

FILED

MAR 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 295851

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

THE BANK OF NEW YORK, AS TRUSTEE, PURSUANT TO THE
TERMS OF THE CERTAIN POOLING AND SERVICING
AGREEMENT DATED AS OF NOVEMBER 1, 1996 RELATED TO
METROPOLITAN ASSET FUNDING, INC., MORTGAGE PASS-
THROUGH CERTIFICATES SERIES 1996-A

Appellant,

v.

BRIAN R. HOOPER AND LISA M. HOOPER, HUSBAND AND WIFE,
MARCO T. BARBANTI, ROYAL POTTAGE ENTERPRISES,
STERLING SAVING BANK, JUNCO FROST LAVINIA, IN.,
UNIFUND CCR PARTNERS, AND BANKERS TRUST COMPANY OF
CALIFORNIA,

Respondents.

BRIEF OF APPELLANT

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Joe Solseng, WSBA #16855
Robinson Tait, P.S.
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BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court's Order Reconveying Deed of Trust entered October 29, 2010 erred in so far as it declared that Royal Pottage Enterprises is the fee owner of the property.

2. The trial court's Judgment For Defendants Royal Pottage Enterprises and Junco Frost Lavinia, Inc. and Judgment for Defendant Marco T. Barbanti entered on October 29, 2010 erred in ordering attorney fees to these three defendants.

3. The trial court's Order Denying Motion for Reconsideration entered November 30, 2010, repeated the errors set forth in Assignments 1 and 2.

Issues Pertaining to Assignments of Error

1. In Washington, a purchaser under a real estate contract has substantial rights in the property, but does not have legal title until the contract is fully paid. Did the trial court err in declaring Royal Pottage Enterprises, Inc., a successor in interest to a purchaser under a real estate contract, to be the fee owner of the property where the contract has not been fully paid?

2. Although a contract may provide that only one party may recover attorney fees and costs incurred in enforcing the contract, RCW 4.84.330 provides that, if the other party to the contract is the prevailing party in the litigation, it shall be entitled to its attorney fees under the contract. Did the trial court err in awarding attorney fees to defendants Marco T. Barbanti, Royal Pottage Enterprises, Inc. and Junco Frost Lavinia, Inc., none of whom were parties to the note and deed of trust sued upon in the foreclosure lawsuit below and none of whom could be liable under those loan instruments?

B. Statement of the Case

The property involved in this matter is a commercial building located at 5711 North Division Street, Spokane, Washington. On April 23, 1993, Brian and Lisa Hooper, who owned the property, executed a promissory note and granted a deed of trust on the property to Metropolitan Mortgage & Securities Co. ("Metropolitan") to secure a loan in the amount of \$143,000. Clerk's Papers, hereafter, CP 6, 12-17.

On May 1, 1996, the Hoopers entered into a real estate contract selling the property to Marco Barbanti. CP 47, 49-64. The real estate contract provided that Barbanti was taking the property subject to the underlying Metropolitan deed of trust. The contract stated that the underlying obligation would be paid by the Hoopers but funded by

Barbanti through payments to the Hoopers' escrow agent. Barbanti did not assume the obligations under the Hoopers' note and deed of trust to Metropolitan, but the contract required him to make payments to the Hoopers' escrow agent to cover the underlying obligation and to make smaller payments to the Hoopers. CP 63.

In April 1997, Metropolitan assigned its beneficial interest under the deed of trust to the Bank of New York. CP 19. In 2003, Barbanti executed a quit claim deed on the property in favor of Royal Pottage Enterprises, Inc.

In April 2009, the Bank of New York filed a complaint to foreclose the deed of trust on the property. In its complaint, the bank sought a money judgment and decree of foreclosure against the Hoopers. The bank also sought to recover from the Hoopers its costs and attorney fees incurred in the foreclosure action. CP 8. In addition to the Hoopers, the complaint named several persons and entities holding an interest in the property as defendants, including Marco Barbanti, Royal Pottage Enterprises (hereafter, "Royal Pottage") and several other parties which held judgments against Marco Barbanti. Included among such judgment lienors was Junco Frost Lavinia, Inc. (hereafter, "Junco Frost"). CP 5. The complaint also sought to foreclose any interest in the property held by

these defendants. CP 9. The complaint did not seek attorney fees and costs against these defendants. CP 1-19.

