

**Case No. 73100-9-I**

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

---

JOSEPH R. AND MELANIE W. ELENBAAS,  
husband and wife, and the marital community composed thereof,

Appellants/Defendants,

v.

BANNER BANK, a Washington corporation,

Respondent/Plaintiff.

---

**BRIEF OF RESPONDENT, BANNER BANK**

---

Arnold M. Willig, WSBA #20104  
Elizabeth H. Shea, WSBA #27189  
Charles L. Butler, III, WSBA #36893  
Attorneys for Banner Bank  
HACKER & WILLIG, INC., P.S.  
520 Pike Street, Suite 2500  
Seattle, Washington 98101  
Tel.: (206) 340-1935  
Fax: (206) 340-1936

FILED  
APR 15 2010  
CLERK OF COURT  
JULIA M. HARRIS

**TABLE OF CONTENTS**

**I. TABLE OF AUTHORITIES.....iii**

**II. INTRODUCTION .....1**

**III. ASSIGNMENTS OF ERROR.....5**

**IV. STATEMENT OF THE CASE .....6**

**A. The Elenbaases’ Loan History Shows A Series of  
    Uncured Payment Defaults .....6**

**B. The Elenbaases’ Loan Defaults Are Ongoing And  
    Were Never Cured .....10**

**C. Banner Bank Properly Filed Its Complaint To  
    Collect Payments Rightfully Owed.....13**

**D. The Elenbaases’ Answer Mirrors Their Here,  
    Which The Trial Court Properly Rejected.....13**

**E. Banner Bank Accurately Calculated The Elenbaases’  
    Ongoing Defaults On Their Loan.....16**

**F. The Trial Court Carefully Reviewed The Elenbaases’  
    Payment History On The Loan, And Found  
    Numerous Defaults.....21**

**G. Appellants’ Brief Was Not Timely Filed/Served.....23**

**V. ISSUES PRESENTED .....26**

**VI. STANDARD OF REVIEW.....27**

**VII. LEGAL AUTHORITY & ARGUMENT .....28**

**A. Summary Judgment Was Properly Granted Against  
    The Elenbaases .....28**

**B. The Elenbaases Unquestionably And Continually**

	<b>Breached Their Contracts By Failing To Make Timely Payments.....</b>	<b>30</b>
C.	<b>Washington’s Credit Agreement Statute Of Frauds Limits The “Issues” Raised By The Elenbaases To The Written Loan Documents .....</b>	<b>33</b>
D.	<b>The Elenbaases Are Bound By The Contracts They Signed .....</b>	<b>36</b>
E.	<b>The Plain Meaning Rule Limits The Analysis To The Documents Admittedly Signed And Executed By The Parties .....</b>	<b>38</b>
F.	<b>The Elenbaases Have Been Unjustly Enriched If Their Loan Is Not Repaid.....</b>	<b>41</b>
G.	<b>The Elenbaases Do Not Cite Any Legal Authority As To The Substantive “Issues” They Raise.....</b>	<b>42</b>
H.	<b>Banner Bank Is Entitled To Its Attorneys’ Fees And Costs In This Appeal.....</b>	<b>43</b>
VIII.	<b>CONCLUSION.....</b>	<b>44</b>
IX.	<b>APPENDIX A.....</b>	<b>45</b>

## I. TABLE OF AUTHORITIES

### A. Table of Cases

<i>Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.</i> , 61 Wn. App. 151, 159 60, 810 P.2d 12 (1991) .....	42
<i>Bank of Am., NA v. Owens</i> , 173 Wn.2d 40, 48-49 (2011).....	27
<i>Bates v. Grace United Methodist Church</i> , 12 Wn. App. 111, 115, 529 P.2d 466 (1974) .....	28
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 663-664 (1990) .....	39
<i>Brogan &amp; Anensen, LLC v. Lamphiear</i> , 165 Wn.2d 773, 775-776 (2009).....	39
<i>DePhillips v. Zolt Constr. Co.</i> , 136 Wn.2d 26, 32, 959 P.2d 1104 (1998).....	39
<i>Dixon v. Countrywide Financial Corp.</i> , 664 F. Supp. 2d 1304, 1309-10 (S.D. Florida 2009).....	35
<i>Doty-Fielding v. Town of South Prairie</i> , 143 Wn. App. 559, 566, 178 P.3d 1054 (2008) .....	29
<i>Dragt v. Dragt/DeTray, LLC</i> , 139 Wn. App. 560, 576, 161 P.3d 473 (2007) .....	41
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 86 Wn. App. 628, 639 (1997).....	32
<i>Federal Way Sch. Dist. No. 210 v. State</i> , 167 Wn.2d 514, 523, 219 P.3d 941 (2009) .....	27
<i>Graff v. Allstate Ins. Co.</i> , 113 Wn. App. 799 (2002) .....	28
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355,	

359-60, 753 P.2d 517 (1988).....	29
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 504, 115 P.3d 262 (2005) .....	39
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 695, 974 P.2d 836 (1999).....	39
<i>In re Marriage of Schweitzer</i> , 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997) .....	39
<i>J.W. Seavey Hop Corp. v. Pollock</i> , 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944) .....	40
<i>Jesco Contr. Corp. v. Nationsbank Corp.</i> , 830 So.2d 989, 992 (La. 2002) .....	36
<i>Lake Air, Inc. v. Duffy</i> , 42 Wn.2d 478, 480, 256 P.2d 301 (1953).....	37
<i>Lang v. Bank of Durango</i> , 78 P.3d 1121, 1123-24 (Colo. App. 2003).....	36
<i>Mackey v. Graham</i> , 99 Wn.2d 572, 663 P.2d 490 (1983) .....	28
<i>McBride v. Walla Walla County</i> , 95 Wn. App. 33, 36-37, 975 P.2d 1029 (1999) .....	29
<i>N.W. Indep. Forest Mfr. v. Dep't of Labor and Indus.</i> , 78 Wn. App., 707, 712 (1995) .....	30
<i>National Bank v. Equity Investors</i> , 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973) .....	37
<i>Olsen v. Nichols</i> , 86 Wash. 185, 149 P. 668 (1915).....	40

<i>Olympic Fish Products, Inc. v. Lloyd</i> , 93 Wn.2d 596, 611 P.2d 737 (1980) .....	28
<i>Overton v. Consol. Ins. Co.</i> , 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002).....	29
<i>Perry v. Continental Ins. Co.</i> , 178 Wash. 24, 33 P.2d 661 (1934).....	37
<i>Premier Farm Credit, PCA v. W-Cattle, LLC</i> , 115 P.3d 504, 514-515 (Colo. App. 2006) .....	36
<i>Seven Gables Corp. v. MGM/UA Entm't Co.</i> , 106 Wn.2d 1, 13, 721 P.2d 1 (1986) .....	29
<i>Skagit State Bank v. Rasmussen</i> , 109 Wn.2d 377, 380 (1987) .....	37
<i>State Farm General Insurance Co. v. Emerson</i> , 102 Wn.2d 477, 687 P.2d 1139 (1984) .....	28
<i>Tokaz v. Frontier Federal Savings &amp; Loan Association</i> , 33 Wn. App. 456, 656 P.2d 1089 (1982).....	28
<i>Whirlpool Financial Corp. v. Sevaux</i> , 96 F.3d 216, 225 (7th Cir. 1996).....	36
<i>Whitney Nat'l Bank v. Rockwell</i> , 661 So.2d 1325, 1330 (1995) .....	34
 <b>B. Statutes</b>	
RCW 4.84.330.....	37, 41
RCW 19.36.100.....	32
RCW 19.36.110.....	31, 32, 33

**C. Rules, Other Authorities, Treatises**

CR 5(b)(1) .....23  
CR 5(2)(a) .....23  
CR 56(c) .....22  
BLACK’S LAW DICTIONARY 1535-36 (6th ed. 1990).....40  
<http://www.zoominfo.com/p/Joe-Elenbaas/781931363> .....12

**D. Rules of Appellate Procedure**

RAP 9.2 .....1, 20, 25  
RAP 9.5 .....1, 20  
RAP 9.6 .....1, 20  
RAP 10.2 .....20, 25  
RAP 10.3 .....1  
RAP 10.4(b) .....38  
RAP 18.1 .....36, 37, 41  
RAP 18.5 .....18  
RAP 18.9 .....19

## II. INTRODUCTION

Respondent Banner Bank, a Washington banking corporation (“Banner Bank”), Plaintiff below, by and through its attorneys, HACKER & WILLIG, INC., P.S., respectfully presents this Brief of Respondents pursuant to Washington Rules of Appellate Procedure (“RAP”) 10.1(b)(2) and 10.3.

