

FILED

OCT 24 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 306798

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

RICHARD L. HARWOOD and THE HARWOOD GROUP, LLC,

Petitioners

vs.

WELLS FARGO BANK N.A.,

Respondent

BRIEF OF RESPONDENT WELLS FARGO BANK,
N.A.

Ronald E. Beard, WSBA No. 24014
Benjamin J. Roesch, WSBA No. 39960
LANE POWELL PC
Attorneys for Respondent Wells Fargo
Bank, N.A.

LANE POWELL PC
1420 Fifth Avenue, Suite 4200
Seattle, Washington 98101-2338
Telephone: 206.223.7000
Facsimile: 206.223.7107

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1420 Fifth Avenue, Suite 4200
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Telephone: 206.223.7000
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I.

INTRODUCTION

This commercial dispute between two corporate lenders – The Harwood Group, LLC and Wells Fargo Bank, N.A. (“Wells Fargo”) – arises from the nonjudicial foreclosure of property previously owned by Ms. Ann Short. In 1999, Ms. Ann Short borrowed money from Wells Fargo’s predecessor in interest, secured by a deed of trust in her house. Ms. Short had difficulty paying her mortgage, and faced foreclosure in 2007. The Harwood Group, LLC – a limited liability company owned by Mr. Harwood¹ – lent her money to forestall that foreclosure. Harwood’s loan to Ms. Short was secured by a junior deed of trust on the house. When Ms. Short was unable to repay Harwood’s loan, in lieu of foreclosure she conveyed her home to The Harwood Group, LLC in November 2007, subject, of course, to Wells Fargo’s senior deed of trust. Wells Fargo’s loan to Ms. Short again fell into default, and Wells Fargo again initiated nonjudicial foreclosure proceedings in 2009. The trustee’s sale was postponed several times until November 30, but Harwood was unable to cure Ms. Short’s default.

¹ This brief will refer to the Harwood Group, LLC and Mr. Harwood collectively as “Harwood.” However, because it appears that Mr. Harwood’s only interest in this case is as owner of the Harwood Group, LLC, which appears to be the real party in interest, this brief will use the pronoun “it.”

Harwood asserts a claim for promissory estoppel, arguing that Wells Fargo promised to postpone the trustee's sale yet again, but failed to do so. By November 24, 2009, when the alleged promise was made Harwood had no statutory right to avert the trustee's sale by curing Ms. Short's default. Having failed to exercise its statutory right under the Deed of Trust Act to avert the sale, Harwood now seeks a windfall from Wells Fargo in the form of profits that it would have made if it had cured Ms. Short's default, averted the trustee's sale, and then later sold the property on the open market.

The trial court dismissed Harwood's promissory estoppel claim pursuant to CR 12(b)(6). The Court's ruling should be affirmed for two separate and independently sufficient reasons. First, Harwood's promissory estoppel claim is barred by the statute of frauds. Second, Harwood has not alleged facts that, if true, would support all the elements of his claim.

II.

COUNTER-STATEMENT OF THE ISSUES

1. Whether Harwood's promissory estoppel claim is barred by the statutes of fraud found in RCW 64.04.010 and/or RCW 19.36.110.
2. Whether Harwood may maintain a claim for promissory estoppel where he has not alleged any reasonable, detrimental reliance.

III.

COUNTER-STATEMENT OF THE CASE

A. Factual Allegations

In December 1999, Ms. Short signed a refinanced promissory note, secured by a deed of trust on her home. [CP 4, ¶ 5.] This note was subsequently transferred to a mortgage-backed security, for which Wells Fargo acted as servicer and attorney-in-fact. [CP 4, ¶¶ 4, 7.] In 2007, Ms. Short fell behind on this loan, and non-judicial foreclosure proceedings were commenced. [CP 4, ¶ 5.]

In a bid to cure her default and avert the 2007 trustee's sale, Ms. Short borrowed money from Harwood. [CP 5, ¶ 5.] This loan was secured by a second-position deed of trust in favor of the Harwood Group, LLC. [*Id.*] Ms. Short did not repay this loan, and the Harwood Group, LLC became the owner of the property. [CP 4, ¶ 3.] Ms. Short was also unable make mortgage payments to Wells Fargo, and nonjudicial foreclosure was again initiated in 2009 – although by this time Ms. Short no longer owned the property. [CP 4, ¶¶ 3, 6.] Allegedly at Harwood's request, the sale was postponed several times before finally being scheduled for November 30, 2009.

