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JAN 12 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

APPELLATE CASE NO. 353958

MATTHEW L. MASSEY AND JACOB R. MASSEY,
Appellants

v.

HOWARD M. NEILL, Successor Trustee, STANIA NICKA
LOCKEMAN, Beneficiary and CHRIS DANIEL BOYD,
Beneficiary, Respondents

APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR WHITMAN COUNTY
HONORABLE GARY J. LIBEY, JUDGE
Case No. 17-2--00109-38

RESPONDENT'S BRIEF

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

MATTHEW L. MASSEY and)	
JACOB R. MASSEY)	
)	Appellate Case No. 353958
Appellants,)	
)	Superior Court Case
)	No. 17-2-00109-38
)	
v.)	RESPONDENT'S
)	BRIEF
HOWARD M. NEILL,)	
SUCCESSOR TRUSTEE,)	
STANIA NICKA LOCKEMAN,)	
Beneficiary and CHRIS DANIEL)	
BOYD, Beneficiary,)	
)	
Respondents.)	
)	

STATEMENT OF THE CASE

Briefly summarized, excluding extraneous materials, the
Statement of the Case is as follows:

1. Stania Nicka Lockeman, hereafter Lockeman, loaned to Matthew L. Massey and Jacob R. Massey, hereafter Massey's, \$105,000.00 as shown by a Promissory Note dated July 21, 2014, (CP page 190-191), that was secured by a Deed of Trust, dated July 21, 2014, recorded under Whitman County Auditor's File No. 725258 on July 30, 2014 (CP 186-188).

2. The Lockeman Promissory Note came due in full, principal and interest, in the amount of \$136,500.00, on July 22, 2016 (CP 190, paragraph 2.).

3. On January 12, 2017 an Amended Notice of Default was mailed first class and certified mail, return receipt requested to Massey's. (CP 104-107) In addition, the Amended Notice of Default was posted on the property (CP 111-114).

4. Lockeman served the Notice of Trustee's Sale and Notice of Foreclosure on Massey's, with a sale date scheduled for June 2, 2017 (CP 197-203).

5. Chris Daniel Boyd, hereafter Boyd, sold to Massey's Lot 3, Chris Boyd Airport Short Plat No. 1. The sale involved a purchase money loan, in the amount of \$150,000.00, as shown by a Promissory Note dated August 1, 2014 (CP 209-210). The Promissory Note was secured by a Deed of Trust dated July 29, 2014, recorded under Whitman County Auditor's File No. 725259 on July 30, 2014 CP 205-207).

6. As a result of the default on the Lockeman Promissory

Note and Deed of Trust, Boyd commenced a foreclosure on his Deed of Trust with Massey's with a sale scheduled for May 26, 2017 (CP 216-218). The significant provisions of the Notice of Trustee's Sale are as follows:

“III

The default(s) for which this foreclosure is made is/are as follows:

1. Failure to pay when due the amount owing Stania Nicka Lockeman on a note and deed of trust that is senior to this deed of trusts, that matured on July 22, 2016, in the total outstanding amount of \$156,355.79, including interest, late fees, cost and foreclosure fees. (CP 216)

V.

... The sale will be discontinued and terminated if at any time on or before MAY 15, 2017 (11 days before the sale date), the default(s) as set forth in paragraph III. 1. Are cured and the Trustee's fees and costs herein are paid (CP 216-217).”

7. Massey's filed a Complaint To Restrain Trustee's Sale on May 25, 2017 (CP 3). On May 26, 2017, the date scheduled for the Boyd sale, a Motion For Order To Continue Trustee's Sale was filed by Massey's (CP 45-46). Judge Libey signed Massey's Order Continuing Trustee's Sales on May 26, 2017(CP 48-49). In his oral ruling, Judge Libey stated that “You prepare an order to that effect, and there will be a temporary restraining order to restrain the deed of trust foreclosure sales until after, until further order of the Court....”(RP page 4, lines 6-9).

8. On May 26, 2017, there was no proof of service of service evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen year of age or over who is competent to be a witness, that the notice has been served on the trustee. On June 12, 2017 an Affidavit of Service was filed with the court showing service on Karen at 165 NE Kamiaken, Suite 201, [not trustees address], Pullman, WA 99163 with no reference to Motion to Continue Trustee's Sale and Notice of Hearing on Motion to Continue Trustee's Sale. (CP 224-225). Apparently, additional documents were served on both Lockeman and Boyd (CP 226-229).

