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NO. 47265-1-II

STATE OF WASHINGTON

BY  DEPUTY

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

IOAN A. PAUNESCU and DANIELA PAUNESCU, husband and wife,

Appellants,

v.

GERHARD H. ECKERT and MARGARETHE ECKERT AS TRUSTEES
OF THE ECKERT FAMILY TRUST; and SCOTT RUSSON and JANE
DOE RUSSON, husband and wife,

Respondents

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

I. INTRODUCTION

This case involves Ioan and Daniela Paunescu who, as part of their plan to open an adult home care business, borrowed \$290,000 from the only source available to them—a private lender. Mr. and Mrs. Paunescu represented at the inception of the loan that they planned to open a business with the loan proceeds. They used the loan to build an addition to their property that was designed according to State mandated specifications for the adult home business. Meanwhile, recognizing their obligations under the loan documents, the Paunescus made regular payments on the loan.

The Paunescus underestimated the time associated with building the addition and obtaining a license to operate their business. The loan came due before the Paunescus could generate any profit from their business. After over (5) years of concessions and extensions by the lenders, Gerhard and Margarethe Eckert, it became clear that the Paunescus could not and would not repay the loan. Therefore, the Eckerts hired Scott Russon to foreclose on the property and the Paunescus were evicted from the property.

The Paunescus did not object to or attempt to appeal the foreclosure action. This matter was filed after they were evicted from the

property. By their Complaint, the Paunescus asserted a litany of allegations against the Eckerts and Scott Russon. The essential theme of their allegations was that the Deed of Trust and Promissory Note underlying the Eckert Loan were deficient and unenforceable and, therefore, the appointment of Scott Russon as successor trustee (the foreclosure and eviction actions that followed) was void. The Paunescus further asserted claims that the Eckerts violated Washington's Unfair Business Act as well as the Consumer Loan Act. They claimed that they were entitled to the Homestead Exemption. Finally, they claimed that Scott Russon violated his fiduciary duties towards them during the foreclosure and eviction proceedings.

Only nineteen (19) days after their Amended Complaint was filed, the Paunescus filed a Motion for Partial Summary Judgment against the Eckerts and Scott Russon. Over the Paunescus objections, the parties eventually agreed to continue the hearing on the motion to January 16, 2015 in order to allow time to exchange discovery. The Paunescus' counsel, Philip Wuest, withdrew from representing them on November 13, 2014. Since that time, the Paunescus have represented themselves *pro se*.

Throughout the life of this case, the Paunescus have refused to take responsibility for their own mistakes and miscalculations in operating their business such that they could repay their debt to the Eckerts. They assert

that the loan was unenforceable. They claim that the Eckerts should have known better than to lend them money in the first place. They blame the Eckerts, Scott Russon, Judge Clark, the economy, and even President Obama for their inability to repay the loan that they sought out and voluntarily accepted. CP 514. During her deposition, the following exchange occurred with Daniela Paunescu:

Mrs. Paunescu: But I got a complaint coming against Judge Clark, also.

Mr. Scisciani: What is the nature of the complaint that you having coming against Judge Clark?

Mrs. Paunescu: Her not doing her job.

Mr. Scisciani: What is that you think she didn't do it that she needed to do?

...

Mrs. Paunescu: She approved a foreclosure saying it was commercial property and it was residential. She didn't do her job verifying the proof, the burden of proof, she had in front of her. She didn't check on it. She didn't let me have another hearing. Instead of her giving me my 60 days—the foreclosure was done illegally, anyways. We all know that. That's not even the problem. And you guys don't have to agree with me. She should have gave me another hearing so I can go and explain to her. She didn't do that. Then she went ahead and have a settlement to the Eckerts, which no judge gives a settlement for a judgment to anybody at an eviction.

CP 522.

The trial court recognized that the loan was valid and enforceable and agreed that the Paunescus failed in their responsibility to repay the Eckert Loan. The trial court granted the Eckerts' and Scott Russon's motions for summary judgment and denied the Paunescus' motion. Because no genuine issues of material fact remained following the summary judgment motions, this matter was dismissed.

When asked in her deposition what Daniela Paunescu hoped to achieve through this case, she responded as follows:

I want to prove them wrong. . . I want to prove that I was wronged and I'm not going to let it go until I do. This is a battle. It's not even anymore about the house or anything. It's I [sic] want to prove it.

CP 529. This irrational sentiment has resonated throughout every step of this case. By this appeal, the Paunescus are attempting to assert every claim that they can think of in order to escape responsibility for their own mistakes. These claims have no merit. Because the Paunescus did not and cannot meet their burden of proof on any of their claims, Respondent Scott Russon respectfully requests that this Court affirm the trial court's Summary Judgment decisions.

II. FACTUAL SUMMARY

A. **The Property**

The property that is the subject of this case is located at 5619 NE 56th Street in Vancouver, Washington (hereinafter “the property”). CP 473-474. Ioan and Daniela Paunescu purchased the property in July of 2005. *Id.* Purchase of the property was financed through two (2) separate loans from MIT Lending (hereinafter “the MIT Loans”). CP 480. The loans were secured by two (2) Deeds of Trust. CP 554-583. The first Deed of Trust was in the amount of \$164,000 and the second was secured for \$41,000. CP 480.

