

NO. 41470-8-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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COLUMBIA COMMUNITY BANK,

Respondent

v.

NEWMAN PARK, LLC,

Appellant

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NEWMAN PARK, LLC,

Appellant,

v.

COLUMBIA COMMUNITY BANK,

Respondent.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE PAULA CASEY

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BRIEF OF APPELLANT

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## ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Assignment of Error No. 1: The trial court erred by entering the Order Granting Columbia Community Bank's (CCB) Motion for Partial Summary Judgment Re: Equitable Subrogation and Unjust Enrichment.

Assignment of Error No. 2: The trial court erred by entering judgment allowing CCB relief based on its claims for equitable subrogation and unjust enrichment.

1. Is CCB entitled to relief on the grounds of equitable subrogation and unjust enrichment when it was a volunteer?

2. Is the doctrine of equitable subrogation applicable when there is no question of priority between competing creditors?

Assignment of Error No. 3: The trial court erred by denying the motion of Newman Park, LLC (Newman Park) for attorney's fees.

1. Did Newman Park substantially prevail?

## STATEMENT OF THE CASE

### I. Newman Park, LLC.

Newman Park is a Washington limited liability company. It was formed in October of 2004. (CP 666) Its Application to Form a Limited Liability Company is a form offered by the Secretary of State. In a section

entitled “management of LLC is vested in one or more managers,” the “yes” box is checked. (CP 539)

At all materials times, Newman Park had twelve members. These were Landmark Development Ventures, Inc. (Landmark); Brian and Maya Allen; Rick and Christine Goode; William Lowry; Kurt and Susan Rylander; Jim and Jean Schroeder; and Jeff and Kathleen Sunshine.<sup>1</sup> Landmark initially had a 39% membership interest while the Individual Members held the remaining 61% between them. Joseph Sturtevant is the sole shareholder, director, and officer of Landmark. (CP 471-72)

Newman Park’s Operating Agreement identifies Mr. Sturtevant as “manager” in paragraph 8.2 and “managing member in paragraph 1.6. He is referred to as both manager and managing member in paragraph 10.1. (CP 471, 475) In annual reports and other submissions to the Secretary of State, Mr. Sturtevant referred to himself as “manager” except for one place where he called himself “managing member.” (CP 128-35)

Critically, the Operating Agreement limits the power of members to borrow money or encumber company property. Without the approval of members holding 80% of its membership interests, no member of Newman Park can incur any liability greater than \$25,000.00; pledge

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<sup>1</sup> The latter eleven persons will be referred to collectively as “the Individual Members.”

company property to secure a loan greater than \$50,000.00; or refinance any obligation leading to aggregate indebtedness of greater than \$50,000.00. The provision will be set out in full below. (CP 472)

Newman Park owns real property located in Thurston County, Washington. It purchased this property for \$500,000.00 in December of 2004 and received a Statutory Warranty Deed. (CP 668, 679) It financed a portion of the purchase price through a loan from Hometown National Bank in the amount of \$393,100.00. (CP 681, 701)

## II. Trinity Development-Northwest, LLC.

Trinity Development-Northwest, LLC (Trinity) is a Washington limited liability company that was formed in October of 2007. (CP 540) Mr. Sturtevant holds a 95% membership interest in Trinity. Robert Leach owns the other 5%. (CP 550) None of the Individual Members have had any interest in Trinity. (CP 464, 597-616)

## III. Inception of the Transaction.

In late 2007, Mr. Sturtevant approached (CCB) to seek a loan for Trinity. He met with Bradley Volchok who at time was an assistant vice president of CCB. (CP 244) Mr. Volchok's duties included marketing. That involves attempting to gain deposits for the bank. The deposits are then used to fund loans at a higher rate of interest than CCB must pay to

its depositors. This practice allows CCB to make a profit. (CP 243, 255-256)

Mr. Sturtevant provided Mr. Volchok with a personal financial statement. It stated that he owned a 100% interest in Newman Park. In other words, Mr. Sturtevant did not disclose the existence of the Individual Members. (CP 274)

On January 16, 2008, Mr. Sturtevant wrote to Mr. Volchok. He expressed the desire to enter into a “mutually beneficial and long term (business) relationship.” He stated that he would deposit \$1 million in a Certificate of Deposit with CCB in exchange for CCB providing a business line of credit in the amount of \$3 million. (CP 272) Mr. Volchok understood that Mr. Sturtevant wanted to commence a deposit and lending relationship that would grow over the years. For his part, Mr. Volchok believed that CCB might make other loans to Mr. Sturtevant or his entities in the future. (CP 247)

Mr. Volchok considered Mr. Sturtevant to be a “prime client” because Mr. Sturtevant was offering to deposit \$1 million in a Certificate of Deposit. Mr. Sturtevant also appeared to represent various different entities and, to Mr. Volchok’s perception, had a “lot of connections where he could refer additional business to the Bank as well.” For that reason, Mr. Volchok attempted to schedule a meeting with Mr. Sturtevant with