Harwood alleges that less than a week before the scheduled sale, on November 24, 2009, he called Wells Fargo and told it that he “had

funds to cure the default,” and offered to pay approximately \$17,000 to cancel the sale. [CP 5-6, ¶¶ 9, 10.] However, because fewer than 11 days remained before the scheduled sale date, the Deed of Trust Act required Harwood to pay the entire principal and interest owing on the note to invoke a statutory right to stop the sale. RCW 61.24.040(f)(V). According to Harwood, Wells Fargo declined to accept its \$17,000 tender, but told it that the November 30 sale would be postponed and that Wells Fargo would call him on that date to inform it of the sum that Wells Fargo would accept to cancel the sale. [CP 5, ¶ 9.] The sale went forward as scheduled, and the property was sold to a third party.

B. Procedural History

Harwood filed suit nearly 18 months later. It did not seek to void the trustee’s sale or allege that Wells Fargo violated the Deed of Trust Act in any way. Instead, Harwood sought damages based on promissory estoppel, and under the Consumer Protection Act. [CP 5, 49.] Wells Fargo moved to dismiss both claims pursuant to CR 12(b)(6). [CP 8-31.] On June 17, 2011, the trial court dismissed Harwood’s promissory estoppel claim, but allowed its CPA claim to proceed. [CP 32-33.]

Harwood chose not to take any discovery on its CPA claim. [CP 74, ¶ 33.] Wells Fargo did, however, and Harwood subsequently produced the documents referenced and relied upon in its complaint.

These documents show why Harwood intentionally alleged his claim in the vaguest of terms. For example, the loan agreement reveals that Ms. Short borrowed money from Harwood two days before the scheduled June 15, 2007 trustee's sale. [CP 4, ¶ 5; CP 103.] Harwood agreed to reinstate Ms. Short's loan with Wells Fargo and give her \$1,000, [*id.*] in exchange for a \$16,000 Demand Promissory Note at 12% interest, [CP 4, ¶ 5; CP 98, 103,] secured by a second-position deed of trust on the property. [CP 4, ¶ 5; CP 100-101.] The promissory note was due "on demand," and Ms. Short agreed to give Harwood a deed in lieu of foreclosure if she was not able to repay within nine months. [CP 103.] She could thereafter rent her home from Harwood for \$600 per month, with rental payments to "be paid directly from [Ms. Short's] disability check." [CP 103-04.]

Six months later, on November 6, 2007, Ms. Short lost her home when she signed a Deed in Lieu of Foreclosure to The Harwood Group, LLC. [CP 4, ¶ 3; CP 108-110.] Thus, Ms. Short remained obligated on the Wells Fargo loan, and no longer owned her home. [CP 78, 103-104.] Ms. Short was unable to make her mortgage payments, resulting in the 2009 nonjudicial foreclosure proceedings discussed above.

After receiving these documents, Wells Fargo moved for summary judgment on Harwood's remaining CPA claim, which the trial court

granted. [CP 35-36.] Harwood then filed this appeal, but seeks review only of the CR 12(b)(6) dismissal of its promissory estoppel claim.

IV.

ARGUMENT

A. Standard of Review

Orders to dismiss for failure to state a claim are reviewed *de novo*. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Dismissal is proper where there are no facts that would justify the relief requested. *Id.* CR 12(b)(6) requires dismissal where the plaintiff includes contentions that show on the face of the complaint that there is some insuperable bar to relief. *Id.* While the factual allegations of the complaint are presumed to be true, *id.*, the plaintiffs' legal conclusions are not. *West v. State, Washington Ass'n of County Officials*, 162 Wn. App. 120, 252 P.3d 406 (2011).²

B. The Trial Court Properly Dismissed Harwood's Promissory Estoppel Claim Because It Is Barred by the Statute of Frauds.

The trial court held that Harwood's promissory estoppel claim was barred by the statute of frauds. [RP 20:17-24.] Harwood presented no

² Both below and on appeal, Harwood urges application of the federal standard for Rule 12(b)(6) motions – even citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). [CP 48; App. Br., pp. 7-8.] There is no indication that the trial court applied this more stringent standard, but Harwood cannot complain now if it had. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (party prohibited “from setting up an error at trial and then complaining of it on appeal”).

substantial, reasoned argument to the contrary, either in the trial court or on appeal. The trial court’s holding was correct and should be affirmed.

