69644-1

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NO.: 69644-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

ERIK D. ENSBERG,

Appellant,

vs.

JASON D. NELSON and FRANCINE E. NELSON, husband and wife, and the marital community comprised thereof,

Respondent.

BRIEF OF APPELLANT

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INTRODUCTION

This case is a challenge to the trial court's denial of a judgment for default on a Promissory Note and for granting a judgment for breaching a Statutory Warranty Deed. The court erroneously held that there was no consideration for the Promissory Note. The court also ruled that a judgment against a homeowner's association acted as an encumbrance against a parcel of property within that association; and, therefore, the grantor was found to have breached the warranty against encumbrances in the Statutory Warranty Deed. The court further ruled that the damages were the alleged diminished value even though no credible evidence of value was presented. It is contended by the Appellant that on each of these issues the court erred as a matter of law.

ASSIGNMENTS OF ERROR

Assignments of Error

1. That the trial court erred in finding from the testimony the following Finding of Fact:

> Findings of Fact 1.14:
>
> Neither Ensberg nor the Nelsons knew about the Judgment or that it was a potential encumbrance upon their lots. CP at 16.

Specifically, the court erred in finding as follows: ". . . that it was a potential encumbrance upon their lots."

2. That the trial court erred in finding from the testimony the following Finding of Fact:

> Findings of Fact 1.23:
>
> As part of that transaction, a title report was issued which reported the Judgment. Efforts were made to remove the information about the Judgment from the title report, but those efforts were unsuccessful. As a result of the Judgment being reported on the title report, the buyers in the transaction with the Nelsons exercised their right not to proceed with the purchase of Lot 18. CP at 18.

Specifically, the court erred in finding as follows: "As a result of the Judgment being reported on the title report, the buyers in the transaction with the Nelsons exercised their right not to proceed with the purchase of Lot 18."

3. That the trial court erred in finding from the testimony the following Finding of Fact:

> Finding of Fact 1.29:
>
> The Nelsons did not pay the note, but allowed the property to go into foreclosure. The property was sold at a trustee's sale in August, 2010 and the principal balance owing on the first deed of trust at that time was $129,733.00. CP at 19.

Specifically, the court erred in finding as follows: ". . . and the principal balance owing on the first deed of trust at that time was $129,733.00."

4. That the trial court erred in concluding that the judgment entered against Key Bay Homeowners' Association was an encumbrance against the subject lot, Lot 18.

Conclusions of Law 2.2:

> The $523,474.00 judgment against the Key Bay Homeowners' Association is an encumbrance upon Lot 18. CP at 19.

5. That the trial court erred in concluding that the judgment against the Key Bay Homeowners' Association was a burden upon the land owned sold by Ensberg to Nelson.

Conclusions of Law 2.3:

> Washington law's definition of an encumbrance is expansive, as reflected in the *Hebb v. Severson* opinion, cited by both parties. Here the exact amount of the encumbrance may not be known. It appears to have been anywhere from zero to $523,474.00 at the time the plaintiff sold the property to the defendants, but it was nevertheless a burden upon the land. It did not, however, render the title unmarketable. CP at 20.

6. That the trial court erred in concluding that Ensberg violated the statutory warranty deed against encumbrances when he executed the deed in selling the property to Nelson.

Conclusions of Law 2.4:

> Although plaintiff did not know about the encumbrance when he executed the statutory warranty deed, and cannot be said to have sold the property with any intent to deceive defendants or commit fraud or any misrepresentation, plaintiff nevertheless violated the statutory warranty deed covenant against encumbrances. CP at 20.

7. That the trial court erred in concluding that Nelson established sufficient evidence as to the value of the property with the encumbrance as compared to the value of the property without the encumbrance, resulting in a determination of damages totaling $86,267.00.

Conclusions of Law 2.6:

> Defendants have established on a preponderance of the evidence that they had a good faith purchaser willing to buy the property for $216,000.00 in the fall of 2009. The market value of the property subject to the encumbrance was established by the principal amount owing the first lien holder at the time of trustee's sale in August of 2010: $129,733.00. Thus the damages due from plaintiff to defendants are the difference between those two numbers, or $86,267.00. CP at 20.

8. That the trial court erred in concluding that Ensberg's breach of contract claim fails because there was no consideration at the time the contract was entered into.

> Conclusions of Law 2.7:
>
> The plaintiff's breach of contract claim fails because there was a failure of consideration at the time the contract was entered into. CP at 20.

9. That the trial court erred in concluding that Nelson should be awarded attorneys fees.

> Conclusions of Law 2.8:
>
> The Nelsons [sic] attorney's fees and costs are recoverable by them pursuant to RCW 4.84.330. CP at 21.

