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No. 69424-3-1

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

TAN-E, LLC, a Washington limited liability company, KING HAIN LIN, an individual, TSUN-HAIN LIN, an individual; WEN-YEN LIN and YEH-YOAN CHENG LIN and their marital community,

Appellants,

v.

CHRISTOPHER KOH and DAVID KOH, as trustees of CD TRUST, a Trust organized and existing under the laws of the State of Washington

Respondents.

CO. 111 4-11-11
NO. 69424-3-1
I/AUG 11 10:51 AM '11

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting CD Trust's motion for partial summary judgment on its claim under the May 1, 2007 Note, despite genuine issues of material fact regarding affirmative defenses and setoffs.
2. The trial court erred in awarding CD Trust default interest commencing on June 1, 2007 to April 30, 2008, because CD Trust waived and is estopped from asserting default based upon its June 8, 2007 letter.
3. The trial court erred in granting CD Trust's summary judgment motion to dismiss the first counterclaim for breach of contract, where genuine issues of material fact exist regarding CD Trust's agreement to loan \$1,000,000 under the August 31, 2007 Note.
4. The trial court erred in granting CD Trust's summary judgment motion to dismiss defendants' second counterclaim for fraud and misrepresentation because there are genuine issues of material fact.
5. The trial court erred in granting CD Trust's summary judgment motion to dismiss the third counterclaim for breach of the duty of good faith, the declarations and evidence create genuine issues of material fact.
6. The trial court erred in granting CD Trust's summary judgment motion to dismiss defendants' fourth counterclaim for unjust enrichment.
7. The trial court err in granting CD Trust's motion for partial summary judgment to dismiss the fifth counterclaim for violations of the

Washington Consumer Protection Act (“CPA”), in light of conflicting genuine issues of material fact relating to unfair and deceptive practices.

8. The trial court erred in denying defendants’ motion for reconsideration of the Order dismissing their counterclaims.

9. The trial court erred in denying the motion for attorney’s fees by defendants Tan-E and Lins, who were substantially prevailing parties.

10. The trial court erred in granting a final judgment in favor of CD Trust for \$1,796,726.50 on the May 1, 2007 Note.

II. ISSUES PRESENTED ON REVIEW

1. Are defendants in foreclosure actions entitled to assert equitable defenses, including setoffs for counterclaims?

2. Did the trial court err in granting CD Trust’s summary judgment motion on the May 1, 2007 Note, due to genuine issues of material fact regarding the affirmative defenses and setoffs arising from CD Trust’s breaches of agreements to loan \$1,000,000 under the August 31, 2007 Note and release \$700,000 under the Withdrawal Agreement?

3. Should CD Trust’s summary judgment motion to dismiss the counterclaim for breach of contract be denied in light of conflicting evidence and genuine issues of material fact relating to CD Trust’s agreements to loan \$1,000,000 and release \$700,000?

4. Does a three-year statute of limitations apply to a breach of contract claim based on the written August 31, 2007 Note, Deed of Trust, and Withdrawal Agreement, and where the counterclaim is asserted as a setoff in a foreclosure action?

5. Does the Statute of Frauds apply to a breach of contract claim if the statutory notice under RCW 19.36.130 is not provided?

6. Is CD Trust estopped from taking inconsistent positions on regarding the second \$1,000,000 loan and the Withdrawal Agreement?

7. Alternatively, can CD Trust be held liable for breach of an oral loan agreement under a theory of promissory estoppel?

8. Did the declarations and evidence submitted by the parties raise genuine issues of material fact relating to CD Trust's breaches of the second \$1,000,000 loan and the Withdrawal Agreement, precluding summary judgment dismissal of the counterclaims for fraud and misrepresentation, breach of the duty of good faith, and violations of the Washington Consumer Protection Act?

9. Are appellants entitled to recover their reasonable attorney's fees as the substantially prevailing parties in the foreclosure action, and in this appeal under RAP 18.1?

10. Should the judgment against Tan-E and Lins be reversed and remanded for trial proceedings, where summary judgment was granted

on the May 1, 2007 Note, despite the existence of genuine issues of material fact regarding affirmative defenses and counterclaims?

III. STATEMENT OF THE CASE

A. The Parties

Appellant Tan-E, LLC (“Tan-E”) is a Washington limited liability company which owns and develops real estate in Sammamish, Washington. (CP 26-42, ¶2).¹ The individual appellants, including King-Hain (Bruce) Lin, Tsun-Hain (Kenneth) Lin, Wen-Yen (Tony) Lin, and Yeh-Yoan Cheng (Jeanne) Lin (collectively, “Lins”) are the managers of Tan-E, their family owned business. (CP 26-42, ¶3). Jeanne Lin acted as the operating manager in Tan-E’s business and dealings with CT Trust.

Respondents David Koh and Christopher Koh are co-trustees of CD Trust, a Washington trust engaged in private lending. (CP 1-13, ¶2).

B. Development of Tan-E Properties

Tan-E owns four properties in Sammamish, King County, Washington: Tax Parcel Nos. 202506-9010 (“Lot 10”), 012505-9081 (“Lot 81”), 202506-9058 (“Lot A”); 202506-9043 (Lot 43).²

¹ For reference purposes, citations to pleadings and declarations include paragraph numbers where applicable. Exhibits to declarations are designated with “Ex”.

² The combined legal description of Lot 10 (Parcel A) and Lot 81 (Lot B) is set forth in paragraph 4.2 of CD Trust’s Amended Complaint. (CP 14-25). Lot A is legally described in paragraph 4.4. Lot 43 (Parcel C) and Lot 1 of TJ Square are referenced in paragraphs 4.6 and 4.8, respectively.

C. CD Trust's Loans to Tan-E and Lins

During 2007, Tan-E and Lins devoted substantial efforts and financial resources to the development of Lot 10 and Lot A, including road and utilities improvements, and construction of a single family residence on Lot A. These development activities required financing.

CD Trust loaned \$1,000,000 to Tan-E under a Promissory Note dated May 1, 2007 ("May 1, 2007 Note"). Lins signed the Note on behalf of Tan-E and as guarantors. (CP 80-133; Ex. 3). Tan-E provided a Deed of Trust on Lots 10 and 81 to secure payment of the Note. (CP 80-133; Ex. 4). Payment of the Note was due on April 30, 2008.

When Tan-E borrowed \$1,000,000 from CD Trust, \$550,000 of the loan funds was immediately applied to pay off a loan that CD Trust made to Tan-E in February, 2006. (CP 340-364, ¶5). The remaining loan funds of \$450,000 were used for road and utilities improvements on Lot 10. (CP 340-364, ¶7). Tan-E's construction plans for the Lot A residence were approved and the City of Sammamish issued a building permit on August 27, 2007. (CP 340-364, ¶7).

Needing additional financing, Jeanne Lin contacted China Trust Bank to request a \$1,000,000 loan for construction on Lot A. (CP 340-364, ¶s 8, 10). Ms. Lin also met with Christopher Koh at CD Trust to

review the building plans, estimated construction costs, and Tan-E's financing needs. (CP 340-364, ¶10).

Christopher Koh had sent a June 8, 2007 letter to Jeanne Lin regarding non-compliance with certain terms of the May 1, 2007 Note. (CP 419-458; Ex. 4). CD Trust continued to engage in discussions with Ms. Lin regarding another loan without taking any action as a result of the June 8, 2007 letter. (See Section C.3). Mr. Koh told Ms. Lin "in no uncertain terms that CD Trust would agree to loan another \$1,000,000 to Tan-E, to be secured with a Deed of Trust on Lot A." CP 340-364, ¶10).

