

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

No. 41985-8-II

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

NORM V. GIANNUSA, *Appellant (s)*,

v.

COMPLETE BOWLING SERVICE CO., *Respondent.*

BRIEF OF APPELLANT(S)

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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). 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. 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 by determining that Complete Bowling Service Company is entitled to surplus funds, as junior lien holder, it was the successful bidder at the trustee sale and now owns the property.”

C. STATEMENT OF THE CASE

Norm Giannusa was the owner of real property located at 10623 Irene Avenue SW, Tacoma, WA 98499 (hereinafter “property”). CP 28-33. There were two loans secured by the property (1st position lien in favor of SunTrust Mortgage, Inc., and 2nd position lien in favor of Complete Bowling Service Co.). CP 1-22. Mr. Giannusa, who operates a bowling supply and bowling ball drilling shop, obtained the CPS loan in order to operate his business and service certain CPS receivables. CP 28-33. As such, the loan was clearly commercial in nature.

Mr. Giannusa was unable to service the promissory note in favor of SunTrust Mortgage Co., and the Tacoma property was sold at a non-judicial foreclosure on December 27, 2010. CP 34-36. The sale yielded excess proceeds which the foreclosing trustee deposited with the registry of the Pierce County Superior Court on January 27, 2011 under cause number 11-2-05865-0. CP 28-33.

Norm Giannusa formally appeared in this case on January 31, 2011, by filing a notice of appearance and a concurrent motion for disbursement set for February 24, 2011. CP 28-33. Pursuant to RCW 61.24.080(3), Norm Giannusa sent notice of his motion to all parties listed by the trustee on the original declaration of mailing by first and certified mail. CP 37-38. Norm Giannusa's motion complied with all of the statutory requirements of RCW 61.24.080(3). *Supra*.

Respondent, Complete Bowling Service Co. (hereinafter "CPS") retained counsel to handle this matter and its counsel appeared in this matter and filed a response to disburse the surplus proceeds on February 22, 2011. CP 39, 42-62. The parties argued the case before a Court Commissioner on March 10, 2011, at which time the Commissioner found in favor of CPS. CP 97-98. 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 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). Accordingly, the proper standard of review is abuse of discretion.

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). 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. CPS SHOULD BE PRECLUDED FROM PURSUING THE SURPLUS FUNDS AS THE RESULT WOULD BE TANTAMOUNT TO A DEFICIENCY JUDGMENT

The critical issue before this court is what effect does the purchasing of the property by a non-foreclosing junior lienholder have on that lienholder’s rights and remedies against the residuary of the property (i.e. funds surplus to the foreclosure sale) and the debtor (i.e. deficiency claim).

a. A recovery from Surplus Funds does Constitute a form of Deficiency.

Washington’s anti-deficiency statute is contained under RCW 61.24.100 within the structure of Washington’s Deed of Trust Act (RCW 61.24), which also contains the statute governing the disposition of surplus proceeds under RCW 61.24.080(3). Generally speaking a foreclosing

lienholder who utilizes the non-judicial foreclosure remedies in the Deed of Trust Act, may not seek a deficiency judgment against the debtor. *See generally*, RCW 61.24. Conversely a non-foreclosing junior lienholder loses its lien against the property when a senior lienholder forecloses, but is allowed to pursue legal remedies against the debtor. The question before this court is, what effect does the purchasing of the property by a junior lienholder have on its remedies against the debtor. As the rule was interpreted in the instant case, there was no distinction, but a closer examination reveals that there ought to have been a different treatment. If a junior lienholder recovers surplus funds, then that creditor reduces the amount of its deficiency claim against the debtor by the amount of surplus funds that it recovered. For example: Senior Lienholder A is owed \$100,000.00, and Junior Lienholder B is owed \$50,000.00. If the property sells at A's sale, and recovers only \$100,000.00, then B is allowed to obtain a deficiency judgment against the former homeowner for \$50,000.00. If, however, the sale yields \$105,000.00, then B must reduce its deficiency judgment to \$45,000.00, consequently, in truth, the surplus funds are treated as part of the deficiency scheme.

