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OCT 29 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 291243

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STEVEN F. SCHROEDER,
a married man dealing with his sole and separate property,
Appellant,

v.

EXCELSIOR MANAGEMENT GROUP, LLC and CRAIG G.
RUSSILLO, Trustee,
Respondents.

RESPONDENTS' BRIEF

Bradley W. Andersen, WSBA # 20640
Phillip J. Haberthur, WSBA #38038
Craig G. Russillo, WSBA #27998
Attorneys for Respondents,
Excelsior Management Group, LLC, and
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I. INTRODUCTION

In June, 2007, Appellant Steven F. Schroeder borrowed money from Respondent Excelsior Management Group, LLC. To secure the loan, Schroeder conveyed a Deed of Trust on his property. In the Deed of Trust, Schroeder “warranted” that the property was not being used for agricultural purposes, and promised that it would not be used for such purposes in the future.

When Schroeder defaulted on the loan, Excelsior initiated a non-judicial foreclosure of the property. But just before the sale was set to occur, Schroeder filed this lawsuit to try and stop the Trustee’s Sale. Despite his warranty to the contrary, Schroeder alleged the property was being used for agricultural property. He therefore claimed that Excelsior had to conduct a judicial foreclosure.¹

To avoid unnecessary delay, and even though it disputed Schroeder’s claim, Excelsior voluntarily stopped its non-judicial foreclosure and initiated a judicial foreclosure lawsuit (Foreclosure Lawsuit).² Shortly after Excelsior filed its Foreclosure Lawsuit, Schroeder wanted to stop the foreclosures and settle both cases. He therefore offered to sign a new loan and Deed of Trust. In return, Excelsior agreed to stop

¹ RCW 61.24.030 prohibits non-judicial foreclosure of agricultural properties.

² CP 52. *Excelsior Mortgage Equity Fund II, LLC v. Steven Schroeder*, Stevens

the foreclosure and give Schroeder a second chance by extending the loan. However, Excelsior insisted that Schroeder agree that its Property was not agricultural property so that, if Schroeder defaulted again, Excelsior could conduct a non-judicial foreclosure.

So on March 31, 2009, Schroeder signed a new Promissory Note and Deed of Trust.³ He again warranted, in these new loan documents, that the property was not being used for agricultural purposes, and promised that it would not be used for such purposes in the future.

In addition to the new loan documents, the parties, through their respective attorneys, executed a Stipulated Motion and Order of Dismissal with Prejudice on April 7, 2009 (Stipulated Order of Dismissal). In the Stipulated Order of Dismissal, Schroeder agreed, consistent with the new loan documents, that the property was not being principally used for agricultural purposes. Schroeder also agreed, in the case of any future foreclosures, to not claim that the property was being used for agricultural purposes. Excelsior relied upon Schroeder's warranties and waiver when they agreed to stop its judicial foreclosure and extend the term of the loan.

In 2006, Schroeder defaulted on the new Promissory Note. Consistent with the Deed of Trust and Stipulated Order of Dismissal,

County Superior Court #2009-2-00048-2.

³ SCP 214.

Excelsior proceeded with a non-judicial foreclosure. But again, after the Trustee's Sale was set, Schroeder filed a last minute lawsuit⁴ (Schroeder II) to try to stop the foreclosure sale. And despite his warranties to the contrary, this waiver in the Stipulated Order of Dismissal, Schroeder again claimed that Excelsior had to conduct a judicial foreclosure because the property was being used for agricultural purposes. *Déjà vu* all over again.

But realizing he could not stop the Trustee's Sale without setting aside the April 7, 2009 Stipulated Order of Dismissal, Schroeder tried to set aside the dismissal by claiming his attorney had entered the Stipulated Order of Dismissal without his knowledge.

On April 6, 2010, after the parties had taken some depositions, the trial court held a hearing to consider Schroeder's motion. Each party submitted evidence. While Schroeder relied upon his own self-serving declaration, Excelsior presented deposition transcripts that Schroeder clearly showed that he had received a copy and was aware of the Stipulated Order of Dismissal before it was entered. Excelsior also presented evidence that, even before the Stipulated Order of Dismissal was entered, Schroeder had signed the new Deed of Trust warranting that the property was not being – and would not be used – for agricultural

⁴ *Steven Schroeder v. Phillip Haberthur*, Stevens County Superior Court #2010-2-00054-1.

purposes.

Based on this evidence, the trial court denied Schroeder's Motion to vacate. The trial court later denied Schroeder's Motion for Reconsideration.

In this appeal, Schroeder essentially wants to re-litigate whether his attorney had the actual authority to enter the Stipulated Order of Dismissal. Schroeder also claims the Stipulated Order of Dismissal is void because a debtor cannot waive their right to claim that their property is agricultural property. He does not, however, challenge the validity of the Deed of Trust in which he expressly warranted that the Property was not being used for agricultural purposes or that he was in default.

