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FILED

FEB 10 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 310345

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

BANK OF NEW YORK, AS TRUSTEE PURSUANT TO THE TERMS OF THAT CERTAIN POOLING AND SERVICING AGREEMENT DATED AS OF NOVEMBER 1, 1996 RELATED TO METROPOLITAN ASSET FUNDING, INC., MORTGAGE PASS-THROUGH CERTIFICATES SERIES 1996-A,

Respondent,

v.

MARCO T. BARBANTI, ROYAL POTTAGE ENTERPRISES; JUNCO FROST LAVINIA, INC.

Appellants.

APPELLANTS' JOINT PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS.

This Joint Petition for Discretionary Review by the Supreme Court is filed by Marco T. Barbanti, Royal Pottage Enterprises, Inc., and Junco Frost Lavinia, Inc.

II. DECISION FOR WHICH REVIEW IS SOUGHT. The Decision for which review is being sought was rendered by the Court of Appeals for the State of Washington, Division III in the case of *Bank of New York v. Marco T. Barbanti, et al*, Case No. 31034-5-III wherein the Court of Appeals affirmed in part and reversed in part the decision by the Spokane County Superior Court in Case No. 102045702. The Decision by the Court of Appeals was filed on December 12, 2013. A Joint Motion for Reconsideration was filed on January 2, 2014. The Joint Motion for Reconsideration was denied by Decision filed on January 9, 2014. This Joint Petition seeks review of the part of the Court of Appeals' Decision which affirmed the Superior Court's decision.

III. ISSUES PRESENTED FOR REVIEW.

The Joint Petition presents the following two issues for review:

1. When ruling on a summary judgment motion, does a Court have the authority to reach beyond the scope of the moving party's motion and decide issues that are not raised in the motion?

2. The previous issue notwithstanding, does a Court ruling on a

summary judgment have the authority to resolve factual issues in the context of a summary judgment motion and grant summary judgment when there is a dispute on material facts presented in the record before the Court?

IV. STATEMENT OF THE CASE.

Brian and Lisa Hooper (hereinafter "Hooper") owned a piece of real property commonly known as 5711 N. Division, Spokane, WA 99207 (Clerk's Papers (CP) 1-42; 121-155; 156-309; 109-120). The property at 5711 N. Division, Spokane, WA 99207 is the subject of this litigation (hereinafter "subject property") (CP 1-42; 121-155; 156-309; 109-120). On or about March 25, 1993 Hooper executed and delivered a promissory note (hereinafter "Hooper note") to Metropolitan Mortgage & Securities, Co. Inc.(CP 1-42; 121-155; 156-309; 109-120). The promissory note was secured by a Deed of Trust which was recorded on April 23, 1993 under Auditor's File No. 9304230387 in the records of Spokane County, Washington (hereinafter "Hooper deed of trust")(CP 1-42; 121-155; 156-309; 109-120). Metropolitan Mortgage assigned its interests in the Hooper Note and Deed of Trust to Respondent Bank of New York (BNY)(CP 59-108).

In May, 1996 Petitioner Marco T. Barbanti (hereinafter "Barbanti") purchased the subject property from Hooper for $160,000.00 (CP 121-155; 156-309). The purchase price for the subject property was to be paid as follows: $7,000.00 cash paid at closing; and the balance of $153,000.00

pursuant to a real estate contract (hereinafter "Hooper-Barbanti contract")(CP 121-155; 156-309). The Hooper-Barbanti contract was recorded on May 24, 1996 under Auditor's File No. 960520463 in the records of Spokane County, Washington (CP 121-155; 156-309).

The Hooper-Barbanti contract provided that Barbanti's purchase of the subject property was done "subject to" the underlying Hooper note and Hooper deed of trust (CP 156-309). The Hooper-Barbanti contract specifically stated that the Hooper note continued to be Hooper's obligation, however Barbanti was to provide Hooper with the funds necessary to discharge the monthly obligation under the Hooper note (CP 156-309). At the time of the sale of the subject property the amount owed by Hooper on the Hooper note was $133,549.83 (CP 156-309). An escrow account was set up to pass through payments from Barbanti to Hooper to Metropolitan Mortgage & Securities, Inc. to apply on the Hooper note (Allegro Escrow Account Number 15206)(CP 156-309). Barbanti's obligation to provide funds to Hooper was for the underlying obligation was subject to any future adjustments that may be made in the amount of that obligation (CP 156-309).

The difference between the amount owed by Hooper on the Hooper note and the unpaid balance on the Hooper-Barbanti contract was $19,450.17 as of the closing date of the Hooper-Barbanti purchase and sale (CP 156-309). A separate escrow account (Allegro Escrow Account Number 15208)

was set up to collect the monthly contract payment that was payable directly to Hooper (CP 156-309).

Mr. Barbanti stopped making payments to Hooper in the pass through account (Allegro Escrow Account Number 15206) in 2000 (CP 156-309). The next due date on the pass through account is 1-1-2001 (CP 156-309). The last payment made on the Hooper note was made on March 8, 2003 (CP 156-309). By Quit Claim Deed recorded July 21, 2003 under Auditor's File No. 4929722 in the records of Spokane County, Washington Barbanti quit claimed his interest in the subject property to Petitioner Royal Pottage Enterprises, Inc. (hereinafter "Royal Pottage") (CP 109-120). Barbanti did not assign his interest in the Hooper-Barbanti contract nor did Royal Pottage assume the purchaser's obligations under that contract.(CP 1-42; 397-404).