On August 27, 2010, Marco Barbanti filed a motion to dismiss Bank of New York's foreclosure action on the basis an action on the note and deed of trust was time barred under the applicable statute of limitations. CP 33-38. Defendants Royal Pottage and Junco Frost joined in the motion to dismiss. CP 105-106.

Based upon Barbanti's admission in the memorandum that he had failed to make the payments to cover the underlying deed of trust payments as required by real estate contract, the Hoopers moved to amend their answer and to add a cross claim against Barbanti. Their proposed amended pleading included a claim that although Barbanti had continued to pay the smaller payment to the Hoopers, he had breached the real estate contract by failing to pay the amounts to cover the underlying deed of trust payments which he was also obligated to make under the real estate contract. CP 39-48. The Hoopers then assigned their seller's interest in the real estate contract to the Bank of New York by a Seller's Assignment of Real Estate Contract. CP 66-67.

In its opposition to dismissal and at the hearing on September 24, 2010, the Bank of New York asked the court to deny the dismissal and allow the bank to amend its complaint to assert claims enforcing the real

estate contract, now held by the bank, based upon Barbanti's breach of his obligations under the contract. CP 65-68. At the hearing the court orally granted the motion to dismiss, leaving the bank to file a separate lawsuit to enforce the real estate contract against Barbanti. CP 109, 113. That lawsuit was filed on October 28, 2010. CP 162.

On October 15, 2010, Barbanti, Royal Pottage and Junco Frost filed motions for attorney fees pursuant to RCW 4.84.330. CP 110-11, 116-117. On the same day, Royal Pottage and Junco Frost also filed a motion for reconveying the deed of trust. CP 118-119.

On October 29, 2010, the court entered four orders: (1) Order Granting Motion to Dismiss (dismissing the bank's foreclosure action as barred by the statute of limitations), CP 137-141; (2) Order Reconveying Deed of Trust, CP 142-150; (3) Judgment For Defendant Marco T. Barbanti (awarding attorney fees), CP 152-154; and (4) Judgment For Defendants Royal Pottage and Junco Frost (awarding attorney fees), CP 155-158.

The Bank of New York filed a motion for reconsideration of the order reconveying the deed of trust asking the court to modify its order so as not to improperly declare that Royal Pottage was the fee owner of the property. CP 159-163, 183-188. The bank also filed a motion for reconsideration of the judgments awarding attorney fees to the defendants.

CP 164-167. The trial court denied all motions for reconsideration on November 30, 2010.

No appeal has been taken regarding the order dismissing the foreclosure action. As noted in the assignments of error (1) the court's order of reconveying the deed of trust, is in error, in so far as it declared Royal Pottage holds fee ownership of the property, and (2) the court erred in granting attorney fees to Barbanti, Royal Pottage and Junco Frost pursuant to RCW 4.84.330.

C. Summary of Argument

The trial court erred in declaring that Royal Pottage, a grantee under a quit claim deed granted by a purchaser under a real estate contract was the fee owner of the property. Additionally, the court erred in awarding attorney fees, pursuant to RCW 4.84.330, to three defendants who were not parties to the underlying note and deed of trust and against whom plaintiff could not have obtained an award of attorney fees if it had prevailed in its action.

D. Argument

1. Standard of Review

The standard of review with respect to both the trial court's declaration that Royal Pottage was the fee owner of the property and its award of attorney fees under RCW 4.84.330 is de novo, because each is a

question of law. Questions of law are reviewed de novo. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 556, 852 P. 2d 295 (1993). Whether a statute or a provision of a contract authorizes an award of attorney fees is a legal question which is reviewed de novo. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App 120, 126, 857 P. 2d 1053 (1993); *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

2. The Court's Declaration that Royal Pottage is the Fee Owner of the Property was Error.

The trial court's order dismissing the bank's deed of trust foreclosure action as time barred by the statute of limitations made the provisions of RCW 7.28.300 applicable to the barred deed of trust. That statute provides:

Quieting title against outlawed mortgage or deed of trust.

