

NO. 39611-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Roger A. Lee and Elizabeth Lee, his wife,
Appellants

v.

Jon Parker, Trustee and Timberland Bank, a corp.,
Respondents

BRIEF OF RESPONDENTS

FILED
COURT OF APPEALS
DIVISION II
09 DEC -4 PM 12:39
STATE OF WASHINGTON
BY  DEPUTY

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Respondents

PM 12-2-09

TABLE OF CONTENTS

INTRODUCTION	1
RESTATEMENT OF ISSUES PRESENTED FOR REVIEW	1
RESTATEMENT OF THE CASE.....	2
ARGUMENT	6
A. The Plaintiffs' complaint to stay the trustee's sale under the Deed of Trust became moot when the plaintiffs failed to obtain an order or injunction restraining the trustee's sale.....	6
B. The trial court did not abuse its discretion in denying leave to amend to add a new party when the case was already moot.....	14
C. The Trial Court properly awarded attorney fees to the Trustee and the Bank pursuant to the attorney fee clause in the deed of trust.....	15
D. The Trustee and Bank are entitled to recover their fees and costs on appeal.....	19
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Cox v. Helenius</i>, 103 Wn.2d 383, 693 P.2d 683 (1985)	7, 8, 9
<i>Hackney v. Sunset Beach Inves.</i>, 31 Wn. App. 596, 644 P.2d 138 (1982).....	17
<i>Herzog Aluminum, Inc. v. General American Window Corp.</i>, 39 Wn. App. 188, 692 P.2d 867 (1984).....	16, 17, 18, 19
<i>In re: Foreclosure Cases</i>, 521 F. Supp. 2d 650 (S.D. Ohio 2007).....	12, 13
<i>In re: Jacobson</i>, 402 B.R. 359 (Bankr. W.D. Wash. 2009)	13, 14
<i>Mudarri v. State</i>, 147 Wn. App. 590, 600 ¶15, 196 P.3d 153 (2008), <i>rev. denied</i> , 166 Wn.2d 1003 (2009).....	14
<i>Plein v. Lackey</i>, 149 Wn.2d 214, 67 P.3d 1061 (2003)	7, 9, 10
<i>Stryken v. Panell</i>, 66 Wn. App. 566, 832 P.2d 890 (1992).....	17
<i>Svensen v. Stock</i>, 143 Wn.2d 546, 555, 23 P.3d 455 (2001)	8
<i>Woodruff v. McClellan</i>, 95 Wn.2d 394, 622 P.2d 1268 (1980)	17
<i>Yuan v. Chow</i>, 96 Wn. App. 909, 917-18, 982 P.2d 647 (1999) <i>rev. denied</i> , 140 Wn.2d 1006 (2000).....	18, 19

STATUTES

RCW 4.12.010..... 4

RCW 4.12.090..... 5

RCW 4.84.330..... 16, 18

RCW 61.24.130.....passim

RCW 61.24.130 (1) 6

RCW 61.24.130(2) 6

INTRODUCTION

This case arises out of a straightforward non-judicial foreclosure of a Deed of Trust. Jon Parker, as Trustee under the Deed of Trust, sent a Notice of Default, and then a Notice of Foreclosure and Notice of Trustee Sale to the plaintiffs, grantors under the Deed of Trust. The Deed of Trust Act allows a party to commence an action to contest a foreclosure and trustee sale, but to prevent the sale, the party must obtain an order or injunction restraining the sale. RCW 61.24.130. The plaintiffs commenced this action, but they failed to obtain a restraining order or injunction. The sale proceeded, and the property was sold. Under the clear provisions of the Deed of Trust Act, this action is moot and no relief is available to the Plaintiffs.

RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the plaintiffs' complaint to stay the trustee's sale under the Deed of Trust become moot when the plaintiffs failed to obtain an order or injunction restraining the trustee's sale?
2. Did the trial court abuse its discretion in denying leave to amend to add a new party when the case was already moot?
3. Did the trial court properly award attorney fees pursuant to the attorney-fee clause in the Deed of Trust?