At the time of the making of the MIT loans, Daniela Paunescu had a poor credit score. CP 528. Due to this fact, MIT Lending required Mrs. Paunescu to execute a Quit Claim Deed to her husband to establish the property as his separate property. *Id.* Thereafter, Mr. Paunescu executed all of the loan documents individually. CP 516. Both Deeds of Trust securing repayment of the MIT Loan with the property were recorded on July 21, 2005. CP 554-583.

In July 2006, the Paunescus obtained a home equity line of credit from Bank of America in the amount of \$60,000. CP 480. This loan was used to refinance the \$41,000 MIT Deed of Trust and to “pay off some debt” that the Paunescus had. *Id.*

B. The Eckert Loan

Sometime in 2006, Mr. and Mrs. Paunescu decided to start an adult home care business. CP 482. In order to open their business, they needed to build or buy a property. CP 509. They decided to operate the business on their existing property. CP 482. In order to make extra room for the business and to bring the property into compliance with state regulations for an adult home care facility, an extensive remodel was required. CP 505.

The Paunescus commissioned designs for the addition to the property in February 2007. CP 489. These plans were approved by Clark County in April of 2007. *Id.* The proposed addition provided for six (6) additional bedrooms with private bathrooms. CP 585. The new designs also provided for modifications to the property that would be compliant with the requirements of the Washington Association of Building Officials (“WABO”) and the Americans with Disabilities Act (“ADA”). CP 506.

In order to build the addition to the property, the Paunescus had to take out a loan. The Paunescus had no equity in their property at this time. Additionally, they had a poor credit history. CP 514-515. For these reasons, a traditional loan from a bank was not available to them. The Paunescus contacted an acquaintance, Ben Lucescu, to help them find a private lender. CP 504. Mr. Lucescu introduced the Paunescus to the

Eckerts. CP 484. On or about May 15, 2007, the Paunescus obtained a \$290,000 loan from the Eckerts (hereinafter “the Eckert loan”). *Id.* The loan was secured by a Deed of Trust listing the Eckert Trust as the beneficiary. CP 587-590. The Eckert loan was a short term, interest only loan, due and payable in full on May 12, 2008. CP 592-595.

According to Mrs. Paunescu, they planned to use the Eckert loan to fund construction for the addition to their property for the adult home care business. CP 484. They intended to repay the Eckert loan through a refinance from another lender within one (1) year. *Id.*

The Paunescus failed to adequately manage their business such that they could repay the Eckert Loan. The Paunescus did not have a formal business plan prior to taking the loan from the Eckerts. CP 509. According to Mrs. Paunescu, the process of opening an adult home care business first required her to build or buy a facility. *Id.* Next, they would have to apply for a license and sign a contract with the State to place residents in the facility. *Id.* Mrs. Paunescu admitted during her deposition that she and her husband underestimated the time required to build the addition, apply for a license, obtain a contract with the State, and have residents placed in the home from whom she could generate income to repay the loan. CP 510. According to Mrs. Paunescu, construction on the home began in May of 2007 and lasted until September of 2007. *Id.* The

Paunescus did not have a budget for this process, nor did they organize a formal timeline for construction. *Id.* Mrs. Paunescu even admitted her own ignorance during this process:

Mr. Scisciani: I'm going to ask you, did you have anything in mind relative to when we're going to be done with construction, when I can contact DSHS, when can I get people in these rooms and when can I start generating money with which I might do, among other things, repay this loan?

Mrs. Paunescu: You know, you must be somewhere around 50 years old, 40 years, 40-something, correct? Me, at the time, I was about 20 years old. You tell me what a 20-year old kid really think about at that point. You tell me. There's a certain—once you get older and older and older, you get more smarter and smarter, hopefully.

...

Mrs. Paunescu: I did not.

CP 511.

The Paunescus did not even hire a general contractor for the job. CP 506. Instead, they hired and managed contractors themselves. CP 491. Changes to the property were made according to the WABO requirements. CP 505. In the end, the Paunescus did not get their license to operate the adult home care business until February 15, 2008—a little less than three (3) months before the loan came due. CP 511.

C. Payments on the Eckert Loan

The Paunescus made the required payments of \$2,900 per month to the Eckert Trust between June 2007 and November 2008 as contemplated by the Promissory Note they signed with the Eckerts. CP 592-595. In the fall of 2007, the Paunescus asked the Eckerts to loan them an additional \$50,000. CP 510. The Eckerts were unwilling to extend this loan. *Id.* The Paunesucs were uable to obtain refinancing of the Eckert loan by May 12, 2008. CP 490.

