

No. 73100-9

FILED  
Mar 03, 2016  
Court of Appeals  
Division I  
State of Washington

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

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BANNER BANK, a Washington chartered banking corporation,  
Respondent,

vs.

JOSEPH R. ELENBAAS and MELANIE W. ELENBAAS, husband  
and wife and the marital community comprised thereof,  
Appellants,  
and

ERROL HANSON FUNDING, INC., a Washington corp.; *et al.*,  
Defendants.

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REPLY BRIEF OF APPELLANTS  
JOSEPH AND MELANIE ELENBAAS

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## I. INTRODUCTION

Banner Bank's response brief is largely unremarkable, with three exceptions: its rambling, four page introduction; its argumentative statement of the case; and its misguided attempt to argue issues wholly not germane to the issues before this Court. *See, e.g.*, Br. of Resp'ts at 23-26, 33-42. The Court should neither condone Banner Bank's violations of the Rules of Appellate Procedure nor be misled by its efforts to muddy the waters. Simply stated, Banner Bank offers nothing to dissuade this Court from reversing the trial court's summary judgment determination and remanding for a trial on the merits.

That Banner Bank lacks support for its arguments is discernible in the brevity of its brief. It spares a trifling two pages at the end of that brief for a response to the merits of the Elenbaases' appeal. Regardless, the bank's arguments are unavailing. The Elenbaases raised genuine issues of material fact as to whether there was a breach of contract and when that breach of contract occurred thereby precluding summary judgment. Summary judgment was improper. The Elenbaases are entitled to their day in court.

This Court should reverse the trial court's summary judgment order entered in favor of Banner Bank and remand for a trial on the

merits. The Court should also award the Elenbaases their attorney fees and costs on appeal.

## II. RESPONSE TO BANNER BANK'S INTRODUCTION AND STATEMENT OF THE CASE

The Elenbaases must begin their response to Banner Bank's introduction and statement of the case by pointing out the obvious: the introduction is a far cry from the concise introduction that RAP 10.3(a)(3) requires<sup>1</sup> and the statement of the case violates RAP 10.3(a)(5).<sup>2</sup> The bank's statement is a far cry from the "fair recitation" required by the rules and places an unacceptable burden on the Elenbaases and the Court *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990).

Additionally, there must be a reference to the record for each factual statement of the case. RAP 10.3(a)(5); RAP 10.4(f). But here, portions of the bank's statement of the case lack any reference

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<sup>1</sup> RAP 10.3(a)(3) permits an optional, "concise" introduction. The introduction is not meant as a substitute for the statement of the case or the argument section of the brief. It is meant to be a concise introduction to the issues presented. *Washington Appellate Practice Deskbook* (WSBA 3d ed. 2005, 2011 Supplement) at § 19.7(8) (stating: "The introduction should not exceed one or two pages. The introduction should give the reader or listener a high-level picture of the forest before plunging into the trees of the brief.").

<sup>2</sup> RAP 10.3(b) dictates that a response brief conform to RAP 10.3(a) and answer the appellant's opening brief. A statement of the case is not required; however, if one is provided, it must contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5)

whatsoever to the record. The Court should disregard any factual material not supported by the record. RAP 10.7; *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995) (striking portions of supplemental brief containing factual assertions not supported by the record). Citations to the record are required to enable the Court to properly consider a case; sanctions may be imposed for violating the rules *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d 1238 (1992) (imposing sanctions for failing to properly cite to the record in the statement of the case). *See also*, *Litho Color, Inc. v. Pac. Emp'rs Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999) (imposing sanctions for counsel's failure to comply with the rules). The Court should disregard any "facts" claimed by Banner Bank that are not grounded in the record.