10. The trial court erred in dismissing Ensberg's breach of contract claim against Nelson. CP at 9, ll. 6-7.

11. The trial court erred in awarding a judgment in favor of the Nelson and against Ensberg for $86,267.00 because Ensberg did not breach a warranty in the statutory warranty deed; and, even if he did, the damages were too speculative to grant an award. CP at 9, ll. 8-10.

12. The trial court erred in awarding Nelson their attorneys fees and costs based upon the errors of the court regarding denying judgment in favor of Ensberg. If Ensberg had been granted judgment and Nelson's

counter-claims denied, then attorneys fees should have been awarded to Ensberg and not Nelson. CP at 9, 1. 14.

Issues Pertaining to Assignments of Error

1. Can a grantor of real property who was not a judgment debtor be liable for breach of the present warranty against encumbrances when conveying a Statutory Warranty Deed?

The standard of review is de novo. (Assignment of Error Nos. 1, 2, 4, 5, 6 and 10)

2. Does the existence of a breach of one (1) of the warranties in a deed mean that there was no consideration in the formation of the contract; and, assuming valid consideration, should Appellant prevail on his claim for damages to Respondents' default on the Promissory Note?

The standard of review is de novo. (Assignment of Error Nos. 8 and 10)

3. Even if Ensberg breached the Statutory Warranty Deed, can a court grant damages to Nelson when the evidence of damages is speculative?

The standard of review is de novo. (Assignment of Error Nos. 3, 7 and 11)

4. Should attorneys fees be awarded to Ensberg as the prevailing party?

The standard of review is de novo. (Assignment of Error Nos. 9 and 12)

STATEMENT OF THE CASE

This case involves the sale of real property by Statutory Warranty Deed followed by a second attempted sale of said real property. The Appellant, Erik D. Ensberg (hereafter "Ensberg"), originally purchased vacant property near Lake Chelan in Chelan County at the encouragement of a business acquaintance, the Respondents, Jason D. Nelson and Francine E. Nelson (hereafter referred to as "Nelson"), who had previously purchased two (2) lots adjacent to Ensberg. Ensberg made that purchase on April 15, 2004. CP at 15, ll. 1-11, Ex. 1. These purchases were orchestrated by Nelson's friend, Jack Johnson, whose company, Key Development Corporation, was developing and selling the lots. TR at 33.

Approximately five (5) years later, Ensberg decided he wanted to sell his lot and approached Nelson to see if they were interested in purchasing it, as he had previously expressed interest. On January 25, 2009, Nelson bought Ensberg's property for $195,000.00,which comprised of an assumption of the underlying debt still owed by Ensberg of

approximately $129,603.00. CP at 16, ll. 4-15, Ex. 2.

The entire transaction was handled by the same closing agent that the developer, Key Development Corporation, had used when Ensberg had originally purchased the subject real property five (5) years previously. TR at 41. Title insurance was again obtained through First American Title. Ex. 7. Ensberg had no involvement in selecting either the escrow or the title company and had no part in drafting the documents Ensberg signed, including the Statutory Warranty Deed. TR at 41, ll. 7-25 and 42, ll. 1-6. Ensberg received a Promissory Note and Deed of Trust (in second position) for the balance owed by Nelson of $55,396.00. Ensberg received approximately $10,000.00 from Nelson on the date of closing. CP at 16.

First American Title insurance company performed a title search prior to the closing between Ensberg and Nelson and showed no judgment encumbering the subject property. CP at 17. However, approximately six (6) months after that closing, Nelson put the property back up for sale and received an offer to buy from Mr. and Mrs. Boyer (a third party). Boyer offered to buy the property for $216,000.00. Ex. 15. That transaction was scheduled to be closed by a different escrow agent and a different title insurance company (North Meridian Title Insurance Company) than the previous two (2) transactions. Ex. 15. North Meridian Title, in its first

preliminary title report, listed a judgment against Key Bay Homeowners' Association. Ex. 15. The judgment was for over $500,000.00.

There were multiple efforts to convince North Meridian Title Insurance Company to remove the reference of that judgment as an encumbrance against title. North Meridian eventually did so, but referenced the judgment in a "note" asserting that it has not attached to the title, but the homeowners' association may assess a levy in the future. The full text states as follows:

> THE JUDGMENT AGAINST THE KEY BAY HOMEOWNER'S ASSOCIATION, A WASHINGTON NONPROFIT CORPORATION (THE "ASSOCIATION"), HAS NOT ATTACHED TO THE TITLE TO THE LAND DESCRIBED IN SCHEDULE A HEREIN. IF, AFTER APPEAL, THE JUDGMENT ATTACHES TO THE ASSOCIATION'S INTEREST, THE ASSOCIATION MAY LEVY ASSESSMENTS AGAINST EACH LOT TO RECOVER THE FUNDS OWED TO THE JUDGMENT CREDITORS. THIS NOTE PROVIDES NOTICE OF THE POTENTIAL FUTURE LIABILITY FOR SUCH ASSESSMENT(S).
> Ex. 27.

