70004-9

70004-9

No. 70004-9-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

WASHINGTON FEDERAL, a federally chartered savings association,

Plaintiff/Appellant,

v.

KENDALL D. GENTRY and NANCY GENTRY, individually, and the martial community comprised thereof

Defendants/Respondents.

BRIEF OF RESPONDENTS KENDALL AND NANCY GENTRY

Christopher I, Brain, WSBA #5054
Email: cbrain@tousley.com
Mary B. Reiten, WSBA #33623
Email: mreiten@tousley.com
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
206.682.5600

Attorneys for Defendants/Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Appellant Washington Federal ("WaFed") had three choices by which it could pursue a deficiency judgment: (1) Judicial Foreclosure (RCW 61.12.060); (2) Non-Judicial Foreclosure (RCW 61.24.100); and (3) Suing the borrower or the guarantors on the obligations under the deed of trust or the guaranty before foreclosure (RCW 61.24.100(2)(a)).

WaFed chose to pursue non-judicial foreclosure, but it failed to first read the deeds of trust on which it foreclosed. These deeds of trust secured not only the promissory note, but also all "Related Documents," which included Respondents' (hereinafter, the "Gentrys") guaranties. And under RCW 61.24.100(10), when a guaranty is secured by a deed of trust, then non-judicial foreclosure of that deed of trust also extinguishes all obligations under that guaranty:

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor <u>if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust</u>. (Emphasis added).

Now WaFed complains that it does not like the way its deeds of trust are written, and argues that the Court should (1) ignore the word "guarantor," and (2) read the word "any" to exclude "deficiency

judgments" but only as it relates to guarantors. Should WaFed's interpretation prevail, the same language of RCW 61.24.100(10) would have one meaning as applied to a guarantor and an entirely different meaning as applied to a borrower. That is, deficiency judgments would be permitted against guarantors but not against borrowers. The Gentrys respectfully submit that this Court should reject such an absurd result.

II. STATEMENT OF ISSUES ON APPEAL

1. Whether the deeds of trust secure the Gentrys' guaranties. (Yes).

2. Whether RCW 61.24.100(10) prohibits deficiency actions against guarantors where (1) the deed of trust secures the guaranty; and (2) a non-judicial foreclosure of that deed of trust has occurred. (Yes).

3. Whether the waivers in the Gentrys' guaranties violate Washington public policy and protections for guarantors set up in the Deed of Trust Act. (Yes).

III. STATEMENT OF FACTS

A. The Landed Gentry Loan

On April 27, 2009, Landed Gentry borrowed $3,574,847.74 from Horizon in exchange for its promissory note (the "Landed Gentry Note"). CR 4-7 (Landed Gentry Note). Landed Gentry secured the Landed Gentry

Note through various collateral including a junior deed of trust dated May 1, 2006, and recorded in Skagit County under Number 200605010189, against property located on East Blackburn Road, Mount Vernon, Washington, commonly known as the "Blackburn Road Property" (the "Blackburn Road DOT"). CR 9-21 (Blackburn Road DOT). Landed Gentry also secured the Landed Gentry Note with a deed of trust dated May 1, 2006, and recorded in Skagit County under Number 200605090130, against property located on Little Mountain Road, Mount Vernon, Washington, commonly known as "Little Mountain Road Property" (the "Little Mountain DOT"). CR 23-32 (Little Mountain DOT). In addition to the two deeds of trust, the Gentrys personally guaranteed the Landed Gentry Note. CR 34-39 (Landed Gentry Guaranties).

B. The Gentry Family Loan

On September 1, 2009, Gentry Family borrowed $1,127,832.73 from Horizon in exchange for its promissory note (the "Gentry Family Note"). CR 41-44 (Gentry Family Note). Gentry Family secured the Gentry Family Note with various collateral, including the Little Mountain DOT. CR 517 at ¶ 2.7 (Complaint). Further, the Gentrys personally

guaranteed the Gentry Family Note. CR 46-51 (Gentry Family Guaranties).