Most egregiously, however, Banner Bank resorts to an *ad hominin* attack on Joseph Elenbaas. Br. of Resp'ts at 13. The bank cites to a blog that reprinted an article allegedly published in the *Bellingham Herald* regarding an altercation between Joseph and the Whatcom County Sherriff. *Id.* But that blog was not part of the record below and the bank made no effort to properly include it. RAP 9.1(c); RAP 9.11. Moreover, a third-party account of immaterial facts serves

no purpose in this appeal. The Court should disregard it.<sup>3</sup>

Regardless of the irregularities in Banner Bank's brief, it is clear the bank and the Elenbaases disagree about the circumstances which led the bank to file suit against. Specifically, the parties contested material facts regarding the Elenbaases' alleged initial default in 2011, their alleged default in 2013, and Banner Bank's refusal to accept partial payments.

First, Banner Bank alleges "the Loan has indisputably long been in default." Br. of Resp'ts at 10. Its conclusion is based on its accusation that the Elenbaases' initial payment after refinancing was late and that the Elenbaases had missed three payments by March 2011. Br. of Resp'ts at 10. Banner Bank alleged that in March 2011, it "again received partial payment, but the default was not cured" and that this cycle repeated "many times over the past five years." Br. of Resp'ts at 10.

Contrarily, the Elenbaases argue that they cured their initial default by May 2011. Importantly, they believed the terms of the loan began a month after the actual date. CP 256. Thus, the Elenbaases believed each payment was actually early and not late as Banner

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<sup>3</sup> Interestingly, there is no record of this article on the *Bellingham Herald's* website.

Bank alleged. On May 19, 2011, the Elenbaases received a letter from the bank's counsel regarding their alleged default. CP 282. In the letter, counsel acknowledged Banner Bank had received a check from the Elenbaases for \$4,790 that "paid your monthly payments current through April 2011, including late fees in the amount of \$511.28." *Id.* Based on this letter the Elenbaases believed they had made consistent timely payments due under the Loan. CP 155-156. They continued to make monthly payments to Banner Bank. CP 293-95 .

Banner Bank then contends that it began returning the Elenbaases' partial payments to them in May 2014. Br. of Resp'ts at 11. It maintains this occurred only after "numerous written demands for full payment." Br. of Resp'ts at 11. Its practice of returning partial payments was "in large part to protect the Elenbaases because the Bank was preparing to commence its judicial foreclosure of the Property." Br. of Resp'ts at 11.

Conversely, the Elenbaases recall that Banner Bank began refusing their payments as early as November 2013. CP 246-247. This was nearly a year before Banner Bank filed suit. CP 16. Banner Bank contends that it informed the Elenbaases that they were in default of their September and October payments. CP 248-49. It

repeatedly returned the Elenbaases' payments after November 2013, despite frequently holding the payments for upwards of six months. CP 293-95. The Elenbaases contend that had Banner Bank accepted their payments, then they would not have defaulted in 2013 and 2014. Further, the Elenbaases contend that there is no provision in the Deed or Loan that permitted Banner Bank to refuse their payments simply because the payments were not for the full amount due. CP 156; 163, 167, 172.

Banner Bank alleges that the Elenbaases defaulted on their loan by failing to timely make their September, October, and November 2013 payments. On November 12, 2013, Banner Bank sent a letter to the Elenbaases requiring payment of \$3,763.32 by November 22nd or "Banner Bank may exercise its rights under the loan agreement." CP 248. In a November 21, 2013 letter, Banner Bank returned a \$2,400 check to the Elenbaases after declaring it "insufficient." CP 246. It did so *before* the November 22nd deadline imposed in its November 12th correspondence. CP 246. Then on December 19, 2013, Banner Bank returned another \$2,400 check and a new \$1,400 check the Elenbaases remitted to Banner Bank on December 3, 2013. CP 243. Banner Bank noted that because the November payment was now past-due, the Elenbaases owed more

money. CP 243.