Appellants Joseph and Melanie Elenbaas (the “Elenbaases”) failed to repay their loan from Banner Bank. The loan payments that they did make, starting with the very first one, were late. CP 86. Rather than accept Banner Bank’s numerous offers of assistance to reschedule payments, have the payments deducted directly from their bank account, mail the payments in pre-addressed, stamped envelopes and pay the arrearages over time, they simply continued to fall further and further behind in their payments. CP 19-20, 87, 193-195. The Elenbaases then embarked on a strategy of sending payments in various amounts to different Banner Bank branches and claiming that they were caught up on their payments. CP 19-20, 90, 119. They perpetuated this strategy in the trial court, and in their argument in this appeal. Of course, Banner Bank’s demonstrating (on numerous occasions) the actual application of the Elenbaases’ payment history [CP 83-90, **Appendix A**], and the Elenbaases’ failure to dispute the balance due on the loan, lead the trial

court to conclude that there were no genuine issues of material fact and granted summary judgment as a matter of law. CP 297-299.

Further, the Elenbaases failed to pay the taxes on the real property that secured Banner Bank's loan, and allowed other judgments from creditors to attach to the real property. CP 87. Despite Banner Bank's exhaustive attempts to assist the Elenbaases in getting back on track, their undisputed loan defaults continued over a period of years. CP 20. The unrefuted evidenced demonstrated that the Elenbaases defaulted on the loan in 2009, and that since September of 2013 alone they missed or made partial payment that were never fully made up or cured. **Appendix A**; CP 293.<sup>1</sup>

The unrefuted evidence also showed that at the times the Elenbaases *did* elect to make payment on their loan, they wrote sporadic, haphazard checks to Banner Bank, again, dropping them off at randomly-selected Banner Bank branches instead of simply depositing the payments in the mail in a timely fashion. CP 19-20. If a check happened to be written for more than the regular payment amount, the Elenbaases did not provide any direction to Banner Bank as to how the additional funds should be applied. CP 220-235.

---

<sup>1</sup> The Elenbaases' statement with respect to this document, that only \$30,596.10 was due to Banner Bank as of October 2014, ignores the loan expenses and other fees and costs that were properly assessed and allocated to the loan, and also due and owing. *See*, Appellants Brief, pg. 21.

After numerous communications from Banner Bank that their loan was in default due to nonpayment, late payment, and/or insufficient payment, the Elenbaases were notified that their loan file had been transferred to Banner Bank's special credits department for assessment, monitoring, and, eventually, collection. As early as March of 2011, Banner Bank provided the Elenbaases with specific contact information for the Bellevue real estate special credits department, which they for the most part ignored. CP 201.

The Elenbaases proceeded unfazed by their ongoing loan defaults. Ignoring Banner Bank's offer of assistance in providing a direct point of contact with its special credits department, Mr. Elenbaas had a habit of appearing at any one of several Banner Bank branches in the greater Bellingham area, handing over a late and insufficient payment, and demanding that the check be "pouched" to Banner Bank's offices in Walla Walla, Washington. CP 90, 119, 133, 207, 216-217, 253-257. Mr. Elenbaas did this on many occasions even though he was well aware that his loan file was being managed by Banner Bank's special credits team in Bellevue, then Walla Walla since 2011. CP 201. These unfortunate practices by the Elenbaases further delayed their payment and frustrated Banner Bank's ability to collect and apply the Elenbaases' untimely payments on their loan. CP 253-255 & 271-279. In the end, the

Elenbaases were their own worst enemy.

By way of brief background, the Elenbaases requested this loan from Banner Bank in approximately April of 2009, and the loan went into default when the Elenbaases' very first payment was 25 days late. CP 86.

The loan remained in default due to irregular payments and due to the Elenbaases' failure to pay their 2010 property taxes. CP 86. The Elenbaases defaulted on their monthly payments beginning in about January of 2011, and these payment defaults were never fully cured. CP 201. The Elenbaases' 2011 property taxes also went unpaid. CP 203. Banner Bank attempted to work with the Elenbaases to get their payments back on track for the next three years. CP 195-196; [253-255, 271-279, 351, 243, 246, 207-215, 240-242, 119, 356 (date order 2011-2014)].

In the end, on or about September 9, 2014, over three years later, Banner Bank had exhausted all reasonable efforts to assist the Elenbaases, and filed its Complaint. CP 16-44. In approximately May of 2014, at a time when the loan was clearly in default, Banner Bank began returning the Elenbaases' partial payments in large part to protect the Elenbaases because Banner Bank was already preparing to file its Complaint for Judicial Foreclosure. CP 16-44. When the Elenbaases wrote letters of complaint to elected officials, Banner Bank also carefully explained these facts to the Elenbaases and to the Office of Congresswoman Suzan

DelBene. CP 239.

There was simply nothing further that Banner Bank could reasonably do to assist the Elenbaases with making timely, full payments on their loan. Thus, Banner Bank respectfully requests that the Orders, Judgment, and Decree of Foreclosure entered in the trial court be affirmed, that this appeal be dismissed, and that Banner Bank be awarded its reasonable attorneys' fees and costs herein.

### **III. ASSIGNMENTS OF ERROR**

Banner Bank assigns no error to any action taken, ruling made, or order entered by the trial court. Banner Bank is not appealing any decision of the trial court in this matter, and respectfully requests that the Orders, Judgment, and Decree of Foreclosure entered in the trial court be affirmed.

The Elenbaases raise three purported assignments of error, each of which Banner Bank denies and specifically disputes, and none of which offer any sufficient or legitimate basis on which to prevail in this appeal.

Notably, the Elenbaases do not assign error to the trial court's confirmation of the Sheriff's Sale and orders corresponding thereto. Brief of Appellants, pg. 6; CP 540. Thus, in any event, the Sheriff's Sale should be upheld.

///

#### IV. STATEMENT OF THE CASE

##### A. The Elenbaases' Loan History Shows A Series of Uncured Payment Defaults.

**Promissory Note.** On or about November 25, 1997, Whatcom State Bank, now known as Banner Bank, loaned Joseph R. Elenbaas and Melanie W. Elenbaas, One Hundred Twenty-Three Thousand Five Hundred and no/100 Dollars (\$123,500.00). CP 17-18. The Loan was evidenced by a Promissory Note (the "1997 Note") in the same amount. CP 17-18. On or about April 29, 2009, the Elenbaases requested that Banner Bank refinance the Loan (the "Refinance") to advance additional funds, which Banner Bank agreed to do, loaning the Elenbaases One Hundred Seventy-Seven Thousand Five Hundred Twenty-Nine and no/100 Dollars (\$177,529.00), evidenced by a new, replacement Promissory Note (the "2009 Note"). CP 18. The 1997 Note and the 2009 Note will be, as they were below, collectively referred to hereinafter as the "Note" or the "Loan." The Note matures by its terms on April 25, 2019. CP 18, 84-85.

Pursuant to the clear terms of the Note, the Elenbaases were to pay Banner Bank "60 monthly consecutive principal and interest payments of \$2,139.36" followed by "59 monthly consecutive principal and interest payments . . . of \$2,126.55" and one final "principal and interest payment

of \$2,126.31[.]” CP 96. Significantly, the Elenbaases’ very first payment was 25 days past due and remained past due until the February 2010 payment was missed altogether. CP 272. In March of 2010 the Elenbaases made a double payment, putting them back to one payment in default. CP 272. Even this is clearly a default under the terms of the Note: “Each of the following shall constitute an event of default . . . Borrower fails to make any payment when due under this Note.” CP 96. Upon default, the Note makes clear Banner Bank’s rights: “Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.” *Id.*

**Deed of Trust.** As security for the Loan, on or about November 25, 1997, the Elenbaases executed a Construction Deed of Trust to secure their Loan from Banner Bank under the Note (the “Construction Deed of Trust”). CP 84-85. Pursuant to the Construction Deed of Trust, the Elenbaases granted to Banner Bank a security interest in real property commonly known as 5200 Defiance Drive, Bellingham, Washington (the “Property”). CP 84. The Construction Deed of Trust was properly recorded in the real property records of Whatcom County, Washington on November 25, 1997, under Whatcom County Auditor’s Number 1971102825. CP 85. The Construction Deed of Trust clearly states at CP

100:

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantor's obligations under the Note, this Deed of Trust, and the Related Documents.