Mrs. Paunesucu admits that after they were unable to secure refinancing of the Eckert loan, they “paid the Eckerts out of their [loan] money” for approximately one and a half years. CP 512. The Paunescus wrote to the Eckerts in May 2009 and acknowledged their obligations:

We are not disputing that we owe that amount. We do want to pay it back in full. . . We took out the private loan from the beginning with the thought that we will do the Adult Foster Care Home. This is what you knew the money was for. The loan was used all for the construction for the home.

CP 648-649.

The Paunesucs made payments of \$1,450 in December 2008 and January 2009. CP 597. Thereafter, the Paunescus stopped making payments on the loan until November 2012 when they paid \$500 per month until May of 2013. *Id.* The Paunesucs made no further payments

on the Eckert loan. *Id.* In July of 2013, the Eckerts decided to seek the assistance of an attorney to secure full payment and/or foreclosure on the loan.

D. Non-Judicial Foreclosure on the Property

The Eckerts retained Scott Russon to proceed with a non-judicial foreclosure on the property. Because the Eckert loan was made for the expansion of the property to accommodate the adult home care business (a fact admitted by the Paunescus), Mr. Russon characterized the loan as commercial.

Mr. Russon carefully adhered to the required procedures for a non-judicial foreclosure of a commercial loan. A Notice of Default was mailed to the Paunescus and posted on their property on September 11, 2013. CP 599-602. The Eckerts appointed Mr. Russon as the successor trustee on the Deed of Trust. CP 604-605. Upon Mr. Russon's appointment, the Eckerts executed a Request to Initiate Foreclosure Proceedings. CP 607-609. A Notice of Trustee's Sale and Notice of Foreclosure were served on October 31, 2013. CP 611-614.

Mr. Russon also provided copies of the Notice of Trustee's Sale to all of the parties that had an interest in the property, including the senior lienholder, MIT Lending. CP 688-697. The Notice of Trustee's Sale to

MIT Lending was returned to Mr. Russon as “undeliverable.” CP 668-686.

The Trustee’s Sale was scheduled for February 7, 2014 at 2:00 p.m. at the gazebo in front of the Clark County Public Service Center. CP 611-614. The Eckerts, on behalf of the Eckert Family Trust, purchased the property at the Trustee’s Sale for \$568,144.75 subject to the first MIT loan. CP 616.

E. Eviction

Initially, the Eckerts planned to lease the property to the Paunescus following the foreclosure sale because they did not want to evict them or their tenants. CP 618-619. Ultimately, however, the Paunescus did not pursue the lease option. CP 528. Therefore, the Eckerts evicted the Paunescus and their tenants.

A Complaint for Unlawful Detainer, along with an Eviction Summons was served upon the appellants on March 19, 2014. CP 621-625. A hearing was held on March 28, 2014 and Writ of Restitution was issued, thereby validating that the foreclosure was done properly. CP 632-637. The Paunescus were evicted and the Eckerts were granted possession of the property. *Id.*

Because the Paunescus were caring for state placed tenants in their adult care facility, Mr. Russon contacted the Department of Social &

Health Services (“DSHS”) to inform them of the situation and for direction on how to proceed. CP 639. DSHS conducted an investigation of the Paunescus’ facility and ultimately revoked their license and stopped placement of admissions for their adult care home. CP 641-646. The tenants were removed from the facility on or about April 7, 2014. The Paunescus moved out of the house by April 16, 2014.

PROCEDURAL HISTORY

The Paunescus filed their Amended Complaint on July 18, 2014. CP 21-30. Before counsel for Mr. Russon could appear or answer the Complaint, the Paunescus filed their Motion for Partial Summary Judgment. CP 35-46. The hearing was originally set for August 22, 2014. *Id.* The parties agreed to continue the hearing to January 16, 2015 to allow the Eckerts and Mr. Russon to conduct discovery.

The Eckerts and the Russons each issued discovery requests to the Paunescus. A deposition of Daniela Paunescu was held on November 24, 2014. During her deposition, Mrs. Paunescu threatened to file sanctions against Judge Clark if her Motion for Partial Summary Judgment was not granted. CP 522. In response to this threat, the Eckerts filed a Request for Determination of Judge’s Status on December 3, 2014. Mr. Russon filed a Joinder to this request on December 9, 2014. A hearing on the pleadings was held on December 12, 2014. CP 60. The Eckerts’ & Mr. Russon’s

intention in filing the request was to (1) confirm whether Judge Clark would need to recuse herself, and (2) confirm that the Court would maintain the January 16, 2015 hearing date for the parties Motions for Summary Judgment. At the hearing, Judge Clark confirmed that she did not see any need to recuse herself from the matter. CP 60. Judge Clark confirmed with the parties that they all still wished to proceed with the hearing as scheduled on January 16, 2015. All of the parties, **including the Paunescus**, agreed. CP 60 & RP 12.

The Eckerts and Mr. Russon each filed Motions for Summary Judgment. CP 61-93; 95-116. The Eckerts and Mr. Russon each also filed their own responses to the Paunescus' Motion for Partial Summary Judgment. CP 61-93; 128-136. The Court heard these motions on January 16, 2015. RP 15-23. The Court granted the Eckerts' and Mr. Russon's motions. CP 137-138 & RP 15-23. The Court dismissed the matter and awarded the Eckerts and Mr. Russon reasonable attorney's fees and costs. CP 167-169; 242-244.