Rick Roby and Dan Wahlin. Mr. Roby was CCB's president, and Mr. Wahlin was CCB's executive vice president. (CP 250) The meeting ultimately took place. Mr. Sturtevant told the CCB representatives about various entities and projects in which he was involved. (CP 251) At least by that time, Mr. Sturtevant had told Mr. Volchok that Landmark was the sole member or owner of Newman Park. (CP 252)

On January 23, 2008, Mr. Volchok sent an e-mail to Mr. Sturtevant indicating loans that CCB might be willing to make. He stated that CCB was considering loaning \$500,000.00 to Mr. Sturtevant's architectural firm and an amount between \$2 million and \$2.4 million to Trinity. The amount of the latter loan depended on whether CCB paid off the loan to Hometown National Bank secured by Newman Park's property. (CP 283-284) The loan would be smaller if CCB was in second position behind Hometown National Bank because CCB then would bear the risk of paying Hometown National Bank's loan to Newman Park if Trinity defaulted on the loan. (CP 252)

On February 1, 2008, Mr. Volchok sent a commitment letter to Mr. Sturtevant for his consideration. The letter contained options for loans to Trinity. In the first option, CCB agreed to afford Trinity a revolving line of credit of up to \$2.5 million secured by a Certificate of Deposit of \$1 million together with sufficient real estate. Alternatively, CCB would

provide Trinity with a revolving line of credit of up to \$1.5 million secured by sufficient real estate but without the Certificate of Deposit. The Bank requested collateral consisting of the \$1 million Certificate of Deposit; a first deed of trust on Newman Park's property; and a third deed of trust on Mr. Sturtevant's personal residence. (CP 254, 288-291)

The purpose of the loan as stated in the commitment letter was to "provide liquidity for real estate investments and development projects." No specific projects were identified, however. (CP 297) The commitment stated a single contingency, that being:

A new appraisal for the Newman Park property and an updated appraisal of Joe Sturtevant's personal residence both to be reviewed and accepted by Columbia Community Bank. The loan officer will visit both sites as well.

(CP 299) The commitment letter also limited the loan to the sum of 65% of the appraised value of the Newman Park property together with 80% of the appraised value of Mr. Sturtevant's residence. (CP 297)

The commitment letter discussed deposits that Mr. Sturtevant would make in the following terms:

Primary deposit relationship with Columbia Community Bank for Sturtevant, Golemo & Associates, PLLC (Mr. Sturtevant's architectural and engineering firm) and Trinity Development-Northwest, LLC would be required.

Additionally, we would appreciate the opportunity for the deposit relationship with Landmark Development Ventures, Inc. and other entities plus your personal deposit relationship.

(CP 299) This language was placed into the commitment letter to bring more money into the Bank that could fund other loans. (CP 256-257)

The commitment letter made it clear that CCB desired to be in first position on the Newman Park property. It wanted to avoid being in a position subordinate to Hometown National Bank's position and avoiding the accompanying risk. (CP 252-254)

Nothing in the commitment letter required Mr. Sturtevant to produce Newman Park's Operating Agreement. (CP 256)

Mr. Sturtevant signed and returned the letter on February 11, 2008. He opted to borrow \$1.5 million. He declined to give a \$1 million Certificate of Deposit as additional collateral. (CP 295-300) At this point, Mr. Volchok believed that CCB was required to make the loan to Trinity if the contingencies in the commitment letter were satisfied. (CP 256-257)

On February 22, 2008, Mr. Sturtevant sent a copy of Newman Park's Operating Agreement to Mr. Volchok. This appears to be the first time that Mr. Volchok or anyone at CCB had seen the document. (CP 258, 303-314) The Operating Agreement that Mr. Sturtevant produced was altered. It made no mention of the Individual Members as did the true

Operating Agreement. It indicated that Landmark was Newman Park's sole member. (CP 305-306)

CCB ultimately obtained an appraisal on the Newman Park property. It put the value at \$4.2 million. (CP 317-320) This placed the loan to value ratio at approximately 25% based upon the maximum value of the lien on Newman Park's property being \$1,040,000.00. This was well under the required percentage of 65% as stated in the commitment letter.

Mr. Sturtevant was pleased with this appraisal. He asked that the loan be increased based upon this value. (CP 321) The Bank declined to loan a larger sum. (CP 260)

#### IV. Closing and Documenting the Transaction.

CCB required the execution of a number of documents in connection with the loan to Trinity. First and foremost, Mr. Sturtevant, on behalf of Trinity, executed a promissory note in the amount of \$1.5 million to CCB. The promissory note was dated February 28, 2008, and required payment of all interest and principal by no later than February 28, 2009. (CP 483-484) Mr. Sturtevant, as president and secretary of Landmark, signed a Deed of Trust to Newman Park's property naming CCB as beneficiary. The instrument states that the lien of the Deed of Trust cannot exceed \$1,040,000.00. (CP 509, 518) CCB also required the execution of

Limited Liability Company Resolution to Borrow/Grant Collateral. This document was to be executed by Newman Park consenting to its property being pledged as security for the loan to Trinity. Mr. Sturtevant, as president and secretary of Landmark, executed this document. (CP 499)

The balance due on the loan to Hometown National Bank in the amount of \$403,127.67 was paid at closing from the proceeds of the loan. Real property taxes payable to the Thurston County treasurer in the amount of \$8,356.11 were also paid through closing. (CP 551-553)

