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No. 70729-4-I

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

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Auxier Financial Group, LLC,  
Appellant

v.

Joseph T. Sellars and Gregory Greene,  
Respondents.

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Appellant's Reply Brief

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2015 JUN 20 AM 9:59  
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## **I. INTRODUCTION**

Plaintiff/Appellant, Auxier Financial Group, LLC's, ("AFG") hereby submits its Reply to Defendant(s)/Respondent(s) Joseph T. Sellars's ("Sellars") and Gregory Greene's ("Greene") Responsive Briefs filed separately by each Defendant/Respondent, Sellars and Greene.

### **A. Regarding Sellars's Response.**

There are multiple undisputed facts in relation to Sellars' statements and actions: (1) Sellars made statements under oath filed in a declaration in a prior lawsuit admitting he was liable for the debt. (CP 330 ¶14, ¶15); (2) The above referenced declaration was signed and filed 1 year and 4 months **after** the order of discharge was entered in Sellars's bankruptcy. (CP 331); (3) The Sellars declaration under oath was relied upon by AFG and AFG's attorney, as shown by the quoting of Sellars's declaration, in ¶2.1 of the Complaint against Sellars and Greene. (CP 565 Lns 4-10); (4) On December 12, 2012, Sellars filed an Answer (CP 552), drafted and reviewed by his counsel (CP 430, Dec. of Minor, Ex. C, Pg. 1), admitting against his interest his liability under the debt and AFG's right to foreclose. (CP 552 & Sellars's Response Pg. 10 ¶1 confirming Sellars admitting to Section 2.1 of AFG Complaint containing recitals of Sellars's declaration under oath)

Sellars's response to AFG's Opening Brief can be summed up to a

single fact. On August 10, 2010 a discharge order was entered in US Bankruptcy Court of Western Washington. It is undeniable that the Bankruptcy Court entered this order without the relevant facts raised by Greene's challenge of the Deed of Trust over 2 years later. These newly discovered facts, if known at the time and found to be true, would have exempted the loan at issue in this appeal from discharge under 11 U.S.C. § 523(a)(2)(A). It was in Greene's, May 6<sup>th</sup>, 2013, answer and declaration in the case at bar where the notarized signature represented as Greene's, by Sellars, was first challenged calling into question the dischargeability of the debt and the enforceability of the Deed of Trust. Neither of these issues have been fully adjudicated in any Court.

Due to these issues never being raised before May 6, 2013 it was not possible for: (1) AFG's predecessor, Chase Bank, to challenge the dischargeability of the debt by presenting this post-bankruptcy evidence when the bankruptcy was open; (2) the bankruptcy court to have considered and adjudicated these post-bankruptcy issues. As a result of these issues occurring post-bankruptcy the trial court erred in granting Sellars summary judgment based on the argument it lacked jurisdiction.

Sellars should be held to the long-standing rule that a party (Sellars) cannot make declarations under oath and plead admissions against interest taking one position (that Sellars is liable for a debt), and then at a later

time, after those statements have been relied upon by the opposing party (AFG) take a directly contrary position which ultimately causes additional harm to the opposing party (AFG). See AFG's Opening Brief Pg. 33.

The trial court's granting of Sellars's motion for summary judgment accepting Sellars's dramatic change in position that was directly contrary to the above stated facts was error. The trial court erred when it failed to fully adjudicate the newly discovered post-bankruptcy evidence and inferences to be drawn therefrom, that created material issues in dispute.

Sellars's Response (Pg. 7 ¶2) further misinforms this Court with its statement "*AFG also states that it cannot foreclose on Sellars if the personal debt claim is discharged. AFG provides no legal basis for why this might be so.*" This is a misinterpretation of AFG's argument that the trial court's order, if not reversed, has required AFG to split AFG's unified claim. Contrary, to Sellars' statement AFG provided significant legal basis and authority supporting its position in Section I (Pg. 44-49) of AFG's Opening Brief. Neither Sellars nor Greene has provided any authority in opposition to that assignment of error.

