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No. 53494-1-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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KIMBERLY HAN,  
Appellants/Plaintiffs

v.

ROBERT E. MARTIN,  
Respondent/Defendant

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**APPELLANTS' REPLY TO  
RESPONDENT'S BRIEF**

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COMES NOW Appellant, Kimberly Han, by and through her attorney of record, Kelly DeLaat-Maher of Smith Alling P.S., and submits Appellant's Reply to Respondent's Brief on appeal as follows:

**I. RESTATEMENT/CLARIFICATION OF FACTS**

Han relies on the facts contained within the Appellant's brief, and those facts will not be reiterated here.

The parties appear to agree on many pertinent facts. Han and Martin were friends that helped and supported one another. CP 38, 52. Martin does not dispute that Han took care of him for a significant length of time, assisting him with medical, physical and personal needs. CP 33, 79. He does not dispute that he volunteered to help her rebuild her credit by co-signing on the loan with Kitsap Credit Union. CP 56.

Ms. Han acknowledged she was obligated to repay the loan to Kitsap Credit Union. CP 60. Indeed, the record reflects that she made several payments on the loan. CP 110. However, she ultimately defaulted on a final balloon payment in December, 2016. As a result, the credit union utilized the certificates of deposit Martin had provided to Han as collateral for the loan to pay the balance. CP 66, 110.

The parties do not dispute the loan the parties entered into with Kitsap Credit Union for Ms. Han's benefit. Where the parties disagree, however, is the nature of Ms. Han's obligation to Martin upon default of the loan to Kitsap Credit Union. Mr. Martin himself did not provide any affidavits or testimony whatsoever as to Han's purported obligation to him. Instead, Martin's counsel attached various discovery responses from Ms. Han to his Declaration, careful review of which demonstrates that Ms. Han believed the certificates of deposit constituted a gift. CP 79, CP 62, CP 65-66. Although she did not specifically point these portions of the record out to the court while she was acting pro se, she did file a responsive brief to Martin's motion for summary judgment outlining her argument and position. CP 122-125.

## **II. ARGUMENT**

### **A. GENUINE ISSUES OF MATERIAL FACT PREVENT SUMMARY JUDGMENT**

Martin claims he met his burden on summary judgment, despite not providing any affidavits based upon his own personal knowledge, because he "point[ed] out to the trial court that the nonmoving party lacks sufficient evidence to support its case." Response Brief at 4 (citing to *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989)). In

pointing out that the nonmoving party lacks sufficient evidence, the moving party must identify “those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *White v. Kent Medical Center, Inc. P.S.*, 61 Wn.App. 163, 170, 810 P.2d 4 (1991).

Here, while Martin selectively pointed to discovery responses provided by Ms. Han, he did not point to any pleadings, depositions, answers to interrogatories, admissions on file or affidavits as to **his intention** in providing the certificates of deposit as collateral to the loan. He presented no evidence as to Ms. Han’s obligations to him, only her obligation to Kitsap Credit Union. Because Ms. Han was admittedly a party to the loan, she acknowledged she had an obligation to pay it. However, nowhere does Martin point to evidence that Ms. Han understood and agreed she had an obligation to repay Martin in the event the collateral was used to pay the balance of the loan following default.

By contrast, the pleadings, answers to interrogatories and deposition on file and utilized in support of Martin’s Motion demonstrate Ms. Han’s belief that the collateral was provided to her as a gift and that she was not under an obligation to repay him. Ms. Han argued her position in her pro

se response to Martin's Motion for Summary Judgment. Ms. Han demonstrated genuine issues of material fact for trial, which facts should have prevented the court from determining summary judgment.

**B. MS. HAN IS NOT LIABLE TO MARTIN BECAUSE HE PAID THE OBLIGATION TO KITSAP CREDIT UNION**

Martin argues that Ms. Han is liable to Martin based upon the theory of unjust enrichment. Unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another. *Baillie Commc'ns, Ltd., v. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 160, 810 P.2d 12 (1991).

Martin cites to *Columbia Community Bank v. Newman Park, LLC*, 177 Wn.2d 566, 304 P.3d 472 (2013) in support of the argument that Martin is entitled to reimbursement because he paid the obligation of a defaulting party, Kimberly Han. He argues that the use of his collateral to pay the loan resulted in Ms. Han's unjust enrichment. Martin makes this argument even though he was equally obligated on the loan. Martin's reliance the *Newman Park* case is misplaced.

