P.2d 1074. Accordingly, "there [was] no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such enforcement would be inequitable." *Miebach*, 102 Wn.2d at 177, 685 P.2d 1074 (quoting *Malo*, 62 Wn.2d at 815, 384 P.2d 867).

Likewise, Morgan Court was not a bona fide purchaser because it was not a purchaser for value and had prior notice of

Deutsche Bank's predecessor's interest in the Unit. Under Washington law, "[a] bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration." *Casa del Rey*, 110 Wn.2d at 70, 750 P.2d 261 (quoting *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960)). Morgan Court knew that the purchase price they paid was only a small fraction of the value of the Unit. Eleven days before the sale, its counsel informed it that the 2008 tax assessed value was \$226,000.00, yet it only paid \$8,818.17 for what it claims to be free and clear title. *See Casa del Rey*, 110 Wn.2d at 71, 750 P.2d 261 (denying bona fide purchaser status based in part on the purchasers' knowledge that the price paid was a small fraction of the value).

Furthermore, the fact that Morgan Court named Deutsche Bank's predecessor-in-interest in *Morgan Court I* shows Morgan Court knew of the lender's interest. CP 125-29. Yet Morgan Court provided MERS no notice of the Sheriff's sale and declined to delay the Sheriff's sale in large part to avoid "provid[ing] lenders with additional opportunities to challenge the underlying proceedings." CP at 254. In addition, Morgan Court knew that the amount it paid at

the Sheriff's sale was a small fraction of the \$210,000.00 signed offer for the Unit that was provided to Morgan Court just the day prior to the Sheriff's sale. CP 255-72.

Since Morgan Court was not a bona fide purchaser for value, “[t]here is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.” *Malo*, 62 Wn.2d at 815, 38 P.2d 867 (quoting *Thisius*, 26 Wn.2d at 818, 175 P.2d 619).

2. The Price Morgan Court Paid was Grossly Inadequate.

The *Miebach* opinion also establishes that a “grossly inadequate” purchase price is a factor in determining whether a Sheriff's sale should be set aside. The *Miebach* court found that the \$1,340.02 purchase price was grossly inadequate based on the home's \$106,000.00 fair market value. 102 Wn.2d at 174,178-79, 685 P.2d 1074. The grossly inadequate sales price combined with the creditor's failure to satisfy the judgment out of the debtor's personal property, warranted setting aside the Sheriff's sale. 102 Wn.2d at 179, 685 P.2d 1074. They did so despite the fact that the judgment creditor had complied with the statutory notice requirements. 102 Wn.2d at 179, 685 P.2d 1074. The creditor's compliance with

the Sheriff's sale and redemption notice requirements was "not enough" to overcome the "circumstances of inequity." 102 Wn.2d at 179, 685 P.2d 1074.

In *Casa del Rey v. Hart*, the court found that the judicial sale purchase price of \$14,125.85, or 4.8% of the \$290,000.00 total value, was "grossly inadequate." 110 Wn.2d at 72, 750 P.2d 261. The grossly inadequate sales price and the judgment creditor's failure to reasonably attempt to collect the judgment out of the judgment debtor's personal property warranted invalidating the Sheriff's sale. *Id.* at 73-74, 750 P.2d 261.⁵

Here, Morgan Court purchased the Unit for \$8,818.17, or 4.2% of the \$210,000.00 purchase price offered by a third party days before the Sheriff's sale, and 3.9% of the 2008 tax assessed value of \$226,000.00. CP 257, 275. Based on *Casa del Rey*, the purchase price here was "grossly inadequate" and Morgan Court was not a bona fide purchaser. 110 Wn.2d at 72, 750 P.2d 261. Therefore,

⁵ In both *Miebach* and *Casa del Rey*, the failure to attempt to collect the judgment out of the judgment debtor's personal property satisfied the circumstances-indicating-unfairness prong, but neither case indicated that was the only circumstance indicating unfairness that would support overturning a Sheriff's sale. *Miebach*, 102 Wn.2d at 179, 685 P.2d 1074; *Casa del Rey*, 110 Wn.2d at 70-72, 750 P.2d 261.

Deutsche Bank need only demonstrate “slight circumstances indicating unfairness” to justify an equitable remedy that disregards the judicial sale. *Id.* at 71-72, 750 P.2d 261.