Sellars has remained silent at each of his multiple opportunities to object and/or respond to AFG's argument that the trial court's orders require AFG to split its single cause of action including; (1) AFG's raising this issue in its Combined Response to Defendants individual Motions for

Summary Judgment; (2) AFG's Motion for Reconsideration(s) of the Granting of Defendants Sellars and Greene Motion for Summary Judgment; (3) this Court's Motion to Determine Appealability and Whether Review Should be accepted by the Court (even after additional time was granted upon the request of Greene's counsel's request for an opportunity to respond after the entry of Commissioner Mary Neel's initial decision accepting review); and (4) in Sellars's Responsive Brief filed in this Appeal. AFG claims this silence should be taken as acquiescence of the validity of this assignment of error.

Sellars misinforms this Appellate Court by claiming that AFG for the first time is raising its objections to the Attorney's fee award for Sellars on this Appeal. AFG objected to an award of attorney's fees to Sellars beginning with its Response to the Motions for Summary Judgment (CP 385 ¶5.6). AFG raised Mr. Sellars claiming to appear pro-se while Mr. Minor was billing fees in its motion for reconsideration (CP 23) and that Mr. Minor (Sellars' attorney) "...has billed for fees that are not normally billed for." See (CP 25 Ln 19-21, CP 26).

Sellars has conceded that it was error for the trial court to award the \$240 filing fee for Sellars' cross claim against Greene. AFG claims this concession supported by the case law cited in AFG's Opening Brief (Pg.41) also applies to all fees related to the cross-claim against Greene

and/or counter cross-claim from Greene against Sellars because: (1) Sellars was not entitled to any award of attorney's fees at that stage of the proceedings because the granting of the summary judgment by the trial court was error; (2) Even if the order of summary judgment to Sellars is not reversed, nevertheless, at a minimum Sellars was not entitled to the award of fees not related to defense of AFG's claims against Sellars.

**B. Regarding Greene's Response.**

Greene's Resp. claims he showed "uncontroverted evidence" that "...he is not a signatory on the Deed of Trust..." (Greene Resp Pg. 1 ¶1), however Greene's self-serving declaration (CP 510-524) stating that "In reviewing the [Deed of Trust]...the signatures contained therein are not mine." (CP 511 ¶4) was far from "uncontroverted". **It is also important for this Court to take notice of the undeniable fact that there has been no determination or finding of fact by the trial court as to whether Greene did or did not personally sign the Deed of Trust.** See Judge Okrent's Order Granting Greene's Motion for Summary Judgment. (CP 58-59)

AFG made substantial efforts to uncover the details related to the signing of the Deed of Trust including the taking of 4 separate depositions which produced significant testimony supporting the enforceability of the Deed of Trust in addition to the "prime facie" evidence that already

existed as a result of the signatures being notarized.

**First**, Greene's self-serving declaration was directly contrary to Greene's previous declaration under oath (CP 71 ¶2) regarding a Quit Claim Deed, with an identical signature (CP 75) to the signatures on the Deed of Trust that he now disputes. That Quit Claim Deed is the only instrument that transferred the real property interest from L.B. Enterprises, originally obtained by Trustee Deed to Greene and Sellars individually. The identical signature appearing on this Quit Claim Deed, acknowledged by a separate notary public, Mr. Shimizu, is also "prima facie" evidence of the validity of Mr. Greene's signature appearing thereon. See Greene's Resp. Brief Pg. 12 "Mr. Greene does rely on that quit claim deed, there is nothing to challenge on it."

**Second**, Greene's self-serving declaration is also contrary to Greene's previous declaration under oath identifying the Deed of Trust and admitting he and Sellars "...secured the Loan with the Main Property via a Deed of Trust, to which I was a party." (CP 71 ¶3). Greene attached a "true and correct copy of the Deed of Trust as Ex. B to his declaration. (CP 77-103)

**Third**, Greene's self-serving declaration is also contrary to the testimony given by, Jacqueline H. Kimzey, in her deposition (CP 292) regarding her standard business practice of obtaining copies of driver's

license, at the time parties sign real estate documents. Copies of both Greene and Sellars driver's license appeared in the escrow file produced by Ms. Kimzey. (CP 277-279). There is nothing in the record to contradict that the standard process described by Ms. Kimzey was properly followed during the signing of the Deed of Trust, by both Greene and Sellars.

**Fourth**, Greene's self-serving declaration was contrary to the testimony of, Cathy Haage, (Ms. Haage) the notary who acknowledged the signatures on the Deed of Trust. Ms. Haage answered AFG's counsel's questions during her deposition (CP 319 Ln 19 – CP 320 Ln 5) as follows:

**Q.** Well, the question ultimately is what step did you take, if any, to be certain in your understanding that the signatures you were being asked to notarize, were in fact the signatures of the people that appeared to have signed the document?

