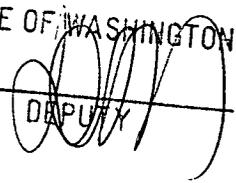


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
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No. 43619-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FIRST-CITIZENS BANK & TRUST COMPANY,

Respondent,

v.

CORNERSTONE HOMES & DEVELOPMENT LLC, a Washington
corporation; and its Guarantor DANIEL L. ALLISON and JEANNE
ALLISON, individually and the marital community thereof,

Appellants.

BRIEF OF APPELLANTS ALLISON

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INTRODUCTION

Respondent First Citizens Bank & Trust Company (First Citizens) commenced this lawsuit against appellants Daniel and Jeanne Allison (Allison) after it completed non-judicial foreclosures upon certain deeds of trust that secured loans that First Citizens' predecessor, Venture Bank, made to defendant Cornerstone Homes & Development, LLC (Cornerstone). Daniel Allison signed a Guaranty for the loans made to Cornerstone. (CP 31-33.) First Citizens sought and obtained a deficiency judgment against Allison for the amount its claims the debt owed by Cornerstone exceeded the value of the real property which it acquired by the non-judicial foreclosures. (CP 200-01, 204-05.)

Significant to this appeal is the fact that all the loans guaranteed by Allison and upon which First Citizens sued were secured by deeds of trust; and First Citizens elected its right to non-judicially foreclose on each and every one of the deeds of trust pursuant to the Deed of Trust Act, chapter 61.24 RCW, before commencing suit. Also significant to this appeal is the fact that First Citizens' predecessor bank voluntarily and unilaterally chose to include express terms in each of the deeds of trust to provide that the deeds secure not only the

promissory notes, but also the very Guaranty upon which First Citizens relies for its deficiency claim. This unilateral decision of the bank, coupled with its election to foreclose non-judicially, now bars First Citizens' deficiency claim against the Allison as the guarantor.

Notably, though First Citizens' initially sought a deficiency judgment against the borrower Cornerstone (CP 1-9), First Citizens voluntarily dismissed that claim out of recognition that its election to non-judicially foreclose served to fully and completely discharge any remaining obligations of the borrower (to include payment of a deficiency). (CP 230-31, 202-03. See also RCW 61.24.100, *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007).) Under of the terms of the Guaranty that is the subject of this appeal, the Guaranty obligations were likewise discharged.

While RCW 61.24.100 does provide that a lender may, under certain conditions, both non-judicially foreclose and pursue a deficiency judgment against guarantors of a commercial note, the limited statutory authorization does not apply to this case. RCW 61.24.100(10) provides:

A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not

secured by the deed of trust. (Emphasis added.)

The Guaranty that is the subject of this appeal was, in fact, expressly secured by the deeds of trust that were non-judicially foreclosed.

First Citizens' predecessor Venture Bank elected, without input from Allison, to secure the Allison obligation under the Guaranty by the same deeds of trust that secured the promissory notes. The form and express terms of these deeds of trust were exclusively dictated by the bank. First Citizens' thereafter elected to exercise its statutorily created remedy of non-judicial foreclosure on those deeds of trust. Under Washington law, these elections are dispositive of First Citizens' claim. The non-judicial foreclosure served to fully discharge all obligations secured by the deeds of trust, which included not only the promissory notes, but also the Guaranty. Allison's obligations were discharged and they may not be held liable for any deficiency following the non-judicial foreclosures.

ASSIGNMENT OF ERRORS

Allison assigns error to the trial court's decision to enter the May 24, 2012 Order for Judgment on the Pleadings (CP 200-01), which Order provides that First Citizens is entitled to a deficiency judgment against Allison pursuant to the Guaranty, despite that

Allison's obligations under the Guaranty were discharged when First Citizens foreclosed on the deeds of trust that secured the Guaranty.

ISSUES

1. May a secured lender that voluntarily elected to invoke the statutorily created remedy of non-judicial foreclosure obtain a deficiency judgment pursuant to a Guaranty, where the Guaranty was secured by the same deeds of trust foreclosed upon?