The Elenbaases contend, however, that pursuant to the bank's November 12th and 21st letters, they overpaid the amount due for the September and October 2013 payments. CP 243. Rather than accept the Elenbaases' payment, Banner Bank returned it and insisted they pay their now due November payment and attorney's fees. CP 244. Then, between December 2013 and May 2014, the Elenbaases continued to make periodic payments that Banner Bank deemed "insufficient" as only "partial payment." CP 293-95. Banner Bank's own accounting shows that by January 21, 2014, the Elenbaases owed Banner Bank \$8,878.35 (inclusive of late fees). CP 293. *Yet the Elenbaases had sent Banner Bank six checks totaling \$10,800.* CP 293. Despite this, Banner Bank insisted the Elenbaases were \$1,878.35 in arrears. CP 293.

Banner Bank makes a mountain out of a molehill when it complains about the service of the Elenbaases' opening brief. Br. of Resp'ts at 23-26. The Elenbaases sought and were granted permission by the Court to file their brief on January 6, 2016, one day after the original due date. They mailed the brief to Banner Bank's counsel on January 5, 2016. They emailed a courtesy copy on the same day. Although the Elenbaases' counsel signed the brief on

January 5, 2016, the declaration of service inadvertently stated the brief had been served on December 22, 2015.

### III. ARGUMENT IN SUPPORT OF THE REPLY BRIEF

#### A. Standard of Review

Despite agreeing with the Elenbaases that this Court's review is *de novo*, Banner Bank cloaks its arguments in a more deferential standard. Br. of Resp'ts at 29 (stating: "The Elenbaases tried everything, but the trial court found no merit to any of their arguments[.]"). More problematic, Banner Bank asserts an abuse of discretion standard in its facts section headings. *See, e.g.*, Br. of Resp'ts at 13 ("D. The Elenbaases' Answer Mirror Their Argument Here, Which the Trial Court Properly Rejected), 21 ("F. The Trial Court Carefully Reviewed the Elenbaases' Payment History on the Loan, And Found Numerous Defaults"). Not only are these sections misplaced as fact sections, they also inappropriately suggest this Court should apply a deferential standard of review. It should not.

The Elenbaases reiterate what Banner Bank forgets: the Court must consider the evidence in the light most favorable to the Elenbaases as the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

**B. The Trial Court Erred By Granting Summary Judgment In Banner Bank's Favor And By Denying Reconsideration Of That Order**

**1. The Elenbaases raised a genuine issue of material fact concerning their alleged breach of contract**

Banner Bank misses the point. The issue is not whether the Deed and/or Note apply—they clearly do. Rather, the issue is whether the Elenbaases can be found in default when Banner Bank arbitrarily began to refuse their payments. The Elenbaases do not dispute that they were required under the terms of the Note and the Deed to make timely payments or that they fell behind on their payments at times. But they insist they paid all payments and satisfied the amounts due either by subsequent payments or by pre-payments. Banner Bank seems to equate the Elenbaases' situation to that of an individual who stops making payments on his mortgage all together. But that is not what happened in this case. Here, the Elenbaases paid their monthly mortgage obligation in multiple payments.

As Banner Bank's response indicates, the Note and Deed dictate the terms of the parties' contract. But nowhere do those terms prohibit the Elenbaases from making multiple payments to satisfy their monthly mortgage obligation, which is what they did. Nonetheless, Banner Bank claims it could refuse these payments and force a

default.

Notably, the evidence presented showed that the Elenbaases had over paid the amount due in May 2014 by nearly \$2000. CP 293-95. They also presented evidence that Banner Bank had received “some 18 checks totaling \$41,600.00, of which \$31,300.00 are cashiers checks or postal money orders, during a time frame in which only \$27,811.68 of payments became due.” CP 155 (emphasis in original). In other words, they presented evidence that they were not in default. Under the proper summary judgment standard, the Court must accept their evidence as true.

The Elenbaases raised a genuine issue of material fact sufficient to preclude summary judgment. The trial court thus erred by granting summary judgment in Banner Bank’s favor.