**A.** I would either have discussed it with them, that they had come by and signed, or I would have seen them in the office physically prior to viewing the documents being signed.

**Q.** Do you have any recollection of ever having notarized signature of Mr. Green, without confirming with him that he had signed the document?

**A.** No.

**Fifth**, Mr. Greene, during his deposition, also testified:

**(1)** About when he learned of the Deed of Trust (CP 136 Ln 18-20):

**Q.** Well, for how long had you known of the existence of the deed of trust?

**A.** I've known about the deed of trust since 2007, I would say, I guess February 2007.

(2) That the loan was intended to refinance the prior Foundation Financial Partners loan, to the benefit of both, Greene and Sellars. (CP 122 Ln 6-25; 125 Ln 5-11; 139 Ln 6 – CP 141 Ln 5; CP 146) An example of Greene’s testimony is provided in the excerpt below from CP 130 Ln 9-25.

Q. I’m going to ask you to look at line 104 on Page 1. [of the HUD-1 (CP 233, Ex. 6 to Greene Deposition)]

A. Okay.

Q. What do you see there?

A. Payoff first deed of trust to Foundation Financial.

Q. And how much do you see?

A. \$295, 172.80

Q. Now, if I understand correctly, you have previously indicated that this payoff would have been to your benefit?

A. Yes.

All of the above referenced evidence and testimony was presented to the trial court in the Declaration of Edward L. Mueller in Support of Plaintiff’s Response Opposing Defendant Gregory Greene’s Motion for Summary Judgment (CP 60-67 ¶¶ 2,3,5,15,17) and the attached exhibits.

At a minimum, the overwhelming amount of above described conflicting evidence and testimony creates material issues of fact and inferences favorable to the non-moving party that precluded the granting of Greene’s Summary Judgment Motion.

## **II. STATEMENT OF THE CASE**

### **A. Additional Material Facts that are not disputed related to Sellars.**

Mr. Minor’s demand to AFG’s counsel (Sellars’s Response Pg. 10 ¶

3-4) was the complete dismissal with prejudice of all claims including the judicial foreclosure against not only Sellars but also Mr. Greene. AFG could not agree, because that would waive its rights to judicially foreclose.

AFG tried to eliminate the need for Sellars to “expend time defending against” AFG’s Motion for Summary Judgment by first postponing then canceling the hearing after notification of Sellars change in position, and then taking no further action against Sellars.

Sellars’s Motion for Summary Judgment was not simply for dismissal of the monetary claims, instead Sellars’s motion sought “The dismissal of all claims against Defendant Sellars.” (CP 463 §1(A)).

These conflicting statements under oath and admissions against interest show Sellars was not and is not entitled to summary judgment, as a matter of law. See AFG’s Opening Brief Pg. 33.

### **III. STANDARD OF REVIEW FOR SUMMARY JUDGMENT**

Summary judgment is only proper when there is NO genuine issue of material fact. The moving party is not entitled to judgment as a matter of law if a reasonable persons could differ on a conclusion. CR 56(c), Scott v. Pac. W. Mtn. Resort, 119 Wn. 2d 484, 502, 834 P.2d 6 (1992). If the nonmoving party demonstrates that an issue of material fact exists which establishes a genuine issue for trial, then summary judgment must be denied. See CR56(e) and, e.g. Young v. Key Pharm, Inc. 112 Wn.2d

216, 770 P.2d. 182 (1989). All facts and reasonable inferences from the evidence must be construed in favor of the nonmoving party.

Greene's Resp. Pg. 5 misquotes **Greaves v. Medical Imaging Systems, Inc.** 124 Wn 2d 389,392 (1994) "Certainly all facts and reasonable inferences are to be considered in the light most favorable to the **moving** party. *Id.*" The **Greaves** ruling actually read "When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court.<sup>1</sup> In summary judgment, all facts and reasonable inferences are to be considered in the light most favorable to the **non-moving party**,<sup>2</sup> and all questions of law are reviewed de novo."<sup>3</sup>

#### IV. ARGUMENT

##### **A. The Material Facts in Dispute and Inferences To Be Drawn Therefrom Prohibit the Granting of Greene's Summary Judgment Based on His Statute of Frauds Defense.**

Greene's solitary defense relies on the Statute of Frauds which Greene only partly cites "...any agreement, and promise shall be void, unless such agreement...be in writing, and signed by the party to be charged therewith..." is wholly dependent upon a finder of fact

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<sup>1</sup> **Citing Syrov v. Alpine Resources, Inc.**, 122 Wash.2d 544, 548 n. 3, 859 P.2d 51 (1993)

<sup>2</sup> (Citing **Central Wash. Bank v. Mendelson-Zeller, Inc.**, 113 Wash.2d 346, 351, 779 P.2d 697 (1989)).

