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

Case No. 64147-6-I

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ELIZABETH BEKKEVOLD,

Appellant,

v.

EVERGREENBANK,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Elizabeth Bekkevold was the holder of a promissory note and the beneficiary of a vendor's purchase money deed of trust used to secure that promissory note with respect to real property she sold to Wescott Development LLC (the "Property"). Ms. Bekkevold did not execute any documents that would have the effect of subordinating her interest in her deed of trust to any other encumbrance on the same property, nor were any such documents ever recorded. As the vendor/financier, Ms. Bekkevold's interest in the Property was superior to the interest of any other party, including that of Respondent EvergreenBank, whose deed of trust in the Property was recorded simultaneously with Ms. Bekkevold's Deed of Trust. Because Ms. Bekkevold's Deed of Trust was senior to that of EvergreenBank, the trustee's sale conducted by EvergreenBank did not extinguish Ms. Bekkevold's Deed of Trust and EvergreenBank took title to the property at the trustee's sale subject to both the *lis pendens* filed in this action and to Ms. Bekkevold's Deed of Trust.

## II. ARGUMENT

### A. Ms. Bekkevold's Deed of Trust has Priority as a Vendor Purchase Money Mortgage.

Where both a seller and a third-party lender hold purchase-money mortgages, the courts ordinarily give preference to the seller. Restatement (Third) of Property; Mortgages § 7.2(c) (1997) (vendor purchase money mortgages generally have priority over third party purchase money

mortgages). *See also*, 3 POWELL ON REAL PROPERTY (1991 rev.) ¶ 455.1, p. 37-227.

The facts and circumstances of the instant case are rarely seen and, as a consequence, there is little precedent upon which to rely, even outside the State of Washington (in which there is virtually none). However, there is a Colorado case in which the fact pattern was remarkably similar to the one here: *ALH Holding Co. v. Bank of Telluride*, 18 P.3d 742 (Colo. 2000).

In *ALH Holding*, the real property vendor brought a declaratory judgment action to determine the respective priorities of its deed of trust and respondent bank's earlier-recorded deed of trust that secured bank's loan to the purchaser for the down payment. The *ALH Holding* court held that (1) the recording statute did not resolve the question of priority under circumstances of that case,<sup>1</sup> and (2) the vendor's deed of trust was entitled to priority over the bank's deed of trust.

Where a security agreement, or mortgage, is executed between a purchaser and a vendor as part of the same transaction in which the purchaser acquires title to the property, the execution of the deed and the mortgage are considered simultaneous acts. As a matter of law, such a purchaser never has an unencumbered title to property in which he can assign further rights. Therefore, even a third party who loans money to the purchaser that is applied to the purchase, and who takes back a mortgage on the purchased property, cannot acquire rights to the property from the purchaser unencumbered by the vendor's mortgage, regardless of the order in which the documents are signed.

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<sup>1</sup> Similar to Washington, the recording statute in Colorado is a race-notice recording statute. *ALH Holding*, 18 P.3d at 744.

ALH Holding, 18 P.3d 742 at 745. Although subordination agreements between a vendor and third-party lender can be found by implication, the earlier recording of the third-party lender's deed of trust cannot, without more, support such a finding. CJS § 274 (2009), citing ALH Holding, *supra*.

But here, there is no “more.” There was no agreement between Ms. Bekkevold and EvergreenBank. There is no reasonable basis upon which Ms. Bekkevold can be found to have subordinated her interests to that of EvergreenBank in particular or upon any certain terms.

The reasoning and result in ALH Holding is consistent with the Restatement and is supported by the same equitable considerations.<sup>2</sup> As the Comments to the Restatement explain:

***[T]he equities favor the vendor.*** Not only does the vendor part with specific real estate rather than money, but the vendor would never relinquish it at all except on the understanding that the vendor will be able to use it to satisfy the obligation to pay the price. This is the case ***even though the vendor may know that the mortgagor is going to finance the transaction in part by borrowing from a third party and giving a mortgage to secure that obligation.*** In the final analysis, the law is more sympathetic to the vendor's hazard of losing real estate previously owned than to the third party lender's risk of being unable to collect from an interest in real estate that never previously belonged to it.