C. The Blackburn Southeast Loan

On December 14, 2005, Blackburn Southeast borrowed $2,550,000.00 from Horizon in exchange for its promissory note (the "Blackburn SE Note"). CR 53-59 (Blackburn SE Note). Blackburn Southeast secured the Blackburn SE Note with various collateral, including the Little Mountain DOT. CR 517 at ¶ 2.10 (Complaint). Further, the Gentrys personally guaranteed the Blackburn SE Note. CR 61-66 (Blackburn SE Guaranties).

D. The Foreclosure of the Deeds of Trust

Each of the three notes matured on January 5, 2010. Landed Gentry, Gentry Family and Blackburn Southeast failed to pay the debts when they became due. CR 518 at ¶ 3.1 (Complaint). As a result, WaFed, the successor-in-interest to Horizon under an assignment by the FDIC, foreclosed on both the Blackburn Road Property and the Little Mountain Road Property. WaFed was the successful bidder for both properties at the sale, which took place on April 1, 2011. CR 518-19 at ¶¶ 4.1-4.6 (Complaint).

guaranteed the Gentry Family Note. CR 46-51 (Gentry Family Guaranties).

C. The Blackburn Southeast Loan

On December 14, 2005, Blackburn Southeast borrowed $2,550,000.00 from Horizon in exchange for its promissory note (the "Blackburn SE Note"). CR 53-59 (Blackburn SE Note). Blackburn Southeast secured the Blackburn SE Note with various collateral, including the Little Mountain DOT. CR 517 at ¶ 2.10 (Complaint). Further, the Gentrys personally guaranteed the Blackburn SE Note. CR 61-66 (Blackburn SE Guaranties).

D. The Foreclosure of the Deeds of Trust

Each of the three notes matured on January 5, 2010. Landed Gentry, Gentry Family, and Blackburn Southeast failed to pay the debts when they became due. CR 518 at ¶ 3.1 (Complaint). As a result, WaFed, the successor-in-interest to Horizon under an assignment by the FDIC, foreclosed on both the Blackburn Road Property and the Little Mountain Road Property. WaFed was the successful bidder for both properties at the sale, which took place on April 1, 2011. CR 518-19 at ¶¶ 4.1-4.6 (Complaint).

E. The Language of the Deeds of Trust

Both the Blackburn Road DOT and the Little Mountain DOT (collectively, the "DOTs") provide that they "**[ARE] GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST**." (Block lettering and bold face in the original.) CR 11, 25. The terms "Indebtedness" and "Related Documents" are defined terms.

Indebtedness means:

> [A]ll principle, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by the Trustee or Lender to enforce the Grantor's obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust. Specifically, without limitation, Indebtedness includes the future advances set forth in the Future Advances provision, together with all interest thereon and all amounts that may be indirectly secured by the Cross-Collateralization provision of this Deed of Trust.

CR 16-17, 30 (emphasis added). That is, the deeds of trust secure the Indebtedness, which is defined as "amounts dues under the [Landed Gentry, Gentry Family or Blackburn SE] Note[s] or Related Documents."

Related Documents mean:

> [A]ll promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgagers, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust.

CR 17, 31 (emphasis added). That is, the guaranties constitute part of the Indebtedness that is secured by the Blackburn Road DOT and the Little Mountain DOT.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

Three issues exist for the Court to decide, each of which is reviewed de novo. Seybold v. Neu, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). First, do the DOTs secure the Gentrys' guaranties? Second, if the Gentrys' guaranties are secured by the DOTs, does RCW 61.24.100(10) preclude a deficiency action against the Gentrys after a non-judicial foreclosure? And finally, if the DOTs secure the guaranties, and RCW

61.24.100(10) precludes deficiency judgments against a guarantor after a non-judicial foreclosure sale, are the waivers of statutory anti-deficiency protections in the guaranties void as a matter of public policy? The answer to all three questions is "Yes."

B. The Deed of Trust Act

The legislature enacted the Deed of Trust Act in 1965 to permit non-judicial foreclosure. "The enactment of RCW ch. 61.24, however, contemplated a 'quid pro quo' between lenders and borrowers": Debtors gave up their right of redemption and creditors gave up their right to a deficiency judgment. Thompson v. Smith, 58 Wn. App. 361, 365, 793 P.2d 449 (1990) (quoting Donovik v. Seattle-First Nat'l Bank, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988).