Petitioner Junco Frost Lavinia, Inc. (hereinafter "Junco Frost") is the judgment creditor under Judgment No. 02901497-6 entered in Spokane County Superior Court Case No. 02-2-00486-0 against Barbanti (CP 1-42; 397-404).

On April 16, 2009 BNY commenced a lawsuit in the Spokane County Superior Court (Case No. 09-2-01686-5) (hereinafter "BNY One") (CP 156-309). BNY One sought to reduce the unpaid balance on the Hooper note to a judgment and then sought to judicially foreclose the Hooper deed of trust to satisfy the judgment (CP 156-309). The judicial foreclosure also sought

to extinguish the interests of all the Defendants that were junior to the Hooper note and deed of trust (CP 156-309).

Barbanti, Royal Pottage, and Junco Frost moved to dismiss the Complaint in BNY One on the grounds that the Complaint had been filed after the statute of limitations had expired on the enforcement of the Hooper note (CP 156-309). Royal Pottage also moved to quiet title and have the Hooper deed of trust reconveyed (CP 156-309). The Defendants' Motions to Dismiss BNY One were granted, the lawsuit was dismissed, the deed of trust was ordered reconveyed and judgments in favor of the Defendants were entered including an award of attorney's fees and costs in favor of the prevailing Defendants (CP 156-309).

BNY filed an appeal. (Washington State Court of Appeals, Division III Case No. 295851)(CP 156-309). The appeal **did not** assign error to or challenge the Superior Court's decision which ruled that the Hooper note was no longer enforceable because the lawsuit had been commenced after the applicable statute of limitations had expired (CP 156-309). The appeal in Bank of New York 2009 also **did not** assign error to or challenge the Superior Court's order reconveying the Hooper deed of trust (CP 156-309). The appeal in Bank of New York 2009 **only** assigned error to the award of attorney's fees and costs in favor of the prevailing Defendants and to the

additional language used by the Superior Court in its order reconveying the Hooper deed of trust where, in Bank of New York's opinion, the Superior Court went beyond reconveying the Hooper deed of trust when it declared that title be quieted in favor of Royal Pottage (CP 156-309). The Court of Appeals reversed the part of the Superior Court's decision in BNY One awarding attorney's fees and costs to the prevailing Defendants and reversed the part of the Superior Court's decisions which stated that title was quieted in favor of Royal Pottage (CP 156-309). A Petition for Discretionary Review was filed with the Washington State Supreme Court and that Petition was denied.

On September 16, 2010 Hooper executed a Deed and Seller's Assignment of Real Estate Contract (hereinafter "Seller's Assignment") which was recorded on September 24, 2010 under Auditor's File No. 5936989 in the records of Spokane County, Washington (CP 59-108; 109-120). In the Seller's Assignment Hooper quit claimed its interest in the subject property to BNY and also assigned and transferred to BNY all of Hooper's right, title and interest in the Hooper-Barbanti contract (CP 59-108; 109-120). The parties to the Seller's Assignment did not do a UCC filing for their transaction (CP 156-309).

On October 28, 2010 the Summons and Complaint in the present case

(hereinafter "BNY Two") were filed. (CP 1-42). In BNY Two the Plaintiff, BNY, in its newly acquired status as assignee of the seller's interest under the Hooper-Barbanti contract, sought to foreclose judicially the Hooper-Barbanti contract due to an alleged failure to make payments. (CP 1-42). The BNY Two Complaint also sought to extinguish the interests of the other named defendants that were junior to the Hooper-Barbanti contract and to quiet title in favor of BNY. (CP 1-42).

Even though **no Answer had been filed by the Defendants**, BNY moved for Summary Judgment in this case. (CP 54-56). BNY's Summary Judgment Motion sought to foreclose the Hooper-Barbanti Contract and quiet title in favor of BNY however the Motion **never sought a determination that Barbanti and/or his successor in interest were in default** of any contractual obligation. (CP 54-56).

Since the inception of the Hooper-Barbanti contract in May, 1996 and at all times material to this litigation Barbanti has regularly and timely made the monthly payments payable directly to Hooper under the Hooper-Barbanti contract (Allegro Escrow Account No. 15208)(CP 156-309). After the execution and recording of the Seller's Assignment in September, 2010, the records held by Allegro Escrow Services, Inc. for Account No. 15208 continued to show that each monthly payment made by Barbanti was being

disbursed to Hooper and not to Bank of New York (CP 156-309). Bank of New York not only failed to file a UCC statement for its Seller's Assignment but it also failed to notify the escrow agent of any assignment of Hooper's interest in the contract (CP 156-309; 121-155; 320-331).

Barbanti continued to make the regular monthly payment to Hooper under Allegro Escrow Account No. 15208 up to and including the March, 2012 payment (CP 156-309). After making the March, 2012 regular payment, Barbanti requested a payoff quote from Allegro Escrow for the Hooper account (CP 156-309). Pursuant to the payoff quote prepared by Allegro Escrow, on March 26, 2012 Barbanti paid the entire outstanding balance on the Hooper-Barbanti contract **in full** (CP 156-309). The Allegro Escrow Account No. 15208 was closed and Barbanti was given the original Hooper-Barbanti contract marked "ALLEGRO SERVICES, INC. PAID IN FULL" and Barbanti was given the original Statutory Warranty Fulfillment Deed (dated May 21, 1996) which had been held by the escrow agent until such time as the contract was paid in full (CP 156-309). The original Statutory Warranty Fulfillment Deed was recorded on March 26, 2012 under Auditor's File No. 6078471 in the records of Spokane County, Washington (CP 156-309).