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<sup>2</sup> Section 7.2(c) of the Restatement provides:

A purchase money mortgage given to a vendor of real estate, in the absence of a contrary intent of the parties to it and subject to the operation of the recording acts, has priority over a purchase money mortgage on that real estate given to a person who is not its vendor.

RESTATEMENT (THIRD) OF PROPERTY; MORTGAGES § 7.2(c), cmt. 6. (Emphasis added). *See also, Nelson v. Stoker*, 669 P.2d 390, 394 (Utah, 1983) (“Equity and justice justify the protection afforded a vendor who parts with his property on the faith that his mortgage or trust deed securing purchase monies loaned to the vendee is entitled to priority over any preexisting claims which may be asserted against the vendee mortgagor.”)

Even though Colorado is a race-notice state like Washington, the operation of Colorado’s recording act did not affect the outcome in *ALH Holding*. So despite being recorded earlier in time, the bank’s purchase money deed of trust was not given priority over the vendor’s purchase money deed of trust. *ALH Holding*, 18 P.3d at 747.

And so it should be here. EvergreenBank knew prior to recording that Ms. Bekkevold was to have a vendor’s purchase money security interest in the Property. But EvergreenBank failed to require a subordination agreement or take any other affirmative steps to establish any priority of its deed of trust over the one granted to Ms. Bekkevold. EvergreenBank cannot now magically “step to the front of the line” ahead of Ms. Bekkevold.

**B. Ms. Bekkevold’s Deed of Trust and the EvergreenBank Deed of Trust Attached Simultaneously to the Property.**

EvergreenBank claims that it, too, is the beneficiary of a purchase money deed of trust similar to that held by Ms. Bekkevold. But this claim actually supports and bolsters Ms. Bekkevold’s argument that EvergreenBank’s Deed of Trust attached to the Property *at the same time* as Ms. Bekkevold’s Deed of Trust; assuming arguendo that

EvergreenBank also holds a purchase money deed of trust, both deeds of trust attached simultaneous with the recording of the deed as a part of the same transaction. Jump v. North British & Mercantile Ins. Co. of London and Edinburgh, 44 Wash. 596, 601, 87 P. 928, 390 (1906) (courts regard a deed of conveyance and purchase-money mortgages as simultaneous); American Gen'l Financial Svcs., Inc. v. Carter, 39 Kan.App.2d 683, 690, 184 P.3d 273 (2008) (purchase money mortgage interest attaches simultaneously with recordation of deed); ALH Holding Co. v. Bank of Telluride, 18 P.3d 742, 745 (Colo. 2000).

This is an application of the doctrine known as instantaneous seisin, recognized in many jurisdictions, including Washington. See, Jump, 44 Wash. at 601. Under that doctrine, upon the simultaneous execution of the deed and a purchase money mortgage, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and, without stopping, vests in the mortgagee. It follows, therefore, that no lien of any character can attach to the title of the mortgagee superior to that evidenced by the purchase money mortgage. See, 53 Am.Jur.2d Mechanics' Liens § 271, at 808-09 (1970).

It is undisputed that Ms. Bekkevold holds a vendor's purchase money deed of trust and her interest in the Property attached simultaneously with the recording of the deed. If EvergreenBank is also seen as holding a purchase money deed of trust, then its interest in the Property attached simultaneously with the recording of the deed as well and, by the natural extension of logic, simultaneous with Ms. Bekkevold's Deed of Trust.

