

FILED  
COURT OF APPEALS  
DIVISION II

2013 FEB 21 PM 1:06

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

43194-7-II  
No. ~~42347-2-H~~

THE COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

---

ESTATE OF JOHN BALL BY AND THROUGH LAUREEN  
MONETTE EXPR, *Appellant (s)*,

v.

JP MORGAN CHASE BANK, *Respondent*.

---

BRIEF OF APPELLANT(S)

---

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

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES.....3**

**A. INTRODUCTION.....4**

**B. ASSIGNMENTS OF ERROR.....5**

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

**D. ARGUMENT.....6**

*Standard of Review.....6*

*Procedure for reviewing claims under RCW 61.24.080(3).....6*

**CHASE 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.....7**

**E. CONCLUSION.....10**

## TABLE OF AUTHORITIES

### Table of Cases

#### *Washington Cases*

<u>Anderson v. Starr</u> , 159 Wash. 641; 294 P. 581 (1930).....	7
<u>Cerrillo v. Esparza</u> , 158 Wn.2d 194, 199, 142 P.3d 155 (2006).....	7
<u>First State Bank v. Arneson</u> , 109 Wash. 346; 186 P. 889 (1920).....	8
<u>Folsom v. Burger King</u> , 135 Wn.2d 658, 663, 958 P.2d 301 (1998).....	7
<u>Gill v. Strouf</u> , 5 Wn.2d 426, 431; 105 P.2d 829 (1940).....	8
<u>In the Matter of the Trustee's Sale of the Real Property of</u> <u>Willard H. Brown et al.</u> , 161 Wn. App. 412; 250 P.3d 134 (2011).....	5
<u>Sunnyside Valley Irrigation Dist. v. Dickie</u> , 149 Wn.2d 873, 880, 73 P.3d 369 (2003).....	6
<u>Wilson v. Henkle</u> , 45 Wn. App. 162; 724 P.2d 1069 (1986).....	6,7

#### Constitutional Provisions

*(None)*

#### Statutes

RCW 61.24.080.....	7
RCW 61.24.080(3).....	4,6,7, 9,10,11

#### Regulations and Rules

*(None)*

#### Other Authorities

*(None)*

## A. INTRODUCTION

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

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

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

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

## **B. ASSIGNMENTS OF ERROR**

### *Assignment of Error*

**No. 1** “The court erred by determining that JP Morgan Chase Bank is entitled to surplus funds, as junior lien holder, despite the fact that it was the successful bidder at the trustee sale its deed of trust merged with the its fee title in the property.”

### *Issue Pertaining to Assignment of Error*

**No. 1** How does the doctrine of merger apply to non-judicial foreclosure sales under RCW 61.24 when the purchaser at the sale also holds a second deed of trust.

## **C. STATEMENT OF THE CASE**

The Estate of John Ball by and through Laureen Monette (hereinafter “Ball”) was the owner of real property located at 721 5<sup>th</sup> Avneue NW, Puyallup, WA 98371 (hereinafter “property”). *CP 1-25, 217-246*. There were two loans secured by the property (1<sup>st</sup> position lien in favor of Washington Mutual Bank and 2<sup>nd</sup> position lien in favor of Washington Mutual Bank), which were transferred to JP Morgan Chase Bank. *CP 1-25*. Mr. Ball was unable to service the promissory notes in favor of Washington Mutual Bank and/or Chase, and the Puyallup property was sold at a non-judicial foreclosure on September 2, 2011. JP Morgan Chase Bank (the second mortgage) through its wholly-owned subsidiary Home Sales, Inc. was the successful bidder at the foreclosure sale. *Id.* The sale yielded

excess proceeds which the foreclosing trustee deposited with the registry of the Pierce County Superior Court on October 10, 2011 under cause number 11-2-14696-6. *Id.*

The Estate of Mr. Ball formally appeared in this case on February 3, 2012, by filing a notice of appearance and a concurrent response to JP Morgan Chase Bank's motion for disbursement. *CP 216, 217-246.*

The parties argued the case before the Pierce County Superior Court on February 8, 2012, at which time the Commissioner found in favor of Chase. *CP 247-248.* The instant appeal ensued.

#### **D. ARGUMENT**

##### *Standard of Review:*

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

In this case, there is no clear authority on the issue of a second mortgage holder who purchases the foreclosed property, and the appellants are arguing for an extension of the law to follow the interpretation giving by other States on this issue. The standard of review for legal questions and statutory interpretation is *de novo*. *See, Sunnyside Valley Irrigation Dist. v.*

Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), Cerrillo v. Esparza, 158 Wn.2d 194, 199, 142 P.3d 155 (2006).