Clearly, surplus funds resulting from a non-judicial trustee sale and a deficiency judgment from a trustee sale are interrelated and to distinguish one from the other defeats the purpose of the anti-deficiency statute. In either case, the former homeowner is subject to a monetary

detriment. Whether loss of pecuniary interest is by virtue of a judgment or by loss the debtor's equity in their home (in the form of surplus funds) exalts form over substance.

Moreover, in recently published opinion the Washington Court of Appeals analogized a recovery from surplus funds with a deficiency. In the case of 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), the court reasoned that RCW 61.24.100 would limit a junior lien-holder's recovery from surplus funds pursuant to Washington's anti-deficiency statute.

The Browns treat the two sentences of *paragraph (6)* as two separate matters, one sentence deals with the limited opportunity for a deficiency judgment after foreclosing a commercial loan deed of trust **and the second with priority for proceeds after a foreclosure**. This effectively creates the following hierarchy for the proceeds from a foreclosure sale: (1) deed of trust securing a noncommercial loan (typically that used to purchase the residence); (2) homestead exemption; (3) deed of trust securing a commercial loan.

Id. (emphasis added).

Similarly to the instant matter, the Brown case dealt with a commercial loan, and the court clearly applied Washington's anti-deficiency statute contained under RCW 61.24.100 to apply with respect to surplus funds. To suggest a segregation of surplus funds and deficiency judgment would be an artificial distinction, which is simply not equitable

given the purpose of the law. In fact, a recovery from the surplus funds clearly serves as a reduction to any future deficiency judgment.

b. A non-foreclosing junior lien-holder and successful bidder at the trustee sale should not be able to avail itself of the surplus funds remedy.

In the seminal case of Washington Mutual Savings Bank v. United States, 115 Wn.2d 52; 793 P.2d 969 (1990), the Washington Supreme Court held that the non-foreclosing lien-holder was barred from seeking a deficiency judgment against the former homeowner.

We do not deem it necessary to determine how a deficiency judgment should be measured in this case since we hold here that none may be obtained by a nonforeclosing junior lienor following a nonjudicial foreclosure sale. There is simply no statutory authority for allowing such a judgment following a nonjudicial, or deed of trust, foreclosure. Indeed, the title to RCW 61.24.100, part of the deeds of trust act, states flatly that "[d]eficiency decree precluded in foreclosure under this chapter". We decline to create an exception to this statutory bar by judicial fiat.

Id. at 58

Based on the court's ruling in Washington Mutual CPS should be barred by Washington's anti-deficiency statute from recovering any of the surplus funds. Clearly any post-sale recovery of money resulting from the sale would constitute a deficiency. Naturally, a normal creditor in CPS's position may proceed to sue a debtor like Mr. Giannusa on the underlying promissory note and recover in that manner. "We do not herein address

the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note because it is not before us.” Id. at 59.

Many commentators misunderstand the holding in Washington Mutual, as it applies to junior lienholders. The Washington State Supreme Court denied Washington Mutual a deficiency against the grantor under its deed of trust. As a result, the IRS was required to pay off the bank’s loan balance, because Washington Mutual was unable to obtain a deficiency against the borrower, which may have served to reduce the redemption price. This case was decided more than twenty years ago despite several revisions of Washington Deed of Trust Act contained in RCW 61.24., the legislature has not acted to invalidate this holding.

The Washington Mutual decision was again cited by this State’s highest court. In Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 67 P.3d 555 (2007), the court distinguished its holding so that it does not apply to a sold-out junior lien-holders; i.e., a junior lien-holder that does not purchase the property at the foreclosure sale.

Here, Beal Bank is not a purchaser of the property at a nonjudicial foreclosure sale but seeks to enforce its rights under the separate promissory notes. Because Washington Mutual, as the senior lienholder, elected to pursue its rights to a nonjudicial foreclosure, Washington Mutual's action does not preclude a junior lienholder (here, Beal Bank) from seeking its legal recourse. Put another way, while Beal Bank's rights in the collateral are extinguished by Washington Mutual's trustee's sale, the underlying promise by the Sariches and Mr. Cashman to pay Beal Bank on the two notes continues via the promissory

notes, although the promissory notes are now unsecured as a result of that trustee's sale.

Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 67 P.3d 555 (2007) (emphasis added). However, at the same time the court in Beal Bank clarified that the opinion in Washington Mutual is inapplicable to the Beal Bank fact pattern.

Later, in clarifying the opinion, we narrowed our holding by adding: "We do not herein address the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note because it is not before us." Wash. Mut., 115 Wn.2d at 59. Hence, the Washington Mutual case has no bearing on the present case and expressly did not address the issue before us now.

Beal Bank, 161 Wn.2d at 550

The Beal Bank case is indeed factually distinguishable from the instant case and the holding in Washington Mutual, as the issue in Beal Bank turned on a non-purchasing junior lien-holders right to sue under the promissory note related to its deeds of trust. In contrast, the question certified by the Ninth Circuit Court of Appeals in Washington Mutual is whether "Washington law allows a nonforeclosing junior lienholder who purchases property at a nonjudicial foreclosure sale to sue for a deficiency." Wash. Mutual, 115 Wn.2d at 55.

Both courts, albeit unwittingly, distinguished the between rights of a junior lien-holder that is the successful bidder at the trustee sale has and those rights of a sold-out junior lien-holders (i.e. a 2nd mortgage that does

not purchase at the auction). Despite the factually distinguishable holding in Beal Bank the holding in Washington Mutual is still valid and should serve to bar a purchasing junior lienholder's post-foreclosure recovery. Other jurisdictions, such as California, Nevada and Alaska have created similar distinctions by statute or by judicial fiat. *See generally*, Walter E. Heller Western Inc. v. Bloxham, 176 Cal. App. 3d 266 (1985); Carrillo v. Valley Bank of Nevada, 734 P.2d 72 (1987); Adams v. Alaska Federal Credit Union, 757 P.2d 1040 (1988).

This reasoning is sound from a public policy standpoint, since the junior lien-holder bidder could outbid most other bidders knowing that any excess proceeds will be recovered subsequent to the sale by utilizing the surplus funds statute contained in RCW 61.24.080(3). As such, the junior lien-holder has an unfair competitive advantage, since the junior lien-holder could recover the proceeds up to the amount of the outstanding debt and basically purchase the property for the price of the first mortgage and then sell the property at a profit and still seek a deficiency by suing under the promissory note. In returning the example above, junior lienholder B essentially as a "credit" of \$50,000 to use at the auction that other bidders won't have. For example, if the bidding goes past the balance owed to senior lienholder A (\$100,000), B knows that it can continue to bid (up to \$50,000 excess) knowing that it will utilize RCW 61.24.080(3) to recover those funds. That allows B an unfair competitive advantage at the sale,

which it can then convert to its gain when it turns around and sells the property.

Whether the purchasing junior lien-holder recovers surplus funds and thereby reduces its deficiency or just obtains a deficiency is immaterial, as either measure would create a recovery to the detriment of the homeowner.

Precisely this issue was addressed by the California Court of Appeals in Walter E. Heller Western Inc. v. Bloxham, 176 Cal. App. 3d 266 (1985). In that case the California court was asked to determine whether the fair value limitations contained in California's anti-deficiency statute would apply to a junior lien-holder that purchased the property at a non-judicial foreclosure sale of the senior lien-holder. The court found that the fair value provisions would apply to limit the non-foreclosing junior lien-holders recovery.

In Bank of Hemet v. United States (9th Cir. 1981) 643 F.2d 661, the Ninth Circuit reviewed California's antideficiency legislation and concluded a junior lienor who purchases at the senior's sale is limited by the fair value provisions of section 580a when he seeks a deficiency judgment. (*Id.*, at p. 668.)...