In 1998, the Legislature amended the Deed of Trust Act to permit deficiency judgment in very narrow circumstances. Specifically, the Act now provides: "Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust." RCW 61.24.100(1) (emphasis added). That is, deficiency judgments after non-judicial foreclosure are the exception, not the rule.

The statute, RCW 61.24.100, goes on to provide that commercial loan guarantors may be subject to deficiency judgments if given timely notices under RCW 61.24.042(3)(c) and such actions are commenced within a year of the non-judicial foreclosure sale. RCW 61.24.100(4). Moreover, the guarantor is entitled to have the court establish the "fair value" of the property, and if that "fair value" is greater than the bid at the trustee's sale, then that is the value used to calculate the deficiency. RCW 61.24.100(5). And, a guarantor may also secure a guaranty with a deed of trust on its own property, but any deficiency is then limited to waste and wrongful retention of rents, insurance proceeds, or condemnation awards. See RCW 61.24.100(5).

Finally, and the matter under contention here, RCW 61.24.100(10) provides that "[a] trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation was not secured by the deed of trust." (Emphasis added). WaFed wants to get around this language by arguing that the statute's plain meaning should be ignored. Its position cannot stand for the simple reason that it chose to be bound by the limitations in the Deed of Trust Act.

The fact is that a creditor makes an election of remedies when the debtor defaults. A creditor may (1) non-judicially foreclose (RCW ch. 61.24); (2) judicially foreclose (RCW ch. 61.12); (3) sue on the note or the guaranty (RCW 61.24.100(2)(a); or (4) seek the appointment of a general receiver to sell the property (RCW ch. 7.60). Here, WaFed chose to non-judicially foreclose. WaFed made the deliberate choice to be bound by the limitations imposed on it by the Deed of Trust Act. The relief WaFed seeks (rejection of the plain meaning of the DOTs, RCW 61.24.100(10), and blanket waivers in violation of public policy) would render the protections in the Deed of Trust Act superfluous and meaningless.

C. "Related Documents" Include the Gentrys' Guaranties

The Gentrys' guaranties are secured by the DOTs, which explicitly define the Gentrys' guaranty for each note as a "Related Document" that composes part of the "Indebtedness" that each DOT secures. To find that each guaranty is not secured by either the Blackburn Road DOT or Little Mountain DOT would directly contradict each DOT's plain and unambiguous inclusion of the terms "guaranties" in its definition of "Related Documents."

Because the DOTs are integrated documents, the context rule for the interpretation of contracts applies. Berg v. Hudesman, 115 Wn.2d

657, 660, 801 P.2d 222 (1990); CR 16, 29 ("This Deed of Trust, together with any Related Documents, constitute the entire understanding and agreement of the parties as to the matters set forth in the Deed of Trust. No alteration of or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment."). But even under the context rule, the parole evidence rule applies. Berg, 115 Wn.2d at 660.

The parol evidence rule provides: "[E]xtrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake." Id. at 670 (quoting St. Yves v. Mid State Bank, 111 Wn.2d 374, 377, 757 P.2d 1384 (1988)). Because of the parole evidence rule, even if evidence existed that directly contradicts the language of the DOTs (WaFed has no such evidence, see Op. Br. at 5), such evidence could not change their terms. And here, those terms unambiguously include the Gentrys' guaranties as secured Related Documents.

1. Whether "Guaranty" or "guaranty" is Used in the DOTs, Each Term Refers to the Gentrys' Guaranties

WaFed makes much of the fact that "Guaranty" with a capital "G" is used in certain parts of the deeds of trust and a lower case "g" is used in other parts. But "an ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole." McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983); see also Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 895, 28 P.3d 823 (2011) (holding that courts will not read ambiguity into a contract where it can be reasonably avoided). Here, reviewing the contract as a whole, the terms "Guaranty" and "guaranty" are used interchangeably – avoiding any ambiguity by the use of both "Guaranty" and "guaranty." For example, under "Events of Default … Events Affecting the Guarantor," the DOTs provide that an event of default occurs when:

> Any of the preceding events [of default] occurs with respect to any Guarantor of any of the indebtedness or any Guarantor dies or becomes incompetent or revokes or disputes the validity of, or liability under, any Guaranty of the indebtedness. In the event of death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactorily to Lender, and, in doing so, cure an Event of Default. (Emphasis added.) CR 14, 28.

