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No. 58927-0

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COURT OF APPEALS
DIVISION ONE
FEB 22 2007

WASHINGTON STATE COURT OF APPEALS
DIVISION I

BEAL BANK, SSB, a Texas State Savings Bank,

Appellant/Plaintiff,

vs.

STEVEN and KAY SARICH, and the marital community comprised thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital community comprised thereof
Respondents/Defendants.

APPELLANT'S REPLY BRIEF

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1. Reply to Brief of Mr. Cashman.

Mr. Cashman responds to Beal Bank's appeal with three principal arguments that do not substantively address the issue on appeal, including an issue of estoppel that was not ruled upon by the trial court.

1.1 The Trustee's sale did not absolve Mr. Cashman's debt.

First, Mr. Cashman responds to the gravamen of the appeal by simply stating the ruling in Washington Mutual Sav. Bank v. United States, 115 Wn.2d 52, 793 P.2d 114 (1990) is the basis for the Sarich's discharge from all debt, and "to the extent this proposition is true," he should likewise have the same treatment.

He then reasons that RCW 61.24.100(1) extends this protection, without citing or addressing the entirety of the language of the statute, which provides:

> Except as permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale **under that deed of trust**. (Emphasis added.)

Mr. Cashman ignores the issue appealed, and his factual position demonstrates dramatically why Judge McBroom improperly applied the Deed of Trust Act.

The loan at issue in this case is a commercial loan. Mr. Cashman was a commercial borrower and a signatory to Note #62 in the amount of

$420,000. The note on its face provides, "... the undersigned borrower ("Borrower") promises to pay..." (CP 367) The money was borrowed and never repaid. Mr. Cashman had no interest in the real property that his business partner, Mr. Sarich, pledged to secure the loan. Mr. Cashman is not a signatory "under that deed of trust" given by Sarichs to the first lienholder, Washington Mutual Bank. (CP 148) Mr. Cashman is not a signatory "under that deed of trust" given by Mr. Sarich to US Bank to secure Note #62. (CP 26-34) Mr. Cashman has one status and one only: he is a co-signator to a promissory note that has not been repaid.

A signator to a loan agrees on his/her behalf to repay the debt in his/her own right even if signed by several parties; they are jointly and severally liable. Household Finance Corp. of Sioux Falls v. Smith, 70 Wn.2d 401, 403, 423 P. 2d 621 (1967); 10 CJS Bills and Notes §81 and §439. Mr. Cashman did not post security for the loan. A fair reading of RCW 61.24.100(1) would be limited to a trustee's sale "under that deed of trust". The deed of trust in this case is the first deed of trust given by Mr. and Mrs. Sarich to Washington Mutual Bank. Since Mr. Cashman is not a party to the deed of trust there is no law that permits him to invoke the protection of the provisions of the Act as to that Deed of Trust.

Further, Mr. Cashman did not respond to the provisions of RCW 61.24.100(10), which permits an action against a debt not secured

by the deed of trust foreclosed. Since the Washington Mutual Deed of Trust was the foreclosed deed of trust, any reliance by Mr. Cashman on the Sarich deed of trust given to US Bank is not apposite.

Mr. Cashman's position raises an important public policy question for the Court. If accepted, Mr. Cashman's position would foster fraud. If arguendo, all debt is wiped out by the trustee's sale, a strong financial incentive exists for joint obligors to orchestrate a "default" by one party who has pledged property to wipe out the debt owed by many. The legislature had to have this concern in mind since the Act does not speak specifically in terms of all debt, but rather debt of any borrower "under that deed of trust". To extend the extinguishment of the debt provision to borrowers other than the one who granted the deed of trust would be a formula for fraud.

On the flipside of the public policy consideration, creditors would never use a deed of trust if Mr. Cashman is correct. Deeds of trust have a legitimate and important function in the lending world. They provide an expedient to move beyond disputes about a debt when the creditor elects to look only to the property to satisfy the debt given the financial circumstances of a debtor. This avoids lengthy and costly litigation. However, if there are other solvent debtors who have pledged to honor a debt that would be exonerated from payment by the trustee's sale, no

creditor would use the non-judicial foreclosure process. The effect from a practical point of view would be to render the process a nullity and put back into the courthouse the very lawsuits the Deed of Trust Act was designed to preclude. Public policy should reject Mr. Cashman's interpretation of the Deed of Trust Act, which would lead to, at worst, fraud and in the best scenario, increased judicial foreclosure litigation.

1.2 Equitable Estoppel not ruled on by Judge McBroom.

Second, Mr. Cashman asserts somehow Beal Bank misled him at the time of the Washington Mutual trustee's sale. He relies on the doctrine of Equitable Estoppel to assert this argument. (CP 180)[1] It must be noted that Judge McBroom only ruled on the question of whether the Deed of Trust Act bars the action on the notes. In doing such, he denied Beal Bank's motion for summary judgment, which is the basis for the appeal in this case. There has been no ruling on the question of equitable estoppel.

Arguendo, if the issue were before the trial court, Mr. Cashman, as do the Sarichs, would find their record does not support the argument.

---

[1] It is of note that Mr. Cashman relies on the actions of Beal Bank's counsel to assert he should prevail on the doctrine of equitable estoppel. (Cashman's Response Brief, p. 5-10.) Yet Mr. and Mrs. Sarich rely on these same facts as disputed to assert they preclude Beal Bank's grant of summary judgment. (Sarichs' Response Brief, p. 8-9.) Respondents do not agree on the significance of the facts.