V. Knowledge of the Individual Members.

The Individual Members knew nothing of this transaction until June of 2009. At that time, the loan to Trinity was already in default. (CP 464, 597-616)

VI. CCB's Knowledge and Intentions.

Had CCB known that Landmark was not Newman Park's sole member and that there were actually eleven Individual Members, it would have not made the loan to Trinity. (CP 270)

VII. Subsequent Developments.

Trinity did not pay the loan when it was due. CCB then took steps to foreclose its Deed of Trust nonjudicially. Newman Park received a Notice of Default dated September 21, 2009. (CP 582-586) The substitute trustee, A&F Trustee Services, Inc., followed this up with a Notice of

Trustee's Sale stating that the sale would occur on February 12, 2010. (CP 591-595) By agreement, the sale date was extended to April 15, 2010. (CP 57)

VIII. Course of Litigation.

On March 5, 2010, CCB filed a Complaint for Declaratory Judgment, Equitable Subrogation, and Unjust Enrichment. It sought a judgment declaring that its Deed of Trust on Newman Park's property was valid and enforceable. Alternatively, it sought a lien on that property under the doctrine of equitable subrogation or unjust enrichment. (CP 4-8)

On March 10, 2010, Newman Park filed a Complaint for Declaratory Relief seeking a declaration that the Deed of Trust was not valid or enforceable. (CP 460-462)<sup>2</sup> Newman Park answered CCB's complaint, and CCB answered Newman Park's complaint. (CP 9-11, 90-93) The two cases were ultimately consolidated. (CP 33-35)

Newman Park moved for summary judgment seeking a determination that the Deed of Trust given to secure CCB's loan to Trinity was invalid and unenforceable. (CP 908) It claimed that Landmark, the signatory of the Deed of Trust had neither actual authority nor apparent

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<sup>2</sup> Newman Park also sought relief in the complaint against A&F Trustee Services, Inc., the substitute trustee on the Deed of Trust that was dealing with the foreclosure. The parties were able to come to an understanding concerning the foreclosure proceedings and the role of A&F Trustee Services, Inc., and it was dismissed as a party defendant.

authority to execute the document and pledge Newman Park's property for the loan to Trinity. The trial court agreed and granted Newman Park's motion on April 16, 2010. (CP 72-73; RP I 74-80)<sup>3</sup> CCB then moved for reconsideration of the Court's ruling. (CP 74-76) The trial court denied this motion. (CP 159-160)

CCB then moved for partial summary judgment to establish a lien on the property either through equitable subrogation or unjust enrichment. (CP 229-235) The trial court granted this motion. (CP 409-411)

On October 22, 2010, the trial court entered the final orders in this matter. Newman Park had moved for an award of attorney's fees. (CP 412-417) The Court denied this motion. It determined that there was no prevailing party since each side had prevailed on substantial issues. (CP 438-439; RP I 116) The trial court then entered judgment incorporating its prior summary judgment orders. The judgment stated that the aforementioned Deed of Trust on Newman Park's property was invalid. However, it granted judgment to CCB on its claim for equitable subrogation and unjust enrichment. The principal amount of the judgment equaled the total paid from the closing of the loan to Trinity for retirement of the loan from Hometown National Bank and payment of property taxes

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<sup>3</sup> "RP I" refers to the Verbatim Report of Proceedings for hearings on April 15, 2010; June 4, 2010; and October 22, 2010. "RP II" refers to the Verbatim Report of Proceedings for the hearing on July 30, 2010.

to Thurston County. CCB was also allowed a lien on Newman Park's property for this purpose. (CP 435-437)

Newman Park appealed. (CP 440-449) CCB cross-appealed. (CP 450-459)

### ARGUMENT

#### Assignment of Error No. 1:

The trial court erred by entering the Order Granting Columbia Community Bank's Motion for partial Summary Judgment Re: Equitable Subrogation and Unjust Enrichment.

#### Assignment of Error No. 2:

The trial court erred by entering judgment allowing CCB relief based on its claims for equitable subrogation and unjust enrichment.

##### I. Standard of Review.

The trial court granted CCB's motion for partial summary judgment allowing it relief on the basis of equitable subrogation and unjust enrichment. An appellate court reviews such an order *de novo* engaging in the same inquiry as did the trial court in taking all facts and inferences in the light most favorable to the nonmoving party. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 604, 605, 238 P.3d 1129 (2010); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 240 P.3d 162 (2010).

A court is not limited to granting or denying summary judgment relief to the moving party. When the undisputed facts demonstrate that the nonmoving party is entitled to relief, the Court may grant summary judgment to the nonmoving party. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

In this case, the evidence is clear and not subject to material dispute. CCB was a volunteer in connection with the transaction. Therefore, it was not entitled to relief on either the grounds of equitable subrogation or under a theory of unjust enrichment. Furthermore, the doctrine of equitable subrogation is not applicable here. The trial court's ruling to the contrary therefore amounted to error.

II. Relief Based Upon Unjust Enrichment Is Not Available to CCB Because It Was a Volunteer.

a. Introduction.