A second ground on which to find that no ambiguity exists here rests on the fact that the general and specific terms ("Guaranty" and "guaranty") do not conflict. Seattle First Nat'l Bank v. Westlake Park Ass'n, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). That is, a borrower cannot be their own surety; thus, the only possible meaning of lower case "guaranty" includes the Gentrys' guaranties.[1] 74 Am. Jur. 2d Suretyship § 1 (Definition and nature of relationship).

And finally, even assuming ambiguity exists, that ambiguity is construed against the drafter, here WaFed. McGary, 99 Wn.2d at 287. Under each of these analyses, the conclusion reached is that the DOTs secure the Gentrys' guaranties.

2. Whether the Guaranties Provide They are Secured by the DOTs is Irrelevant

WaFed also incorrectly argues that because the Gentrys' guaranties do not specifically provide that they are secured by a deed of trust, the language in the DOTs securing the guaranties is meaningless. But the DOTs are the documents that provide the operative securitization language. And the DOTs provide that they secure the "Indebtedness;"

---

[1] Unlike the case cited by WaFed (Diamond B. Contractors, Inc. v. Granite Falls Sch. Dist., 117 Wn. App. 157, 70 P.3d 966 (2003)), no other possible meaning can be assigned to lower case "guaranties."

"Indebtedness" includes "Related Documents;" and "Related Documents" includes the "guaranties."

Further, the drafter of these DOTs contemplated that a default by the guarantor would constitute a default under the DOT. CR 14, 28. Thus, WaFed's argument that the DOTs could not have secured the guaranties because they only regulated performance by the borrower rings false.

Finally, had Horizon Bank (WaFed's predecessor-in-interest to the DOTs) meant to exclude guaranties, it could have. Indeed, the definition of "Related Documents" in the DOTs specifically excludes "environmental indemnity agreements," demonstrating that its author knew how to exclude documents that should not be included. CR 17, 31. WaFed appears to concede this point when it cites to Washington Practice for the example that environmental indemnities may be excluded from those documents secured by deeds of trust – as was done here. Op. Br. at 19. Indeed, only one word needed to be added. If "guaranties" had been inserted before "environmental indemnity agreements" in the last sentence of the "Related Documents" definition, WaFed might have prevailed. Even one, five-word sentence could have made all the difference: "Guaranties are not Related Documents."

3. The Little Mountain DOT Modification Does Not Change the Definition of "Related Documents" or "Indebtedness"

The modification of the Little Mountain DOT does not change the definition of "Related Documents." In its opening brief, WaFed fails to point out that the Little Mountain DOT Modification provides that "[e]xcept as expressly modified above, the terms of the original Deed of Trust shall remain unchanged and in full force and effect...." CR 195 (2009 Modification). In other words, because the 2009 modification did not change the terms "Indebtedness" or "Related Documents" as defined in the original Little Mountain DOT, those terms remain as originally stated. Indeed, the only term to change in the Little Mountain DOT is the term "Note." The cross-collateralization provisions are an addition, not a change that redefines which documents are secured.

D. RCW 61.24.100(10) Precludes Deficiency Actions Against a Guarantor After a Non Judicial Foreclosure if the Guaranty is Secured by the Deed of Trust

Because the Gentrys' guaranties are secured by the DOTs, the next issue turns on statutory interpretation. That is, does RCW 61.24.100(10) prohibit deficiency judgment against guarantors where (1) the guaranty is secured by the deed of trust; and (2) a non-judicial foreclosure of that deed of trust has taken place.

RCW 61.24.100(1) provides that "Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust." (Emphasis added). Section 10 then provides that "[a] trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor **if** that obligation, or the substantial equivalent of that obligation, **was not** secured by the deed of trust."[2] (Emphasis added).

Here, the trial court did not err when it adopted the clear language of RCW 61.24.100(10) and held that obligations under a guaranty secured by a deed of trust are extinguished by the non-judicial foreclosure of that deed of trust. This interpretation conforms to the plain meaning of the statute.

