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

U.S. BANK, NATIONAL ASSOCIATION AS LEGAL TITLE
TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST, its successors in
interest and/or assigns,

Plaintiff,

vs.

TARMO PAUL ROOSILD; SAMANTHA CASTRONOVO;
OCCUPANTS OF THE PREMISES,

Defendants.

APPELLANTS' BRIEF

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II. INTRODUCTION

This case involves a lender's attempt to foreclose on a promissory note and deed of trust in a judicial foreclosure proceeding. The trial court erred in finding that the lender was permitted to initiate foreclosure proceedings without following the pre-foreclosure notice requirements as set forth in the deed of trust. The deed of trust required that the lender send the borrower a notice of default prior to commencing foreclosure proceedings. The lender did not do that. Instead, the lender in this case attempts to rely on a defective notice of default, sent by an entity that was not the beneficiary of the loan. Because these pre-foreclosure notice requirements were conditions precedent to foreclosure, the foreclosure could not occur unless these conditions were satisfied. The conditions were not satisfied and therefore the lower court erred in ruling that the lender could proceed with foreclosure.

III. ASSIGNMENTS OF ERROR

The trial court erred in granting Respondent's Motion for Summary Judgment and Decree of Foreclosure as to Defendants.

IV. STATEMENT OF THE CASE:

Appellants Tarmo Rooslid and Samantha Castronovo purchased the real property at 20250 Bond Road, Poulsbo, Washington in 1993. Clerk's Papers, p. 117. In 2006, the borrowers signed and delivered a

promissory note to the original lender, Bank of America N.A. (“BANA”) for the amount of the \$227,000 loan. The Note was secured by a Deed of Trust. The Deed of Trust was executed at the same time as the Note, and that the Deed of Trust was recorded on October 17, 2006. *Id.*, p. 6. The borrowers purchased and resided in the home as their primary residence. *Id.*, p. 106.

In the event of the borrower’s default, the procedure for foreclosure of the deed of trust is detailed in paragraph 22 of the deed of trust document as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property at public auction at a date not less than 120 days in the future. The notice shall further inform Borrower of the right to reinstate after acceleration, the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale, and any other matters required to be included in the notice by Applicable Law. If the default is not cured on or before the date specified in the notice, Lender at is option, may required immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including but

not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale Lender shall give written notice to Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee and Lender shall take such action regarding notice of sale and shall give such notices to Borrower and to other persons as Applicable Law may require. After the time required by Applicable Law and after publication of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of the Property for a period of periods permitted by Applicable Law by public announcement at the time and place fixed in the notice of sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it or to the clerk of the superior court of the county in which the sale took place.

CP, p. 28. The Deed of Trust document defines "lender" as "the beneficiary under this Security Instrument." CP, p. 17. Therefore, the deed of trust requires that the lender at the time must follow certain pre-foreclosure requirements, including providing the borrower with a notice of default.

BANA is the original lender and beneficiary of the Deed of Trust.

CP, p. 16-17. On December 28, 2006, BANA determined that the note had

been inadvertently lost or destroyed. CP, p. 12. On June 10, 2016, the deed of trust was assigned from BANA to Christiana Trust. On November 17, 2016, the deed of trust was then assigned to Respondent. *Id.*, p. 44 – 46. US Bank National Association as legal title trustee for Truman 2016 SC6 Title Trust is the current note holder. *Id.*, p. 5-6.

At some point after incurring the debt, the borrowers began having financial difficulties when Mr. Rooslid was laid off from his job and diagnosed with cancer.¹ CP, p. 118. They were advised by BANA, the lender at the time, that if they missed several payments they would be eligible for federal loan modification programs. *Id.* The borrowers followed this advice and began trying to apply for federal loan modifications and regularly attempted to contact the lender to make arrangements. CP, p. 118-119.

In May 2015, after the borrowers stopped making payments, they received a notice of default and intent to accelerate from BSI Financial Services, a loan servicer on behalf of Christiana Trust. CP, p. 118-119. This was the only notice they received. *Id.* The notice explained that acceleration and foreclosure may occur if the default was not cured by June 11, 2015. *Id.*, p. 107. The borrowers were then directed to contact the

¹ Mr. Rooslid passed away from his illness in 2019.

“Loss Mitigation Department” to learn more on loan workout programs and to avoid foreclosure. An address and phone number were provided. *Id.*, p. 107.