4. Are the respondents entitled to recover their attorney fees on appeal?

RESTATEMENT OF THE CASE

In January of 2006, Defendant Timberland Bank loaned plaintiffs Roger A. and Elizabeth Lee \$350,000 to purchase a home in Ocean Shores, Grays Harbor County. CP 41. The plaintiffs gave Timberland Bank a promissory note and Deed of Trust. Defendant Timberland Bank is the beneficiary of the trust, and defendant Jon Parker is the current Trustee. *Id.*

Plaintiffs Lee failed to make their required monthly payments in September and October, 2008. CP 42. They moved from Ocean Shores to King County. CP 113. The Bank sent a notice of default to the plaintiffs, advising them that they could cure the default by paying the delinquent payments and late charges. CP 61-62, 113-114.

When the plaintiffs failed to cure their default, a statutory notice of foreclosure was sent to them. CP 65-68, 114. The notice also advised the plaintiffs that they could reinstate the Deed of Trust by curing the default, and that they could also contest the default by initiating a superior court action (CP 67-68):

You may contest this default by initiating court action in the Superior Court of the county in which the sale is to be held. In such action, you may raise any legitimate defenses you have to this default. A copy of your Deed of Trust and documents evidencing the obligation secured thereby are enclosed. You may wish to consult a lawyer. Legal action on your part may prevent or restrain the sale but only if you persuade the court of the merits of your defense.

The Bank also sent the plaintiffs a notice of trustee's sale. CP 70-74, 114. The sale was set for April 24, 2009. CP 70. The notice again told the plaintiffs how to cure the default. CP 72-73.

In mid-March, 2009, plaintiffs' attorney called Trustee Jon Parker and asked the name and contact information for persons in possession of the Note and Deed of Trust. CP 25. Plaintiffs' attorney, Robert Stevenson, and Trustee Jon Parker dispute the substance of the telephone call. Stevenson claims that Parker refused to provide the information. CP 25. Parker responded by letter that the loan was sold to Freddie Mac (more formally known as Federal Home Loan Mortgage Corporation) (CP 117):

This loan was sold to Freddie Mac. Timberland Bank retained the servicing rights and responsibilities. The foreclosure is being pursued on behalf of Freddie Mac. Freddie Mac has the original note. If your clients pay the note in full, it will be marked paid in full and returned to them otherwise the foreclosure will proceed as scheduled.

Stevenson demanded to know the contact information for Freddie Mac, CP 26, which Parker then provided. CP 118.

On March 31, 2009, 24 days before the trustee sale, plaintiffs filed their complaint in King County. CP 101. Plaintiffs alleged that the trustee is obligated to “clearly demonstrate evidence of the original promissory note, together with any and all assignments of the original note; the evidence should prove who owns the note at the time of foreclosure and who actually holds the note that represents the obligation of Plaintiffs.” CP 102. The plaintiffs alleged that failure to produce the original note avoids the sale, and asked that the sale of the plaintiffs’ home should be “stricken pending resolution of this action.” CP 102.

The plaintiffs did not ask for a restraining order or an injunction to enjoin the trustee’s sale.

Parker and the Bank moved to change venue to Grays Harbor County, citing RCW 4.12.010, which requires that an action to foreclosure a mortgage must be brought in the county in which the real property is located. CP 79-84. Plaintiffs opposed the motion, claiming that this was not an action to enjoin the foreclosure, but a demand that the trustee prove the owner and holder of the note and Deed of Trust as of the date of foreclosure. CP 27-31.

The trial court granted the change of venue. CP 19-20. The Trustee and the Bank had requested an award of fees pursuant to RCW 4.12.090, providing for a reasonable attorney fee for changing venue to the proper county, CP 84, and upon proof, the trial court awarded attorney fees of \$2,882.05. CP 104.

Meanwhile, the plaintiffs having failed to enjoin or restrain the trustee sale, the sale went forward on April 24, 2009. Freddie Mac, the only bidder at the sale, purchased the property. CP 115-16. Trustee Jon Parker issued a trustee's deed to Freddie Mac. *Id.*, CP 120-21.

After the change of venue to Grays Harbor County, plaintiffs moved to join Freddie Mac pursuant to CR 19 as a person needed for just adjudication of the issues. CP 109-12. Trustee Jon Parker and the Bank opposed to the motion on the ground that the sale of the property had mooted the plaintiffs' complaint. CP 122. The trial court denied the motion to join Freddie Mac and awarded attorney fees and costs pursuant to the Deed of Trust in the amount of \$3,437.50. CP 143. The court also entered Findings of Fact and Conclusions of Law and Judgment. CP 145. This appeal followed. CP 148.