<sup>3</sup> **Caritas Servs., Inc. v. Department of Social & Health Servs.**, 123 Wash.2d 391, 402, 869 P.2d 28 (1994) (citing **Syrov v. Alpine Resources, Inc.**, 122 Wash.2d 544, 548 n. 3, 859 P.2d 51 (1993)).

determining that Greene, himself, did not sign the Deed of Trust. There has been no such finding of fact. Greene also conveniently excludes the remainder of the text of RCW 19.36.010 which reads “...be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized....” Even if the signature on the Deed of Trust is not Mr. Greene’s signature an inference that should have been drawn from the evidence in the court record is that Greene authorized another person to sign the Deed of Trust. Even though Greene has denied that he gave such an authorization, his denial simply creates an issue of material fact in dispute.

It is clear that there exist genuine material facts in dispute as to whether Greene, personally signed the Deed of Trust. This in and of itself is adequate to bar the granting of Greene’s motion for summary judgment. Greene claims that AFG didn’t provide “clear, cogent, and convincing evidence” that the notary acknowledgment was properly accomplished, however this initial burden is not on AFG. Furthermore, a simple reading of the acknowledgement shows that it was properly accomplished (CP 92, See the “true and correct copy” of Deed of Trust, attached to Dec. of Greene). This Court has recently reviewed the elements of a notary acknowledgement appearing on a disputed deed in Bale v. Allison, 173 Wn.App. 435, 294 P.3d 789 (Div. 1 2013):

“The Bales also claim the deed's invalidity because "the notary failed to enter in her acknowledgment the identity of the person appearing before her." Resp't's Br. at 13. They offer no additional argument on this issue and cite no authority supporting their claim that this omission invalidated the deed, and we can decline to address it. *See Palmer v. Jensen*, 81 Wash.App. 148, 153, 913 P.2d 413 (1996) (" Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." ). Even if we consider this argument, it fails. Review of the disputed deed shows that the grantor's and grantees' names appear on the document. Bob signed and dated the deed. The notary's signature appears directly beneath Bob's signature. The deed contains a blank in the certification: " I certify that I know or have satisfactory evidence that \_\_\_\_\_, the person(s) who appeared before me...." Ex. 2. Despite this omission, it is clear that the notary acknowledged Bob's signature because he was the only person who signed the deed. The notary's uncontroverted trial testimony supports this conclusion. *See RP* (June 9, 2011) at 458-69.”

Similar facts exist here. As a result the burden of providing “clear, cogent, and convincing evidence to dispute the “prima facie” evidence lies on Greene, not AFG. Greene did not meet that burden. Greene’s argument to the contrary (See Greene’s Resp. Pg. 10 ¶2) that inferences are not adequate in order for AFG to prevail may be correct at trial, however see the summary judgment standard cited by Greene in Young, (*supra*).

“the evidence and all reasonable inferences therefrom is considered in the light most favorable to the plaintiff, the nonmoving party. An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. Del Guzzi Constr. Co. v. Global Northwest Ltd., 105 Wash.2d 878, 882, 719 P.2d 120 (1986).”

Greene, himself, made conflicting declarations under oath regarding the

enforceability of the Deed of Trust. AFG has also provided substantial, clear evidence to support the validity of the notary's acknowledgment of Greene's signatures.

There are inferences to be drawn, from the evidence. One such inference is that, if Greene did not sign the Deed of Trust.<sup>4</sup> Sellars, as a "...person thereunto by him or her lawfully authorized..." by Greene, was the person who signed Greene's name to the Deed of Trust. After all, (1) Greene and Sellars had discussed the refinancing of the Foundation Financial Partners hard money loan via the Washington Mutual Bank loan in question<sup>5</sup>; (2) Greene was aware of the closing of the loan within days of it being funded<sup>6</sup>; (3) Greene was an experienced and knowledgeable real estate broker and investor<sup>7</sup>; (4) Greene made a declaration under oath that the Loan was "... secured...with the Main Property via a Deed of Trust, **to which I was a party.**" (CP 71 ¶3); (5) Greene did not dispute the validity of the Deed of Trust or his signatures at any point for more than 6 years prior to AFG's seeking to enforce that security interest.