The borrowers made multiple attempts to contact lender using the information that was provided on the notice. CP, p. 118-119. On June 1, 2015, the borrowers sent a letter requesting and in person meeting, and sent another similar letter on June 8, 2015, this time through counsel, requesting documentation of the alleged debt. CP, p. 121-123.

On September 4, 2015, the borrowers received a response providing that the owner of the debt was Christiana Trust. CP, p. 125-126. However, that was incorrect information. At that time, BANA was still the lender. *Id.*, p. 108. BANA did not assign the deed of trust to Christiana Trust until June 10, 2016, more than a year after the notice of default was sent for Christiana Trust. *Id.* The deed was subsequently assigned to Respondent on November 7, 2016. *Id.*, p. 108.

Due to job opportunities and medical treatment needs, the borrowers moved out of the property and have since been renting it. CP, p. 117-118. The property is also listed for sale. CP, p. 117-118.

On March 23, 2017, US Bank filed a Summons and Complaint for Foreclosure. CP, p. 1-11. US Bank alleged that no payments have been received since January 1, 2012 and the total debt is \$304,627.69. CP, p. 7.

The borrowers answered the complaint on October 29, 2018. CP, p. 37-41. On April 25, 2019, the lender filed a Motion for Summary Judgment. CP, p. 42-51. In opposition to the lender's motion for summary judgment, the borrowers argued that the lender was not entitled to foreclose because it had failed to follow pre-foreclosure procedure as stated in the deed of trust. CP, p. 105-116. Specifically, the borrowers argued that the prerequisite notice of default was defective because it was issued by a lender who did not own the loan at the time. CP, p. 109-115.

On August 14, 2019, after oral argument and briefing, the trial court issued an order granting summary judgment in favor of the lender and a decree of foreclosure. CP, p. 136-140. The court focused its ruling on paragraph 22 of the Deed of Trust, stating:

“Paragraph 22 of the Deed of Trust, for the subject property as identified herein, sets forth the notice requirements for acceleration and default for proceeding with a nonjudicial foreclosure as administered by a Trustee under RCW 61.24 and does not apply to a judicial foreclosure pursuant to RCW 61.12. Defendants have not established that a judicial foreclosure requires pre-foreclosure notice procedures.”

The Court's order cited to a footnote, explaining that RCW 61.12.040, the judicial foreclosure statute, does not specify any requirements requiring notice, other than the Summons and Complaint. CP, p. 137 The borrowers now appeal the trial court's ruling.

V. ISSUES:

1. Did the lower court err in granting summary judgment as a matter of law? YES.
2. Did the lower court err in ruling that the terms of the Deed of Trust did not apply to the judicial foreclosure sought by Respondent? YES.

VI. ARGUMENT

The lower court's ruling in the August 14th 2019 summary judgment order should be reversed because the lender was not entitled to summary judgment as a matter of law. While the lower court is correct that the Deed of Trust document sets forth specific pre-foreclosure notice requirements, it is not correct in its ruling that these requirements are inapplicable to a judicial foreclosure, such as the one that occurred in this case. In so ruling, the lower court found that the terms of the Deed of Trust *only* applied to a nonjudicial foreclosure administered by a Trustee under RCW 61.24 (emphasis added). There is no language in the Deed of Trust document that limits the applicability of the terms to *only* nonjudicial foreclosures. Clerk's Papers, p. 16-30. As this was a judicial foreclosure and not subject to the statutory requirements of a nonjudicial foreclosure, the lender was required to follow the pre-foreclosure notice procedures detailed in the Deed of Trust and Promissory Note. The fact that this was a judicial foreclosure does not eliminate the requirements set forth in these two contracts. Among other requirements, the Deed of Trust

required that the lender provide the borrowers with a pre-foreclosure notice. The lender did not comply with those requirements. Clerk's Papers, p. 28. Therefore, because the pre-foreclosure notice requirements specified in the contracts were not followed, the lender cannot foreclose on the property in this judicial foreclosure.

A. Standard of Review

The standard of review for a summary judgment order is de novo. *Hoffer v. State*, 110 Wn. 2d 415, 421, 755 P.2d 781 (1988). Summary judgment is appropriate only when all of the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hisle v. Todd Pac. Shipyards*, 151 Wn. 2d 853, 861, 93 P.3d 108 (2004). The moving party fails to meet its burden for summary judgment if it does not offer evidence to show it is entitled to judgment as a matter of law. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980). In a summary judgment proceeding, all evidence and reasonable inferences are considered in the light most favorable to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 266, 770 P.2d 182 (1989).