The trial court allowed CCB a judgment against Newman Park in the amount of the funds from the loan to Trinity that went to pay off the loan to Hometown National Bank and the property taxes that were due. It further placed a lien on Newman Park's property to secure the payment. This judgment cannot be upheld on the doctrine of unjust enrichment because CCB was a volunteer.

b. Volunteers Are Not Entitled to Relief under the Doctrine of Unjust Enrichment.

Washington recognizes two formulations of the doctrine of unjust enrichment. The first contains two elements.

1. The enrichment of the defendant must be unjust; and
2. The plaintiff cannot be a volunteer.

*Lynch v. Deaconess Medical Center*, 113 Wn.2d 162, 165, 775 P.2d 681 (1989); *Trane Co. v. Randolph Plumbing & Heating*, 44 Wn.App. 438, 442, 722 P.2d 1325 (1986); *Smith v. Dalton*, 58 Wn.App. 876, 795 P.2d 706 (1990); *Ellenburg v. Larson Fruit Co.*, 66 Wn.App. 246, 251-52, 835 P.2d 225 (1992). The doctrine has also been expressed on the basis of the following three elements:

1. A benefit conferred upon the defendant by the plaintiff;
2. An appreciation or knowledge by the defendant of the benefit; and
3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

*Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn.App. 151, 159-60, 810 P.2d 12 (1991).

Both formulations recognize that the mere fact that a person benefits another is not sufficient to require the other make restitution under the theory of unjust enrichment. The enrichment must be found to be unjust. *Lynch v. Deaconess Medical Center, supra*, 113 Wn.2d at 165-66. Furthermore, the two formulations are not inconsistent. Each was cited with favor in *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

As indicated, a volunteer is not entitled to relief on the grounds of unjust enrichment. Whether a person acts as a volunteer is determined in light of all the surrounding circumstances including the following:

1. Whether the benefits were conferred at the request of the party benefitted;
2. Whether the party benefitted knew of the payment but stood back and let the party make the payment; and
3. Whether the benefits were necessary to protect the interests of the party who conferred the benefit or the party who benefitted thereby.

*Ellenburg v. Larson Fruit Co., supra*, 66 Wn.App. at 251-52.

c. Lenders Are Considered to Be Volunteers.

Counsel's research has disclosed two Washington cases where lenders sought relief under the doctrine of unjust enrichment. In

each, the Court found the lender to be a volunteer after considering the factors set out in *Ellenburg v. Larson Fruit Company, Inc., supra*, and denied the lender relief based on a claim of unjust enrichment.

*Ellenburg v. Larson Fruit Company, Inc., supra*, itself dealt with an unjust enrichment claim made by a lender. Mr. Ellenburg had purchased an orchard. He contracted with Northwest Vineyard/Orchard Management Company (Northwest Management) to manage the orchard. Disputes arose between Mr. Ellenburg and Northwest Management. Mr. Ellenburg sought to terminate the relationship and refused to pay at least some of Northwest Management's fees. Northwest Management then sued. Meanwhile, Northwest Management contacted Larson Fruit Company, Inc. (Larson Fruit) to harvest the crop. Mr. Ellenburg's attorney advised Larson Fruit of the pending suit. He requested Larson Fruit not to disburse any funds to Northwest Management until the conclusion of the pending litigation and in conformity with a court order. Unbeknownst to Mr. Ellenburg, Larson Fruit loaned \$100,000.00 to Northwest Management. It then harvested the crop and received net proceeds of \$102,819.23. Northwest Management defaulted on its loan and sought bankruptcy protection. Larson Fruit claimed the right to apply \$100,000.00 of the proceeds from the harvest to satisfy its loan to Northwest Management. The trial court entered a finding of fact to the

effect that Larson Fruit was not compelled to make the loan to Northwest Management. Nonetheless, it concluded that Larson Fruit was not a volunteer. The Court reversed on the basis that the trial court's findings of fact demonstrated that Larson Fruit was in fact a volunteer and therefore not entitled to any recovery under the doctrine of unjust enrichment. It noted, among other things, that Ellenburg did not request the advance to Northwest Management from Larson Fruit and did not know of it until long after it was made. 66 Wn.App. at 252.

In *Bank of America, N.A. v. Wells Fargo Bank, N.A.*, 126 Wn.App. 710, 109 P.3d 863 (2005), reversed on other grounds *sub nom. Bank of America, N.A. v. Prestance Corporation*, 160 Wn.2d 560, 160 P.3d 17 (2007), the Court held that a lender who paid a prior mortgage had no unjust enrichment claim because that lender acted as a volunteer. In that case, Mr. Sugihara received a thirty year home loan in the amount of \$543,150.00 from Washington Mutual secured by a first deed of trust. He then borrowed approximately \$400,000.00 from Bank of America. The loan was secured by a second deed of trust on his residence. He later obtained another loan for \$1 million from Bank of America that was also secured by a deed of trust on his residence. He then applied for and obtained a revolving line of credit with Wells Fargo Bank. It tendered payment of the amount due on the \$400,000.00 loan made by Bank of

America and requested reconveyance of the deed of trust securing that loan. For reasons not important here, Bank of America did not reconvey although it did cash the check from Wells Fargo Bank.

