

66031-4

66031-4

NO. 66031-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HOMESTREET BANK, a Washington state chartered savings bank,

Respondent,

v.

JOHN B. NORRIS, individually and on behalf of his marital community.

Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

1. Whether the trial court correctly ruled that it had jurisdiction over Mr. Norris's marital community regardless of whether Respondent specifically named and served Appellant's wife with the complaint.
2. Whether the trial court correctly ruled that the guaranties signed by Mr. Norris constitute a community debt, not a separate debt.
3. Whether the trial court abused its discretion in granting Respondent's motion to strike the sur-reply filed by Mr. Norris two days prior to the summary judgment hearing.
4. Whether the trial court abused its discretion in denying Mr. Norris request for leave to file an amended answer adding an affirmative defense.
5. Whether the trial court correctly ruled that no disputed issue of material existed with respect to the "fair value" of the subject properties since Mr. Norris did not provide any evidence disputing their appraised values.
6. Whether the trial court abused its discretion in denying Mr. Norris's request for a continuance under CR 56(f) when Mr. Norris neglected to provide any evidence in support of his request.

STATEMENT OF THE CASE

This is an action by respondent HomeStreet Bank (“Respondent” or “HomeStreet”) to enforce unambiguous, written guarantees signed by appellant John B. Norris (“Appellant” or “Mr. Norris”) to secure various commercial loans obtained by two of his companies, Forest Ridge, LLC (“Forest Ridge”) and Norris Homes, Inc. (“Norris Homes”). CP 2-7.

A. Forest Ridge, LLC

On or about April 10, 2007, Forest Ridge obtained a commercial loan from HomeStreet in the principal amount of \$4,500,000.00. (“Loan RC80725”). CP 76-77 at ¶2.¹ Forest Ridge’s obligation to repay Loan RC80725 was secured by, among other things, a first priority deed of trust against certain real property and improvements owned by Forest Ridge located in King County, Washington. CP 77 at ¶3.

To further secure repayment of Forest Ridge’s debts to HomeStreet, Mr. Norris promised to personally pay Forest Ridge’s debts to HomeStreet in the event of Forest Ridge’s default or failure to adhere to its loan obligations. CP 77 at ¶4. This promise is evidenced by Mr. Norris’s execution of the Unconditional Blanket and Continuing Guaranty dated April 10, 2007 (“Forest Ridge Guaranty”), in which Mr. Norris

¹ Pages 76 through 948 of the clerk’s papers in this matter were submitted via the *Supplemental Designation of Clerk’s Papers*, filed on 1/7/11.

“unconditionally, absolutely, and irrevocably” guaranteed and promised to immediately pay HomeStreet the full amount of existing and future indebtedness of Forest Ridge, including without limitation all loans, advances, interest, costs, fees, and other debts. CP 147-51.

The terms of the Forest Ridge Guaranty expressly provided that Mr. Norris’s obligations thereunder were incurred on behalf of his marital community:

[A]ny married person who signs this Guaranty warrants that it is an obligation incurred on behalf of his or her marital community and agrees that this Guaranty shall bind the marital community.

CP 150 at ¶11. Mr. Norris also expressly signed the Forest Ridge Guaranty “individually and on behalf of the marital community.” CP 151.

Forest Ridge defaulted under the payment and performance obligations of Loan RC80725, and HomeStreet thereafter commenced proceedings to foreclose by non-judicial trustee’s sale the real property collateral securing the loan. CP 77 at ¶5. The collateral securing Loan RC80725 was sold at a non-judicial foreclosure trustee’s sale on September 18, 2009. HomeStreet was the successful bidder at the foreclosure sale with a credit bid of \$3,250,000, which, when subtracted from the \$4,500,000 principal balance of the loan, resulted in an unpaid deficiency under Loan RC80725 of \$1,250,000. CP 78 at ¶6.

HomeStreet's foreclosure sale credit bid of \$3,250,000 was based upon and match the contemporaneous appraisal of the real property conducted by an experienced, independent real estate appraiser in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). CP 78 at ¶7; CP 152-229. The outside appraisal was also reviewed by HomeStreet's in-house appraiser on July 9, 2009, again in accordance with USPAP. CP 78 at ¶7; CP 230-37. Both the external and internal appraisers concluded that the fair market value of the real property collateral was \$3,250,000, which was the amount of HomeStreet's subsequent credit bid at the nonjudicial foreclosure sale. CP 78 at ¶7; CP 152-237.

B. Norris Homes, Inc.

Norris Homes obtained eleven commercial loans from HomeStreet that were secured by, among other things, first priority deeds of trust against certain real property and improvements owned by Norris Homes located in King County and Snohomish County, Washington. CP 78-79 at ¶¶11-13.

To further secure repayment of Norris Homes' debts to HomeStreet, Mr. Norris unconditionally and absolutely promised to pay Norris Homes' debts to HomeStreet in the event of Norris Homes' default or failure to adhere to its loan obligations. CP 14 ¶14. This promise is

evidenced by Mr. Norris's execution of an Unconditional Blanket and Continuing Guaranty dated April 4, 2007 ("Norris Homes Guaranty"), in which Mr. Norris "unconditionally, absolutely, and irrevocably" guaranteed and promised to immediately pay HomeStreet the full amount of existing and future indebtedness of Norris Homes, including without limitation all loans, advances, interest, costs, fees, and other debts. CP 255-59.

The terms of the Norris Home Guaranty expressly provided that Mr. Norris's obligations thereunder were incurred on behalf of his marital community. CP 258 at ¶11 (stating that "any married person who signs this Guaranty warrants that it is an obligation incurred on behalf of his or her marital community and agrees that this Guaranty shall bind the marital community"). Mr. Norris also expressly signed the Norris Home Guaranty "individually and on behalf of the marital community." CP 259.

Norris Homes defaulted under the payment and performance obligations of the Norris Homes Loans, and HomeStreet thereafter commenced proceedings to foreclose by non-judicial trustee's sale the real property collateral securing the Norris Homes Loans. CP 79-80 at ¶16.

1. First Norris Homes Trustee Sales.

The collateral securing eight of loans obtained by Norris Homes (collectively, the "First Norris Homes Sale Loans") was sold at separate

non-judicial foreclosure trustee's sales on September 18, 2009. The total amount owed to HomeStreet under the First Norris Homes Sale Loans on the foreclosure sale date was \$11,303,258. CP 80 at ¶17. HomeStreet was the successful bidder at each of the foreclosure sales of the collateral with credit bids of \$6,494,000, which, when subtracted from the outstanding principal balance, resulted in an unpaid deficiency on the First Norris Homes Sale Loans of \$4,809,258. CP 80-81 at ¶¶18-19.