Procedure for reviewing claims under RCW 61.24.080(3):

RCW 61.24.080(3) provides for the procedure for adjudicating claims related to surplus funds resulting from a non-judicial foreclosure. In ascertaining the relative priorities of competing claimants, RCW 61.24.080(3) provides in relevant part that: “[i]nterests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property.” RCW 61.24.080(3). 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. CHASE 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 should 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 CHASE with title in the property and CHASE held a deed of trust. Accordingly, the first factor is met. Second, CHASE's own deed of trust and promissory note does not contain any language barring the application of the merger doctrine. Therefore, CHASE cannot readily articulate that the doctrine of merger should not apply. On the contrary, CHASE took the affirmative step to purchase the property at the non-judicial foreclosure sale. Junior lienholders 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, CHASE's deed of trust merged into its fee simple interest in the property. Accordingly, CHASE 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 CHASE's deed of trust was not discharged, then CHASE cannot support a claim for the instant surplus funds. RCW 61.24.080(3).

In point of fact, it is not difficult to apply the doctrine of merger to the case at bar. Imagine that the Ball Estate deeded the property to Chase one day before the bank foreclosed. Then imagine that a successful third party bidder at the sale bid more than the amount necessary to satisfy the first Bank and surplus funds arose. When Chase Bank subsequently applies

RCW 61.24.080(3) to obtain the surplus funds, they could not do so under the theory that they had a second mortgage. It would be clear that their interest, at that point, would be as the homeowner, because the doctrine of merger would have merged the deed of trust into the fee simple estate. As such, and there would not be any deed of trust to rely upon when attempting to retrieve the surplus funds. Rather, at that point, CHASE would be the fee owner.

If that is the case, why should the date of the purchase change the analysis? When CHASE acquires the fee title through the senior deed of trust holder's foreclosure sale, it is exactly the same as if CHASE had acquired fee title the day before from the Estate of Mr. Ball. The two estates merge, and the deed of trust extinguishes (not from the operation of the sale, but rather from the merger of the two estates). Since the deed of trust is extinguished (not by the foreclosure, but rather because of the merger), it ceases to be a property interest within the meaning of RCW 61.24.080(3) upon which predicate an interest in the surplus funds.

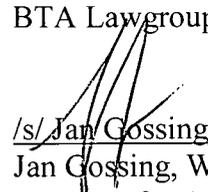
In summary, the senior mortgage was extinguished during its own non-judicial foreclosure sale, thus no intervening lien exists. Furthermore, CHASE's deed of trust and promissory note do not contain any language prohibiting a merger. The doctrine of merger clearly applies due to CHASE' election to purchase the property at the sale thus preventing CHASE 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 CHASE. CHASE deed of trust merged into its fee simple interest in the property, thus precluding any recovery from surplus funds. As such, the Estate of Mr. Ball by and through Lauren Monette respectfully request that the court overturn the judgment of the Pierce County Superior Court in favor of CHASE and rule that the Estate has the highest priority claim to the surplus funds pursuant to RCW 61.24.080(3).

Dated this 20<sup>th</sup> day of February, 2013

Respectfully Submitted by:  
BTA Lawgroup, PLLC

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

1 BTA Lawgroup PLLC  
2 31811 Pacific Highway South, B-101  
3 Federal Way, WA 98003  
4 (253) 444-5660 (253) 444-5659 [Fax]

FILED  
COURT OF APPEALS  
DIVISION II  
2013 FEB 21 PM 1:05  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

5 COURT OF APPEALS  
6 of the  
7 STATE OF WASHINGTON  
8 DIVISION II

9 In re the Trustee's Sale of the real property of:  
10 JOHN W. BALL, an unmarried individual, as  
11 his separate estate.

Pierce County Superior Court  
Cause Number: 11-2-14696-6  
Court of Appeals Cause No. **431947-II**  
**AFFIDAVIT OF SERVICE**

12  
13  
14 The undersigned declares under penalty of perjury under the laws of the State of  
15 Washington as follows:

16 That on the 20<sup>th</sup> day of February, 2013, I caused to be delivered, via first class mail, a  
17 copy of the Appellant's Brief to the following parties:

18 Sakae Sakai  
19 13555 SE 36th St Ste 300  
20 Bellevue, WA 98006-1489

21 DATED this 20th day of February, 2013.

22 BTA Lawgroup PLLC

23 /s/ Jan Gossing  
24 Jan Gossing, WSBA #31559  
25 Attorney for Appellants

AFFIDAVIT OF SERVICE

BTA Lawgroup PLLC  
31811 Pacific Highway South, Ste. B-101  
Federal Way, WA 98003  
(253) 444-5660 (253) 444-5659 [Fax]