**2. The Elenbaases raised a genuine issue of material fact concerning the date by which they allegedly breached their contract**

Even assuming *arguendo* that the Elenbaases breached their contract with Banner Bank, Banner Bank never established when their breached occurred. Banner Bank thus failed to satisfy its summary judgment burden.

Without definitely stating the date upon which the default occurred, the amount of the Elenbaases’ alleged default cannot be

calculated. Banner Bank did not substantively address this portion of the Elenbaases' argument.

Tellingly, Banner Bank's own factual recital does not establish when the Elenbaases allegedly breached the contract. Banner Bank contends the Elenbaases' first payment after the refinance was 25 days late and thus "the Loan has indisputably long been in default." Br. of Resp'ts at 10. It also asserts that it "explicitly accelerated the Note in March 2011, after missed and late payments." *Id.* However, the Elenbaases continued to make their monthly payment and Banner Bank took no action to accelerate the loan. In fact, a May 19, 2011 letter from Banner Bank acknowledged receipt of a \$4,790 payment that "paid [the Elenbaases'] monthly payments current through April of 2011, including late fees in the amount of \$511.28." CP 282. Upon receiving this letter, the Elenbaases understandably believed they had cured their default and continued to make their regular monthly payment to Banner Bank. The Elenbaases thus strongly disagree that they fell into default. Banner Bank's assertion that they "indisputably" defaulted does not satisfy its burden to establish the date of the default.

Banner Bank also suggests that the breach of contract occurred in September 2013. Were it not for Banner Bank's arbitrary refusal to

accept the Elenbaases' partial payments, then they would not be in default. The Elenbaases presented evidence that they made their September 2013 payment. They should have their day in court to determine when the alleged default actually occurred to properly calculate the amount of damages due to Banner Bank, first assuming without agreeing that a default occurred.

Without a discernable default date, there is a genuine issue as to the amount the Elenbaases owed to Banner Bank and the damages that it accrued. Summary judgment was therefore inappropriate.

**C. The Elenbaases Timely Served Their Opening Brief**

Banner Bank contends the Elenbaases improperly served their opening brief because they served it electronically in the absence of an electronic service agreement. Br. of Resp'ts at 23-26. It neglects to mention that the Elenbaases provided it with an electronic copy of the brief *as a courtesy*. More to the point, however, the Elenbaases complied with the applicable rules. Their brief was timely served.

A number of different court rules apply to determine the timeliness of service in this context. For example, RAP 10.2(h) provides, in pertinent part, that: “[a]t the time a party files a brief, the party should serve one copy on every other party and on any amicus curiae, and file proof of service with the appellate court.” RAP 18.5(a)

provides, in relevant part:

a person filing a paper must, at or before the time of filing, serve a copy of the paper on all parties, amicus, and other persons who may be entitled to notice . . . . Service must be made as provided in CR 5(b), (f), and (g).

RAP 18.6(b) provides in part:

Except as provided in GR 3.1, if the time period in question applies to a party serving a paper by mail, *the paper is timely served if mailed within the time permitted for service.*

(Emphasis added). CR 5(b)(2)(A) provides:

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

(Emphasis added). Service on opposing counsel under CR 5(b)(2)(a) is *complete* on the third day following mailing and “actual receipt is legally insignificant.” *Rosander v. Nightrunners Transport Ltd.*, 147 Wn. App. 392, 401, 196 P.3d 711 (2008). In *Vasquez v. Dep’t of Labor & Indus.*, 44 Wn. App. 379, 390, 722 P.2d 854, 861 (1986), Division II noted that the Supreme Court’s purpose in adopting the civil rules was to “conform to the federal practice. . . [and] to preserve the Washington practice.” The *Vasquez* court went on to note that the

standard in both Washington and at the federal level is to have service be effective *upon mailing*.

Accordingly, service by mail should be effective upon mailing when the time period in question applies to a party serving by mail. But when a time period applies to a party upon whom service is made, the time begins to run, and the service is deemed complete, 3 days after the paper is mailed to the party.