HomeStreet's foreclosure sale credit bids of \$6,494,000 were based on appraisals of the real property collateral, all completed within six months of the foreclosure date. The appraisals were conducted by experienced, outside real estate appraisers in accordance with USPAP. CP 81 at ¶19; CP 260-340; CP 349-416; CP 428-82; CP 494-560; CP 572-656. The outside appraisals were also reviewed by HomeStreet's in-house appraiser, again in accordance with USPAP. CP 81 at ¶19; CP 341-48; CP 417-27; CP 483-93; CP 561-71; CP 657-66.

The amount of HomeStreet's credit bids at the nonjudicial foreclosure sale matched the appraised, fair market value of the properties. CP 80-81 at ¶¶18, 20. Whenever the outside appraisal and internal appraisal review disagreed as to the fair market value, HomeStreet used the higher of the two values in determining the credit bids (which reduced the amount of the deficiency amount, to the benefit of Mr. Norris). CP 81

at ¶20.

2. *Second Norris Homes Trustee Sales.*

The collateral securing the two remaining loans (collectively, the “Second Norris Homes Sale Loans”) was sold at separate non-judicial foreclosure trustee’s sales on January 15, 2010. CP 83 at ¶28. The total amount owed to HomeStreet on the Second Norris Homes Sale Loans on the foreclosure sale date was \$4,703,921. CP 83 at ¶29. HomeStreet was the successful bidder at each of the foreclosure sales of the collateral with credit bids of \$4,200,000, which resulted in an unpaid deficiency on the Second Norris Homes Sale Loans of \$503,921. CP 83 at ¶¶29-30.

HomeStreet’s foreclosure sale credit bid of \$4,200,000 was based upon and matched the appraisals of the real property collateral, which were conducted by experienced, outside real estate appraisers in accordance with USPAP. CP 84 at ¶31; CP 667-795; CP 804-937. The outside appraisals were also reviewed and confirmed by HomeStreet’s in-house appraiser, again in accordance with USPAP. CP 84 at ¶31; CP 796-803; CP 938-48.

The combined deficiency under the First Norris Homes Sale Loans and Second Norris Homes Sale Loans totals \$5,313,179. CP 85 at ¶37. When combined with the deficiency under Loan RC80725, the combined indebtedness under the Forest Ridge and Norris Homes loans after all of

the trustee's sales totaled \$6,563,179 ("the Combined Deficiency Indebtedness").

C. Complaint.

On April 27, 2010, respondent HomeStreet Bank ("Respondent" or "HomeStreet") filed the instant lawsuit in King County Superior Court against defendant John B. Norris, individually and on behalf of his marital community ("Appellant" or "Mr. Norris"), for the Combined Deficiency Indebtedness, plus interest and fees. CP 1-8. HomeStreet alleged that Mr. Norris and his marital community were liable for the deficiency amounts under the Forest Ridge and Norris Homes loans pursuant to the terms of the Forest Ridge Guaranty and Norris Homes Guaranty (collectively, "Guaranties"). Id.

D. HomeStreet's Motion for Summary Judgment and Related Filings.

HomeStreet moved for summary judgment against Mr. Norris on July 23, 2010, alleging that it was entitled to judgment as a matter of law under the Guaranties for the Combined Deficiency Indebtedness. CP 29-37. Mr. Norris submitted his response brief on August 8, 2010; among his various arguments, Mr. Norris contended that HomeStreet was not entitled to judgment against his marital community. CP 38-43. Within his response brief, Mr. Norris also included a request for additional time

under CR 56(f). CP 41. HomeStreet thereafter submitted a reply brief. CP 46-54.

On August 18, 2010, two days before the scheduled hearing, Mr. Norris filed a sur-reply, entitled “Supplemental Response to Plaintiff’s Motion for Summary Judgment and Request for Leave to Amend Answer” (“Sur-Reply”). CP 55-57. The Sur-Reply contained a brand-new, previously-undisclosed argument that supplemented Mr. Norris’s previous contention HomeStreet was not entitled to judgment against his marital community. Id. The new argument contended that the Equal Credit Opportunity Act (“ECOA”) precluded judgment against the marital community. Id.

With the Sur-Reply, Mr. Norris also requested leave to amend his Answer to add a new affirmative defense; however, Mr. Norris did not include a Notice of Motion, did not include a motion to shorten time, and did not include a copy of the proposed Amended Answer. Id.

E. Oral Argument and Judge Canova’s Rulings.

Counsel for the parties appeared for oral argument on August 20, 2010 in front of the trial court, presided by Judge Greg Canova. See Verbatim Report of Proceedings (“RP”), 8/20/10. In his preliminary rulings, the trial court granted HomeStreet’s motion to strike Mr. Norris’s Sur-Reply and denied Mr. Norris’s request for leave to amend his Answer.

CP 68-71; see also RP 3-4. The court also denied Mr. Norris's request for a continuance under CR 56(f). CP 72-73; see also RP 4-5.

After oral argument by both parties, the trial court entered an order granting summary judgment in favor of HomeStreet and awarding judgment against Mr. Norris in the amount of \$6,563,179, plus applicable prejudgment interest. CP 74-75. The court calculated the judgment "based upon a finding of the fair value of the property sold at the trustee's sale under RCW 61.24.100(5)." CP 75; see also RP 21-22. The court also found that Mr. Norris's liability under the judgment includes his marital community. *Id.*; see also RP 22-24.

ARGUMENT

A. The Trial Court Had Jurisdiction Over Mr. Norris's Marital Community Regardless of Whether HomeStreet Named and Served His Spouse.

Mr. Norris wrongly contends that HomeStreet cannot enforce a judgment against community property where it has not named and served Mr. Norris's spouse. The issue of whether a superior court has personal jurisdiction is a question of law that is reviewed de novo. Lewis v. Bours, 119 Wash.2d 667, 669, 835 P.2d 221 (1992). Washington law does not require a claimant to name and serve both spouses in an action against community property. Under the 1972 amendments to Chapter 26.16 RCW, the Washington Legislature set forth that either spouse may manage

and control community property. See RCW 26.16.030. As a result, a general rule exists in Washington that “*either spouse can sue or be sued in a community property matter.*” Harry M. Cross, “The Community Property Law in Washington (Revised 1985),” 61 Wash. L.Rev. 13, 90-91 (1986) (emphasis added).² See also Oil Heat Co. of Port Angeles, Inc. v. Sweeney, 26 Wn. App. 351, 356, 613 P.2d 169, 172 (1980) (holding that “service of process upon either spouse and a resulting judgment for a community obligation is enforceable against the community”); Komm v. Department of Social and Health Serv., 23 Wn. App. 593, 598-99, 597 P.2d 1372 (1979) (enforcing judgment against community property where only one spouse was named and served in lawsuit). Judgment against one spouse is therefore enforceable against the entire community. See id.