1. The Alleged Promise Falls Within the Statute of Frauds.

The statute of frauds applies to Wells Fargo’s alleged promise for two reasons. First, the alleged statement encumbered an interest in real property under RCW 64.04.010. Second, it was a “credit agreement” under RCW 19.36.110. In either case, the statute of frauds bars Harwood’s claim.

a. Wells Fargo’s Alleged Statement Created or Evidenced an Interest In Real Property Within the Meaning of RCW 64.04.010. The trial court concluded that Harwood’s claim was barred by Washington’s statute of frauds concerning real property, RCW 64.04.010, which provides that “[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed” “The purpose of the statute of frauds is ‘the prevention of fraud arising from uncertainty inherent in oral contractual undertakings.’” *Losh Family, LLC v. Kertsman*, 155 Wn. App. 458, 465, 228 P.3d 793 (2010) (quoting *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971)).

A deed of trust – like the one foreclosed by Wells Fargo in this case – creates an interest in real property. See Black’s Law Dictionary, p.

476 (9th ed. 2009) (defining “deed of trust” as “[a] deed conveying title to real property to a trustee as security until the grantor repays a loan”). See also RCW 61.24.005(7 & 14) (defining “grantor” and “senior beneficiary” with reference to deeds of trust “encumbering” interests in property). Cf. *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 221–22, 450 P.2d 166 (1969) (mortgage creates a lien against the property it describes). Nonjudicial foreclosure is the process by which the beneficiary to a deed of trust asserts its interest in the real property upon which the deed of trust is placed. Indeed, consistent with both the letter and spirit of RCW 64.04.010, the Deed of Trust Act requires that critical communications concerning nonjudicial foreclosure be made in writing. See, e.g., RCW 61.24.040.³

Harwood’s own allegations show that Wells Fargo’s alleged promise, if true, encumbered the real property, and conveyed to Harwood an additional interest in it. According to Harwood, Wells Fargo promised to stop the trustee’s sale from going forward as scheduled on November 30, 2009 if Harwood subsequently paid an undisclosed sum. In short, Harwood argues that Wells Fargo’s alleged promise conveyed an interest

³ The writing requirement also promotes the three goals of the Deed of Trust Act: “(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.” *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003).

in the property and in the deed of trust. Wells Fargo allegedly gave Harwood an option which, if exercised, would avert foreclosure – an option that did not otherwise exist under the Deed of Trust Act. *See* RCW 61.24.040(f)(V) (within 10 days of sale, entire debt must be paid to avert sale). It is well established that “[a]n option to purchase real estate is subject to the statute of frauds.” *Pardee v. Jolly*, 163 Wn.2d 558, 567, 182 P.3d 967 (2008). Just as an option contract grants the promisee an interest in the property by restricting the promisor’s ability to sell it on the market, a promise not to foreclose, if enforced, would grant the promisee an interest in the property by restricting the trustee’s ability to sell it at trustee’s sale.

Thus, the trial court properly concluded that the alleged promise fell within RCW 64.04.010 – particularly in the absence of argument to the contrary below. Its dismissal of Harwood’s promissory estoppel claim should therefore be affirmed.

b. Wells Fargo’s Alleged Statement Was a “Credit Agreement” Under RCW 19.36.110. Harwood’s claim is also barred by a second statute of frauds for “credit agreements.”⁴ RCW 19.36.110 provides as follows:

⁴ Although the trial court did not base its decision upon RCW 19.86.110, this Court may affirm on any ground properly developed in the record. *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, ___ Wn. App. ___, 282 P.3d 146, 152 (2012).

A credit agreement is not enforceable against the creditor unless the agreement is in writing and signed by the creditor. The rights and obligations of the parties to a credit agreement shall be determined solely from the written agreement, and any prior or contemporaneous oral agreements between the parties are superseded by, merged into, and may not vary the credit agreement. . . .