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ARGUMENT

I. NO GENUINE ISSUES OF MATERIAL FACT EXIST IN THIS MATTER, THEREFORE SUMMARY JUDGMENT WAS WARRANTED.

A. Standard of Review

This Court reviews an order granting summary judgment de novo. *Adams v. King County*, 164 Wn.2d 640, 647, 192 P.3d 891 (2008). Under CR 56(c), a court may grant summary judgment if the record presents no genuine issue of material fact and the law entitles the moving party to judgment. *Id.* “In conducting this inquiry, this Court must view all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Such facts must move beyond mere speculative and argumentative assertions. *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612-13, 62 P.3d 470 (2003). A fact is a material fact only if it is a fact upon which the outcome depends, and mere argumentative speculation or assertion are insufficient to place a fact in material controversy. *Cranwell v. Mesec*, 77 Wn.App. 90, 890 P.2d 491, *rev. denied*, 127 Wash.2d 1004 (1995). When a nonmoving party fails to controvert facts supporting the summary judgment motion, those facts are considered as established. *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 779 P.2d 697 (1989).

B. Discovery was Complete Prior to the Motions for Summary Judgment Hearing

The Paunescus' only novel claim in this appeal is their allegation that the summary judgment motion was premature because they did not have a full opportunity to conduct discovery. *Brief of Appellant pg. 26-31*. This argument is without merit for several reasons.

Motions to continue in the context of summary judgment are governed by CR 56(f). This rule provides:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment and may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Id. The Paunescus never made an attempt to continue the summary judgment hearing under this rule. In fact, the issue of discovery was never raised before the trial court. Instead, the facts clearly demonstrate that the Paunescus were eager for the hearing and that they did not wish to delay any further. For these reasons, the Court should not consider this question pursuant to RAP 2.5(a). Nevertheless, Mr. Russon will address these issues for this Court's consideration.

The Paunescus filed their motion for partial summary judgment on August 6, 2014. CP 35-37. The motion hearing was continued to January 16, 2015 specifically to allow the parties to conduct discovery. Discovery

was conducted and ultimately, a deposition of Daniela Paunescu was held on November 24, 2014. Prior to the deposition, it was presumed that the respondents would take the deposition of Ioan Paunescu as well, however, after Mrs. Paunescu's deposition was complete, it was determined that this was not necessary. The Paunescus never requested any depositions, nor did they issue any discovery requests.

At the December 12, 2014 hearing on the Request for Determination of Judge's Status, the following exchange occurred between Mrs. Paunescu and Judge Clark:

Mrs. Paunescu: That's January 16. That's what I want ma'am.

Judge: So at this time are you objecting to this Court going forward with the January motion?

Mrs. Paunescu: Not at this time.

Judge: Okay.

Mrs. Paunescu: No objection. I'm fine.

RP 12. The very purpose of this hearing was to confirm that, despite Mrs. Paunescu's threats against Judge Clark, the hearing on the parties' motions for summary judgment could still be held on January 16, 2015. The hearing on the Request for Determination of Judge's Status was held a mere thirty five (35) days prior to the motions for summary judgment hearing. Mrs. Paunescu had the opportunity to object to the motions for summary judgment hearing date at the December 12, 2014 hearing. The Paunescus certainly would have been aware that they needed extra time to

conduct discovery at this late stage. They never made any objection to the hearing date. In fact, their own actions and statements clearly show that they were eager to move forward with the hearing. They cannot now claim that the summary judgment motions were not ripe simply because their motion was denied.

The Paunescus waived their right to raise discovery issues on appeal given demands that the trial court move forward with the hearing on the motions for summary judgment. Furthermore, by failing to make *any* arguments relating to the status of discovery prior to the hearing, they have not preserved these arguments for this Court.

The Paunescus have given no reason why they did not issue discovery requests or set any depositions. They have not stated what further evidence they need or how that evidence might raise a genuine issue of material fact. The Paunescus cannot show that they were entitled to a continuance of the summary judgment motion under CR 56(f) and there is no reason in hindsight to show that the summary judgment motions were not appropriately conducted by the trial court on January 16, 2015.

C. The Eckert Deed of Trust and Promissory Note were Valid and Enforceable

1. Introduction

The Paunescus assert that a trust cannot take an interest in a promissory note or deed of trust because it is not a legal entity and cannot take title to trust assets. *Brief of Appellant pg. 15*. Thus, the Paunescus claim, the Promissory Note for the Eckert loan and the Deed of Trust securing repayment of that loan were invalid because the Eckert Trust is not a proper holder or beneficiary. *Id.* at 17. Furthermore, the Paunescus claim that the loan was invalid because the true name of the trust from which they borrowed \$290,000 is the “Eckert Family Trust” and all of the loan documents reference the “Eckert Trust.” *Id.*

Due to all of these alleged deficiencies, the Paunescus claim that the appointment of Scott Russon as successor trustee was invalid, and therefore, the foreclosure and eviction that followed were also invalid.