Mr. Norris neglects to provide any authority in support of his contention that no jurisdiction exists against the community unless both spouses are sued. Mr. Norris cites DeElche v. Jacobsen, 95 Wn.2d 237, 622 P.2d 835 (1980), but this decision merely held that community property is not immune from separate tort liabilities; it is not relevant to the issue in question. See id. at 247 (holding that husband’s community

² The Washington Court of Appeals has acknowledged Mr. Cross’s expertise in community property law and have expressly cited this particular article. See In re Marriage of Chumbley, 150 Wn.2d 1, 5, 74 P.3d 129 (2003) (en banc); Pixton v. Silva, 13 Wn. App. 205, 534 P.2d 135 (1975).

was not exempt from judgment arising from a separate tort). Similarly, Mr. Norris also cites Dolby v. Worthy, 141 Wn. App. 813, 173 P.3d 946 (2007), but this decision again fails to support Mr. Norris's position. The court in Dolby simply evaluated whether service on a secretary or office assistant constituted sufficient service of process on a partnership or sole proprietorship. Id. at 816-17. Effective service of process is not relevant to the issue at hand, and Mr. Norris thus cannot provide any authority in support of his argument.

Moreover, Mr. Norris waived his right to contest personal jurisdiction over the marital community by neglecting to timely raise such contention. "A party waives his defense of lack of personal jurisdiction or insufficiency of process by failing to raise the issue in any entry of appearance, pleadings, or answers." State ex rel. Coughlin v. Jenkins, 102 Wn. App. 60, 63, 7 P.3d 818 (2000); see also In re Marriage of Steele, 90 Wn. App. 992, 997-98, 957 P.2d 247 (1998) (stating that a party waives the claim of lack of personal jurisdiction by "consent[ing], expressly or impliedly, to the court's exercising jurisdiction"). Every defense shall be asserted in the responsive pleading if one is required, and the defenses of lack of personal jurisdiction or insufficiency of service may also be made by motion. See CR 12(b).

Here, HomeStreet expressly filed suit against Mr. Norris “individually and on behalf of his marital community,” see CP 1, and yet Mr. Norris failed to timely assert the issue of lack of personal jurisdiction by responsive motion or pleading. Mr. Norris did not file a motion to dismiss, did not include lack of personal jurisdiction as an affirmative defense, and participated in discovery on the merits. See CP 26-28.³ Under such circumstances, Mr. Norris waived any defense of lack of personal jurisdiction, and the trial court therefore had personal jurisdiction over him and his marital community.

Accordingly, since Washington law does not require a claimant to sue or personally serve both spouses in order to obtain judgment against the marital community—and because, in any event, Mr. Norris already waived his right to contest personal jurisdiction—the trial court therefore had jurisdiction to proceed against the community.

B. The Guaranties Expressly Bound Mr. Norris’s Community Property, and the Legal Effect of the Guaranties is a Matter of Law.

Mr. Norris’s liability under the Guaranties is a community debt, not a separate debt, as discussed below. The trial court’s order enforcing judgment against Mr. Norris’s community liability is reviewed de novo.

³ Mr. Norris did not raise the issue of personal jurisdiction within his Answer or at any time prior to HomeStreet’s Motion for Summary Judgment; he first raised the issue within his opposition brief to HomeStreet’s Motion for Summary Judgment. See CP 26-28; CP 42.

See Elliott v. Dep't of Labor & Indus., 151 Wn. App. 442, 446, 213 P.3d 44 (2009). Interpretation of an ambiguous contract is a question of law. Absher Constr. Co. v. Kent School District No. 415, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995). "If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision." Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

1. The Terms of the Guaranties Expressly Bind Mr. Norris's Community Property.

Mr. Norris's contention that his debts under the Guaranties are separate debts, not community debts, is untenable because the express language of the Guaranties states otherwise. The terms of the Guaranties both expressly provide that Mr. Norris's obligations thereunder were incurred on behalf of and would bind his marital community:

If any Guarantor is an individual and resides in a community property state, then, unless such Guarantor's obligations hereunder are otherwise limited by a specific annotation either on the first page of this Guaranty or following Guarantor's signature below, *any married person who signs this Guaranty warrants that it is an obligation incurred on behalf of his or her marital community and agrees that this Guaranty shall bind the marital community.*

CP 150, 258 at ¶11 (emphasis added). Absent a "specific annotation" indicating otherwise, Mr. Norris therefore expressly acknowledged and agreed to bind his marital community under the Guaranty. *Id.* No such

annotation exists; in fact, Mr. Norris expressly signed the Guaranties “individually and on behalf of the marital community.” CP 151, 258.

The language included in the Guaranties that bound Mr. Norris’s marital community is enforceable under Washington law, which enforces contractual agreements to bind the marital agreement except under limited exceptions where the spouse’s consent is required. See RCW 26.16.030. The exceptions requiring the spouse’s consent include, among others, the giving away of community property, the sale of certain community property (such as household goods), or the purchasing or encumbering of community real property. Id. Here, Mr. Norris’s action in signing the Guaranty on behalf of the marital community does not fit within any of these exceptions, and the Guaranties therefore bind his marital community even if his spouse did not assent to the agreement. Mr. Norris signed the Guaranties in order to support and ensure repayment of various commercial loans from HomeStreet to his companies, Forest Ridge and Norris Homes; the Guaranties thus do not involve a gift, do not involve the sale of household goods or other community property, and are not for the purchase of community real property. CP 147-51, 255-59. Nor do the Guaranties fit within any other listed exception. See RCW 26.16.030. Accordingly, Mr. Norris’s contractual agreement to bind the marital

community is valid and enforceable under Washington law regardless of whether his spouse expressly consented.

Appellant's brief cites the Washington Supreme Court's decision in Nichols Hills Bank v. McCool, 104 Wn.2d 78, 81, 701 P.2d 1114, 1116 (1985), but this case is easily distinguishable. In Nichols Hills, the court rejected a bank's attempt to execute against community property on the basis of a guaranty made by the husband, without the wife's signature. The Court held that the consent of the spouse was required because the guaranty was a "gift of community credit"; it was made on the behalf of the couple's son "solely out of parental affection" without consideration. Id. at 81. Gifts of community property require the express consent of both spouses. RCW 26.16.030(2).

Here, on the other hand, the Guaranties cannot possibly constitute a "gift of community." When Mr. Norris signed the Guaranties in support of various loans, he did not do so as a gift; he did it to benefit himself and his community, believing that it was in his own self-interest, the interest of his companies, and the interest of his marital community (which benefited from the financial success of Mr. Norris's companies). *See* Warn/Williams & Associates v. Quick Check, Inc., 114 Wn. App. 1049 (2002) (finding that signing of guaranty did not constitute a gift under RCW 26.16.030: "When Joseph Crupi signed the guaranty, he did not

make a ‘gift’ of community credit. He did it so that Quick Check would have a place to conduct its business, thereby bringing a material economic benefit to the community.”). No court has ever held that a guaranty signed for obvious business purposes constitutes a “gift” under RCW 26.16.030, and the marital community of Mr. Norris is therefore bound by the Guaranties.