Wells Fargo Bank argued that Bank of America's cashing of the check established a contract implied in law based upon unjust enrichment that required reconveyance of the deed of trust. The Court denied relief to Wells Fargo Bank holding that it was a volunteer. It discussed the factors for determination of whether a party is a volunteer noted in *Ellenburg v. Larson Fruit Company, Inc., supra*. It noted that Bank of America had not requested the check from Wells Fargo Bank and knew nothing of the loan application until Wells Fargo Bank sent a payoff request. Significantly, the Court noted that Wells Fargo Bank was a volunteer because it made the loan on a voluntary basis for profit. It stated:

Although (Bank of America) let the benefit be conferred by cashing the check, it was not at (Bank of America's) request — Bank of America had no knowledge of Sugihara's loan application to (Wells Fargo Bank) until the accounting demand came from (Wells Fargo Bank) for the payoff amount. Nor did (Wells Fargo Bank) make a loan to protect any interest — the (Wells Fargo Bank) loan officer testified that the loan was made on a voluntary basis for profit. We conclude that under these circumstances, Wells Fargo Bank was a volunteer. .

126 Wn.App. at 723.

The Supreme Court reversed the Court of Appeals' decision in *Bank of America, N.A. v. Prestance Corporation, supra*. Its ruling did not address the Court of Appeals' holding on the issue of unjust enrichment. The Supreme Court addressed a different issue—whether Wells Fargo Bank could be equitably subrogated to Washington Mutual's first deed of trust when its \$1 million loan went, in part, to pay off Mr. Sugihara's loan from Washington Mutual. The Supreme Court limited its decision to one issue in the following language:

The only issue before is a legal one: Should we adopt §7.6 of Restatement (Third) to hold a refinancing mortgagee's actual or constructive knowledge of intervening liens does not automatically preclude a court from applying equitable subrogation.

160 Wn.2d at 564. The Court of Appeals had ruled that such knowledge precluded the refinancing lender from claiming equitable subrogation. The Supreme Court held to the contrary and allowed Wells Fargo to be equitably subrogated to Washington Mutual's position. It specifically did not discuss or decide whether Wells Fargo Bank was entitled to relief against Bank of America on the basis of unjust enrichment. Doing so was not necessary in light of its decision on the equitable subrogation issue.

CCB is in exactly the same position as Wells Fargo Bank in *Bank of America, N.A., v. Wells Fargo Bank N.A., supra*. It loaned money to Trinity to make a profit. It was also interested in beginning an ongoing banking relationship with Mr. Sturtevant that would lead to other loans in the future and the referral of other business by Mr. Sturtevant. Since the profit motive lay at the heart of the loan, CCB is a volunteer and entitled to no relief under the doctrine of unjust enrichment.

Both *Ellenburg v. Larson Fruit Company, Inc., supra*, and *Bank of America, N.A., v. Wells Fargo Bank, N.A., supra*, share common themes. First of all and critically, the lenders were not required to make the loans that they made. Secondly, the loans were not made to or requested by the entity or person against whom unjust enrichment was claimed. In both, the lenders were held to be volunteers.

d. CCB Is a Volunteer.

Under the test set out in *Ellenburg v. Larson Fruit Co., supra*, and under the authority of that case and *Bank of America, N.A., v. Wells Fargo Bank, N.A., supra*, CCB is clearly a volunteer. Therefore, it cannot benefit from the doctrine of unjust enrichment.

The first consideration is whether any benefits were conferred at the request of the party benefitted. The request for funds was made on behalf of Trinity, not Newman Park. In order for Newman Park

to approve or request the benefit, 80% of its membership interests had to consent. As paragraph 2.2 of the operating agreement states in pertinent part:

The Members shall not cause the Company to do any of the following without the consent of Members holding an eighty percent interest:

- (1) Mortgage, pledge, or grant a security interest (collectively, the "pledge") in any Company property to the extent that the secured indebtedness from such pledge would exceed \$50,000 in the aggregate.
- (2) Incur or refinance any indebtedness for money borrowed by the Company, if after such financing, the aggregate indebtedness of the company would exceed \$50,000.00.

No one obtained approval for the transaction from 80% of Newman Park's membership. No such approval was ever communicated to CCB. In the absence of such an approval, it is clear that Newman Park did not request the payment made by CCB.

The alleged benefits to Newman Park are the payments of the loan to Hometown National Bank and property taxes to the Thurston County Treasurer. It was CCB that opted to make those payments. CCB recognized that it had two options. It could have taken second position behind Hometown National Bank and loaned less money to Trinity or it could have made a larger loan part of which would have been used to pay

off Hometown National Bank. CCB opted for the latter approach only to avoid its own risk of having to deal with the position of Hometown National Bank if Trinity defaulted.

The second element is whether Newman Park knew of the payment but stood idly by letting it occur. Newman Park's Individual Members—those who held 61% of the membership interest in the company—knew nothing of the loan or CCB's payment to Hometown National Bank before it occurred and learned of it only after the loan to Trinity was in default. These were the members who had to approve of the transaction under the terms of Newman Park's operating agreement. Newman Park therefore did not stand idly by while letting the payment be made.