1. The Plain Language of RCW 61.24.100(10) Governs

"When statutory language is unambiguous, [the Court] looks only to that language to determine the legislative intent without considering

---

[2] WaFed inexplicably argues that the trial court did not rely on RCW 61.24.100(10). Op. Br. at 17. But the trial court's letter opinion provides in pertinent part: "RCW 61.24.100 clearly states deficiency judgment shall not be obtained against a guarantor when that guaranty is secured by a deed of trust which is nonjudicially foreclosed except for a few narrowly crafted exceptions." This passage refers to subsection (10).

outside sources." State v. Ortega, __ Wn.2d __, 297 P.3d 57, 60-61 (March 21, 2013) (quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (holding that the plain language of "the arresting office" does not mean "any officer" when determining the legality of an arrest for a misdemeanor committed in "the arresting officer's" presence). Only by ignoring the plain language meaning of the phrase "any obligation" does WaFed reach the conclusion that "any" cannot include deficiency judgments. But "any" is defined as: "one or some indiscriminately of whatever kind." Merriam Webster's Online Dictionary at http://www.merriam-webster.com/dictionary/any (last visited May 17, 2013). Accord Shoreline Comm. Coll. Dist. No. 7 v. Empl. Sec. Dep't, 120 Wn.2d 394, 405, 842 P.2d 938 (1992) (interpreting "any" broadly in accordance with its plain meaning); State v. Tracer, 173 Wn.2d 708, 717-18, 272 P.3d 199 (2012) (distinguishing between "the prosecuting attorney" and "any prosecuting attorney" and concluding that "the" referred to the elected prosecuting attorney and "any" referred to all prosecuting attorneys).

And "obligation" is defined as: "something (as a formal contract, a promise, or the demands of conscience or custom) that OBLIGATES one to a course of action." Indeed, a second definition of obligation is: "a debt

security (as a mortgage or corporate bond)." Id. at http://www.merriam-webster.com/dictionary/obligation?show=0&t=1351638913 (last visited May 17, 2013) (emphasis in original). A guaranty falls under this definition of "any obligation" and the result of having given a guaranty – liability for a deficiency – is also encompassed. To find otherwise would be to eviscerate the inclusion of "guarantor" in RCW 61.24.100(10).

Finally, the term "if" means "in the event that," "allowing that," "on the assumption that," and "on condition that." Id. at http://www.merriam-webster.com/dictionary/if (last visited on May 17, 2013). The application of the doctrine of expressio unius est exclusion alterius ("to express or include one thing implies the exclusion of the other") supports the fact that the Legislature conditioned the right to bring a deficiency action on the guaranty not being secured by the deed of trust.

Indeed, WaFed's interpretation would create two different, contradictory meanings of the phrase "any obligation." That is, guarantors could still be pursued for deficiency judgments, but borrowers could not – yet the language used in the statute is identical for each. Such a result cannot stand.

2. Other Limitations on Deficiency Judgments Against Guarantors do NOT Conflict With RCW 61.24.100(10)

RCW 61.24.100(10) does not conflict with RCW 61.24.100(3) – (6), which WaFed would like this Court to find provide the only limits on deficiency judgments. Rather RCW 61.24.100(10) provides an additional ground on which to deny a lender a deficiency judgment against a guarantor. Indeed, RCW 61.24.100 provides that: "Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust." RCW 61.24.100(1) (emphasis added). Contrary to WaFed's protestations, it does not say, "Except to the extent permitted in subsections (3) – (6)…"[3]

If the language of subsection (10) appeared in a section of Deed of Trust Act other than RCW 61.24.100, WaFed might have a point. But it is located in the specific section that addresses the liability of guarantors. Because "any obligation" encompasses guaranties and any resulting liabilities incurred as a result of those guaranties, that phrase should be

[3] Indeed, RCW 61.24.100(3)(c) provides that "Subject to this section" (i.e. the entirety of RCW 61.24.100), an action for a deficiency may be had against a guarantor if the guarantor is given the appropriate notices.

given its plain meaning.[4] That is, the pursuit of "any obligation" against a guarantor, including a deficiency judgment, cannot go forward if the guaranty is secured by a deed of trust that was non-judicially foreclosed.