The other case cited in Appellant’s brief, Colorado Nat’l Bank v. Merlino, 35 Wn. App. 610, 668 P.2d 1304 (1983), is similarly distinguishable. In Merlino, the defendant purchased land in Colorado without the knowledge of his wife, and the appellate court affirmed that the promissory note securing the land transaction constituted a separate debt, not a community debt. Id. at 611, 616. As stated by the court, the debt is not considered a community debt because the purchase of real property falls into one of the six exceptions within RCW 26.16.030:

Here, the community presumption has been reversed by statute when an obligation is incurred by one spouse for the purchase of real property. RCW 26.16.030(4) prevents one spouse from binding the community to a real property purchase without the other spouse joining in the transaction of purchase.

Id. at 616. Here, on the other hand, the Guaranties are not a contract to purchase real property; under the Guaranties, Mr. Norris simply assumed the responsibility of assuring payment or fulfillment of another’s debts

(i.e., the loan obligations of Forest Ridge and Norris Homes). See CP 147-51.CP 255-59. Absent an obligation therein to purchase real property, the Guaranties thus do not fit within the exception under RCW 26.16.030(4).

Accordingly, by its express language and enforceable terms, the Guaranties are community debts, not separate debts, and the obligations of the Guaranties do not fit within any of the stated exceptions under RCW 26.16.30. The trial court's ruling should be affirmed.

2. *Alternatively, the Debts Under the Guaranties Are Community Debts, Not Separate Debts, Because Mr. Norris Neglected to Provide Clear and Convincing Evidence Rebutting the Presumption of Community Liability.*

As discussed above, the Guaranties expressly bound Mr. Norris community property, and such terms are enforceable. Nevertheless, even assuming *arguendo* that the Guaranties did not expressly bind the marital community, Mr. Norris's liability under the Guaranties would still constitute a community debt, not a separate debt. All debts incurred by either spouse during marriage are presumed to be community debts. Oil Heat Co. of Port Angeles, Inc. v. Sweeney, 26 Wn. App. 351, 353, 613 P.2d 169 (1980). "A guaranty obligation of one spouse creates a presumption of community liability." Grayson v. Platis, 95 Wn. App. 824, 836, 978 P.2d 1105 (1999). This presumption can only be overcome by

“clear and convincing evidence” to the contrary. Id.; see also Beyers v. Moore, 45 Wn.2d 68, 70, 272 P.2d 626 (1954). The burden of overcoming this presumption rests on the proponent of the limited liability. Beyers, 45 Wn. 2d at 70; see also Pacific Gamble Robinson Co. v. Lapp, 95 Wn.2d 341, 344, 622 P.2d 850 (1980).

The presumption of community debt may be rebutted by a showing that the spouse incurring the debt or obligation did so without "the intention or expectation... that a material economic benefit would accrue to the community." Bank of Washington v. Hilltop Shakemill, Inc., 26 Wn. App. 943, 947, 614 P.2d 1319 (1980); see also Malotte v. Gorton, 75 Wn.2d 306, 308, 450 P.2d 820 (1969); Beyers, 45 Wn.2d at 70 (“If there was any expectation of benefit to the community from the transaction at the time the note was signed by respondent Eberli, it was a community obligation.”) Washington courts interpret such “benefit” quite broadly. So long as the community expected a benefit to result from the transaction—any benefit whatsoever, of any quantity—then the resulting debt is considered to be a community debt:

If some community property benefit, direct or indirect, can be found, the presumption of community liability will not be overcome.... There has been almost a total erosion of the holding (and the apprehensions it raised) that a community liability could not be found in transactions principally of benefit to third persons, such as obligations arising through accommodation endorsement, guaranty,

or suretyship; *the dimensions of 'community debt' have become, in effect, extremely broad.*

Harry M. Cross, "The Community Property Law in Washington (Revised 1985)," 61 Wash. L.Rev. 13, 119-20 (1986) (emphasis added).⁴

In order to avert judgment against the marital community, Mr. Norris must therefore present clear and convincing evidence establishing that the debts contracted by Mr. Norris under the Guaranties are (i) in no way connected with the community property and (ii) the community did not receive, or expect to receive, any benefit from the Guaranties. Mr. Norris, however, presents no such evidence. Although Mr. Norris contends that a prenuptial agreement renders Forest Ridge and Norris Homes as separate property, he does not present any evidence concerning the status and nature of *income* he received from these companies subsequent to his marriage. See CP 44-45.⁵ A court must uphold the community debt presumption if the marital community is receiving and/or

⁴ The absence of evidence from Mr. Norris materially contrasts, for example, with the evidence provided by the defendant in Union Securities Co. v. Smith, 93 Wn. 115, 160 Pac. 304 (1916). In Union, the defendant guaranteed the indebtedness of his company to a lender. Id. at 116. After being sued by the lender, the defendant provided evidence that not only was the company his separate property *but the income he earned from the company was also his separate property*. Id. at 118 (noting evidence of prior agreement between spouses "that whatever he acquired and his personal earnings should be his"). Since the community thus did not benefit in any manner from the company, the court found that the husband's act of signing the guaranty was not for the benefit of the community.

⁵ Washington appellate courts expressly acknowledge Mr. Cross's expertise in community property law. See, supra, fn. 2.

commingling funds generated by Norris Homes and Forest Ridge, or if the marital community is otherwise benefiting from the businesses (through receipt of income, property benefits, insurances benefits, employment of the spouse, purchase of property or real property, or other such benefits). Mr. Norris presents no evidence indicating otherwise, or any evidence indicating how the marital community was otherwise supported.

Without presenting any evidence concerning the income from Forest Ridge and Norris Homes (and why the community did not benefit from such income), Mr. Norris cannot overcome the presumption that the expected benefit to these companies from the Guaranties also extended to Mr. Norris's community property. The debts incurred by Mr. Norris under the Guaranties thus constitute community debts, not separate debts, and Mr. Norris's argument therefore fails.⁶

Furthermore, the Court must also reject Mr. Norris's argument due to the simple fact that—although he asserts that the pre-nuptial agreement

⁶ In his brief, Mr. Norris wrongly implies that the debts under the Guaranties are not community debts simply because Forest Ridge and Norris Homes are purportedly his sole and separate property. (App.'s Br. at 10-11.) This argument, however, ignores the fundamental nature of a third-party guaranty, especially in contrast with the nature of the underlying loan agreement. When Mr. Norris entered into the loan agreements with HomeStreet on behalf of Norris Homes and Forest Ridge, such debt may constitute a separate debt, not a community debt, under the purported terms of the prenuptial agreement. The Guaranties, on the other hand, are different; Mr. Norris signed them personally and not on behalf of his corporation. Indeed, that was the inherent purpose of the Guarantors: for someone *other* than Forest Ridge and Norris Homes to be held liable for certain debts.

renders the debt a separate debt— Mr. Norris *neglected to actually provide the prenuptial agreement to the trial court*. The only evidence produced by Mr. Norris is an uncorroborated declaration that came from Mr. Norris himself, without any supporting evidence or documentation. See CP 44-45. The Washington Supreme Court has held that such evidence is insufficient to defeat the presumption that debts incurred during marriage are community debts:

The evidence in support of the finding falls from the lips of [the defendant] alone. It is entirely uncorroborated. Such evidence, coming as it does from a vitally interested witness, is not necessarily to be accepted at its face value. ... To our minds, the evidence does not support the finding that the notes were not community obligations of M. D. Dungan and wife. It lacks that clear and convincing quality that is necessary to overcome the presumption that notes executed by the husband alone are community obligations.