In late August, 2007, CD Trust agreed to loan another \$1,000,000 loan to Tan-E and Lins under a Promissory Note dated August 31, 2007 ("August 31, 2007 Note). (CP 80-133; Ex. 4; CP 63-65, ¶2). Tan-E and Lins executed the August 31, 2007 Note and delivered a Deed of Trust which expressly secured "payment of ...\$1,000,000...in accordance with the terms of promissory note of even date herewith." (CP 80-133, Ex. 5; CP 63-65, ¶2; CP 340-364, ¶11).

The Deed of Trust on Lot A was provided for the August 31, 2007 loan and unrelated to the May 1, 2007 Note. CD Trust did not request an agreement to cross-collateralize properties. In fact, no other agreements were signed before the Deed of Trust was recorded August 31, 2007. (CP 80-133, Ex. 5; CP 63-65, ¶2).

Jeanne Lin expected that the loaned funds of \$1,000,000 loan would be released through escrow after the Deed of Trust was recorded, just like funds from the May 1, 2007 loan were released. (CP 340-364 ¶11, 12). This time, however, CD Trust accepted the Note and Deed of Trust, but failed to deliver the loan funds to the borrowers.

Instead, CD Trust deposited \$1,000,000 into a joint Certificate of Deposit at China First Bank, so that CD Trust could retain control over the funds and prevent withdrawals by the borrower without Christopher Koh's authorization. (CP 63-65 ¶3). Tan-E and Lins could not proceed with construction on Lot A without the loan funds from CD Trust.

On September 4, 2007, after finding out that CD Trust would not release the loan funds of \$1,000,000, Jeanne Lin was forced to sign additional documents just to receive \$150,000 from a separate business loan with China Trust Bank. (CP 63-65, ¶6; CP 340-364, ¶s 12-14).³ Suddenly, the \$1,000,000 that Ms. Lin expected to receive was shaved down to \$150,000, far less than the amount needed for construction of the home. Faced with a Hobson's choice, Ms. Lin reluctantly signed documents to borrow \$150,000 and establish a joint CD account, which

³ China Trust Bank presented a Business Loan Agreement, a Promissory Note, and Assignment of Deposit Account to Jeanne Lin for her signature on September 4, 2007. (CP 340-364, ¶13). The China Trust loan was made to Jeanne Lin, individually, and was fully repaid on November 17, 2007. (CP 340-364 ¶15).

were presented to her on September 4, 2007, (CP 340-364, ¶14).⁴

D. CD Trust's Breach of Withdrawal Agreement

After receiving only \$150,000 from China Trust Bank, Jeanne Lin repeatedly requested CD Trust's release of the loan funds which the August 31, 2007 Note and Deed of Trust were signed. (CP 340-364, ¶16). Although the Deed of Trust on Lot A was specifically provided to secure repayment of the second \$1,000,000 loan, CD Trust demanded more collateral before releasing funds. (CP 340-364, ¶16).

CD Trust required Tan-E and Lins to sign an Agreement Regarding Withdrawal of Funds from Line of Credit dated September 21, 2007 ("Withdrawal Agreement"). (CP 63-65, ¶s 4, 5; CP 340-364; ¶17; CP 80-133, Ex. 6). The Withdrawal Agreement authorized the borrowers to withdraw \$700,000 from the joint Certificate of Deposit in exchange for additional collateral: (a) a Deed of Trust on Lot 1 of TJ Square; and (b) a Statutory Warranty Deed for Lot 43.⁵ (CP ¶63-65, ¶5).

On September 21, 2007, with CD Trust holding the money and the leverage, Tan-E and Lins also signed an Agreement Regarding

⁴ Jeanne Lin had no discussions with CD Trust regarding a joint CD account or \$150,000 line of credit until September 4, 2007, five days after the Note and Deed of Trust were signed. (CP 340-364 ¶11).

⁵ The Withdrawal Agreement required Tan-E and Lins to repay \$300,000 on the May 1, 2007 Note by and to provide a Statutory Warranty Deed for Lot 43 to secure the \$300,000 payment. (CP 80-133, Ex. 6).

Cross-Collateralization and Universal Default (“Universal Default Agreement”). (CP 80-133, Ex. 8). The stated consideration for the Universal Default Agreement was the Withdrawal Agreement, under which CD Trust agreed to release \$700,000. (CP 80-133, Ex. 8).⁶ Lins had no choice but to sign the new agreements just to get CD Trust to release \$700,000 of the \$1,000,000 that it previously agreed to loan. Otherwise, construction would be delayed or completely halted.

Under duress, Lins signed Withdrawal Agreement and Universal Default Agreement, along with the Deed of Trust and Statutory Warranty Deed, and delivered them to CD Trust’s attorney. (CP 340-364 ¶s 17, 18). CD Trust failed to deliver a signed Withdrawal Agreement, and it never released any portion of the \$700,000. (CP 63-65, ¶’s 5, 6). Therefore, Tan-E and Lins alleged that CD Trust cancelled the transaction. (CP 63-65, ¶5, 6; CP 26-42, ¶13; CP 80-133, Ex. 2). CD Trust denied that it cancelled the transaction and finally produced a signed Withdrawal Agreement during Jeanne Lin’s deposition. (CP 623-627, Ex. 1).

Tan-E and Lins sustained substantial damages as a result of the CD Trust’s breaches of its agreements to loan \$1,000,000 under the

⁶ Paragraph 2 of the Universal Default Agreement states: “As consideration for the execution by CD Trust of the Agreement Regarding Withdrawal of Funds From Line of Credit, dated September 21, 2007, it is agreed by the parties as follows: (terms omitted).(CP 80-133; Ex. 7).

August 31, 2007 Note, and to release \$700,000 under the Withdrawal Agreement. (CP 63-65, ¶7). Without access to loan funds of \$1,000,000, Tan-E and Lins were unable to finance construction and finish the home on Lot A, which remains partially completed today. (CP 63-65, ¶7; CP 340-364 ¶21; Ex. 11). The inability of Tan-E and Lins to complete and sell the home prevented them from paying off the May 1, 2007 Note.

E. CD Trust's Foreclosure Action

On December 9, 2010, CD Trust filed a lawsuit in the King County Superior Court (Case No. 10-2-42707-4 SEA) against defendants Tan-E, Lins, and Wen Kai Lee, seeking a judgment for \$2,000,000, plus interest on the May 1 Notes, and foreclosure against all four Tan-E properties and Lot 1 of TJ Square.⁷ CD Trust later filed an Amended Complaint requesting judgment for \$1,000,000 plus interest on the May 1, 2007 Note, and interest on the August 31, 2007 Note, even though CD Trust withheld the loan funds. (CP 1-13).⁸

⁷ Wen Kai Lee, a family acquaintance of Lins, is not a member of Tan-E, did not sign the May 1 2007 Note. did not borrow any funds from CD Trust, (CP 75-77; CP 78-79). Defendants filed a motion for partial summary judgment to dismiss Wen Kai Lee and his marital community. (CP 66-74). CD Trust responded by filing a motion for voluntary dismissal, and the claims against Wen Kai Lee and his marital community were dismissed. (CP 332-333).

⁸ In addition to correcting the claim amount to \$1,000,000, the Amended Complaint deleted the false allegation in the original Complaint that defendants removed \$850,000 from the Certificate of Deposit. (CP 1-13, ¶ 4.6).