The failure of the Grantor (the Elenbaases) to make any single payment when due constitutes an Event of Default under the terms of the Construction Deed of Trust. CP 103. The Construction Deed of Trust further provides at CP 104:

**RIGHTS AND REMEDIES ON DEFAULT.** Upon the occurrence of any Event of Default and at any time thereafter, Trustee or Lender, at its option, may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:

\* \* \*

**Foreclosure.** With respect to all or any part of the Real Property, the Trustee shall have the right to exercise its power of sale and to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

\* \* \*

**Attorneys' Fees; Expenses.** If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and on any appeal. Whether or not any court action is involved, all reasonable expenses incurred by Lender which in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on

demand and shall bear interest at the Note rate from the date of expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's attorneys' fees whether or not there is a lawsuit, including . . . appeals and any anticipated post-judgment collection services, the cost of searching records, obtain title reports (including foreclosure reports), surveyors' reports, appraisal fees, title insurance, and fees for the Trustee, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

**Assignment of Rents.** On or about November 25, 1997, the Elenbaases granted Banner Bank an Assignment of Rents as continuing security interest in and to the rents from the Property. CP 85. The Assignment of Rents was properly recorded on November 25, 1997, under Whatcom County Auditors Number 1971102826. CP 85.

**Modification of Deed of Trust.** On or about April 29, 2009, at the time of the Refinance, the Elenbaases executed a Modification of Deed of Trust (the "Modification") to secure their Loan from Banner Bank under the Note. CP 85. Pursuant to the Modification, the Elenbaases granted to Banner Bank a continuing security interest in the Property. CP 115. The Modification was properly recorded in the real property records of Whatcom County, Washington on May 1, 2009, under Whatcom County Auditor's Number 2090500100. CP 115. As below, the Note, Construction Deed of Trust, Assignment of Rents, Modification and other

documents related to the Loan are collectively known herein as the “Loan Documents.”

**B. The Elenbaases’ Loan Defaults Are Ongoing And Were Never Cured.**

The Elenbaases’ payments on the Loan are due on the 25th day of each month beginning with the initial payment after the Refinance, which was due on May 25, 2009. CP 86. The May 25, 2009 payment was not received by Banner Bank until June 19, 2009, twenty-five (25) days late. Thus, the Loan has indisputably long been in default.

Since its inception, the Loan has been paid sporadically with payments frequently late; many times being three (3) months in default. CP 86. In March 2011, when the Loan payments were due for January, February, and March 2011, Banner Bank again sent a demand letter to the Elenbaases outlining the defaults, explicitly accelerating the Note, and demanding full payoff within fifteen (15) days (*see*, CP 201); and Banner Bank again received a partial payment, but the default was not cured. CP 86. The Elenbaases’ “default - partial payment - further default” cycle has been repeated many times over the past five years. CP 86-87.

Further, the Note clearly states that only non-payment defaults may be cured, under certain delineated circumstances. CP 97.

Banner Bank has tried everything, making repeated requests for

full payment from the Elenbaases. CP 89, 201. Banner Bank's requests (and eventually demands) have included numerous explanations of the amounts in default, and have advised of the fact that the Elenbaases have accrued additional costs, late fees, and legal fees/costs due to the continued and ongoing default. CP 119, 201. Banner Bank has included spreadsheets and loan history printouts, explanations of the payment due date; then finally statements that partial payments were unacceptable and notice of Banner Bank's willingness to consider a repayment agreement and/or automatic payment withdrawal. CP 87-89, [253-255, 271-279, 351, 243, 246, 207-215, 240-242, 119, 356 (date order 2011-2014)].

In May of 2014, after numerous written demands for full payment, Banner Bank began returning all payments (both partial and otherwise) to the Elenbaases, as insufficient to cure the continuing defaults and bring the Loan current or to pay the Loan in full. CP 86-90, 119-138. This was done in large part to protect the Elenbaases because the Bank was preparing to commence its judicial foreclosure of the Property. CP 16-44. Banner Bank advised the Elenbaases it will no longer accept partial payments on the Loan. CP 86. Banner Bank has demanded full payment of the default amounts due and owing under the Note, but no payment completely curing the default has been paid. CP 86-87.

The current monthly payment amount on the (adjustable rate) Note

is \$2,119.33. CP 87. Late charges accrue on payments received in excess of fifteen (15) days after the date it is due. CP 87. At the time Banner Bank filed its Motion for Summary Judgment, the Elenbaases were past due for the September 25, 2013 through October 25, 2014 payments, resulting in late charges in the amount of \$1,278.64, plus costs in the amount of \$3,248.51, and attorneys' fees and costs through September 2014 in the amount of \$18,965.63. CP 87. The past due balance as of October 29, 2014 was approximately \$52,808.24, not including accruing attorney fees and costs, late charges and accruing interest. CP 87.

At the time Banner Bank's Motion for Summary Judgment was filed, the Elenbaases had also failed to pay the real property taxes for 2013 and 2014 in the amounts of \$996.18 and \$1,082.75 respectively, plus interest and penalties. CP 87.

The amount due to pay off the Loan as of October 29, 2014 was approximately \$150,300.69, which consists of the principal balance in the amount of \$117,869.61, interest accruing at 7.50% *per annum* in the amount of \$9,311.70, which continues to accrue in accordance with the terms of the Note, unpaid late charges in the amount of \$1,278.64, advances in the amount of \$3,248.51, payoff and processing fees of \$142.00 and prior attorneys' fees and costs through September 2014 in the amount of \$18,965.63. CP 87-88.

**C. Banner Bank Properly Filed Its Complaint To Collect Payments Rightfully Owed.**

Based on the Elenbaases' continuing nonpayment, default under the Loan Documents, and resulting loan balance, and having demanded payment from the Elenbaases but receiving no full payment or response to Banner Bank's offer of a repayment agreement and/or automatic payment withdrawal, Banner Bank was left with no other option but to file its Complaint on September 9, 2014. CP 88.

The Elenbaases evaded service of process of the Summons and Complaint for several weeks, and Banner Bank was forced to serve the pleadings with the assistance of the Whatcom County Sheriff's Office, who had a long history with the Elenbaases. CP 48, 55-56.<sup>2</sup>

**D. The Elenbaases' Answer Mirrors Their Arguments Here, Which The Trial Court Properly Rejected.**

The Elenbaases were eventually properly served, and on October 20, 2014, they filed their Answer to Banner Bank's Complaint. CP 49-50. Predictably, the Elenbaases denied that any defaults existed or that necessary payments were *not* made, alleging that the last received "Notice of Loan Payment Due" indicates a total amount due of \$26,744.84 (as of 09/25/14); further alleging that Banner Bank has somehow "acknowledged" the total amount of checks received is "\$41,600.00", and

---

<sup>2</sup> <http://www.zoominfo.com/p/Joe-Elenbaas/781931363>

that the checks referenced in a footnote note to the Complaint were somehow not returned to the Elenbaases. CP 20. Of course, Banner Bank has a delivery tracking number from Federal Express which reflects the delivery of the checks the Elenbaases allege “were not” returned to the Elenbaases. CP 87-89.

On October 9, 2014, Banner Bank again returned, this time via hand delivery, all checks being held totaling \$20,000.00. CP 87, 81, 197. At that time, demand had been made by Banner Bank for the Elenbaases’ past due payments of \$26,143.50 (at the time the Complaint was filed) plus costs of \$3,248.51 and attorneys’ fees and costs incurred (at the time the Complaint was filed) in the amount of \$13,498.57. The default balance due at that time was approximately \$42,890.58, and the Elenbaases’ checks did not cover even half of that amount. CP 20.