Morrison v. Dungan, 182 Wn. 503, 503-04, 47 P.2d 988 (1935); see also Malotte, 75 Wn.2d at 309 (finding that uncorroborated testimony of husband and his wife that there was no benefit to the community from transaction did not overcome presumption that he was acting on behalf of the community in signing note).

Accordingly, absent any admissible evidence whatsoever rebutting the presumption that debts incurred during marriage are community

debts—let alone the “clear and convincing” evidence required—the trial court could not have ruled otherwise. Stated the trial court:

[T]he Court is not in a position to accept the bare conclusions set forth in Mr. Norris' declaration that the prenuptial agreement, wherever it is and whatever it says, gives him separate property interest in Norris Homes and that, therefore, by executing the guarantees, he wasn't really binding the community, he was simply binding himself because of this prenuptial agreement. Again, the total absence of evidence supporting these assertions is what fails to create a genuine issue of material fact here. I don't know what the prenuptial agreement says. I cannot accept his bare assessment or statement of what it says and what it means.

RP 23.

For any and all of those reasons, Mr. Norris failed to present clear and convincing evidence to overcome the presumption that his community property benefited, or intended to benefit, from the Guaranties.

HomeStreet is therefore entitled to judgment against Mr. Norris's marital community, and the trial court's ruling should be affirmed.

C. The Trial Court Did Not Abuse its Discretion in Rejecting Mr. Norris's Sur-Reply.

1. *The Sur-Reply Improperly Contained New Arguments and Is Not Permitted Without Leave.*

The trial court acted within its discretion in striking the Sur-Reply submitted by Mr. Norris, finding that (i) Mr. Norris neglected to obtain leave from the court in order to file a sur-reply and (ii) the submission

improperly raised new legal arguments that Mr. Norris neglected to include in his response brief. A trial court's ruling “on whether to accept an untimely response or to strike it as untimely is reviewed for an abuse of discretion.” Davies v. Holy Family Hosp., 144 Wn. App. 483, 499, 183 P.3d 283 (2008). Discretion is abused only when it is exercised “on untenable grounds or for untenable reasons.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The Court had two distinct grounds for striking Mr. Norris’s Sur-Reply. First, neither the Washington Civil Rules nor King County Court’s Local Rules provide the right to file a sur-reply, and both CR 56(c) and KCLR 7(b)(4)(F) require the party opposing a motion for summary judgment to file any responding documents no later than 11 days before the summary judgment hearing. See CR 56(c); KCLR 7(b)(4)(F). Here, Mr. Norris filed a pleading that is not permitted under the applicable rules, did so a mere *two* days prior to the summary judgment hearing, and, additionally, neglected to seek leave to file the submission. See CP 55-57. The Court therefore had reasonable grounds to reject the submission, as it set forth in its ruling:

I'm granting the motion to strike the supplemental response. The court rules do not allow a supplemental response, neither the general civil rules nor the local rules permit it. When it is permitted on rare occasions, it is only permitted with prior approval of the Court.

RP 3.

Additionally, the trial court found that the Sur-Reply improperly contained new arguments that Mr. Norris neglected to include in his prior brief. Stated the trial court: “The supplemental response is not addressing an issue raised for the first time in the plaintiff’s reply, which is a final reason for striking it.” RP 3. A party is not allowed to bring new arguments raised for the first time that the party could have brought in its earlier brief. Even in jurisdictions where a sur-reply is permitted, leave to file a sur-reply will only be granted to address new matters raised in a reply to which a party would otherwise be unable to respond. United States ex rel. Pogue v. Diabetes Treatment Ctrs. Of America, 238 F.Supp.2d 270, 276-77 (D.D.C. 2002). The matter set forth in the reply must be “truly new.” Id.

Mr. Norris’s Sur-Reply contained a brand new argument concerning the Equal Credit Opportunity Act (“ECOA”) that did not respond to anything specific within HomeStreet’s reply brief and did not attempt to distinguish or rebut a particular case or new argument set forth by HomeStreet. CP 55-57; CP 46-54. Previously, Mr. Norris had already submitted a Response brief that, despite arguing that HomeStreet could not obtain judgment against Mr. Norris’s community property, neglected to include any reference to ECOA. CP 41-42. The Sur-Reply thus set

forth an entirely new argument to support the exact same contention set forth in its response brief: that HomeStreet was not entitled to judgment against his marital property. CP 55-57; 41-42. There was no reason for Mr. Norris to neglect to include the ECOA argument in his response brief, and a new argument raised for the first time in a sur-reply is therefore impermissible.⁷

Accordingly, various grounds existed for striking Mr. Norris's untimely and unnecessary Sur-Reply, and the trial court did not abuse its discretion in doing so.

2. *Regardless, the New Argument Contained in the Sur-Reply is Baseless.*

Additionally, even if the trial court wrongly excluded the Sur-Reply (which it did not), the new argument contained therein is baseless and ineffective against HomeStreet's motion for summary judgment. Mr. Norris alleges that HomeStreet's claim against the marital community is barred under the Equal Credit Opportunity Act and its implementation under the Federal Reserve Board's Regulation B, 12 C.F.R. § 202

⁷ In his briefing, Mr. Norris claims that it was "unclear from the Complaint" whether HomeStreet was seeking judgment against Mr. Norris's marital community. See App.'s Br. at 11. The caption of the Complaint, however, expressly states Mr. Norris was sued "individually and on behalf of his marital community." CP 1. Moreover, Mr. Norris had enough awareness to raise the marital community issue within his initial response brief. CP 41-42.

(collectively, "ECOA"). This argument is without merit and inapplicable to HomeStreet's summary judgment motion on various grounds.

First, Mr. Norris argument cannot stand because he neglected to include the ECOA defense within the affirmative defenses included in his Answer. CP 28. In the Answer, a party must set forth specific defenses listed within CR 8(c) along with "any other matter constituting an avoidance or affirmative defense." CR 8(c). Affirmative defenses that are not properly pleaded are generally deemed waived. *Rainier Nat'l Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153 (1981). Here, Mr. Norris did not include ECOA among his listed affirmative defenses, nor did he even plead related affirmative defenses such as estoppel or illegality. See CP 28. He therefore waived his right to raise ECOA as a defense and, even if the trial court had admitted the Sur-Reply, he thus could not have raised this argument during the summary judgment hearing.