Defendants Barbanti, Royal Pottage, and Junco Frost opposed the

Plaintiff's Summary Judgment on multiple grounds including but not limited to:

1. The Hooper-Barbanti contract had been fully satisfied in part as the result of the Court's final decision in BNY One which ruled that the Hooper Note was no longer enforceable and in part due to Barbanti's full payment of all amounts owed to Hooper. The evidence for this claim was the decision in BNY One and the release of the original real estate contract stamped "PAID IN FULL" and the release and recording of the Statutory Warranty Fulfillment Deed for the Hooper-Barbanti contract.

2. In this case BNY stood in Hooper's shoes (as a result of the previously discussed assignment by Hooper) and therefore because Hooper was bound by the result in BNY One so too was BNY, as Hooper's successor, bound by the doctrines of *res judicata* and collateral estoppel (arising from the decision in BNY One) from attempting to collect any monies allegedly owed under the Hooper note and deed of trust because the earlier litigation between the same parties resulted in a final judgment declaring the Hooper note unenforceable and ordering the Hooper deed of trust reconveyed.

3. BNY failed to meet its burden as the moving party in a summary judgment because it failed to allege that Mr. Barbanti was in default or the

dollar amount of Mr. Barbanti's alleged default under the Hooper-Barbanti contract. Therefore the Court had no facts before it (either disputed or undisputed) to form a basis for a judgment of foreclosure of the contract. Barbanti and the other Defendants raised additional issues in opposition to the Summary Judgment Motion but those issues are not relevant in this Petition. (CP 121-155; 156-309).

The Superior Court ignored all these arguments and entered the Order Granting Summary Judgment which summarily quieted title in favor of BNY (CP 332-336). The decision was appealed. (CP 337-344). The Court of Appeals in an unpublished opinion (Case No. 31034-5-III) reversed the part of the decision of the Superior Court which quieted title in favor of BNY. However in its Opinion (See p. 13 Unpublished Opinion) the Court of Appeals affirmed the conclusion that Barbanti was in default of his payment obligation under the contract despite the fact that: the Motion did not request that finding; the Superior Court made no such finding or conclusion; and the Court of Appeals specifically ruled that the Superior Court had not made any determination regarding the amount of Barbanti's alleged default. A Motion for Reconsideration was filed and denied by the Court of Appeals. This Petition ensued.

V. ARGUMENT.

RAP 13.4(b) governs whether a Petition for Discretionary Review is accepted by the Supreme Court. The Rule provides that review "will" be accepted only if one or more of the following criteria are met:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). The Petitioners contend that this Joint Petition presents adequate basis for accepting review on all four grounds outlined in the rule for reasons discussed herein.

A. SIGNIFICANT ISSUES OF CONSTITUTIONAL DUE PROCESS.

It is "horn book" law in Washington that the summary judgment procedure is designed to avoid an unnecessary trial when there is no genuine issue of material fact. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The Washington Supreme Court continued in *Jacobsen*:

> However, a trial is *absolutely* necessary if there is a genuine issue as to any material fact....A 'material fact' is one upon which the outcome of the litigation depends...

Jacobsen, supra at p. 108 (Citations omitted) (Emphasis added).

A litigant's right to his/her day in court is **absolute** and can only be truncated if the litigation presents no dispute of a material fact. In this case the decision by the Court of Appeals must be reviewed because not only did the Court of Appeals ignore an obvious dispute on a material fact, but the Court of Appeals overstepped the bounds of a court's authority in the context of a summary judgement motion and went beyond the call of BNY's Motion to decide issues that were not specified in the Summary Judgment Motion. Ignoring a dispute of a material fact in the context of deciding a summary judgment motion and reaching an issue that is not raised or presented in the summary judgment motion (or the trial court's decision on the motion) is contrary to the well established principles enunciated by this Court and directly conflicts with decisions in all the other Court of Appeals Divisions.

In addition if such action by the Court of Appeals remains unchallenged it opens the door to divesting litigants of their right to have a trial on the merits of their claims and defenses when a dispute of material fact is presented. The implications of such a precedent will lead to erosion of the rights of every litigant who goes to court in the State of Washington.

The solution to the problem created by the decision of the Court of Appeals in this case is simple. The entire case should be reversed and remanded for trial. There is no precedential "down side" to this solution

because the Court of Appeals has already reversed and remanded the case for a determination of the amount of Barbanti's alleged default (a dispute of material fact requiring a trial). The remand can easily include instructions to determine the existence of a default at the same trial. In fact the two issues intuitively go hand in hand. Determining the amount of an alleged default *a fortiori* requires determination of the existence of the default.

There is no basis in the record before the Superior Court or the Court of Appeals for either Court to reach out and decide the issue of whether Mr. Barbanti defaulted in his contractual obligations just like there is no basis in the record to determine the extent, if any, of Mr. Barbanti's default. BNY's Motion never requested a determination that Mr. Barbanti was in default (CP 54-56). The Superior Court's Order Granting Summary Judgment (CP 332-336) fails to address either the issue of whether a default exists or the issue of the amount of the alleged default. Logically if the remedy for the oversight on the "dollar amount" issue is a reversal and remand for trial, the same result is mandated on the companion issue. If this decision is not reviewed it will be "open season" for courts in Washington to undercut the decisional law from this Court and resolve factual disputes in summary judgment proceedings and decide issues even if the issues are not raised in the pleadings. All this will take place while divesting litigants of the right to a

trial on the facts. The due process implications of circumventing what this Court has called the "absolute" right to a trial are readily apparent. Summary judgment will become synonymous with summary execution and all litigants will suffer.