2. A Trust is a Valid Legal Entity That May Take Title to Property.

A legal entity is defined as “a body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents.” *Black’s Law Dictionary* 913 (8th ed. 2004).

For a trust to be valid, it must involve specific property, reflect the settlor’s intent and be created for a lawful purpose. *Id.* In Washington, a

trust is created if (1) the trustor has capacity to create a trust, (2) the trustor indicates an intention to create the trust, (3) the trust has a definite beneficiary, (4) the trustee has duties to perform, and (5) the same person is not the sole trustee and sole beneficiary. RCW 11.98.011. Washington law recognizes trusts as legal entities consisting of the trust estate and the associated fiduciary relations between the trustee and the beneficiaries.

Restatement (Third) Trusts § 2, comment a.

The Paunescus claim that the trustee is the owner of the trust assets. This assertion is not founded in any law. To the contrary, RCW 11.98.070 provides:

A trustee, or the trustees jointly, of a trust, in addition to the authority otherwise given by law, have discretionary power to acquire, invest, reinvest, exchange, sell, convey, control, divide, partition, and manage the trust property in accordance with the standards provided by law, and in so doing may:

- (1) Receive property from any source as additions to the trust or any fund of the trust to be held and administered under the provisions of the trust;
- . . .
- (9) Grant leases of trust property. . .;
- . . .
- (17) Change the character of or abandon a trust asset or any interest in it.

The trustee powers above clearly contemplate that the trust has its own assets separate and apart from the trustee.

The authorities relied upon by the Paunescus in their Brief of Appellant are not informative on any of these issues. In *Lowman v. Guie*, 130 Wn. 606, 228 P. 845 (1924), the Court discussed whether a common law trust was a corporate entity. This debate is simply irrelevant to the present case, first and foremost because it concerns a common law trust, which is a form of a business organization. *Black's Law* at 1547. Whether or not a common law trust is a corporate entity is irrelevant for purposes of this discussion.

The Paunescus further rely upon *Portico Management Group, LLC. V. Harrison*, 202 Cal.App. 4th 464, 136 Cal.Rptr. 3d 151 (2011). *Portico* is a California decision, and thus, it has no bearing on Washington law. Nevertheless, this case involved a question of whether a trust could be a judgment debtor under the California Code of Civil Procedure. The *Portico* case does not include any discussion even remotely related to whether a trust could be a beneficiary under the terms of a deed of trust. For these reasons, *Portico* is neither persuasive nor helpful to the present matter.

The Eckert Family Trust was validly created. The trust holds the property of the trustors, Gerhard and Margarethe Eckert for their use and

enjoyment during their lives and for the benefit of their three (3) children. The Eckerts are the trustees of the Eckert Family Trust. CP 461-466. As trustees, the Eckerts have the power to sell, dispose of, invest, reinvest, exchange, and manage the assets of the trust. Because the trust is and was at all relevant times a valid legal entity, it could take an interest in the Promissory Note and Deed of Trust.

3. The Eckert Deed of Trust was Valid

Even if a trust could not be considered a legal entity and would, therefore, be an invalid beneficiary, this defect would not render the deed of trust invalid. Washington courts have considered the effect of a designation of an unlawful beneficiary on a deed of trust and promissory note in recent years. In *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013), the Court of Appeals specifically refused to void a deed of trust under these circumstances. The Court explained:

[Walker] asks the court to void a consensual lien against his property because of a defect in the instrument creating the lien, the designation of an ineligible entity as beneficiary of the deed of trust We reject the argument that this defect in a deed of trust, standing alone, renders it void and note that Washington courts have repeatedly enforced between the parties a deed or mortgage that failed to comply with the statutory requirement of an acknowledgement.

Id. at 322. Washington courts will not allow borrowers to escape their responsibilities under circumstances like those in this case. The Paunescus provide no support for their assertion that “any deed which lists an invalid entity is void.” *Brief of Appellant pg. 17.* In reality, the law stands for the exact opposite of this position.

4. The Use of the Name “Eckert Trust” Instead of “Eckert Family Trust” is Irrelevant.

The loan proceeds were deposited into the Paunescus’ bank account from an account in the name of the Eckert Family Trust. CP 520. All of the loan documents reference the “Eckert Trust.” CP 587-590; 592-595. Despite this minor error, the fact remains that the Paunescus accepted the money from the Eckert Family Trust and made loan payments to the Eckerts without any confusion. CP 178. Therefore, the Paunescus are estopped from asserting that the loan was not valid to begin with. Additionally, the Paunescus waived their right to contest the validity of the loan because they (1) accepted the loan, (2) spent all of the loan proceeds, (3) made payments on the loan as contemplated by the loan documents, (4) requested additional time to repay the loan, and (5) asked for an additional \$50,000 loan from the Eckerts.