Second, even if Mr. Norris had included an affirmative defense related to ECOA, such an affirmative defense is not permitted in an action to collect a debt. A violation of ECOA must be brought as a separate, independent claim or counterclaim and cannot be used as a defense against a guaranty or defaulted loan. Remedies under ECOA are expressly limited to "equitable and declaratory relief," 15 U.S.C. §1691e(c), and the invalidation of a guaranty is therefore not permitted as a remedy for an

ECOA violation. See F.D.I.C. v. 32 Edwardsville Inc., 873 F. Supp. 1474, 1480 (D. Kan. 1995) ("ECOA does not provide for the invalidation of a guaranty as a remedy for an ECOA violation, and defensive use of the ECOA in this case is therefore impermissible."); Diamond v. Union Bank & Trust, 776 F. Supp. 542, 544 (N.D. Okla. 1991) ("[T]here is no authority, in statutory language or case law, for the proposition that a violation of the ECOA renders an instrument void."). Accordingly, courts generally do not allow a defendant to raise an ECOA claim as an affirmative defense in an action to collect a debt; the proper method under ECOA is instead via a claim or counterclaim. See, e.g., FDIC, 873 at 1480 (finding that ECOA claims cannot be raised as affirmative defenses); Riggs Nat'l Bank of Washington, D.C. v. Linch, 829 F.Supp. 163, 169 (E.D. Va. 1993) (holding that ECOA violation cannot be asserted as affirmative defense); CMF Virginia Land, L.P. v. Brinson, 806 F.Supp. 90, 95 (E.D. Va. 1992) (stating that ECOA does not "afford relief by way of an affirmative defense. A counterclaim certainly can be premised upon a violation of the ECOA, but such a violation cannot be alleged to avoid basic liability on the underlying debt."). But see Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28 (3d Cir. 1995) (finding exception where lender brings suit to recover on a guarantee illegally procured through marital discrimination). Mr. Norris's purported defense under

ECOA is therefore procedurally untenable and has no bearing against the force and effect of the Guaranties. If Mr. Norris alleges a violation under ECOA, then he must bring such allegation as an independent claim or counterclaim; an affirmative defense under ECOA is not permitted.

Third, even if procedurally permitted, Mr. Norris's argument under ECOA is wholly irrelevant, having no bearing on whether the Guaranties are applicable against Mr. Norris's marital community. Under ECOA, it is "unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction" on the basis of the applicant's marital status. 15 U.S.C. § 1691. The purpose of ECOA is "to eradicate credit discrimination against women," especially married women (i.e., requiring husbands' signatures for credit). Anderson v. United Finance Co., 666 F.2d 1274, 1277 (9th Cir. 1982). With that purpose, ECOA sets forth that "a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d). In other words, if an applicant is qualified for a loan, or if a credit-worthy applicant guarantees a loan, a lender cannot insist that the applicant's spouse also assume liability. See id.

Here, on the other hand, HomeStreet did not require that Mr. Norris's spouse provide any additional liability or collateral beyond what her husband had already provided. ECOA is relevant to precluding a lender from requiring an applicant's spouse to guarantee her separate property in support of the applicant's loan request; ECOA's provisions, however, do not affect the property *already pledged by the applicant*. See 12 C.F.R. § 202.7(d). For example, in the lone case cited by Mr. Norris, the ECOA violation at issue only affected the "personal liability" of the spouse and the spouse's separate property; it did not involve community property or any other property that did not require the spouse's signature. See Silverman, 51 F.3d at 33. Indeed, Mr. Norris fails to provide any cited decision where ECOA's provisions affected community liability. See App.'s Br. at 12-14.

Moreover, ECOA is only relevant in situations where the lender *needs* the spouse's signature in order to bind the property in question; in situations where the spouse's signature is not necessary, ECOA is not applicable. See, e.g., 12 C.F.R. § 202.7(d)(2)-(5). Washington law does not require the spouse's signature in order to incur liability to the community property, rendering ECOA inapplicable with respect to community property. See RCW 26.16.030 ("Either spouse or either domestic partner, acting alone, may manage and control community

property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property...”). In fact, even if Washington law required a spouse’s signature in order to bind community property, ECOA permits a lender to require a spouse’s signature if necessary make to “to make the community property available to satisfy the debt in the event of default.” 12 C.F.R. § 202.7(d)(2). See also 12 C.F.R. § 202.7(d)(3) (stating that a lender may require a spouse’s signature if necessary “to make the property being offered as security available to satisfy the debt in the event of default”). The provisions of ECOA are therefore irrelevant to the Guaranties and enforcement against Mr. Norris’s marital community.

Fourth, the ECOA violations alleged by Mr. Norris are not available to guarantors because a guarantor is not an “applicant” for a loan and thus cannot claim to be discriminated against. See Moran Foods, Inc. v. Mid-Atlantic Market Devel. Co., 476 F.3d 436 (7th Cir. 2007) (finding that a guarantor is not subject to ECOA’s protections). ECOA expressly prohibits discrimination against “applicants” on the basis of, among other things, gender or marital status, but the term “applicant” is not defined within the statute. 15 U.S.C. § 1691(a). Although the Federal Reserve advises that the term “applicant” encompasses guarantors, see 12 C.F.R. §§ 202.2(e), 202.7(d), the Seventh Circuit disagreed and held that the term

“applicant” cannot reasonably be stretched to include guarantors. Moran, 476 F.3d at 441. The court noted that a guarantor is not an “applicant” because a guarantor does not, by definition, apply for anything. Id. Also, logically, a guarantor cannot be denied credit for which he or she did not apply, and thus it is difficult to conceive how a lender can discriminate against a guarantor. Id.

Courts generally defer to administrative regulations when statutory language is ambiguous, but the Seventh Circuit found that there is nothing inherently ambiguous about the term “applicant” within ECOA; as a result, interpreting that term to mean something other than what it says—and encompass guarantors—is unreasonable. Id. Another federal court recently agreed with the decision in Moran and held similarly against a guarantor:

I find the reasoning of the Seventh Circuit in Moran Foods to be persuasive... Extending the protections of the ECOA to someone in [the Guarantor’s] position expands the ECOA beyond its intended purpose and leads to circular and illogical results. [The Guarantor] cannot show discrimination by virtue of the fact that she chose to guarantee her husband’s business loan. She was never denied anything, and there is no logical remedy that would make her whole.

Champion Bank v. Reg'l Dev't, LLC, No. 08CV1807, 2009 WL 1351122, at * 3 (E.D. Mo. May 13, 2009).⁸ Because Mr. Norris, as the guarantor, is not considered an “applicant” under the loan, the provisions of ECOA are therefore not applicable to him and the Guaranties.

For any and all of those reasons, Mr. Norris’s argument under ECOA is therefore baseless, irrelevant, and procedurally ineffective with respect to enforcement of the Guaranties against his marital community. The trial court did not abuse its discretion in rejecting Mr. Norris’s Sur-Reply, but, even if it had accepted it, Mr. Norris’s new argument is unpersuasive and would not alter the court’s ultimate findings.