Another inference to be drawn from the evidence is that Sellars as the primary borrower of the WaMu Loan, is providing quid pro quo

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<sup>4</sup> **No fact finder has yet made a finding**, see Judge Okrent's Order Granting Greene Summary Judgment, **making NO findings of fact**. (CP 58-59)

<sup>5</sup> See CP 145 Ln 10 – CP 146 Ln 8

<sup>6</sup> See CP 136 Ln 18-21

<sup>7</sup> See CP 146 Ln 20-25

consideration for other transactions where Greene acted as the primary borrower responsible for another loan (CP 36 ln 20 – CP 38 ln 9) and an inference that Greene and Sellars had a separate agreement that was not disclosed to the Lender whereby both Sellars and Greene were equally liable for the debt. See Sellars’s cross-claim against Greene (CP 553 ¶3-4).

Another inference that should have been made in AFG’s favor is Greene’s reliance upon the Quit Claim Deed bearing his identical signature as is on the Deed of Trust while disputing the signature on the Deed of Trust is that Greene is changing his story to create a defense against the enforcement of AFG’s valid security interest. This was also presented to the trial court, see the Dec. of Mueller. (CP 63-64 ¶6).

Greene’s Resp. (Pg. 7 ¶ 2 – Pg. 8) cites 4 statements made in the Depositions of Ms. Kimzey; Ms. Haage; and Mr. Shimizu as “uncontroverted evidence”, however none of the statements are clear, cogent, convincing, or conclusive evidence as would be required for Greene to overcome the contradictory evidence supplied by AFG.

Ms. Kimzey’s stated when asked about her knowledge as to whether Greene did or did not sign the Deed of Trust, was “I believe so...” This statement was based on her review of the business records contained in the file which showed compliance with the standard practice of obtaining the signer’s driver’s license at the time of a signing. This supports the “prima

facie” evidence that Mr. Greene was present and signed the Deed of Trust.

Ms. Haage’s statement “...they could have come in and signed, but not necessarily when I was in the room...” is a generalization of what “could have” happened, not as Greene would have this Court believe that the Deed of Trust was notarized absent Greene being present (Greene Resp. Pg. 9 ¶3). This is not conclusive evidence as to what “did happen”. Ms. Haage also stated when asked of her recollections of the notarization of the Deed of Trust (CP 314):

- Q.** Do you have any knowledge of any situation in which you were asked as a notary to notarize a signature for Mr. Green [sic], when Mr. Green [sic] had not appeared in front of you?
- A.** I do not recall ever being asked to notarize something that he did not appear in front of me.
- Q.** Well, I think you answered the question as best you can. I recognize that you are... I can see from the expression on your face, you were searching your memory?
- A.** Well, I guess, in a typical transaction, you would sit down and [sic] explain everything to the borrowers. With these particular individuals, they knew what they had before it ever got to our office, they were well-versed in their transactions. So, there was never a time that I was asked to notarize something that I don’t believe was signed by the parties.

The prima facie evidence that exists by the notarization of the signatures with the addition of Ms. Haage’s testimony above, at a minimum, creates a material issue of fact in dispute that was appropriate for trial as to who signed “Greg Greene” to the Deed of Trust.

Mr. Shimizu's statement, "I'm not sure, if I was notarizing one of them, both of them, I'm not sure, so I don't recall notarizing this document" is likewise not clear, cogent, convincing, or conclusive evidence as to who actually appeared before Mr. Shimizu. Mr. Shimizu testified when he was asked about whether he had ever notarized a signature of Greene when Greene was not present (CP 258-259):

- Q.** Do you remember ever having an occasion when you notarized the signature of Mr. Greg Greene when he was not present?
- A.** I don't recall any situation where that would have happened.

Mr. Shimizu further testified

- Q.** Do you have any reason as you look at it to question whether or not you notarized the Exhibit 3. [the Quit Claim Deed]
- A.** I can't be certain, but that appears to be my notary.