ARGUMENT

1. THE PROPERTY WAS NOT IN AGRICULTURAL USE AND THE TRUSTEE'S SALE SHOULD NOT BE RESTRAINED

At the time the property was purchased from Boyd, it was merely a vacant lot with no agricultural use. (CP 211) At the time the Deed of Trust was signed by Massey's there was an intent to construct a marijuana grow operation on the property, but at that time there was no agricultural use of the property. Therefore, the statement signed by Massey's in both the Lockeman and Boyd Deeds of Trust that the property is not used principally for agricultural or farming purposes was true at the time the deed of trust was signed (CP 186 and 205). At the time scheduled for the trustee's sale, the

property was not used for agricultural purpose, as no crops of any sort had been raised (RP page 7, lines 9-10).

RCW 61.24.030, Requisites to trustee's sale, provides:
"It shall be requisite to a trustee's sale;

...

(2) That the deed of trust contains a statement that the real property conveyed **is** not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted ..., and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it **is used in an operation that produces crops**, livestock, or aquatic goods." [emphasis added]

WAC 246-70-030(20) dealing with definitions related to marijuana, defines "Production" as follows:

"(20) "Production" includes the manufacturing, planting, cultivating, growing, or harvesting of marijuana."

The property, had it been used to "produce crops" at both the time the deed of trust was granted and at the time the trustee's sale was scheduled, it would not have been proper to proceed with a non-judicial foreclosure of the deeds of trust. However, at neither time was the property being used to produce crops, as defined by statute or administrative code. RCW 61.24.030(2); WAC 246-70-030(20).

Counsel argues that if marijuana had been planted the court would have to have found that the property was used for agricultural

purposes (Appellants Brief page 17). This argument is unfounded, since it was not true at the time the deed of trust was granted nor was it true at the time the trustee's sale was scheduled.

Counsel cites Gardner v. First Heritage Bank, 175 Wn.App. 650, 303 P.3d 1065 (2013) for the proposition that if there is any agricultural use of the property at the time the deed of trust was granted or at the time of the trustees sale, then the property must be foreclosed judicially. Briefly summarized, Gardner took out a construction loan on a lot in February, 2007. He borrowed additional funds in November, 2007. Then in April, 2008 he refinanced the loan on the lot. Gardner defaulted on the loan in April, 2009. When the bank sought to non-judicially foreclose on the loan, Gardner claimed that the property was used for agricultural purposes and could not be foreclosed non-judicially. The court held:

“Gardner contends that on both critical dates, lot 10 was used for agricultural purposes. Even assuming genuine fact disputes over lot 10's nonagricultural use on the trustee's sale date, Gardner demonstrates no material fact disputes involving lot 10's use on the date he granted the February 2007 deed of trust. Gardner argues that as of that date, “Lot 10 was used for no purpose other than pasturing horses” Br. Of Appellant at 33. Nothing in the record shows, as required under RCW 61.24.030(2), that Gardner used lot 10 *principally* for the *operation* of a horse training and breeding enterprise. Gardner, supra. Page 670-671

Massey's argue at page 20 of their brief, that “the purchase

money and operational loans, made specifically for an agricultural purpose, shows that the property was primarily used for an agricultural purpose on acquisition. Construction of a grow facility confirmed that use.”

Boyd sold a vacant lot to Massey’s. Lockeman loaned money for the construction of a building. At some point in the future, an agricultural use could have materialized, but both at the time of the execution of the deeds of trust and the scheduled trustee’s sale, there was no agricultural use of the property. Because someone hopes to enter into an agricultural business, but fails to succeed in that endeavor, does not create an agricultural use. In the case at bar, we have a lot with a multiple use building partially completed.

Finally, Massey’s admit in their brief at page 22, that “the operation was mostly complete and Appellants were seeking additional financing to take out the Lockeman and Boyd loans and begin the planting of the crop.” This is merely the additional proof that the property, as of the date scheduled for the trustee’s sale was not used principally for agricultural purposes

2. THE COURT ORDER CONTINUING THE TRUSTEE’S SALE WAS A RESTRAINING ORDER.

Pursuant to RCW 61.24.130(1) and (2):

“(1) Nothing contained in this chapter shall prejudice the right of the borrower, ..., to restrain, on any proper grounds, a

trustee's sale. ...”

(2) No court may grant a restraining order or injunction to restrain a trustee's sale unless the person seeking the restraint give five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. No judge may act upon such application unless it is accompanied by proof, evidenced by return of a sheriff, the sheriff's deputy, or by any person eighteen years of age or over who is competent to be a witness, that the notice has been served on the trustee.”