At the very worst, the use of the name “Eckert Trust” was a minor scrivener’s error. It was not used to deceive the Paunescus nor did it

create any confusion about where the money came from and to whom the payments should be made. The Paunescus cannot now claim—after spending \$290,000 of the Eckert Family trust’s money and several years of making payments on the loan to the Eckerts—that this minor error made any difference in their transaction with the Eckerts.

5. Appointment of Scott Russon as Successor Trustee was Valid

The Paunescus claim “[t]hat because Deed of Trust [sic] listed invalid beneficiary, the Appointment of Successor Trustee was invalid and Russon had no authority to carry out a non-judicial foreclosure sale of the Residential Property and the trustee sale was was [sic] invalid and non-effectual against Paunescu’s interest.” *Brief of Appellant pg. 19*. Just as with their Motion for Summary Judgment, the Paunescus provide no legal authority for this claim. *Id.*

The Paunescus address the Mortgage Electronic Registration System, Inc. (hereinafter “MERS”) in their brief. *Brief of Appellant pg. 10*. It is true that the named beneficiary on the Deed of Trust was MERS. CP 587-590. The Paunescus point out that the Court in *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), held that MERS is not a valid beneficiary of a deed of trust and thus lacks the authority to assign the security instrument. The Paunescus failed to state,

however, that the *Bain* case further held that “only the *actual holder* of the promissory note or other instrument evidencing the obligation may be beneficiary with the power to appoint a trustee.” (emphasis added) *Id.* at 89.

In the present case, the Eckerts were the *actual holders* of both the Deed of Trust and the Promissory Note. As the holders, they had the power to appoint Mr. Russon as successor trustee. Therefore, Mr. Russon’s appointment was valid and he had the power to carry out the non-judicial foreclosure on the Paunescus’ property.

6. Conclusion

A trust is a legal entity. It owns trust assets independently from the trustee. As trustees, the Eckerts had the authority to make a loan on behalf of the trust. Naming the Eckert Trust as holder of the Promissory Note and Deed of Trust was proper because it was the trust’s asset (i.e. money) that was loaned to the Paunescus. Notwithstanding, even if this Court determines that the Eckert Trust was not a lawful beneficiary, case law has clearly established that this defect would not render the deed of trust invalid and would not allow borrowers to escape their obligations.

Because the Eckerts were the holders of the Deed of Trust and the Promissory Note, they had the power to appoint Scott Russon as successor trustee. Therefore, the foreclosure and eviction that followed were valid.

The Paunescus have failed to point to any issue of material fact regarding these issues. The trial court properly found that these claims were without merit. CP 137-138. Because the Paunescus have not met their burden, Mr. Russon respectfully requests that summary judgment be affirmed.

D. The Foreclosure and Eviction Were Valid.

1. Introduction

The Paunescus argue that Mr. Russon, as Successor Trustee, did not adhere to the laws and procedures pertaining to foreclosing on a residential property. *Brief of Appellant pg. 13*. Furthermore, the Paunescus claim that Mr. Russon did not provide notice of the foreclosure to all of the necessary parties. *Id.* For these reasons, the Paunescus contend, the foreclosure and the eviction that followed were improper and illegal. *Id.* These claims lack merit.

2. Mr. Russon Properly Characterized the Loan and Foreclosure as Commercial.

The Paunescus contend that Mr. Russon failed to comply with RCW 61.24.030 and .031. These statutes govern the foreclosure of a primary residence and set forth notice requirements, as well alternative options to avoid foreclosure. In a residential foreclosure, these procedures are mandatory. Because the foreclosure that is the subject of this case was commercial, these statutes are inapplicable and therefore, Mr. Russon was

not required to comply with them. Specifically, RCW 61.24.031(7)(a) provides:

(7)(a) This section applies only to deeds of trust that are recorded against owner-occupied residential real property. This section does not apply to deeds of trust:

(i) Securing a commercial loan...

A commercial loan is defined as “a loan that is not made primarily for personal, family, or household purposes.” RCW 61.24.005(4).

The purpose of a loan is established from the representations made by the borrower at the time of the loan. *Brown v. Giger*, 111 Wn.2d 76, 82, 757 P.2d 523 (1988). The focus is on the purpose the borrower actually represented at the time, not what was written on the application. *Id.* The representations made by the borrower are a factual question, determined by examining the circumstances surrounding the transaction. *Castrohuevo v. General Acceptance Corp.*, 79 Wn.App. 747, 751-52, 905 P.2d 387 (1995).

The documentary evidence carries more weight than unsubstantiated claims of contrary oral representations. *Pacesetter Real Estate v. Fasules*, 53 Wn.App. 463, 471-72, 767 P.2d 961 (1989). Lenders have a “right to rely on representations made in the contract setting based on a general duty to contract in good faith.” *Id.* at 473-74. Similarly,

courts give persuasive significance to the fact that the funds were used for business purposes. *Id.* at 472-73.