Defendants Tan E and Lins asserted several affirmative defenses, including breach of contract, failure of consideration, misrepresentation and fraud, coercion/undue influence, bad faith and unclean hands, waiver and estoppel, unjust enrichment, and setoffs (CP 26-42, ¶s 31-39).

Defendants alleged setoffs for the following counterclaims:

1. Breach of Contract: The first counterclaim alleged that CD Trust to breached agreements to loan \$1,000,000 to Tan-E and Lins under the August 31, 2007 Note, and release \$700,000 of the loan funds under the Withdrawal Agreement. (CP 26-42, ¶s 7-19).

2. Misrepresentation/Fraud. The second counterclaim alleged that CD Trust fraudulently induced Tan-E and Lins to sign the August 31, 2007 Note and Deed of Trust on Lot A by misrepresenting an agreement loan to \$1,000,000, without intending to actually release the funds. CD Trust later fraudulently induced the borrowers to sign Withdrawal Agreement (granting additional collateral) and the Universal Default Agreement (for cross-collateralization) by misrepresenting that \$700,000 would be released. (CP 26-42; ¶s 7-15, 20-25).

3. Breach of Duty of Good Faith. The third counterclaim alleged that CD Trust breached its implied duty of good faith by failing to release \$1,000,000 in loan funds after receiving the signed August 31, 2007 Note and Deed of Trust, and failing to release \$700,000 after

receiving the signed Withdrawal Agreement. (CP 26-42; ¶s 7-15, 26-28).

4. Unjust Enrichment. The fourth counterclaim alleged that CD Trust would be unjustly enriched if it is allowed to exercise rights under the Withdrawal Agreement and/or Universal Default Agreement, foreclose against defendants' properties, and recover default interest under the August 31, 2007 Note. (CP 26-42; ¶s 7-15, 30).

5. Consumer Protection Act Violations. The fifth counterclaim alleged that CD Trust engaged in unfair and deceptive lending practices by: (a) withholding loan funds from defendants after obtaining the August 31, 2007 Note and recording the Deed of Trust on Lot A; (b) demanding more properties for collateral before releasing loan funds; (c) withholding \$700,000 after receiving the signed Withdrawal Agreement and Universal Default Agreement; and (c) declaring default and marshaling the Tan-E properties and Lot 1 for foreclosure based upon deeds of trust given as consideration for funds never released. (CP 26-42; ¶s 7-15, 31-35).

F. Trial Court Decisions

All claims and disputes in the underlying action were decided under orders entered by Judge Richard Eadie on several motions filed by the parties, including the following:

1. Summary Judgment Order Regarding Lot A. Defendants filed a summary judgment motion to dismiss claims against Lot A on the grounds that CD Trust can only pursue foreclosure against the properties designated as collateral for the May 1, 2007 Note (Lots 10 and 81). Because defendants received no funds after signing the Universal Default Agreement, the consideration (release of \$700,000) for cross-collateralizing properties failed. (See defendants' Motion (CP 52-62) and Reply (CP 334-339). On August 19, 2011, the trial court entered an Order granting the motion in part and dismissing all claims relating to the use of Lot A as collateral for the May 1, 2007. (CP 365-367).⁹

2. Dismissal of Claims Against Lot 1 of TJ Square. On July 27, 2011, the trial court entered a stipulated Order dismissing the claim against Lot 1 of TJ Square, a property jointly owned by Bruce Lin and Wen Kai Lee. (Dkt # 56).

3. Summary Judgment on May 1, 2007 Note. CD Trust filed summary judgment motion for principal and interest owed on the May 1, 2007 Note. (CP 397-418).¹⁰ On January 13, 2012, the trial court granted

⁹ Defendants' motion was denied as to claims relating to the use of Lot A as collateral for the August 31, 2007 Note, under which CD Trust claimed interest. The trial court denied CD Trust's motion for reconsideration relating to the use of Lot A as collateral for the first loan. (CP 395-396).

¹⁰ Defendants opposed the motion on the grounds that affirmative defenses (including equitable defenses) and counterclaims based on CD Trust's breach of the

the motion and ordered that CD Trust was entitled to judgment for \$1,695,025 (\$1,000,000 principal and default interest of \$695,025), “subject to defendants’ counterclaims and offsets, if any”. (CP 556-558).

4. Denial of Summary Judgment on Interest Claim. Defendants filed a summary judgment motion to dismiss CD Trust’s interest claim under the August 31, 2007 Note, because the loan funds were not received, (CP 501-510). On February 3, 2012, the trial court entered an Order denying the motion, finding that there are “genuine issues of material fact regarding Defendants’ obligation to pay interest on some or all of the principal amount of the August 31, 2007 note.” (CP 582-583).¹¹

5. Summary Judgment Dismissing Counterclaims. CD Trust filed a summary judgment motion to dismiss all of defendants’ counterclaims arising from CD Trust’s breach of the second agreement to loan \$1,000,000. (CP 585-602). On May, 4, 2012, the trial court granted the motion in part and ordered the dismissal of the first through

August 31, 2007 loan can be asserted in a foreclosure action, and support setoffs against amounts owed under the May 1, 2007 Note. (CP 530-544).

¹¹ Defendants requested reconsideration regarding the interest claim based on the court’s oral ruling, in dismissing counterclaims, that there was no meeting of the minds regarding an agreement to loan \$1,000,000 under the August 31, 2007 Note. Although the basis for reconsideration arose on when the counterclaim order was entered on May 10, 2012, the trial court denied the motion as untimely under CR 59(b) because it was filed more than 10 days after the Order denying defendants’ first motion regarding interest on the August 31, 2007 Note. (CP 665-667).

fifth counterclaims. (CP 637-640).¹² Defendants' motion for reconsideration was denied on June 15, 2012. (CP 694-695).¹³

6. Voluntary Dismissal of Interest Claim on Second Loan. On May 12, 2011, CD Trust filed a CR 41 motion for voluntary dismissal of its claim of interest under the August 31, 2007 Note, and for the release of Lot A as collateral for the Note.¹⁴ The trial court dismissed the interest claim and Lot A from the action. (CP 692-693).

7. Denial of Motions for Attorney's Fees. On August 24, 2012, the trial court entered an Order denying motions of CD Trust and defendants for attorney's fees, ruling that both sides prevailed on important issues in the case. (CP 736-737). The Order states that CD Trust prevailed on its claim for \$1,000,000 plus interest on the May 1, 2007 Note, while defendants were successful in obtaining the release of valuable parcels of property as collateral for the Note.

¹² The trial court denied the motion for dismissal of the sixth counterclaim for a declaratory judgment, as it relates to the August 31, 2007 Note (specifically, plaintiff's interest claim), and Lot A as collateral for that note. (CP 637-640).

¹³ Defendants contended that: (a) conflicting declarations create material fact issues regarding the second loan; (b) CD Trust is precluded from taking inconsistent positions on the August 31, 2007 Note and Withdrawal Agreement; and (c) an oral promise to loan funds is enforceable under promissory estoppel. (CP 653-664).

¹⁴ Following the trial court's ruling on the dismissal of counterclaims, CD Trust concluded that it is unlikely to succeed in establishing a claim of interest based on the August 31, 2007 Note and Deed of Trust. (CP 641-643).

8. Judgment. On September 7, 2012, the trial court entered Judgment in favor of CD Trust against Tan-E and Lins for \$1,796,726.50 (including \$1,695.025 on the May 1, 2007 Note, plus prejudgment interest of \$101,701.50). (CP 738-749). Judgment was entered in favor of defendants on their sixth counterclaim against CD Trust, declaring that the Deed of Trust on Lot A, Statutory Warranty Deed for Lot 43; and Deed of Trust on Lot 1 of TJ Square are unenforceable.