Even though the title insurance company determined it ultimately was not a lien against the property, Boyers decided not to go through with the sale. The sellers, Nelson, did not ask Ensberg to "fix" the problem, nor

did Nelson make any further effort to sell the property. TR at 49-50. The property was eventually foreclosed as Nelson defaulted, not only on Ensberg's Promissory Note, but also on the underlying Note and Deed of Trust. CP at 18-19. There is no evidence as to what the property sold for at the trustee's sale.

The foreclosure had the effect of removing Ensberg's Deed of Trust against the property, but the balance on the Promissory Note was still due and owing; and the last payment made on September 1, 2009, brought the balance on that date of $50,012.34. TR at 82, ll. 2-8, and Ex. 11. Ensberg filed this lawsuit praying for a judgment on the balance owed. Nelson countersued claiming that Ensberg breached the Statutory Warranty Deed (all other claims brought by Nelson were voluntarily dismissed).

During trial, there was no expert or lay testimony regarding the value of the subject real property with the offending judgment present as an alleged defect against title. There also was no expert or lay testimony regarding the value of the subject real property without the judgment as an alleged encumbrance. Mrs. Nelson testified that she guessed they would have profited from the sale (after paying the balance owed to Nelson and the underlying holder of the Deed of Trust) $25,274.28 had the sale to the new buyers been completed. TR at 83, ll. 10-20, and Ex. 33.

The court ruled that the judgment was an encumbrance against title and, therefore, a breach of the Statutory Warranty Deed conveyed by Ensberg to Nelson. The court further ruled that Nelson was damaged thereby, and that their loss was the sale price of the failed sale to their buyers (Boyers) minus the unknown bid price that was the "highest bidder" at the trustee's sale on foreclosure of the first position Deed of Trust. CP at 20, ll. 7-21. In addition, Nelson was awarded attorneys fees and costs pursuant to a provision awarding such fees and costs under the Promissory Note between Ensberg and Nelson. TR at 21. After entry of judgment against Ensberg, this appeal has followed.

ARGUMENT

I. A GRANTOR OF A STATUTORY WARRANTY DEED HAS NOT BREACHED ANY OF THE WARRANTIES FOR A JUDGMENT THAT DOES NOT ATTACH TO GRANTOR'S REAL PROPERTY.

A. A Judgment Only Attaches As a Lien Against Real Property Owned by the Judgment Debtor.

Real property owned by a judgment debtor is the only property subject to a judgment lien. In other words, a judgment lien cannot attach to real property owned by a person who was not party to

lawsuit.[1] The Washington State statutes are very clear on when and how judgments can attach to real property as a lien.

> The real estate of any judgment debtor, and such as the judgment debtor may acquire, not exempt by law, shall be held and bound to satisfy any judgment of the district court of the United States rendered in this state and any judgment of the supreme court, court of appeals, superior court, or district court of the state, and every such judgment shall be a lien thereupon to commence as provided in RCW 4.56.200 and to run for a period of not to exceed ten years from the date on which such judgment was entered . . .
> RCW 4.56.190.

> The lien of judgments upon the real estate of the judgment debtor shall commence as follows:
>
> * * *
>
> (2) Judgments of the superior court for the county in which the real estate of the judgment debtor is situated, from the time of the filing by the county clerk upon execution docket in accordance with RCW 4.64.030; . . .
> RCW 4.56.200.

In this case, the undisputed facts demonstrate that Ensberg was not a judgment debtor to any judgment during his ownership of the relevant

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[1] An exception, not applicable to this case, would be when a third party acquires real property from a judgment debtor who had a judgment entered against him during his ownership and said judgment was not paid prior to closing.

subject property. The judgment at issue was entered in the case of *Deep Water Brewing, LLC, et. al. v. Fairway Resources Limited, LLC, et. al.*, filed in Chelan County Superior Court under Cause Number 02-2-00848-2. The judgment debtors in that case were Jack J. Johnson, Key Development Corporation, and Key Bay Homeowners Association. Ex. 6, p. 2. The judgment was signed by Hon. Judge T. W. Small on March 17, 2008, and recorded with the Clerk on or about April 11, 2008.[2] *Id.*

Even though Ensberg owned the subject real property at the time this judgment was entered, he was not one of the judgment debtors, was not a party to that case and had no control or input regarding its outcome. The statute clearly limits the attachment of judgment liens to real property owned by judgment debtors, only. The subject real property was subsequently conveyed to Nelson on or about January 25, 2009. Ex. 2. In summary, none of the named judgment debtors were the owners of the subject real property at the time the judgment was entered and neither Ensberg nor Nelson was ever named as a judgment debtor. In short, no judgment lien attached to the subject real property. The standard of review is *de novo* since this issue is a question solely of law. See,

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[2] This case was the subject of appellate review under *Deep Water Brewing, LLC v. Fairway Resources Limited, et al.*, 152 Wn.App. 229, 215 P.3d 990 (2009).