This Court has ruled that the function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists. It is not to resolve issues of fact or to arrive at conclusions based thereon. *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 21, 586 P.2d 860 (1978) citing *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 424-25, 367 P.2d 985 (1962). In this case the Court of Appeals reached out and decided an issue that was not properly before it and made that decision in contravention of the well established decisional law from this Court and all the Divisions of the Court of Appeals. Before this type of egregious conduct becomes the law of the case, it is incumbent on this Court to review the Decision to insure that litigants in the civil courts are afforded adequate opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

B. CONFLICT WITH COURT OF APPEALS' DECISIONS.

A review of decisions on this issue from all **three** Divisions of the Court of Appeals further documents the problem in this case and the need to review the decision at issue. In *Renfro v. Kaur*, 156 Wn.App. 655, 661, 235

P.3d 800 (Div. I, 2010) the Court ruled in a contract interpretation context that summary judgment is not proper if the parties' written contract when viewed in light of the parties other objective manifestations has two or more reasonable but competing meanings. In *Bates v. Grace United Methodist Church*, 12 Wn.App. 111, 112-3, 529 P.2d 466 (Div. II, 1974) the Court ruled in a summary judgment context it must accept as true the evidence asserted by the nonmoving party and it must give the nonmoving party the benefit of all reasonable inferences therefrom.

Even decisions from Division III contravene the decision made by the Court of Appeals in this case. In *Landberg v. Carlson*, 108 Wn.App. 749, 753, 33 P.3d 406 (Div. III, 2001) the Court ruled that summary judgment is a procedure for testing the existence of a party's evidence.

The decision by the Court of Appeals in this case demands review because the Court in reviewing a summary judgment motion (that was filed before the Defendants answered the Complaint) used the summary judgment process not to test the existence of a party's evidence but instead to resolve a dispute of material fact (Is Mr. Barbanti in default?) when that issue was not even presented by the pleadings on file. The need to review the Court's decision becomes even more overwhelming when viewed in light of the fact that the Court of Appeals ruled that the corollary issue of the amount of Mr.

Barbanti's alleged default had not been resolved and hence the case remanded on that issue.

The record before the Court of Appeals and Superior Court contained a Summary Judgment Motion seeking to quiet title to certain real estate. The moving party's arguments surrounding the Motion implied that some default existed but never sought a determination from the Court on that fact. The nonmoving parties responded by asserting defenses based upon *res judicata* and collateral estoppel but more importantly they presented the undisputed fact that the contract in question was fully performed in part as a result of BNY One and in part due to Mr. Barbanti's payoff. The undisputed evidence in the record showed the contract paid in full and the warranty fulfillment deed had been recorded.

The dispute on that one material fact (is there a default or has the contract been fulfilled?) should have resulted in denial of the summary judgment motion and moved the parties to a trial on the merits. Instead the Superior Court ignored all the issues surrounding the existence of a default and the issues of *res judicata* and collateral estoppel (even though argued and briefed by the Defendants). The Court of Appeals correctly reversed the quiet title part of the decisions because of failure to comply with RCW 7.28.230(1) and correctly remanded for trial on the issue of the amount of Mr. Barbanti's

alleged default.

However for some unfathomable reason the Court of Appeals went beyond the scope of BNY's motion and beyond the scope of the Superior Court's Order Granting Summary Judgment and ruled that Mr. Barbanti was in default (even though the Court acknowledged that the record before it contained no factual basis for determining the amount of default). All of this took place in a proceeding where all facts and inferences therefrom **must** be viewed in the light most favorable to Mr. Barbanti and the other Defendants. This rationale flies in the face of well established decisional law from this Court and all the Courts of Appeal in Washington.

C. SUBSTANTIAL PUBLIC INTEREST.

In other cases, Division III got it right. For example in *Kofmehl v. Baseline Lake*, LLC, 167 Wn.App. 677, 695, 275 P.3d 328 (Div. III, 2012) Judges Siddoway and Brown (who were part of the panel that adjudicated the present case) held:

> But no motion for summary judgment on mutual assent was submitted for decision below, so no issue of mutual assent is before us on appeal.

No request to decide the issue of a default was before either the Superior Court or the Court of Appeals. No decision on the existence of default was made by the Superior Court yet the Court of Appeals reached out and decided

an issue not presented by the pleadings and did so in a summary judgment context. This action flies in the face of the Civil Rules and contradicts all available decisional law. Such action sets a dangerous precedent for all litigants in the State of Washington who now face the possibility of never seeing the inside of a courtroom and having their day in court because now in a summary proceeding disputed facts can be adjudicated despite the rulings in decisional law.

D. CONFLICT WITH SUPREME COURT OPINIONS.

In case the unprecedented nature of the Decision at issue and the need for review aren't clear enough, this Court's decision in *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 146-47, 969 P.2d 458 (1999) holding that nothing in CR 56(c) allows the raising of additional issues other than those presented in the summary judgment motion, further emphasizes the need for this Court to step in clear up these apparent inconsistencies. Reaching out to decide issues not raised in the summary judgment motion not only contradicts the rulings by the Supreme Court, but it also conflicts with other Courts of Appeal in this State:

> It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment....In sum it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought.

White v. Kent Medical Center, 61 Wn.App. 163, 168-69, 810 P.2d 4 (Div. I, 1991).