Mr. Cashman did not submit a declaration. There is no evidence to suggest in the least he was misled. There is only argument by Mr. Cashman's attorney.

Mr. Cashman attempts to bootstrap his position by way of correspondence between counsel for Sarichs and Beal Bank memorializing discussions about the upcoming trustee's sale. (CP 153-154; App 3-1 thru 3-2) The letter is not addressed to Mr. Cashman or his attorney. There is no basis for Mr. Cashman to assert reliance on a document not directed to him. Moreover, the letter would be evidence of ER 408 discussions and not admissible if there were any effort at asserting equitable estoppel.

And importantly, the letter does not say what is argued both by Mr. Cashman and Sarichs. The letter states the Bank was making "preparation" for payoff of the Washington Mutual Bank lien, but goes on to stress that the Sarichs need to produce some financial information that it could rely upon to determine if Sarichs were judgment proof as argued. Sarichs never produced such records and continue to resist such. Invocation of equity requires equity. The financial information to support Sarichs contention of poverty has never been produced. In fact the information in the possession of the bank suggests great wealth by the Sarichs.

Continuing with the letter, it goes on to discuss scheduling of Sarichs' answer and defenses. If this letter is supposed to be the guarantee that Beal Bank would bid no matter what, then we know there would have been no subsequent pleadings filed after the trustee's sale. We know this because the effects of Washington Mutual Bank v. United States, supra., would have extinguished the debt because Beal Bank would have been a purchaser at the sale. Mr. Cashman's after the fact argument is a backfire to generate sympathy for the elderly, but wealthy, borrowers. That sympathy does not rise to the level of any form of reliance by Mr. Cashman. An attempt to raise estoppel as an issue that was not resolved by the trial court and not supported by the record should be ignored by the Court on appeal.

1.3. The Note Signed by Mr. Cashman does not provide for Attorney Fees.

Mr. Cashman correctly points out there was a document he signed with US Bank captioned a Term Loan Agreement. (CP 113) That agreement does have a one-sided attorney fee provision that would be treated as reciprocal in Washington. RCW 4.84.330. However, the agreement is not the basis of the claim asserted by Beal Bank against Mr. Cashman. He was sued on Note #62, which does not provide attorney

fees to either party. It was error for Judge McBroom to award attorney fees to Mr. Cashman.

2. Reply to Response Brief of Sarich.

Mr. and Mrs. Sarich respond much in the same manner as Mr. Cashman. They also posited an alternative argument that suggests, contrary to Mr. Cashman, there are disputed material facts that would preclude summary judgment to Beal Bank. This is presumably on the theory that if Washington Mutual v. United States, supra., does not bar Beal Bank's claim, then disputed material facts would preclude judgment in favor of Beal Bank at this time. The law and the record do not support the arguments advanced by Mr. and Mrs. Sarich.

2.1 Counterstatement of Facts.

Mr. and Mrs. Sarich infer certain facts not supported by the record. At page 5 of their Response Brief, they assert the real property at issue in this case was the 'home" of the Sarichs. This is not correct when the borrowing occurred. The condominium was a secondary investment property of Mr. and Mrs. Sarich. Mr. and Mrs. Sarich's primary residence was a very expensive home they owned in California which they pledged to US Bank to secure the $2,432,000 Note #60. (CP 334) The home was sold in 2004 for $3,000,000. (CP 296-297) Of the proceeds, $2,798,537.81 was forwarded to Beal Bank to pay off the amounts due on

the sale of their California personal residence. (CP 303) Any inference that this case involves foreclosure on the home of elderly people, of poor means, is not supported by the record or the facts.

At page 8-9 of their Response Brief, Mr. and Mrs. Sarich state for the same reason as Mr. Cashman, "Beal assured Sarichs that it would pay off the senior lien and purchase the condo at the foreclosure sale". As noted above, the letter of counsel cannot be read in the manner asserted. Most telling is the contradictory assertion at page 9 of their Response Brief. Sarichs assert they "expected the excess value" to be applied to the amount owed. This is diametrically opposed to the Sarichs' legal position that Washington Mutual's foreclosure sale wiped out any debt owed that is secured by the property. Sarich could not "expect" any money to be applied because there would be no debt per their legal argument based on Washington Mutual. Again this assertion is not supported by either the facts or the legal position asserted by Sarichs.

At pages 9-10, Mr. and Mrs. Sarich express confusion why Beal Bank did not purchase at the sale. The numerous reasons shown in the record are very compelling for this decision. First, Beal Bank was unwilling to pay Washington Mutual's first position lien amount of $1,648,630.06. Sarichs' argument is Beal Bank should be expected to pay the Washington Mutual $1,648,630.06 for the "privilege" of accepting the

risk of selling the property on the open market at a later date. There is no legal principal that requires a bank to spend such a sum. Second, Sarichs refused to produce financial information to permit Beal Bank to make an assessment of whether it should look to the property rather than the documented wealth of the Borrowers. This was a business judgment of Beal Bank, and one the law permits it to make as an election of remedy, which was before the trial court. (CP 325)

2.2 Sarichs' citation to Washington Mutual is incomplete.

At pages 11-20 of their Response Brief, Sarichs offer a more elongated version of the position asserted by Mr. Cashman, i.e., Washington Mutual, supra., unequivocally bars the action of a junior lienholder such as Beal Bank in the wake of a trustee's sale. To reach this conclusion, Sarichs dance around the language of the Washington Mutual decision. They fail to offer a cogent response to both the concurrence of Justice Guy in the main decision as well as the Court's subsequent clarifying order. Washington Mutual v. United States, Order clarifying opinion, 800 P.2d 1124 (1990).

