71913-1

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NO. 71913-1

COURT OF APPEALS, DIVISION I,

OF THE STATE OF WASHINGTON

MORGAN COURT OWNERS ASSOCIATION

Respondent,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as TRUSTEE FOR MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-NC2 MORTGAGE PASS-THROUGH CERTIFICATES,

Appellant.

Appeal from the Superior Court of King County
Cause No. 13-2-14604-5 KNG
The Honorable SUSAN AMINI

RESPONDENT MORGAN COURT OWNERS ASSOCIATION'S BRIEF

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I. INTRODUCTION

Respondent Morgan Court Owners Association ("Morgan Court") is seeking to quiet title to a condominium unit (the "Unit") purchased through a judicial foreclosure of its statutory assessment lien, where the deed of trust lender failed to respond to the foreclosure suit or redeem the Unit within the one year redemption period following the sheriff's sale. The sole issue presented in this appeal is whether a lender is entitled, as a matter of law, to have the Court use its equitable power to override or set aside a judicial foreclosure sale where the sale price was substantially below the market value of the property, but the condominium association complied with all applicable legal requirements for the foreclosure action and sale, and where there was no irregularity or misconduct involved.

In 2008, Morgan Court Owners Association ("Morgan Court") filed a judicial foreclosure action (the "Foreclosure Action") to foreclose its statutory lien for unpaid condominium assessments for a condominium unit ("Unit") then owned by Carol Obeng ("Obeng"). In addition to Obeng, Mortgage Electronic Registration Systems, Inc. ("MERS") was named as a defendant and served with the summons and complaint, because it was the record beneficiary under a deed of trust recorded against the Unit (the "Obeng Deed of Trust"). Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust

2007-NC2 Mortgage Pass-Through Certificates, Series 2007-NC2 ("Deutsche Bank") is the current successor to the rights and interests of MERS under the Obeng Deed of Trust.

Morgan Court obtained a Default Judgment, Order and foreclosure Decree (the "Foreclosure Judgment") on February 10, 2009, which resulted in a sheriff's sale of the Unit to Morgan Court on December 4, 2009, for the amount then due Morgan Court ($8,818.17). Morgan Court first attempted to collect the Foreclosure Judgment through a wage garnishment against Obeng, but that was blocked by a bankruptcy filing by Obeng. A loan servicer for Deutsche Bank was put on notice that the Foreclosure Judgment had been entered and that Morgan Court intended to proceed with the foreclosure via a relief from stay motion filed in the bankruptcy action in May 2009. There was a one-year redemption period after the sheriff's sale, but neither Obeng nor Deutsche Bank redeemed the Unit. There is no claim that Morgan Court failed in any way to comply with any legal requirement applicable to the Foreclosure Action or resulting Sheriff' sale, or otherwise engaged in any misconduct.

Morgan Court filed the current action to quiet title to the Unit in March 2013. Morgan Court moved for summary judgment and Deutsche Bank responded by asserting, *inter alia*, that it was entitled to equitable relief permitting it to purchase the Unit from Morgan for whatever damage

amount Morgan Court can prove. In essence, Deutsche Bank is seeking to obtain an equitable redemption right long after it let its statutory redemption right expire. Besides the fact that the foreclosure sale price was substantially below a market value in excess of $200,000, the only other factors advanced for equitable relief were that Morgan Court (1) knew about and intended to foreclose the Obeng Deed of Trust, and (2) did not provided more notice about the sheriff's sale than was required by the applicable statutes. Deutsche Bank did not assert any irregularity or misconduct in connection with the foreclosure and sale. The trial court ruled against Deutsche Bank's request for equitable relief and granted summary judgment as requested by Morgan Court.

In addition to a low sale price, the Washington Courts have always required some sort of irregularity or misconduct in the foreclosure or sale process to override or set aside a judicial foreclosure sale. Because there is no irregularity or misconduct in this case, the trial court's decision should be affirmed.

II. ASSIGNMENTS OF ERROR

Morgan Court accepts Judge Amini's order in this case. Morgan Court does not make any assignment of error.

III. STATEMENT OF THE CASE

The factual description in the Statement of the Case section of Deutsche Bank's Opening Brief is correct, insofar as it goes, and is not repeated in this Brief. The section does, however, include addition information not included in Deutsche Bank's Opening Brief.