2. May a secured lender who invoked and benefitted from the remedy created by the Deed of Trust Act, chapter 61.24 RCW, contractually expand the statutory remedy and contractually eliminate express limitations on the statutory remedy?

STATEMENT OF THE CASE

The facts to this case are undisputed and, in the proceedings below, the parties stipulated to resolution of the issues of liability without a trial and without presentation of live witnesses. Instead, the parties consented to the trial court's determination of liability, as a matter of law, based upon the loan documents attached to the Complaint (CP 1-83), the Answer (84-89) and the legal arguments presented. (See CP 107.)

First Citizens sued for a deficiency judgment on three separate loans made by its predecessor, Venture Bank, to Cornerstone. (CP 1-

83.) The loans were evidenced by three separate promissory notes, the first note being executed on March 7, 2006 (CP 117-25), the second on April 12, 2007 (CP 145-52) and the third on August 3, 2007 (CP 172-75). Each promissory note was secured by a separate construction deed of trust of corresponding date against different properties. (CP 127-35, 154-62 and 177-85.) After Cornerstone defaulted on all three loans, First Citizens, who purchased Venture Bank's assets from the Federal Deposit Insurance Corporation (FDIC), non-judicially foreclosed on all three deeds of trust and acquired the properties at the Trustee's Sales. (CP 141-43, 164-66, and 187-89.)

Prior to the above loan transactions, on or around December 10, 2003, Dan Allison executed a Commercial Guaranty. (CP 137-39.) The Guaranty provides that the "Indebtedness Guaranteed" is as follows:

The indebtedness guaranteed by this Guaranty includes any and all of the Borrower's [Cornerstone's] Indebtedness to Lender and is used in the most comprehensive sense and means and includes any and all of Borrower's liabilities, obligations and debts to Lender, now existing and hereinafter incurred or created...

(CP 31.) Thus, while the Guaranty was executed before the loans that are the subject of appeal, it nonetheless purports to extend to the

three subsequent loan transactions with Cornerstone. The Guaranty executed on December 10, 2003 is the sole basis for First Citizens' claim against Allison.

The promissory notes, the deeds of trust and the Guaranty are related and intertwined and, by their own terms, must be construed together. In fact, the Guaranty expressly incorporates the terms of the subsequent promissory notes and the deeds of trust, as well as all other loan documents, into the Guaranty itself. The Guaranty, under the section entitled Miscellaneous Provisions, provides:

Amendments. This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of, or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment. (Underlining added.)

(CP 32.) Under section entitled Definitions, the Guaranty provides:

Definitions. The following capitalized words and terms shall have the following meanings when used in this Guaranty. ...

* * *

Related Documents. The words "Related Documents" means all promissory notes, credit agreements, loan agreements, environmental agreements, mortgages, deeds of

trust, security deeds, collateral mortgages, and all other Instruments. Agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.
(Underlining added.)

(CP 33.) Thus, the terms of each of the subsequently executed deeds of trust foreclosed upon by First Citizens were expressly incorporated into the Guaranty and are also considered terms of the Guaranty.

In this case, each of the pre-printed deeds of trust prepared by First Citizens' predecessor, Venture Bank, provides:

THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. (All caps in original, underlining added).

(CP 128, 155, 178.)

The "Indebtedness" secured by the deeds of trust was not limited to the promissory notes, but also secures obligations in related loan documents. The term "Indebtedness" is expressly defined in the deeds of trusts:

The words "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with

all renewals of, extensions of, modifications of, consolidations of and substitutions for the Notes or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Trustee or Lender to enforce Grantor's obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust. Specifically, without limitation, indebtedness includes the future advances set forth in the Future Advances provision, together with all interest thereon and all amounts that may be indirectly secured by the Cross-Collateralization provision of the Deed of Trust. (Emphasis added.)

(CP 134, 161, 184.) The deeds of trust, which again are pre-printed forms drafted by the bank, define the term "Related Documents" to include all guaranties:

The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that the environmental indemnity agreements are not "Related Documents" as are not secured by this Deed of Trust. (Emphasis added).

(*Id.*) Thus, each of the deeds of trust expressly secured the Guaranty upon which First Citizens sued.