Edmonson v. Popchoi, 155 Wn.App. 376, 383-84, 228 P.3d 780 (2010).

B. The Warranty Against Encumbrances was not Breached by Ensberg, the Grantor.

1. Warranty against encumbrance is breached, if at all, only at the time of conveyance.

The warranty against encumbrance is a present warranty that is breached, if at all, only at time of transfer or conveyance of title. Generally speaking, there are five (5) warranties granted in a Statutory Warranty Deed. RCW 64.04.030 provides the statutory framework for this type of deed.

* * *

> Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his or her heirs and assigns, with covenants on the part of the grantor: (1) That at the time of the making and delivery of such deed he or she was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he or she warrants to the grantee, his or her heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such covenants shall be obligatory upon any grantor, his or her heirs and personal

> representatives, as fully and with like effect as if written at full length in such deed. RCW 64.04.030.

In the case of *Mastro v. Kumakichi Corp.*, 90 Wn.App. 157, 951 P.2d 817 (1998), this court addressed a potential breach of a statutory warranty deed based upon the existence of an encroachment by a neighboring property owner who ultimately brought an action against the grantee for adverse possession. In that case, the court quoted from *Foley v. Smith*, 14 Wn.App. 285, 292, 539 P.2d 874 (1975), and William B. Stoebuck, Washington Practice, Real Estate: Property Law, §7.2, at 447 (1995), the five (5) identified covenants (or warranties) granted by a Statutory Warranty Deed:

> (1) that the grantor was seised of an estate in fee simple (warranty of seisn); (2) that he had a good right to convey that estate (warranty of right to convey); (3) that title was free of encumbrances (warranty against encumbrances); (4) that the grantee, his heirs and assigns, will have quiet possession (warranty of quiet possession); and (5) that the grantor will defend the grantee's title (warranty to defend).
> *Mastro*, 90 Wn.App. at 162.

The court went on to assert that some covenants are present and others are future. "These covenants include both 'present' covenants, such as the warranty of seisin, which are breached at

conveyance, and 'future' covenants, which may be breached or become effective after conveyance." *Id.*, at 163.

The covenant against encumbrances is a present covenant. Washington Practice defines it as follows: "Like the covenant of seisin, the covenant against encumbrances is a "present" covenant, broken only by an "encumbrance" that exists at the time of conveyance, but broken by the mere existence of the encumbrance, without the need for an eviction." The treatise went on to describe various examples of what constitutes an encumbrance as identified by Washington State Appellate Court decisions. Mortgages, leaseholds and restrictive covenants would be considered encumbrances without question. "However, Washington does not regard governmental land-use regulations, such as zoning and building regulations, as encumbrances, even if there is an existing violation, since such regulations are not clouds on the title itself." 18 Washington Practice Real Property §14.3. See also, *Stone v. Sexsmith*, 28 Wn.2d 947, 184 P.2d 567 (1947).

In the case of *Moore v. Gillingham*, 22 Wn.2d 655, 157 P.2d 598 (1945), a question was raised regarding an encumbrance or lien attaching for failure to pay certain taxes. The court emphasized that

the warranty against encumbrance was a present covenant breached, if at all, only at the time of delivery or transfer of title.

In the *Moore*, *supra*, case, the Court was reviewing the trial court's determination that unpaid taxes attached to the title as a lien and, therefore, was a breach of the warranty against encumbrances. The Court had previously noted: "A covenant against encumbrances is a covenant in praesenti and, if breached at all, is broken at the time it is made." *Id.*, at 661. The Court held that because there were taxes due **on the property** at the time of delivery of the deed the covenant against an encumbrance was broken immediately upon said delivery. *Id.*

In the case at bar, the question is limited to whether there was a breach of the warranty against encumbrance upon transfer of title from Ensberg to Nelson. The only encumbrance in question is the judgment against other third parties who were not owners of the real property at the time of that judgment being recorded in Chelan County. Therefore, as a matter of law, the warranty against encumbrance was not breached by Ensberg. The standard of review is *de novo* since this issue is a question solely of law. See, *Edmonson v. Popchoi*, 155 Wn.App. 376, 383-84, 228 P.3d 780 (2010).