ARGUMENT

A. The Plaintiffs' complaint to stay the trustee's sale under the Deed of Trust became moot when the plaintiffs failed to obtain an order or injunction restraining the trustee's sale.

The Deed of Trust Act protects the grantor of the Deed of Trust from any defect in the proceedings leading up to the non-judicial foreclosure by expressly authorizing the grantor to file an action in superior court to restrain or enjoin the sale:

Nothing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper legal or equitable ground, a trustee's sale. The court shall require as a condition of granting the restraining order or injunction that the applicant pay to the clerk of the court the sums that would be due on the obligations secured by the deed of trust, if the deed of trust was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

...

RCW 61.24.130 (1). In addition, the court may require the applicant to post security for the payment of costs and damages, including attorney fees. *Id.* The applicant must give the trustee five days' notice of the hearing. RCW 61.24.130(2).

A grantor of a Deed of Trust who has received a notice of default and foreclosure waives any right to contest the propriety of the non-judicial sale if the grantor fails to obtain an order or injunction to restrain the sale. *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003); *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). In *Plein v. Lackey*, Cameron was a junior creditor behind two secured creditors, Columbia Bank and Sunset Investments. Cameron paid the amounts due to Columbia and Sunset, and they assigned their promissory notes and deed of trust to Cameron. 149 Wn.2d at 219. Cameron hired attorney Lackey to begin non-judicial foreclosure proceedings on the Sunset note and deed of trust. *Id.* at 220.

Plein was a junior creditor, who filed suit seeking a permanent injunction barring the trustee sale, but Plein did not obtain a preliminary injunction or any other order restraining the sale, and the trustee sold the property to Cameron. *Id.* at 220. Plein argued that when Cameron paid off Sunset, the debt was extinguished and the trustee's sale was accordingly null and void. *Id.* The Supreme Court held that Plein's failure to comply with the statutory procedure of RCW 61.24.130 by obtaining a preliminary

injunction or restraining order waived Plein's right to contest the propriety of the trustee's Sale:

This statutory procedure is "the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure".

Id. at 226 (quoting "**Cox**, 103 Wn.2d at 388). The Court explained (*id.* at 227):

Simply bringing an action to obtain a permanent injunction will not forestall a trustee's sale that occurs before the end of the action is reached. [Citations omitted]. Moreover, if it did, it would render the requirements of RCW. 61.24.130 meaningless because it would be unnecessary to obtain an actual order restraining the sale or to provide five days' notice to the trustee and payment of amounts due on the obligation. A statute must not be judicially construed in a manner that renders any part of the statute meaningless or superfluous. **Svensen v. Stock**, 143 Wn.2d 546, 555, 23 P.3d 455 (2001).

Nor does an action contesting the default satisfy the requirements of RCW 61.24.130. "[A]n action contesting the default, filed after notice of sale on foreclosure has been received, does not have the effect of restraining the sale." **Cox**, 103 Wn.2d at 388.

Cox v. Helenius announces the same rule, but reaches a different result based on different facts. The Coxes gave a deed of trust to San Juan Pool Corporation to secure payment of a promissory note for the installation of the swimming pool. When the pool proved to be defective, the Coxes filed a complaint for damages and reconveyance of the deed of trust. 103 Wn.2d at

386. The Trustee, Helenius, served a notice of default and a notice of foreclosure sale after the Coxes had filed their Complaint. *Id.*

The Supreme Court interpreted the Deed of Trust Act to mean that the complaint filed by the grantor prior to the notices of default, foreclosure and trustee's sale automatically precluded the trustee from moving forward with the sale. But an action commenced after the notice of default, foreclosure and deed of trust would not prevent the sale unless the grantor obtained a restraining order or injunction:

[W]e conclude that an action contesting the default, filed after notice of sale and foreclosure has been received, does not have the effect of restraining the sale. RCW 61.24.130 sets forth the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure. That section allows the superior court to issue a restraining order or injunction to halt a sale on any proper ground. The Coxes failed to apply for an order restraining the sale, although they requested that relief in their amended complaint. Here, however, the trial judge properly determined that the lawsuit the Coxes filed after receiving the notice of default but prior to initiation of foreclosure constituted an action on the obligation. Therefore, one of the statutory requisites to non-judicial foreclosure was not satisfied.