The term “credit agreement” is defined as

an agreement, ***promise***, or commitment to lend money, to otherwise extend credit, ***to forbear with respect to the repayment of any debt or the exercise of any remedy***, to modify or amend the terms under which the creditor has lent money or otherwise extended credit, to release any guarantor or cosigner, or ***to make any other financial accommodation pertaining to a debt or other extension of credit.***

RCW 19.36.100 (emphasis added). Wells Fargo’s alleged promise to postpone the trustee’s sale falls squarely within this statutory definition.

Nonjudicial foreclosure under Washington’s Deed of Trust Act is a remedy in the event of the borrower’s default on a secured obligation. RCW 61.24.030(3). The term “forbearance” means “[t]he act of refraining from enforcing a right, obligation, or debt.” Black’s Law Dictionary 717 (9th ed. 2009). As the Eighth Circuit recently held, “[b]ecause foreclosure is a means of enforcing a debt, a promise to postpone the foreclosure sale falls squarely within the plain meaning of a forbearance agreement and is thus a ‘credit agreement’ within the meaning of” Minnesota’s similar statute of frauds provision. *Brisbin v. Aurora*

Loan Services, LLC, 679 F.3d 748, 752 (8th Cir. 2012) (holding promise to postpone foreclosure barred by statute of frauds). Because Wells Fargo’s alleged promise to Harwood was one to “forbear with respect to . . . the exercise of any remedy,” the statute of frauds in RCW 19.36.110 renders it unenforceable.⁵

In addition, the alleged purpose of the promised postponement was to allow Harwood additional time to avert the trustee’s sale. [CP 5, ¶ 8.] The alleged promise therefore also falls squarely within the plain statutory meaning of “other financial accommodation pertaining to a debt or other extension of credit.” RCW 19.36.110. *See, e.g., Brisbin*, 679 F.3d at 752; *Cowlitz Bank v. Leonard*, 162 Wn. App. 250, 253-54, 254 P.3d 194 (2011) (holding estoppel claims based on bank’s statements that it did not expect to be repaid within term of promissory note barred by RCW 19.36.110).⁶

⁵ RCW 19.36.130 and .140, which require the inclusion of a notice stating “[o]ral agreements or oral commitments to loan money, extend credit, or to forbear from enforcing repayment of a debt are not enforceable under Washington law,” do not remove this “credit agreement” from the statute of frauds. Here, Harwood admits that it and Wells Fargo had no written relationship whatsoever. [RP p. 17, ll. 8-9.] As such, Wells Fargo had no opportunity to provide Harwood with the statutory notice. It would be anomalous if a party could avoid application of the statute of frauds due to the utter lack of *any* written communication, particularly since RCW 19.36.110 and .140 anticipate that the credit agreement will be in writing. Moreover, such a rule would undermine the certainty-promoting purpose of the statute of frauds. *Losh Family*, 155 Wn. App. at 465. ⁶ RCW 10.36.120(2) provides that Section .110 does not apply to “a loan of money or extension of credit to a natural person that is primarily for personal, family, or household purposes and not primarily for investment, business, agricultural, or commercial purposes.” Section .120(2) has no application here. First, Wells Fargo’s alleged promise to Harwood was not a “loan.” Second, Wells Fargo’s alleged promise related to Harwood’s investment, [CP 4-5, 6, ¶¶ 7, 12,] not “primarily for personal, family, or household purposes.”

Thus, RCW 19.36.110 also applies to Wells Fargo's alleged promise and provides an alternative – and equally dispositive – basis to affirm the trial court's dismissal of Harwood's claim.

2. Harwood Cannot Allege That the Statute of Frauds Was Satisfied. Harwood did not, and could not, allege facts even suggesting that the statute of frauds was satisfied in this case – in short, facts showing that it “is entitled to relief.” CR 8(a)(1). Indeed, Harwood concedes that “[t]he particular parties don't have any – any relationship in writing.” [RP p. 17, ll. 8-9.] The alleged promise is therefore unenforceable and dismissal of Harwood's promissory estoppel claim should be affirmed.

3. Washington Law Is Clear That the Statute of Frauds Applies to Promissory Estoppel Claims. Instead of contesting the foregoing, Harwood attempts to make an end-run around the statute of frauds by arguing that it does not apply to claims for promissory estoppel. [RP 11, ll. 1-4, p. 14 l. 16-25, p. 18, ll. 4-6; App. Br. 14-15.] Harwood presents no authority for this proposition and, indeed, there is none.