IV. ARGUMENT

A. Summary of Argument

The trial court resolved all issues in the case with testimony at trial regarding conflicting evidence and facts presented by the parties in summary judgment proceedings. In doing so, the trial court improperly resolved disputed issues of fact on summary judgment.

The trial court's decision granting summary judgment to CD Trust on its claim under the May 1, 2007 Note for \$1,696,025 was erroneous because defendants submitted declarations and evidence demonstrating genuine issues of material relating to affirmative defenses, including equitable defenses and setoffs. The affirmative defenses arising from CD Trust's breaches of the second loan agreement should have been considered in deciding CD Trust's summary judgment motion.

The trial court also erred in awarding default interest from June 1, 2007, as CD Trust waived the defaults asserted in its June 8, 2007 letter.

The trial court erred in granting CD Trust's summary judgment motion to dismiss counterclaims for damages despite conflicting declarations which created multiple genuine issues of material fact. CD Trust, which asserted claims for breaches of the August 31, 2007 Note and the Withdrawal Agreement, is precluded from taking inconsistent positions. Alternatively, an oral promise to loan funds is enforceable under a theory of promissory estoppel.

By granting CD Trust's summary judgments, the trial court deprived Tan-E and Lins of the opportunity to present testimony at trial regarding the loan transactions and dealings between the parties. The unjust result is a judgment in favor of CD Trust for \$1,796,726.50 on one Note, without proper offsets for the damages caused by CD Trust's breaches of the second loan agreement.

B. The Court Of Appeals Reviews Summary Judgments De Novo, As A Pure Question Of Law

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court. *Faylor's Pharmacy v. DSHS*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). The Court of Appeals will affirm the summary judgment only if there are no

genuine issues of material fact between the parties and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. *Failor's Pharmacy*, 125 Wn.2d at 493.¹⁵ All facts and all reasonable inferences from those facts are considered in the light most favorable to the non-moving party. *Failor's Pharmacy*, 125 Wn.2d at 493.

The burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). 852, 719 P.2d 98 (1986). Summary judgment is appropriate only if reasonable minds could reach but one conclusion from the evidence, and only if the conclusion thus reached entitles the moving party to a judgment in its favor. *Morris*, 83 Wn.2d at 493.

C. The Trial Court Erred in Granting Summary Judgment on the May 1, 2007 Note Because There Are Genuine Issues of Material Fact Regarding Affirmative Defenses and Setoffs

CD Trust filed a motion partial summary judgment on the May 1, 2007 Note, alleging that defendants were liable for \$1,000,000 and default interest of \$695,025 because the Note was not paid by April 30, 2008, and a title requirement for Lot 81 not satisfied. (CP 397-418).

¹⁵ Summary judgment is generally appropriate where the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

CD Trust's strategy was to pursue judgment on the first Note, without any setoff for breaches of its agreement to loan \$1,000,000 under the second Note and release \$700,000 under the Withdrawal Agreement. Attempt to isolate the May 1, 2007 Note, CD Trust argued that affirmative defenses and counterclaims are irrelevant because they do not relate to the first loan.

The trial court granted summary judgment on the May 1, 2007 Note for \$1,695,025, "subject to defendants' counterclaims and offsets, if any". (CP 556-558). While the Order recognized defendants' right to assert offsets and counterclaims¹⁶, the trial court erred in granting summary judgment because CD Trust failed to present evidence sufficient to defeat other legal and equitable defenses.

1. CD Trust Failed to Present Evidence to Defeat Relevant Affirmative Defenses on Summary Judgment

CD Trust's pursuit of judgment on the first loan without regard for its breach of the second loan conflicts with the established rule in that

¹⁶ Setoffs can be asserted in affirmative defenses, or by counterclaim to reduce the amount of the judgment in a foreclosure case. *Peterson v Johnson*, 20 Wash. 497, 55 P. 932 (1899). Notably, CD Trust did not dispute defendants' right to assert raise equitable defenses at trial and to obtain an appropriate reduction of judgment prior to foreclosure.(CP 545-550). However, the trial court later dismissed the counterclaims for damages and the trial date was stricken, so the affirmative defenses were never adjudicated.

offsets may be based on a breach or liability of the party against whom the offset is asserted. *Seattle-First Nat'l Bank v. Siebol*, 64 Wn.App. 401, 407-408, 824 P.2d 1252 (1992); *Swenson v. Lowe*, 5 Wn.App. 186, 188, 486 P.2d 1120 (1971).

In *Siebol*, the borrowers entered into a loan agreement based upon a loan officer's oral representation that the loan would include amounts for purchasing inventory. The borrowers relied upon the loan officer's representation in leasing land and spending money on \$60,000 on improvements. The lender brought a foreclosure action seeking recovery on loans secured by borrowers' real property, and the borrowers counterclaimed for damages resulting from lender's breach of its oral promise to provide improvement and inventory financing. The Court of Appeals held that the borrowers were entitled to assert lender's alleged breach of an oral promise to provide other financing as an affirmative defense in the foreclosure action by the lender's action to recover on loans secured by borrowers' real property. *Siebol*, 64 Wn.App. at 407.

As in *Siebol*, defendants' affirmative defenses arose from the lender's failure to provide loan funds. CD Trust agreed to loan

\$1,000,000 loan under the August 31, 2007 Note, and release \$700,000 under the Withdrawal Agreement, but repudiated both agreements.¹⁷

CD Trust failed to submit evidence or legal arguments showing that the legal defenses of breach of contract, failure of consideration, misrepresentation and fraud, and coercion/undue influence are without merit as a matter of law. Defendants' declarations and briefing demonstrated that such defenses are supported by substantial evidence and applicable law. (CP 530-544; CP 80-133; CP 63-65; CP 340-364).

Similarly, CD failed to establish that there are no genuine issues of material fact regarding equitable defenses of bad faith and unclean hands.¹⁸ CD Trust submitted Christopher Koh's declaration regarding a non-monetary default in June, 2007, and calculations of accumulated interest. (CP CD Trust just contended that the affirmative defenses were irrelevant without challenging the merits of the defenses. (CP 419-458; CP 545-550). .

¹⁷ CD Trust argued that *Siebol* rejected the application of the "continuous relationship" doctrine. (CP 545-550). The *Siebol* court stated that Washington cases do not directly address the continuing relationship doctrine, which has been applied in other jurisdictions to toll the statute of limitation until the relationship between the parties is terminated. The *Siebol* decision regarding the continuing relationship doctrine should not be extended beyond the statute of limitations issue in that case.

¹⁸ Under the doctrine of unclean hands, a party cannot request equitable relief if that party has acted unfairly or in bad faith, i.e. with unclean hands. *Willener v Swetting*, 107 Wn.2d 388, 730 P.2d 45 (1986).

Defendants' declarations provided evidence of bad faith and unclean hands. CD Trust refused to release the loan funds after obtaining defendants' signatures on the August 31, 2007 Note and recording the Deed of Trust on Lot A. CD Trust demanded more collateral and cross-collateralization before releasing \$700,000, and then failed to release any funds even after receiving the signed Withdrawal Agreement, Universal Default Agreement, and security (Deed of Trust on Lot 1 of TJ Square and Statutory Warrant Deed on Lot 43.). CD Trust then sued Tan-E and Lin for foreclosure on all of their properties, as if defendants received the second \$1,000,000.

CD Trust was unjustly enriched by encumbering multiple properties as collateral for loan funds that were never released to the borrowers, and then obtaining a judgment for \$1.8 million despite breaching its agreements to make the second loan and release funds.