Sarichs quote, in part, the language of Washington Mutual from pages 55-58 of the decision. The quote does not include the operative factual language of the ruling, leading to the question on this appeal. The Court stated:

> In the present case, Washington Mutual is the holder of the lien being foreclosed for purposes of figuring the redemption price, since "**a purchaser who acquires title as a result of a nonjudicial foreclosure sale is treated as the holder of the lien being foreclosed** if a lien...held by him is partially or fully satisfied by reason of the foreclosure sale. (Emphasis added.)

115 Wn.2d at 56.

Beal Bank was not a purchaser as was the IRS in Washington Mutual, supra.

Sarichs did not quote or respond to Justice Guy's comment in his concurrence that states:

> Washington law provides that no deficiency judgment may be obtained after a deed of trust foreclosure. **However, where a junior deed of trust holder does not foreclose, that junior deed of trust holder is not precluded from suing under the note.** (Emphasis added.)

115 Wn.2d at 60.

Beal Bank is precisely the junior holder addressed by Justice Guy.

Significantly, Sarichs do not provide a meaningful position as to the Court's clarifying order of the majority, which specifically states:

> **We do not herein address the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note** because it is not before us. (Emphasis added.)
>
> 800 P.2d at 1124.

Washington Mutual does not cover the factual scenario at issue in this appeal. Rather, a proper reading of the limits of the Washington

Mutual case show the issue on appeal was not reached by the Court. It is Beal Bank's position the statute on its face, sound legal reasoning, and good public policy dictates the rule that a non-foreclosing junior lienholder does not lose its right to sue on a Note after a trustee's foreclosure sale. This is the logical extension of the Washington Mutual rationale or why make a distinction between a purchasing v. non-purchasing junior lienholder.

Sarichs' citation to the Real Property desk book article of Professor Stoebuck at 18 Washington Practice, Real Estate: Transactions, §20.17 also misses the mark. Professor Stoebuck leads the section dealing with Washington Mutual by reciting the very proposition asserted by Beal Bank:

> On its face, RCWA 61.24.100 seems clearly to say that nonjudicial foreclosure satisfies only "the obligation secured" and bars a deficiency decree of judgment "on such obligation" (Emphasis added in the original.)
>
> 18 Wash Prac. at 434; (App. 5-1 thru 5-5).

Professor Stoebuck describes the Washington Mutual decision, including the clarification, as "surprising", "adds confusion" and "knowledgeable mortgage attorneys simply do not take the decision at face value". Id. Professor Stoebuck invites clarity from either the Supreme Court or the legislature. This appeal does exactly what Professor Stoebuck advocates.

Contrary to Sarichs' position, Professor Stoebuck advocates the clarity should be in accord with the plain reading of the statute.

In response to the public policy concerns raised by Judge McBroom's ruling, Sarichs offer one solution, i.e., the creditor can only be "satisfied" by the property, either by accepting excess sales proceeds or buying the property. (Sarich Response Brief, p. 17-19) Albeit that solution is debtor friendly, the argument ignores the reality of the transaction. Mr. and Mrs. Sarich signed the Note #61. The Note is the promise to repay the debt. Just because Sarichs have other creditors, the promise to repay the Note is not diminished. If Sarichs offer the same collateral to numerous creditors, the promise made to repay the debt is not lessened or impaired by that pledge. How Sarichs deal with their other creditors is not only none of the business of Beal Bank, but also would subject the Bank to a claim of tortious interference with a business relationship if they did attempt to interfere.

At issue here is the situation in which there are multiple debtors who have the apparent ability to repay a significant debt they promised to repay. But Sarichs and Mr. Cashman assert they do not have to do so now because a third party creditor (Washington Mutual) foreclosed on collateral pledged for a different transaction. Sarichs argue Beal Bank should not look to the promise to pay, but should take steps to protect

itself from other third party creditors. This would be a poor public policy choice if it became the law, and there is no language in the Deed of Trust Act that can reasonably be construed to support such an argument.

Sarichs also incorrectly argue that the rule announced by Justice Guy and Professor Stoebuck, and advocated by Beal Bank, would leave, "...the borrower at the mercy of the lenders," and ". . . would expose borrowers to deficiency judgments without any of the protections provided by a judicial foreclosure". (Sarich Response Brief, p. 19) This argument articulates an incomplete proposition. The secured party, who foreclosed on the property, as well as any of the purchasers, is barred from deficiency. This is per Washington Mutual. Because of their election, those creditors are gone and there is no deficiency as to them, which is exactly what the Deed of Trust Act intended to provide. As to other debts created by the debtor, what complaint should there be that independently they have to repay those who choose not to look to the foreclosed property for payment? A borrower should not be entitled to such a complaint. It is one that would completely skew the borrowing practices of the financial community.