Pursuant to RCW 61.24.040(6):

“(6) The trustee may for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by a public proclamation at the time and place fixed for sale in the notice of sale”

The court, orally, temporarily restrained the sale on May 26, 2017 (RP page 4, lines 1-3). The court had no authority to continue the sale, as this is the right preserved exclusively to the trustee. RCW 61.24.040(6) The Motion for Order To Continue Trustee's Sale and the Note for Hearing, filed on May 26, 2017 sought to continue the sale pursuant to RCW 61.24.130, not to continue the hearing on the Complaint To Restrain Trustee's Sale(CP 45-47). That being the case, then the requirements of RCW 61.24.130 must be met, namely a five day notice to the trustee before the hearing on the restraint or injunction to restrain a trustee's sale.

RCW 61.24.130(2). Furthermore, the judge is not authorized to act on the request for a restraining order unless proof of service is on file.

RCW 61.24.130(2). It should be noted that the Affidavits of Service were not filed until June 12, 2017 (CP 224-229)

The trustee's sales were both continued, not the hearing on the Complaint To Restrain Trustee's Sale (CP 48-49). Therefore, the order did in fact restrain both sales.

A similar argument was made in Plein v. Lackey, 149 Wn.2d 214, 67 P.3d 1061 (2003). A trustee's sale was scheduled for March 31, 2000. Plein filed suit to obtain permanent injunction and disputed whether there was a default, on February 7, 2000. On March 28, 3 days before the trustee's sale, Plein filed a motion for summary judgment on their claims but no preliminary injunction or order to stop the trustee's sale was made. Initially, addressing the issue of the five days' notice, the court held:

“... Although his complaint sought a permanent injunction and disputed whether there was a default (by alleging the debt had been extinguished), he never sought a preliminary injunction or any order that would have halted the sale, and according did not comply with other requirements such as providing the trustee with five day's notice of any attempt to seek such an order. As one commentator explained,
[t]he injunction actions consists of two stages: the temporary injunction and the permanent injunction.
The grant of the temporary injunction merely prevents

the trustee's sale from taking place until a full hearing on the merits of the permanent injunction can be obtained. The grant or denial of the permanent injunction, on the other hand, constitutes the final resolution of the action."

Plein, supra at 226-227

The case went on to state that the sale was held on March 31, 2000 and the property was sold. It was held:

"(Bringing a suit objecting to the alleged default or to the foreclosure proceedings but without obtaining a restraining order does not prevent the sale from going forward.)

Moreover, if it did, it would render the requirements of RCW 61.24.130 meaningless because it would be unnecessary to obtain an actual order restraining the sale or to provide five days' notice to the trustee and payment of amounts due on the obligation. A statute must not be judicially construed in a manner that renders any part of the statute meaningless or superfluous [citations omitted]. Plein, supra. Page 227)

What the above reference shows, is that the five days' notice must precede the date of the trustee's sale. That being the case, then the hearing on May 26, 2017 had to be treated as the "temporary injunction" restraining the sale scheduled for that day, pending the hearing on the permanent restraint.

Schroeder v. Excelsior Mgmt. Grp., 177 Wn.2d 94, 297 P.3d 677 (2013) further amplifies the proposition that the application to restrain the trustee's sale must be made at least five days' before the sale. That being the case, the hearing on the Motion to Continue the Sale made on May 26, 2017, had to be construed as a restraint of sale

and not as a continuance of the action to permanently restrain the sale. The facts relevant to this argument in Schroeder, supra., were that a non-judicial foreclosure was completed in November, 2009. The trustee's sale was scheduled for February 19, 2010. The court found:

“ On February 8, 2010, mere days after being hired, Pfefer served the trustee with a summons and complaint seeking to block the sale, including the assertion that the land was agricultural, with a hearing scheduled for February 16, 2010, which gave the trustee five days' notice required by RCW 61.24.130(2).” Schroeder, supra.,at101

This statement in the opinion specifically clarifies the fact that even the preliminary hearing on the restraint must be served at least 5 days before the trustee's sale.

Judge Libey was correct in holding that the Motion For Order to Continuance Trustee's Sale and the Order Continuing Trustee's Sale was an order restraining the trustee's sale.

3. THERE WAS NO WAIVER OF THE DEED OF TRUST ACT RELATING TO “NOT USED PRINCIPALLY FOR AGRICULTURAL PURPOSES” BECAUSE THERE HAS NEVER BEEN ANY AGRICULTURAL USE OF THE PROPERTY.