CD Trust failed to meet its burden of showing that there are no genuine issues of material fact regarding affirmative defenses. The trial court erred in granting summary judgment, without requiring CD Trust to defeat the defenses on the merits.

2. CD Trust Breached its Duty of Good Faith

In every contract, there is an implied duty of good faith and fair dealing, which obligates the parties to cooperate with each other so that

each may obtain the full benefit of performance. *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986); *Cavell v. Hughes*, 29 Wn.App. 536, 539, 629 P.2d 927 (1981).

In addition to arguing that the defendants' defenses are irrelevant to liability under the May 1, 2007 Note, CD Trust denied that it owed a duty of good faith because such a duty arises only in the performance of specific obligations. *Donald Murphy Contractors v King County*, 112 Wn.Ap. 192, 197, 49 P.3d 912 (2002). In doing so, CD Trust disregarded its specific obligations with respect to the second loan.

The fallacy of CD Trust's position is it did agree to pay the second \$1,000,000 under the August 31, 2007 Note, and it did agree to release \$700,000 under the Withdrawal Agreement. In fact, CD only agreed to make the second loan, but it also obtained the signed \$1,000,000 Note and recorded the Deed of Trust, and then obtained the signed Withdrawal Agreement and more security instruments. CD Trust's duty of good faith applied to its specific obligations to loan funds under the August 31, 2007 Note, and to release funds under the Withdrawal Agreement.¹⁹

¹⁹ The duty of good faith permeated the lending relationship. *K.M.C. Co., Inc. v Irving Trust Co.*, 757 F.2d 752 (6th Cir 1985) (despite demand provision in loan agreement, Irving Trust had a good faith obligation to notify KMC before it discontinued funding a line of credit); *Reid v Key Bank of Southern Maine, Inc.*,

The trial court erred in summarily dismissing the affirmative defense of bad faith. CD Trust should not have been permitted to obtain a summary judgment on the May 1, 2007 Note based upon a motion which ignored its conduct in connection with the second loan.

3. There Are Genuine Issues of Material Fact Regarding Waiver and Estoppel Precluding Summary Judgment

The trial court erred in granting summary judgment despite genuine issues of material fact regarding waiver and estoppel defenses.

Waiver is defined as the intentional relinquishment of a known right. *Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 246 P.3d 205 (2010). Whether waiver has occurred is a question of fact, unless reasonable minds could reach only one conclusion. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 177 P.3d 755 (2008).

A waiver, unlike a modification of a contract, is unilateral, and therefore does not require offer and acceptance, consideration or reliance. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn. App. 327, 493 P.2d 782 (1972). A waiver may be express, or may be inferred from circumstances indicating intent of waiver. *Edmonson v. Popchoi*, 155 Wm.App. 376, 228 P.3d 780 (2010).

831 F.2d 9 (1st Cir. 1987) (lender did not act in good faith where a credit line was terminated without attempt to negotiate with borrower).

Repayment of the first loan was not due until April 30, 2008. (CP 80-133; Ex. 4). CD Trust relied upon a June 8, 2007 letter in claiming that defendants breached requirements for clear title (Lot 81) and no tax liabilities in June, 2007. (CP 419-458, Ex. 4).²⁰ When Christopher Koh presented the letter to Jeanne Lin, she initialed it to acknowledge receipt and wrote the words “rcvd copy subject to negotiation” (CP 419-458, Ex. 4). Jeanne Lin testified that Mr. Koh accepted her note without change and said “okay”, indicating his agreement that the default letter was subject to negotiation, and file it away. (CP 397-418; CP 459-481; Ex. 3, Lin. Dep. pp. 141-142).

Christopher Koh denied that he intended to negotiate regarding the June 8, 2007 default letter. (CP 459-481 ¶4). It is undeniable, however, that CD Trust failed to take any default action against Tan-E and Lins during the next four months. Instead, CD Trust engaged in negotiations with Jeanne Lin and ultimately agreed to loan another \$1,000,000 to Tan-E under the August 31, 2007 Note.

These facts support the conclusion that the CD Trust was waived the default alleged in the June 8, 2007 letter. In view of the parties’

²⁰ The May 1, 2007 Note (paragraph 2.d) required the title insurance policy for Lot 81 to confirm that the Deed of Trust granted to CD Trust was in a first position. In his declaration, Christopher Koh stated that the title policy for Lot 81 showed unpaid property taxes and a deed of trust in favor of Westar Lending that was ahead of the Deed of Trust held by CD Trust. (CP 419-458, ¶3; Ex. 3).

conflicting declarations, the issue of whether CD Trust intended to waive the alleged default is a question of fact requiring testimony at trial.

Similarly, there are unresolved issues of material regarding the estoppels defense in this case. The elements of equitable estoppel are: (1) an admission, statement or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission;²¹ and (3) injury to the relying party if the court allows the first party to contradict or repudiate such admission, statement or act. *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn. 2d 816, 881 P.2d 986, 994 (1994):

Washington courts have quoted with approval the following statements 31 C.J.S., Estoppel §59:

This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts

Kessinger v. Anderson, 31 Wn. 2d 157, 169, 196 P.2d 289, 296 (1948).

After presenting the June 8, 2007 letter, CD Trust negotiated with Jeanne Lin and eventually agreed to loan another \$1,000,000.

Defendants relied upon CD Trust's agreement to loan funds in delivering

²¹ The second element has been described as action "on the faith of" the other party's statement or act. *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn. 2d 353, 365, 705 P.2d 1195, 1205 (1985),

explained in Section C.3. If the default date is determined to be April 30, 2008, the interest is reduced to \$645,025. (CP 419-458, ¶6; Ex. 6).

D. The Trial Court Erred In Granting Summary Judgment and Dismissing Counterclaims Despite Issues of Material Fact

Defendants' counterclaims arose from CD Trust's breaches of the agreements to loan \$1,000,000 under the August 31, 2007 Note, and release \$700,000 of the loan funds under the Withdrawal Agreement. CD Trust breached its duty to act in good faith, committed fraud, and engaged in unfair and deceptive practices by misrepresenting its intentions to loan funds to obtain the signed Note and Deed of Trust on Lot A, and then the withholding the funds. Three weeks later, CD Trust coerced the borrowers into signing the Withdrawal Agreement and Universal Default Agreement, and providing security instruments for Lot 1 of TJ Square and Lot 43, but CD Trust still withheld the loan funds.

CD Trust's summary judgment motion on the counterclaims was based on grounds that: (1) the decision regarding Lot A precludes claims under the Withdrawal Agreement; (2) counterclaims are barred by a three-year statute of limitations; and (3) the statute of frauds bars claims arising from an oral loan agreement; and (CP 585-602).

CD Trust's arguments were flawed and fail to negate the existence of its agreements to loan \$1,000,000 and release funds, which

are confirmed by the August 31, 2007 Note, the Deed of Trust, and the Withdrawal Agreement that CD Trust prepared. At best, the declarations and evidence submitted by the parties created genuine issues of material fact regarding the second loan.

1. CD Trust Breached the Withdrawal Agreement by Failing to Release \$700,000 of the Loan Funds

First, CD Trust asserted that defendants could not pursue a counterclaim for breach of the Withdrawal Agreement under the trial court's previous orders. CD Trust specifically pointed to the summary judgment order declaring that Lot A cannot be used as collateral for the May 1, 2007 Note. Based upon a misapprehension of the court's decision regarding Lot A, CD Trust tried to argue that the Withdrawal Agreement is unenforceable for the same reason that the Universal Default Agreement is unenforceable: lack of consideration.