The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

The obvious purpose of the statute is to remove stale liens from clouding title to property. To accomplish that purpose, the statute provides that a **record owner** of the property may have **judgment quieting title against** such a lien. If the trial court had limited its order to removing the cloud on

the title by quieting title against the deed of trust and declaring it to have no further legal effect, its order would be in compliance with the statute, and no appeal would have been taken on this issue.

Unfortunately, the court went further and in both the “Findings and Conclusions” and the “Order” portions of the Order Reconveying Deed of Trust, entered on October 29, 2010, the court stated that defendant Royal Pottage is the “fee owner” of the property. CP 142-150. This declaration is in error. In its motion for reconsideration, the bank requested the court to modify its order reconveying the deed of trust to correct this error. CP 159-163, 183-188. The trial court denied this motion. CP 189-190.

Any ownership interest Royal Pottage has in the property is through the quit claim deed from Marco Barbanti. Barbanti’s interest was a purchaser’s interest under a real estate contract and Royal Pottage can have no more ownership interest than did Barbanti.

In Washington, a seller under a real estate contract retains legal title to the property as security for performance of the contract. *Tomlinson v. Clarke*, 118 Wn.2d 498, 504, 825 P.2d 706 (1992). A purchaser under a real estate contract has substantial rights in the property, but his ownership interest does not amount to a fee ownership. *Bays v. Haven*, 55 Wn. App. 324, 777 P.2d.562 (1989). *Cascade Security Bank v. Butler*, 88 Wn.2d

777, 567 P.2d 631 (1977). See also, Washington Real Property Deskbook, ch. 45(3) (3d ed. 1996). Because Barbanti's interest was not as a fee owner of the property, Royal Pottage, taking under the quit claim deed, cannot be a fee owner.

The court's declaration that Royal Pottage is the fee owner was not only wrong, it was unnecessary and premature. RCW 7.28.300 only requires that a judgment quieting title may be obtained by a record owner of the property. It does not provide a mechanism for the court to determine competing ownership interests in the property. The trial court should not have incorrectly declared that Royal Pottage held the property as a fee owner, but should have limited its ruling under RCW 7.28.300 to simply quieting title against deed of trust found by the court to be barred by the statute of limitations. This is what the bank asked the trial court to do in its motion for reconsideration. CP 159-163.

The competing interests of the Bank of New York (seller's interest under the real estate contract) and Royal Pottage (purchaser's interest under the real estate contract) were not at issue in foreclosure case. The foreclosure action involved the bank's rights and remedies against the Hoopers under its note and deed of trust. Because the trial court did not allow the bank to amend its complaint to seek enforcement remedies as the

current holder of the real estate contract, the bank was required to file a separate action in the trial court to enforce the purchaser's obligations under the contract. If the bank prevails in that action, any interest Royal Pottage has in the property would be eliminated.

This court should correct the trial court's erroneous and unnecessary declaration of fee ownership, not only because it is wrong, but because it is an improper cloud on the property title which, at a minimum, causes confusion as to the true state of the title.

3. The Court Erred in Awarding Attorney Fees Under RCW 4.84.330.

In Washington, a court has no power to award attorney fees unless authorized by statute, contract, or on equitable grounds. *Fisher Properties, Inc., v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986); *Herzog Aluminum v. General American Window Corporation*, 39 Wn. App 188, 692 P. 2d 867 (1984); *Bongirno v. Moss*, 93 Wn. App. 654, 657, 969 P.2d 1118 (1999). The court below incorrectly agreed with the defendants that they were entitled to attorney fees pursuant to RCW 4.84.330. Because that statute provides no basis for the award of attorney fees in this case, the trial court's award of attorney fees should be reversed.

RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

The *Herzog* court concluded that "the broad language '[i]n any action on a contract' found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract." *Herzog*, 39 Wn. App. at 197. Said differently, the mutuality of remedy under the statute provides for an award of attorney fees to a prevailing party under a contractual provision if the party-opponent would have been entitled to attorney fees under that same provision had that opponent prevailed, even when the contract itself is found invalid. *Herzog*, 39 Wn. App. at 195-97.

The note signed by the Hoopers included the following attorney fee provision:

If this note is placed in the hands of an attorney for collection, or if suit shall be brought to collect any of the principal or interest payable hereunder, I promise to pay a reasonable attorney's fee and all other costs and expenses incurred therein by holder.