In their Answer, Allison asserted that the debts, including the obligations under the Guaranty, were extinguished by the non-judicial foreclosure. (CP 88.) Prior to the scheduled trial, the parties agreed that the relevant facts regarding liability were not disputed and, as such, the issue of liability was a legal question. Accordingly, the parties agreed to present the loan documents to the trial court, along with written and oral legal argument, so that the court may determine, as a matter of law, if Allison is liable under the Guaranty for any deficiency owed to First Citizens by Cornerstone. (See CP 107, 201.)

Following legal and oral argument, the trial court concluded that Allison was liable under the Guaranty and, on May 24, 2012, entered the First Citizens' proposed Order for Judgment on the Pleadings. Pursuant to an agreement of the parties, judgment was thereafter entered against Allison in a stipulated amount. (CP 204-05.)

On June 19, 2012, Allison timely filed a Notice of Appeal of the trial court's Order for Judgment on the Pleadings.¹ Though Allison later filed an Amended Notice of Appeal to include the subsequently entered Judgment, Allison does not challenge the amount awarded on this

¹ Allison inadvertently omitted the Notice of Appeal and a subsequent Amended Notice of Appeal in the Designation of Clerk's Papers. Allison filed today a Supplemental Designation of Clerk's Papers to ensure that both the Notice of Appeal and Amended Notice of Appeal are included in the Clerk's Papers. As of the date of this brief, however, a numeric reference number has not yet been assigned to these pleadings.

appeal. Rather, Allison only raises the legal question of liability to this Court.

ARGUMENT

A. Allison's Obligations Under The Guaranty Were Discharged When First Citizens Non-Judicially Foreclosed Upon Deeds Of Trust Which Expressly Secured the Guaranty.

1. The Washington Deed of Trust Act and its anti-deficiency provisions.

Washington enacted the Deed of Trust Act, chapter 61.24 RCW, in 1965. The Act created a non-judicial foreclosure option for deeds of trust as an alternative to the cumbersome traditional judicial mortgage foreclosure system. See, 67 Wash. L. Rev. 235, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure, Washington Mutual Savings Bank v. United States* (1992). Because foreclosing lenders derive substantial benefit from the non-judicial alternative, the Act also included anti-deficiency provisions. *Id.* As originally enacted, if the debt owed to the lender exceeded the sales price, the lender was generally precluded from recovering the deficiency – the debt was deemed fully discharged by operation of law. More specifically, with regard to anti-deficiency, the Deed of Trust Act originally provided at RCW 61.24.100:

Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the

sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation, except that if such obligation was not incurred primarily for personal, family, or household purposes, such foreclosure shall not preclude any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure such obligation. Where foreclosure is not made under this chapter, the beneficiary shall not be precluded from enforcing the security as a mortgage nor from enforcing the obligation by any means provided by law. (Emphasis added.)

The anti-deficiency provision at that time was broad. Except for the limited authorization in the context of commercial loans to foreclose against additional deeds of trusts or liens covering real or personal property, following a non-judicial foreclosure, the lender was statutorily prohibited from taking further action to collect on an obligation secured by a deed of trust. See, *Wash. Mut. Sav. Bank v. United States*, 115 Wash.2d 52, 58, 793 P.2d 969 (1990). (“Washington law provides that no deficiency judgment may be obtained when a deed of trust is foreclosed.”)

In 1998, the Washington Legislature amended the Deed of Trust Act. The most significant amendment was to the anti-deficiency provision at RCW 61.24.100. As amended, the Act retained the

general prohibition against deficiency judgments following a non-judicial foreclosure. As amended, RCW 61.24.100(1) provides:

Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.

See also, *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007).

The Amendment nonetheless created new exceptions to the broad prohibition against recourse on a loan deficiency. In the context of commercial loans only, a lender was afforded limited recourse against a borrower if (1) the fair value of the property foreclosed upon is less than the debt owed and (2) the property foreclosed upon is not the residence of the borrower. In such case, the lender may obtain a judgment against the borrower for wrongful retention of any rents, insurance proceeds or condemnation awards that are owed to the lender and to the extent the deficiency was caused by waste to the property committed by the borrower. RCW 61.24.100(3)(a). First Citizens makes no allegations of waste in its Complaint, so this narrow exception has no application in this case.