The court in Bank of Hemet correctly perceived a real distinction **between a sold-out junior and one who purchases at the senior's sale, a distinction that was not before our Supreme Court in Roseleaf**. (See Benjamin, *California Fair Value Limitations Applied to Non-Foreclosing Junior Lienholder* (1982) 12 Golden Gate L.Rev. 317.) The junior in Roseleaf did not purchase at the senior's sale. To apply the fair value limitations to that junior would result in the amount of his deficiency

being limited by the amount of someone else's bid, a factor over which he has no control. **However, once a junior chooses to purchase, it is equitable to apply the fair value limitations to him. Any loss to him as creditor by his own underbidding is gained by him as purchaser for a bargain price.** (Cal. Mortgage and Deed of Trust Practice (Cont.Ed.Bar Supp. 1985) § 4.31, p. 35.) "To so limit the deficiency judgment right is consistent with the general purpose of section 580a, viz., **to protect against a lienor buying in the property at a deflated price, obtaining a deficiency judgment, and achieving a recovery in excess of the debt by reselling the property at a profit [para.] The unmistakable policy of California is to prevent excess recoveries by secured creditors.**" (Bank of Hemet v. United States, *supra*, 643 F.2d at p. 669.)

Walter E. Heller Western Inc. v. Bloxham, 176 Cal. App. 3d at 272-273 (1985) (*emphasis added*). Coincidentally, the Bank of Hemet case is factually very reminiscent of the Washington Supreme Court's holding in Washington Mutual. Both cases turn on the question of the appropriate redemption price the IRS is entitled to utilize after a foreclosure. Both cases limit the junior lien-holders' right to receive a recovery, since in both cases the junior lien-holder was the successful bidder at the trustee sale. Unlike, California, Washington does not have a statutory provision which only limits the junior lienholder's recovery by the fair market value of the property. Washington's statutory scheme provides for an outright prohibition of such a recovery with respect to the foreclosing lienholder. Based on the holding in Washington Mutual a purchasing junior lien-holder should

be prohibited from obtaining any recovery by virtue of the surplus funds following a non-judicial foreclosure sale.

In Carrillo v. Valley Bank of Nevada, 734 P.2d 72 (1987) the Nevada Supreme Court came to the same conclusion.

Valley Bank insists that the trustee's sale extinguished its security interest in the property and left the Bank in the position of a sold-out junior lienor. **Endorsement of such a view would truly exalt form over substance in disregard of reality. The Bank, in fact, preserved its security by acquiring the property at the sale. It could have elected not to participate in the sale, thereby losing its security interest.** Thereafter, it could have pursued its remedy against Carrillo on the promissory note. In so doing, the Bank would have enjoyed the status it now claims. **The Bank could not restructure the equation to produce a return greater than its full entitlement by treating the property and Carrillo's promissory note as unrelated factors.** It is the policy of Nevada law, under First Interstate Bank and Crowell, not to countenance such an approach. Valley Bank nevertheless contends that McMillan v. United Mortgage Co., 84 Nev. 99, 101, 437 P.2d 878, 879 (1968), is dispositive in exempting sold-out junior lienors from Nevada's deficiency statutes. First, as previously observed, we do not consider Valley Bank to be a sold-out junior lienor in spite of the legal effect of the trustee's sale in extinguishing the Bank's second trust deed.

Carrillo, 734 P.2d at 724 (1987), (*emphasis added*).

This holding, as the California cases cited above, clearly limit a purchasing junior lienholder's recovery. At a minimum, California and Nevada distinguish between sold-out junior lien holders and purchasing junior lien-holders. Washington's case law does the same when combining the holdings in Washington Mutual and Beal Bank.

2. CPS SHOULD BE PRECLUDED FROM PURSUING THE SURPLUS FUNDS AS PURCHASING JUNIOR LIEN-HOLDER MERGES ITS DEED OF TRUST INTO ITS OWNERSHIP OF THE PURCHASED PROPERTY

RCW 61.24.080 only allows recovery from surplus funds for those liens that were discharged by operation of the trustee sale.

Interests 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). Emphasis added.

Accordingly, any lien that is not discharged by operation of the trustee sale cannot claim any surplus funds.

Under doctrine of merger a purchasing junior lien-holder could be deemed to merge its deed of trust into the fee simple ownership of the property. Merger occurs when the fee interest and a charge, such as a deed of trust or a mortgage, vests in the possession of one person. Anderson v. Starr, 159 Wash. 641, 643, 294 P. 581 (1930).