The Paunescus borrowed \$290,000 from the Eckerts in order to build an addition to their property to make room for an adult home care business. CP 484. Even before making the loan, the Paunescus commissioned architectural drawings for the addition. CP 489. All of the improvements on the property were designed and built with WABO standards in mind as required by the State as a condition to obtaining a license to open an adult home care business. CP 506. In their May 2009 letter to the Eckerts, Mrs. Paunescu admitted to the purpose of the loan:

We took out the private loan from the beginning with the thought that we will do that ***Adult Foster Care Home***. This is what you knew that the money was for. ***The loan was used all for the construction of the home.***

CP 648-649. Under these circumstances, a reasonable person could conclude that the loan was a commercial loan. The Paunescus seem to argue that because the property itself was residential, then the loan was residential. *Brief of Appellant pg. 20*. The Paunescus are confusing the issues in this regard. Additionally, contrary to the Paunescus' arguments, the fact that the Paunescus used a small portion of the Eckert loan to refinance their second Deed of Trust with MIT Lending is irrelevant given the larger purpose underlying the Eckert Loan.

All of the facts surrounding the loan clearly indicate that it was made for a commercial purpose. Because the loan was made for a commercial purpose, it was a commercial loan and RCW 61.24.031 was not applicable to the non-judicial foreclosure on the loan.

3. Mr. Russon Sent All of the Required Notices to Other Lienholders

The Paunescus argue that the trustee of the first Deed of Trust on the property was U.S. Bank and not the entity who made the loan, MIT Lending. *Brief of Appellant pg. 22*. Therefore, the Paunescus claim that the trustee never received the Notice of Default and Notice of Intent to Foreclose. *Id.*

RCW 61.24 et. al. dictates the procedures for foreclosing on a deed of trust. Mr. Russon adhered to the requirements of this chapter strictly when he foreclosed on the Eckert Deed of Trust. Specifically, Mr. Russon was required to provide notice to the borrower and grantor, as well as the occupants of the real property that is being foreclosed on. RCW 61.24.040 (b)(i) and (vi). With respect to the holders of any additional liens on the property, notice must be mailed to:

- (ii) The beneficiary of any deed of trust or mortgagee of any mortgage, or any person who has a lien or claim of lien against the property, that was recorded *subsequent to* the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

...
(v) The last holder of record of the lien of any judgment subordinate to the deed of trust being foreclosed

(emphasis added) *Id.* Mr. Russon was not required to provide notice to the senior lienholder given the above statute. Despite this, Mr. Russon did send notice to MIT Lending using the information provided to him in the Trustee's Sale Guarantee from First American Title Insurance Company. The Notice of Trustee's Sale to MIT Lending was returned to Mr. Russon as "undeliverable," however, he was not required to take additional steps to provide notice to MIT. CP 680.

Interestingly, the Paunescus first contended in their Opposition to Mr. Russon's Motion for Summary Judgment that notice should have been sent to Chase Bank. CP 760-869. They now assert that notice should have been provided to US Bank. *Brief of Appellant pg. 22.* MIT Lending is the holder of the first mortgage. Chase Bank is the loan servicer. CP 554-583. According to the Paunescus, US Bank was the trustee of the Deed of Trust. Nothing in RCW 6.24.040 requires the successor trustee to provide notice to either a trustee or a loan servicer. This is especially true in light of the fact that the first mortgage was not affected by the foreclosure on the Eckert Loan. As a junior lender, the Eckerts purchased the property in foreclosure *subject to* the first mortgage.

Mr. Russon fulfilled and, in fact, exceeded his duty to provide notice of the foreclosure. The Paunescus have failed to establish that Mr. Russon did not provide notice to any party required by law. Therefore, this claim is without merit.

4. The Eviction was Done Legally

The Paunescus appear to claim that because Mr. Russon provided them with a Sixty Day Notice to Vacate the property pursuant to RCW 61.24.146, that he is somehow conceding that the loan was residential. *Brief of Appellant pg. 25*. This is another instance of the Paunescus confusing the fact that their residential property secured the commercial loan that they took from the Eckerts.

Because the Paunescus lived in the property that was foreclosed on, Mr. Russon was required to follow the procedures for foreclosing on a tenant-occupied property pursuant to RCW 61.24.146. Because Mr. Russon was presented with the unique situation of foreclosing on a property that housed state-placed tenants, he contacted DSHS for guidance. CP 665. Thereafter, DSHS conducted an independent investigation of the Paunescus' adult home care facility and decided to revoke the Paunescus' license. CP 639. Mr. Russon had no participation or oversight of this process.

5. Conclusion

Because the Eckert loan was made for a commercial purpose, Mr. Russon properly characterized it as a commercial loan. Accordingly, he was not required to follow the procedures required of a non-judicial foreclosure on a residential property.

Mr. Russon provided notice of foreclosure to all required parties. The Paunescus have failed to demonstrate that any notice requirement was not satisfied. Additionally, the Paunescus have failed to point to any deficiencies in the eviction process.

Because the Paunescus did not raise any issues of material fact regarding these claims, the trial court dismissed them on summary judgment. CP 167-169. The Paunescus have failed again in this regard, therefore, Mr. Russon respectfully requests that this Court affirm the trial court's grant of summary judgment.