**C. Recording Numbers Do Not Control Priority.**

EvergreenBank also contends that, because the recording number on its deed of trust is one digit lower than the one entered on Ms. Bekkevold's Deed of Trust, its interest is entirely superior to that of Ms. Bekkevold. However, the mere fact that one mortgage is indexed ahead of the other does not show priority of record. CJS § 295 (Instruments Recorded at Same Time); *see also, Hood v. Landreth*, 207 N.C. 621, 178 S.E. 222 (1935). And the mere order in which they are entered on the record is not necessarily controlling as to priority. *See, e.g., Chatten v. Knoxville Trust Co.*, 154 Tenn. 345, 289 S.W. 536, 50 A.L.R. 537 (1926). Especially in light of EvergreenBank's claim that it holds a purchase money security interest, the recording numbers do not control priorities here.

**D. Only Part of EvergreenBank's Deed of Trust Could be a Purchase Money Deed of Trust.**

EvergreenBank contends that it financed \$366,000.00 of the purchase price, but that it loaned Wescott Development, LLC over \$500,000 to be secured by its deed of trust.<sup>3</sup> EvergreenBank thus admits that not all of the money that EvergreenBank loaned to Wescott Development LLC was used for the purchase of the Property. A substantial portion of the funds that EvergreenBank loaned to Wescott must have been used for some purpose other than to purchase the

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<sup>3</sup> Wescott Development LLC purchased the property from Ms. Bekkevold for \$1,166,000.00, \$800,000.00 of which was seller-financed by Ms. Bekkevold through her vendor's purchase money deed of trust.

Property. The EvergreenBank Deed of Trust was thus not purely a purchase money deed of trust.

A purchase money mortgage as defined as including “a mortgage given to a vendor of the real estate or to a third party lender *to the extent* that the proceeds of the loan are used to ... acquire title to the real estate.” Restatement (Third) Property; Mortgages, § 7.2 (Emphasis added). Thus, the priority enjoyed by a purchase money deed of trust *only* extends to the amounts actually advanced for the purchase of the property and not to other monies advanced or paid for other purposes. CJS § 270 (Priority of Purchase-Money Mortgages), *citing to Federal Land Bank of Columbia v. Bank of Lenox*, 192 Ga. 543, 16 S.E.2d 9 (1941); *Dalton Moran Shook Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 440 S.E.2d 585 (1994). *See also, BancFlorida, et al. v. Hayward*, 689 So.2d 1052, 1055 (1997) (contract purchasers’ claims junior to bank’s mortgages, but only to the extent that the bank’s funds were used to purchase the property.) Indeed, where two purchase money deeds of trust are simultaneously recorded, the one determined to be junior should be subordinated to the other deed of trust only to the extent that that other deed of trust secures the purchase price. *Dalton*, 113 N.C.App. 707, 440 S.E.2d 585.

In *Dalton*, the holder of a mechanic’s lien disputed the priority of a purchase money deed of trust granted by a development company in favor of a bank. The deed and the deed of trust had been recorded simultaneously, a situation to which the doctrine of instantaneous seisin was applicable. *Dalton*, 113 N.C.App. at 709, 440 S.E.2d at 587. The Court agreed with the lienholder, holding that, where the deed of trust

secures an advance of additional money over and above the amount of the loan that was applied to the purchase price, that deed of trust is superior in priority as a purchase money deed of trust only to the extent that it secures the purchase price. *Id.* at 713, 440 S.E.2d at 589.

The application of the doctrine of instantaneous seisin has always been limited to purchase money transactions. . . . Extending the priority afforded by the doctrine to deeds of trust which secure amounts in addition to the purchase price does not comport with the policy supporting the doctrine.

*Dalton*, 113 N.C.App. at 713, 440 S.E.2d at 590 (citations omitted). *See also, West Durham Lumber Company v. Meadows*, 179 N.C.App. 347, 353, 635 S.E.2d 301, 305 (2006). To the extent that a deed of trust secures non-purchase money sums, the doctrine of instantaneous seisin is inapplicable and deed of trust is subordinate to other purchase money deeds of trust. *Dalton*, 113 N.C.App. at 716, 440 S.E.2d at 591.