At the time the property was purchased from Boyd, it was merely a vacant lot with no agricultural use. (CP 211) At the time

the Deed of Trust was signed by Massey's there was an intent to construct a marijuana grow operation on the property, but at that time there was no agricultural use of the property. Therefore, the statement signed by Massey's in both the Lockeman and Boyd deeds of trust that "the property is not used principally for agricultural or farming purposes" was true at the time (CP 186 and 205). At the time scheduled for the trustee's sale, the property was not used for agricultural purpose, as no crops of any sort had been raised (RP page 7, lines 9-10).

RCW 61.24.030, Requisites to trustee's sale, provides:

"It shall be requisite to a trustee's sale;

...

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted ..., and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it **is used in an operation that produces crops**, livestock, or aquatic goods." [emphasis added]

WAC 246-70-030(20) dealing with definitions related to marijuana, defines "Production" as follows:

"(20) "Production" includes the manufacturing, planting, cultivating, growing, or harvesting of marijuana."

The property had it been used to "produce crops" at either the time the deed of trust was granted or at the time scheduled for the

trustee's sale, but not both, then a non-judicial foreclosure of the deeds of trust was proper. RCW 61.24.030(2)

Counsel argues that if marijuana had been planted the court would have to have found that the property was used for agricultural purposes (Appellants Brief page 17). This argument is unfounded, since it was not true at the time the deed of trust was granted nor was it true at the time the trustee's sale was scheduled.(RP 6, lines 8-10)

Counsel argues that this is a waiver of the rights under a deed of trust by the borrower claiming by signing the deed of trust he waived his right to have the enforcement of the deed of trust non-judicially, citing Schroeder v. Excelsior Mgmt. Grp, 117 Wn.2d 94, 297 P.3d 677 (2013). The issue in Schroeder, supra. was that the primary question before the court was whether the parties to a deed of trust may waive the statutory requirement that agricultural land must be foreclosed judicially.

The facts in Schroeder, supra., are that after a non-judicial foreclosure of a deed of trust was commenced, which was defended on the grounds that the property was used primarily for agricultural purposes, a settlement agreement was reached whereby Schroeder refinanced the property with a new deed of trust, but with a stipulation, in addition to a new deed of trust, that the property was not used for agricultural purposes and that it could be foreclosed non-judicially. In fact, at all times the property was used for

agricultural purpose, as found by the court. A new non-judicial trustee's sale was scheduled for February 19, 2010. On February 8, 2010 the trustee was served with a summons and complaint seeking to block the sale on several grounds, including the assertion that the land was agricultural. A hearing to enjoin the sale was set for February 16, 2010, which gave the trustee the five days' notice required by RCW 61.24.130(2). Schroeder, by his attorney struck the February 16, 2010 hearing, but on February 15, 2010 filed a separate action seeking damages. Excelsior proceeded with its non-judicial trustee's sale with Excelsior receiving the property in the sale. Excelsior then filed a motion to dismiss Schroeder's February 15, 2010 complaint based upon Schroeder's failure to give the five days' notice of the hearing. The argument is stated, at page 106:

“... they argue that Schroeder waived the right to raise this argument by signing a deed that state that “[t]he property has not been used and will not be used, for agricultural purposes and that settling the first lawsuit in part by knowingly waiving any and all right he may have to judicially foreclosure of the subject property on the grounds it is used for agricultural purposes.”

Ultimately, it was held in dismissing this argument concerning waiver, at page 107:

“The legislature has set forth in great detail how non-judicially foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory

protections lightly. [citations omitted].”

This is not the argument made herein. At the time that the deed of trust was granted, there was no agricultural use of the property. Funds were loaned by Lockeman to construct a building on the property, that could be used to conduct a marijuana grow facility. The building could also have been used for any other purpose, such as storage or for another business purpose. A two year loan was made by Lockeman to construct the building. At the time scheduled for the trustee’s sale, May 26, 2017, there was no production of a “crop” taking place on the property. (RP 7, lines 8-10) Now, three and one half years later, there has yet to be any production taking place on the property.

The Gardner v. First Heritage Bank, 175 Wn.App. 650, 303 P.3d 1065 (2013) is also not applicable to this matter. The original construction loan from First Heritage for the construction of a home on the property, was secured by a deed of trust, provided that it was not used principally for agricultural purposes, which was true at the time. Subsequently, at the time scheduled for the trustee’s sale, Gardner claimed that the property was being used for agricultural purposes, by partial use for a livestock program. The non-agricultural use, if true either at the time of granting the deed of trust or at the time of the trustee’s sale allows for a non-judicial foreclosure of the deed of trust. RCW 61.24.030(2).