On or about October 24, 2014, four days after filing their Answer to Banner Bank’s Complaint, the Elenbaases again made a partial payment and again returned the partial payments which had been hand delivered to them on October 9, 2014. CP 188, 189. Even if the \$20,000.00 and the \$2,200.00 partial payment received by Banner Bank were applied to the Loan, the Elenbaases would remain in default. CP 196-197. The Elenbaases reference an additional \$20,000 that is purportedly in Banner Bank’s possession. However, Banner Bank is not in possession of the

purported payments. CP 88-90.

In the trial court, the Elenbaases also attempted to dispute the costs and expenses allocated to the Loan, including Banner Bank's appraisal fees. But these charges, too, had been explained to Mr. Elenbaas on multiple occasions. On summary judgment, Banner Bank's counsel argued:

Again, we believe that he has had a number of opportunities to look at each and every one of these charges and this is simply just a perpetuation of what he has been doing for the last couple of years, which is trying to create confusion as to or creating his own issue of fact, if you will, as to when he has tendered funds and how he believes that they should have been applied.

*See*, Verbatim Report of Proceedings ("VRP"), dated December 5, 2014, pg. 18, lns. 16-23.

In granting Banner Bank's Motion for Summary Judgment, the trial court agreed:

The issues are . . . fairly straightforward. Some of the facts . . . may appear more complicated and convoluted than they actually are. . . . [I]t seems abundantly clear that the defendants, Elenbaases, are in default and . . . especially the way the economy has been, any time anybody goes into default, you really certainly have my sympathies. Week to week I see good people in default, . . . for no fault of their own quite often. And, again, they have my sympathies but sympathy or making judgment on sympathies is not part of my job.

*See*, VRP, December 5, 2014, pg. 18, lns. 16-23.

Banner Bank has now spent five years in this “default - partial payment - further default” cycle created by the Elenbaases. *See*, CP 89 and Section IV(E) below. Banner Bank has sent repeated demands for full payment, and has requested in-person and/or telephone conferences with the Elenbaases to discuss either a repayment plan or an automatic payment plan, to which the Elenbaases have failed to appear, as agreed, but rather have responded with rambling, inconsequential letters and notes, without cure payment, and further delaying efforts to collect full payment or set up an agreeable repayment plan. CP 89.

**E. Banner Bank Accurately Calculated The Elenbaases’ Ongoing Defaults On Their Loan.**

Time and again, Banner Bank provided the Elenbaases with a full and accurate accounting of their Loan. Beginning in 2011, when the Elenbaases were notified that their loan file had been referred to the Real Estate Special Credit Department in Bellevue, Washington and default amount was \$6,351.11 [CP 201], Banner bank has repeatedly provided loan histories and individual spreadsheets in an attempt to explain the default [CP 253-255, 271-279, 351, 243, 246, 207-215, 240-242, 119, 356 (date order from 2011 through 2014)].

These writings are all in the record before the Court, and are summarized as follows:

## **2011**

- March 14, 2011 – Banner Bank letter to the Elenbaases addressing default and describing acceleration of the loan [CP 201];
- April 27, 2011 – H&W letter to the Elenbaases addressing the default [CP 284];
- May 19, 2011 – H&W letter to the Elenbaases addressing the default and providing payment history [CP 282];

## **2012**

- January 26, 2012 – H&W letter to the Elenbaases addressing [CP 280];
- February 16, 2012 - Formal Notice of Default to the Elenbaases [CP 202];
- March 20, 2012 – Banner Bank letter to the Elenbaases providing loan history and addressing default & providing payment envelopes [CP 271];
- April 4, 2012 – Banner Bank letter to the Elenbaases responding to each individual point raised in 3/26/2012 Elenbaas letter and providing loan payment status [CP 253];

## **2013**

- October 18, 2013 – Banner Bank letter to the Elenbaases confirming receipt of payment and addressing default [CP 351];

- November 12, 2013 – H&W letter to the Elenbaases addressing default [CP 248];
- November 21, 2013 – H&W letter to the Elenbaases returning short payment and addressing default and providing amount due to reinstate loan [CP 246];
- December 19, 2013 – H&W letter responding to Elenbaas letter and addressing default [CP 243];

## **2014**

- March 5, 2014 – H&W letter to the Elenbaases addressing default and Banner Bank’s attempts to contact borrower [CP 240];
- April 3, 2014 – BB reply letter to Congresswoman Suzan DelBene [CP 239];
- April 25, 2014 – H&W letter responding to Elenbaas letter to Banner Bank addressing denial of request for loan modification/lower payment and addressing accruing costs [CP 236];
- May 20, 2014 – Banner Bank letter to the Elenbaases returning partial payment delivered to the Bellingham Branch, addressing default, accruing additional costs, late fees, and attorneys’ fees, and proposing repayment plan; providing automatic payment authorization forms [CP 119];

- June 25, 2014 – Banner Bank letter to the Elenbaases returning partial payment, noting partial payments are unacceptable and requesting in-person meeting to resolve matter prior to foreclosure [CP 356];
- July 2, 2014 – H&W letter to the Elenbaases addressing multiple letters from Elenbaas; default, and directing communication to law firm [CP 358];
- July 23, 2014 H&W letter to the Elenbaases addressing default, and providing requested information[CP 207];
- July 24, 2014 Banner Bank letter to the Elenbaases addressing accruing fees [CP 172];
- September 11, 2014 Banner Bank letter to the Elenbaases addressing accruing fees [CP 173];
- October 7, 2014 – H&W letter to the Elenbaases returning fund received, but insufficient to reinstate the loan [CP 218];
- November 12, 2014 – H&W letter to the Elenbaases providing hearing date; addressing default and directing all communication to law firm [CP 182];

This is not a “classic ‘he said, she said’ dilemma,” as the Elenbaases have argued. Appellants’ Brief, pg. 19. Rather, this is a case in which Banner Bank has repeatedly shown, by way of detailed letters,

loan histories, and calculations, that the Elenbaases' loan defaults were consistent, ongoing, and never fully cured or addressed. CP 201, 271-279, 253-255, 351, 243, 246, 207-215, 240-242, 119, 356 (date order 2011-2014).

The Elenbaases' late payments, letters to any number of parties (including Banner Bank employees at branch locations across the State, Banner Bank's President [CP 169, 174, 177, 180], and the Office of Congresswoman Suzan DelBene [CP 239], all of which required attorney handling), and other shenanigans caused delays and increased costs. It became the proverbial "snowball effect," all of which could have been avoided by making prompt regular payments over the course of the loan. Again, the Elenbaases' default began with the very first loan payment in 2009 being 25 days past due, and was exacerbated by payments being anywhere from six (6) days to seventy-nine (79) days late. CP 271-279.

The Elenbaases also frequently made payments in unusual or irregular amounts, with no instruction as to the application of these odd amounts. CP 272-274. In an attempt to properly account for the jumbled payments, Banner Bank initially applied the odd amount to past due interest; then in 2011 began allocated the alleged overpayment amount into a suspense account until there was enough extra to constitute another payment (though there being sufficient extra in the suspense account was

rare). *Id.* Mr. Elenbaas is on record that he attempted to “round up” the payment amount to get further ahead, and yet his very first payment (which was late) was exactly the amount of one payment plus one late charge. CP 256.

The record is well documented with examples of Banner Bank bending over backwards for the Elenbaases, and the March 20, 2012 letter from Elaine Wilcox, Vice President of Special Credits Real Estate and REO Manager for Banner Bank, is a key example of this. Here, Ms. Wilcox references the number of times she and Banner Bank’s counsel had – even as of 2012 – tried to reach the Elenbaases, provides a detailed spreadsheet of payments which she put together, provides a detailed loan history generated by Banner Bank’s account management system, and even provides extra self-addressed payment envelopes so that the Elenbaases’ payments would come directly to her for application to the Loan. CP 271-285. In the end, the Elenbaases were unable to remedy their ongoing loan defaults, despite quite literally every effort by Banner Bank. The Complaint was filed on September 9, 2014. CP 16.