E. The Paunescus are Not Entitled to the Homestead Exemption

The Paunescus claim that their homestead rights are superior to the Eckert Deed of Trust that was foreclosed on. *Brief of Appellant pg. 25-27*. The Paunescus cite to *Mann v. Household Fin. Corp. III*, 109 Wn.App. 387, 35 P.3d 1186 (2001) to support this contention. The *Mann* case concerned a property that was purchased in foreclosure subject to a senior deed of trust. The Court in *Mann* held that the senior deed of trust was not

extinguished by the foreclosure sale and that the senior lien holder was entitled to foreclose upon the property. *Id.*

We agree with the Paunescus that senior liens are not extinguished in foreclosure. When the Eckerts purchased the Paunescus' property in foreclosure, they took it subject to the first MIT Loan. The Eckerts recognize the validity of the senior deed of trust, and in fact, have made several attempts throughout this case to discover information that will allow them to make payments on the MIT loan. The Paunescus have refused to give this information to the Eckerts and claim to have been making regular payments on the first MIT loan themselves.

There is a distinction, however, between a deed of trust and the homestead exemption. A deed of trust is an instrument that secures the payment of a debt with the debtor's property. The homestead exemption is a legal regime which protects a specified amount (\$125,000 in Washington State) of home equity from creditors. *See* RCW 6.13 et al. The homestead exemption is intended to help keep families from losing their homes in hard times. Simply put, in the event of a foreclosure or bankruptcy, lenders do not have to pay the equivalent of their homestead exemption available in equity to their creditor. The homestead exemption is not a lien on the property.

Regardless of their confusion about the nature and priority of the homestead exemption, the Paunescus are not entitled to the homestead exemption in this case for two (2) reasons. First, a party cannot claim the homestead exemption in response to a non-judicial foreclosure on a deed of trust. *Felton v. Citizens Fed. Savings & Loan Assn. of Seattle*, 101 Wn.2d 416, 679 P.2d 928 (1984). Second, Daniela Paunescu did not have a legal interest in the property after she deeded her interest to her husband. CP 528. Accordingly, she assigned her rights in the property, including her homestead exemption, to her husband. Thereafter, Mr. Paunescu signed away his rights to the homestead exemption when he executed the promissory note and deed of trust. For these reasons, the trial court properly held that the Paunescus are not entitled to the homestead exemption.

ATTORNEY'S FEES

Mr. Russon requests an award of attorney's fees on appeal pursuant to RAP 18.1(a). An award of attorney's fees based on a contractual provision is appropriate when the action arose out of the contract and the contract is central to the dispute. *Seattle First Nat'l Bank v. Wash. Ins. Ass'n.*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). Furthermore, 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.

CP 587-590.

The Deed of Trust obviously was the foundation of the Paunescus' claims against all the Eckerts and Mr. Russon. The Paunescus' case rested upon their theory that the Deed of Trust was invalid and, therefore, all actions by the Eckerts and Mr. Russon stemming from the Deed of Trust were similarly invalid. The Deed of Trust upon which the Paunescus' claims are based include a provision by which the Mr. Russon is entitled to recovery of "all costs, fees and expenses in connection with the Deed of Trust." Specifically, the Deed of Trust upon which the Paunescus' claims were based states as follows:

To pay all costs, fees and expenses in connection with the Deed of Trust, **including the expenses of the Trustee incurred in enforcing the obligation secured hereby** and Trustee's and attorney's fees actually incurred as provided by statute.

(emphasis added). Not only does the foregoing provision provide for payment of "all costs, fees and expenses in connection with the Deed of Trust," but it includes an illustrative example that establishes that such

“costs, fees and expenses” specifically includes those incurred by the Trustee (Scott Russon). This entire case was about “enforcing the obligation secured [by the Deed of Trust].” Thus, the Paunescus cannot reasonably contend that they are not responsible for the Mr. Russon costs, fees and expenses associated with this lawsuit.

CONCLUSION

It is clear that the Paunescus have failed to meet their burden of proof on any of their claims at the trial level and on appeal. For these reasons, and for the reasons set forth above, Respondent Scott Russon respectfully requests that this Court affirm the trial court’s Summary Judgment decisions.

DATED this 15th day of July, 2015.

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CERTIFICATE OF SERVICE

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

I certify under penalty of perjury under the laws of the State of

Washington, that the following is true and correct:

I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<u>Plaintiffs</u> Ioan & Daniela Paunescu 13609 NE 28th Street Vancouver, WA 98682	() Via U.S. Mail (X) Via Legal Messenger () Via Facsimile () Via E-Mail
<u>CO/ Defendants Eckert</u> Ben Shafton Caron Colven Robison & Shafton, P.S. 900 Washington Street, Suite 1000 Vancouver, WA 98660	() Via U.S. Mail () Via Legal Messenger () Via Facsimile (X) Via E-Mail

DATED this 15th day of July, 2015, at Seattle, Washington.



Kandice Besaw, Legal Assistant