2.3 Summary Judgment should be granted Beal Bank on Appeal.

Sarichs argue even if Washington Mutual did not require dismissal of Beal Bank's claim as an impermissible deficiency action, then disputed facts remain that precludes summary judgment in favor of Beal Bank. To avoid summary judgment, there must be no disputed material facts; a "material fact" is one that affects the outcome of the litigation. City of Lakewood v. Pierce County, 106 Wn.App. 63, 69, 23 P.3d 1 (Div. 2, 2001). If a reasonable mind could reach but one conclusion, even questions of fact are determined as a matter of law. Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). Sarichs do not present any disputed material facts supported by the record nor are they material in nature to defeat summary judgment. (Sarich Response Brief, p. 20-24) Addressing the issues raised:

(1) *Mr. Sarich's alleged mental state in 2002.* The record has the observations of Mrs. Sarich that her husband began showing signs of dementia in the 1990's but it became "worse beginning in 2003". This is a year after the note was signed. (CP 91) There is no offered testimony as to Mr. Sarich's mental state, lay or expert, when he signed Notes #61 or #62 in 2002. There is no evidence of lack of capacity at the time of signing. Certainly Mrs. Sarich did not raise it at the time she and her husband

jointly executed Note #61. Further, there is no assertion of lack of capacity for Mrs. Sarich's signature on Note #61 or Mr. Cashman' capacity to sign Note #62. The record does not establish a material fact on a lack of capacity of Mr. Sarich and certainly does not challenge the capacity of Mrs. Sarich or Mr. Cashman.

(2) *The sale of Sarichs' house in California.* Sarichs suggest an improper application of the proceeds to Note #62, instead of Note #61 when the California house was sold. This position is contrary to the specific undisputed written instruction given by Mr. and Mrs. Sarich to Beal Bank as to application of the funds. (CP 399-403, specifically at CP 401; App 4-1 thru 4-5 – Referring to the Notes as 1 (Note #60), 2 (Note #61) and 3 (Note #62))

(3) *Application of the funds from sale of the California house.* The funds from the California property sale were received from Sarichs and paid per the escrow agreement signed by Sarichs. (CP 334-335; CP 399-404; App 4-1 thru 4-5) The alleged $60,000 error, if any, is not a dispute with Beal Bank but with the escrow agent and the realtor. (CP 335-336)

(4) *Funds applied to Note #62.* The affidavits of Mr. Elkins (CP 201-211); Mr. Wall (CP 333-371); and Mr. Beattie (CP 386-404) show the application of proceeds, from the sale of the California house

was consistent with the written directive of Mr. and Mrs. Sarich. There is no competent evidence offered to rebut the proper application of funds. CR 56(e).

(5) *Funds applied to Note # 62.* The same response applies to this assertion as was given to assertion number (4) above.

(6) *Beal Bank was required to bid at the trustee's sale and pay $1,600,000 to Washington Mutual Bank.* The undisputed fact is Beal Bank did not bid. That is the issue on appeal. Since it had no duty to bid, the failure to do such is neither a disputed nor a material fact. It is the controlling fact why Washington Mutual is not apposite to Judge McBroom's ruling. This fact does not defeat summary judgment.

(7) *Stock Certificates.* Sarichs are correct; the stock certificates have not been liquidated. Since Judge McBroom ruled there is no claim by Beal Bank it cannot realize on the other collateral. Beal Bank is uncertain why this argument is offered. If the debt survives, then any collateral could be liquidated, including the stock. Given the Court's ruling Beal Bank cannot act. This is neither a disputed nor material fact.

3. Neither Respondent addresses the Constitutional Impairment caused by Judge McBroom's ruling.

Beal Bank asserts Judge McBroom's ruling is an impermissible interference with contract that is unconstitutional. (Opening Brief, p. 22)

Neither Respondent offered a contrary position, likely because there is no constitutional response that would abide an argument that a non-party to the contract (the Note) can abolish the debt without any say by the promisee. Beal Bank believes proper interpretation of RCW 61.24 et. seq. avoids the need to rule on the Constitutional question. However, the statute is unconstitutional if read as suggested by Respondents and as ruled upon by Judge McBroom.

4. The awarded fees to Sarichs were excessive.

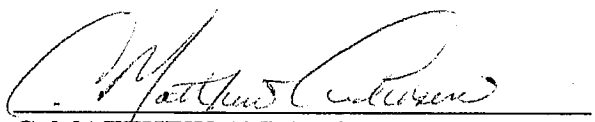
Sarichs argue at length why the amount of fees awarded was reasonable. Beal Bank relies on its opening brief to substantiate its position that the award was excessive, and without merit as to Mrs. Sarich.

5. Conclusion.

For the above stated reasons, those set forth in its opening brief and oral argument, Beal Bank requests the relief stated in its opening brief, including attorney fees.

Dated this 21st day of February 2007.

Respectfully submitted,



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WSBA # 6868
Attorney for Appellant

No. 58927-0

WASHINGTON STATE COURT OF APPEALS
DIVISION I

BEAL BANK, SSB, a Texas State Savings Bank,

Appellant/Plaintiff,

vs.

STEVEN and KAY SARICH, and the marital community comprised thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital community comprised thereof
Respondents/Defendants.

SUPPLEMENTAL APPENDIX TO APPELLANT'S REPLY BRIEF

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APPENDIX

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DATED this 21st day of February, 2007.

C. MATTHEW ANDERSEN
WSBA # 6868
Attorney for Appellant

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BUSH STROUT & KORNFELD

Winston & Cashatt
LAWYERS
A Professional Service Corporation

Winston & Cashatt has offices in Spokane, Washington, Seattle, Washington and Coeur d'Alene, Idaho

November 3, 2005

Gayle Bush
Bush, Strout & Kornfeld
601 Union Street, Suite 5500
Seattle, WA 98101-2373

Re: Beal Bank v. Steve & Kay Sarich et al.