The express consideration for the Universal Default Agreement was the Withdrawal Agreement, under which CD Trust agreed to release \$700,000 to defendants.²³ CD Trust failed to release any of the promised funds to defendants. The Universal Default Agreement was unenforceable because CD Trust never provided the stated consideration

²³ Paragraph 2 of the Universal Default Agreement states: "As consideration for the execution by CD Trust of the Agreement Regarding Withdrawal of Funds From Line of Credit, dated September 21, 2007, it is agreed by the parties as follows: (terms omitted).(CP 80-133; Ex. 7).

(\$700,000) for cross-collateralizing properties. Instead of acknowledging that it caused the failure of the consideration for the Universal Default Agreement, CD Trust spun the argument as a “lack of consideration” that also rendered the Withdrawal Agreement unenforceable. That was not the court’s ruling.

The Withdrawal Agreement contained mutual promises and consideration that was independent of the Universal Default Agreement. Defendants agreed to provide more collateral (Lot 1 of TJ Square and Lot 43) in exchange for CD Trust’s agreement to release \$700,000. Defendants performed by their side by delivering the signed Withdrawal Agreement, along with the Deed of Trust (for Lot 1 of TJ Square) and Warranty Deed (for Lot 43). The key fact is that defendants received loan funds after signing the Withdrawal Agreement and Universal Default Agreement on September 21, 2007.

CD Trust cannot escape the fact that the agreed consideration for the Universal Default Agreement failed due to its failure to perform. The Withdrawal Agreement is not unenforceable just because CD Trust unilaterally decided to hold back funds.²⁴

Defendants received no consideration for cross-collateralizing

²⁴ The trial court did not rule that the Withdrawal Agreement is unenforceable. The summary judgment order states that Lot A cannot be used as collateral for the May 1, 2007 Note. The bottom line was that CD Trust did not release any funds under the Withdrawal Agreement.

their properties. Therefore, the trial court properly ruled that Lot A cannot be used as collateral for the first loan. That summary judgment order cannot be stretched to bar a counterclaim for breach of the Withdrawal Agreement.

2. Defendants' Breach of Contract Claim is Not Barred by a Three-Year Statute of Limitations

CD Trust further argued that the breach of contract claim is barred by a three-year statute of limitations for oral contracts, even though the loan terms are confirmed in the August 31, 2007 Note, and the Deed of Trust securing repayment of the \$1,000,000 Note.

Defendants signed and delivered these instruments, and the Deed of Trust was recorded, as instructed by CD Trust. The Withdrawal Agreement, which CD Trust also prepared, sets forth its subsequent agreement to release \$700,000 to defendants. These customary loan documents confirm and constitute a written loan agreement, defeating CD Trust's contention that a three-year statute of limitations applies.

CD Trust's statute of limitations argument also conflicts with defendants' right to assert counterclaims as setoffs in a foreclosure action

to reduce the judgment amount in a foreclosure action. *Peterson v Johnson* 20 Wash. 497, 55 P. 932 (1899).²⁵

“Statutes of limitation never run against defenses arising out of the transactions sued upon.” *Siebol*, 64 Wn.App. at 407 (citing *Allis-Chalmers Corp. v. City of N. Bonneville*, 113 Wn.2d 108, 112, 775 P.2d 953 (1989)). ‘[A]s [long] as the courts will hear the plaintiff’s case, time will not bar the defenses which might be urged thereto and which grew out of the transaction connected with the plaintiff’s claim ...’ *Warren v. Wash. Trust Bank*, 19 Wn.App. 348, 363, 575 P.2d 1077 (1978) (quoting 51 Am.Jur.2d *Limitation of Actions* § 76 (1970)), judgment modified on other grounds, 92 Wn.2d 381, 598 P.2d 701 (1979).

Offset is one of the defenses that are not barred by a statute of limitations if the main action is timely. *Siebol*, 64 Wn.App. at 407, 824 P.2d 1252 (citing 51 Am.Jur.2d *Limitation of Actions* § 77, at 656 (1970)). Consequently, the statute of limitations did not bar the plaintiffs who challenged a foreclosure from asserting claims as offsets in *Olsen v. Pesarik*, 118 Wn.App. 688, 77 P.3d 385 (2003).²⁶

²⁵ Defendants’ affirmative defense states: “Set-Offs and Counterclaims. Sums recovered by plaintiff on its claims, if any, must be offset or substantially reduced by claims and damages asserted in the Amended Complaint.” (CP 26-42 ¶38).

²⁶ *Olsen* was an action to restrain a non-judicial foreclosure of a deed of trust, the Court of Appeals held that the statute of limitations did not bar trustors from asserting an offset defense because the foreclosure proceeding itself was not time barred. See also: *Allis-Chalmers v. N. Bonneville*, 113 Wn.2d at 112, 775 P.2d 953.

As in *Olsen*, the main “action” in this case is the foreclosure. Defendants’ setoff defense and counterclaims relate to the same transactions that are the subject of foreclosure. Defendants are legally entitled to offset their damages against sums owed under the May 1, 2007 Note, without a three-year statute of limitations.

3. The Statute of Frauds Does Not Apply

CD Trust relied heavily upon Christopher Koh’s first declaration (CP 206-250) regarding CD Trust’s alleged oral understandings with China Trust Bank, and Jeanne Lin, which are contradicted by Jeanne Lin’s declarations. (CP 63-63; CP 340-364). Mr. Koh attempted to use alleged oral agreements to connect the August 31, 2007 Note, to the Withdrawal Agreement, and the Universal Default Agreement that were signed three weeks later on September 21, 2007, as if they all comprised the second loan agreement. CD Trust was unable to overcome this temporal problem to enforce the Universal Default Agreement.

Despite making its own allegations regarding oral agreements, CD Trust’s motion contended that the breach of contract counterclaim is barred by the Statute of Frauds under RCW 19.36.110, which provides that a credit agreement is not enforceable unless the agreement is in writing and signed by the parties. The Statute of Frauds is strictly construed by courts and not applied to cases that are not squarely within

its terms. *Sherwood B. Korssjoen, Inc. v. Heiman*, 52 Wn.App. 843, 852, 765 P.2d 301 (1988).²⁷

RCW 19.36 applies only if notice was given as required by RCW 19.36.130. A conspicuous notice must be given to the parties to a credit agreement on a separate document or incorporated into the one of the credit agreement documents. RCW 19.36.140. The notice must state substantially the following: Oral agreements or oral commitments to loan money, extend credit, or to forbear from enforcing repayment of a debt are not enforceable under Washington law. RCW 19.36.140.

RCW 19.36.130 provides that if this notice is not given, RCW 19.36.100-.140 will not apply. The August 31, 2007 Note does not contain the notice required under RCW 19.36.140. Without the statutory notice, RCW 19.36.100-.140 does not apply.²⁸

4. The Second Loan Was Supported by Consideration

CD Trust contended that the breach of contract counterclaim is barred because there was no consideration for a direct loan of \$1,000,000 to defendants. Defendants delivered the signed August 31, 2007 Note

²⁷ The underlying purpose of a Statute of Frauds is to prevent fraud, not be a means of perpetuating one. *Greaves v. Med. Imaging Sys. Inc.*, 71 Wn.App. 894, 898, 862 P.2d 643 (1993), *rev'd on other grounds*, 124 Wn.2d 389, 879 P.2d 276 (1994).