2. A title insurance report or the lack of confidence by a potential third party buyer is not the test of

whether there has been a breach of the warranty against encumbrance.

At the very least, there must be an actual encumbrance on or touching the property itself in order to arrive at the question of whether that warranty has been breached. The Washington State Supreme Court has defined an encumbrance in this context. The standard of review for this question of law is *de novo*. In the case of *Hebb v. Severson*, 32 Wn.2d 159, 201 P.2d 156 (1948), the court carefully analyzed whether the existence of a present violation of a protective restriction (the existence of a building within five feet of property boundary) constituted an encumbrance. *Id.*, at 165-166. The court's definition of an encumbrance is as follows:

> An 'encumbrance' has been defined by this court to be any **right to, or interest in, land which may subsist in third persons**, to the diminution of the value of the estate of the tenant, but consistent with the passing of the fee; and, also, as a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner does not conflict of his conveyance of the land in fee. *Green v. Tidball*, 26 Wash. 338, 67 P. 84, 55 L.R.A. 879; *Linne v. Bredes*, 43 Wash. 540, 86 P. 858, 6 L.R.A.,N.S., 707, 117 Am.St.Rep. 1068, 11 Ann.Cas. 238. *Hebb, supra.*, at 160 (Emphasis added).

In *Williams v. Hewitt*, 57 Wash. 62, 106 P. 496 (1910), the court addressed the question of whether a ten-year building restrictive covenant constitutes a warranty against encumbrance. The court concluded that not the covenant itself, but the existing breach of that covenant, was an encumbrance and cited two (2) cases outside of the State of Washington for further definition.

> It is first contended that the clause should be treated as surplusage, or as a condition subsequent, and not as an incumbrance. We think that the clause is an incumbrance. "Any right existing in another to use the land, or whereby the use of the owner is restricted, is an incumbrance." *Wetmore v. Bruce*, 118 N.Y. 319, 23 N.E. 303. "If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is in law diminished in value and incumbered." *Mackey v. Harmon*, 34 Minn. 168, 24 N.W. 702. "A building restriction constitutes an incumbrance upon the title, and its imposition is a breach of the covenant against incumbrances." 5 Am. & Eng.Enc. of Law (2d. Ed.) p. 6. See also, *Streeper v. Abeln*, 59 Mo.App. 485.
> *Id.*, at 63.

In the case at bar, as previously stated, there was an existing judgment against other third parties. The *Hebb* case illustrates

that not every technical violation is a breach of one (1) of the warranties. *Hebb, supra.*, at 159. However, it is instructive to note that there must, at least, be a technical violation. That is, there must be a technical restriction or lien relating to a right to, or interest in, land subsisting in third persons. That is the definition of an encumbrance to which a court must look.

In this case, the only way a judgment could, by any definition, create a "right to, or interest in, land subsist[ing] in third persons" is if that judgment was against the property owner. *Id.*, at 160. Ensberg was the property owner when the judgment was recorded. He was not a judgment debtor and, therefore, free of any lien on his property at the time of conveyance.

3. A judgment against a homeowner's association does not create a breach of the Statutory Warranty Deed by a property owner within that association.

One might arguably claim that the property could be under threat of a lien by the homeowners association, who was, in fact, a named party to the lawsuit that gives rise to the judgment in question. However, such conclusion assumes more than the presented evidence in this case and would clearly not constitute a violation of a breach of the warranty against encumbrance. It is an event that might happen in the

future and would not constitute a present violation of the warranty at the time of conveyance. The standard of review is *de novo*.

In contrast, the State Legislature has specifically ruled in the case of condominium associations that a judgment against a condominium association (assuming it is perfected under RCW 4.64.020), will act as a lien in favor of the judgment lienholder against all of the units of the condominium. Notice, however, that it is an express act of the Legislature to create this kind of encumbrance against one (1) of the unit owners within the condominium. The relevant text states as follows:

> (1) Except as provided in subsection (2) of this section, a judgment for money against the association perfected under RCW 4.64.020 is a lien in favor of the judgment lienholder against all of the units in the condominium and their interest in the common elements at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.
> Wash. Rev. Code Ann. § 64.34.368 (West).

In the case at bar, we are not dealing with a condominium; and there is no evidence of an association's power or authority to assess dues to pay the judgment. The by-laws, covenants and/or other governing documents are not exhibits in this trial, nor was there any testimony regarding the authority of the Key Bay Homeowners'

Association having the power or right to assess dues to satisfy an outstanding judgment against the Association. Furthermore, there is no evidence that the Association would have the right, power or authority to attach a lien against any individual lot owner for failing to pay such an assessment. Therefore, even if it was possible for an association to take some coercive action against its members, no such evidence has been presented, and it clearly would be an event occurring, if at all, in the future and, therefore, would not constitute the required present breach of the warranty at time of conveyance.