The reasoning behind the court's holding in the *Dalton* case is equally valid here: To grant EvergreenBank any priority as to sums it advanced in excess of the purchase money, simply because those sums are secured by the same deed of trust that secures EvergreenBank's purchase money loan, would provide EvergreenBank with priority it could not otherwise obtain. The purpose of the doctrine of instantaneous seisin is to give first priority to the purchase money lender and prevent the possibility that she will lose the money loaned *and* the land. This purpose is not effectuated where the lender is seeking to secure obligatory advances for costs associated with project development and construction.

So even if the court holds that the EvergreenBank Deed of Trust is a purchase money deed of trust that is in some way superior to Ms. Bekkevold's Deed of Trust, at best it can only be said to be *partially* superior. To the extent that the EvergreenBank Deed of Trust secured the repayment of money not used toward the purchase of the property, EvergreenBank's Deed of Trust is junior to Ms. Bekkevold's Deed of Trust.

**E. Ms. Bekkevold Was Under no Obligation to Commence an Action to Enjoin the Trustee's Sale but Preserved Her Right to Contest the Lien Priorities by the Filing of her Lis Pendens.**

A primary objective of the present litigation is to affirmatively determine just whose interests in the Property are junior and, in some respects, to what extent. If Ms. Bekkevold is ultimately adjudicated to have been a wholly junior lienholder vis-à-vis EvergreenBank, then her interest in the Property would indeed be extinguished by the completion of the non-judicial foreclosure trustee's sale. On the other hand, if Ms. Bekkevold's interest is senior in any way to that of EvergreenBank, then the Property does remain subject to and remains encumbered by Ms. Bekkevold's Deed of Trust.

EvergreenBank seems to argue that Ms. Bekkevold brought this action to restrain the sale of the Property, as sort of an "end around" to the provisions of RCW 61.24.130. Ms. Bekkevold is uncertain of how many times it must be said for EvergreenBank to understand her position: Ms. Bekkevold did not object to the *conduct* of the trustee's sale but, through the filing of her *lis pendens*, preserved her right to contest which encumbrances were extinguished by that sale. Again, the purpose of this

action was not to restrain the sale of the Property, as is the subject of RCW 61.24.130; the purpose of this action was, in part, to establish the priority of lienholders and, with the trustee's sale going forward, determine whether the Property would remain encumbered by Ms. Bekkevold's Deed of Trust following the trustee's sale. By timely filing the action and the *lis pendens*, Ms. Bekkevold successfully preserved her right to have the Court make that determination.

Ms. Bekkevold timely filed her lawsuit and notice of *lis pendens*, and then put EvergreenBank on actual notice of the filing of the action and the *lis pendens*. With this actual knowledge, EvergreenBank took title to the Property at the trustee's sale subject to the *lis pendens*; indeed any successful bidder would have been similarly subject to the *lis pendens* and bound by the outcome of this litigation.

**F. The Alleged "Agreement" to Subordinate Remains Infirm.**

Evergreen does not seem to contest that it did not obtain a formal subordination agreement that would establish its position as that of a senior holder. Nor does EvergreenBank dispute the fatal flaws in the alleged agreement to subordinate in this case, except to say that they are ones "with which Evergreen [*sic*] disagrees." *Brief of Respondent* at 7, fn. 1.

Still, the alleged "agreement" to subordinate is deficient in several critical aspects. First, both the vendor and the third-party lender must be parties to any agreement to subordinate. *See generally*, CJS § 274 (2009); *ALH Holding Co. v. Bank of Telluride*, 18 P.3d 742 (Colo. 2000). EvergreenBank has offered no evidence and has pointed to no evidence in the record that indicates at all that Ms. Bekkevold, the vendor, entered into

any agreement with EvergreenBank, the third-party lender, to subordinate her deed of trust to that of EvergreenBank.