The amended Act also provided limited authorization for lenders to obtain a deficiency judgment against a party guarantying a loan secured by the deed of trust. RCW 61.24.100(3)(c) provides:

(3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:

* * *

(c) Subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042. (Emphasis added.)

The Act further provides, however, at RCW 61.24.100(10):

A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust. (Emphasis added.)

Thus, a lender may seek a deficiency judgment against a guarantor of a loan secured by a deed of trust, provided that the guaranty was not also secured by the deed of trust foreclosed upon.

Washington's Supreme Court recently confirmed that this power of sale without judicial supervision conferred to lenders is, indeed, a

significant power. *Bain v. Metropolitan Mortgage Group, Inc.*, ___ Wn.2d ___, ___ P.3d ___, 2012 WL 3517326 at *3 (August 16, 2012). Courts are thus instructed to strictly construe the Deed of Trust Act in favor of borrowers “because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.” *Id.* Allison contends that such policy concerns also warrant construction in favor of the protection of guarantors. In any event, the Supreme Court’s recent decision directs that the Deed of Trust Act should not be construed to provide more expansive rights to lenders than those expressly conferred in the Act. *Id.* at *6.

2. **First Citizens’ (Venture Bank’s) voluntary elections to secure the Guaranty by the deeds of trust and to non-judicially foreclose on the deeds of trust extinguished all obligations under the Guaranty, and left First Citizens without a statutory right to seek a deficiency under RCW 61.24.100.**

Since First Citizens elected to non-judicially foreclose pursuant to the Deed of Trust Act, Chapter 61.24 RCW, its action against defendant Daniel Allison, as guarantor for a debt secured by a deed of trust, is a lawsuit founded not just on the Guaranty, but upon the limited statutory authorization to obtain a deficiency judgment following a non-judicial foreclosure on the deed of trust. First Citizens’ acknowledged this fact, first in its Complaint for Debt (see CP 3 (¶ 3.7),

CP 6 (¶ 4.8) and CP 8 (¶ 5.6) asserting “Defendants are each liable for judgment for deficiency still owing on the indebtedness, . . . all provided in RCW 61.24.100(3)(5).”), and then again in its brief to the trial court (see CP 98, stating “The actions against Guarantor are proceeding under RCW 61.24.100(5).”).

This Court should therefore construe the loan documents prepared by Venture Bank in the context of the Deed of Trust Act and decide whether each Guaranty qualifies for an anti-deficiency exception under RCW 61.24.100, or whether the obligations under the Guaranty were extinguished when the non-judicial foreclosures were completed. Certain rules of statutory and contract construction are applicable.

With regard to construction of RCW 61.24.100, because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales, the Deed of Trust Act must be construed in favor of borrowers. *Udall*, 159 Wn.2d at 915. Additionally, as exceptions to the general prohibition against recovery of deficiency judgments, the provisions authorizing limited recourse against borrowers and guarantors must be narrowly construed. Washington courts narrowly construe exceptions to statutory provisions. *City of Union Gap v. Washington State Dept. of*

Ecology, 148 Wn. App. 519, 527, 195 P.3d 580 (2008); *Muckleshoot Indian Tribe v. Washington Dept. of Ecology*, 112 Wn. App. 712, 722, 50 P.3d 668 (2002). Narrow construction ensures that we give effect to the legislative intent underlying the general provisions. *Union Gap*, 148 Wn. App. at 527. Narrow judicial construction requires a court to choose, when a choice is available, a restrictive interpretation over a broad, more liberal interpretation. *Id.* Of course, issues of statutory construction are questions of law subject to de novo review. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

With regard to applicable rules of contract interpretation, the “touchstone of contract interpretation is the parties' intent.” *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301(1996). We look for the parties' intent in the contract's language, subject, and objective; the circumstances surrounding formation; the parties' subsequent conduct; and the reasonableness of the parties' interpretations. *Durand v. HMC Corp.*, 151 Wn. App. 818, 829-830, 214 P.3d 189 (2009). Where there are no evidentiary issues presented that would affect the construction of a contract, its construction presents a question of law for the court. *Hymas v. UAP Distribution, Inc.*, 167 Wn. App. 136, 154, 272 P.3d 889 (2012).