**F. The Trial Court Carefully Reviewed The Elenbaases’ Payment History On The Loan, And Found Numerous Defaults.**

At the point of summary judgment and the Elenbaases’ subsequent motion for reconsideration, the trial court carefully and closely reviewed

the objective expressions and summaries of the Elenbaases' payment history on the Loan, and found clear defaults. CP 298. The Elenbaases, both through counsel at the summary judgment hearing on December 5, 2014, and through Mr. Elenbaas (after counsel was terminated) at the reconsideration hearing on January 16, 2015, presented lengthy argument, evidence, and documentation to the trial court. In fact, at the reconsideration hearing alone, Mr. Elenbaas presented the vast majority of the 44 pages of argument captured on the transcript of same. *See*, VRP, January 16, 2015. The Elenbaases have submitted no new evidence to contradict that which was before the trial court because the ongoing, uncured defaults speak for themselves.

To unwind the Elenbaases' bizarre late and partial payment habits on the Loan took some doing. In the end, the defaults are best represented in one particular Exhibit to Banner Bank's Reply in support of summary judgment. CP 293. Here, Banner Bank focuses on the Elenbaases payment defaults as of September 25, 2013. As the Court will note, by date, each payment owing is set forth, followed by any partial/late payment received, then the outstanding payments due, then the shortfall from payments on hand, and finally an accounting of any returned insufficient payment. CP 293-295, **Appendix A**. The key calculation on this spreadsheet is the "Shortfall" column: the escalating outstanding

balance was never made up by the Elenbaases, despite demand from Banner Bank, and thus the shortfall grew and grew.

Try as they might to distract the Court from scrutinizing their own peculiar payment history, the Elenbaases cannot refute the facts of their own defaults, which are carefully and correctly set forth here. On this basis, the trial court entered summary judgment in favor of Banner Bank, and the corresponding Orders and Judgment should be upheld.

**G. Appellants' Brief Was Not Timely Filed/Served.**

Turning to a significant procedural defect in the Elenbaases' appeal, the Elenbaases admit that their Appellants' Brief was due on January 5, 2016. *See*, Second Motion for Extension of Time, dated January 5, 2016, but filed January 6, 2016. With this Court's permission, the Elenbaases filed same on January 6, 2016. *See*, Notation Ruling dated January 8, 2016. However, the Elenbaases did not serve counsel for Banner Bank until January 8, 2016. *See*, Willig Decl., ¶¶ 3-4, Exhibit A. Thus, Appellants' Brief is untimely filed and served, and should be stricken. For this reason alone, the appeal should be dismissed.

Further, the date on the Elenbaases' Declaration of Service is clearly incorrect, as it states: "EXECUTED this 22nd day of December, 2015." These typographical errors aside, the parties had no agreement to accept e-mail service: counsel for Banner Bank had proposed e-service for

documents filed in the appeal, but the parties were unable to come to agreement on same. To be clear, the parties in this appeal did not have any agreement in place, either informal or otherwise, to accept e-mail or e-service of documents filed, served, or exchanged in this case. *See*, Willig Decl., ¶ 5.

Thus, as service via e-mail is not good service under RAP 18.5, which in this instance cites to Washington Superior Court Civil Rule (“CR”) 5(b)(1) or 2(a), and because Banner Bank’s counsel only received Appellants’ Brief on January 8, 2016, the Elenbaases have not timely filed their Brief.

This is especially unfortunate and grating because the Elenbaases have cause significant delays in this appeal. Like in all appeals, shortly after the filing of a notice of appeal, appellant is required to file a Designation of Clerk’s Papers, which in this case was due on March 16, 2015. *See*, Court of Appeals Letter dated March 11, 2015. The Elenbaases failed to timely complete this necessary first step, and thus the Court, two (2) months later, issued notice that the slapdash designation that *was* late filed by the Elenbaases did not comply with the Rules of Appellate Procedure.” *See*, Notation Ruling dated May 5, 2015. Thereafter, the Elenbaases delayed further, and the Court responded that if the Elenbaases did not file an “amended designation of clerk’s papers . . .

a court's motion to impose sanctions and/or dismiss in accordance with RAP 18.9 is set for Friday, June 26, 2015, at 10:30 a.m." *See*, Notation Ruling dated June 8, 2015.

The Elenbaases continued to demand more time, and the Court granted one final extension of the deadline to file an amended designation of clerk's papers, noting in particular that,

[t]his is a lengthy extension, in addition to the delay already caused by the Elenbaases' failure to file the required document. If the Elenbaases fail to file an amended designation of clerk's papers in compliance with RAP 9.6 by July 24, 2015, this case will be dismissed or sanctions of \$250 imposed against the Elenbaases without further notice of this Court.

*See*, Notation Ruling dated June 23, 2015.

On the eve of dismissal of this appeal, over four (4) months late, the Elenbaases finally filed an Amended Designation of Clerk's Papers and an Amended Statement of Arrangements, though the hearings covered in the latter amended document cover multiple hearings where very little if anything by way of substance occurred. All of the foregoing points to the Elenbaases goal of delaying this appeal as much as possible.

Under a regular briefing schedule, given that the Elenbaases filed their Notice of Appeal nearly one year ago, the Elenbaases' brief would have been due on or about June 29, 2015. *See*, RAP 9.6, 9.2, 9.5, 10.2, and scheduling letter dated March 11, 2015. But, given their delay and

manipulation of the Court Rules to achieve same, requiring the Court to issue letter after letter of admonishment, Elenbaases have enjoyed an additional seven (7) months to file their Brief. *See*, Correspondence from the Court dated April 6, 2015, May 5, 2015, June 8, 2015, and June 23, 2015.

Thus, Banner Bank respectfully requests that the Orders and Judgment entered in the trial court be affirmed, that they be awarded their fees and costs incurred on appeal, and that this appeal be dismissed.

#### **V. ISSUES PRESENTED**

The Elenbaases raise two “issues” pertaining to their asserted “assignments of error,” and again, neither offers any sufficient or legitimate basis on which to prevail in this appeal. In any event, this Court should decide as follows:

1. Whether the trial court properly granted summary judgment in favor of Banner Bank where, as here, the Elenbaases do not dispute the validity and enforceability of the Loan Documents, do not dispute that they defaulted on the Loan on multiple occasions beginning with the very first payment, do not dispute the substance of Banner Bank’s accounting of the loan, do not dispute that the trial court considered all of the above – and more, and cannot point to any document in the present record to show the existence of a genuine issue of material fact? **Yes.**

2. And whether the trial court, seeing no merit to any one of the Elenbaases' unsupported arguments, erred in awarding attorneys' fees and costs to Banner Bank when it properly granted summary judgment in its favor? **No.**

3. Finally, given the above, whether Banner Bank is entitled to an award of its attorneys' fees and costs incurred in this appeal? **Yes.**

In short, the trial court got it right, and saw this case for what it is: an attempt at distraction by borrowers who were consistently in default over a period of years, and who unfortunately never fully paid the Loan current. The Elenbaases have successfully preyed on Banner Bank's willingness to bend over backward for them, when the defaulted Loan should have gone into judicial foreclosure long ago.

Accordingly, the decision of the lower court and the Orders and Judgment entered should be affirmed.

## **VI. STANDARD OF REVIEW**

"A grant of summary judgment is reviewed *de novo*." *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009).

Here, Banner Bank carried its burden of demonstrating that there is no genuine issue as to any material fact in this case, and that it is are entitled to a judgment as a matter of law. CR 56(c); *Federal Way Sch. Dist.*, 167 Wn.2d at 523; *Bank of Am., NA v. Owens*, 173 Wn.2d 40, 48-49 (2011).

## VII. LEGAL AUTHORITY & ARGUMENT

### A. Summary Judgment Was Properly Granted Against The Elenbaases.

The purpose of summary judgment is to avoid useless trials when there is no issue of any material fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). If there is no issue as to any material fact, the trial court may grant summary judgment as a matter of law. *State Farm General Insurance Co. v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984).

On summary judgment, the moving party is not compelled to meet every speculation, conjecture, or possibility by alleging facts to the contrary. *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974). A question of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799 (2002).

To avoid summary judgment, the nonmoving party must present specific facts to demonstrate that genuine issues of material fact exist. *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490 (1983); *Tokaz v. Frontier Federal Savings & Loan Association*, 33 Wn. App. 456, 656 P.2d 1089 (1982). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having

its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008). Conclusory statements are insufficient to overcome a summary judgment motion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

A fact for purposes of summary judgment must be a reality and not a supposition or opinion. *McBride v. Walla Walla County*, 95 Wn. App. 33, 36-37, 975 P.2d 1029 (1999). Again, “[u]ltimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.” *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002) (quoting, *Grimwood*, 110 Wn.2d at 359) (citation omitted).