B. The terms of the deed of trust and promissory note control in a judicial foreclosure

The pre-foreclosure notice requirements in the Deed of Trust and Promissory Note apply to a judicial foreclosure and the lender was

required to follow these steps prior to initiating the foreclosure in this case. In a judicial foreclosure, the terms of the Deed of Trust and/or Promissory Note are controlling in regard to pre-foreclosure procedure because there is no detailed statutory procedure as in a non-judicial foreclosure.

The lower court erred in holding that the lender had the right to foreclose on the property; the lender did not have the right because the lender did not follow the terms of the Deed of Trust and Promissory Note. These documents plainly required the lender to follow specific steps prior to foreclosure. CP, p. 28. These requirements are detailed in the documents themselves. CP, p. 16-32. The requirements are not statutory requirements, but rather conditions precedent in a contract. Because the conditions were not met, the foreclosure could not occur.

Instead, the lower court focuses on two principles not at issue here: first, that the statutory requirements of a nonjudicial foreclosure do not apply to a judicial foreclosure. CP, p. 137. The borrowers have never argued that the statutory requirements of a nonjudicial foreclosure are applicable to this case. CP, pp. 110-115. The law is clear that judicial and nonjudicial foreclosures are separate, subject to entirely different rules and procedure. See *infra* pp. 10-11. Appellant's briefing in the lower court - now in this Court - does not attempt to argue otherwise. *Id.*

Second, the lower court erred in focusing on the filing of a lawsuit as clear and unequivocal acceleration of the loan. *Id.* The borrowers do not assert that the loan was not accelerated. Rather, the loan could not be accelerated because the pre-foreclosure notice requirements were not satisfied. As cited in the summary judgment order, the court in *Glassmaker* held that the filing of a lawsuit was a clear and unequivocal acceleration of the loan. CP, p. 137; *Glassmaker v. Ricard*, 23 Wn.App 35, 38, 593 P.2d 179 (1979). Rather, the issue at hand is whether the lender is allowed to accelerate and foreclose the loan when the lender did not follow pre-foreclosure notice procedures as stated in the Deed of Trust document - specifically, the Notice of Intent to Accelerate. It did not follow those procedures and, therefore, cannot foreclose.

i. A judicial foreclosure is not subject to the statutory requirements of a non-judicial foreclosure

A lender may foreclose upon a deed of trust in one of two ways: by commencing an action in superior court (a judicial foreclosure) or by following the strict statutory procedure (a non-judicial foreclosure). See *Helbling Bros., Inc. v. Turner*, 14 Wn.App 494, 496 – 497, 542 P.2d 1257 (1975). The Deeds of Trust Act requires that the lender choose whether to foreclose the deed of trust pursuant to the terms of RCW 61.24.040 or to

foreclosure the deed of trust as a mortgage as provided for in RCW 61.24.100. *Id.*

A judicial foreclosure involves the filing of a civil lawsuit. RCW 61.12; See *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 419, 757 P.2d 1378 (1988). A judicial foreclosure does not have the same expedited, statutory framework as a non-judicial foreclosure, however, a judicial foreclosure provides borrowers with certain protections that are not otherwise available, such as the right to upset price, redeem and homestead. *Id.* See RCW 61.12.060; RCW 61.12.020.

The initial requirement for a judicial foreclosure is a valid mortgage, secured by a valid obligation. A statutory deed of trust is a form of a mortgage. *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 588 P.2d 1153 (1979). A deed of trust is a three-party mortgage, where the trustee holds title for the beneficiary to secure an obligation that the grantor owes the beneficiary. *Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wash.App 166, 171, 367 P.3d 600 (2016).

This is in contrast to a non-judicial foreclosure, which is an expedited process strictly regulated by statute – Washington's Deeds of Trust Act (DTA). RCW 61.24, et seq.; *Washington Federal v. Harvey*, 182 Wn.2d 335, 336, 340 P.3d 846 (2015). Among the procedures set forth in detail, the DTA contains specific provisions regarding the timing and content of

pre-foreclosures notices. RCW 61.24.030(8). In contrast, there are no similar statutory requirements for a judicial foreclosure. Therefore, the terms of the deed of trust and/or promissory note are controlling in a judicial foreclosure.

ii. The common law of contracts applies to deeds of trust and promissory notes

In a judicial foreclosure, the terms of the documents control in determining whether a default has occurred and if so, whether the post-default procedures have been followed. The documents often set forth requirements that are separate from statutory or common law requirements. For example, if the documents do not so provide, acceleration of the loan is not allowed. *Llewellyn Iron Works v. Littlefield*, 74 Wash. 86, 89-90, 132 P. 867 (1913). In that case, the court declined to accept the argument that a default caused the entire debt to mature and become due because there was no clause in the note that expressly provided for that. *Id.* at 89-90.