Dear Gayle:

I am sending this letter to you in the event that we are unable to connect up today by phone. I did see you left a message for me yesterday afternoon, but unfortunately I have not had a chance to return the phone call.

My client is making the necessary preparations to pay off the Washington Mutual Bank lien, and any lien associated with the Homeowners Association in anticipation of the sale on December 2, 2005.

My client has previously requested a written financial statement in order to consider the possibility of releasing the Sariches by way of a deed in lieu. I know of your concerns and reservations about asking your clients to do so, given their health situations, but my instructions from my client are that until it receives some written verification that it can analyze about the Sarichs' personal financial situation, it simply cannot agree to a deed in lieu based on your assurances alone that the Sariches would be unable to respond to a deficiency judgment.

I would ask you again to consider providing some financial information to my client so it can properly assess its alternatives, including the potential of a deed in lieu. If you feel that your clients cannot, at this time, prepare the written financial statements that Beal has requested, perhaps copies of last year's tax returns and other financial statements that may have been prepared for other lenders would suffice.

C. Matthew Andersen ID
Beverly L. Anderson
Courtney R. Beaudoin ID
Robert P. Beschel
Richard L. Cease
Bonnie L. Charney CA
Patrick J. Cronin ID
Kevin J. Curtis CA
Robert H. Crick
Stephen L. Farnell
John H. Guin ID MT
Tim M. Higgins
Michael T. Howard ID
Carl E. Hueber
Nancy L. Isserlis
Jason M. Kettrick MT
Brian T. McGinn ID
Kammi L. Mencke
Elizabeth A. Mosey
Fred C. Pflanz
Lynden O. Rasmussen
James E. Reed
Richard W. Relyea
Eowen S. Rosenrater
Patrick A. Sullivan
Lawrence H. Vance, Jr. ID
Lucinda S. Whaley
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Of Counsel
James P. Connelly

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Leo J. Driscoll

Leo N. Cashatt 1910-1977
Joseph J. Rekofke 1921-1997
Patrick H. Winston 1904-1996

All lawyers admitted in WA. Lawyers admitted in: ID, CA, MT, and WY as indicated.

I have prepared a Confirmation of Joinder of Parties Claims and Defenses and indicated to the court that there is a pleading still to be filed, which is your answer, and that we would request that this matter be continued for 30 days based on the fact that after December 2, 2005, two of the parties will be eliminated from the case because those liens will be paid.

I look forward to hearing from you.

Sincerely yours,

NANCY L. ISSERLIS

NLI:rjh

cc: Dave Wall

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Beal Bank

6000 Legacy Drive
Plano, Texas 75024-3601
www.bealbank.com
Tel 469/467-5000

April 9, 2004

Mr. Steve Sarich
111 West Highland Drive, Unit 4-E
Seattle, WA 98119

Re: *Sale of Property located at 40455 Morningstar Road, Mission Ranch, Rancho Mirage, California (the "Rancho Mirage Property")*

Dear Mr. Sarich:

As we discussed yesterday on the telephone, Beal Bank is the assignee from U.S. Bank National Association of three deeds of trust and the notes and claims secured thereby, including:

- that certain Deed of Trust dated March 15, 1993, from Steve Sarich, Jr. and Kay Sarich, recorded on April 28, 1993, in the Official Records of Riverside County, California as Document No. 155460, together with any amendments, renewals, extensions, or modifications thereto, encumbering, among other things, the above-referenced Rancho Mirage Property ("Deed of Trust No. 1");
- that certain Deed of Trust dated September 26, 2001, from Steve Sarich, Jr. and Kay Sarich, recorded on October 9, 2001, in the King County, Washington Registry of Deeds as Document No. 20011009002007, together with any amendments, renewals,

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extensions, or modifications thereto, encumbering, among other things, real property commonly known as 111 West Highland Drive, Unit 4E, Seattle, Washington 98119 and referred to herein as the "Seattle Property" ("Deed of Trust No. 2"); and

- that certain Deed of Trust dated September 26, 2001, from Steve Sarich, Jr. and Kay Sarich, recorded on November 15, 2001, in the King County, Washington Registry of Deeds as Document No. 20011115001133, together with any amendments, renewals, extensions, or modifications thereto, encumbering, among other things, the Seattle Property ("Deed of Trust No. 3").

The Notes assigned to Beal Bank include:

- that certain Installment or Single Payment Note dated September 27, 2002, in the principal sum of $2,432,000, executed by Steve Sarich, Jr. and Kay Sarich, payable to the order of U.S. Bank National Association, as amended from time to time ("Note No. 1"). As of April 9, 2004, the amount due and owing on Note No. 1 is $2,560,118.27;
- that certain Promissory Note dated September 26, 2001, in the principal amount of $344,600.79, executed by Steve Sarich, Jr. and Kay Sarich, payable to the order of U.S. Bank National Association, as amended from time to time ("Note No. 2"). As of April 9, 2004, the amount due and owing on Note No. 2 is $360,107.18; and

B01843

- that certain Term Note (for Term Loan Agreement) dated September 24, 2002, in the principal amount of $420,000, executed by Steve Sarich, Jr. and Joe Cashman, payable to the order of U.S. Bank National Association, as amended from time to time ("Note No. 3."). As of April 9, 2004, the amount due and owing on Note No. 3 is $439,018.28;

You and Kay Sarich have opened an escrow with West Coast Escrow (Escrow No. PS-02092-TS) for the purpose of selling the Rancho Mirage Property. It is estimated that the net proceeds of the sale before payment to Beal Bank will be approximately $2,859,431. You have stated that you intend that the net proceeds will be paid out of escrow to Beal Bank, with such payment being applied first to Note No. 1, then to Note No. 3, and finally to Note No. 2, in that order. It is estimated that the amount of payment made to Beal Bank will be sufficient to pay Note No. 1 in full; that the balance of the payment made to Beal Bank will not be sufficient to pay Note No. 3 in full; and that after application of the payment made to Beal Bank to Note No. 1 and Note No. 3, there will not be any remaining amount of the payment available to be applied to Note No. 2.