A. Additional facts concerning the Foreclosure Action and sheriff's sale.

Ten days after entry of the Foreclosure Judgment on February 10, 2009, Morgan Court could have proceeded with Sheriff's sale of the Unit. CR 62(a); CP 135-139. But the sale in this matter did not occur until December 4, 2010. CP 146-47. Instead of proceeding immediately with a sheriff's sale, Morgan Court first attempted to collect the amount due through a wage garnishment against Obeng. CP 338, 353-55. Obeng frustrated that collection attempt by filing a Chapter 13 bankruptcy action in May 2009. CP 338, 356-59.

In response to the bankruptcy, Morgan Court filed a proof of claim that included a copy of the foreclosure judgment. CP 338, 363-375. On May 19, 2009, Saxon Mortgage filed a proof of claim for the deed of trust at issue here, in its capacity as the servicing agent for Deutsche Bank. CP 338, 376-378. In addition, an attorney for Saxon Mortgage filed a Request for Service of Notice in the bankruptcy action. CP 339, 379-80. On May 27, 2009, Morgan Court filed a motion for relief from stay to allow it to

proceed with foreclosing upon the Unit in accordance with state law. CP 339, 381-84. This motion specifically references the foreclosure judgment obtained before the bankruptcy and that a copy of such foreclosure judgment was included with Morgan Court's proof of claim. On May 27, 2009, copies of the motion and related papers were mailed to both Saxon Mortgage and its attorney. CP 339, 385-86. There were no objections to Morgan Court's motion and an order was entered on June 23, 2009, allowing relief from stay for Morgan Court to proceed with its foreclosure in any manner allowed under state law. CP 339, 387-89.

Although the relief from stay order was issued on June 23, 2009, Morgan Court did not initiate the sheriff's sale process until October 14, 2009, when it had an order of sale issued. CP 140-41.

There is no claim that Morgan Court engaged in misconduct of any nature, or in any way failed to comply with any statute or court rule in connection with the Foreclosure Action or sheriff's sale in (1) any of the papers filed by Deutsche Bank in opposition to the summary judgment motion below, (2) oral argument at the summary judgment hearing below, or (3) Deutsche Bank's Opening Brief.

B. Additional facts concerning the summary judgment motion.

In response to Morgan Court's summary judgment motion in this quiet title action, Deutsche Bank argued an assortment of defenses. But

the only issue on this appeal is the trial court not granting equitable relief permitting Deutsche Bank to purchase the Unit. Opening Brief, p. 3. Deutsche Bank is not challenging the trial court's ruling on any other matter claimed below. In the summary judgment proceeding, the claim for equitable relief was based upon (1) the relative amounts due Morgan Court and Deutsche Bank, (2) the value of the Unit, (3) the sheriff's sale price, (4) the fact that Morgan Court knew about and intended to eliminate the Obeng Deed of Trust, and (5) that Morgan Court did not provide more notice of the sheriff's sale than required by the applicable statutes. CP 309-10, 313-15.

In its response to and oral argument against the summary judgment motion, and in its Opening Brief, Deutsche Bank offers no reason or explanation as to why (1) there was no response to the service of the Foreclosure Action, (2) it did not pay the limited six-month priority amount of Morgan Court's judgment before the sheriff's sale occurred, or (3) it did not attempt to redeem the Unit before expiration of the one-year redemption period after the sheriff's sale.

It should be noted that before Summerhill Village Homeowners Ass'n v. Roughley, lenders routinely took the position that they had redemption rights following condominium lien foreclosure sale. 166 Wn.App. 625, 289 P.3d 645 (2012). The Summerhill decision was the first

reported case holding that lenders did not have redemption rights in such cases, and it was not reported until February 21, 2012, over a year after the redemption period had expired in the December 2010. The Washington Supreme Court subsequently overturned the Summerhill case, ruling that lenders like Deutsch Bank in this case did in fact enjoy redemption rights under the redemption statute then in effect. BAC Home Loans Servicing, LP v. Fulbright, 180 Wn.2d 754, 328 P.3d 895 (2014). Furthermore, Deutsche Bank was actually the lender party in the Summerhill case and actively taking the position, correctly as it turns out, that it did have a redemption right. The Summerhill decision does not explain Deutsche Bank's failure to attempt a redemption in this case.