*Id.* See also, CR 6(e) (noting “[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a . . . paper upon the party and the notice is served upon the party by mail, 3 days shall be added to the prescribed period.”).

Here, the Elenbaases timely served their brief because they mailed it to Banner Bank on January 5, 2016. Their service on January 5th was thus *effective*, although not deemed *complete* until January 8th. RAP 18.5(a); RAP 18.6(b); CR 5(b)(2)(A). Essentially, Banner Bank gained three additional days to complete its brief because the Elenbaases served it by mail. CR 6(e). The Elenbaases nevertheless provided the bank with an electronic copy of their brief as a courtesy.

Banner Bank was not disadvantaged by the Elenbaases’ service. If it was, then it could have filed a motion for extension of time that the Court would presumably have granted if reasonable. It did

not, which speaks volumes.

**D. Banner Bank's Additional Arguments Are Immaterial To The Issues Before This Court**

The remainder of Banner Bank's arguments are immaterial to the issues before this Court. Contrary to Banner Bank's assertions, the Elenbaases are not attempting to modify or to add terms to the Loan or Note. Again, the Elenbaases do not dispute they owed a monthly amount to Banner Bank for their mortgage. But paying a portion one week and the remaining portion another week does not constitute breach if the full amount due is paid. CP 26-40. Consumers in nearly all circumstances have the option of making partial payments against a debt so long as the partial payments satisfy the amount due in full. If Banner Bank wanted to prevent its customers from making multiple partial payments to satisfy the full amount due, then Banner Bank could have prohibited those partial payments in the terms of the Deed or the Note. It did not and thus cannot impose such a prohibition upon the Elenbaases.

The Elenbaases dispute Banner Bank's contention that it is "undisputed" they did not make their required monthly mortgage payments. They presented ample evidence showing they timely made the payments due, but paid the amounts due in installments. Their evidence, which the Court must accept as true, is more than sufficient

to defeat summary judgment.

Finally, Banner Bank's argument about unjust enrichment is an unnecessary frolic and detour away from the actual issues before this Court. The trial court did not grant Banner Bank's motion for summary judgment based on its unjust enrichment claim. The bank cannot make that argument on appeal without making a cross-claim, which it did not do. There is no unjust enrichment aspect to a breach of contract claim. Further, Banner Bank's argument that the Elenbaases did not cite any legal authority is disproven by their briefing. The primary issue before this Court is one of fact, not law.

**E. The Court Should Deny Banner Bank's Request For Attorney Fees On Appeal**

Banner Bank seeks attorney fees and costs on appeal under RAP 18.1. Br. of Resp'ts at 43. "Where a statute or contract allows an award of attorney fees at trial, an appellate court has authority to award fees on appeal." *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001). The trial court awarded Banner Bank attorney fees and costs under RCW 4.84.330. On the same basis, Banner Banks asserts it is also entitled to attorney fees and costs on appeal. Br. of Resp'ts at 43. Where the Court concludes the trial court erred in granting summary judgment to Banner Bank, there is no basis for an award of fees on appeal under RAP 18.1.

Banner Bank's request should be denied.

IV. CONCLUSION

Banner Bank offers no legitimate response to the arguments the Elenbaases raised in their opening brief. The challenged summary judgment was granted improperly. Accordingly, this Court should reverse the trial court's judgment and remand for a trial on the merits.

The Court should deny attorney fees and costs to the Banner Bank on appeal and instead award them to the Elenbaases.

DATED this 3rd day of March, 2016.

Respectfully submitted,

/s/ Emmelyn Hart

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## DECLARATION OF SERVICE

On said day below, I caused to be served on the following a true and accurate copy of the **Reply Brief of Appellant's Joseph and Melanie Elenbaas** in Court of Appeals Cause No. 73100-9-I in the manner set forth below:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct. EXECUTED this 3rd day of March, 2016.

/s/ Julie J. Johnson  
Julie J. Johnson