Finally, the payment made to Hometown National Bank was not necessary to protect any of CCB's interests. First and foremost, CCB was not required to loan any money to Trinity. It made the loan for the understandable reason of making a profit. It expected Mr. Sturtevant to make substantial deposits that it would use to fund other loans. It expected to pay a lower rate of interest on the deposit that it would charge for the loans that it made. CCB also hoped that it could make other loans to Mr. Sturtevant generating still more profit. Finally, CCB expected Mr. Sturtevant to refer more business to it thereby leading to still more profit.

Our case is indistinguishable from *Ellenburg v. Larson Fruit Company, Inc., supra*, and *Bank of America, N.A., v. Wells Fargo Bank, N.A., supra*. As indicated above, the lenders in those cases made loans not requested by and without the knowledge of the entity against whom unjust enrichment relief was sought. The same must be said of this transaction. Newman Park did not ask CCB to pay the obligation to Hometown National Bank or the outstanding property taxes. CCB was also not required to make the loan to Trinity or to pay Newman Park's obligations. It is therefore a volunteer and entitled to no relief under the doctrine of unjust enrichment.

III. CCB Is Not Entitled to Relief under the Doctrine of Equitable Subrogation.

a. Introduction.

CCB is also not entitled to relief under the doctrine of equitable subrogation. First of all, volunteers are not entitled to relief under that doctrine. And, as discussed above, CCB acted as a volunteer in this transaction. Secondly, the doctrine is not applicable here because our dispute is not one of priority between competing creditors.

///

b. The Doctrine of Equitable Subrogation Does Not Protect Volunteers.

Washington first explicitly recognized the doctrine of equitable subrogation in *Kim v. Lee*, 145 Wn.2d 79, 331 P.3d 665 (2001). In *Bank of America, N.A. v. Prestance Corporation, supra*, the Court adopted the formulation of the doctrine as contained in Restatement (Third) *Property* §7.6 as follows:

- a. One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.
- b. By way of illustration, subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs the obligation:
  - (1) In order to protect his or her interest;
  - (2) Under a legal duty to do so;
  - (3) On account of misrepresentation, mistake, duress, undue influence, deceit or other similar disposition; or
  - (4) Upon a request from the obligor or the obligor's successor to do so, if the person performing was promised repayment and reasonably expected to receive a security interest in the

real estate with the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holders of intervening interests in the real estate.

(CP 319)

A party cannot benefit from the doctrine of equitable subrogation when that party is a volunteer, however. The Court made that clear in *BNC Mortgage, Inc., v. Tax Pros, Inc.*, 111 Wn.App. 238, 46 P.3d 812 (2002). In that case, Tax Pros, Inc. (Tax Pros) sued Mr. and Mrs. Scott and obtained a writ of attachment on certain property they owned. It later obtained a judgment against them for \$268,009.00 as a partial judgment pursuant to RCW 54(b). Shortly thereafter, Ford Consumer Finance Corporation (Ford) loaned the Scotts \$285,000.00. This loan was secured by a Deed of Trust on the same property that was the subject of the writ of attachment Tax Pros had obtained in the suit against the Scotts. Tax Pros received \$170,000.00 from the proceeds of this loan in exchange for it subordinating its interest in the property to that of Ford. BNC Mortgage, Inc. (BNC), a financial institution with no other interest in the property, then chose to loan money to the Scotts. As part of the loan, it paid off Ford and secured a reconveyance of Ford's Deed of Trust. Tax Pros then went to trial on its unresolved claims against Mr. and Mrs. Scott and obtained a judgment for an additional \$136,871.00 together with

prejudgment interest in the amount of \$22,184.00. The judgment provided that it would be enforceable against the property that was the subject of Tax Pros' previous writ of attachment. BNC then filed a separate action for declaratory relief seeking to establish that its Deed of Trust was superior to Tax Pros' outstanding judgment. It alleged, among other things, that it should be equitably subrogated to Ford's Deed of Trust in the property — which was superior to Tax Pros' interest by virtue of the subrogation agreement — because it had paid the amount that was due to Ford.

The Court held that BNC was not entitled to equitable subrogation because it was a volunteer. It defined the term “volunteer” as follows:

A person is a “volunteer” if he or she acts “freely and without compulsion.” A person is under “duty or compulsion” if he or she acts to fulfill his or her own legal duty, “to protect his (or her) own rights or to save his (or her) own property,” or in some other way not freely and voluntarily chosen by him (or her).

111 Wn.App. at 253-54. Under that definition, it ruled that BNC was a volunteer and not entitled to equitable subrogation relief. It stated:

BNC was a volunteer here. It was not under any duty or compulsion to loan money to the Scotts, or to pay Ford. It had no interest in the Scotts' residence that it needed to protect. It did not act under any other duty or compulsion, but instead

chose freely and voluntarily to avail itself of a business opportunity. Its hopes were to achieve a profit and, quite understandably, to secure itself against loss. That it may not realize those hopes is not by itself sufficient to warrant a judicial alteration of Washington's long-settled scheme of lien priorities.