Even if acceleration is allowed on default, the conditions precedent must be followed, including the notice requirements. Outside of the documents, case law requires that the lender must give written notice of acceleration to the borrower. *Glassmaker v. Ricard*, 23 Wn.App at 37-39. In *Glassmaker*, the court held that written notice of acceleration is required in addition to any other terms or conditions precedent in the

document. *Id.* The court confirmed that an affirmative action on behalf of the lender is necessary to commence the acceleration. *Id.* This was in *addition* to any language in the promissory note or deed of trust. *Id.* Similarly in *Weinberg v. Naher, et al.*, the court reviewed the language of the contracts and extended the notice requirements for acceleration, beyond the documents. *Weinberg v. Naher, et al.*, 51 Wash. 591, 592 – 596, 99 P. 736 (1909). Importantly, and most relevant to the case at bar, the terms of the documents were considered, rather than ignored. Therefore, a close review of this caselaw shows that Washington courts consider the language in the deed of trust and/or promissory note to be specifically considered in a determining whether a lender has followed pre-foreclosure procedure.

iii. The pre-foreclosure notice requirements in the Deed of Trust were conditions precedent necessary for foreclosure to occur

The notice requirements in the Deed of Trust were conditions precedent to a lender beginning foreclosure proceedings. Those requirements were not followed, and as such, the foreclosure could not occur.

Promissory notes and deeds of trust, while negotiable instruments subject to the Uniform Commercial Code, are also written contracts. *Terhune v. North Cascade Trustee Services, Inc.*, 9 Wn. App. 2d 708, 718,

446 P.3d 683 (2019). A promissory note is a contract to pay money. *Dept. of Revenue v. Sec. Pac. Bank of Wash.*, 109 Wn.App. 795, 808, 38 P.3d 354 (2002). Deeds of trust and promissory notes are governed by the six-year statute of limitations for written contracts. RCW 4.16.040(1); *Westar Funding, Inc. v. Sorrels*, 157 Wn.App 777, 784-85, 239 P.3d 1109 (2010).

Where the UCC is not applicable, common law principles apply. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn. App. 327, 334, 493 P.2d 782 (1972). This includes the law of contract interpretation and elements of a contract, such as conditions precedent. Accordingly, the law of contract interpretation applies to security instruments. *4518 S. 256th, LLC v. Karen L. Gibbons, PS*, 195 Wn.App. 423, 441-442, 382 P.3d 1 (2016). Contract language that is clear and unambiguous is enforced as written. *Lehrer v. Dept. of Soc. & Health Servs.*, 101 Wn.App 509, 515-516, 5 P.3d 722 (2000). There is no need for interpretation of a clear and unambiguous contract. *See Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn.App. 416, 423, 909 P.2d 1323 (1995).

As with any other contract, a promissory note can contain conditions precedent. *Vogt v. Hovander*, 27 Wn. App. 168, 177, 616 P.2d 660 (1979). A condition precedent is an act or event that must exist or occur before a duty to perform arises. *Tacoma Northpark, LLC v. NW, LLC*, 123

Wn.App. 73, 79, 96 P.3d 454 (2004) citing *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). Parties a contract may form an agreement based upon a condition precedent which dictates liabilities therefrom. *Id.* The condition precedent must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, or before usual judicial remedies are available. *Id.*

In order to maintain an action on contract, the plaintiff must have complied with conditions precedent contained in the contract. *Puget Sound Service Corp. v. Bush*, 45 Wn.App. 312, 316, 724 P.2d 1127 (1986) citing *Langston v. Huffacker*, 36 Wn.App. 779, 786 (1984). “Where a defendant’s obligation is subject to a condition precedent of performance by the plaintiff, the latter must allege and prove that he: (1) performed the condition precedent, or (2) was excused from performance.” *Id.* This rule imposes a burden that the plaintiff must prove performance or an excuse. *Id.*

In determining whether a contract provision is a condition precedent, courts will look to the intent of the parties, taken from a fair and reasonable construction of the contract language and in light of the surrounding circumstances. *Lokan & Associates, Inc. v. American Beef Processing, LLC*, 177 Wn.App. 490, 499 311 P.3d 1285 (2013). The intent to create a condition is often revealed by such phrases and words such as

“provided that,” “on condition,” “when,” “so that,” “while,” “as soon as,” and “after.” *Id.* citing *Ross v. Harding*, 64 Wn.2d 231, 237 (1964).