In *Newman Park*, Newman Park LLC was a development company with 12 members, including a company owned by Sturtevant that held a 39% interest in Newman Park. *Id.* at 570. Newman Park owned real property with an existing loan held by Hometown National Bank. *Id.* Unbeknownst to the other 11 members of the company, Sturtevant obtained

a loan from Columbia Community Bank on behalf of another of his companies, wholly unrelated to Newman Park. He secured Columbia Community Bank's loan with Newman Park's real property, despite lacking authority to do so as only one of 12 members *Id.* at 570-571. In order to obtain the loan, Sturtevant provided a forged operating agreement showing his company as the only stakeholder of Newman Park. *Id.* at 571-572. As a condition of lending the funds, Columbia required Sturtevant to pay off the existing Hometown National Bank loan so as to place Columbia in first position on the property, which Sturtevant did. *Id.* at 571. When Columbia became aware that Sturtevant lacked authority, it filed suit seeking a determination that it had acquired a lien on Newman Park's property based upon equitable subrogation. *Id.* at 572.

The Court of Appeals and the Supreme Court affirmed the trial court in determining that Columbia was entitled to be equitably subrogated to Hometown's position, based upon repayment of that debt. *Id.* at 573. In the refinancing world, equitable subrogation is a tool by which real property lenders replace the prior, senior lien position of an earlier lender by paying off that prior lender's loan. *Id.* at 574. The doctrine is described as follows:

In its simplest form, equitable subrogation involves three parties: a lender, a debtor, and a third party. If a third party pays a debtor's outstanding loan to the lender without any formal agreement between the parties, then, under certain

circumstances, equity permits the third party to take over the lender's interest and receive the continuing payments of the debtor—to step into the lender's shoes to the extent of the current obligation. In other words, the third party is subrogated to the lender's interest. The rationale is that subrogation prevents the windfall that would otherwise accrue to the debtor—that is, it prevents unjust enrichment

*Id.* at 575. In this context, it is not the debtor who is unjustly enriched absent subrogation, it is the junior lienholder. *Id.* at 575.

The case at hand bears no factual similarities and is wholly unlike that presented in *Newman Park*. Here, Ms. Han did not fraudulently induce Martin to loan her money secured by real property that she lacked authority to commit, unlike Columbia's loan to Sturtevant's company. Martin is not equitably subrogated to Kitsap Credit Union based upon the facts presented, unlike Columbia to Hometown National Bank's interest in *Newman Park's* real property.

Instead, Martin and Han were jointly obligated on a loan taken from Kitsap Credit Union, with Martin's full knowledge, consent and participation. Indeed, he willingly secured that loan with his Certificates of Deposit. Ms. Han stated in discovery presented to the Court that the Certificates of Deposit were a gift to her, and she was not required to pay them back to Martin in the event of default on the Kitsap loan. The facts of *Newman Park* are wholly inapplicable and simply do not support Martin's

theory that Ms. Han has been unjustly enriched by Martin, thereby entitling him to summary judgment.

Martin goes on to cite Section 23 of the Restatement (Third) of Restitution and Unjust Enrichment. *Newman Park* does not reply upon or adopt the Restatement and, in fact, nowhere mentions it. Martin cites no other case law that adopts the Restatement or supports its application to the facts presented here, and its citation should be disregarded by the court.

**C. GENUINE ISSUES OF MATERIAL FACT WERE PRESENTED SUGGESTING A GIFT**

Martin argues that Ms. Han failed to provide evidence of the gift of the certificates of deposit, thereby justifying the Court's decision in granting summary judgment. It should be noted that Martin himself provided no evidence to rebut her testimony that the certificates of deposit were indeed intended as a gift. Martin nonetheless acknowledges Ms. Han's deposition testimony whereby she stated the loan's security was intended as a gift. Respondent's Brief p. 8.

Indeed, taking into consideration that English is a second language for Ms. Han, she consistently testified that the security was a gift to her. In response to Interrogatories, Ms. Han very clearly stated "the purpose of the loan was actually a gift to help me. . ." CP 79. In response to another interrogatory, Ms. Han stated very clearly that she did not owe him monies.

*Id.* After the CD's were taken, Martin told her she had now received everything he was planning on giving her upon his death. *Id.* Her deposition testimony is no different, wherein she refers to the certificates of deposit as a "pre-draw" of an anticipated inheritance. CP 62, CP 65.

The requirements for a completed gift are: (1) an intention of the donor to presently give; (2) a subject matter capable of passing by delivery; (3) an actual delivery; and (4) an acceptance by the donee. *Henderson v. Tagg*, 68 Wash.2d 188, 192, 412 P.2d 112 (1966); *In re Gallinger's Estate*, 31 Wash.2d 823, 832, 199 P.2d 575 (1948); 38 C.J.S. Gifts § 10 (1943); 38 Am.Jur.2d *Gifts* § 18 (1968). When viewed in the manner most favorable to Ms. Han as the non-moving party, the facts demonstrate genuine issues of material fact as to Martin's intention.