Important to this case is that all of the loan documents are pre-printed forms that were prepared without negotiation with or input from Cornerstone or Allison. The loan documents are thus adhesion contracts.² See, *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 883-884, 224 P.3d 818 (2009). While adhesion contracts are not necessarily unconscionable, applying general principles of contract interpretation, reviewing courts construe ambiguities in these agreements against the drafter. *Petersen-Gonzales v. Garcia*, 120 Wn. App. 624, 632, 86 P.3d 210 (2004).

In this case, the pre-printed deeds of trust prepared by Venture Bank provide:

THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. (All caps in original, underlining added).

(CP 128, 155, 178.)

² Whether a contract is one of adhesion depends upon an analysis of the following factors: (1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a take it or leave it basis, and (3) whether there was no true equality of bargaining power between the parties. *Townsend*, 153 Wn. App. at 883-884.

The “Indebtedness” secured by the deeds of trust was not limited to the promissory notes. The term “Indebtedness” is expressly defined in the deeds of trusts:

The words “Indebtedness” means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Notes ore Related Documents and any amounts expended or advanced by Lender to discharge Grantor’s obligations or expenses incurred by Trustee or Lender to enforce Grantor’s obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust. Specifically, without limitation, indebtedness includes the future advances set forth in the Future Advances provision, together with all interest thereon and all amounts that may be indirectly secured by the Cross-Collateralization provision of the Deed of Trust. (Emphasis added.)

(CP 134, 161, 184.) Finally, the term “Related Documents” is also defined in the bank’s pre-printed forms:

The words “Related Documents” mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that the

environmental indemnity agreements are not “Related Documents” as are not secured by this Deed of Trust. (Emphasis added).

(*Id.*)

Application of RCW 61.24.100 to the loan documents in the context of the applicable rules of construction leads to the conclusion that the Guaranty that Allison executed was secured by the deeds of trust upon which First Citizens Bank foreclosed. Because Venture Bank (the predecessor in interest to First Citizens Bank) elected to secure the Guaranty obligations by the deeds of trust (it could have excluded the Guaranty from the deeds of trust), it cannot now seek a deficiency judgment after electing the expedient non-judicial foreclosure remedy. Completion of the non-judicial foreclosure discharged all obligations secured by the deeds of trust, including the Guaranty.

Venture Bank clearly understood that all obligations secured by the deeds of trust would be discharged following non-judicial foreclosure. This is evidenced by the fact that Venture Bank expressly excluded environmental indemnity agreement obligations from the obligations secured by the deeds of trust. The Bank could have also excluded the guaranty obligations from the debts secured by the deeds

of trust, but chose not to. Likewise, it was First Citizens' choice to foreclose non-judicially; it could have foreclosed judicially.

Those choices now have ramifications. Allison's obligations under the Guaranty were discharged, as a matter of law, following the non-judicial foreclosure on the deeds of trust securing the Guaranty. RCW 61.24.100. As such, First Citizens is precluded from obtaining a deficiency judgment against Allison. *Id.*

B. First Citizens Cannot Contractually Override The Legislature And Expand The Limited Rights Granted To Secured Creditors Under The Deed of Trust Act Through So-Called Waivers By The Guarantor.

First Citizens will argue that Allison contractually "waived" the anti-deficiency protections afforded by the Deed of Trust Act in RCW 61.24.100. The "waiver" is not applicable, because the Guaranty is secured by the deed of trust. What First Citizens labels as "waivers" are, in reality an attempt to contractually expand a legislatively created remedy that was expressly excluded by the same statute it invokes. The bank had no legal authorization to so expand its statutory rights. To the contrary, the Washington Supreme Court has indicated that contractual alteration or expansion of this statutory remedy is not authorized. See *Bain, supra*, 2012 WL at *6.