The Washington Supreme Court has repeatedly rejected the proposition that the statute of frauds does not apply to claims for promissory estoppel. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 398–401, 879 P.2d 276 (1994) (citing *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644 (1980); *Lige Dickson Co. v.*

Union Oil Co., 96 Wn.2d 291, 635 P.2d 103 (1981); *Lectus, Inc. v. Ranier Nat'l Bank*, 97 Wn.2d 584, 647 P.2d 1001 (1982); *Family Med. Bldg Inc. v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 702 P.2d 459 (1985)); *French v. Sabey Corp.*, 134 Wn.2d 547, 557, 951 P.2d 260 (1998) (“We adhere to *this* rule.”) (emphasis in original); *Berg v. Ting*, 125 Wn.2d 544, 559, 886 P.2d 564 (1995) (conveyance of real estate).

Even though the trial court explicitly cited *Greaves* as the basis for its dismissal order, [RP 16:8-20,] Harwood fails to cite or discuss the controlling authority, much less provide this Court with reason to depart from it. The trial court’s order should be affirmed.

4. This Court Should Not Consider Harwood’s New and Unsupported Statute of Frauds Arguments. As Harwood concedes, the trial court held that the statute of frauds applied to the alleged promise and barred its promissory estoppel claim. [See App. Br., p. 14; RP 20:17-24.] Although Wells Fargo explicitly moved for dismissal on this basis, [CP 15-17,] Harwood strategically chose not to brief this issue in the trial court. [CP 47-55.] At oral argument, Harwood presented the trial court with no authority for its “end run” assertion, and instead admitted that it was unaware of the controlling authority. [RP 16:8-22.] In the absence of authority or reasoned argument, the trial court did not err in applying the

statute of frauds, and Harwood should not now be permitted to argue otherwise on appeal.⁷

Even if Harwood's discussion at oral argument below was sufficient to preserve these issues for appeal, its passing treatment on appeal requires affirmance. Harwood merely states in conclusory fashion that RCW 64.04.010 does not prevent enforcement of the alleged promise, but again provides no authority or analysis. [App. Br., pp. 14-15.] Such "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).⁸ This Court should decline to consider Harwood's conclusory argument, and affirm dismissal of his promissory estoppel claim.

C. Dismissal of Harwood's Promissory Estoppel Claim Should Be Affirmed Because It Cannot Plead All Elements.

Even if the statute of frauds did not bar Harwood's claim, Harwood did not, and could not, plead facts supporting all requisite elements of promissory estoppel. Before addressing the specific elements,

⁷ RAP 2.5(a); *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998) ("Issues not raised in the trial court will normally not be considered for the first time on appeal.").

⁸ See RAP 10.3(a)(6) (requiring argument "with citations to legal authority"); *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) ("We do not consider conclusory arguments that do not cite authority."); *State v. Stubbs*, 144 Wn. App. 644, 184 P.3d 660 (2008) ("Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review.") (internal citations omitted), *rev'd in part on other grounds*, 170 Wn.2d 117, 240 P.3d 143 (2010).

it is worth revisiting the factual and legal context in which Wells Fargo's alleged promise was made.

1. The Context of Wells Fargo's Alleged Promise. When a Notice of Trustee's Sale is first issued, the borrower and various other parties have a statutory right to avert the trustee's sale by curing the borrower's default, which is specified in the notice. RCW 61.24.090(1); RCW 61.24.040(f)(III) (specifying amount of default at time of notice). Curing the default reinstates the loan, and the borrower goes back to making her monthly payments. However, the right to cancel the trustee's sale in this manner lasts only until 11 days prior to the sale. RCW 61.24.090(1).⁹ Thus, there is no dispute that on November 24, when Wells Fargo's alleged statement was made, Harwood had no statutory right to avert the November 30 trustee's sale by curing Ms. Short's \$17,000 default.