Whether Mr. Barbanti is in default and the amount of the alleged default was never raised in the summary judgment motion and was never addressed in the Court's Order Granting Summary Judgment. Therefore there is no legal basis for the Court of Appeals reaching out to decide the issue of the existence of default especially when in the same breath it concluded that the extent of that alleged default cannot be decided on the record before it.

VI. CONCLUSION.

Due process of law and the litigant's concomitant right to have one's day in court are the cornerstones of our legal system as evidenced by the decisions previously cited. In this case the Petitioners have had no process. BNY's summary judgment motion was filed before the Defendants ever answered the complaint. Despite BNY's failure to plead all the relief it needed and despite the Superior Court's failure to rule on certain issues, the Court of Appeals on its own reaches out and decides issues not even raised in the pleadings and in the summary judgment context *resolves* disputed issues of material fact - the existence of a default. This is accomplished while the Court of Appeals acknowledges that it cannot decide the issue of the extent of the alleged default and while all parties and the Court know that in the summary judgment context all facts and inferences therefrom are to be viewed in the light most favorable to the nonmoving party. If this Decision is to be given any legal respect in light of the overwhelming weight of authority disputing the result herein, then the Supreme Court needs to review

and reconcile this decision with established precedent.

In *Bitzan v. Parisi*, 88 Wn.2d 116, 117, 558 P.2d 775 (1977) this Court granted a Petition for Discretionary Review in order to review the sufficiency of the evidence supporting the challenged jury instructions. If discretionary review was proper in that case then review is definitely justified under RAP 13.4(b) because the result in this case effectively turns summary judgment proceedings into mini-trials where judges can reach and decide issues not even raised in the pleadings and also resolve factual disputes outside the motion and without a trial. If Civil Rule 56 is to be given this elevated status in our jurisprudence then such a result should only be allowed with the blessing of this State's highest Court.

Respectfully Submitted, on
February 10, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

THE BANK OF NEW YORK, As Trustee, Pursuant to the Terms of that Certain Pooling and Servicing Agreement Dated as of November 1, 1996 Related to Metropolitan Asset Funding, Inc., Mortgage Pass-Through Certificates Series 1996-A,	)	No. 31034-5-III
Respondent,	)	UNPUBLISHED OPINION
v.	)	
MARCO T. BARBANTI, ROYAL POTTAGE ENTERPRISES, Inc., and JUNCO FROST LAVINIA, Inc.,	)	
Appellants,	)	
STERLING SAVING BANK, UNIFUND CCR PARTNERS, and BANKERS TRUST COMPANY OF CALIFORNIA,	)	
Defendants.	)	

FEARING, J. — Appellants Marco T. Barbanti, Junco Frost Lavinia Inc., and Royal Pottage Enterprises Inc., appeal a summary judgment order, in favor of plaintiff Bank of New York (BONY), judicially foreclosing a real estate contract and quieting title to the sold commercial property. Appellants' assignments of error raise issues regarding

standing and real party in interest, the propriety of summary judgment, the timing of judicial foreclosure procedures, and the availability of quiet title remedies. We affirm the trial court's entry of summary judgment declaring appellant Barbanti to be in default in his obligations under the real estate contract. We reverse the trial court's quieting of title in favor of BONY and remand for purposes of proceeding with the statutorily required foreclosure process, after resolving the amount of the debt owed.

FACTS

This case involves a contract to purchase and sell real estate subject to a deed of trust securing a promissory note, an arrangement that eventually involved six parties, and that this court previously addressed in *Bank of New York v. Hooper*, 164 Wn. App. 295, 298-302, 263 P.3d 1263 (2011), *review denied*, 173 Wn.2d 1021 (2012). The facts have not changed substantially from the prior litigation.

Brian R. Hooper and Lisa M. Hooper owned commercial property on North Division Street in Spokane. In March 1993, they signed a promissory note for $143,000 secured by a deed of trust on the property in favor of Metropolitan Mortgage and Securities Company. Then, in May 1996, the Hoopers signed a real estate contract selling the property to Barbanti for $160,000. Barbanti paid the Hoopers $7,000 down, agreed to pay them $19,450.17 in monthly installments, and agreed to fund their monthly payments for the $133,549.83 still owed on the promissory note secured by the deed of trust.

The real estate contract provided that Barbanti would purchase the property subject to the deed of trust. He agreed the purchase price he must pay included the principal then due under the related promissory note, which was $133,549.83. But Barbanti did not assume this obligation directly to Metropolitan Mortgage. Instead, he separately promised to the Hoopers to obey the note's and deed of trust's terms. And, he agreed, "Th[is] covenant[ ] . . . shall survive the delivery of the Seller's deed and bill of sale to the Purchaser." Clerk's Papers (CP) at 177. The contract's default clause reads:

> 18. PURCHASER'S DEFAULT. The Purchaser shall be in default under this contract if it (a) fails to observe or perform any term, covenant or condition herein set forth or those of any Prior Encumbrances, or (b) fails or neglects to make any payment of principal or interest or any other amount required to be discharged by the Purchaser precisely when obligated to do so . . . .

CP at 181. The remedies clause reads, in relevant part:

> 19. SELLER'S REMEDIES. In the event the Purchaser defaults under this contract the Seller may, at its election, take the following courses of action:
>
> . . . .
>
> (d) Judicial Foreclosure. To the extent permitted by any applicable statute, the Seller may judicially foreclose this contract as a mortgage, and in connection therewith, may accelerate all of the debt due under this contract if the defaults upon which such action is based are not cured within fifteen (15) days following the Seller's written notice to the Purchaser which specifies such defaults and the acts required to cure the same (within which time any monetary default may be cured without regard to the acceleration) . . . . The purchaser at any foreclosure sale may (but shall not be obligated to), during any redemption period, [exercise certain rights]
>
> . . . .