The statute is clear with regard to the scope of the exception to the general bar on deficiency judgments following non-judicial

foreclosures. First Citizens chose to invoke the power of sale authorized by the Deed of Trust Act so as to complete a relatively quick and inexpensive sale of the property without judicial review. In electing that statutorily created remedy, it waived the right to seek a deficiency judgment based upon any contractual obligation secured by the same deed of trust foreclosed upon. First Citizens can offer no authority for its argument that it can re-instate remedies waived by the bank's own election through contractual "waivers" from the guarantor.

Moreover, the Deed of Trust Act expressly states which of its provisions may be contractually waived. See RCW 61.24.100(9) and (11) For example, RCW 61.24.100(9) provides: "Any contract, note, deed of trust, or guaranty may, by its express language, prohibit the recovery of any portion or all of a deficiency after the property encumbered by the deed of trust securing a commercial loan is sold at a trustee's sale." While the Act does expressly authorize the parties to contractually waive the limited rights afforded to lenders to collect a deficiency, there is no such authorization to contractually waive the statutory protections afforded borrowers and guarantors.

First Citizens brought this action pursuant to the Deed of Trust Act, Chapter 61.24 RCW. This statute limits First Citizens' remedies and does not authorize contractual expansion of the limited right

statutorily granted to sue for a deficiency judgment. The so-called “waivers” cannot be invoked to expand First Citizens’ statutorily created remedy and are without affect here.

C. Independently, The Guaranty “Waivers” Are Insufficiently Specific To Be Enforced Against Allison As Knowing And Intentional Waivers And Are Against Public Policy.

Notably, First Citizens acknowledged in its brief to the trial court that, to pursue a deficiency under the Deed of Trust Act, the bank was required to provide certain proscribed notices and commence its action within one year of the trustee’s sale. (See CP 94.) Even though the Guaranty purports to waive the Guarantor’s notice rights and the statue of limitations defense (see CP 31-32), First Citizens seemed to recognize that it had no right to contractually override those statutory prerequisites to a deficiency suit.

Without analysis or legal support, First Citizens seemed to argue below that the statutory prohibition against deficiency suits on guaranties secured by a foreclosed upon deed of trust can be contractually waived. As noted earlier, the Deed of Trust Act identifies certain authorized waivers (see RCW 61.24.100(9) and (11); it does not include waiver on the prohibition against deficiency actions based on secured guaranties. Again, when the Legislature chooses to express certain specific exceptions to a statute, the statute must be

construed to mean that exceptions not so listed were intentionally excluded. *National Electrical Contractors Ass'n, Cascade Chapter v. Riverland*, 138 Wn.2d at 17-18.

Independently, the “waiver” is unenforceable in that it is insufficiently specific and fails to expressly state that the guarantor waives rights it may hold as the guarantor on a secured Guaranty. To be enforceable, the waiver must site the specific statute which provides the right being waived and explain the legal significance of the waiver. See *Union Bank v. Gradsky*, 265 Cal. App.2d 40 (1968); *Cathay Bank v. Lee*, 14 Cal. App. 1533 (1993); *Resolution Trust Corporation v. Titan Financial Corporation*, 22 F.3d 923 (9th Cir. 1994).³ The “waivers” in the subject Guaranty make no mention of the Deed of Trust Act and are wholly silent of the right of a secured guarantor.

Finally, the waivers should not be enforced because they are against public policy. Agreements to waive rights involving a question of public policy are void. *Grandview Inland Fruit Co. v. Hartford Fire Insurance Co.*, 189 Wash. 590, 605, 66 Pac. 827 (1937). “While one

³ The waiver in the Guaranty has its foundation on California Statutory law, specifically California Civil Code § 2856, which expressly authorizes such waivers. There is no such authorization in Washington. To the contrary, Washington’s Deed of Trust Act limits the allowable waivers or limitations on the extended statutory rights at RCW 61.24.100(9).

may decline to take advantage of a privilege given to him by statute, he may not bind himself by or be held to a contract which denies to him a right which the law has allowed to him on grounds of public policy.” *Id.* See also, *Murphy v. Campbell Investment Co.*, 79 Wn.2d 417, 422-23, 486 P.2d 417 (1971). See also, *Security State Bank v. Burk*, 100 Wn. App. 94, 98-99, 995 P.2d 1272 (2000).