3. Circumstances Indicating Unfairness Justify an Equitable Remedy Here.

Although Morgan Court initially attempted to satisfy the judgment out of Ms. Obeng’s personal property, there are multiple circumstances indicating unfairness here that justify an equitable alternative to quieting title in Morgan Court’s favor. Morgan Court was aware of, and intended to foreclose, Deutsche Bank’s interest in the Unit. To apparently ensure that neither Deutsche Bank nor its predecessor challenged its lien position, Morgan Court sent notice of the Sheriff’s sale to only the judgment debtor. While this tactic may technically comply with the statute, this approach demonstrates that Morgan Court’s intent was to purchase and own the Unit at a small fraction of its value, not to just collect its \$6,381.88 judgment.

Likewise, Morgan Court was aware of a private third-party buyer willing to purchase the Unit for \$210,000.00. The proceeds from that sale would have allowed Deutsche Bank to recover some of the amount secured by its deed of trust on the property after Morgan Court was paid. Nonetheless, Morgan Court refused to delay the

Sheriff's sale one month to allow that sale to go through, in order to avoid lender challenges to its super lien status and to purchase the Unit for a small fraction of the \$226,000.00 2008 tax assessed value and the \$210,000.00 a private third party was willing to pay for the Unit.

Morgan Court's use of its super lien status to purchase the Unit for 3.9% of the tax assessed value is an additional circumstance indicating unfairness. Condominium associations, such as Morgan Court, enjoy a "super lien" priority exception to Washington's recording act, which grants lien priority to the deed or interest "first recorded." *See BAC Home Loans Serv., LP*, 180 Wn.2d 754, 328 P.3d at 897-98 (citing RCW 65.08.070 and RCW 64.34.364). The Condominium Act grants associations priority over a recorded mortgage on the condominium unit "to the extent of assessments for common expenses, ... which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee..." RCW 64.34.364(3). The purpose of the super lien status is to protect associations for up to six months of unpaid association fees, not to

provide a vehicle for associations to purchase condominiums free and clear for the amount of unpaid association fees.

It is this super lien priority that allowed Morgan Court to take its lien for \$4,109.71 in unpaid assessments, push the Sheriff's sale of the Unit, purchase the Unit for a fraction of its value, and to extinguish Deutsche Bank's Deed of Trust securing a \$243,000.00 loan. This same super lien status provided Morgan Court an unfair advantage and should be considered by the court in its equity analysis. Again the super lien status was not intended to provide a mechanism for an HOA to buy a condominium for the amount of the lien. *See Summerhill Village Homeowners Ass'n*, 289 P.3d 645, 648 (noting "practical effect" of super lien status would likely be the lender's payment of the outstanding assessments rather than foreclosure by the HOA) (citing the official comments to RCW 64.34.364) *overruled on other grounds by BAC Home Loans Servicing, LP*, 328 P.3d 895.

Morgan Court took advantage of its super lien status and the lack of a Sheriff's sale statutory notice requirement to purchase the Unit at a fraction of the value while extinguishing Deutsche Bank's Deed of Trust. Morgan Court showed no intent to simply collect the lien amount; it wanted the Unit for pennies on the dollar.

4. Deutsche Bank is Not Barred from Equity by Not Having “Saved” the Deed of Trust Before the Sheriff’s Sale.

Contrary to the trial court’s suggestion, Deutsche Bank’s alleged “inaction” does not preclude it from obtaining equitable relief. The Washington Supreme Court has applied equity even where the party had notice and failed to act. The *Miebach* court set aside the Sheriff’s sale based on equity despite the fact that the parties had complied with the statutory notice requirements. 102 Wn.2d at 179, 685 P.2d 1074. There, the creditor’s compliance with the Sheriff’s sale and redemption notice requirements was “not enough” to overcome the “circumstances of inequity.” 102 Wn.2d at 179, 685 P.2d 1074. Likewise, the fact that Deutsche Bank, or its predecessor, did not “protect” its deed prior to the Sheriff’s sale or timely exercise its statutory redemption right does not disqualify it from equitable relief. *Id.* Again, Morgan Court provided no notice to Deutsche Bank of the Sheriff’s sale or the right to redeem the Unit and refused to delay the Sheriff’s sale to avoid interference from the “lenders.”