CP at 181-82. Finally, the real estate contract provides,

> 23. COSTS AND ATTORNEYS' FEES. [I]n the event either party hereto institutes, defends or is involved with any action to enforce the provisions of this contract, the prevailing party in such action shall be entitled to reimbursement by the losing party for its court costs and reasonable attorneys' costs and fees, including such costs and fees that are incurred in connection with any . . . foreclosure . . . appeal, or other proceeding . . . .

CP at 183.

Later Barbanti arranged to pay Metropolitan Mortgage's escrow directly for amounts owed under the note secured by the deed of trust.

Metropolitan Mortgage assigned its interest as payee under the promissory note and beneficiary under the deed of trust to BONY in February 1997. In March 2003, Barbanti stopped paying the portion of the purchase price due under note secured by the deed of trust but continued paying the portion of the purchase price due to the sellers, Hoopers. Barbanti quitclaimed his interest in the property to Royal Pottage on July 17, 2003. Junco Frost Lavinia obtained a judgment lien against the property.

In April 2009, BONY sued, in an earlier action, to foreclose the deed of trust on the property. In its complaint, BONY sought a money judgment and decree of foreclosure against the Hoopers. BONY's complaint named, as defendants, other persons and entities alleged to have an interest in the property, including Barbanti and Royal Pottage.

In August 2010, Barbanti moved to dismiss BONY's foreclosure action as time barred under the statute of limitations. Barbanti admitted he failed to make payments to

escrow to satisfy the note and the underlying deed of trust as required by his real estate contract with the Hoopers.

In September 2010, before the hearing on Barbanti's motion to dismiss, the Hoopers signed a Deed and Seller's Assignment of Real Estate Contract, under which they quitclaimed their interest in the property and assigned their seller's interest in the real estate contract to BONY. BONY did not record the assignment. Thereafter, Barbanti continued to pay to the escrow company, the portion of the purchase price due to the seller under the real estate contract. The escrow agent continued to disburse the payments to the Hoopers, rather than BONY. BONY has never accelerated the debt owed.

At the dismissal hearing on September 24, 2010, BONY asked the court to deny dismissal and allow it to amend its complaint to assert a claim enforcing the real estate contract based upon Barbanti's breach of his obligations under the contract. The trial court orally granted the dismissal motion, apparently denying the amendment request.

On October 28, 2010, BONY filed this second lawsuit to enforce the real estate contract against Barbanti. On October 29, 2010, the court, in the first suit, entered orders: dismissing the bank's foreclosure action as barred by the statute of limitations; directing a reconveyance of the deed of trust; quieting title in "fee ownership" to Royal Pottage; and entering judgment in favor of appellant Barbanti and others for reasonable attorney fees and costs. On appeal, this court, in October 2011, reversed the trial court's order quieting

title in "fee ownership" because the property was still subject to the real estate contract. We also reversed the award of reasonable attorney fees and costs.

Barbanti obtained a payoff quote from the escrow agent. On March 26, 2012, he paid $14,790.45, received the fulfillment deed along with the original real estate contract stamped "PAID IN FULL," and recorded the deed. CP at 167.

In this second lawsuit, the trial court granted BONY summary judgment, judicially foreclosed the real estate contract, and quieted title to the property in the bank's favor.

LAW AND ANALYSIS

I. Standing and Real Party in Interest

Appellants contend BONY lacks standing and is not a real party in interest to file this suit to foreclose the real estate contract. They base this contention upon the fact that, despite the Hoopers' assignment of their seller's interest in the real estate contract to the bank, the escrow agent thereafter continued disbursing Barbanti's real estate contract payments to the Hoopers, who continued collecting them without the bank's objection. Appellants also argue that, because the right to receive real estate contract payments is personal property, the party holding the right must memorialize it in a filing under the Uniform Commercial Code (UCC) article 9A, chapter 62A RCW. It is undisputed that the bank failed to do so and, thus failed to perfect its security interest. We do not address whether BONY had standing or was a real party in interest, since appellants waived the right to assert these defenses when they did not assert them in the trial court.

Appellants failed to file an answer to respondent's complaint and thus failed to

assert standing and real party in interest as defenses. Appellants did not expressly assert that BONY lacked standing nor was a real party in interest when responding to the bank's summary judgment motion. Appellants contend they indirectly asserted the defenses when, in opposition to BONY's motion, they questioned the validity of the deed and seller's assignment and presented evidence supporting the defenses. Appellants also contend they may raise a standing issue for the first time on appeal because it concerns subject matter jurisdiction.

"The concepts of standing and CR 17(a) real party in interest are often interchanged by our courts. Standing refers to the demonstrated existence of 'an injury to a legally protected right.' 'The real party in interest is the person who possesses the right sought to be enforced.'" *Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wn. App. 568, 576, 295 P.3d 258 (2013) (footnote omitted) (citations omitted) (quoting *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 176 n.2, 982 P.2d 1202 (1999)) (citing Philip A. Trautman, *Joinder of Claims and Parties in Washington*, 14 GONZ. L. REV. 103, 109 (1978)). "These issues, although analytically distinct, are intertwined . . . ." *Id.*

Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008); *In re Application by Rapid Settlements, Ltd.*, 166 Wn. App. 683, 695, 271 P.3d 925 (2012); *see also* RAP 9.12. The reason for this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A defendant waives the

right to assert an affirmative defense if he or she fails to raise the defense at the trial court. *City of Seattle v. Lewis*, 70 Wn. App. 715, 718-19, 855 P.2d 327 (1993).