Because there is sufficient evidence that Schroeder's attorney was authorized to sign and enter the Stipulated Order of Dismissal, the trial court did not abuse its discretion when it refused to vacate the Stipulated Order of Dismissal. Moreover, Schroeder represented to both this court in the Stipulated Order of Dismissal, and to Excelsior in the Deed of Trust, that the subject property was not being used, and would not be used principally for agricultural purposes. He cannot now be allowed to change his position or renege on his representation simply just to avoid foreclosure.

And because the underlying loan documents provide for attorney's

fees, Excelsior is entitled to collect its legal fees and costs on this appeal.

II. STATEMENT OF ISSUES

Excelsior does not assign any errors, but restates the issues on appeal as follows:

1. CR 60(b) permits trial courts to vacate a final order for certain enumerated reasons, including mistakes and surprise. But the moving party must prove a basis for such relief. The trial court denied Schroeder's Motion to vacate the April 7, 2009 Stipulated Order of Dismissal because Schroeder failed to prove that his lawyer did not have Schroeder's authority to sign and enter the Order. Did the trial court abuse its discretion in denying Schroeder's motion?

2. Under CR 60(b), a party must produce evidence to support their motion to set aside a Final Judgment. In this case, the Court considered both sides' evidence and documents before ruling on Schroeder's Motion to Vacate. Did the trial court error when it found that Schroeder could not prove that his lawyer lacked consent to enter the April 7, 2009 Stipulated Order of Dismissal?

3. When a party signs a document in which they expressly warrant that certain facts exist, they are bound by those warranties. In this case, Schroeder knowingly warranted that his Property was not principally being used for agricultural purposes. Can Schroeder now renege on his

warranties and claim a fact that is contrary to his expressed warranties?

4. A waiver is the intentional relinquishment of a known right. Here, Schroeder waived, in writing, his right to claim that his property was being used for agricultural purposes in return for Excelsior agreeing to stop the pending foreclosures and extend Schroeder's loan. Did Schroeder waive his right to claim that the property was being used for agricultural purposes?

5. Once a Trustee Sale has occurred and Debtor cannot, under Washington's waiver doctrine, sue to challenge a Trustee's Sale. Schroeder failed to obtain an Order to stay the Trustee's Sale. Is Schroeder's appeal moot?

6. The law generally permits the prevailing party to recover their legal fees and costs when the parties have included an attorney's fees provision in their contracts. Here, the underlying Promissory Note and Deed of Trust allow the prevailing party to recover their legal fees. If Excelsior prevails in this appeal, is it entitled to its attorney's fees?

III. COUNTERSTATEMENT OF THE CASE

Excelsior offers the following counterstatement of the case.

A. 2007 Loan and 2008 Lawsuits.

On June 12, 2007, Schroeder executed a Promissory Note ("Note")

payable to Excelsior Management Group, LLC (“EMG”).⁵ As security for the Note, Schroeder executed a Deed of Trust in favor of Excelsior.⁶ The Deed of Trust was recorded on June 14, 2007 with the Auditor of Stevens County, Washington, under Auditor’s File No. 2007 0006505.⁷ In the Deed of Trust, Schroeder specifically warranted that the property was not being used principally for agricultural purposes.⁸ He also promised not to permit the property to be used for agricultural purposes in the future without Excelsior’s consent.⁹

In 2008, Schroeder defaulted on the loan. Excelsior, therefore, initiated a non-judicial foreclosure of the Deed of Trust.¹⁰ A Trustee’s Sale was set for January 9, 2009. But before the date for the Trustee’s Sale, Schroeder filed this lawsuit to stop the sale. (Schroeder I).

In his Complaint, Schroeder alleged that because the property was agricultural, and Excelsior needed to conduct a judicial foreclosure.¹¹ Simply to sidestep Schroeder’s challenge, and to avoid any delays, Excelsior initiated a separate lawsuit to avoid the issue, on January 29,

⁵ CP 35; CP 58.

⁶ CP 35; 62.

⁷ *Id.*

⁸ CP 67.

⁹ *Id.*

¹⁰ CP 8.

¹¹ CP 3-5.

2009 (foreclosure suit) to conduct a judicial foreclosure of the Property.¹²

B. Schroeder settles both lawsuits by signing new Loan Documents and a Stipulated Order of Dismissal With Prejudice.

After Excelsior filed its Foreclosure Lawsuit, the parties reached a settlement. Excelsior agreed to withdraw the foreclosure action and in return, Schroeder agreed to sign a new Promissory Note and Deed of Trust, which he did on March 31, 2009, and to withdraw any claims that the Property was protected as agricultural property.¹³

1. New Loan, Deed of Trust and Promissory Note.

So, on March 31, 2009, Schroeder signed a new Note and Deed of Trust.¹⁴ This new Deed of Trust includes a specific provision where Schroeder warrants that the “Property has not been used, and will not be used, for agricultural purposes.”¹⁵ Excelsior also required Schroeder to execute a new Loan Agreement for the 2009 Loan. Section 3.1.6 expressly provides that “[e]very representation, warranty, covenant and agreement contained in every Loan Document...are true and accurate in all material respects.”¹⁶

¹² CP 52-57.

¹³ CP 35. SCP 214.

¹⁴ SCP 169-196.

¹⁵ SCP 173-196.