D. The Trial Court Did Not Abuse its Discretion in Denying Leave to Amend Mr. Norris’s Answer.

The trial court properly denied Mr. Norris’s request for leave to amend his Answer since he did not comply with the express requirements of CR 15(a) and neglected to file a notice of motion. The decision to grant or deny leave to amend pleadings is reserved to the discretion of the trial court. Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A trial court abuses its discretion when its decisions are manifestly

⁸ Unpublished opinions are permitted under the law of the Eight Circuit provided that the opinion is issued on or after January 1, 2007. See 8th Cir. R. 32.1A.

unreasonable or based on untenable grounds or reasons. Travis v. Tacoma Pub. Sch. Dist., 120 Wn. App. 542, 554, 85 P.3d 959 (2004).

CR 15(a) expressly required that Mr. Norris's request for leave to amend his Answer include "a copy of the proposed amended pleading."

CR 15(a) states as follows:

If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated 'proposed and unsigned, shall be attached to the motion.

Mr. Norris, however, did not include a copy of such pleading with his request for leave, and the trial court therefore had tenable grounds to deny the leave request. See RP 3-4.

Additionally, the trial court also rejected Mr. Norris's motion for leave because Mr. Norris neglected to properly note the motion for consideration by the trial court. Mr. Norris submitted a supplemental brief to the Court which, in addition to a sur-reply, set forth a "request for leave to amend." CP 55. Mr. Norris, however, never filed a Notice of Motion for his request and thus neglected to actually note the motion for hearing, which meant that such motion was never properly in front of the court. Id. Since he filed the request only two days prior to the hearing, Mr. Norris also erred by neglecting to file a motion to shorten time in order to permit the court to hear the request on an accelerated basis. See id. The trial

court thus had tenable grounds to find, as it did, that the leave request was “not properly noted” and thus subject to rejection. See RP 3.

Moreover, even if the trial court had permitted Mr. Norris to amend its Answer to include the ECOA affirmative defense, the proposed amendment would not have affected the trial court’s summary judgment ruling. A denial of a motion for leave to amend does not constitute an abuse of discretion if the proposed amendment was futile. Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 729, 189 P.3d 168 (2008). Here, Mr. Norris’s proposed amendment was futile on two separate grounds. First, Mr. Norris only raised the ECOA argument in its Sur-Reply, which the Court rejected as improper and untimely. RP 3; see also CP 55-57. Without the Sur-Reply, Mr. Norris could not have raised the ECOA argument in defense of HomeStreet’s summary judgment even if it had amended its Answer. Absent any argument at the summary judgment hearing with respect to the ECOA defense, an amendment of the Answer could have no affect on the summary judgment motion at issue and would thus be futile.

Second, Mr. Norris’s affirmative defense under ECOA has no bearing upon HomeStreet’s claims and judgment upon Mr. Norris’s community property. As discussed previously, Mr. Norris misconstrues ECOA’s provisions, which are irrelevant to the salient issues, and his

allegations under ECOA are also procedurally defective. See, supra, Section C.2 at pp. 27-29.

For any and all of those reasons, the trial court did not abuse its discretion in denying Mr. Norris's request for leave to amend his Answer.

E. Mr. Norris Did Not Provide Any Evidence Disputing the “Fair Value” of the Properties, and Summary Judgment is Therefore Appropriate.

The trial court properly determined that, in evaluating the “fair value” of the sold properties under RCW 61.24.100(5), no disputed issue of fact existed with respect to the appraised values of these properties. Questions of statutory interpretation are reviewed de novo. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Mr. Norris neglected to provide *any* evidence disputing HomeStreet's contemporaneous, appraised values of these properties, and, absent such evidence, no disputed issue of fact existed. HomeStreet established the fair values of these properties via independent appraisals of the real property collateral, along with the subsequent review and evaluation performed by HomeStreet's in-house appraisers. CP 78 at ¶7; CP 81-82 at ¶¶19-25; CP 84 at ¶¶31-34; CP 152-237; CP 260-666; CP 667-948. These appraisals and reviews were conducted by experienced, professional real estate appraisers in accordance with USPAP, and Mr. Norris provided no reason (let alone any evidence) to dispute the valuations contained therein. Id.

A dispute is only genuine if a fact finder viewing the evidence could return a verdict for the non-moving party. Reynolds v. Hicks, 134 Wn.2d 491, 951 P.2d 761 (1998). “Mere unsupported conclusory allegations and argumentative assertions will not defeat summary judgment.” Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wn. App. 137, 141-142, 890 P.2d 1071 (1995). In order to establish a genuine issue of disputed material fact, the non-moving party “must furnish the factual evidence upon which he relies,” rather than merely asserting that unresolved issues remain. Bates v. Grace United Methodist Church, 12 Wn. App. 111, 115-16, 529 P.2d 466 (1974).

Mr. Norris cannot defeat summary judgment simply by stating, without any supporting evidence, that he disputes the appraised value of these properties; he instead “must furnish factual evidence” for doubting the accuracy of these appraisals. See Bates, 12 Wn. App. at 115-16. Mr. Norris, however, did no such thing. See CP 38-45. Absent any evidence disputing the validity or methodologies of the appraisals submitted by HomeStreet, reasonable minds could not disagree that the appraised values of these properties constitutes their fair values under RCW 61.24.100(5). Without any evidence to the contrary, the Court therefore ruled properly when it held that HomeStreet conclusively established the fair value of the subject properties under RCW 61.24.100(5). See RP 21-22.

Additionally, although Mr. Norris contends in his brief that he is entitled under RCW 61.24.100 to a fair value determination by the trial court, he already received such a determination from the trial court. The language under RCW 61.24.100(5) merely states that the judge must “determine” the fair value of the property; the statute does not set forth that a separate, independent hearing is required, or that such determination cannot be conducted in conjunction with a summary judgment motion. Here, the trial court weighed the submitted evidence pertaining to the fair value of the property and, based upon such evidence, determined that the appraised value established the “fair value” of the property under RCW 61.24.100. Stated the court in its ruling:

The fair market value in the Court's view was appropriately established by both the outside evaluators and the inside -- that is the evaluator and appraiser employed by HomeStreet Bank. The benefit of any doubt was given to the defendant in terms of giving him any higher appraisal; that is, if there was any disagreement in the assessed valuation and the appraised evaluation between the outside and the inside appraiser. There is nothing in the record that in the Court's view creates any genuine issue of material fact as to the appropriate fair market value that was established by those appraisals. There is no bases in the record before the Court at this point to doubt the credibility of the appraisals or the appraisers themselves. The methodology used appears appropriate and the Court is accepting at this point the appraisal values reflected in those appraisals.

RP 21-22. The trial court's order also sets forth that the judgment is “calculated by the Court based upon the fair value of the property sold at

the trustee's sale under RCW 61.24.100(5)." CP 75. The review and evidentiary analysis conducted by the trial court in determining the "fair value" of the properties is exactly what is contemplated by the statute, and Mr. Norris's request for an additional, separate determination is unwarranted.