As a judicial foreclosure is subject to the law of mortgages, not the statutory procedures of the Deeds of Trust Act, the Court will consider whether the conditions precedent to foreclosure have occurred. See *Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn.App. at 170. In the *Deutsche Bank* case, the court noted that one of the reasons the judicial foreclosure was allowed was because the conditions precedent to foreclosure of both the promissory note and the deed of trust had occurred. *Id.* at 170.² Therefore, in a judicial foreclosure, Washington courts will consider whether a condition precedent to foreclosure of the promissory note and/or the deed of trust have occurred.

Washington courts have held that the common law of contracts is inapplicable to non-judicial sales, but they are silent as to whether it is applicable to a judicial foreclosure. See *Udall v. T.D. Escrow Services, Inc.*, 132 Wn.App 290, 130 P.3d 908 (2006), overruled on other grounds. The court’s reasoning in the *Udall* holding is instructive here. In that case, the court found that the common law of contracts was inapplicable to a

² The court’s opinions does not provide analysis on what the conditions precedent were, other than to mention they were considered.

nonjudicial foreclosure because of the detailed statutory procedures that make up the framework of a nonjudicial sale. *Id.* at 301. The court found that applying the common law of contracts would interfere with the statutory procedure and contravene the Deed of Trust Act's purpose and policy of creating an efficient and inexpensive method of foreclosure. *Id.* The Court noted that applying contract law could possibly provide exceptions to the narrowly prescribed statutory process that demands strict compliance. *Id.*

Therefore, the reason that contract law is inapplicable to the strict statutory framework of a non-judicial sale shows why contract law is applicable to a judicial sale, which, other than the basic framework of a civil lawsuit, mandates no detailed procedure. Other than the requirements of a valid mortgage, secured by a valid obligation, there is no other specified procedure for a judicial foreclosure, beyond the procedure of a regular civil lawsuit. See *supra* p. 11. As the detailed statutory procedure is not required, the Court should apply the common law of contracts.

In this case, the deed of trust document itself provides unambiguous instruction as to the procedure a lender must follow prior to initiating a foreclosure. CP, p. 11. The terms in paragraph 22 of the Deed of Trust clearly enumerate the steps that were required to be taken by the lender. *Id.* The lender is defined as the "beneficiary under this Security

Instrument.” CP, p. 17. Therefore, the deed of trust required that the then-current beneficiary of the security agreement be the party to send a pre-foreclosure notice to the borrowers.

The pre-foreclosure notice requirements in the deed of trust are conditions precedent. These requirements are evidenced by the conditional language contained in paragraph 22 of the deed of trust document (“Lender shall give notice to Borrower *prior to* acceleration.”) CP, 28.

The lender was required to serve on borrowers a proper pre-foreclosure as required by the terms of the deed of trust itself. At the time the foreclosure process was started by the US Bank, it was the lender and was therefore required to serve the borrowers with a notice of default and intent to accelerate. However, the lender did not serve this notice, and on that basis alone, foreclosure is not permitted.

The May 2015 notice is defective and cannot be used by one lender in a later foreclosure proceeding. The only notice was issued in May 2015 by Christiana Trust, an entity that was not the current lender of the loan at that time. CP, p. 121. Christiana Trust was not assigned the interest in the Deed of Trust until June 2016. CP, pp. 86-88. In other words, Christiana Trust could not have foreclosed on the deed of trust or note in May 2015 at the time the notice was issued because it was not the lender at that time. The deed of trust was later assigned to US Bank in November 2016. CP,

pp. 89-91. Therefore, U.S. Bank cannot rely on a pre-foreclosure notice that was sent to the borrowers prior to November 2016 unless it was sent by the then-current lender. In order to commence foreclosure proceedings pursuant to the terms in the deed of trust, U.S. Bank, as the current lender, was required to send a pre-foreclosure notice to the borrowers, which it did not do.