¹⁶ *Id.*

So as he did in the original Deed of Trust, Schroeder once again warranted that the property was not principally being used for agricultural purposes, and promised that it would not be used for such purposes in the future.

2. Stipulated Order of Dismissal.

In addition to signing a new Deed of Trust, Schroeder's attorney Matthew K. Sanger (WSBA#6717) executed a Stipulated Motion and Order of Dismissal with Prejudice ("Order of Dismissal").¹⁷ Schroeder now claims that his attorney entered this Order without his consent, but the evidence does not support Schroeder's claim.

During his deposition, Mr. Schroeder admitted to having received a copy of the Order of Dismissal from his prior attorney, Matthew Sanger before the Stipulated Order was entered.¹⁸ Schroeder testified that he provided the Order of Dismissal to his new attorney, Matthew Pfefer and therefore admitted it had been in his possession.¹⁹ Schroeder also testified that he received a copy of his attorney's March 30, 2009 letter enclosing a draft of the Order of Dismissal.²⁰ He also admitted he discussed this Order of Dismissal with Mr. Sanger *before* Mr. Sanger executed the

¹⁷ CP 10.

¹⁸ SCP 130-152.

¹⁹ *Id.*

²⁰ *Id.*

Order.²¹ Finally, Schroeder testified that he went through the Order of Dismissal with Mr. Sanger before it was filed.²²

Schroeder's attorney, Mr. Sanger, also testified that he in fact discussed the Order of Dismissal with Schroeder. He verified that, on March 30, 2009, he sent a letter to the Trustee *and Schroeder* with the proposed changes to the Order of Dismissal.²³ Mr. Sanger swore he discussed the Stipulated Order with Schroeder prior to signing it and entering it with the court.²⁴ Mr. Sanger says he copied Schroeder on his correspondence regarding the Order of Dismissal²⁵ and that he discussed the entire contents of the Order of Dismissal with his client.²⁶ Mr. Sanger testified that he believed he had the authority from Schroeder to execute the Order of Dismissal.²⁷

The Stipulated Order of Dismissal was eventually presented to and signed by Judge Allen Nielson on April 7, 2010. The Stipulated Order of Dismissal contains 8 simple paragraphs and provides that Schroeder:

- 1) Has knowingly waived any and all right he may have

²¹ *Id.*

²² *Id.*

²³ SCP 126-129.

²⁴ SCP 160-162.

²⁵ SCP 156.

²⁶ SCP 160-163.

²⁷ SCP 162.

to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes;

- 2) Shall not be allowed to again allege that the subject property is used for agricultural purposes;
- 3) Any future deed of trust executed by Schroeder to [Excelsior], an associated company or assigns, need not be judicially foreclosed but may be foreclosed nonjudicially in accordance with RCW 61.24; and,
- 4) The matter was dismissed with prejudice.²⁸

C. Schroeder again Defaults but claims, once again, that the Property is being used for agricultural purposes.

After signing the new loan documents, Schroeder defaulted on the new loan, therefore prompting Excelsior to initiate, once again, non-judicial foreclosure to collect on the Promissory Note. Excelsior set a Trustee Sale but Schroeder, once again, despite his warranty and Stipulation to the contrary, sued²⁹ to try and stop the Trustee Sale.³⁰ Schroeder, once again, claimed that the property was principally being used for agricultural purposes, and therefore had to be judicially

²⁸ CP 36-37.

²⁹ Incidentally, Schroeder did not contest that he was not in default under the 2010 Note, instead, his defense rested in attempting to force Excelsior into a judicial foreclosure.

³⁰ Stevens County Superior Court Cause No. 2010-2-0054-1 (“Schroeder II”).

foreclosed.³¹

D. Schroeder tries to vacate the April 7, 2009 Stipulated Order of Dismissal.

Excelsior countered that the court should not intercede because Schroeder had specifically warranted and represented in the new Deed of Trust, and in the Stipulated Order of Dismissal, that the property was not being used for agricultural purposes. Schroeder responded by moving to vacate the April 7, 2009 Stipulated Order of Dismissal on the ground that his attorney did not have the authority to sign the Stipulation.

E. Court Holds Hearing To Consider Schroeder's Motion.

Schroeder filed his Motion for Partial Relief on February 15, 2010 and noted it for hearing on March 2, 2010.³² Schroeder then moved his Motion to the March 23, 2010 docket.³³ Schroeder then struck the Motion but, on March 25, 2010, filed a "Motion for Order Staying Certain Provisions of Order Dated April 7, 2009."³⁴ Schroeder's Motion for a stay is identical in many respects to Schroeder's Motion for Partial Relief, except that it asks the trial court to "stay" the effects of the Order rather

³¹ Schroeder II.

³² CP 39-40.

³³ CP 47.

³⁴ CP 79.

than granting full relief from the Order of Dismissal.³⁵ Indeed, the arguments in both motions were identical (e.g., attorney not authorized to execute Order of Dismissal). However, the Motion purports to be in the alternative to Excelsior's Motion for Summary Judgment that was filed in the Schroeder II lawsuit.