The contradictory facts, evidence, and inferences drawn therefrom have created material questions of fact and law that were not ripe for summary judgment. AFG supported the prima facie evidence of the notary acknowledgment of Greene's signature on the Deed of Trust and the Quit Claim Deed. Greene has relied solely on his own self-servicing declaration and made allegations that Sellars' forged his signatures. There has been no finding of fact as to which of the various theories presented to the trial court were correct: (a) Greene, himself signed the Deed of Trust; (b)

Sellars forged Greene's signature on both the Deed of Trust and Quit Claim Deed and conspired with two separate notary publics to notarize Greg Greene's signatures; (c) Sellars or some other person signed the Deed of Trust and Quit Claim Deed with Greene's authorization.

Greene's citing of Meyers v. Meyers, 503 P.2d 59, 81 Wn.2d 533 (Wash. 1972) is not similar to the facts existing here. In Greene's quote of the Meyers court "...respondents' evidence established that the Notary's certificate was false, in that the person executing the deed had forged the names of the grantors..." here there has been no finding of fact similar to what existed in the Meyers case.

AFG's restates its position in regards to the conditional award of attorney's fees to Greene that whereas the granting of Greene's summary judgment in error, so was the award of fees also an error.

AFG's also restates its position in regards to the errors of the trial court in denying AFG's motion for reconsideration.

**B. The Trial Court Failed to Adjudicate the Evidence Newly Discovered Post-Petition And Post-Petition Admissions Against Interest Of Sellars, Entered with Advice of Sellars's Counsel.**

**1. AFG's Predecessors Could Not Have Presented Evidence to the Bankruptcy Court During The Time The Bankruptcy Was Open Because That Evidence Did Not Exist Until After The Bankruptcy Had Closed.**

Sellars argues that "AFG now tries to challenge a bankruptcy discharge in a Washington Court that its predecessor in interest failed to

do in Bankruptcy Court.” (Sellars’s Resp. §IV(B)(1) Pg. 13). However, this argument that AFG is attempting to “*re-litigate the issues involving the discharged debt*” (Sellars’s Resp Pg. 6 ¶2) is simply inaccurate because the newly discovered evidence and inferences drawn therefrom, could not have been litigated during the time the bankruptcy was open. This is a chronological certainty because these post-petition facts and claims did not first arise until May 6, 2013 when Greene’s answer and declaration was entered more than two (2) years after the bankruptcy was closed. These facts by operation of the discovery rule are post-bankruptcy issues as are the claims associated with them.

**Alexander v. Sanford** 181 Wash.App. 135, 325 P.3d 341 (Div. 1, 2014) “The discovery rule is an exception to the normal rules governing when a cause of action accrues...Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action: duty, breach, causation and damages.” citing **Allen v. State** 118 Wash.2d 753, 758, 826 P.2d 200 (1992) (footnote omitted)

Sellars argues that AFG’s reliance on the discovery rule is misplaced, because AFG doesn’t address how it was unable to discover Sellars filed bankruptcy. This is misdirection of the issue to confuse this Court. It is not that a bankruptcy existed that has been newly discovered as of May 6, 2013, it was the outright, “**...concealment of information by [Mr. Sellars and Mr. Greene]**” related to Mr. Sellars’s “*...false pretenses, false representation, or actual fraud (subparagraph (a)(2)(A))*;

*or for money obtained by the use of the statement in writing that is materially false, etc. (subparagraph (a)(2)(B)).*” (Sellars’s Resp Pg. 13 ¶2). Had this information been known and properly adjudicated when the bankruptcy was open. The court would have found the debt to be exempt from discharge. The cause of action related to this new evidence did not accrue until May 6, 2013, **Alexander**, *supra* after the assignment by Chase to AFG of

“...any and all beneficial interest under [the Deed of Trust] together with the Promissory Note referred to in item (E) of the Deed of Trust and also all rights accrued or to accrue under said Note and Deed of Trust.” (CP 677) (emphasis added)

These post-bankruptcy claims and rights derived from the newly discovered post-petition evidence are properly brought by AFG and subject to adjudication for the first time by the Superior Court in this case.