You have requested that Beal Bank make its demand to escrow for the net proceeds of the sale. Beal Bank will do so. If you, Kay Sarich and Joe Cashman confirm your and their intent as described below, and if Beal Bank receives the full amount of the net proceeds from the sale, and if the amount paid to Beal Bank is sufficient to pay Note No. 1 in full, Beal Bank will apply such amount as is necessary to satisfy Note No. 1 in full to Note No. 1, execute a reconveyance of Deed of Trust No. 1, and apply the balance

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of the payment to Note No. 3 and Note No. 2 in that order. Note No. 2 and Note No. 3 (as they may be reduced in amount by application of any funds as described herein) will continue in full force and effect and continue to be secured, among other things, by Deed of Trust No. 2 and Deed of Trust No. 3. Any defaults currently in existence under any of the Notes or Deeds of Trust described herein or under any related documents will remain as defaults, and such Notes, Deeds of Trust and related documents will be fully enforceable by Beal Bank.

If this letter correctly states your intent and the intent of Kay Sarich and Joe Cashman, please so confirm by signing this letter in the space provided below, have it signed in the spaces provided below by Kay Sarich and Joe Cashman, and execute along with Mrs. Sarich the enclosed demand letter to the escrow company and return the executed documents to Beal Bank by fax at (972) 673-0932. After receipt of both fully executed documents, a representative of Beal Bank will then execute the demand and deliver it to the escrow company as our joint instructions.

This letter is not and shall not be construed as an agreement by Beal Bank to forbear from exercising any of its right or remedies and is not and shall not be construed as a waiver by Beal Bank of any defaults, rights or remedies, all of which are expressly reserved. The application of funds as you direct shall not alter, amend, compromise or satisfy any unpaid loan balance, or effect the Deed of Trust on the Seattle Property (111 West Highland Dr., #4) or any other collateral agreement given to secure the unpaid balance due.

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ORAL AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR FORBEAR FROM ENFORCING REPAYMENT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

Sincerely,

Dave Wall,
Commercial Loan Officer

Confirmed:

Date: April 9, 2004

Steve Sarich, Jr.

Date: April 9, 2004

Kay Sarich

Date: April __, 2004

Joe Cashman

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§ 20.17 Trustee's Sale's Effect on Secured Obligation

A basic feature of Washington's deed of trust statute is the so-called "no-deficiency" provision of RCWA 61.24.100. This has caused more litigation than any other feature of the statute. Actually, it is a misnomer to call it a "no-deficiency" provision, because it is more than that. The statute says that a trustee's foreclosure "shall *satisfy the obligation* secured by the deed of trust foreclosed ... and no deficiency decree or other judgment shall thereafter be obtained on such obligation...." (Emphasis added.) Even after the proviso added by a 1990 statutory amendment, there are still cases in which nonjudicial foreclosure of a deed of trust may bar the beneficiary from pursuing remedies on other security for the same obligation.[1] The Washington Court of Appeals has held that a beneficiary who accepts a deed in lieu of foreclosure is barred from collecting a deficiency, on the theory that the deed in lieu is the "functional equivalent" of trustee's foreclosure.[2] However, a beneficiary who feels it is worthwhile to pursue a deficiency judgment is given an option: he may elect to foreclose the deed of trust judicially as a mortgage, in which event a deficiency judgment may be had.[3]

So far as is known, the so-called no-deficiency provisions apply to all beneficiaries of deeds of trust. The Federal Veterans Administration argued at one time that those provisions did not bind them. No federal statute or regulation said that such provisions were not binding, but the Veterans Administration argued that the Federal Government should not be burdened with the extra costs that the provisions entailed. Both the United States Court of Appeals for the Ninth Circuit and the Federal District Court for the Western District of Washington rejected the Veterans Administration's position.[4] However, it seems that if a federal statute or regulation specifically allowed a federal agency to pursue a deficiency, the statute or regulation would have supremacy over Washington State law.

RCWA 61.24.100 reads that nonjudicial foreclosure "shall satisfy the obligation secured by the deed of trust foreclosed...." Therefore, the so-called no-deficiency provision protects only a party who is an obligor on

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1. Wash. L. 1990, ch. 111, § 2, added this proviso after the words quoted in text: "except that if such obligation was not incurred primarily for personal, family, or household purposes, such foreclosure shall not preclude any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security agreements, or other security interests of liens covering any real or personal property granted to secure such obligation." Implications of that amendment will be explored later in this section.