A key factor in Deutsche Bank's argument in its Opening Brief is that Morgan Court declined requests to extend the date of a sheriff's sale because of a pending short sale of the Unit. Opening Brief, pp. 2, 6-7, and 23-24. Documentation for these requests was buried near the end of 107 pages of exhibit material attached to the declaration submitted by Deutsche Bank's counsel in opposition to the summary judgment motion. CP 170-278. But Deutsche Bank did not make a single reference to potential sale or extension requests, let alone argue that they warranted equitable relief, in its opposition brief for the summary judgment motion, or in oral argument on the summary judgment motion. Those matters are

being asserted for the first time in Deutsche Bank's Opening Brief for this appeal.

IV. LEGAL ARGUMENT

A. This appeal presents an issue of law that is subject to de novo review.

Deutsche Bank's Opening Brief does not point to a single material issue of fact. Summary judgment standards about factual matters are not involved here. This appeal concerns the trial court's summary judgment denial of Deutsche Bank's request for equitable relief, given the undisputed facts presented.

> In matters of equity, "trial courts have broad discretionary power to fashion equitable remedies." The Supreme Court reviews the authority of a trial court to fashion equitable remedies under an abuse of discretion standard. However, it is a well-established rule that an equitable remedy is an extraordinary, not ordinary form of relief. A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate. (citations omitted) (emphasis added)

Sorenson v. Pyeatt, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006).

The trial court's ruling that Duetsche Bank is not entitled to equitable relief under the facts presented is an issue of law, which is subject to de novo review.

> While the fashioning of the remedy may be reviewed for abuse of discretion, the question of whether equitable relief is appropriate is a question of law. (citations omitted)

Niemann v. Vaughn Community Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005).

B. The trial court's decision was correct under the facts and authority cited by Deutsche Bank in the summary judgment proceeding.

None of the cases cited by Deutsche Bank in the summary judgment proceeding dealt with equitable relief from a judicial foreclosure sale. Deutsche Bank's counsel stated that she could not find any Washington case dealing with the fact pattern in this case. RP 18. Instead, she asked the trial court to look to the five factors considered in an encroachment case: Proctor v. Huntington, 169 Wn.2d 491, 238 P.3d 1117 (2010). RP 18; *See* also CP 314. Application of those factors to a judicial foreclosure action is problematic at best, but Deutsche Bank failed to meet the first factor; "The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure". Proctor, 169 Wn.2d at 500. The trial court ruling specifically noted that Deutsche Bank's predecessor (MERS) had notice of the case, and that the Obeng Deed of Trust was eliminated because of its inaction before the sheriff's sale. RP 31. In other words, Deutsche Bank and its predecessor were negligent, as argued by Morgan Court. CP 332.

Washington Courts have repeatedly held that inadequate price alone is not a sufficient reason to set aside an otherwise valid judicial

foreclosure sale. Home Owners' Loan Corp. v. Callahan, 2 Wn.2d 604, 609-13, 98 P.2d 1077 (1940); Northern Sav. & Loan Ass'n v. Taylor, 190 Wash. 535, 537, 69 P.2d 810 (1937); Washington Mut. Sav. Bank v. Horn, *186 Wash.* 75, 77, 56 P.2d 995 (1936); Atwood v. McGrath, 137 Wash. 400, 407, 242 P. 648 (1926). In ruling for Morgan Court, the trial court noted correctly that Deutsche Bank's proportionality or windfall arguments (other terms for price inadequacy) had been raised in other cases, but that "the amount of the sale by itself is not – is not the reason to set aside a foreclosure." RP 32-33.

C. The new cases relied upon by Deutsche Bank in this appeal do not warrant a reversal because there was no irregularity or misconduct in the foreclosure sale.

Unlike the summary judgment motion, Deutsche Bank now cites cases involving judicial foreclosure sales and a "gross inadequacy" of the foreclosure sale price. Even when there is a gross price inadequacy, something more is required for equitable relief.

> While it is a primary rule that mere inadequacy of price, unless so gross as to shock the conscience, is not enough to set aside a judicial sale, it is also true that, when there is a great inadequacy, slight circumstances indicating unfairness will be sufficient to justify a decree setting the sale aside. Ballentyne v. Smith, 205 U.S. 285, 27 S.Ct. 527, 51 L.Ed. 803. (emphasis added)

Roger v. Whitham, 56 Wash. 190, 193, 105 P. 628 (1909). In the cases where sales have been set aside, the "slight circumstances indicating

unfairness" have always involved some sort of irregularity or misconduct by the foreclosing creditor or foreclosure buyer.