“state courts and bankruptcy courts have concurrent jurisdiction over all proceedings arising under Title XI or in or related to cases under Title XI.” 28 U.S.C.A. § 1334(b). “Bankruptcy courts do not have exclusive jurisdiction...forum shopping by debtor after discharge...is not type of offensive conduct which discharge injunction was designed to protect. Bankr.Code, 11 U.S.C.A. § 362.” **In re Watson**, 192 B.R. 739, 9th Cir.BAP (Cal.),1996)

Sellars cites nothing in the record, as none exists, to show the trial court “...assumed that the debt to Chase Bank (now held by AFG) was for money obtained by false pretenses, false representation, or actual fraud...”. The trial court made no such findings of fact or conclusions of

law (CP 51-57). Instead Sellars's Motion for Summary Judgment was granted and the award attorney's fees were granted, further injuring AFG, by the trial court on the mistaken argument urged by Sellars's legal counsel that the superior court had no jurisdiction to adjudicate the newly discovered post-bankruptcy facts and issues.

Sellars's Response claims that the Washington state court is not empowered to adjudicate the issues by expanding on AFG's citing of **In re Watson** this is not helpful for Sellars' argument, because with a complete review of the case including the concluding passage of that section it's clear that in that case the: "...agreement was a postpetition agreement not subject to Watson's defense of discharge in bankruptcy, and allowed the trial to proceed." **In re Watson**, at 747. Here it is not an agreement of re-affirmation, but newly discovered post-bankruptcy evidence and post-bankruptcy admissions against interest of the debtor, with advice of Sellars's counsel, that are at issue.

**2. The Doctrine of Issue Preclusion Does Not Apply Where The Issues are Not Identical and There Was Not a Final Judgment on the Merits.**

Neither of these issues existed during the bankruptcy, therefore, they could not have been adjudicated by the bankruptcy court, Sellars's next argument the **Watson** court also dealt with:

There is nothing in the record showing that the superior court considered whether the agreement was an improper

reaffirmation agreement under the provisions of § 524(c); the court simply formed its legal conclusion on the finding that the agreement was a post-bankruptcy agreement. Therefore, the basis for the superior court's determination concerning the nature of the agreement was an issue that was not identical to that subsequently raised in bankruptcy court and was not fully litigated in state court. At least, the record does not show otherwise, and the party asserting collateral estoppel has the burden of establishing all the requisites for its application. *In re Berr*, 172 B.R. 299, 306 (9th Cir. BAP 1994). In the absence of a factual record showing that the superior court considered the pertinent code section, i.e., if the provisions of § 524(c) applied to the agreement, then that question of federal law was unresolved by the state court.

Here the courts' roles are reversed and yet the outcome is the same.

There is nothing, and **could not have been**, anything in the record of the bankruptcy showing that the post-petition facts were considered.

This is fatal to Sellars' argument of issue preclusion, because the 3<sup>rd</sup> and 4<sup>th</sup> elements, are not satisfied. First, the bankruptcy court could not make judgment on the merits, because neither the evidence nor admissions against interest existed at that time. Second, the claims were not identical because Greene's answer and declaration did not exist.

**3. The Process of Re-affirmation is Inapplicable Where The Discovery of Post-Bankruptcy Evidence and Admissions Against Interest Create Post-Bankruptcy Claims That Have Yet To Be Adjudicated.**

Sellars makes substantial efforts to direct this Court to the process whereby a debtor can re-affirm a validly dischargeable debt during the time a bankruptcy is open. However, this is not relevant to the case at bar

where there exist post-bankruptcy claims that have yet to be adjudicated. Until this issues are fully adjudicated, which (1) the bankruptcy court could not do, because the evidence did not exist; and (2) the trial court did not consider because of the arguments urged by Sellars's counsel that only the bankruptcy court had jurisdiction any discussion of the process related to re-affirmation of a validly dischargeable debt is pre-mature and not ripe for discussion. Each of the citings to which Sellars refers to discuss a separate post-petition agreement between the debtor and creditor, are not similar to this case or helpful.

**4. Sellars's Responsive Brief § 5(a) Is A Misrepresentation Of The Record and Irrelevant.**

Sellars's citing to 11 U.S.C. § 524(a) is irrelevant because it deals with the voiding of a judgment. In the case at bar there is no judgment that has been issued. Further, Sellars's Response Brief states "The plain language of the Bankruptcy Code expressly precludes AFG's waiver argument." AFG has made no such argument and Sellars has cited to no point in the record where such an argument has been made.