²⁸ The May 1, 2007 Note (CP 80-133, Ex. 3) does contain notice language regarding the unenforceability of oral loan agreements in paragraph 17 (Commercial Property). Paragraph 17 also states: (OPTIONAL-Not applicable unless initialed by Holder and Maker to this Note). None of the parties initialed paragraph 17 in the spaces provided, making the notice legally ineffective.

and Deed of Trust to escrow, just they did with the first loan. The Note and Deed of Trust provided valuable consideration for the second loan without needing a separate loan agreement.

After receiving the Note and Deed of Trust, plaintiffs deposited funds into a joint CD account instead of releasing the \$1,000,000 through escrow. CD Trust strained to assert that it never agreed to loan the second \$1,000,000, but only agreed to deposit funds into a Certificate of Deposit account controlled by Christopher Koh. These contentions were also rebutted in Jeanne Lin's declarations. (CP 63-65; CP 340-364).

CD Trust affirmed the second \$1,000,000 loan in its initial Complaint, alleging that "on August 31, 2007, Plaintiffs loaned an additional \$1,000,000 to Defendants..." (CP 1-13, ¶4.3). An express admission in a pleading should control and exclude testimony tending to show the contrary until the inconsistency is obviated by an amendment. *Standard Finance Co. v. Townsend*, 1 Wn.2d 274, 95 P.2d 786 (1939).

The Amended Complaint does disavow an agreement to loan the second \$1,000,000. Even so, a former pleading, although it has been superseded by another, is admissible in evidence as an admission of facts. *Davis v. Browne*, 20 Wn.2d 219, 147 P.2d 263 (1944).²⁹

²⁹ In *Davis*, the issue was whether automobile was purchased for family purposes and was being driven for that purpose at time of accident. The court held that the

5. There are Genuine Issues of Material Fact Regarding the Loan Agreement and the Breach of Contract Claim

In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve factual issues on their merits. *Balise v Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). The summary judgment procedure may not be used to try an issue of fact. *Thomas v CJ Montag & Sons, Inc.* 54 Wn. 2d 20, 337 P.2d 1052 (1959).

The parties' declarations presented conflicting facts regarding the loan under the August 31, 2007 Note. Christopher Koh's declaration denied any agreement to loan \$1,000,000 under the August 31, 2007 Note. Jeanne Lin declared that in August, 2007, CD Trust agreed to make a second loan of \$1,000,000, and that defendants signed the August 31, 2007 Note and the Deed of Trust to confirm the loan terms.³⁰

Washington courts have held that the trier of fact in a trial setting should make the final determination with respect to the existence of an oral contract; disputes about oral contracts should not be decided by summary judgment. *Duckworth v. Langland*, 95 Wn.App. 1, 988 P.2d 967 (1998) (issue of material fact regarding alleged oral partnership

fact that original verified answer contained an admission could be considered even though the amended answer denied such allegation.

³⁰ Plaintiffs did not provide the notice required under RCW 19.36.130. Therefore, the provisions of RCW 19.36.100-.140 do not apply. See Defendants Response to Motion for Partial Summary Judgment Dismissing Counterclaims, pages 12-13.

precluded summary judgment dismissing accounting claim); *Garbell v. Tall's Travel Shop*, 17 Wn.App. 352, 354, 563 P.2d 211 (1977) (question of fact regarding oral bonus agreement defeated summary judgment).

Deciding disputes over oral agreements at trial makes sense because such disputes depend a great deal on the credibility of witnesses. *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn.App 495, 962 P.2d 824 (1997). In the *Crown Plaza* case, Crown Plaza argued that Synapse did not meet its burden of proving that there was “unequivocal mutual consent” to the agreement. The Court of Appeals rejected Crown Plaza’s arguments, stating:

Crown Plaza contends that Synapse presented no evidence beyond mere allegations or assertions supporting the formation of an oral contract. Crown Plaza appears to confuse the concept of making a bare assertion (*e.g.*, “there was an oral contract”) with making a statement that, if believed by a factfinder, would support the legal contention. Here, Combs stated that he and Tiderington entered into an agreement and Tiderington denies it. Only a factfinder can determine which of these statements is more credible, considering all the evidence, including the unsigned written agreement and the reasonableness of the agreement. (Emphasis added).

Crown Plaza, 87 Wn.App. at 501.

Here, CD Trust argued that defendants did not meet their burden of proving that there was a mutual assent and meeting of the minds. Only the factfinder at trial can determine whether the statements by Christopher Koh or Jeanne Lin regarding the second loan are more

credible, considering all the evidence. These fact issues must be decided at trial, where the court can weigh the credibility of the witnesses.

CD Trust's motion raised genuine issues of material fact regarding the second loan agreement. The trial court erroneously decided to resolve the fact issues on summary judgment.

6. CD Trust is Estopped From Taking Inconsistent Positions on the Loan and Withdrawal Agreement

The rule of preclusion of inconsistent positions (judicial estoppel) bars as evidence statements and declarations by a party regarding the facts which would be contrary to sworn testimony the party has given in the same or prior judicial proceedings. *Mastro v. Kumakichi Corp.* 90 Wn.App. 157, 951 P.2d 817 (1998); *King v. Clodfelter*, 10 Wn.App. 514, 518 P.2d 206 (Div. 1 1974).

CD Trust asserted claims for breach of the August 31, 2007 Note and Withdrawal Agreement. Christopher Koh acknowledged the agreement to release \$700,000. (CP 206-250). Judicial estoppel prevents CD Trust from denying its agreements to loan funds and release funds under the August 31, 2007 Note, and Withdrawal Agreement.

7. CD Trust Can Be Held Liable For Breach of an Oral Promise to Loan Funds Under Promissory Estoppel

Defendants alleged that CD Trust breached written agreements to loan and release funds under the August 31, 2007 Note, Deed of Trust,

and Withdrawal Agreement. Washington courts have also recognized that a borrower can maintain a claim under a theory of promissory estoppel, where the borrower relies upon an oral promise to loan funds.

In the *Siebol* case, the Court of Appeals affirmed that borrowers were entitled to an equitable offset based upon promissory estoppel:

Here, the court rejected the Siebols' suggestion Mr. Wheat's oral promise constituted a contract to lend money, but found the bank answerable on a theory of promissory estoppel. Seafirst's arguments that the court should have concluded the alleged oral contract failed for lack of certainty are, therefore, pointless.

Siebol, 64 Wn.App. at 401.

The borrower in *Siebol* had justifiably relied upon the lender's oral promise to loan funds. Even though counterclaims arising from an oral promise to loan funds were beyond the statute of limitations, an equitable offset was warranted on the basis of promissory estoppel.

Promissory estoppel requires five elements: (1) a promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. *Farm Crop Energy, Inc. v. Old Nat'l Bank*, 38 Wn.App. 50, 52, 685 P.2d 1097 (1984).

If it is determined that there is no written agreement to loan the second \$1,000,000, the elements of promissory estoppel are satisfied in this case. CD Trust promised to make the second \$1,000,000 loan. Defendants justifiably relied upon the promise to loan funds in signing the August 31, 2007 Note and Deed of Trust. Injustice can only be avoided by allowing defendants to enforce the promise to loan \$1,000,000, and assert counterclaims due to CD Trust's breaches.

E. There are Genuine Issues of Material Fact Regarding Counterclaims for Fraud and Misrepresentation

CD Trust's motion relied upon a general rule that a promise to do something in the future, if not performed, is not a representation of existing fact upon which a fraud claim can be based. (CP 585-602). But CD Trust failed to address a well established exception.