Two of the cases relied upon most heavily by Deutsche Bank in its Opening Brief demonstrate the point: Casa del Rey v. Hart, 110 Wn.2d 65, 750 P.2d 261 (1988) and Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984). Unlike this case, the underlying judgments in Casa del Rey and Miebach did not involve a mortgage or other lien claim against the real property at issue. Both cases involved strictly monetary judgments that were used to bring about sheriff's sales of properties owned by the judgment debtors, but not otherwise involved in the underlying judgment claims. Casa del Rey, 110 Wn.2d at 67; Miebach, 102 Wn.2d at 172. There were statutes in both cases requiring the creditor to look to personal property before resorting to the sale of real property. Casa del Rey, 110 Wn.2d at 73; Miebach, 102 Wn.2d at 178; Miebach v. Colasurdo, 35 Wn.App. 803,820, 670 P.2d 276 (1983) (Willimas dissenting). In both cases the judgment creditors or plaintiffs failed to make reasonable efforts to satisfy the judgments out of personal property. Casa del Rey, 110 Wn.2d at 73; Miebach, 102 Wn.2d at 178.

Casa del Rey summarized the holding in Miebach as a three part test:

> In *Miebach v. Colasurdo*, 102 Wash.2d 170, 685 P.2d 1074 (1984), we held that a sheriff's sale may be set aside on equitable grounds where (1) the buyer or his successor is not a bona fide purchaser, (2) the price paid for the property is grossly inadequate, and (3) there are "irregularities" surrounding the sale, such as a failure on the part of the creditor to seek satisfaction of the debt from personal property Before executing against real property. (emphasis added).

Casa del Rey, 110 Wn.2d at 69. That makes it clear that the "slight circumstances indicating unfairness" means some sort of irregularity in the sale process. In both cases, not resorting to personal property first (as required by statute) was the irregularity or misconduct that satisfied the third prong of the test.

Malo v. Anderson is the only other case cited in Deutsche Bank's Opening Brief in which a judicial foreclosure sale was actually set aside. 62 Wn.2d 813, 384 P.2d 867 (1963). Malo involved a divorce decree where the husband did not make all of the monthly payments required under the divorce decree. The wife improperly claimed the right to accelerate the due date for the bulk of the payments that were not yet due, and caused a sheriff's sale for all amounts then due and all amounts due in the future. Malo, 62 Wn.2d at 813. The Court found that there was no

acceleration right and that the wife had "circumvented the terms of the divorce decree" and "utilized statutes [the foreclosure statutes] in an unauthorized manner". Malo, 62 Wn.2d at 816. In Malo, there were irregularities and misconduct in the foreclosure process.

The first two prongs of the Casa del Rey test are not at issue here. Morgan Court has not claimed and does not claim bona fide purchaser status, and the foreclosure sale price was substantially below the apparent market value. But the third prong of the Casa del Rey test is not met here. There was no irregularity in the foreclosure process. Unlike Casa del Rey and Miebach, this case involved a foreclosure judgment for a statutory lien against the Unit, rather than a general monetary judgment otherwise unrelated to the Unit. Morgan Court was not legally required to resort to personal property first. Even though it was not so required, Morgan Court nonetheless tried to collect through a wage garnishment, and only resorted to a sheriff's sale after that was frustrated by Obeng's bankruptcy filing. CP 338, 353-59. That aspect of this case is the polar opposite of what occurred in Casa del Rey and Miebach. That is probably why Deutsche Bank turned to Proctor in the summary judgment proceeding.

D. The circumstances cited by Deutsche Bank do not entitle it to equitable relief to set aside the foreclosure sale.

No irregularity or misconduct is alleged here. Deutsche Bank does not claim that Morgan Court or the sheriff failed to comply with any statutory requirement with respect the foreclosure action and sheriff's sale at issue here. Deutsche Bank argues, nonetheless, that the third prong of the Casa del Rey test is satisfied because: (1) Morgan Court knew of and intended to foreclose Deutsch Bank's interest; (2) Morgan Court only sent notice of the actual ssale to the judgment debtor (Obeng); (3) Morgan Court knew about a potential third-party sale for $210,000 and would not agree to extend the sheriff's sale date; and (4) Morgan Court used its super lien status to purchase the Unit for a small portion of its actual value. Opening Brief, pp. 23-25.