First Citizens had a variety of remedies available to it to collect on the Cornerstone debt. It could have foreclosed judicially and simultaneously pursued a deficiency against both Cornerstone and the guarantor. It could have sued on the Guaranty first, leaving the foreclosure option available as a later remedy. Or, it could (and did) choose the efficient remedy of a Trustee’s sale pursuant to the Deed of Trust Act without judicial oversight. In choosing this last remedy, however, First Citizens also accepted the statutory limitations imposed on the remedy, to include the limitation that the bank must forego a deficiency judgment for any debts secured by the deeds of trust foreclosed upon.

Our Supreme Court has articulated a policy against construction of the Deed of Trust Act so as to expand creditor remedies. See *Bain, supra*. Enforcement of the “waivers” would work against this public policy. Notably, the Guaranty itself acknowledges at page 2 that, if the

Guaranty is found to be in contravention to public policy or law, it is only enforceable to the extent it complies with public policy and law. (CP32). This Court should not enforce the waivers as advocated by First Citizens, but should hold that the Guaranty was fully discharged.

REQUEST FOR ATTORNEYS' FEES

Pursuant to RAP 18.1(b), the terms of the Guaranty and RCW 4.84.330, appellants Allison request that they be awarded their attorneys' fees incurred defending this lawsuit and prosecuting this appeal.

The Commercial Guaranty upon which First Citizens sued provides for payment of attorneys' fees as follows:

Attorneys' Fees, Expenses. Guarantor agrees to pay upon demand all of the Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Guarantor shall also pay all court costs, and such additional fees as directed by the court.

(CP 32.) RCW 4.84.330 provides that unilateral attorney fee provisions such as the above are to be construed to give reciprocal rights to all parties to the contract. More specifically, RCW 4.84.330 requires that under such provisions, reasonable attorneys' fees and costs shall be awarded to the prevailing party, "whether he is specified in the contract . . . or not." The contractual and statutory right of the prevailing party to an attorney fee award is absolute. The court only has discretion with regard to the amount to be awarded. *Metropolitan Mortgage & Securities Co, Inc. v. Becker*, 64 Wn. App. 626, 632, 825 P.2d 360 (1992).

If this Court holds that First Citizens' election to non-judicially foreclose on the deeds of trust discharged Allison's obligation under the Guaranty, Allison, as the prevailing party, is entitled to an award for attorneys' fees, costs and expenses incurred defending this lawsuit and prosecuting this appeal. This Court should rule that Allison is entitled to recover all reasonable attorneys' fees in this action and, upon submission of a proper fee petition and costs bill, award Allison the fees incurred in this appeal. The matter should be remanded to the trial court for a determination of the amount of reasonable fees incurred before the superior court.

CONCLUSION

First Citizens, as a successor to Venture Bank, is barred from seeking a deficiency judgment because of the bank's unilateral decision to secure each Guaranty by the deeds of trust, and its subsequent election to foreclose non-judicially pursuant to the Deed of Trust Act. This Court should reverse the trial court and remand with direction that judgment be entered in favoring of appellants Allison and that all claims against appellants Allison be dismissed with prejudice and without recovery to First Citizens.

Dated this 4th day of September, 2012.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

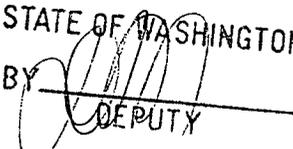
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STATE OF WASHINGTON

BY  DEPUTY

No. 43619-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FIRST-CITIZENS BANK & TRUST COMPANY

Respondent,

v.

CORNERSTONE HOMES & DEVELOPMENT, LLC, a Washington
Corporation; and its Guarantor DANIEL L. ALLISON and JEANNE
ALLISON, Individually and the Marital Community Composed Thereof,

Appellants.

CERTIFICATE OF SERVICE

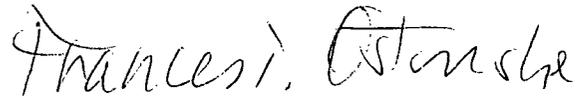
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THIS IS TO CERTIFY that on this 4th day of September, 2012, I did serve via email and U.S. Postal Service (or other method indicated below), true and correct copies of the foregoing Appellants' Opening Brief by addressing for delivery to the following:

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