II. A BREACH OF A WARRANTY DOES NOT MEAN THERE WAS NO CONSIDERATION IN THE FORMATION OF A CONTRACT, AND ENSBERG IS ENTITLED TO A JUDGMENT FOR NELSON'S DEFAULT OF THE PROMISSORY NOTE.

The parties did, in fact, enter into a binding contract with consideration. It is commonly understood that, in order for a contract to validly exist, there must be consideration exchanged. Without consideration, there is no contract, and there would be no breach. All warranty cases presuppose the exchange of consideration in forming a valid contract without regard to whether the seller breached one (1) of the warranties in the Statutory Warranty Deed. See, *Edmonson v. Popchoi*, 172 Wn.2d 272, 256 P.3d 1223 (2011); *Hebb v. Severson*, *supra.*;

Mastro v. Kumakichi, 90 Wn.App. 157, 951 P.2d 817 (1998); and *Foley v. Smith*, *supra*. The standard of review is *de novo*.

The court, in *Virtue v. Stanley*, 87 Wash. 167, 151 P. 270 (1915), responded to the claim that a contract for the sale of real property and a subsequent note for payments thereon lacked mutuality and/or consideration. The court disagreed with the argument when it said as follows:

> We are not impressed with the assertion that the contract lacked mutuality. It was prepared by George A. Virtue, and urged upon respondents. Its consideration to each was the mutual promises and covenants of the other. It had for its object the settlement of the existing indebtedness of respondents. It was clear and explicit. It is correct that a contract naked of any obligation or duty on one side-a *nudum pactum*-is not enforceable. But it is elementary, and requires no argument or citation to sustain, that if a contract contains mutual or reciprocal duties, burdens, or obligations, and the intent thereof can be ascertained by any fair construction, it may be enforced specifically, when possible and appropriate, or by compensating the injured party for any breach by the other.
> *Virtue v. Stanley*, 87 Wash. 167, 173-74, 151 P. 270 (1915).

In the case at bar, Ensberg transferred title to Nelson in exchange for a cash down payment, promissory note and assumption of underlying

debt. CP at 16. There is no dispute that consideration was exchanged between the parties. The question is whether there was a breach of that contract by one (1) party to the other. That dispute exists on appeal in this case.

In addition, the unrefuted evidence demonstrates that Nelson failed to make all of the required payments as established by the terms of the promissory note. CP at 17. The payment terms are set forth clearly in the promissory note. See Exhibit 3. And, the total payments made as admitted by Nelson left a balance owing of $50,012.34 plus interest at the default rate of 18%. TR at 82, Ex. 3. A demand for payment was made by Ensberg, but Nelson refused to pay. Judgment should have been entered in favor of Ensberg for the balance owed, plus interest and attorneys fees.

III. THE DAMAGES AWARDED TO NELSON WERE SPECULATIVE AND, THEREFORE, RULED IN ERROR.

A. Damages Due to the Breach of the Warranty Against Encumbrance Would be Based Upon the Diminution of Value of the Subject Real Property.

Although the measure of damages in a breach of warranty case is fact dependent, the general method for calculating damages in a breach of warranty against encumbrance is usually determined by the diminished value of the real property at the time of conveyance. In

Williams v. Hewitt, 57 Wash. 62, 106 P. 496 (1910), the property in question was burdened by a ten-year restrictive covenant, which prohibited certain residential construction. The court analyzed the proper measure of damages, and the court said as follows: "In the case at bar, the measure of damages is the difference in the value of the property with and without the restrictive clause, if the value of the property is diminished by the presence of the clause in the chain of title." *Id.*, at 65.

Perhaps more persuasive in this case, however, is the *Hewitt* Court's comment about the measure of damages in the case of unpaid taxes or an unpaid mortgage. "Where the incumbrance consists of taxes or a mortgage, or is of such nature that it can be computed, and the grantee can compel a release, he cannot recover beyond nominal damages until he has paid the debt." *Id.*, at 64.

In the case at bar, the judgment is more akin to unpaid taxes or an unpaid mortgage. Thus, based on the *Williams* case, Nelson would only be entitled to nominal damages if the judgment is, in fact, considered an encumbrance against title[3]. However, even if this court rejects that measure of damages, at a minimum, the proper measure of damages would be the diminished value **at the time of conveyance**

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[3] The trial court vacillated on the value of the encumbrance when she said it "appears to have been anywhere from zero to $523,474.00 at the time the plaintiff sold the property to the defendants. . ." CP at 20, ll. 3-5.

caused by the existence of this encumbrance as compared to its value without the encumbrance.