111 Wn.App. at 254-55.

There is no difference between BNC in *BNC Mortgage, Inc., v. Tax Pros, Inc., supra*, and CCB here. CCB did not have to loan any money to Trinity. It also had no interest in Newman Park's property that it needed to protect. It was acting under no compulsion at all and simply sought to pursue what it considered to be a lucrative business opportunity—beginning a banking relationship with Mr. Sturtevant. It also wanted to secure itself against risk and loss by requiring that proceeds from the Trinity loan be used to pay the obligation to Hometown National Bank and the outstanding property taxes. As the court ruled in *BNC Mortgage, Inc., v. Tax Pros, Inc., supra*, those factors make CCB a volunteer and not subject to relief under the doctrine of equitable estoppel.

c. The Doctrine of Equitable Estoppel Is Not Applicable.

The doctrine of equitable estoppel addresses disputes concerning priority between competing creditors both of whom have an interest in the property at issue. The doctrine has no applicability in the absence of such a dispute between creditors. The purported subrogee, in

this case CCB, will have its own claim to the property that will rise and fall on its own merits. Restatement (Third) *Property* §7.6, comment a.

This dispute is not between competing creditors. There is no intervening judgment lien or writ of attachment that affects priorities as in *BNC Mortgage, Inc., v. Tax Pros, Inc., supra*. We also do not have competing claims under a succession of deeds of trust as in *Bank of America, N.A., v. Prestance Corporation, supra*. Rather, CCB's claim is against the owner of the property that its Deed of Trust purports to encumber—a Deed of Trust that is invalid. As indicated in Restatement (Third) *Property* §7.6, comment a, CCB is entitled to sue or seek other relief based on its own Deed of Trust and have its claim rise or fall on the merits of that Deed of Trust. Equitable subrogation is simply not applicable.

IV. There Is No Policy Reason to Allow Relief to CCB under the Circumstances Presented Here.

The doctrine of equitable subrogation is beneficial because it promotes the ability of homeowners to refinance their properties in the face of competing claims among creditors all of whom have an interest in the property at issue. *Bank of America, N.A. v. Prestance Corporation, supra*, 160 P.3d at 580-81. What happened in this case does not promote that policy because what happened here was not a normal refinance

transaction. Newman Park did not seek to refinance its loan to Hometown National Bank. Trinity sought a loan from CCB and attempted—albeit improperly—to use Newman Park’s property as collateral. Secondly, this was not a mere refinance. Trinity received a loan well in excess of Newman Park’s obligation to Hometown National Bank. The lien of the deed of trust exceeded the amount due to Hometown National Bank by over \$600,000.00. And that excess did not go to Newman Park.

CCB is not entitled to relief because it is a volunteer in this transaction. It cannot claim that the Court should find in its favor because of the policy in favor of allowing refinancing.

Assignment of Error No. 3:

The trial court erred by denying the motion of Newman Park, LLC for attorney’s fees.

The trial court denied Newman Park’s motion for attorney’s fees because it felt that both sides had prevailed on substantial issues. The trial court’s decision was error because Newman Park substantially prevailed.

First of all, it is clear that the prevailing party in this matter, whichever party that might be — is entitled to an award of attorney’s fees. A party that invalidates a contract containing a clause allowing attorney’s fees is entitled to an award of attorney’s fees. In *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004), an employee who

successfully invalidated a noncompetition agreement containing a provision allowing attorney's fees to the prevailing party was entitled to a fee award. Furthermore, a party who sues successfully to rescind a contract for the purchase and sale of real estate is entitled to an award of attorney's fees if the rescinded contract contains a provision allowing such an award to the prevailing party. *Stryken v. Panell*, 66 Wn.App. 566, 572-73, 832 P.2d 890 (1992); *Almanza v. Bowen*, 155 Wn.App. 16, 23-24, 230 P.3d 177 (2010).

Newman Park successfully invalidated the Deed of Trust that had been given to secure CCB's loan to Trinity. That Deed of Trust contained the following provision:

Attorneys' Fees; Expenses. If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's attorneys' fees and Lenders' legal expenses, whether or not there is a lawsuit, including attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the

cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees, title insurance and fees for Trustee, to the extent permitted by applicable law. Grantor also will pay any costs, in addition to all sums provided by law.

(CP 524)

Entitlement to an award of attorney's fees under a contractual provision is governed by RCW 4.84.330. That statute allows attorney's fees based upon a contractual provision to the prevailing party. The term "prevailing party" is defined as "the party in whose favor final judgment is rendered." A party need not prevail on all claims to be deemed a prevailing party under the terms of RCW 4.84.330. A party must only substantially prevail. *Silverdale Hotel Associates v. Lomas & Nettleton Co.*, 36 Wn.App. 762, 774, 677 P.2d 773 (1984); *Kysar v. Lambert*, 76 Wn.App. 470, 493, 887 P.2d 431 (1995). If neither side wholly prevails, a determination of who is the prevailing party depends upon who is the substantially prevailing party. This question depends upon the extent of the relief afforded the parties. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997); *Scoccolo Construction, Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 521, 145 P.3d 371 (2006).