The doctrine of merger applies, when the entire legal and equitable estates are united in one person, there can be no occasion to keep them distinct; but if there is an outstanding intervening title, the foundation of the merger does not exist as a matter of law. Equity does not favor the doctrine of merger. Anderson, at 643. The doctrine of merger does not apply if there are other intervening encumbrances on the property. Gill v. Strouf, 5 Wn.2d 426, 431, 105 P.2d 829 (1940). Similarly, Washington courts have applied the doctrine of merger and extinguishment for well

over 100 years in instances where the holder of an obligation also becomes the person required to pay the obligation.

The duty to pay and the right to receive being both vested in one person at the same time, in the absence of the rights of third parties, or other rights which equity will preserve, the one offsets and balances the other, and the obligation was thus extinguished.

First State Bank v. Arneson, 109 Wash. 346, 350; 186 P. 889, 890 (1920)

As such two factors determine whether the doctrine of merger applies. First, the rights under the deed of trust/promissory note and the title to the property must vest in the same person. Second, the parties did not manifest an express or implied intent that merger should not apply. There is little doubt that purchasing the property at the foreclosure sale vests CPS with title in the property and CPS held a deed of trust. Accordingly, the first factor is met. Second, CPS's own deed of trust and promissory note does not contain any language barring the application of the merger doctrine. Therefore, CPS cannot readily articulate that the doctrine of merger should not apply. On the contrary, CPS took the affirmative step to purchase the property at the non-judicial foreclosure sale. Junior lien-holders often choose this option to protect their equity position in a given property. However, absent any proof to the contrary and since there are no intervening encumbrances, CPS' deed of trust merged into its fee simple interest in the property. Accordingly, CPS cannot argue that its deed of trust was divested by operation of the non-

judicial foreclosure, because it merged into the fee simple estate, and was not extinguished by the sale, but rather its own action. If the CPS's deed of trust was not discharged, then CPS cannot support a claim for the instant surplus funds. RCW 61.24.080(3).

In summary, the senior mortgage was extinguished during its own non-judicial foreclosure sale, thus no intervening lien exists. Furthermore, CPS's deed of trust and promissory note do not contain any language prohibiting a merger. The doctrine of merger clearly applies due to CPS' election to purchase the property at the sale thus preventing CPS from asserting any further claims under its deed of trust and/or promissory note.

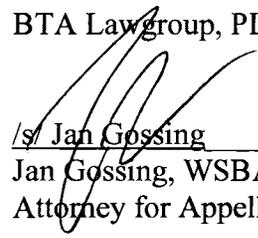
E. CONCLUSION

It was an abuse of discretion for the court to rule in favor of CPS. Washington's statutory scheme as interpreted by the Supreme Court in Washington Mutual precludes a purchasing junior lien holder from recovering against the borrower. Additionally, CPS deed of trust merged into its fee simple interest in the property, thus precluding any recovery from surplus funds. As such, Mr. Giannusa respectfully requests that the court overturn the judgment of the Pierce County Superior Court in favor of CPS and rule that Mr. Giannusa has the highest priority claim to the surplus funds pursuant to RCW 61.24.080(3).

Dated this 8th day of September, 2011

Respectfully Submitted by:

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3
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8 In re the Trustee's Sale of the real property of:

9 JOHN B. GIANNUSA, SR.

Pierce County Superior Court
Cause Number: 11-2-05865-0

Court of Appeals Cause No. 41985-8II

10 **AFFIDAVIT OF SERVICE**

11
12 The undersigned declares under penalty of perjury under the laws of the State of
Washington as follows:

13 That on the 9th day of September, 2011, I caused to be delivered via fax and by
14 first class mail, a copy of the Brief of Appellants, to the following parties:

15 **Curran Law Firm**
16 **555 West Smith Street**
Kent, WA 98032

17 DATED this 9th day of September, 2011.

18
19 BTA Lawgroup PLLC

20
21 /s/ Jan Gossing
Jan Gossing, WSBA #31559
22 Attorney for Appellants

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