In any event, the Motion was scheduled for a hearing on April 6, 2010, the same date as Excelsior's Motion for Summary Judgment in the Schroeder II lawsuit. Because the issues were substantially the same, Excelsior prepared a Combined Response to the two motions.³⁶ Both Motions were heard on April 6, 2010. Schroeder's counsel did not protest the Court considering his motions and instead presented evidence and arguments to the Court. After hearing the arguments and testimony from both sides, the Court denied both motions.³⁷

Schroeder then moved for reconsideration. The Court heard oral arguments on May 11, 2010. But again, after hearing the arguments, the Court denied Schroeder's Motion for Reconsideration.³⁸ Schroeder now

³⁵ CP 78-79.

³⁶ SCP 094-107, Defendant's Combined Response and Memorandum in Opposition to Plaintiff's Motion for Partial Relief from Order of April 7, 2009 and Plaintiff's Motion for an Order Staying Efficacy of Certain Provisions of Order Dated April 7, 2009.

³⁷ SCP 108-110.

³⁸ SCP 119-120.

appeals the trial court's denial of his (1) Motion to set aside the April 7, 2009 Order; and (2) his Motion for Reconsideration.

IV. ARGUMENTS

A. The Standard Of Review Is Abuse Of Discretion.

A trial court's decision to grant or deny a motion to modify or vacate a final judgment under CR 60(b) will not be overturned on appeal absent an abuse of discretion.³⁹ A court only abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.⁴⁰ And a court's finding of facts will be upheld if there is substantial evidence to support the finding.⁴¹ In other words, the appellate court will defer to a trial court's decision on issues of fact.

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³⁹ *Little v. King*, 160 Wn.2d 696, 702-03, 161 P.3d 345 (2007); *Lindgren v. Lindgren*, 58 Wn. App. 588, 594-95, 794 P.2d 526 (1990), *rev. den.*, 116 Wn.2d 1009, 805 P.2d 813 (1991); *Pac. Sec. Cos. V. Tanglewood, Inc.*, 57 Wn. App.817, 820-21, 790 P.2d 643 (1990); *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 304-305, 122 P.2d 922 (2005).

⁴⁰ *Mayer v. STO Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

⁴¹ Findings of fact are reviewed under the substantial evidence standard. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Perry*, 123 Wn. App. at 792. This is a deferential standard that views all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). "The fact finder measures witness credibility, and we do not review that determination on appeal." *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671 (2005). Where there is substantial evidence, the Court of Appeals will not substitute its judgment for that of the trial court even though the court might have resolved a factual dispute differently. *Korst*, 136 Wn. App. at 206.

B. The Trial Court Did Not Abuse Its Discretion When It Denied Schroeder's Motion To Vacate The April 7, 2009 Stipulated Order Of Dismissal.

Schroeder claims the Court erred when it failed to set aside the April 7, 2009 Stipulated Order of Dismissal. He claims that because the Order was entered without his consent, it is invalid. Because it found evidence contrary to Schroeder's allegations, the trial court did not abuse its discretion.

1. Schroeder failed to prove a basis under CR 60(b) to set aside the Stipulated Order of Dismissal.

CR 60(e)(1) *requires* the party seeking to set aside a judgment to state and prove the grounds "upon which relief is asked." This case was dismissed with prejudice by Stipulated Order of the Court on April 7, 2009. Schroeder moved the Court for relief, but failed to state on what basis he was seeking relief. Indeed, his two Motions were completely devoid of any reference to *any* Civil Rule or basis as to why the Motion for Partial Relief or Motion to Stay Efficacy of Order were properly before the Court. It was therefore entirely unclear by what rules or authorities Schroeder purported to move the trial court for relief, or upon which standard his Motions should be judged. Only now on appeal does Schroeder argue that his motions were CR 60(b) Motions.

Moreover, and regardless of the procedural problems, Schroeder

could not prove his claim that his attorney lacked the authority to enter the Stipulated Order. After conducting a hearing, the Judge found in Excelsior's favor. Plain and simple, the evidence did not support Schroeder's allegations.

2. Schroeder's Prior Attorney Had the Express and/or Implied Authority to Enter the Order of Dismissal.

The Order of Dismissal was negotiated by the parties to the original foreclosure action as a way to resolve the two lawsuits and Schroeder's default of the original loan. "A written stipulation signed by counsel on both sides of a case is binding on the parties and the court."⁴² Under the law, Schroeder must prove that the trial court abused its discretion in denying the Order of Dismissal *and* proving that his prior attorney lacked the required authority to execute the Order of Dismissal. Because the facts demonstrate that Schroeder's attorney acted with both the implied and express authority to execute the Order of Dismissal, the trial court acted appropriately when it denied Schroeder's motion.

Once an attorney purports to stipulate to a matter involving a substantial right, the burden shifts to the challenging party to establish that

⁴² *Riordan v. Commercial Travelers Mut. Ins. Co.*, 11 Wn. App. 707, 714-15, 525 P.2d 804 (1974).

the attorney lacked the required authority.⁴³ “CR 2A is intended to avoid disputes about whether or not parties or counsel have reached a final agreement and to give certainty and finality to stipulations that have been made.”⁴⁴

Here, Schroeder claimed, in a February 19, 2010 Declaration, that he had no knowledge of the Order of Dismissal. This claim defies all logic and was completely contrary to his deposition testimony. Fortunately, the trial court learned the truth at the April 11, 2010 hearing when called upon to rule on Schroeder’s motion. The court properly concluded that the Stipulated Order of Dismissal was valid and should not be disturbed.