The case of *Day v. Santorsola*, 118 Wn.App. 746, 76 P.3d 1190 (2003), presents a good illustration of how a party can be substantially prevailing although it is not successful on all of its claims. In that case,

the owners of a subdivision lot sued the homeowners association's construction committee for failure to approve the owners' plans for the house they intended to build. The trial court held that the committee's rejection of the plaintiffs' plans was not reasonable. It entered judgment in favor of the owners allowing them to build a house on their lot subject to certain revised and compromised plans and not to exceed a specified height and roof pitch. It rejected the owners' damage claim, however. The trial court allowed attorney's fees to the owners. The defendants argued that the owners were not the prevailing party because they had lost on their claim for damages. The Court affirmed the owners' entitlement to an award of attorney's fees. It found that the owners substantially prevailed because they were allowed to build a house nearly in accordance with the house they sought to have approved and even though they did not prevail on their claim for damages. 118 Wn.App. at 770.

Similarly, in *Piepkorn v. Adams*, 102 Wn.App. 673, 10 P.3d 428 (2000), in that case, the Piepkorns sued the Adamses for constructing a fence after being denied permission to do so by the development's Architectural Control Committee. The Piepkorns sued for injunctive relief and damages. The trial court ruled in favor of the Adamses. On appeal, the Court reversed and held that the Piepkorns were entitled to an injunction but affirmed the dismissal of the Piepkorns damages claim. It

remanded with directions to grant the Piepkorns' award of attorney's fees because they had substantially prevailed.

In our case, CCB initiated nonjudicial foreclosure proceedings on the Deed of Trust that Landmark had executed. The Notice of Default claimed that \$1,830,183.78 would be due and owing as of September 21, 2009. (CP 584) The Notice of Foreclosure estimated that \$1,976,783.07 would be due by February 1, 2010. (CP 588-589) As a result of the litigation, the amount of the encumbrance was reduced to a principal amount of slightly more than \$400,000.00. In other words, even if Newman Park does not secure a reversal of the judgment entered against it and the lien placed on its property, it will have reduced the amount of CCB's claim by over \$1.5 million. Stated another way, Newman Park will have to pay approximately \$1.5 million less to rescue its property from any claim by CCB if it is not successful in this appeal. By any stretch, Newman Park has substantially prevailed.

For the reasons indicated, Newman Park, as the substantially prevailing party, was and is entitled to an award of attorney's fees. A denial of Newman Park's motion for an award of attorney's fees was therefore error.

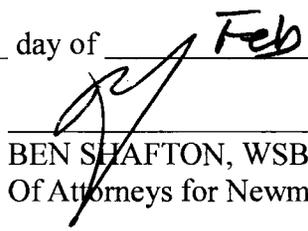
STATEMENT REQUIRED BY RAP 18.1(A)

Newman Park seeks an award of attorney's fees on appeal. Its entitlement to attorney's fees is based upon the aforementioned provision in the Deed of Trust it successfully invalidated. A contractual provision allowing attorney's fees is in support of such an award on appeal. *West Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn.App. 466, 694 P.2d 1101 (1985); *Reeves v. McClain*, 56 Wn.App. 301, 311, 783 P.2d 606 (1989); *Thompson v. Lennox*, 151 Wn.App. 479, 491, 212 P.3d 597 (2009). Newman Park is entitled to prevail on appeal and should therefore its attorney's fees.

CONCLUSION

CCB is not entitled to any relief under the circumstances of this case because it is a volunteer. The trial court erred by ruling to the contrary. The trial court also erred by denying Newman Park an award of attorney's fees because it substantially prevailed at trial. The judgment rendered should be reversed with directions to deny all relief to CCB and to allow Newman Park to recover its attorney's fees. Furthermore, Newman Park should be awarded its attorney's fees on appeal.

DATED this 17 day of Feb, 2011.

  
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BEN SHAFTON, WSB #6280  
Of Attorneys for Newman Park, LLC

NO. 41470-8-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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COLUMBIA COMMUNITY BANK,

Respondent

v.

NEWMAN PARK, LLC,

Appellant

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NEWMAN PARK, LLC,

Appellant,

v.

COLUMBIA COMMUNITY BANK,

Respondent.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE PAULA CASEY

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AFFIDAVIT OF MAILING

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS  
DIVISION II

STATE OF WASHINGTON )  
 )  
County of Clark ) ss.

THE UNDERSIGNED, being first duly sworn, does hereby depose and state:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On February 17, 2011, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the BRIEF OF APPELLANT to the following person(s):

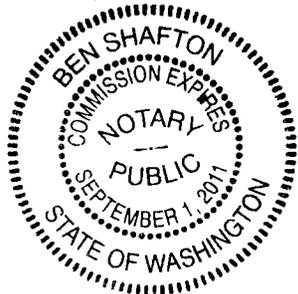
Mr. Thomas Peterson  
Socius Law Group  
Two Union Square  
601 Union Street, Suite 4950  
Seattle, WA 98101-3951

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED this 17 day of February, 2011.

Lorrie Vaughn  
LORRIE VAUGHN

SIGNED AND SWORN to before me this 17 day of February, 2011.



[Signature]  
NOTARY PUBLIC FOR WASHINGTON  
My appointment expires: 9.1.2011