CP 12.

The deed of trust signed by the Hoopers, in relevant part, contained the following attorney fees provision:

To protect the security of this Deed of Trust, Grantor covenants:

* * *

4. To defend any action or proceeding purporting to affect the security hereof or the rights or powers of the Beneficiary of Trustee, and to pay all costs and expenses, including the cost of title search and attorney's fees in a reasonable amount, in any such action or proceeding, and in any suit brought by Beneficiary to foreclose this Deed of Trust.

CP 14-15.

In its foreclosure action, the Bank of New York sought a monetary judgment against the Hoopers, the grantors under the deed of trust, and alleged that the loan instruments provided that the costs of enforcement, including attorney fees were recoverable. CP 4-10. If the bank had prevailed in its foreclosure action, pursuant to note and deed of trust, it would have been able to recover its costs and attorney fees in the judgment against the Hoopers.

However, the bank did not seek nor could it have obtained a monetary judgment or an award of attorney fees against Barbanti, Royal Pottage or Junco Frost. The bank only sought to foreclose the interests of those parties whose interest attached to the property subsequent to the execution of the bank's deed of trust. [CP 1-19]

Barbanti was not a party to the note and deed of trust and did not assume the Hoopers' loan obligations. The real estate contract between the Hoopers and Barbanti was not an assignment of the note and deed of trust. Significantly, the real estate contract provided that the Hoopers would continue to pay the prior encumbrance on the property and that Barbanti would pay an amount to the Hoopers' escrow agent to cover that obligations as well as an additional amount for the Hoopers. CP 46-48. The real estate contract contained a specific section entitled "Prior Encumbrance To Be Paid By Seller But Funded By Buyer" which clearly stated the Hoopers would pay the underlying obligation through their escrow agent with funds deposited with the agent by Barbanti and that Barbanti would also pay a small payment directly to the Hoopers. CP 63.

Some time after the contract was entered into Barbanti began making payments directly to Metropolitan, the holder of the note and deed of trust. CP 47. However, as a non-party to the underlying loan instruments, Barbanti does not have standing to enforce the attorney fee provisions of those agreements. Moreover, Royal Pottage, as the holder of a quit claim deed from Barbanti and Junco Frost, a judgment lienor have no plausible right to enforce those attorney fee provisions.

If the bank had prevailed in its foreclosure action it would not have been entitled to an award of attorney fees against Royal Pottage, Junco

Frost Lavinia or Marco Barbanti under the attorney fee provision of the promissory note and deed of trust. Therefore, the mutuality provisions of RCW 4.84.330 are not triggered and provide no basis for those parties to recover attorney fees against the bank.

Significantly, these defendants do not claim the bank could have obtained an award of attorney fees against them in its action. Rather, they claim that if the bank had obtained an attorney fee award against the Hoopers that the property will be diminished in value against the holders of all subordinate interests in the property and they would have to pay the attorney fees awarded against the Hoopers if they chose to preserve their interest in the property by paying off the underlying obligation. Even if that is so, it does not make them person liable under the contract and against whom the bank could have obtained an award of attorney fees.

As these defendants were not persons “liable on a contract” as required by *Herzog*, the mutuality provisions of RCW 4.84.330 are not triggered even though the banks foreclosure action was dismissed. Stated differently, because the bank could not obtain an award of attorney fees directly against these defendants, RCW 4.84.330 does not support an award of attorney fees to them.

The case of *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 96 P.3d 454 (2004) highlights this point. In that case, NW, LLC

entered into a purchase and sale agreement to sell a subdivision plat to O'Connor. After O'Connor refused to accept the property "as is" due to the seller being unable to complete the plat conditions, NW sold the property to Tacoma Park. O'Connor sued NW on the purchase and sale agreement and sued Tacoma Park on the theory that it was also obligated under the purchase and sale agreement to transfer the property to O'Connor. NW and Tacoma Park prevailed in the trial court and the trial court awarded attorney fees to both pursuant to RCW 4.84.330. Both also prevailed in the appellate court. The appellate court stated:

NW prevailed under the agreement both at trial and on appeal and is, therefore, entitled to its attorney fees.