On March 30, 2009, Schroeder’s former attorney Matthew K. Sanger sent a letter to the Trustee *and Schroeder* with proposed changes to the Order of Dismissal.⁴⁵ In his March 11, 2010 deposition, Schroeder admitted that he discussed the March 30, 2009 letter and changes to the Stipulated Order with Mr. Sanger (“Q: Is it possible you [and Mr. Sanger] discussed [the March 30, 2009 letter]? A: But if – Yeah, I’m sure he

⁴³ See Washington Civil Procedure Deskbook (2006) § 2A.6; *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 734-35, 987 P.2d 634 (1999) (attorney’s oral concession at summary judgment hearing held binding on clients, given clients’ failure to demonstrate attorney’s lack of authority).

⁴⁴ Washington Civil Procedure Deskbook (2006) § 2A.5 citing *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954) (discussing predecessor to CR 2A).

did.”) He also admitted that he received copies of all the documents from Mr. Sanger, including the Stipulated Order.⁴⁶ (“Q: I asked earlier if you did receive a copy of this [stipulated order.] A: I’m sure I did. I’m sure I did.”). Further, in Matthew Sanger’s March 11, 2010 deposition, Mr. Sanger stated that he discussed the Stipulated Order with Schroeder prior to signing it and entering it with the court.⁴⁷ Mr. Sanger clearly felt he had Schroeder’s permission to enter the Stipulated Order of Dismissal.

Finally, On March 31, 2009 – just a few days prior to the entry of the Order of Dismissal – Schroeder signed a new Deed of Trust and Promissory Note warranting that “The Property has not been used, and will not be used, for agricultural purposes.”⁴⁸

His warranties in the loan documents are certainly consistent with the Stipulated Order of Dismissal. Moreover, in February 2009, he filed a lawsuit claiming that Excelsior could not conduct a non-judicial foreclosure because the property was agricultural. But then, in March 2009, he signed a new Deed of Trust and Promissory Note where he

⁴⁵ SCP 126-129.

⁴⁶ SCP 146.

⁴⁷ SCP 159-162 (See generally pages 18-30; p. 25: “Q: Did you have Schroeder’s consent to execute the stipulated motion and order? A: Yes. Q: Were you acting with the authority to do so? A: Yes. Q: Do you believe you fully explained the effect that this would have on any future foreclosure to Mr. Schroeder? A: Yes.”).

⁴⁸ SCP 173-196.

expressly warrants that the property is not used for agricultural purposes. You would think, in light of his pending lawsuit, that he would have been very sensitive to signing something that he did not believe was true.

Then, a few days after signing the new Deed of Trust, Schroeder received a letter from his attorney, with a copy of the proposed Order of Dismissal, stating the same thing – that the property was not being used for agricultural purposes and that he would not be able to claim otherwise if he defaulted on the loan. In light of all of this, how can Schroeder possibly claim that he did not know that he was stipulating to the fact that the Property was not agricultural and therefore could be subject to a non-judicial foreclosure? The old adage of “fool me once, shame on you, but fool me twice, shame on me” seems to apply to Schroeder.

So what is he thinking? Schroeder’s position can only be explained as a last-ditch effort to delay the inevitable. Despite his sworn affidavit, the truth, as revealed by his and his attorney’s depositions, is that Schroeder authorized his attorney to enter the Stipulated Order of Dismissal so that he could get an extension of his loan. Schroeder knew what he was doing. He intended to represent to the trial court, and to Excelsior, that the property was not being used for agricultural purposes and that Excelsior would be permitted to conduct a non-judicial foreclosure if Schroeder defaulted on the loan. He cannot now change his

position.

a. Schroeder's Attorney Acted with Actual Authority To Execute the Stipulated Order.

Schroeder's discussions with his attorney, Mr. Sanger, indicate that he granted Mr. Sanger actual authority to execute the Stipulated Order.⁴⁹ Actual authority for an agent to bind a principal exists when a principal makes an objective manifestation to the agent that they are authorized to act on the principal's behalf.⁵⁰ An attorney is an agent for his or her client, so long as the attorney is acting within the scope of his or her authority.⁵¹ When a person hires an attorney to represent them in a matter, other parties are entitled to rely upon the attorney's authority.⁵²

In this case, Mr. Sanger was retained by Schroeder to renegotiate the original note and loan and execute a new note and loan. Part and parcel of this renegotiation and subsequent agreement with Excelsior was the Order of Dismissal. Mr. Sanger sent Schroeder draft copies of the Order, discussed it with him, and received authorization to execute it. Therefore, Mr. Sanger has actual authority to execute the Stipulated Order, and as agent for Schroeder therefore bound Schroeder to its terms.

⁴⁹ SCP 160-161.