Furthermore, there is no enforceable subordination agreement if the parties never agreed on its terms and conditions. CJS § 266 (Subordination Agreements – Elements of Contract), *citing to L & R Realty v. Connecticut Nat. Bank*, 53 Conn. App. 524, 732 A.2d 181 (1999). The rights of priority under a subordination agreement extend to and are limited strictly by the express terms and conditions of the agreement. CJS § 265 (Subordination Agreements), *citing to Resolution Trust Corp. v. BVS Development, Inc.*, 42 F.3d 1206 (9th Cir. 1994). But in this case, there are no “express terms and conditions” that identify the parties to the subordination or that define the nature and scope of the interests to be given priority.

Finally, EvergreenBank is not entitled to rely upon unrecorded expressions of “intent” between the mortgagor and seller/purchase money lender to construct a valid subordination. “Where an agreement to subordinate is not executed with the formalities required for mortgages or deeds of trust, it cannot be elevated to a position of a mortgage or deed of trust so as to constitute such a competing interest.” CJS § 265 (Subordination Agreements), *citing to Old Stone Capital Corp. v. John Hoene Implement Corp.*, 647 F. Supp. 916 (D. Idaho 1986). As Ms. Bekkevold has discussed at length in her initial brief, none of those formalities were met.

**G. Additional Comments on EvergreenBank's Response.**

Ms. Bekkevold would like to bring to the Court's attention several contentions in EvergreenBank's Response that could mislead the Court. EvergreenBank contends, "On February 28, 2007, Defendant Wescott Development, LLC executed a first position deed of trust on the Property in favor of EvergreenBank. CP 98." CP 98 is the second page of the Declaration of Laura Reifel, an officer of EvergreenBank. However, Ms. Reifel's unilateral declaration that EvergreenBank's Deed of Trust is one of first position is both self-serving and wholly insufficient to establish the priority of that interest. More importantly, a careful reading of the deed of trust to which Ms. Reifel refers, attached as Exhibit B to her Declaration, CP 104-112, fails to reveal any indication that the EvergreenBank Deed of Trust enjoyed any particular lien priority at all.

EvergreenBank makes much of the contention that Ms. Bekkevold signed several documents to prove that she subordinated her deed of trust to that of a third party, so as to place her deed of trust in "second position" behind that other, unspecified interest. CP 52, CP 48, CP 74, CP 77. But **none** of the documents to which EvergreenBank refers specifies any details of the interest to which Ms. Bekkevold is purportedly subordinating her interest, including the identity of the holder of any intended holder of a superior interest. In particular, Ms. Bekkevold never signed any document at all that said that she was subordinating her deed of trust to one to be specifically granted to EvergreenBank.

In its Response, EvergreenBank further attempts to misrepresent to the Court what it was that Ms. Bekkevold actually signed. In particular, EvergreenBank states,

Finally, Plaintiff Bekkevold approved the deed of trust as to content and form and the deed of trust clearly states, “This deed of trust is junior and subordinate, to deed of trust recorded under number 20070302002306” (the EvergreenBank deed of trust). CP 212, 241-242.

*Brief of Respondent at 9.*<sup>4</sup> EvergreenBank would thus have the Court infer that Ms. Bekkevold signed a document containing the recording number for the EvergreenBank Deed of Trust. A quick review of the documents, however, reveals the deception inherent in EvergreenBank’s assertion.

First of all, the copy of the deed of trust containing the recording number for the EvergreenBank Deed of Trust was never signed by Ms. Bekkevold. CP 78. Indeed, logic informs us that Ms. Bekkevold could not have known the recording number, as newly annotated on this document, until *after* the time of recordation, and not before. Second, the copy that Ms. Bekkevold *did* sign did not contain a recording number or any other information about not only the EvergreenBank Deed of Trust, but about *any* deed of trust to which her deed of trust would be junior. CP 77. As such, Ms. Bekkevold cannot be said to have affirmatively acquiesced at all to the subordination of her deed of trust to one held by any particular third party, including EvergreenBank, or on any particular terms.

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<sup>4</sup> Curiously, EvergreenBank cites to CP 241 (page 2 of Plaintiff’s Notice of Appeal) and CP 242 (Exhibit A cover sheet).