Id. at 388.

Application of the principles of *Plein v. Lackey* and *Cox v. Helenius* to this case is straightforward and clear. These plaintiffs did not commence an action against Trustee Jon Parker and

Timberland Bank until after they had received the notice of default, and the notices of foreclosure and trustee's sale. Accordingly, their only remedy was to file a lawsuit under RCW 61.24.130. They filed the lawsuit, but they failed to seek an injunction or restraining order. As the Supreme Court stated in *Plein v. Lackey*, "We also agree that the plaintiffs' failure to obtain a preliminary injunction or restraining order barring the nonjudicial foreclosure sale waived any right to contest the validity of the foreclosure." 149 Wn.2d at 218. So too in this case plaintiffs waived any objection to the validity of the trustee's sale and they no longer have any right to contest the sale.

Plaintiffs allege that Trustee Jon Parker was required to "clearly demonstrate evidence of the original promissory note, together with any and all assignments of the original note", and prove ownership of the note. CP 102. But as discussed above, plaintiffs waived this argument by their failure to obtain a restraining order or an injunction. Just as plaintiff Plein waived the right to argue that the debt had been extinguished, so these plaintiffs waived the right to demand to see a copy of the original note.

In any event, the evidence amply proves that Timberland Bank sold the Note to Freddie Mac, and that Freddie Mac holds the

Note. The Declaration of Janet Deegan, a vice president of Timberland Bank, establishes that Timberland Bank loaned \$350,000 to plaintiffs, that the Bank sold the loan to Freddie Mac, and that the Bank retained the loan servicing rights and responsibilities for the loan. CP 40-41. Trustee Jon Parker explained to the superior court judge in open court that Timberland sells millions of dollars in loans to Freddie Mac every year, and that Freddie Mac had returned the note to Parker after plaintiffs' complaint:

[Mr. Parker]: I have always had the original Deed of Trust because we service the loan we keep the Deed of Trust. It's the Note that goes to Virginia into the vault because Freddie Mac wants to have possession of that and so we assign that to them and they keep it.

Now, after the lawsuit was filed I contacted the bank. I said to Freddie Mac . . . get me that original note because [plaintiffs' counsel] is continuing to complain about this. And I have it. And whoever wants to look at it, as long as it doesn't leave my possession, can look at it. . . .

THE COURT: You're saying you have your original Note?

MR. PARKER: I have it in my file now, but it's a nullity because the foreclosure occurred because Mr. Stevenson didn't take the steps the statute requires in order to enjoin it.

RP 11-12 (7/6/09). Accordingly, even if it had been required to produce the original note as plaintiffs alleged, Trustee Jon Parker

was prepared to do so. It was unnecessary, however, because the plaintiffs never obtained a restraining order or injunction.

Plaintiffs relied in the trial court and continue to rely on appeal on a federal district court case, *In re: Foreclosure Cases*, 521 F. Supp. 2d 650 (S.D. Ohio 2007) (Slip Opinion reproduced at CP 32-37). The problem with *In re: Foreclosure Cases* was exactly the opposite of the issue here. The federal case involves foreclosure of mortgages, not a non-judicial foreclosure of a Deed of Trust. Moreover, the named plaintiff in the foreclosure action was not the original lending institution, and the named plaintiff failed to produce any evidence or chain of title showing it held the mortgage as an assignee or successor in interest. CP 33-34.

This case is exactly the opposite. In a non-judicial foreclosure, the trustee conducts the sale, and it is undisputed that Jon Parker was the appropriate trustee. Moreover, the non-judicial foreclosure was brought in the name of the original lending institution, Timberland Bank, CP 70, and the Bank provided proof that continues to act as servicing agent for Freddie Mac, which now owns the loan and promissory note. CP 41. Finally, Jon Parker possessed the promissory note, which he offered to show to anyone who was interested. RP 11-12. In other words, Timberland

Bank and Jon Parker provided the gaps in the evidence identified in *In re: Foreclosure Cases*. But the Court need not consider the issue, because it is waived.