⁵⁰ See *Estate of Freitag v. Frontier Bank*, 118 Wn. App. 222, 229 (2003).

⁵¹ See *Fite v. Lee*, 11 Wn. App. 21, 28-29 (1974) (explaining the scope of attorney's agency relationship with client).

⁵² See *Haller v. Wallis*, 89 Wn.2d 539, 547 (1978).

b. Schroeder's Attorney Acted with Apparent Authority To Execute the Stipulated Order.

Even if Mr. Sanger did not have the actual authority to act for Schroeder, Excelsior was justified in relying on his apparent authority to enter the Order of Dismissal. Apparent authority to do an act is created as to a third person by the conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.⁵³ Apparent authority exists only to the extent that it is reasonable for the third party dealing with the agent to believe that the agent had authority to act on behalf of the principal.⁵⁴ An agent's exercise of apparent authority results in the principal being bound.⁵⁵

Excelsior was justified in believing Mr. Sanger had authority to enter into the Order of Dismissal. First, Schroeder hired Mr. Sanger as his attorney and held him out as his agent. Second, under the Washington Rules of Professional Conduct (the "RPC"), an attorney has the authority to determine the means by which the attorney works to accomplish the client's objectives.⁵⁶ Because of the requirements of the RPCs, it was

⁵³ *Estate of Freitag*, 118 Wn. App. at 229.

⁵⁴ *Id.*

⁵⁵ *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 364 (1991).

⁵⁶ RPC 1.2(a).

reasonable for Excelsior to presume that Mr. Sanger discussed with and received consent from Schroeder to enter into the Order.⁵⁷ Furthermore, since Schroeder received copies of the correspondence between Mr. Sanger and Excelsior and did not object, it was reasonable for Excelsior to conclude that Mr. Sanger was acting with both actual and apparent authority to bind his clients.

c. Schroeder Ratified His Attorney's Execution of the Order of Dismissal.

Finally, even if Mr. Sanger did not have either actual or apparent authority to bind his client to the Order of Dismissal, Schroeder - by failing to object or by enjoying the benefits of the bargain – ratified the agreement, making it enforceable against him. In Washington, “ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act . . . is given effect as if originally authorized by him”⁵⁸ In this case, Schroeder received copies of the Order of Dismissal and failed to object or otherwise disavow the agreement while accepting the benefits of Excelsior withdrawing its foreclosure lawsuit and extending the loan.

A principal ratifies an agent's actions if, with full knowledge of the facts, he accepts the benefits of the acts or assumes that an obligation has

⁵⁷ See RPC 1.4(a)(2).

been imposed.⁵⁹ Furthermore, failure to repudiate a contract “supports a finding of ratification.”⁶⁰ Schroeder received a copy of the Order of Dismissal both before and after it was signed Mr. Sanger and entered with the court. However, Schroeder did not object to the terms of the Order of Dismissal, nor make any attempt to repudiate it, until it came time to honor it. In addition to having knowledge of the terms of the agreement, Schroeder accepted the benefits of the Order by accepting the loan from Excelsior.

Schroeder may argue that he did not expressly ratify the agreement through affirmative action, but, affirmative action is not required in order for a principal to ratify the actions of its agent. “Ratification can be inferred from a principal’s silence if the circumstances are such ‘that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent.’”⁶¹

3. Schroeder’s Loan Documents Provide that the Property Was Not Used Principally for Agricultural Purposes.

Also, in his new 2009 loan documents, Schroeder specifically warranted to Excelsior that his property was not being used principally for

⁵⁸ *Riss v. Angel*, 131 Wn.2d 612, 636 (1972).

⁵⁹ *Id.*

⁶⁰ *In re Marti & Eicholz*, 310 B.R. 203, 208 (W.D. Wash, 2004).

⁶¹ *Smith*, 63 Wn. App. at 369.

agricultural purposes in accordance with RCW 61.24.030. Excelsior relied upon Schroeder's representation when it agreed to extend the loan, as evidenced by the fact that the loan documents were signed more than two weeks before the Order of Dismissal was filed. Whether Schroeder knew about the terms of the Stipulated Order of Dismissal is therefore immaterial because he clearly knew about these provisions in the loan documents. He voluntarily signed the new Deed of Trust and Promissory Note knowing that he was representing to Excelsior that the property was not being used for agricultural purposes.

Schroeder has never denied this critical fact. Excelsior was entitled to rely upon Schroeder's representations in the loan documents, and the waiver in the Order of Dismissal, when it agreed to extend Schroeder's loan and when it later initiated a non-judicial foreclosure.

C. Trial Court Properly Held a Hearing Before it Denied Both of Schroeder's Motions.

Schroeder next argues that the Court did not properly consider his motions. In fact, Schroeder claims his motion was never actually set for hearing.