Clearly, Massey's property, at the time the vacant land was encumbered by both deeds of trust, it was not being used principally for agricultural purposes. Furthermore, at the time of the scheduled trustee's sale, there had yet to be any production of crops on the premises (RP page 7, Lines 9-10). This being so, a non-judicial foreclosure was appropriate.

Finally, this is not a waiver case. The facts clearly show that at the time the deed(s) of trust were granted, the property was not used principally for agricultural purposes. Massey's Declaration filed June 7, 2017 states:

"In August, 2014, building began on the property at 3631 Airport Rd." (CP page 170, paragraph 25)

Therefore, if the commencement of the construction of a building commenced in August, 2014, prior to that time the property could not have been used for agricultural purposes when the deed(s) of trust were granted. The mere intent to use property for agricultural purposes does not satisfy the requirement that crops are being produced. RCW 61.24.030(2)

Therefore, at both the time the deed(s) of trust were signed and at the time scheduled for the trustee's sale, the property was not used principally for agricultural purposes. Waiver is not at issue in this case.

4. FIVE DAYS' NOTICE OF THE HEARING ON THE MOTION FOR ORDER TO CONTINUE TRUSTEE'S SALE WAS NOT GIVEN.

Once again, the purpose of the hearing on May 26, 2017 was to stop the trustee's sale scheduled for May 26, 2017 and June 2, 2017, not a hearing on the Complaint To Restrain Trustee's Sale (CP 45, lines 18-19). Counsel's declaration that pursuant to RCW 61.24.130, he must give five days' notice of the hearing on the Motion to Restrain Trustee's Sale, does not cure the deficiency of a Notice To Continue The Sales, not the hearing on the Complaint To Restrain Trustee's Sale. The Motion to Continue (CP 45), was in fact to restrain the sales. It should be noted that the Civil Motion Calendar Note For Hearing - Issue of Law states:

“The undersigned has scheduled for telephonic hearing the Motion to Continue Trustee Sale.” (CP 47).

Therefore, in order to restrain the sale, it was necessary to give the trustee at least five days' notice prior to the scheduled trustee's sale and have proof of service of the application. RCW 61.24.130(2). The appropriate timely notice and proof of service were not given and therefore the court should not have granted the continuance of the trustee's sale. This was a proper grounds for the denial of the Complaint To Restrain Trustee's Sale (CP 231-232). Schroeder, supra. at 101, clearly establishes that the motion and

service must take place five days' before the scheduled trustee's sale, whether for a temporary restraint or a permanent restraint. This did not occur.

4.A. THE TRUSTEE DID NOT BREACH HIS DUTY OF GOOD FAITH.

Counsel further alleges that the trustee breached the duty of good faith in not continuing the sale based upon a theory that no default had occurred nor that the property was not used principally for agricultural purposes. These issues had not been raised prior to May 25, 2017 when the Complaint To Restrain Trustee's Sale was filed.

RCW 61.24.010(4) establishes a duty on the part of the trustee to act in good faith to the borrower, beneficiary, and grantor.

Initially, a trustee is not required to make sure that the borrower are vigilantly guarding their rights. Meyers Way v. University Savings, 80 Wn. App 655, 910 P.2d 1308 (1996). Therefore, the trustee is not required to do more than notify in the various foreclosure notice, the borrower of the rights contained in the Deed of Trust Act. Meyers, supra. at 668

At the time that the Amended Notice of Default, the Notice of Trustee's Sale and the Notice of Foreclosure, the specific defaults claimed as to the Boyd deed of trust had been made. The default was based upon the failure to pay the senior deed of trust that was in

foreclosure, thereby affecting the security of his deed of trust. This was a default under the deed of trust, not under the promissory note.

Clearly, there was a default by the borrower of the agreement under the deed of trust(CP205- 206 - To protect the security of this Deed of Trust, Grantor(s) covenant(s) and agree(s): ...4).

It is claimed that the trustee “attempt[ed] to create cross collateralization and failed to give 365 days notice as required by the Boyd Note.” This is not a “cross collateralization” case. The default on the senior deed of trust placed the junior deed of trust in jeopardy of being extinguished if the senior deed of trust were foreclosed.