Instead, between 11 days prior and the date of the trustee's sale, the Deed of Trust Act requires payment of "the entire principal and interest secured by the Deed of Trust" to invoke the statutory right to

⁹ Harwood does not allege that he did not understand this statutory structure. Nor could he. The Notice of Trustee's Sale clearly explains that the default "must be cured by 06/25/09 (11 days before the sale date), to cause a discontinuance of the sale." [CP 4, ¶ 6; CP 119.] Similarly, the statutorily required Notice of Foreclosure, RCW 61.24.040(2), states that "AFTER THE TRUSTEE'S CLOSE OF BUSINESS ON 06/25/009 (11 days before the sale date), YOU MAY NOT REINSTATE YOUR DEED OF TRUST BY PAYING THE BACK PAYMENTS AND COSTS AND FEES AND CURING THE OTHER DEFAULTS AS OUTLINED ABOVE." [CP 123.]

cancel the trustee's sale. RCW 61.24.040(f), § V. This rule makes eminent sense. The beneficiary is made whole on the defaulted loan, and the "full principal and interest" due will be roughly equal to the beneficiary's likely bid at the trustee's sale.¹⁰ RCW 61.24.040(f), § V therefore provides the borrower with a ten-day window to secure the property for the minimum bid price, without the risk of other bidders driving up the price to the borrower's detriment. Harwood tacitly admits that it did not, and could, not tender the full principal and interest,¹¹ as required to assert its statutory right. [CP 5-6, ¶¶ 9-10.] Harwood was therefore powerless to stop the November 30 trustee's sale.

It was in this context that Harwood allegedly called Wells Fargo on November 24 to request that Wells Fargo cancel the sale in exchange for a payment of far less than the "full principal and interest" required to cancel the trustee's sale. Wells Fargo declined this offer by telling him not to tender \$17,000 to cure Ms. Short's default. [*Id.*] Wells Fargo then allegedly stated that it would postpone the trustee's sale and then make a counteroffer in an unspecified dollar amount. [CP 5, ¶ 9.] This set of alleged facts does not give rise to a claim for promissory estoppel.

¹⁰ It is common practice for beneficiaries to bid the amount owing on the obligation, and RCW 61.24.070(2) permits the trustee to credit the amount outstanding on the secured obligation against the beneficiary's bid.

¹¹ Here, the Notice of Trustee's Sale establishes that the "entire principal and interest" was more than \$50,000. [CP 119.]

2. The Elements of Promissory Estoppel. Harwood's claim required it to allege, at a bare minimum, facts supporting the following elements:

(1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.

Corey v. Pierce County, 154 Wn. App. 752, 768, 225 P.3d 367 (2010) (quoting *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 539, 424 P.2d 290 (1967)). Assuming arguendo that Harwood has alleged a "promise" to postpone the trustee's sale, it has not, and cannot, allege facts even consistent with the remaining elements of promissory estoppel.

3. Harwood Has Not Alleged Detrimental Reliance. Harwood argues that it relied on Wells Fargo's promise "to preserve its rights to protect its investment." [CP 6, ¶ 12.] This reliance took the form of *not* delivering approximately \$17,000 to the trustee in an attempt to cure Ms. Short's default and avert the trustee's sale. [CP 5, ¶ 9; App. Br., p. 12.] There are no other allegations or arguments concerning reliance. This purported "reliance" fails for two reasons. First, Harwood's own pleadings establish that he chose not to "tender" the \$17,000 to the trustee on November 24 because Wells Fargo *explicitly rejected his offer to*

cancel the trustee's sale in exchange for this payment, not in reliance on a promise to postpone the trustee's sale. [CP 5, ¶ 9.]

Second, Harwood concedes that at the time of the alleged promise, it had no right to avert the trustee's sale by merely curing Ms. Short's \$17,000 default as it proposed. RCW 61.24.090(1). In short, Harwood lost no "rights to protect its investment" by not tendering \$17,000 to the trustee because it *had no such right* on November 24. It is literally hornbook law that "[t]he action or forbearance must result in a definite change in the promisee's position." 4 Richard A. Lord, *Williston on Contracts*, § 8:7, p. 162 (4th ed. 2008). Thus, just as "[e]stoppel cannot be based upon a promise which only induces the promisee to do that which he is already legally bound to do," *Northern State Const. Co. v. Robbins*, 76 Wn.2d 357, 362, 457 P.2d 187 (1969), it cannot be based on a promise that only induces the promisee to forbear from exercising rights it did not have.¹² Harwood lost no legal rights to "protect its investment," and did not "definitely change" its position vis-a-vis its ability to cause a discontinuance of the trustee's sale. Harwood cannot allege any

¹² This axiom is demonstrated by hypothesizing what would have happened if Harwood had ignored Wells Fargo's promise, and instead proceeded to tender \$17,000 to the trustee on November 24. Because that sum was insufficient under the Deed of Trust Act, the trustee would have been under no obligation to accept it and discontinue the sale – leading to the same result.

detrimental reliance, and its promissory estoppel claim was properly dismissed.