Schroeder first argues that the trial court heard his "unset" Motion for Partial Relief without any advance notice to Schroeder. There are a number of errors with this argument. First, the trial court allowed both

parties to present arguments on Schroeder's motion.⁶² The Order expressly states that the Court "heard and considered arguments from counsel for the parties."⁶³ Regardless, any procedural error was waived or invited by Schroeder's attorney.⁶⁴

Second, the only basis Schroeder provides for failing to set his Motion for Partial Relief for hearing is that he "wished to conduct further discovery before a hearing on the motion for partial relief."⁶⁵ Further discovery in a matter that was dismissed with prejudice is simply not allowed. In other words, Schroeder filed his Motion for Partial Relief, but did not set it, in an attempt to hold the trial court and Excelsior hostage and prevent the trial court from granting Excelsior the relief to which it was entitled.

Regardless, as set out above, the parties had plenty of opportunity to conduct discovery in connection with Schroeder's other lawsuit. Schroeder submitted affidavits and other evidence to support his position. Excelsior also did the same, including introducing the deposition

⁶² SCP 108-110.

⁶³ *Id.*

⁶⁴ "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so." *State v. Momah*, 167 Wn.2d 140, 153 (2009).

⁶⁵ Appellant's Br., p.7.

transcripts of Schroeder and his previous attorney, Matthew Sanger. Schroeder had the same opportunity as Excelsior to take depositions and present whatever evidence he wanted to support his motion. The court considered this evidence at the April 6, 2010 hearing and ruled accordingly.

Third, Schroeder fails to present the applicable law to this Court in an effort to show that he had the *right* to oral arguments on his motions. A court may rule upon a CR 60(b) motion *without* oral testimony and *without* oral argument.⁶⁶ Accordingly, the trial court did not abuse its discretion in hearing argument from counsel on the two Motions despite the fact that the Motion for Partial Relief was not set for hearing on April 6th.

Finally, any claimed irregularity was properly resolved with Schroeder's Motion for Reconsideration. By this time, Schroeder certainly had plenty of time to present any additional arguments or evidence he felt was necessary for the court to consider. Again, the trial court did not abuse its discretion in denying the Motions.

D. Schroeder's Claims are Moot.

"The appellate court has the authority to determine whether a

⁶⁶ *Roberson v. Perez*, 123 Wn. App. 320, 96 P.3d 420 (2004) (oral testimony not required); *Stouilil v. Edwin A. Epstein Jr., Operating Co.*, 101 Wn. App. 294, 3 P.3d 764 (2000) (no abuse of discretion in denying motion without oral argument).

matter is properly before it” RAP 7.3. Schroeder’s claims, and his appeal, are now rendered moot by the foreclosure of the Property at issue. Under Washington law, “a case is moot if [the Court] can no longer provide meaningful relief.”⁶⁷ In this case, the Court cannot provide meaningful relief because the Property has already been foreclosed (on February 19, 2010). Any claim with respect to the foreclosure is now moot—including relief from the Order of Dismissal.⁶⁸ Schroeder’s appeal should be dismissed as a matter of law because this Court, or any other Court, can no longer provide any relief. Whether Schroeder is entitled to any relief, and what type of relief, has become purely academic.

Under the Washington Deed of Trust Act RCW 61.24 *et seq.*, non-judicial foreclosure is authorized and the Act provides pre-sale remedies as the “only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of the sale and foreclosure.”⁶⁹ “A party waives the right to postsale remedies where the party (1) received notice of the right to enjoin the sale, (2) had actual or

⁶⁷ *Yakima Police Patrolmen's Association v. City of Yakima*, 153 Wn. App. 541; 222 P.3d 1217, citing *BBG Group, LLC v. City of Monroe*, 96 Wn. App. 517, 521, 982 P.2d 1176 (1999).

⁶⁸ The following arguments are made in greater length in Defendant’s Memorandum in Support of Motion for Summary Judgment filed March 1, 2010 in case No. 2010-2-0005401. The parcel in question was sold at a non-judicial foreclosure sale on February 19, 2010.

⁶⁹ *Brown v. Household Realty*, 14 Wn. App. 157, 163 (2008).

constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale.”⁷⁰ Waiver is still effective even though a landowner claims he did not have knowledge of their claims, did not have the benefit of counsel, and was ignorant of the legal bases of his claims.⁷¹

Here, the remedy sought (relief from the Order of Dismissal) is a post-sale remedy. Schroeder received notice of the sale and acknowledges having actual knowledge of potential defenses by bringing a lawsuit against the Trustee in January 2010, prior to the sale. However, Schroeder failed to obtain a court order enjoining the sale (indeed, the Court dissolved a TRO in this matter on February 19th).

Washington’s waiver doctrine applies to bar post-sale challenges to both the foreclosure process and the underlying obligation.⁷² Further, the *Brown* court ruled that even money damages claims based on the deed of trust are barred post-sale by the waiver doctrine.⁷³ The Washington Supreme Court explained that “adequate remedies to prevent wrongful foreclosure exist in the presale remedies, and finding waiver....furthers the

⁷⁰ *Id.*

⁷¹ *Id.* at 164.

⁷² *Brown* at 168; *Hallas v. Ameriquest Mortgage Co.*, 406 F. Supp. D 1176 (D. Or. 2005).

⁷³ *Brown* at 167-168.

goals of providing an efficient and inexpensive foreclosure process and promoting the stability of land titles.”⁷⁴ Schroeder, with notice and knowledge of his potential claims, failed to timely enjoin the foreclosure sale and take advantage of his potential remedies.