In the case at bar, there was no testimony regarding the value of the property. The court unilaterally took the position that the fair market value without the encumbrance was the purchase price offered by a third party buyer some months later, which said sale eventually failed. CP at 20, ll. 15-18.

The court further determined that the value of the property with the encumbrance was the trustee's sale value. However, there is no evidence of what the property actually sold for at a trustee's sale, nor would it be credible evidence as to its diminished value.

There must be some credible evidence in the form of testimony or other evidence as to the value of the property both with and without the encumbrance by an expert witness. No such evidence was offered by either party. The court does not have the power or authority to assess damages without evidence supporting the same. The standard of review is *de novo* when the trial court failed to base its findings on any evidence required by law for determining damages. That is, the value of the property at the time of conveyance. The court committed an abuse of discretion when it found, without adequate evidence, that the third party

buyer exercised their rights not to purchase due to the judgment in the title report. There was no admissible evidence directly from the buyers asserting their reasons for not going through with the sale. It is speculation to say that the reason (or sole reason) that they would not go through with the sale related to the judgment against the Association. CP at 18, Findings of Fact 1.23. Furthermore, there is no evidence that the property later sold at a trustee's sale for the balance owed on the underlying debt, nor evidence that the underlying debt reflected the diminished fair market value. Thus, it was an abuse of discretion by the court to enter a finding at Finding of Fact 1.29 that the property was sold at a trustee's sale for $129,733.00.

This court's standard of review for determining the damages is *de novo* as to the trial court's Conclusion of Law (Conclusion of Law 2.6) that the proper measure of damages was a future offer to purchase minus the balance owed (and supposed high bid price) at a trustee's sale. See, *Edmonson, supra.*, at 383-84. As previously briefed, that is not the proper measure of damages. CP at 20 (Conclusion of Law 2.6).

B. Damages Cannot be Based Upon Speculative Evidence.

The court cannot speculate as to damages and render a ruling therefrom. The court in *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 257 P.2d 784 (1953), provided a thorough analysis of the required level of certainty in awarding damages. In that case, the court determined that there was sufficient and certain evidence to award damages in a breach of contract case. However, the court outlined these general rules regarding the requirement of certainty:

> The classic statement of the rule of certainty, which is reiterated in the cases, often without analysis, is that damages, to be recoverable, '* * * must be certain, both in their nature and in respect to the cause from which they proceed.' *Griffin v. Colver*, 1858, 16 N.Y. 489, 495, 69 Am.Dec. 718. Generally, also, '* * * the 'certainty' requirement is usually accompanied by the statement that *712 the damages must not be 'contingent,' 'conjectural,' or 'remote.' Seemingly these phrases have but little additional **788 content.' McCormick on Damages 99, § 25. See, also, 15 Am.Jur., Damages, 410, § 20; 5 Williston on Contracts, 3776, § 1345.
>
> * * *
>
> The certainty rule, in its most important aspect, is a standard requiring a reasonable degree of persuasiveness in the proof of the fact and of the amount of the damage. Through its use, the trial judge is enabled to

> insist that the jury must have factual data-something more than guesswork-to guide them in fixing the award.' McCormick on Damages 99, § 26.

In the case of *State v. Evans*, 96 Wn.2d 119, 634 P.2d 845 (1981), the court assessed the proper measure of damages in an eminent domain case. The Supreme Court ruled that the trial court committed reversible error by failing to provide a proper jury instruction regarding arriving at compensation based on speculation.

> The trial court committed reversible error by failing to instruct the jury pursuant to WPI 150.11 which provides as follows: In arriving at the amount of compensation to be paid the respondents, you should not consider anything which is remote, imaginary, or speculative, even though mentioned or testified to by witnesses. The only elements which you should take into consideration are those which will actually affect the fair market value of the property and which are established by the evidence.

See also, *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 818, 733 P.2d 969 (1987); *Grang v. Finlay*, 58 Wn.2d 528, 364 P.2d 234 (1961); and *Arnold v. Sanstol*, 43 Wn.2d 94, 98, 260 P.2d 327 (1953).

In the case at bar, the court entered Conclusion of Law 2.3 wherein the court stated:

> Here the exact amount of the encumbrance may not be known. It appears to have been anywhere from zero to $523,474.00 at the time the plaintiff sold the property to the defendants, but it was nevertheless a burden upon the land. CP at 20.

That is a textbook definition of speculative. The court admits that the amount may not be known and further admits that it may be anywhere to zero to over half a million dollars. It further underscores the previous briefing that asserts, if there is a breach of warranty, it is a present breach; and damages are not contingent upon a future event. As the court in *Williams v. Hewitt* asserted, damages cannot be more than nominal until the injured party has paid the debt. *Williams v. Hewitt*, 57 Wash. 62, 64. The standard of review on this issue is *de novo* because it specifically addresses a legal question, not a finding of fact. The court cannot speculate as to the value of the property with and without the encumbrance. There must be evidence and/or testimony regarding those values. In this case, there was neither. Therefore, this court should reverse the trial court's ruling thereon.