**C. Sellars' Conceded that the award of the \$240 filing fees for the Cross-Claim Against Greene was in error. This Concession Also Applies To Work Related To The Cross-Claim Against Greene.**

AFG restates its position that Sellars' is not entitled to any attorney's fees because the Summary Judgment was granted in error, by

the trial court. However, even if the granting of Sellars' Summary Judgment is not found erroneous the trial court abused its discretion in awarding Sellars fees and costs not related to the defense of AFG's claims. Sellars argues that AFG is not entitled to review of the award of attorney's fees by the Court of Appeals, however multiple courts disagree:

"The trial court's discretion is not unbridled and we have overturned attorneys' fee awards when we have disapproved of the method utilized by the trial court." Progressive Animal Welfare Soc. v. University of Washington, 790 P.2d 604, 114 Wn.2d 677 (Wash. 1990); citing Boeing Co. v. Sierracin Corp., 108 Wash.2d 38, 65, 738 P.2d 665 (1987); Singleton v. Frost, 108 Wash.2d 723, 733, 742 P.2d 1224 (1987). The trial court's discretion is not unbridled and we have overturned attorneys' fee awards when we have disapproved of the method utilized by the trial court.

The trial court "manifestly abused its discretion" by deeming fees for work other than defending against AFG's claims related to monetary recovery as reasonable.

Boeing Co. v. Sierracin Corp., 738 P.2d 665, 108 Wn.2d 38, 66 (Wash. 1987) "In Nordstrom, we held that when a number of actions are argued and only some of those allow for recovery of attorney fees, it would give the [738 P.2d 683] prevailing party an unfair benefit to award attorney fees for the entire case. Rather, attorney fees should be awarded only for those services related to the causes of action which allow for fees. Nordstrom, at 743, 733 P.2d 208."

Sellars acknowledges and agrees with AFG, because Sellars conceded that the trial court erred in awarding the \$240 filing fee for his cross claim against Greene, AFG respectfully suggests that this concession also applies to each of the charges identified in AFG's Opening Brief (Pg.

41) as well as any additional attorney's fees related to the cross-claim against Greene and/or counter cross-claim from Greene against Sellars because Sellars was not entitled to the award against AFG of those fees. Those awards were, therefore, made on untenable grounds. This is supported by the case law cited in AFG's Opening Brief (Pg.41).

**D. The Court Erred In Issuing Orders Which Required Plaintiff To Split Its Judicial Foreclosure Cause Of Action.**

As in all previous opportunities to respond Sellars completely fails to address the fact that the effect of the trial court's orders granting Sellars's and Greene's Summary Judgments requires AFG to split its claim of judicial foreclosure derived from a single set of loan documents secured by a single piece of real property in order to proceed with foreclosure. AFG claims that this silence on the matter should be taken as Sellars's acquiescence to the validity of this issue and that irrespective of all other arguments on this appeal, both orders granting summary judgment including awards of attorney's fees should be overturned.

Greene, at least, acknowledged AFG's argument of splitting its cause of action. However, Greene provided no authority or facts that counter AFG's position. Instead Greene simply claims "...AFG does not have a cause of action against Greene" because "Mr. Greene is not a signatory to the Deed of Trust..." This again is a disputed material fact that no fact finder has decided.

#### V. ATTORNEY FEES ON APPEAL

AFG is entitled to an award of attorney fees on appeal because the Deed of Trust provides for attorney's fees including on appeal (CP 592 Item 26) in the event of foreclosure.

#### VI. CONCLUSION.

AFG reaffirms its position that the trial court erred by failing to apply the standard of review for summary judgment, as to all 3 orders on appeal, and has further abused its discretion in awarding inappropriate attorney's fees. AFG has shown that genuine materials facts were in dispute and that the trial court's orders did not result in substantial justice being done, because the trial court's orders require AFG to split its unified cause of action in order to enforce its right to foreclosure.

For each and all of those reasons Appellant Auxier Financial Group, LLC asks that the trial court's Orders granting Summary Judgment to each Defendant, and the Order Denying Reconsideration be reversed and the matter remanded to the trial court for further proceedings consistent with this court's decision.

Dated this 19th day of January, 2015.

Respectfully submitted



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**Certificate of Service.**

I certify that in January 19, 2015 I caused to be mailed by first class mail with postage prepaid, to the following named legal counsel for the respective respondents a copy of Appellant's Reply Brief to which this certificate is attached:

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I also certify that I e-mailed a copy of the brief to the respective Counsel for Respondent at the e-mail address shown below each name.

Dated January 19, 2015.



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