After filing their brief, plaintiffs filed a Statement of Additional Authority citing a federal bankruptcy decision, *In re: Jacobson*, 402 B.R. 359 (Bankr. W.D. Wash. 2009). In *Jacobson*, a loan servicing agent filed a motion to lift the automatic stay in bankruptcy to permit the loan servicing agent to proceed with foreclosure. The procedural posture and factual differences between *Jacobson* and this case led to a different result from this case. In *Jacobson*, the servicing agent had the burden of establishing that it had standing, that it was the real party in interest, and that the stay should be lifted. The bankruptcy court held that the evidence was insufficient to establish any of these facts.

Here, in contrast to *Jacobson*, the plaintiffs had the burden of complying with the statutory procedures to enjoin or restrain the trustee's sale. Moreover, Timberland Bank presented evidence that it was the servicing agent for the loan, and Trustee Jon Parker had possession of the promissory note. If the plaintiffs had wished to contest Timberland's authority to proceed, they had the burden of obtaining a restraining order or injunction. If they had succeeded

in restraining the sale, Timberland Bank could have provided whatever evidence might have satisfied the trial court, and Freddie Mac would have had the opportunity to intervene on its own behalf. But since the plaintiffs failed to bring a motion to restrain the sell, none of this happened and the sale proceeded. Plaintiffs' waiver and Timberland's proof easily distinguishes this case from ***Jacobson***.

At the end of the day, all of plaintiffs' arguments are wrecked by one undisputed fact – plaintiffs failed to preserve their objections by complying with the Deed of Trust Act.

B. The trial court did not abuse its discretion in denying leave to amend to add a new party when the case was already moot.

The plaintiffs appeal from the trial court's refusal to join Freddie Mac as a party. BA 13-14. This Court reviews for abuse of discretion the trial court's determination whether a party is indispensable under CR 19, reviewing de novo any legal conclusions underlying the decision. ***Mudarri v. State***, 147 Wn. App. 590, 600 ¶15, 196 P.3d 153 (2008), *rev. denied*, 166 Wn.2d 1003 (2009). A party should be joined under CR 19 only if complete relief cannot be granted in the party's absence, or disposition without the party may impair the rights of the absent

party or persons already parties to the case. CR 19(a). Since this case is moot, the conditions of CR 19 are simply not met. There was no abuse of discretion.

C. The Trial Court properly awarded attorney fees to the Trustee and the Bank pursuant to the attorney fee clause in the deed of trust.

The Deed of Trust provides in relevant part, “[l]ender shall be entitled to recover its reasonable attorneys’ fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument.” CP 55. Plaintiffs’ complaint in this case alleged that the Deed of Trust is subject to the mortgage laws and that the Trustee is accordingly obligated to produce evidence of the original promissory note, together with assignments of the note and proof of ownership at the time of foreclosure. CP 102. This was clearly an action to construe or enforce a term of the Deed of Trust. The trial court properly awarded fees.

Plaintiffs argue that the fee award was in error because the obligations of the Deed of Trust were “extinguished” by the foreclosure and sale of the property. BA 14. The law is otherwise. When a party brings an action based on a contract that includes an attorney fee clause, the prevailing party is entitled to attorney fees

whether or not the contract became effective or whether it remains effective. RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

This statute has been consistently interpreted to require recovery of fees on any action based on a contract that includes an attorney fee clause. The leading case is *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984). In *Herzog*, the defendants successfully defended against a breach of contract lawsuit by proving that there was no enforceable contract. Nonetheless, the *Herzog* Court concluded that RCW 4.84.330 required that fees be awarded to the defendant, even though no enforceable contract had ever been formed (39 Wn. App. at 197):

[W]e concluded that the broad language "[i]n any action on a contract" found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract. Further, because General American obtained a judgment dismissing Herzog's cause of action, General American became a "prevailing party" within the meaning of that statutory terminology. Hence, General American was

properly entitled to an award of reasonable attorney fees incurred at trial.