The fact that subsection (10) prohibits a deficiency against a guarantor where a deed of trust secures it and has been foreclosed non-judicially does not eviscerate any other section of RCW 61.24.100. Indeed, a deficiency judgment would still be available for waste to the property. See RCW 61.24.100(6). Such a reading is reasonable because deficiency judgments against a borrower are also permitted for waste to the property – even though otherwise prohibited. Compare RCW 61.24.100(1) & RCW 61.24.100(3)(a)(i). If WaFed's position were to be credited, then deficiency actions based on waste to property by the borrower would also be prohibited. They are not.

Moreover, drafters of deeds of trust are perfectly capable of excluding guaranties from its coverage – such as the language specifically excluding environmental indemnity reports in these DOTs. See CR 9-21,

---

[4] Compare State v. Delgado, 148 Wn.2d at 730-31 (rejecting prosecution's argument that plain meaning should not be given meaning and rejecting claim of legislative error because the court does not correct statutes where (1) the legislature intended a literal reading; (2) there may be inconsistencies but the statute remains rational as a whole; and (3) the alleged omission does not make render the entire statute meaningless.

23-32 (DOTs); see also Marjorie Dick Rombauer, Wash. Practice: Creditor's Remedies – Debtors' Relief § 3.37 (2d ed. Supp. 2012) (providing that section (10) allows parties to "carve out" obligations, such as liability for environmental contamination, from a transaction where a commercial loan is secured by the deed of trust.").

3. WaFed Greatly Exaggerates the Inefficiencies of the Gentrys' Position

WaFed greatly exaggerates the doom and gloom that allegedly will result from denial of its appeal. The non-judicial foreclosure scheme is only one mechanism that exists for lenders to use to collect on debt. Lenders whose deeds of trust secure guaranties would be well advised to pursue judicial foreclosure so that their right to a deficiency is not waived. Parties to a contract are on constructive notice of the contents of that contract and are bound by the terms contained therein. Tjart, 107 Wn. App. at 897 ("One who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party.").

The lender, often the drafter of the contract, should be bound by the deed of trust's terms. If a lender non-judicially forecloses on a deed of

trust without determining first whether that deed of trust also secures a guaranty, the fault does not lie with the borrower or the guarantor. Accord Bain v. Metro. Mort. Grp., Inc., 175 Wn.2d 83, 109, 285 P.2d 34 (2012) (responding to MERS' public policy argument that it should be permitted to act as a beneficiary on a deed of trust because the Legislature did not intend for borrowers to default without recourse and observing "[o]ne difficulty is that it is not the plaintiffs [borrowers] that manipulated the terms of the act: it was whoever drafted the forms used in these cases.").

The ability of a lender to foreclose non-judicially is a privilege given to lenders by the Legislature. As a result, the terms of the statute are strictly interpreted to protect the borrower and guarantor from overreaching on the part of the lender – especially because the court is not involved in the process. See Bain, 175 Wn.2d at 93 ("This is a significant power, and we have recently observed that "the [Deed of Trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales."). Here, the DOTs were drafted by the lender – expansively drafted in the broadest terms possible. Ironically, the lender now argues for a narrow reading of both the contract and the statute. Lenders should not have it both ways. Either a lender

accepts the protections given to borrowers and guarantors through non-judicial foreclosure in exchange for speed, or it involves the court.

E. The Waivers in the Guaranties Violate Public Policy

Mortgage foreclosure statutes, both judicial and non-judicial, express the public policy of Washington – a public policy in place since 1869. See Kennebec, Inc. v. Bank of the West, 88 Wn.2d 718, 724-25, 565 P.2d 812 (1977) (finding that foreclosure statute is "expressive of the public policy of the state."). Moreover, the protections for guarantors enumerated in RCW 61.24.100 are not "rights and privileges" that may be waived, rather they are limitations on the lender's power to obtain a deficiency from the guarantor. See Schroeder v. Excelsior Mgmt. Grp., __ Wn.2d __, 297 P.3d 677, 683 (Feb. 28, 2013) (rejecting waiver argument because Deed of Trust Act's prohibition on non-judicial foreclosure of agricultural land was not a "right of the debtor," but a limit on a trustee's power). And lenders must strictly comply with the Deed of Trust Act's requirements. Albice v. Premier Mort. Svcs. of Wash., Inc., 157 Wn.2d 560, 567, 276 P.3d 1277 (2012) (citing Udall v. T.D. Escrow Serv., Inc., 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)).