The trial court also awarded Tacoma Northpark attorney fees at trial under RCW 4.84.330, and O'Connor has not assigned error to the ruling. But because O'Connor has no contractual relationship with Tacoma Northpark and no other basis for an award of attorney fees has been presented to us, we deny Tacoma Northpark's request for attorney fees on appeal.

Tacoma Northpark, 123 Wn. App. at 84.

Clearly, although O'Connor had not appealed on the issue, because there was no contractual relationship between O'Connor and Tacoma Northpark, the trial court had erred in awarding attorney fees to Tacoma Northpark, pursuant to RCW 4.84.330, under the purchase and sale agreement.

Two other cases also highlight this mutuality requirement. In *Mutual Security Financing v. Unite*, 68 Wn. App. 636, 847 P. 2d 4 (1993), Unite executed a promissory note to Mutual Security which was secured by a deed of trust. Unite then quit claimed the property to Guzman, but Guzman did not sign the note. The quit claim deed stated it was subject to the deed of trust. Mutual Security sued both Unite and Guzman on amounts due on the note. After finding that Guzman could not be liable on the note because he had not signed it, the court rejected Guzman's claim for attorney fees pursuant to RCW 4.84.330. The court concluded that Guzman was not entitled to attorney fees because she did not sign the note. *Mutual Security Financing*, 68 Wn. App. at 643. Guzman was not entitled to attorney fees because he was not a person "liable on a contract" as required by the *Herzog* line of cases.

In *Yuan v Chow*, 96 Wn. App. 909, 982 P.2d 647 (1999), Yuan sued Chow on a promissory note that Chow had signed payable to Yuan. At signing, Chow made no mention that he was signing the note as an agent for Tam. The note contained an attorney fee provision that provided that all "makers, endorsers, sureties, guarantors, and all other parties on this note . . . promise to pay, upon default, all costs of collection and reasonable attorney's fee incurred or paid by the holder in protecting or enforcing its right under this note." Upon default, Yuan sued Chow on the

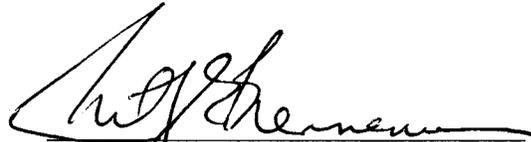
note. Chow joined Tam in the action alleging that he signed the note as Tam's agent. Both Yuan and Chow claimed that Tam was liable on the note as a principal. The court found that Tam could not be liable on the note because he had not signed it, but sustained the trial court's award of attorney fees to Tam, pursuant to RCW 4.84.330, because under the language of the attorney fee provision, if Yuan had prevailed on the agency theory, Tam would have been party liable under the contract and Yuan would have been able to enforce the attorney fee provision against Tam. *Yuan*, 96 Wn. App. at 917-918.

In the instant case none of the defendants to whom the trial court awarded attorney fees signed the note or deed of trust or assumed the obligations and could not be liable on the contract. While the real estate contract between the Hoopers and Barbanti provided the contract was subject to the prior deed of trust, it did not provide that Barbanti assumed the obligations secured by the deed of trust. In fact, the contract provided the Hoopers would continue to pay the amounts due under the deed of trust. Because Barbanti, Royal Pottage and Junco Frost can not be held liable under the note or deed of trust, the bilateral provisions of RCW 4.84.330 do not support an award of attorney fees to them.

E. Conclusion

After finding the foreclosure action barred by the statute of limitations, the trial court correctly quieted title against the barred deed of trust. However, the trial court erred in declaring that Royal Pottage holds the property in fee ownership. Additionally, the court erred in awarding attorney fees to Barbanti, Royal Pottage and Junco Frost under RCW 4.84.330.

Dated this 4th day of March, 2011.



Phillip E. Brenneman, WSBA# 9219
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CERTIFICATE OF SERVICE

I, Allison Heuschele, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a paralegal to Phillip E. Brenneman and Joe Solseng, attorneys for Appellant, Bank of New York, and am competent to be a witness herein.

On March 4, 2011, I caused to be served via Federal Express Overnight Delivery a true and correct copy of APPELLANT'S BRIEF to the following:

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DATED this 4th day of March, 2011.


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