While Ms. Bekkevold's signature on pre-closing documents may be seen as evidencing some knowledge on her part that her deed of trust could be subordinated to another deed of trust, *none* of the documents that Ms. Bekkevold signed show any intent to subordinate to any particular deed of trust. Even a *de minimis* effort to identify the interest to which one intends to be subordinated is a vital, necessary element to create a valid subordination. This situation is analogous to one in which a contract for sale of goods is written by a seller, but the contract fails to specify the buyer, the quantity, or even the purchase price. Short of such specificity, any claimed subordination fails for gross ambiguity at the minimum.

As repeatedly emphasized by EvergreenBank, the REPSA does indeed state, "This indebtedness shall be evidenced by a Promissory Note and a second position Deed of Trust, as set forth below." CP 52. However, the REPSA fails to identify to *what* interest the Deed of Trust is taking a second position. And despite its reference to provisions, the REPSA contains no illuminating terms that were ever "set forth below" to complete the essential terms of that part of the agreement.

EvergreenBank offers no support for another of its contentions that, ". . . the only evidence presented at the trial court level supports Respondent's contention that the respective parties always understood that the Evergreen [*sic*] deed of trust would be superior to Appellant's deed of trust." *Brief of Respondent at 11*. But EvergreenBank fails to point to any evidence whatsoever, whether or not "presented at the trial court level," that shows that Ms. Bekkevold herself had any specific intent to subordinate her interest in the Property to the EvergreenBank Deed of

Trust in particular. While documents containing Ms. Bekkevold's signature may tend to support the contention that she knew she could hold a "junior position" to *some* interest, those documents are *absolutely silent* as to the identity of the interest to which her interest would be "junior." As a consequence, Ms. Bekkevold did not share the same "mutual understanding" with EvergreenBank as to priority of their respective interests. After all, Ms. Bekkevold did not even know it was EvergreenBank that was to hold any interest at all in the Property.

**H. EvergreenBank has Raised Issues of Fact that Would Preclude Summary Judgment.**

As one basis for its defense of the trial court's decision, EvergreenBank contends that Ms. Bekkevold "intended" to subordinate her deed of trust to the EvergreenBank deed of trust used to secure the repayment of over \$500,000, and that that specific "intent" was evidenced by several writings made before closing of the sale and recordation of the deed and deeds of trust.

With apologies for perhaps seeming to belabor the standards for summary judgment set forth in Ms. Bekkevold's initial brief, however, intent is not a proper subject for summary judgment. Even though evidentiary facts are not in dispute, if different inferences may be drawn therefrom as to ultimate facts such as *intent*, knowledge, good faith, negligence, et cetera, summary judgment is not warranted. *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960); *Sanders v. Day*, 2 Wn. App. 393, 398, 468 P.2d 452 (1970).

EvergreenBank does not dispute that none of the documents that Ms. Bekkevold signed specified EvergreenBank as a party to whom Ms. Bekkevold was to subordinate her interests. Nor does EvergreenBank dispute that the documents Ms. Bekkevold signed lacked any particular description of the interest to which hers were to be subordinated. This absence of essential terms of any agreement to subordinate, at the very least, creates a substantial issue of what “the parties” intended. The issue of “intent” is truly one of fact, precluding summary judgment here.

Moreover, because EvergreenBank claims that it held a purchase money security interest in the Property, a genuine issue of fact exists as to the extent to which EvergreenBank’s Deed of Trust secured amounts additional to those used for the purchase price Property. At least to the extent that EvergreenBank’s Deed of Trust secured non-purchase money sums, it was subordinate to Ms. Bekkevold’s vendor purchase money deed of trust and summary judgment was improper. *See, discussion, supra.*

### III. CONCLUSION

Ms. Bekkevold respectfully requests that the decision of the trial court granting summary judgment be reversed, and that this matter be remanded to the trial court for further proceedings consistent with the decisions and rulings of this Court.

Respectfully submitted this 4<sup>th</sup> day of February 2010.

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