Here, the Elenbaases were given every opportunity to present their case to the trial court, opposing summary judgment with purported substantive arguments [CP 159-183], requesting additional time for response after terminating their counsel [CP 155-156, 312-313], moving for reconsideration [CP 307-311, 344-360], moving for post-judgment preliminary injunction [CP 304-306, 437-438], and objecting to the confirmation of the Sheriff’s Sale [CP 471-472]. The Elenbaases tried everything, but the trial court found no merit to any of their arguments, which amount to self-serving statements without any evidentiary support

in the record. The documentary evidence shows continual default because payments were not timely made, and the Elenbaases did not submit any documents to refute Banner Bank's proper accounting of the Loan or to establish that all payments were timely made.

Also, the Elenbaases could not show the existence of any genuine issue as to any material fact. Despite the prolonged default history and ongoing payment difficulties created by the Elenbaases, this collection action is quite simple, and the record is well documented with the many, many instances of Banner Bank attempting to help the Elenbaases and get their regular monthly payments back on track.

The decision of the trial court should be upheld.

**B. The Elenbaases Unquestionably And Continually Breached Their Contracts By Failing To Make Timely Payments.**

"A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." *N.W. Indep. Forest Mfr. v. Dep't of Labor and Indus.*, 78 Wn. App., 707, 712 (1995).

Both the Note and Construction Deed of Trust executed by the Elenbaases require that all payments be timely made, and specifically provide that the failure to do so constitutes a default under the Loan Documents. The Note states that the Elenbaases were to pay Banner Bank

“60 monthly consecutive principal and interest payments of \$2,139.36 each, beginning May 25, 2009” followed by “59 monthly consecutive principal and interest payments . . . of \$2,126.55 each, beginning May 25, 2014” and one final “principal and interest payment of \$2,126.31 on April 25, 2019[.]” CP 96. Regarding default, the Note could not be clearer: “Each of the following shall constitute an event of default . . . Borrower fails to make any payment when due under this Note.” CP 96. Upon default, Banner Bank was legally entitled to “declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.” CP 97.

The Construction Deed of Trust further reinforces the necessity of complying with payment deadlines, at CP 100:

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantor’s obligations under the Note, this Deed of Trust, and the Related Documents.

Here, it is indisputable and undisputed that the Elenbaases signed each and every one of the Loan Documents, thereby creating a duty to perform in conformity therewith. CP 84-85. At all times relevant herein, Banner Bank acted according to their duties under the Loan Documents and under all applicable state and Federal laws. *Id.* However, the

Elenbaases breached their duty to satisfy the debt to Banner Bank by failing to make all regular payments on the Note when due. CP 87. Thus, there is no genuine issue of material fact that the Elenbaases are in default on the Loan Documents.

The goal of awarding money damages is to compensate for losses that are actually suffered. *See, ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639 (1997). The party claiming damages has the burden to establish such damages without subjecting the trier of fact to mere speculation or conjecture. *Id.*

Here, the burden is met according to the specific terms of the Loan Documents and the structure of the refinance requested by the Elenbaases. Banner Bank advanced funds to refinance the Whatcom State Bank loan to the tune of \$177,529.00, which the Elenbaases were obligated to repay with regular (or default, should a default occur) interest. CP 84-85. The Elenbaases unquestionably did not repay the Loan according to its terms and thus Banner Bank has suffered damages as a result. The damages to Banner Bank are clear, the minimum amount of the Judgment, plus interest, as stated in the Judgment, and these damages are owed to Banner Bank. Summary judgment was properly granted as a matter of law on this cause of action.

///

**C. Washington's Credit Agreement Statute Of Frauds Limits The "Issues" Raised By The Elenbaases To The Written Loan Documents.**

To the extent the Elenbaases raise any issues that attempt to vary the terms of the written Loan Documents in the present record, Washington's Credit Agreement Statute of Frauds controls.

The Elenbaases' arguments attempt to create an issue of fact as to Banner Bank's right to demand a single payment or right to refuse to accept "smaller payments[.]" Appellants' Brief, pg. 9. However, if a written loan document has been signed, as here, even if Banner Bank had verbally agreed to accept partial payments, this is not binding or enforceable by or against the creditor. Also, such statements do not create an enforceable loan commitment or credit agreement under Washington law. The relevant credit agreement statute of frauds, Revised Code of Washington ("RCW") § 19.36.110, regarding the enforceability of credit agreements and the effect of oral agreements and partial performance, states:

**A credit agreement is not enforceable against the creditor unless the agreement is in writing and signed by the creditor. The rights and obligations of the parties to a credit agreement shall be determined solely from the written agreement,** and any prior or contemporaneous oral agreements between the parties are superseded by, merged into, and may not vary the credit agreement. Partial performance of a credit agreement does not remove the agreement from the operation of this

section.

*See*, RCW 19.36.110 (West 2015 ed.) (emphasis added).

Further, RCW 19.36.100 defines “credit agreement” as:

**[A]n agreement, promise, or commitment to lend money**, to otherwise extend credit, to forbear with respect to the repayment of any debt or the exercise of any remedy, **to modify or amend the terms under which the creditor has lent money or otherwise extended credit**, to release any guarantor or cosigner, or to make any other financial accommodation pertaining to a debt or other extension of credit.

*See*, RCW 19.36.100 (West 2015 ed.) (emphasis added).

Washington has enacted this credit agreement statute of frauds prohibiting the enforcement of a credit agreement unless it is in writing and executed by the creditor. *See*, RCW 19.36.110. Indeed, a majority of states have now enacted credit agreement statutes of frauds. *See, Whitney Nat'l Bank v. Rockwell*, 661 So.2d 1325, 1330 (1995). The *Whitney* court described the purpose of such statutes as follows:

Credit agreement statutes represent a legislative reaction to the recent surge in lender liability litigation . . . These statutes were enacted primarily to limit the most frequent lender liability claims – those which involve assertions of breach of oral contracts to lend, to refinance or to forbear from enforcing contractual remedies – by requiring a writing as a prerequisite for a debtor to sue a lender and thus precluding debtors from bringing claims based on oral agreements . . . The goal was to prevent bank customers from bringing baseless lender liability claims against banks alleging breaches of undocumented side agreements between the customer and one or more of bank officers . . .

Stated otherwise, these statutes were intended to prevent misunderstandings between parties to credit agreements and to introduce certainty into what is too often an informal process.

Thus, the primary legislative purpose in enacting credit agreement statutes was to establish certainty as to the *contractual* liability of financial institutions.

*Id.* at 1329-1330 (internal citations and quotations omitted; italics in original).

Under Washington's credit agreement statute of frauds, a credit agreement is not enforceable unless it is in writing and signed by the creditor. *See*, RCW 19.36.110. Further, the statute expressly prohibits enforcement of oral agreements to extend credit and declares that partial performance of an alleged credit agreement will not exempt an otherwise prohibited credit agreement from its strictures. *Id.*

Although there are few Washington cases interpreting the statute, myriad other courts have broadly interpreted the applicability of similar credit agreements statutes. For example, many courts have found these types of statutes apply to preclude all causes of action based on credit agreements that have not been both memorialized and properly executed, irrespective of whether the claims are based on tort, contract, equitable or other statutory theories of law.<sup>3</sup> Therefore, this Court must consider only

---

<sup>3</sup> *See, e.g., Dixon v. Countrywide Financial Corp.*, 664 F. Supp. 2d 1304, 1309-

the written contractual agreements between the Elenbaases and Banner Bank, all of which clearly provide that the Loan is in default and the amount of the Judgment is due and properly owing to Banner Bank.

**D. The Elenbaases Are Bound By The Contracts They Signed.**

The Elenbaases' primary argument, distilled to its essence, is that they should not be bound by the terms of their written contracts. As set forth above, the Note specifically provides that the Elenbaases were to pay Banner Bank, beginning on May 25, 2009, "60 monthly consecutive principal and interest payments of \$2,139.36" followed by "59 monthly consecutive principal and interest payments . . . of \$2,126.55" and one final "principal and interest payment of \$2,126.31[.]" CP 96. It is undisputed that they did not.