1. Intent to foreclose against a junior encumbrance does not warrant setting aside an otherwise valid judicial foreclosure.

The fact that Morgan Court knew about the Obeng Deed of Trust and expected to eliminate it through the foreclosure sale is not in any way improper or unusual. The normal result of foreclosing a senior lien is the elimination of junior or subordinate encumbrances. That is inherent in the nature of a senior lien. Morgan Court's knowledge that its foreclosure would eliminate the Obeng Deed of Trust is not an irregularity of any

kind, let alone one that warrants overriding or setting aside an otherwise valid judicial foreclosure sale.

2. Not giving more notice than required by the applicable statutes is not an irregularity that warrants setting aside an otherwise valid judicial foreclosure, especially given the additional notice provided through Obeng's bankruptcy.

RCW Chapter 6.21 sets out a host of requirements for a judicial foreclosure or sheriff's sale, including notice requirements. If Morgan Court or the sheriff failed to give any notice or do anything else required by RCW Chapter 6.21, that might be an irregularity that warrants setting aside the sheriff's sale. But Deutsche Bank does not claim that Morgan Court failed to comply with RCW Chaper 6.21 in any way. The fact that Morgan Court did no more than required by the applicable statutes is not an irregularity that warrants setting aside the sale. Deutsch Bank cites no case where a judicial foreclosure sale was set aside because the judgment creditor did not do more than what the statutes require.

Furthermore, Deutsche Bank's servicing agent was in fact given additional notice that Morgan Court had obtained the Foreclosure Judgment and intended to proceed with a sheriff's sale. This information was included in Morgan Court's motion for relief from stay in Obeng's bankruptcy. CP 339, 381-84. The relief from stay motion was served on

Deutsche Bank's servicing agent and its attorney in May 2010 (more than six months before the sheriff's sale). CP 339, 385-86.

3. Morgan Court's exercise of its statutory lien right is not an irregularity that warrants setting aside an otherwise valid judicial foreclosure.

The application of the condominium lien statute, RCW 64.34.364, was brought to the Trial Courts attention by Morgan Court. CP 111, 479-80. But Deutsche Bank did not advance that as a reason for setting aside the foreclosure sale in the summary judgment proceeding. Deutsche Bank now claims on appeal, for the first time, that Morgan Court's exercise of its statutory lien right under RCW 64.34.364 was unfair and warrants setting aside the foreclosure sale. Opening Brief, pp. 24-25. Arguments not presented to the trial court are generally not considered on appeal. RAP 2.5(a); Lindblad v. Boeing Co., 108 Wn.App. 198, 207, 31 P.3d 1 (2001); Demelash v. Ross Stores, Inc., 105 Wn.App. 508, 527, 20 P.3d 447 (2001).

Even if considered, this argument does not warrant setting aside the foreclosure sale. Deutsche Bank characterizes the lien as a "super lien", but the Supreme Court's analysis in BAC Home Loans reveals it is far from a "super lien". Under that analysis, a condominium lien starts with priority for all future assessments as of the recording of the condominium declaration. BAC Home Loans, 328 P.3d at 899. If that

was as far as the statute went, lenders like Deutsche Bank would have to pay the entire amount due the association to prevent their deeds of trust from being eliminated by the sheriff's sale. But RCW 64.34.364 (2) and (3) modify the normal priority rules to limit the priority over deeds of trust to just six months of condominium assessments. BAC Home Loans, 328 P.3d at 899-900. Deed of trust lenders just have to pay a fraction of the amount due to protect their deeds of trust. In this case, that would have been just $1,225.32, rather than the $8,818.17 actually due Morgan Court as of the sheriff's sale. RP 6; CP 470 (showing monthly assessment amount of $204.22; 6 x 204.22 = $1,225.32). The overall effect of RCW 64.34.364 is to weaken the association's lien claim, for the benefit of deed of trust lenders that respond to the foreclosure suit or otherwise pay the limited priority amount before the sheriff's sale.