4. Harwood's Reliance, If Any, Was Not Justifiable. Even if Harwood had alleged detrimental reliance, that reliance was not justified. *Corey*, 154 Wn. App. at 768. Although Wells Fargo was the beneficiary to Ms. Short's deed of trust, the statutory power to postpone the trustee's sale resides with the *trustee* conducting the sale. See RCW 61.24.030. RCW 61.24.040(6) provides in relevant part that "[t]he *trustee* has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale" (Emphasis added.) Thus, any postponement would require separate action by the trustee. RCW 61.24.040(6)(a & b) (identifying actions required of trustee to affect postponement of sale). Because only action by the trustee – not Wells Fargo – could postpone the trustee's sale, Harwood should have confirmed the postponement with the trustee if it wanted to "protect its investment."

Moreover, this Court should reject Harwood's argument that previous postponements of the trustee's sale render his alleged "reliance" justifiable. [App. Br., p. 11.] Permitting a promissory estoppel claim on this basis will discourage lenders and loan servicers from postponing trustee's sales when requested to do so, lest they expose themselves to potential subsequent promissory estoppel liability. The resulting

reluctance to postpone trustee's sales will harm residential borrowers and frustrate state and federal policy of avoiding foreclosure where possible. *See, e.g.*, RCW 61.24.163 (establishing pre-sale mediation program between borrowers and deed of trust beneficiaries). The Court should not adopt a position harmful to residential borrowers in order to provide windfall profits to a commercial lender who had already taken Ms. Short's home.

5. Justice Does Not Require Enforcement of the Alleged Promise. Finally, the trial court's order should be affirmed because justice does not require enforcing Wells Fargo's alleged promise. *Corey*, 154 Wn. App. at 768. Ms. Short did not lose her home due to the November 30, 2009 trustee's sale, or any other action by Wells Fargo. Ms. Short lost her home two years earlier, when Harwood made an opportunistic loan to a disabled person facing imminent foreclosure, and then took ownership of her property. [CP 4, ¶¶ 3, 5; *see also* CP 103-104, 108-110.] Justice does not require enforcement of Wells Fargo's alleged promise to award Harwood a windfall profit from this transaction.

Moreover, Harwood knew from the outset that its 2007 "investment" in Ms. Short's property was subject to a total loss if Wells Fargo foreclosed. RCW 61.24.050(1); *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 548, 167 P.3d 555 (2007). Harwood also knew precisely what

was necessary to protect its investment: (1) preventing default on the secured obligation, or (2) timely curing any default to avert a trustee's sale. It did neither. Justice does not require enforcement of Wells Fargo's alleged promise to award Harwood a windfall profit where it took Ms. Short's home and then repeatedly failed to avail itself of the protections available in the Deed of Trust Act. The trial court's dismissal of Harwood's promissory estoppel claim should be upheld.

V.

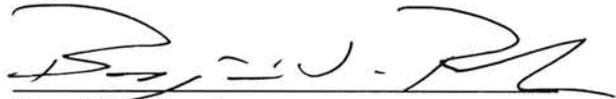
CONCLUSION

For the foregoing reasons, the trial court's order dismissing Harwood's promissory estoppel claim should be affirmed.

RESPECTFULLY SUBMITTED this 24th day of October, 2012.

LANE POWELL PC

By



Ronald E. Beard

WSBA No. 24014

Benjamin J. Roesch

WSBA No. 39960

Attorneys for Wells Fargo Bank N.A.

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2012, I caused to be served a copy of the foregoing **ANSWERING BRIEF ON RESPONDENT WELLS FARGO BANK, N.A.** on the following person in the manner indicated below at the following address:

Mr. Timothy W. Durkop
Durkop Law Office
2906 N Argonne Road
Spokane Valley, WA 99212

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**


Terri L. Potter