Accordingly, Mr. Norris fails to establish the existence of a disputed issue of material fact, and summary judgment is appropriate. The trial court properly examined the evidence supporting the fair value of the properties in question and, finding no evidence to the contrary, reasonably determined the fair values of the properties under RCW 61.24.100(5). The trial court's ruling should be affirmed.

F. The Trial Court Did Not Err in Failing to Grant a Continuance to Mr. Norris.

The trial court properly acted within its discretion in denying Mr. Norris's request for a continuance under CR 56(f). A trial court has broad discretion to grant or deny a continuance; the court's decision will only be overturned for "manifest abuse of discretion." Coggle v. Snow, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). Discretion is abused when it is exercised "on untenable grounds or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A court may deny a motion for a continuance when '(1) the requesting party does not

offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” Pitzer v. Union Bank of California, 141 Wn.2d 539, 556, 9 P.3d 805, 813 - 814 (2000) (quoting Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)).

Here, under the factors set forth in Pitzer and the absence of any supported evidence offered by Mr. Norris, multiple grounds existed to support the trial court’s ruling that Mr. Norris was not entitled to additional time under CR 56(f). These grounds are discussed below in turn.

1. Mr. Norris Did Not Provide Affidavits In Support of Its Continuance Request.

Within its response to HomeStreet’s summary judgment motion, Mr. Norris requested that the trial court grant a continuance under CR 56(f) in order to “give defendant an opportunity to present evidence on the ‘fair value’ of the properties” at issue. CP 41. Mr. Norris, however, neglected to provide any affidavits in support of his request, nor did he provide any evidence indicating why he needed additional time or why he was unable to previously obtain the information that he sought. Id. A continuance under CR 56(f) is only appropriate upon a showing by

“*affidavits of a party opposing the motion* that he cannot, for the reasons stated, present by affidavit facts essential to justify his opposition.” CR 56(f) (emphasis added). If a party needs additional time in order to present evidence supporting his opposition to a summary judgment motion, he must therefore present an affidavit supporting such contention. Id.

Since Mr. Norris did not submit any affidavits (or any other sworn testimony) in support of his continuance request, he did not comply with the minimum requirements of CR 56(f). The trial court therefore had tenable grounds to deny Mr. Norris’s request, and the trial court did not abuse the discretion afforded it.

2. *Mr. Norris Did Not Offer a “Good Reason” for His Delay in Obtaining the Desired Evidence.*

Additionally, the trial court also had sufficient grounds to deny Mr. Norris’s continuance request because, under the first Pitzer factor, Mr. Norris failed to provide a “good reason” for its inability to obtain the desired evidence sooner. See Pitzer, 141 Wn.2d at 556. The appraised value of the Mr. Norris’s collateral was a central issue in establishing the extent of Mr. Norris’s liability, and yet—even after more than three months had passed since being served with HomeStreet’s lawsuit—Mr. Norris apparently took no action whatsoever to investigate or challenge

the appraised property values or ascertain whether the foreclosure sale bids constituted “fair value.” See CP 41.

Indeed, even before HomeStreet filed its lawsuit, Mr. Norris knew for a considerable period of time that the extent of his liability to HomeStreet hinged upon the appraised value of Mr. Norris’s collateral. HomeStreet informed Mr. Norris *more than a year prior to the summary judgment hearing* that he would be held liable for the deficiency amounts remaining after the collateral’s sale. CP 77, 79-80 at ¶¶5, 16. Mr. Norris had long known that his collateral was being sold due to his companies’ debts, had long known of the appraised value and actual sale of this collateral, and had long known of the resulting deficiency and its calculation based upon the properties’ appraised values. Id. Nevertheless, Mr. Norris still had purportedly taken no action to evaluate or dispute the appraised property values or whether the foreclosure sale bids constituted “fair value.” See CP 41.

Accordingly, the Court acted within its discretion in finding that Mr. Norris did not have a reasonable explanation for his purported delay in evaluating the value of his former properties. Stated the Court:

It's not at this point apparent to the Court why there's been a delay in seeking the information. The fair value assessment has been an issue, obviously, since this matter was pursued by the bank in terms of the foreclosures and has certainly been, if not the principal issue, perhaps the

only issue remaining in the case at this stage of the proceedings. There is no basis, in the Court's view, for why this information hasn't previously been sought.

RP 4.

The Court's finding that Mr. Norris did not adequately explain its failure to seek information sooner is clearly not a "manifest abuse of discretion" or based upon "tenable grounds." The trial court's denial of Mr. Norris's CR 56(f) request therefore was within its discretion and should be affirmed.

3. *Mr. Norris Did Not State What Evidence Would Be Established Through the Additional Discovery, or Whether Such Evidence Was Likely to Raise a Genuine Issue of Material Fact.*

Mr. Norris also did not meet the second and third factors under *Pitzer*, which requires that the movant (i) set forth the desired evidence that it seeks to obtain through additional discovery and (ii) show that the desired evidence will raise a genuine issue of material fact. *Pitzer*, 141 Wn.2d at 556. Although Mr. Norris sought to "present evidence on the 'fair value' of the properties," he failed to provide any further explanation (or evidence) as to the type, form, or source of such evidence. *See* CP 41. Lacking the requisite level of specificity, the trial court therefore found that, under the second *Pitzer* fact, "there's no evidence before the Court about what would be established if the Court were to grant this additional

time through discovery.” RP 4. Such a finding is based upon reasonable ground and is not an abuse of discretion.

Moreover, Mr. Norris neglected to provide any basis for believing that additional time would ultimately yield evidence disputing the appraised values of the properties. Each of the properties at issue had already been appraised by an independent, experienced real estate appraiser within six months of the foreclosure date and in accordance with USPAP. See CP 78 at ¶7; CP 81-82 at ¶¶19-25; CP 84 at ¶¶31-34; CP 152-237; CP 260-666; CP 667-948. Mr. Norris neglected to provide any evidence indicating that these appraisals were flawed or questionable in any way. CP 41. The trial court thus had a reasonable basis for finding that additional discovery would not uncover contradictory evidence:

And, finally, related to that factor under Pitzer, there is no evidence that the value would raise a genuine issue of material fact; that is, there is no expectation that anyone, given how the value was obtained, as set forth in the pleadings from the plaintiff, is going to offer a differing opinion as to the fair value.

RP 4-5.

For any and all of those reasons, the trial court had tenable grounds to deny Mr. Norris’s request for continuance under CR 56(f), and such denial does not constitute an abuse of discretion.

CONCLUSION

For the various reasons set forth above, the Court should affirm the rulings and judgment of the trial court in this matter.

Respectfully submitted this 26th day of January, 2011.

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CERTIFICATE OF SERVICE

I certify that on Wednesday, January 26, 2011, service of a true and complete copy of the foregoing Respondent's Brief was made on the following attorney of record for Mr. Norris in this case:

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by delivering same via electronic means and first class mail to the above listed address for said attorney.

DATED this 26th day of January, 2011.

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