Under Washington law, “a case is moot if [the Court] can no longer provide meaningful relief.”⁷⁵ As the court cannot now provide any meaningful relief with respect to the foreclosure, any claim by Schroeder is now moot. Accordingly, trial court did not abuse its discretion in denying Schroeder’s Motions for Relief.

E. Waiver of Statutory Rights in Deed of Trust Act are Permitted in Washington.

Schroeder attempts to argue, without benefit of any citation, that he could not have waived any provisions of the Deed of Trust Act because such a waiver would be “illegal.”

Schroeder induced (or conned) Excelsior into dismissing its lawsuit for judicial foreclosure and advancing him a new loan on the basis that it would be allowed to non-judicially foreclose his property at a later date if we were to default on the new loan. Indeed, Schroeder even represented and warranted to Excelsior that the Property was not being

⁷⁴ *Plein v. Lackey*, 149 Wn.2d 214, 228 (2003).

⁷⁵ *Yakima Police Patrolmen's Association v. City of Yakima*, 153 Wn. App. 541; 222 P.3d 1217, citing *BBG Group, LLC v. City of Monroe*, 96 Wn. App. 517, 521, 982 P.2d 1176 (1999).

used for agricultural purposes when he executed the new 2009 Deed of Trust. Schroeder further promised that he would not permit the property to be used for agricultural purposes without Excelsior's consent.

Now Schroeder seeks to undo that waiver and argue that he no longer has any obligation to perform, i.e., pay back the loan, because his waiver was "illegal." However, Schroeder cannot cite to any case that supports his position. The best he can do is cite to several irrelevant cases for the general proposition that contractual provisions that conflict with the terms of a legislative enactment are illegal and unenforceable.⁷⁶

However, the Deed of Trust Act was enacted to provide *lenders* with a quick, efficient, and cost-effective method of foreclosure.⁷⁷ In return for the Deed of Trust Act, and non-judicial foreclosures, lenders gave up their right to a deficiency judgment in most cases.⁷⁸ Here, Excelsior gave up the right to proceed with its judicial foreclosure when Schroeder had to sign new loan documents and waive any right to claim the Property was protected as Agricultural land. Schroeder gained a valuable right in return for his waiver. It would be unjust for Schroeder to now renege on his waiver.

⁷⁶ *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 333, 828 P.2d 73 (1992); *overruled by Waterjet Tech Inc., v. Flow Int'l Corp.*, 140 Wn.2d 313, 996 P.2d 598 (2000).

⁷⁷ *Kezner v. Landover Corp.*, 87 Wn. App. 458, 467 (1997).

Moreover the waiver of statutory rights, even constitutional rights, is not new to Washington. Washington allows broad waiver provisions familiar to any attorney: waivers of the right to a jury trial; waivers of the right to trial at all (i.e. arbitration agreements), and waivers of liability (i.e. exculpatory clauses). The rights waived in these contexts are indisputably greater than a right to judicial foreclosure, especially when the Deed of Trust act provides ample protection in the form of nonjudicial foreclosure procedures. As the Supreme Court of Washington recently stated, “Generally, statutory rights can be waived[.]”⁷⁹ The notion of waiver, especially when a party gains a valuable right, does not offend public policy. The trial court, therefore, did not abuse its discretion when it denied Schroeder’s Motions.

F. Excelsior is Entitled to recover its Legal Fees and Costs incurred in defending against this Appeal.

The Promissory Note and Deed of Trust signed by Shroeder include provisions that permit the prevailing party to recover their fees incurred in enforcing the terms of those agreements. In this case, Schroeder has tried to prevent Excelsior from enforcing its rights under the Deed of Trust. Therefore, to the extent Excelsior prevails on this appeal, it is entitled to recover its reasonable legal costs and fees.

⁷⁸ RCW 61.24.100.

V. CONCLUSION

Schroeder and Excelsior clearly reached a resolution of the two lawsuits when Schroeder obtained a new loan from Excelsior. In the new Deed of Trust, Schroeder represented and warranted that his property was not currently being used, nor would it be used in the future, for agricultural purposes. Schroeder also agreed, in the Stipulated Order of Dismissal, to not claim otherwise if foreclosure because necessary.

Because Schroeder should not be allowed to change his position or renege on his warranties, and because there was substantial evidence to support the court's ruling, the trial court did not abuse its discretion when it denied Schroeder's Motion to vacate the April 7, 2009 Stipulated Motion to Dismiss. Therefore, the trial court's rulings should be affirmed and Excelsior should be entitled to collect its legal costs and fees.

Dated this 27 day of October, 2010.

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⁷⁹ *Wynn v. Earin*, 163 Wn.2d 361 (2008).

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2010, I caused to be served the foregoing RESPONDENTS' BRIEF on the following party at the following address:

Matthew F. Pfefer
Caruso Law Offices
10417 E 4th Ave Apt 10
Spokane Valley, WA 99206-3638

by delivering to him a true and correct copy thereof, certified by me as such, by way of electronic mail (agreed upon by parties).



Bradley W. Andersen (Philip Habertur)