2. Thompson v. Smith, 58 Wn.App. 361, 793 P.2d 449 (1990).

3. RCWA 61.24.100; Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir.1990) (dictum); United States v. Vallejo, 660 F.Supp. 535 (W.D.Wash.1987) (dictum); Washington Mut. Sav. Bank v. United States, 115 Wn.2d 52, 793 P.2d 969 (1990), opinion clarified 800 P.2d 1124 (1990) (dictum).

4. Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir.1990); United States v. Vallejo, 660 F.Supp. 535 (W.D.Wash.1987).

the obligation secured by the deed of trust. It does not, for instance, prevent a beneficiary who has foreclosed nonjudicially from pursuing claims against other persons that arise out of the transaction in which the trust deed was given as long as those claims are not on the secured obligation.[5] Whether a surety on the obligation is a person against whom an action for a deficiency may be maintained is an interesting question upon which no Washington authority has been found. If, after default, the creditor-beneficiary first pursues the surety and for some reason obtains only partial satisfaction of the obligation, the statutory language does not preclude nonjudicial foreclosure to satisfy the balance. But if the creditor-beneficiary first forecloses nonjudicially, it becomes a complex question whether the surety may escape. If the obligation "was not incurred primarily for personal, family, or household purposes," an exception within RCWA 61.24.100 allows the creditor, after trustee's foreclosure, to realize upon other "security agreements," which seems to allow an action against a surety. But if the obligation was incurred for one of the stated purposes, and if we take literally the statutory language that the foreclosure sale satisfied the obligation, there would be no obligation left upon which to pursue the surety. However, based upon some of the court's language and reasoning in *Donovick v. Seattle–First National Bank*,[6] which suggests that RCWA 61.24.100 is only a no-deficiency statute, some argument may be made that, even then, the creditor has the right to realize upon all security taken for the obligation, *i.e.*, upon the suretyship promise. To avoid all these complications, a creditor who holds both a trust deed and has a surety's guaranty is well advised to pursue the surety before attempting nonjudicial foreclosure.

Donovick v. Seattle–First National Bank, just cited, held that a creditor who took two separate deeds of trust on two parcels of land to secure a single obligation might successively foreclose them both nonjudicially. *Donovick* answered a question that had been in some doubt, but its full implications are unclear. The decision emphasized that the trustee held both sales at the same time, one immediately following the other. From that fact, the court reasoned that the practical result was the same as if both parcels had been described in a single trust deed. The court stated that "delaying sale of the second parcel to the lender's unfair advantage or to the debtor's substantial detriment, or otherwise circumventing the purposes of the act" might have led to a different

5. See Glenham v. Palzer, 58 Wn.App. 294, 792 P.2d 551 (1990), which holds that a beneficiary who has had nonjudicial foreclosure of a trust deed may still pursue claims against third persons, based upon their alleged acts of fraud in connection with the transaction in which the trust deed was given.

6. 111 Wn.2d 413, 757 P.2d 1378 (1988). *Donovick* held that a creditor who took two separate deeds of trust to secure one obligation might successively foreclose nonjudicially on both of them. However, it may be argued that there is a distinction between an obligation secured by two deeds of trust and an obligation secured by a deed of trust and a suretyship.

result. This seems to limit the sweep of the decision. But in another part of the decision, the court said that, "By giving up the right to a deficiency judgment, however, the secured party did not also give up the right to realize upon the security given." As noted above, this suggests the court regarded the statute as only a no-deficiency statute. And there is a further suggestion that a creditor who takes a deed of trust and some other form of security, say, a surety's guaranty or personal property security, might realize upon the other security after a trustee's foreclosure on the trust deed. A later court of appeals decision emphasized that aspect of the *Donovick* opinion.[7]

In 1990, after *Donovick* came down, the legislature amended RCWA 61.24.100, adding the following proviso or exception:

> except that if such obligation was not incurred primarily for personal, family, or household purposes, such foreclosure shall not preclude any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure such obligation.

This language both extends and limits *Donovick*. It extends *Donovick* in that it allows the holder of a deed of trust that does *not* secure a personal, etc., obligation to realize upon any additional form of security, not only another trust deed, and allows such realization after trustee's foreclosure. But it limits *Donovick* by the necessary implication that nonjudicial foreclosure of a deed of trust that *does* secure a personal, etc., obligation bars the creditor from thereafter realizing on other security for the same obligation. However, when the provision is read together with the entire section, the creditor on a personal, etc., obligation is apparently permitted to realize upon the other security if he does so before nonjudicial foreclosure of the trust deed. Questions remain about the sweep of *Donovick*, the interplay between that decision and the amendment, and about the meaning of the amendment itself. Therefore, a creditor who holds a trust deed and other security to secure any kind of obligation, personal or other, is still well advised to realize upon the other security before conducting nonjudicial foreclosure under the trust deed.[8]

On its face, RCWA 61.24.100 seems clearly to say that nonjudicial foreclosure satisfies only "the obligation *secured*" and bars a deficiency decree or judgment "on *such* obligation." (Emphasis added.) Neverthe-

7. See Cascade Manor Assocs. v. Witherspoon, Kelley, Davenport & Toole, P.S., 69 Wn.App. 923, 850 P.2d 1380 (1993). A creditor took as security a deed of trust and an assignment of rents. The court allowed the creditor to reach rents after the trustee's sale. However, the rents had been awarded by a court before the sale.