Martin argues that a promise to make a testamentary gift is not enforceable. P. 9 of Respondent's Brief; *Oman v. Yates*, 70 Wn.2d 181, 422 P.2d 489 (1967). In *Oman*, Rheims promised to Oman to pay the purchase price of a home to be purchased on her behalf from the Sundays. *Id.* at 182. Prior to providing the earnest money or purchase price, he became ill and died. *Id.* at 183. Oman sued his estate for specific performance of the gift. *Id.* The court recognized evidence of donative intent, but indicated the gift was not complete because Rheims only

promised to deliver the purchase price but did not actually perform prior to his death. *Id.* at 186. Thus, the subject matter of the gift was essentially never delivered or accepted.

Unlike *Oman*, Martin promised to co-sign and secure the loan for Ms. Han and did, in fact, do so by providing his certificates of deposit for collateral. Martin further advised that the monies would be the only monies she would receive from him in the event he later died. Martin was not obligated to co-sign the loan, nor was he obligated to provide security for that loan. His intention to do so was a gift to Han based upon their undisputed friendship. Further, the CDs are a subject matter capable of passing by delivery and were further actually delivered and accepted, by virtue of their placement and use as collateral on the loan. Martin released control of the CDs at the time they were offered and utilized as collateral for the loan. It is not necessary for the CDs to have been physically placed into Ms. Han's hands so as to constitute delivery and relinquishment of control, under the circumstances presented here.

In sum, Han raised genuine issues of material fact as to the nature of the CDs as a gift. These facts should have prevented Summary Judgment on that issue. This court should remand the case to the trial court for further determination.

**D. A VOLUNTEER IS NOT ENTITLED TO RECOVERY**

Martin claims that even if he is a volunteer, he is entitled to recovery under unjust enrichment theories. He cites to *Newman Park*, supra in support of the argument that the court in that case rejected the volunteer rule as a bar to equitable subrogation. Reliance on that case, as outlined above, is severely misplaced. Martin's selective recitation of the case leads to an erroneous interpretation of its application, as this case does not involve equitable subrogation.

Equitable subrogation is a theory under unjust enrichment that seeks to maintain the priorities in a **mortgage setting**. See *Bank of America v. Prestance*, 160 Wn.2d 560, 160 P.2d 17 (2007). *Prestance* overruled previous case law that held that a lender paying off a prior lender's loan was not entitled to equitable subrogation because the new lender volunteered to avail itself of a business opportunity. *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn.App. 238, 254 46 P.3d 812 (2002). The Court in *Newman Park* took the *Prestance* ruling a step further by fully adopting the Restatement (Third) of Property: Mortgages § 7.6 and affirming the appellate court's ruling that the volunteer rule is no longer a defense where a mortgagee pays off another mortgage holder.

Simply stated, *Newman Park* and its holding that the volunteer rule does not apply in a mortgage setting is inapplicable here. There is no

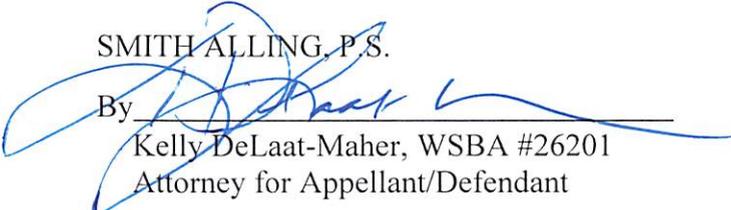
mortgage involved. Martin did not pay off a prior lender and his interest is not equitably subrogated to that prior lender. Instead, he voluntarily co-signed a loan and offered his personal property as collateral to secure the loan. A volunteer is one who acts “freely and without compulsion.” *Goodrich v. Fahey*, 55 Wn.2d 692, 694, 349 P.2d 729 (1960). Martin’s actions were that of a volunteer and genuine issues of material fact exist that should have prevented summary judgment on that issue.

### **III. CONCLUSION**

As outlined in Mr. Han’s Opening Brief, she respectfully requests that the Court reverse the trial court’s Order Granting Summary Judgment and remand for further proceedings. The pleadings and sworn statements, construed in the manner most favorable to the nonmoving party, raise genuine issues of material fact as to the nature of the security provided by Martin for purposes of the loan from Kitsap Bank. Further, Respondent agrees that the amount of the judgment is not supported by the evidence presented, requiring at a minimum remand for recalculation of damages.

RESPECTFULLY SUBMITTED this 13th day of January, 2020

SMITH ALLING, P.S.

By 

Kelly DeLaat-Maher, WSBA #26201  
Attorney for Appellant/Defendant

**CERTIFICATE OF SERVICE**

The undersigned certifies, under penalty of perjury of the laws of the State of Washington, that on January 13, 2020, I caused a copy of the foregoing to be served to the following in the manner noted below:

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DATED at Tacoma, Washington, this 13th day of January, 2020.



Teri Parr, Legal Assistant  
Smith Alling, PS

**SMITH ALLING, P.S.**

**January 13, 2020 - 10:13 AM**

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