IV. ATTORNEYS FEES SHOULD BE AWARDED TO THE APPELLANT, ENSBERG, IN THIS CASE.

The attorneys fees were awarded to the prevailing party at trial, Nelson. If the court reverses the trial court's ruling, then attorneys fees

should be awarded to Ensberg, both for the attorneys fees and costs incurred at trial and for this appeal. Attorneys fees should be awarded to Ensberg for the same reasons that they were awarded to Nelson. That is, attorneys fees are awardable if there is a contractual provision or statutory authority for granting the same.

In the case of *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983), the court denied attorneys fees on the basis of violating the warranty deed because the court determined that the grantee had not given the grantor the opportunity to defend title. The court, however, stated the American view of attorneys fees in asserting that attorneys fees are available if there is a private agreement or contract authorizing the same. Again, in the *Mellor* case, the court pointed out that the grantee was not entitled to attorneys fees even though there was such a provision in the contract since the grantee was not suing on the contract, but was instead suing on the basis of the statutory warranty deed covenant.

> The prevailing American view is that parties should pay their own attorney fees. 3 L. Orland, Wash.Prac., *Rules Practice* § 4441, at 411–12 (3d ed. 1978). In Washington attorney fees may be recovered only when authorized by a private agreement of the parties, a statute, or a recognized ground of equity. *Pennsylvania Life Ins. Co. v. Department of Empl. Sec.*, 97 Wash.2d 412, 645 P.2d 693 (1982).

Mellor v. Chamberlin, 100 Wash. 2d 643, 649, 673 P.2d 610, 613 (1983). *Mellor*, *supra.*, at 649.

In the case at bar, the promissory note upon which Ensberg brought this action has a provision for attorneys fees. See Exhibit 3. Specifically, the promissory note provides as follows:

> 10. ATTORNEYS' FEES AND COSTS: Maker shall pay all costs incurred by Holder in collecting sums due under this Note after a default, including reasonable attorneys' fees, whether or not suit is brought. If Maker or Holder sues to enforce this Note or obtain a declaration of its rights hereunder, the prevailing party in any such proceeding shall be entitled to recover its reasonable attorneys' fees and costs incurred in the proceeding (including those incurred in any bankruptcy proceeding or appeal) from the non-prevailing party.
>
> Exhibit 3, Paragraph 10.

If Ensberg is the prevailing party, then attorneys fees and costs should be awarded at trial and subsequently in this appeal.

In the case at bar, even if this court does not reverse the trial court's decision, attorneys fees should not be awarded to Nelson. Nelson is not entitled to attorneys fees because at no time did Nelson tender the case to Ensberg to clear title. However, if this court does reverse the trial

court decision, then Ensberg should be entitled to attorneys fees and costs based upon the contract that Ensberg sued. That is, on the promissory note which contains a provision for the same. The standard of review is *de novo*. See, *Edmonson, supra.*, at 383-384.

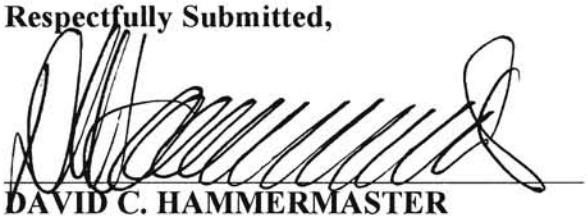
CONCLUSION

A judgment only attaches as a lien to real property owned by a judgment debtor. Any other judgment cannot act as a lien and, therefore, cannot be the basis for breach of the warranty against encumbrances. A judgment against a homeowner's association is not a lien against an individual property owner. Even if an association could levy fees against the homeowner to pay the judgment, that is an event to occur in the future, not the present. No evidence was presented in this case that the Association could levy any assessment or lien an owner's property for failure to pay said theoretical assessment. Even if Ensberg breached the Statutory Warranty Deed, the measure of damages would be the diminished value at the time of transfer. No evidence was presented to the trial court as to date-of-conveyance diminished value, and it most certainly would not include an assumed value that allegedly occurred at foreclosure of the underlying debt some one (1) year later. The absence of such evidence is fatal in Nelson's case. This court should reverse the trial court

and grant a judgment, plus attorneys fees and costs, in favor of Ensberg. The judgment should be for the balance owed on the Promissory Note of $50,012.34, plus interest from September, 2009, to the present at 12% per annum.

DATED this 19th day of April, 2013.

Respectfully Submitted,



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