In Washington, a party is responsible for knowing the contents of

---

10 (S.D. Florida 2009) (claims for breach of contract, negligent misrepresentation, fraud and violation of Florida's Deceptive and Unfair Trade Practices Act are barred by Florida's credit agreement statute where alleged agreement is not reduced to writing and signed by the parties); *Premier Farm Credit, PCA v. W-Cattle, LLC*, 115 P.3d 504, 514-515 (Colo. App. 2006) (collecting cases and broadly interpreting Colorado's credit agreement statute to apply to a wide variety of tort and contract interpreting Colorado's credit agreement statute to apply to a wide variety of tort and contract claims); *Lang v. Bank of Durango*, 78 P.3d 1121, 1123-24 (Colo. App. 2003) (Colorado's credit agreement statute bars all claims related to a credit agreement unless the agreement is in writing); *Jesco Contr. Corp. v. Nationsbank Corp.*, 830 So.2d 989, 992 (La. 2002) (Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery); *Whirlpool Financial Corp. v. Sevaux*, 96 F.3d 216, 225 (7th Cir. 1996) (Illinois' credit agreement statute proscribes all claims by a debtor related to a oral credit agreement without limitation).

the documents they sign. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 380 (1987).<sup>4</sup>

Despite the Elenbaases' obvious and ongoing defaults on their own loan accounts, this is a straight-forward collection matter. The fact remains that the Elenbaases obtained financing assistance from Banner Bank to refinance the Whatcom State Bank loan. CP 84-85. Now, the Elenbaases seek to delay, confuse, and/or avoid repayment of the money

---

<sup>4</sup> The relevant principles are neatly summarized in *National Bank v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973):

It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P.2d 661 (1934). One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand. [The plaintiff], being not only a person of ordinary understanding but one with more than ordinary experience in land transactions and instruments of conveyance and security, and with time and opportunity both to consult with an attorney and to inspect the instruments before signing, cannot now be heard in law to repudiate his signature. The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs. As we said in *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 480, 256 P.2d 301 (1953):

Appellant had ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons. Under these circumstances, he cannot be heard to deny that he executed the contract, and he is bound by it.

*Id.* at 913.

they borrowers from Banner Bank.

The Loan Documents, however, are very clear. The Elenbaases absolutely, unequivocally, and contractually obligated themselves to repay Banner Bank according to the regular schedule outlined above.<sup>5</sup> The Elenbaases failed to timely make payment as required, which are clear events of default. Accordingly, the Judgment and Orders entered in the trial court should stand.

**E. The Plain Meaning Rule Limits The Analysis To The Documents Signed And Executed By The Parties.**

The Elenbaases do not argue that the Loan Documents are somehow ambiguous, or that they are *not* final, integrated expressions of the Loan on which Banner Bank seeks repayment. However, to the extent the Elenbaases' arguments could be construed by this Court as seeking to expand the consideration of this matter beyond the four corners of the Loan Documents, such extrinsic evidence should be kept out.

The “plain meaning” or “parol evidence” rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final

---

<sup>5</sup> The Elenbaases argue that Banner Bank was somehow compelled to accept late, incomplete, partial payments – at any time – that would then somehow “cure” existing defaults, regardless of any time limitations in the Loan Documents. *See*, Appellants’ Brief, pg. 20; CP 155. There is no such obligation under the Loan Documents, and the Loan Documents most certainly contain payment deadlines (among other temporal restrictions on the Elenbaases). In any event, full payment necessary to “cure” or reinstate the Loan was never made.

expression of the terms of the agreement. *See, DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998). Extrinsic evidence is not admissible as to evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; evidence that would show an intention independent of the instrument; or evidence that would vary, contradict or modify the written word. *See, In re Marriage of Schweitzer*, 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997); and *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

Washington courts focus on objective manifestations of the contract rather than the subjective intent of the parties; thus, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005); *see also, Brogan & Anensen, LLC v. Lamphiear*, 165 Wn.2d 773, 775-776 (2009). Here, all of the Loan Documents were final/integrated expressions of the terms of the parties' understanding agreement.

Additionally, the Loan Documents are not in any way ambiguous. Thus, interpreting same as urged by Banner Bank is in keeping with the case of *Berg v. Hudesman* and its adoption of the Restatement (Second) of Contracts §§ 212, 214(c) (1981). *See, Berg v. Hudesman*, 115 Wn.2d 657, 667-669, 801 P.2d 222 (1990). *Berg* noted with approval and expressly

affirmed the age-old and universally accepted “context rule” (i.e., the analytic framework for interpreting written contract language:

May we say here that we are mindful of the general rule that **parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake.** But, as stated in *Olsen v. Nichols*, 86 Wash. 185, 149 P. 668 [(1915)], **parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed,** for the purpose of ascertaining the intention of the parties and properly construing the writing. **Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed.** Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. **If the evidence goes no further than to show the situation of the parties and the circumstances under which the instrument was executed, then it is admissible.**

*See, J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-349, 147 P.2d 310 (1944) (emphasis added).

Here, the Elenbaases may attempt to cloud this Court’s view with “evidence” beyond the plain meaning of the words and/or the context of those words, i.e., the Elenbaases’ incorrect understanding of what a regular monthly payment schedule is, and what it means, as the Note unequivocally states, to make “monthly consecutive principal and interest

payments[.]” The admissibility of such evidence is prohibited under the authority as stated above.

Given that parol or extrinsic evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake, and given also that there was no fraud, accident, or mistake with respect to the Elenbaases’ admitted execution of the Loan Documents, nor are the Elenbaases alleging fraud, accident, or mistake, all other extrinsic evidence should be ignored. The Elenbaases’ are bound to the contracts they signed. Pursuant to those Loan Documents, the Elenbaases defaulted, Banner Bank properly collected on the debt, and judicially foreclosed the Property. Accordingly, the Orders and Judgment should be affirmed.

**F. The Elenbaases’ Have Been Unjustly Enriched If Their Loan Is Not Repaid.**

At a minimum, the Elenbaases have been unjustly enriched by Banner Bank if they are not held to repay the Loan as agreed.

“A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity.” *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007), review denied, 163 Wn.2d 1042 (2008). An unjust enrichment claim is sustained if the claimant establishes that: (1) a benefit was conferred to the

defendant by the plaintiff; (2) the defendant knew of the benefit; and (3) the defendant's acceptance of the benefit makes it inequitable for the defendant to retain the benefit without payment. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991) (quoting, BLACK'S LAW DICTIONARY 1535-36 (6th ed. 1990)).

Here, it is indisputable that the Elenbaases have been unjustly enriched. Banner Bank conferred to the Elenbaases the benefit of a loan in the amount of \$177,529.00. The Elenbaases had knowledge of such benefit by signing the Loan Documents, and it would be inequitable to allow the Elenbaases to retain the benefit of the Loan without the obligation of repayment to Banner Bank. Thus, there is no genuine issue of material fact that the Elenbaases have been unjustly enriched based on their acceptance and retention of the loan proceeds without proper and timely repayment under the Note. The Orders and Judgment entered in the trial court should be affirmed.

**G. The Elenbaases Do Not Cite Any Legal Authority As To The Substantive "Issues" They Raise.**

Other than the general cases set forth under "standards of review" (Appellants' Brief, pg. 17), and a handful of cases having to do with the Elenbaases' assumptive request for attorneys' fees (Appellants' Brief, pg. 25), the Elenbaases do not cite any legal authority, substantive or

otherwise, that is applicable to the “issues” they raise on appeal, i.e., as here, payment of a loan, loan default, and/or judicial foreclosure of a deed of trust securing a defaulted loan. *See*, Appellants’ Brief, pg. 18-25.

Thus, there is no case law to distinguish.

**H. Banner Bank Is Entitled To Its Attorneys’ Fees And Costs In This Appeal.**

Pursuant to RAP 18.1, Banner Bank respectfully requests an award of its attorneys’ fees, costs, and expenses incurred in this appeal.