And if the lender does not take advantage of the limited priority by paying it before the sheriff's sale, it still has the redemption period (usually a year, as in this case) to redeem the property by paying the amount bid, plus taxes and interest. BAC Home Loans, 328 P.3d at 901. Under those circumstances, the association will generally bid the full amount due at the sale, as Morgan Court did in this case. The lender has to pay more to redeem after the sheriff's sale than to protect its deed of trust before the sheriff's sale, but it can still redeem from the sale.

Deutsche Bank and its predecessor did not pay the limited amount before the sale and did not attempt any redemption after the sale. Deutsche Bank does not offer any explanation for those failures.

Even though RCW 64.34.364 limits the amount a lender must pay before the sheriff's sale, Deutsche Bank still claims that Morgan Court's exercise of its statutory lien right is "unfair". Under this analysis, pretty much any foreclosure of a condominium lien is somehow rendered unfair when a deed of trust lender fails to respond to the foreclosure suit and pay the limited priority amount before the sheriff's sale, and then fails to redeem the property during the one-year redemption period after the sale. Morgan Court does not believe that the statute is fair to associations like Morgan Court. All of the assessments amounts benefit the lender by preserving its collateral value. But the lender only has to pay a small portion of the amount due to protect its deed of trust, leaving the association stuck with the rest. Fair or not, that is how RCW 64.34.364 works. But the association lien rights are not meaningless; associations are authorized to judicially foreclose their liens in the same manner as lender mortgages. RCW 64.34.364(9). Morgan Court's exercise of its statutory lien was not unfair, and it was certainly not an irregularity that warrants setting aside an otherwise valid judicial foreclosure sale.

4. Morgan Court's refusal to delay the sheriff's sale was not an irregularity that warrants setting aside an otherwise valid judicial foreclosure.

Documentation for a pending third-party sale and the delay request was buried near the end of 107 pages of exhibit material attached to the declaration submitted by Deutsche Bank's counsel in opposition to the summary judgment motion. CP 170-278. But Deutsche Bank did not make a single reference to those items in its opposition brief for the summary judgment motion, or in oral argument on the summary judgment motion, let alone argue that they justified its equitable relief request. As noted above, arguments not presented to the trial court are generally not considered on appeal. RAP 2.5(a); Lindblad, 108 Wn.App at 207; Demelash, 105 Wn.App at 527.

Even if the Court elects to consider this argument, it has no merit. There was no rush to proceed with the sheriff's sale in this case. Morgan Court first attempted collection through a wage garnishment, which was frustrated by a subsequent bankruptcy filing that Morgan Court had to deal with before proceeding with the sheriff's sale. CP 338, 353-59. Morgan Court did not proceed with the sheriff's sale immediately after the relief from stay order was entered on June 23, 2009; it did not have the Order of Sale issued to start the sheriff's sale process until October 14, 2009. CP

140-41, CP 339, 387-89. It was almost nine months between entry of Foreclosure Judgment on February 10, 2009, the sheriff's sale on December 4, 2010. CP 135-139, 146-47. Morgan Court was under no legal obligation or duty to delay the sheriff's sale even longer just because there was a pending third-party sale that might or might not ever close. Any further delay could have worked against Morgan Court's interest by extending the time in which Deutsche Bank could pay just the limited, six-month priority amount ($1,225.32), and then foreclose the Obeng Deed of Trust, without any further payment to Morgan Court. Proceeding with the sheriff's sale and bidding the full amount due was in Morgan Court's best interest, since that ended Deutsche Bank's option to pay just part of what was due.

Furthermore, completing the sheriff's sale as scheduled did not prevent any subsequent sale to a third party. Obeng continued to own the Unit during the one-year redemption period. Obeng and Deutsche Bank still had the right to redeem the Unit, but only by paying the full amount due Morgan Court, plus interest. To complete a third party sale, all they had to do was exercise the redemption right and pay Morgan Court the redemption amount as part of the sale closing. But no sale was closed during the redemption period. In addition, Deutsch Bank was free to

directly redeem the Unit, or to advance funds to Obeng to redeem, for a year after the sheriff's sale, but there was no redemption effort.

Under the circumstances, Morgan Court's refusal to delay the sheriff's sale was not an irregularity that warrants overriding the otherwise valid sheriff's sale.

V. CONCLUSION

Even where there is a "gross inadequacy" in the sale price, something more is required to invoke equitable relief to override or set aside an otherwise valid judicial foreclosure sale. The only cases where such sales have actually been set aside involved some sort of irregularity or misconduct in the foreclosure or sale process. There was no irregularity or any other misconduct present in this case.