8. See Cascade Manor Assocs. v. Witherspoon, Kelley, Davenport & Toole, P.S., 69 Wn.App. 923, 850 P.2d 1380 (1993), where a creditor was allowed to reach rents under a rent-assignment clause prior to nonjudicial foreclosure on a deed of trust—and to keep reaching rents after foreclosure.

less, in its surprising decision in *Washington Mutual Savings Bank v. United States*[9] the Supreme Court of Washington held, as a necessary part of its decision, that nonjudicial foreclosure of a senior deed of trust bars a junior lienor from thereafter recovering the unpaid balance of his debt. Since the senior's foreclosure extinguishes his security,[10] he has lost both obligation and security. *Washington Mutual* involved unusual facts. Bank *A* held a senior deed of trust, Bank *B* held a second trust deed, and the Internal Revenue Service (IRS) held a third-priority tax lien. Bank *A* conducted a nonjudicial foreclosure sale, having duly notified Bank *B* and the IRS. Bank *B* bid in the land at the sale for the amount of Bank *A*'s obligation, some $42,000. Fair market value of the land was $64,000. Though of course Washington law did not allow redemption after the sale, a federal statute allowed the IRS to redeem. The IRS notified Bank *B* of an intent to redeem, offering to pay the $42,000 purchase price. But Bank *B* demanded the lesser of $42,000 plus the amount of its own unsatisfied debt, $29,800, or the fair market value, $64,000. Reasoning by analogy to Washington's statutory redemption system for straight mortgages, the court held that: (1) foreclosure of Bank *A*'s trust deed extinguished Bank *B*'s indebtedness as well as its security; and (2) therefore, if the IRS wished to redeem from Bank *B*, it had to pay the $42,000 sale price plus Bank *B*'s $29,800 indebtedness. The court expressly said that foreclosure precludes junior lienors from pursuing a "deficiency." Later, in an addendum labeled a "clarification," the court said its decision did not "address the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note."[11] Since a suit "on the promissory note" is synonymous with a suit for "deficiency," the "clarification" only adds confusion.

Obviously, either the Washington State Supreme Court or the state legislature needs really to "clarify" the *Washington Mutual* decision.[12] Taken literally, it means that the holder of every lien junior to a deed of trust in Washington, which of course includes many commercial lenders, must buy at the trustee's sale or lose everything. If there were multiple juniors, this would lead to a bidding war, which, though it would serve the policy of producing a high sale price, would be intolerable to them. Commercial lenders who anticipated this prospect would refuse to lend upon junior security. In fact, it seems that some knowledgeable mortgage attorneys simply do not take the decision at face value.[13] In the writers'

9. 115 Wn.2d 52, 793 P.2d 969 (1990), opinion clarified 800 P.2d 1124 (1990).

10. See RCWA 61.24.050.

11. Washington Mutual Savings Bank v. United States, 800 P.2d 1124 (Wash.1990).

12. See excellent Note, *Rights of Washington Junior Lienors in Nonjudicial Foreclosure*, 67 Wash. L. Rev. 235 (1992), which analyzes the *Washington Mutual* decision.

13. Several leading Washington mortgage attorneys have indicated to William Stoebuck that they cannot accept what the court said. Either that, or they limit the holding to the situation in which a junior lienor purchases at the sale, a limitation the court did not state.

opinion, an attorney should never advise a client to act contrary to a decision by his or her state supreme court, however improvident the decision may seem. At most, the attorney should make a full explanation to the client in writing, so that the client may share in the calculated risk that the decision will not be applied.

Research References:

C.J.S. Mortgages §§ 674–676.
West's Key No. Digests, Mortgages ⇐375.

§ 20.18 Setting Aside Trustee's Sale

Earlier in this chapter we discussed the detailed statutory procedures for restraint of a trustee's foreclosure sale prior to the sale.[1] Washington's deed of trust statute makes no provision for setting aside the sale after it has occurred. Nevertheless, it is possible if there have been substantial and prejudicial irregularities in connection with the sale. We will attempt to define what irregularities will justify setting aside a sale. As a general proposition, Washington courts strongly favor restraining a sale over setting it aside. Underlying this preference are the policies that the nonjudicial foreclosure process should be efficient and inexpensive and should produce a stable title for the purchaser.[2]

Cox v. Helenius is the leading decision in which the Washington Supreme Court set aside a trustee's sale. Factors that led the court to do so were: (1) before the sale, in connection with a lawsuit the grantor had pending with the beneficiary to contest the indebtedness, the trustee led the grantor to believe he would not proceed with the sale; (2) at the sale, only the trustee, his secretary, and the buyer were present; (3) the land, the grantor's home, was worth from $200,000 to $300,000; (4) the secretary entered a "credit bid" for $11,783 on behalf of the beneficiary; and (5) the buyer made the only other bid, purchasing the land for one dollar more than the credit bid. The court said that "this trustee's actions, along with the grossly inadequate purchase price, would result in a void sale." It is not clear whether the grossly inadequate price alone would have been a sufficient ground to set aside the sale. However, the court relied upon *Miebach v. Colasurdo*, a case in which an execution sale was set aside mainly on the ground of grossly inadequate price, though there were also some other factors suggesting a bad-faith purchase.[3] Courts in other jurisdictions have been reluctant to set aside trustees' sales for inadequacy of price alone unless the price is so inadequate as to "shock the conscience of the court." As in *Cox* and

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1. See RCWA 61.24.130 and § 13 of this chapter.

2. Cox v. Helenius, 103 Wn.2d 383, 693 P.2d 683 (1985) (dictum because court set aside sale).

3. 102 Wn.2d 170, 685 P.2d 1074 (1984).