5. The Cases Cited by Morgan Court Do Not Support the Trial Court’s Ruling.

The cases cited by Morgan Court do not excuse the trial court’s failure to determine whether the circumstances here warrant

an equitable remedy other than quieting title. The *Callahan* opinion discusses the multiple exceptions to the “rule,” including where “the disparity [between the public auction bid price and the actual value] is so gross as to shock the conscience.” 2 Wn.2d at 609, 98 P.2d 1077 (quoting *Johnson v. Johnson*, 66 Wash. 113, 119 P. 22, 24 (1911) (refusing to set aside a sale where bid price was between 1/5 and 1/8 of the estimated worth)).

Likewise, in *Horn*, the court acknowledged that a “superior court has the power, in exercise of its discretion, to refuse to confirm a sale when the facts justify such action [and] if there are other things in addition to inadequacy of price.” 186 Wash. at 76-77, 56 P.2d 995. “Other things” include whether the purchaser took steps to further its own interests. *Id.* at 77, 56 P.2d 995 (citing *Mellen*, 179 Wash. 272, 27 P.2d at 207).

Furthermore, none of the cases cited by Morgan Court involve the level of price/value disparity found here. Unlike here, where Morgan Court purchased the Unit for 1/23 of the price an independent third party agreed to pay, in *Callahan* the amount bid at the Sheriff’s sale was 5/7 of the highest estimated value of the property. *Callahan*, 2 Wn.2d at 613, 98 P.2d 1077. In *Taylor*, the \$35,000.00 bid price

was over 3/4 of the \$45,000.00 property value found by the trial court. 190 Wash. at 536, 69 P.2d 810. Furthermore, the debtor there admitted that he would not be able to find a cash buyer for \$35,000.00. *Id.* at 537, 69 P.2d 810. In *Horn*, there was a \$162.08 difference between the amount bid and the amount owed on the debt. 186 Wash. at 75-76, 56 P.2d 995. Finding there were no additional circumstances justifying refusal to confirm the sale, and likely no inadequacy in the bid amount, the court reversed the trial court's order conditioning confirmation of the sale on the purchaser increasing its bid \$300.00. *Id.* at 77-78, 56 P.2d 995.

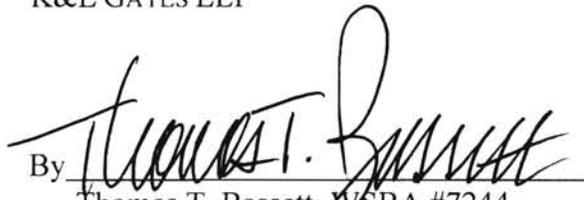
V. CONCLUSION

Morgan Court employed its super lien priority to purchase a condominium free and clear for \$8,818.17 - not to collect its \$6,381.88 judgment for unpaid association fees. In doing so, it seeks to extinguish Deutsche Bank's Deed of Trust securing a \$243,000.00 loan. The grossly inadequate sales price and the multiple circumstances indicating unfairness warranted an equitable resolution by the trial court. The trial court erred by refusing to fashion an equitable remedy based on an incomplete analysis of Washington law.

Deutsche Bank requests that this Court reverse the trial court's order granting summary judgment and remand the case with instructions that the trial court enter an order allowing Deutsche Bank to purchase the Unit from Morgan Court for the amount it paid for the Unit at the Sheriff's sale, plus reasonable related costs to be determined by the trial court or such other equitable relief that makes Morgan Court whole, while preserving Deutsche Bank's lien on the Unit. .

RESPECTFULLY SUBMITTED this 10th day of September,
2014.

K&L GATES LLP

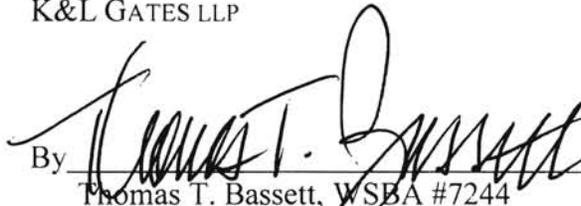
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CERTIFICATE OF SERVICE

I certify that on September 10, 2014, I caused to be served the foregoing APPELLANT'S OPENING BRIEF on the following and in the manner described below:

Michael Gene Fulbright 11820 Northup Way, Suite E200 Bellevue, WA 98005-1966 Email: mike@fulbrightlegal.com <i>Attorneys for Respondent</i>	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Federal Express Overnight <input type="checkbox"/> UPS 2 Day Shipping <input checked="" type="checkbox"/> E-mail per Agreement <input type="checkbox"/> Courier (hand delivery)
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