Appellants' presentation of evidence, to the trial court below, that could support the defenses of real party in interest or standing is insufficient to preserve the issues for appeal. Appellants' failure to specifically identify the defenses and provide legal citations in support of the defenses precluded the trial court from intelligently considering the defenses. We need not consider on appeal a theory that the lower court had no effective opportunity to consider and rule upon. *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967); *Commercial Credit Corp. v. Wollgast*, 11 Wn. App. 117, 126, 521 P.2d 1191 (1974).

Both standing and real party in interest are defenses. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995) (real party in interest); *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, No. 67832-9-I, slip op. at 10 (Wash. Ct. App. Aug. 19, 2013) (standing); *Durland v. San Juan County*, 175 Wn. App. 316, 325, 305 P.3d 246 (2013) (standing). Where an appellant fails to timely raise a real party in interest defense, the defense is waived on appeal. *Nw. Indep. Forest Mfrs.*, 78 Wn. App. at 716. The same goes for standing in cases other than declaratory judgment actions. *See State v. Cardenas*, 146 Wn.2d 400, 404-05, 47 P.3d 127 (2002); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203-04 n.4, 11 P.3d 762 (2000); *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123,

715 P.2d 128 (1986), *vacated on other grounds*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *Baker v. Baker*, 91 Wn.2d 482, 484, 588 P.2d 1164 (1979).

Contrary to appellants' contention, the doctrine of standing does not implicate the superior court's subject matter jurisdiction. *Trinity Universal*, slip op. at 10; *see Ullery v. Fulleton*, 162 Wn. App. 596, 604-05, 256 P.3d 406, *review denied*, 173 Wn.2d 1003 (2011). Therefore, in Washington, a plaintiff's lack of standing is not a matter of subject matter jurisdiction. *Trinity Universal*, slip op. at 10. In federal courts, a plaintiff's lack of standing deprives the court of subject matter jurisdiction, making it impossible to enter a judgment on the merits. *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1102 (9th Cir. 2006). By contrast, the Washington Constitution places few constraints on superior court jurisdiction. *See* CONST. art. IV, § 6 ("The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."); *see also Ullery*, 162 Wn. App. at 604. Accordingly, if a defendant waives the defense that a plaintiff lacks standing, a Washington court can reach the merits. *Id.*

II. Summary Judgment on Default

Appellants contend a genuine issue of material fact exists regarding whether Barbanti defaulted on the real estate contract and the amount of his default. This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary

judgment is proper if the record shows "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). This court construes all facts and reasonable inferences in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Initially, the moving party must show no genuine issue of material fact exists. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Then, the inquiry shifts and the nonmoving party must show a genuine issue of material fact exists. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

On appeal, appellants argue the real estate contract, and Barbanti's obligation to pay the purchase price, merged into the fulfillment deed upon delivery. They cite *Peoples' National Bank v. National Bank of Commerce*, 69 Wn.2d 682, 689-90, 420 P.2d 208 (1966), which states,

> As a general rule, the provisions of a contract for the sale of real estate . . . are considered merged in the execution and delivery of the deed.
>
> There are exceptions to the merger rule, when the terms of the contract of sale of real estate provide that the contract is not fully performed by the delivery of the deed. Under such circumstances, there is no presumption that either party, in giving or accepting the deed, waives the performance of the remaining terms of the contract.
>
> The contract here in question falls within the exception to the merger rule. The grantor and grantee were required, by the express terms of the contract, to perform substantial duties subsequent to the execution and

> delivery of the deed. The execution and delivery of the deed, therefore, did not constitute a waiver by either party of the performance of the remaining covenants.

Peoples' National Bank actually supports BONY's position. The real estate contract between the Hoopers and Barbanti provided that he purchased the property subject to the deed of trust, listed as a prior encumbrance. He agreed the purchase price he must pay included the principal then due under note secured by the deed of trust, which was $133,549.83. He separately promised to obey the note's and deed of trust's terms. And, he agreed, "Th[is] covenant[ ] . . . shall survive the delivery of the Seller's deed and bill of sale to the Purchaser." CP at 177. The real estate contract essentially gave him an obligation, independent from the note and deed of trust, to pay $133,549.83. According to the language of the contract, delivery of the seller's fulfillment deed did not relieve Barbanti of this obligation.

Although the uniform law has not been adopted in Washington, section 1-309 of the Uniform Land Transactions Act provides additional support for our conclusion:

> Acceptance by a buyer or a secured party of a deed or other instrument of conveyance is not of itself a waiver or renunciation of any of his rights under the contract under which the deed or other instrument of conveyance is given and does not of itself relieve any party of the duty to perform all his obligations under the contract.

UNIF. LAND TRANSACTIONS ACT § 1-309, 13 pt. 2 U.L.A. 188 (2002); *see also id.* § 1-309 cmt., 13 pt. 2 U.L.A. 188 ("This section abolishes the doctrine of merger under which the contract of conveyance is 'merged' into the deed . . . . Under this Act, merely accepting a deed does not affect the rights of the parties under their contract.").