Further, the Deeds of Trust Act is consumer protection legislation. It serves a public purpose and, therefore, its protections cannot be waived

by contract. Accord Shoreline Comm. Coll. Dist. No. 7, 120 Wn.2d at 409-10 (holding employee protection aspect of unemployment compensation scheme could not be altered by contract). Any other rule would nullify the benefit of legislation enacted for the public good. Murphy v. Campbell Inv. Co., 79 Wn.2d 417, 430, 486 P.2d 1080 (1971); see also Bain, 175 Wn.2d at 108 (citing cases) (rejecting contractual modification of the Deed of Trust Act's definition of "beneficiary").

RCW 61.24.100 provides the sole exceptions by which a guarantor may be held liable for a deficiency judgment ("Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust." (Emphasis added)). Accepting WaFed's position would eliminate the protective nature of the statute.

Indeed, a borrower cannot waive the protections of the Deed of Trust Act, and a guarantor should not be held to have any less protection. See, e.g., Schroeder, 297 P.3d 677, 683; Albice, 157 Wn. App. at 927-28 & n.10 (holding foreclosure sale void because it occurred outside statutory time frame regardless of fact that extensions were agreed upon); Stretch v. Murphy, 112 P.2d 1018, 1021 (Or. 1941) (holding that waivers of

protections in the foreclosure statute could not be waived because "[t]he statute involved is not one creating a merely personal privilege which may be waived."); accord Dennis v. Moses, 18 Wash. 537, 577-79, 52 P. 333 (1898) (holding that a borrower cannot prospectively waive his right of redemption under the foreclosure statute because of public policy considerations); Conran v. White & Bollard, 24 Wn.2d 619, 629, 167 P.2d 133 (1946) (finding that agreements that chill or suppress one's right to bid at a foreclosure sale "have long been held invalid against public policy.").

The purpose of the 1998 amendments to RCW ch. 61.24 was to allow narrow circumstances in which deficiency judgments could be obtained if a lender elected to foreclose non-judicially, but only pursuant to rules promulgated therein. By reading the Deed of Trust Act as WaFed would like, and to enforce its waiver of anti-deficiency protections, WaFed seeks to have its cake and eat it too. That is, the guarantor must waive all the benefits the Deed of Trust Act provides to guarantors, but the lender gets to keep all the benefits provided to lenders. The Legislature did not intend such a result and the statute prohibits it. The trial court did not err in finding Washington state public policy offended by the blanket waivers in the Gentrys' guaranties.

V. ATTORNEYS' FEES AND COSTS

"Pursuant to RCW 4.84.330, the prevailing party in an action to enforce or defend a contract is entitled to attorney fees and costs where the contract so provides." Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). Here, the Gentrys' guaranties contain a fee shifting provision under which the trial court awarded the Gentrys their fees and costs. CR 35, 47, 62 (Guaranties). The Gentrys respectfully request that the appellate court grant them their fees and costs incurred in responding to this appeal pursuant to the contractual language in their guaranties, RCW 4.84.330, RAP 18.1, and RAP 14.

VI. CONCLUSION

WaFed asks the Court to read the expansive language used in the DOTs out of the instruments through a series of legally unsupportable arguments. The legal conclusion here is simple. The DOTs control what is secured (in this case the "guaranties"), and the Deed of Trust Act controls who is liable for a deficiency (i.e. guarantors are not liable for any deficiency where the deed of trust secures the guaranty, as is the case here). The simple result of these undisputed facts is that WaFed's appeal should be rejected.

DATED this 23rd day of May, 2013.

TOUSLEY BRAIN STEPHENS PLLC

By _____

Christopher I. Brain, WSBA #5054
Email: cbrain@tousley.com
Mary B. Reiten, WSBA #33623
Email: mreiten@tousley.com
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
Tel: (206) 682-5600
Fax: (206) 682-2992

Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 24th day of May, 2013, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Gregory R. Fox, WSBA 30559 Ryan P. McBride, WSBA #33280 Lane Powell PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Overnight Courier ☐ Facsimile ☐ Electronic Mail

Attorneys for Plaintiff/Appellant

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

EXECUTED this 24th day of May, 2013, at Seattle, Washington.

Betty Lou Taylor