If the promise is made for the purpose of inducing a party to enter into an agreement which he would not otherwise enter into, and with a present intent on the part of the person making the promise not to perform, it is a fraud on which an action can be predicated. *Jacquot v. Farmers' Straw Gas Producer Co.* 140 Wash. 482, 249 P. 984 (1926); *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 762, 709 P.2d 1200 (1985) (promise made for purpose of deceiving may be actionable).

This deceit exception was dispositive in *Flower v. T.R.A. Industries, Inc.* 127 Wn.App. 13, 111 P.3d 1192 (2005), an action brought by a former against the employer for breach of employment contract, promissory estoppel, and misrepresentation. The employee's only allegation was related to the employer's promise that he would not be fired except for cause. Contrary to those promises, the employer did not intend for the employment relationship to be anything but at-will. The Court of Appeals found that the alleged promise was "for the purpose of deceiving and with no intention of performing", and reversed the dismissal of promissory estoppel and misrepresentation claims.³¹

CD Trust deceived defendants by promising to loan \$1,000,000 under the August 31, 2007 Note, and then refusing to deliver the loan funds. CD Trust waited until after defendants delivered the signed Note and Deed of Trust to disclose that the loan funds would be deposited into a joint CD account controlled by Christopher Koh. Plaintiffs never intended to release the \$1,000,000 loaned under the August 31, 2007 Note. CD Trust later induced defendants to sign the Withdrawal

³¹ See also: *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 762, 709 P.2d 1200 (1985) (promise made for purpose of deceiving may be actionable); *Markov v. ABC Transfer & Storage Co.*, 457 P.2d 535 (1969) (landlord's representations that lease would be renewed for three years, in circumstances where tenant could reasonably rely, constituted a promissory undertaking and failure to keep promise was actionable as overt deceit).

Agreement and Universal Default Agreement by promising to release \$700,000, but it never intended to deliver those funds. Defendants have actionable claims for fraud and misrepresentation.

Fraud and misrepresentation claims are not barred by a three-year statute of limitations where they are asserted as offsets and counterclaims in a foreclosure case. (See Section D.2). Nor does the Statute of Frauds bar such counterclaims where the agreements to loan funds are confirmed in written instruments and the requisite notice under RCW 19.36.130 was not provided. (See Section D.3).

F. Defendants' Counterclaim for Breach of Good Faith Duties is Supported by Evidence and Applicable Law

CD Trust had an implied covenant of good faith with respect to specific promises to loan funds and the lending relationship, obligating it to cooperate with defendants so that each party could obtain the full benefit of performance. (See *Metropolitan Park Dist.* and other cases cited in Section C.2).

CD breached the implied duty of good faith by agreeing to loan funds under the August 31, 2007 Note and release \$700,000 under the Withdrawal Agreement, taking deeds of trust on several properties, failing to release the loan funds, and then pursuing foreclosure.

CD Trust failed to sustain its burden of showing that, as a matter of law, its conduct complied with good faith duties. The declarations and evidence raised genuine issues of material fact regarding these loan transactions which require testimony at trial. The statute of limitations and Statute of Frauds does not apply for the reasons stated in .

G. CD Trust Has Been Unjustly Enriched

The dismissal of foreclosure claims against all properties except Lots 10 and 81 has mitigated CD Trust's unjust enrichment. CD Trust still is unjustly enriched by the \$1.8 million judgment on one Note, without offsets for damages caused by its repudiation of the second loan.

H. CD Trust is Liable Under the CPA Due its Unfair and Deceptive Lending Practices Affecting the Public Interest

A private party is required to show the following five elements to establish a violation of the Consumer Protection Act (RCW 19.86.020): (1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) affecting the public interest; (4) injuring the plaintiff's business or property; and (5) a causal link between the unfair or deceptive act and the injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)).

On summary judgment, CD Trust contended that there is no evidence of unfair or deceptive acts or practices, and that its alleged

misconduct does not affect the public interest. These contentions overlook the “bait and switch” tactics employed by CD Trust. CD Trust agreed to loan \$1,000,000, and then withheld the funds after receiving the signed August 31, 2007 Note and Deed of Trust. Defendants were induced to sign the Withdrawal Agreement and Universal Default Agreement by CD Trust’s agreement to release \$700,000, only to see CD Trust again withhold funds. These deceptive acts and lending practices culminated in CD Trust’s attempt to foreclose on all of their properties.

The public interest element focuses on whether the acts are capable of repetition. Under RCW 19.86.093(3), the public interest is affected if the unfair or deceptive act "had the capacity to injure other persons" or "has the capacity to injure other persons."

In the absence of a per se violation, the public interest prong is established by evaluating a four-factor test: (1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the general public; (3) whether the defendant actively solicited the particular plaintiff, thereby indicating potential solicitation of others; and (4) whether the parties occupy positions of unequal bargaining power. *Hangman Ridge*, 105 Wn.2d at 791. None of these factors are dispositive, nor is it necessary that all be present. *Id.*

Three of the four factors are satisfied in this case. First, the unfair and deceptive acts were committed in the course of CD Trust's business. Second, CD Trust actively solicited defendants to sign notes and grant deeds of trust. Third, the parties did not occupy positions of unequal bargaining power, as Jeanne Lin did not have the same business experience as the Kohs. CD Trust gained even more bargaining power after it took the Note, recorded the Deed of Trust on Lot A. Appellants concede that the acts complained were not related to public advertising.

Summary judgment should not have been granted to dismiss the CPA claims because there are genuine issues of material fact relating to CD Trust's engaged in unfair and deceptive acts and practices, which caused substantial damages to Tan-E and Lins.

E. Appellants Are Entitled to Recover Attorney's Fees

Appellants request an award of for their reasonable attorney's fees under RCW 4.84.330 and RAP 18.1.

RCW 4.84.330 provides that where a contract specifically provides that attorney's fees, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party shall be entitled to reasonable attorney's fees and costs. The remedial purpose behind RCW 4.84.330 is that unilateral attorney fees

provisions be applied bilaterally. *Herzog Aluminum, Inc. v. General Am. Window Corp.*, 39 Wn.App. 188, 196–97, 692 P.2d 867 (1984).

The August 31, 2007 Note and the Deed of Trust for Lot A both contain attorney’s fee clauses. (CP 80-130, Exs. 4, 5) These clauses are bilateral under RCW 4.84.330, and provide a basis for defendants’ recovery of attorney’s fees.

If neither party wholly prevails, then the party who substantially prevails, depending upon the extent of relief awarded to the respective parties, is considered the prevailing party for purposes of awarding attorney fees. *Riss v. Angel*, 80 Wn. App. 553, 912 P.2d 1028, *amended, review granted* 129 Wn. 2d 1019, 919 P.2d 599. Defendants prevailed on important issues and were successful in obtaining the release of valuable parcels of property as collateral for the August 31, 2007 Note.

The trial court erred in denying defendants’ motion for attorney’s fees. When a party to an appeal was entitled to attorney’s fees at the trial level, that party is also entitled to attorney’s fees if he prevails on appeal. *Reeves v. McClain*, 56 Wn.App. 301, 783 P.2d 606 (1989).

V. CONCLUSION

For the reasons stated, appellants request the Court of Appeals to (1) reverse the orders granting CD Trust’s motion for partial summary judgment on the May 1, 2007 Note, granting CD Trust’s motion for

partial summary judgment to dismiss counterclaims, and denying Tan-E and Lin their attorney's fees; (2) reverse the judgment in favor of CD Trust for \$1,796,000; (3) remand this case for trial proceedings; and (4) award reasonable attorney's fees to appellants.

Respectfully submitted this 4th day of March, 2013

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By 
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