In addition to arguing that BONY lacks standing because of its failure to perfect the assignment of the seller's interest in the real estate contract, appellants suggest that BONY may not enforce the real estate contract because it never perfected a security interest with a filing under UCC article 9A, chapter 62A RCW. They cite *In re Freeborn*, 94 Wn.2d 336, 344, 617 P.2d 424 (1980), which states where a real estate contract seller executes a document that both assigns its seller's interest and conveys legal title, "the assignee-grantee must both file pursuant to U.C.C. article 9 . . . *and* record pursuant to RCW 65.08.070 in order to have priority over subsequent lien creditors, purchasers and encumbrancers." But this case does not involve the priority of the deed and seller's assignment. Failing to perfect does not impact the validity or enforceability of the deed and seller's assignment of the real estate contract.

Appellants claim BONY needed to give 15 days notice of default before instituting the mortgage foreclosure, an act BONY did not fulfill. Appellants base this argument on a faulty reading of the real estate contract remedies clause. The clause reads in part, "[T]he Seller may judicially foreclose this contract as a mortgage, and in connection therewith, may accelerate all of the debt due under this contract if the defaults upon which such action is based are not cured *within fifteen (15) days following the Seller's written notice* to the Purchaser . . . ." CP at 182 (emphasis added). Appellants construe this notice requirement as applying to the earlier clause stating, "[T]he Seller may judicially foreclose this contract as a mortgage." CP at 182. A plain reading indicates appellants' interpretation is incorrect. *See Cornish Coll. of the Arts v. 1000 Va. Ltd.*

P'ship, 158 Wn. App. 203, 231, 242 P.3d 1 (2010) ("Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed."). This notice requirement applies solely to the later clause stating "and in connection therewith, may accelerate all of the debt due under this contract. CP at 182. The bank did not accelerate the entire debt. Therefore, the bank was not required to give appellants the notice mentioned in this provision.

Viewing all facts and reasonable inferences in the light most favorable to appellants, no genuine issue of material facts exists regarding whether Barbanti defaulted under the real estate contract. Again, as to the portion of the purchase price due under the deed of trust, Barbanti made no payment since March 8, 2003. The failure to pay constitutes default under the real estate contract. Any other ruling would allow Barbanti and, in turn, Royal Pottage, to avoid a substantial debt they agreed to pay in exchange for ownership of real property.

III. Summary Judgment on Amount in Default

We agree with appellants that a genuine issue of material fact exists regarding the amount of Barbanti's default. BONY's evidence suggested "Barbanti failed to make at least 72 principal payments of $1,351.65 during the six years following March 8, 2003," which totals $97,318.80 without interest. CP at 315. Appellants' evidence suggested the deed of trust's unpaid balance was "$125,011.72" as of July 9, 2012 or perhaps "$119,499.53" as of April 8, 2009, "together with interest from March 1, 2003 at $21.33 per diem." CP at 207, 309.

The trial court's order on summary judgment does not identify any amount in default. Establishment of this amount, by further summary judgment proceedings or trial, if needed, is essential.

BONY chose to foreclose the real estate contract as a mortgage. Where a seller chooses to judicially foreclose a real estate contract as a mortgage, all laws and procedures governing judicial foreclosures of mortgages apply. RCW 61.30.020(1); 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 21.40, at 518 (2d ed. 2004). The procedures include a sale to satisfy amounts owed and the opportunity of the debtor to pay amounts owed before the sale. RCW 61.12.060, .090, .130. The sale cannot occur and appellants' rights are thwarted without the establishment of the amount owed.

IV. Summary Judgment Quieting Title

We also agree with appellants' contention that the trial court erred by quieting title to the property in BONY. To repeat, since BONY elected to foreclose the real estate contract as a mortgage, BONY must follow mortgage foreclosure proceedings. RCW 61.30.020(1) reads, "At the seller's option, a real estate contract may be foreclosed in the manner and subject to the law applicable to the foreclosure of a mortgage in this state." These proceedings include an order of sale after entry of a judgment amount, a sheriff's sale, a possible sale of the property as a whole or in parcels, a possible upset price, a possible deficiency judgment, a possible distribution of sale proceeds to other lienholders, and a right of redemption. *See* ch. 6.23 RCW; RCW 61.12.060-.150.

BONY contends that RCW 61.12.050 frees it from establishing the amount in default and from a judicial sale. The statute reads, "When there is no express agreement in the mortgage nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged." This statute does not apply since the real estate contract adopted a particular sum owed.

V. Attorney Fees on Appeal

Appellants and BONY respectively request an award of reasonable attorney fees and costs on appeal, under RAP 18.1(a), which authorizes such an award if provided by applicable law. Here the real estate contract authorizes such an award to the party prevailing in an enforcement action, including an appeal from a judicial foreclosure.

Two principles interfere with appellants' request. First, we are affirming that a judgment should be entered in favor of BONY, although the amount of the judgment must still be determined. The "prevailing party" for an attorney fees clause in a contract means the party in whose favor the court rendered final judgment. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997); *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011). Although appellants prevailed on major issues, BONY prevailed on the most important issue. When both parties prevail on a major issue, there may be no prevailing party for attorney fee purposes. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996); *Hawkins*, 166 Wn. App. at 10.

One of the principles interferes in recovery of fees and costs by BONY. Appellants prevailed on major issues, and, if one counted the issues, appellants may have

prevailed on most of the issues. Under these circumstances, we deny all parties an award of reasonable attorney fees and costs.

CONCLUSION

We affirm the trial court's summary judgment ruling that Barbanti is in default under the real estate contract and that BONY may foreclose on the property. We reverse and remand for further proceedings to determine the amount owed under the contract and to foreclose the property in accordance with mortgage statutes. We deny both parties an award of reasonable attorney fees and costs on appeal.

Affirmed in part, reversed in part, and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be field for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Brown, J.

Siddoway, A.C.J.