Banner Bank’s attorneys’ fees and costs were properly awarded against the Elenbaases in the trial court. CP 300-303. Both the Note and Deed of Trust, signed by the Elenbaases, among other Loan Documents, specify that Banner Bank is entitled to repayment of all its attorneys’ fees, costs, and general expenses related to collection upon the Elenbaases’ default under the Note. CP 31, 38. As the prevailing party, the trial court properly awarded Banner Bank its attorneys’ fees, costs, and expenses in this matter pursuant to RCW 4.84.330.

Banner Bank has incurred significant additional attorneys’ fees and costs in this appeal. Thus, under RAP 18.1, should Banner Bank prevail on appeal, Banner Bank respectfully requests an award of its attorneys’ fees and costs incurred since entry of the Judgment, including in this appeal.

For the record, Banner Bank objects to any award of attorneys' fees and/or costs to the Elenbaases. Because the Elenbaases should not prevail on appeal, they should not be entitled to any award of their attorneys' fees, costs, or expenses, either on appeal or in the trial court.<sup>6</sup>

### VIII. CONCLUSION

Appellants' arguments subsist on little more than self-serving statements without evidentiary support in the record.

For all the reasons stated above, the Orders and Judgment should be affirmed and this appeal dismissed without further delay. The trial court committed no error of any kind, and its rulings should be upheld.

DATED this 2<sup>nd</sup> day of February, 2016.

Respectfully submitted,

HACKER & WILLIG, INC., P.S.



---

Arnold M. Willig, WSBA #20104  
Elizabeth H. Shea, WSBA #27189  
Charles L. Butler, III, WSBA #36893  
Attorneys for Respondent,  
Banner Bank

---

<sup>6</sup> In the unlikely event that this matter is reversed and remanded to the trial court, any award of attorneys' fees and/or costs to the Elenbaases should be reserved until this matter is ultimately and finally decided by the lower court.

**IX. APPENDIX A**

PAYMENT DEFAULTS ARE NEVER CURED AFTER SEPTEMBER 2013

RELEVANT DATES	PAYMENT OWING	PARTIAL PAYMENT TENDERED	OUTSTANDING PAST DUE AMOUNTS**	SHORTFALL (FROM PAYMENTS ON HAND)	PAYMENT RETURNED AS INSUFFICIENT
September 25, 2013 (payment due)	\$ 2,139.36		\$2,139.36		
October 25, 2013 (payment due)	\$ 2,139.36		\$4,278.72		
November 3, 2013 (date of check 1505)		\$2,400.00	\$4,278.72	\$1,878.72	
November 12, 2013 (late fee)	\$ 106.97		\$4,385.69		
November 21, 2013 (check 1505 returned)			\$4,385.69		\$2,400.00
November 24, 2013 (date of check 1513)		\$1,400.00	\$4,385.69	\$2,985.69	
November 25, 2013 (payment due)	\$ 2,139.36		\$6,525.05		
December 3, 2013 (*alleged re-tender of check 1505)		\$2,400.00*	\$6,525.05	\$4,125.05	
December 10, 2013 (late fee)	\$ 106.97		\$6,632.02		
December 19, 2013 (checks 1505 and 1513 returned)			\$6,632.02		\$3,800.00 (includes checks for \$1,400.00 and \$2,400.00)
December 19, 2013 (date of check 1396)		\$2,400.00	\$6,632.02	\$4,232.02	
December 25, 2013 (payment due)	\$ 2,139.36		\$8,771.38		
January 3, 2014 (date of check 1499)		\$2,300.00	\$8,771.38	\$4,071.38	
January 9, 2014 (late fee)	\$ 106.97		\$8,878.35		
January 21, 2014 (date of check 653706)		\$2,300.00	\$8,878.35	\$1,878.35	
January 25, 2014 (payment due)	\$ 2,139.36		\$11,017.71		
February 10, 2014 (late fee)	\$ 106.97		\$11,124.68		
February 12, 2014 (postal orders)		\$2,300.00	\$11,124.68	\$1,824.68	
February 25, 2014 (payment due)	\$ 2,139.36		\$13,264.04		

RELEVANT DATES	PAYMENT OWING	PARTIAL PAYMENT TENDERED	OUTSTANDING PAST DUE AMOUNTS	SHORTFALL (FROM PAYMENTS ON HAND)	PAYMENT RETURNED AS INSUFFICIENT
March 12, 2014 (late fee)	\$ 106.97		\$13,371.01		
March 25, 2014 (payment due)	\$ 2,139.36		\$15,510.37		
April 1, 2014 (date of check 141803514)		\$2,200.00	\$15,510.37	\$4,010.37	
April 9, 2014 (late fee)	\$ 106.97		\$15,617.34		
April 25, 2014 (payment due)	\$ 2,139.36		\$17,756.70		
May 5, 2014 (date of check 141803743)		\$2,300.00	\$17,756.70	\$3,956.70	
May 12, 2014 (late fee)	\$ 106.97		\$17,863.67		
May 20, 2014 (checks 1396; 1499; 653706; postal orders; checks 141803514 and 141803743 returned)			\$17,863.67		\$13,800.00 (includes checks for \$2,400.00, \$2,300.00, \$2,300.00, \$2,300.00, \$2,200.00 and \$2,300.00)
May 25, 2014 (payment due)	\$ 2,119.33		\$19,983.00		
May 29, 2014 (date of check 004400771)		\$2,300.00	\$19,983.00	\$17,683.00	
June 3, 2014 (date of check 004400910)		\$1,800.00	\$19,983.00	\$15,883.00	
June 9, 2014 (late fee)	\$ 105.97		\$20,088.97		
June 10, 2014 (date of check 0141803978)		\$2,300.00	\$20,088.97	\$13,688.97	
June 11, 2014 (returned checks 004400771 and 004400910 by mail)			\$20,088.97		\$4,100.00 (includes checks for \$2,300.00 and \$1,800.00; delivery unsuccessful, checks re-sent via hand delivery on October 7, 2014)
June 12, 2014 (date of check 0141803998)		\$4,600.00	\$20,088.97	\$13,188.97	
June 24, 2014 (date of check 0141804064)		\$2,300.00	\$20,088.97	\$10,888.97	
June 25, 2014 (payment due)	\$ 2,119.33		\$22,208.30		

RELEVANT DATES	PAYMENT OWING	PARTIAL PAYMENT TENDERED	OUTSTANDING PAST DUE AMOUNTS	SHORTFALL (FROM PAYMENTS ON HAND)	PAYMENT RETURNED AS INSUFFICIENT
July 10, 2014 (late fee)	\$ 105.97		\$22,314.27		
July 25, 2014 (payment due)	\$ 2,119.33		\$24,433.60		
August 4, 2014 (date of check 557250)		\$2,200.00	\$24,433.60	\$13,033.60	
August 11, 2014 (late fee)	\$ 105.97		\$24,539.57		
August 25, 2014 (payment due)	\$ 2,119.33		\$26,658.90		
September 2, 2014 (date of check 0141804546)		\$2,200.00	\$26,658.90	\$13,058.90	
September 9, 2014 (late fee)	\$ 105.97		\$26,764.87		
September 15, 2014 (date of check 0141804645)		\$2,200.00	\$26,764.87	\$10,964.87	
September 25, 2014 (payment due)	\$ 2,119.33		\$28,884.20		
October 7, 2014 (checks 004400771, 004400910, 0141803978, 0141803998, 0141804064, 557250, 0141804546 and 0141804645 returned)			\$28,884.20		\$19,900.00 (including \$4,100 re-turned as set forth above as well as checks for \$2,300; \$4,600, \$2,300, \$2,200, \$2,200, \$2,200, and \$2,200)
October 9, 2014 (late fee)	\$ 105.97		\$28,990.17		
October 18, 2014 (check tendered)		\$2,200.00	\$28,990.17	\$26,684.20	
October 25, 2014 (payment due)	\$ 2,119.33		\$31,109.50		
Unapplied prior payment		\$515.40	\$30,594.10		
Total Legal Fees and Costs as of September 30, 2014	\$ 18,965.63		\$49,559.73		
Total Appraisal Fees assessed as of May 20, 2014	\$ 3,248.51		\$52,808.24		

\*\*The "Outstanding Past Due Amounts" does not include legal fees and costs at the time such fees and costs were assessed.