The *Herzog* Court relied on a series of cases reaching the same result as to contracts that had been terminated. In *Woodruff v. McClellan*, 95 Wn.2d 394, 622 P.2d 1268 (1980), the seller terminated an earnest money agreement for the purchase and sale of real property. 95 Wn.2d at 395. The purchaser sued for specific performance, and the sellers successfully defended. The Supreme Court held that, even though the agreement had “terminated”, the seller was entitled to attorney fees under the contract. *Woodruff* at 397 (cited at 39 Wn. App. at 192). In *Hackney v. Sunset Beach Inves.*, 31 Wn. App. 596, 644 P.2d 138 (1982), the purchasers rescinded a real estate contract and recovered attorney fees even though the contract had been rescinded. *Hackney*, at 602-03 (cited at 39 Wn. App. at 193).

This Court has applied the *Herzog* analysis. In *Stryken v. Panell*, 66 Wn. App. 566, 832 P.2d 890 (1992), this Court upheld the judgment of the trial court rescinding a contract for the purchase of real estate. This Court held that the purchaser was entitled to an award of attorney fees even though the contract had been rescinded as “void” (66 Wn. App. at 572):

In **Herzog**, Division One engaged in an extensive analysis of the language of RCW 4.84.330. It also took considerable note of California appellate decisions interpreting a markedly similar California statute which apparently was the model for RCW 4.84.330. **Herzog**. These decisions, which Division One said were persuasive evidence of our Legislature's intent in creating RCW 4.84.330, interpreted California's statute as creating a right to fees in a defendant who successfully proved, in an action on a contract, that no contract had been formed. We agree with the court in **Herzog** that there is an entitlement to fees in such cases.

In **Yuan v. Chow**, 96 Wn. App. 909, 917-18, 982 P.2d 647 (1999) *rev. denied*, 140 Wn.2d 1006 (2000), this Court held that the defendant was entitled to attorney fees under the terms of the promissory note even though the defendant had not signed the Note. The Court reasoned that the defendant was entitled to fees under the Note because the defendant would have been liable for fees if the plaintiff had prevailed in the action. *Id.*

The principles of **Herzog**, **Stricken**, and **Yuan** apply with equal force to this case. If the plaintiffs had succeeded in their action to enjoin or set aside the trustee's sale, they would have been entitled to attorney fees under the Deed of Trust. Under the reciprocity required by the statute, they are liable for fees, because the respondents prevailed.

Finally, the plaintiffs brought this action before the trustee's sale, when the Deed of Trust was clearly in effect. For all of these

reasons, the trial court properly awarded fees to Trustee, Jon Parker, and the Bank as prevailing parties.

D. The Trustee and Bank are entitled to recover their fees and costs on appeal.

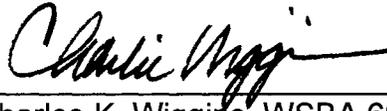
Trustee Jon Parker and Timberland Bank, as prevailing parties, are entitled to recover their attorney fees and costs incurred in the appeal. *Yuan v. Chow*, 96 Wn. App. at 918; *Herzog*, 39 Wn. App. at 197. Moreover, the Deed of Trust expressly provides that, “[t]he term ‘attorneys’ fees’ whenever used in this Security Instrument, shall include without limitation attorneys’ fees incurred by Lender in any bankruptcy proceeding or on appeal.” CP 55. The Trustee and the Bank respectfully ask the Court for recovery of their fees and costs on appeal.

CONCLUSION

Trustee Jon Parker, and Timberland Bank respectfully ask the Court to affirm the judgment of the trial court and award attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 2 day of December, 2009.

WIGGINS & MASTERS, P.L.L.C.



Charles K. Wiggins, WSBA 6948
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 2 day of December 2009, to the following counsel of record at the following addresses:

Co-Counsel for Respondent

Parker, Jonson & Parker, Ps
813 Levee Street
P.O. Box 700
Hoquiam, WA 98550
Fax (360) 532-5788
Tel (360) 532-5780

Counsel for Appellant

Robert H. Stevenson
Attorney at Law
810 3rd Ave., Ste. 228
Seattle, WA 98104-1612

FILED
COURT OF APPEALS
DIVISION II
09 DEC -4 PM 12: 39
STATE OF WASHINGTON
BY CKW
DEP



Charles K. Wiggins, WSBA 6948