In re Upton, 102 Wn.App. 220, 6 P.3d 1231 (2000)

Furthermore, this was not an attempt to accelerate the Boyd deed of trust. The Notice of Trustee’s Sale clearly states, as follows:

“The default(s) for which this foreclosure is made is/are as follows:

1. Failure to pay when due the amount owing Stania Nicka Lockeman on a note and deed of trust that is senior to this deed of trusts, that matured on July 22, 2016, in the total outstanding amount of \$156,355.79, including interest, late fees, cost and foreclosure fees. (CP 216)

V.

.... The sale will be discontinued and terminated if at any time on or before MAY 15, 2017 (11 days before the sale date), the default(s) as set forth in paragraph III. 1. Are cured and the Trustee’s fees and costs herein are paid (CP 216-217).”

Clearly, this was not an acceleration of the note, so long as the senior deed of trust was cured prior to May 11, 2017, 11 days before the scheduled trustee's sale.

This should not be nor can it be construed as a breach of a duty of good faith.

Based upon all theories expounded by Massey's, it is clear that valid grounds for the commencement and follow through of the non-judicial foreclosure of the deeds of trust was appropriate.

4.B. FAILURE TO ADVISE THE COURT OF THE FIVE DAYS' NOTICE

Plaintiff's Complaint To Restrain Trustee's Sale sets forth the requirements of RCW 61.24.130(1) (CP page 5, line 17 thru page 6, line 3). There is no mention of the five days notice required by RCW 61.24.130(2). Plaintiff's Motion For Order To Continue Trustee's Sale, gives lip service to the five days' notice requirement, but fails to set forth that the five days' notice must occur before the trustee's sale, before a temporary restraint can be granted (CP 46, lines 8-9) Had the requirement of the five days notice before the scheduled trustee's sale been presented, the court would not have granted the restraint of the sale. Understandably, the court felt that it had been taken advantage of and therefore found that the Motion was made in bad faith. Schroeder, supra., at 101

ATTORNEY FEES

Pursuant to RAP 18.1, Respondent request that they be awarded their costs and attorney fees in this matter. The American rule, as adopted in Washington, fees and expense are not recoverable absent specific statutory authority, contractual provisions or recognized grounds in equity. Wagner v. Foote, 128 Wn.2d 408, 908 P.2d 884(1996). The deeds of trust executed by Appellants provide for the recovery of costs and fees (CP - covenant(s) of Grantors, paragraph 4, page 186 & 206). Respondents respectfully request the recovery of their attorney fees and costs in this matter.

CONCLUSION

Massey's appeal should be denied and the trial courts order affirmed.

1. Massey's have failed to show that the property being foreclosed upon was used primarily for agricultural use.
2. When the trial court on May 26, 2017 properly treated Massey's Motion For Order Continuing Trustee's Sale as a restraint of the sale and not a continuance.
3. Massey's did not waive the requirements for a non-judicial foreclosure of their deeds of trust by signing the deeds of trust providing that the property was not used primarily for agricultural purposes. At both the time of the execution of the deeds of trust and

at the time scheduled for the trustee's sales, the property was not used for agricultural purposes.

4. Massey's were required to give five days' notice of their motion to restrain the trustee's sale, prior to the date of the trustee's sale. This was not done and it was correct to deny the Complaint to Restrain Trustee's Sale.

5. The trustee did not breach the duty of good faith by not continuing the trustee's sale. The claimed non-default on the Boyd deed of trust and the claimed use of the property for agricultural purposes were without merit and not timely raised.

6. Massey's, through their attorney should have advised the court when seeking to continue the trustee's sale on May 26, 201, should have informed the court that the five days' notice to restrain the trustee's sale must be at least five days' before the scheduled trustee's sale.

7. Respondents should recover their attorney fees and costs, pursuant to their respective deeds of trust.

Respectfully submitted this
11th day of January 2018

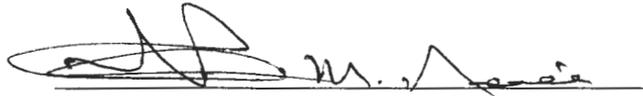
AITKEN, SCHAUBLE, PATRICK,
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Howard M. Neill WSBA No. 05296
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that on this 11th day of January 2018, I caused a full, true and correct copy of this RESPONDENT'S BRIEF to be mailed to attorney for Appellants, Steven Schneider, 621 W. Mallon Ave. Suite 505, Spokane, WA 99201, by first class United States Mail, with postage fully prepaid thereon.

A handwritten signature in black ink, appearing to read "H. M. Neill", written over a horizontal line.

Howard M. Neill