As a matter of law, Deutsche Bank is <u>not</u> entitled to override the judicial foreclosure sale to Morgan Court given the following facts and circumstance presented to the trial court.

- Morgan Court was legally entitled to judicially foreclose its statutory lien for unpaid condominium assessments. In prosecuting the Foreclosure Action and the resulting sheriff's sale, Morgan Court complied with all applicable legal requirements. Deutsche Bank has never claimed that Morgan Court did not comply with any applicable legal requirement, or engaged in

misconduct of any kind. Simply put, there is no indication whatsoever that there was any irregularity or misconduct in connection with the Foreclosure Action or the sheriff's sale.

- Morgan Court did not proceed immediately with the sheriff's sale after entry of the Foreclosure Judgment in February 2010. Although it was not legally required to pursue other means of collection, Morgan Court first tried to collect its judgment through a wage garnishment against Obeng. It was only after the garnishment effort was frustrated by Obeng's bankruptcy filing that Morgan Court resorted to the sheriff's sale.
- The relief from stay motion in the Obeng bankruptcy provided Deutsch Bank's servicing agent additional notice that the Foreclosure Judgment was entered and that Morgan Court intended to proceed with its foreclosure.
- Morgan Court did not rush forward with the sheriff's sale even after obtaining the relief from stay order on June 23, 2010. Morgan Court did not initiate the sheriff's sale process until it had the Order of Sale issued on October 14, 2010. The sheriff's sale did not take place until December 4, 2010, almost nine months after entry of the Foreclosure Judgment.

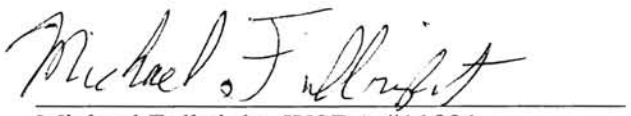
- The pending third-party sale and extension request should not be considered on appeal because they were not brought to the trial court's attention. There was no opportunity for Morgan Court to respond to those factors, and no opportunity for the trial court to consider them. Even if considered, they do not justify setting aside an otherwise valid judicial foreclosure sale. Morgan Court was under no obligation or duty to extend the sheriff's sale and extend time in which Deutsche Bank could pay only part of what Morgan Court was due. Furthermore, a third-party sale could have been closed anytime during the one-year redemption period by paying the redemption amount as part of the sale closing.
- Deutsche Bank was free to redeem the Unit anytime during the one-year redemption period. BAC Home Loans confirms that Deutsche Bank in fact had a redemption right and Deutsche Bank had no reason to think otherwise before the redemption period expired. The Summerhill opinion, which first indicated otherwise until it was overturned by BAC Home Loans, was not issued until over a year after the redemption period in this case expired.
- Deutsche Bank has never offered any reason or explanation whatsoever for its failure to (1) respond to the Foreclosure Action, (2) pay the limited priority amount before the sheriff's sale, or (3)

redeem during the one-year redemption period after the sheriff's sale. Given that Deutsche Bank had more than adequate legal remedies available that it failed to exercise, Deutsche Bank is not entitled to equitable relief in this case.

In light of the foregoing considerations, Morgan Court respectfully requests that this Court affirm the trial court's summary judgment decision.

RESPECTFULLY SUBMITTED this 10th day of October, 20114

LAW OFFICE OF MICHAEL FULBRIGHT



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DECLARATION OF SERVICE

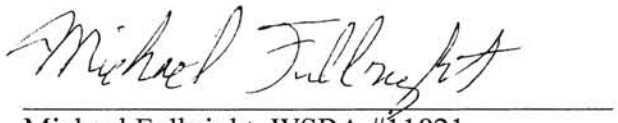
I certify that I mailed a copy of the foregoing Brief by Respondent Morgan Court Owners Association to the Appellant's attorneys listed below, at the addresses listed below, postage prepaid, on October 10, 2014.

Thomas J. Bassett, Todd Reuter
& Thaddeus J. O'Sullivan
K&L Gates LLP
618 West Riverside Avenue, Suite 300
Spokane, WA 99201

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed at Bellevue, Washington, on October 10, 2014.

LAW OFFICE OF MICHAEL FULBRIGHT



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