Those pre-foreclosure notice requirements were conditions precedent to a foreclosure. The deed of trust plainly requires that the lender follow these notice procedures, which includes sending a notice of default and intent to accelerate to the borrower. Because they did not occur, the foreclosure could not occur.

iv. Public policy demands that a lender not be permitted to rely upon a defective notice of default

Permitting the lender to foreclose of the deed of trust and promissory note with a defective notice of default – one that contained incorrect contact information for the lender – would contravene public policy and the intention of the notice requirements. Washington state has a recognized policy of preventing foreclosure. Although the requirements of Washington’s Foreclosure Fairness Act expressly apply only to non-judicial foreclosure, that legislation serves as evidence that there is an emphasis on assisting homeowners facing foreclosure. See Washington State Dept. of Financial Institutions, <http://homeownership.wa.gov>.

In this case, based upon the information that was required to be included in the notice of default – per the terms of the deed of trust – the purpose of that notice was to alert the borrower and provide that borrower an opportunity to cure. Without the correct contact information and name of the lender, the borrower does not have the tools to communicate with the lender and potentially avoid foreclosure. The borrowers in this case made numerous attempts to contact the lender upon receiving the initial notice of default. CP, pp. 121-123. However, the borrowers were unaware that they were not communicating with the entity that owned the loan. *Id.* Therefore, it would contravene recognized public policy to allow a lender to foreclose when the lender has not followed pre-foreclosure procedures specified in the deed of trust that were designed to prevent foreclosure in the first place.

v. The pre-foreclosure notice framework in Paragraph 22 of the Deed of Trust is not limited to non-judicial foreclosures.

The lender has repeatedly mis-stated the borrower’s argument in the lower court, asserting that Appellant was attempting to “impute the protections afforded during a nonjudicial foreclosure and the Deed of Trust Act.” CP, p. 130. In doing so, the lender incorrectly claims that paragraph 22 of the Deed of Trust – which contains the language regarding acceleration and remedies – is only applicable to *nonjudicial* sales as conducted by a Trustee. *Id.* (emphasis added). This argument fails

because it is not supported by the plain language in the document itself. If the logic of the lender's argument is accepted, this would render the remainder of the Deed of Trust superfluous. The language in paragraph 22 is not self-limiting and does not only apply to non-judicial foreclosures.

vi. The borrowers are entitled to reasonable attorneys' fees and costs

The borrowers seek recovery of their attorneys' fees and costs under the terms of the Deed of Trust and Promissory Note, as well as appellate court rule and state law. Appellate courts may award attorneys' fees if authorized by contract, statute or recognized ground in equity. *Parker Estates Homeowners Ass'n v. Pattison*, 198 Wn.App 16, 391 P.3d 481 (2016). A contractual provision in a deed of trust will support an award of attorney's fees under RAP 18.1. *Edmundson v. Bank of America*, 194 Wn.App 920, 932 – 933, 378 P.3d 272 (2016). It is Washington law that if an attorney's fee provision is one-sided, it will be construed as two-sided, with fees awarded to the prevailing party in an action on a contract. RCW 4.84.330. In order to receive an award of fees on appeal, the party must make a request in its brief to the court. RAP 18.1.

Attorney's fees should be awarded to the borrowers in this case if they are the prevailing party because these fees are authorized under both the Promissory Note and Deed of Trust. Under the Promissory

Note, the note holder is entitled to reasonable attorneys' fees in an action to enforce the note. CP, p. 14. Similarly in the Deed of Trust, the lender is entitled to recover reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of Deed of Trust. CP, p. 29. As one-sided attorney's fee provisions, both provisions are construed as two-sided to allow an award of attorney's fees to the prevailing party in this action.

Appellants also request that they be awarded costs for the entire case at the appellate level under RAP 14.2. RAP 14.2 states that "[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review..." A prevailing party is "any party that receives some judgment in its favor." See *Guillen v. Contreras*, 169 Wn.2d 769, 238 P.3d 1168 (2010).

VII. CONCLUSION

For these reasons, Appellants respectfully requests that this Court reverse the ruling of the lower court and find that summary judgment was not appropriate in favor of the Respondent and Respondent is not permitted to foreclose of Appellants' deed of trust and promissory note.

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RESPECTFULLY SUBMITTED this 13th day of February, 2020.

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