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NO. 71544-5-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

BEL AIR & BRINEY, a general partnership; NICK BRINEY, a single man; and ROGER B. BEL AIR and CANDACE A. BEL AIR, husband and wife,

Appellants,

and

CITY OF KENT,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

Thomas F. Peterson, WSBA #16587
Eleanor H. Walstad, WSBA #44241
SOCIUS LAW GROUP, PLLC
Attorneys for Respondent

Two Union Square
601 Union Street, Suite 4950
Seattle, WA 98101.3951
206.838.9100

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I. INTRODUCTION

Without the ability to foreclose, a lien is meaningless. In the context of the doctrine of equitable subrogation, subrogating a party but taking away its ability to foreclose its equitable lien defeats the purpose of the doctrine. It would amount to giving with one hand and taking away with the other. Thus, the courts have long provided that an equitable lienholder may foreclose its lien. The trial court followed this precedent in ordering that the City of Kent could foreclose its equitable lien.

II. ISSUE REGARDING THE ADDITIONAL ASSIGNMENT OF ERROR

Did the trial court correctly permit the City of Kent to foreclose its equitable lien where the courts have long provided for the remedy of foreclosure to equitably subrogated lienholders and removing this essential attribute of a lien would undermine the doctrine of equitable subrogation?

III. ARGUMENT

A. Washington Case Law Has Long Given an Equitably Subrogated Party the Right to Foreclose its Lien

The City of Kent has the right to foreclose its judicially created equitable lien. The Washington courts long ago empowered a party that has been equitably subrogated to foreclose its equitable lien. In 1940 in *Olson v. Chapman*, the Supreme Court of Washington expressly stated that the party in whose favor it granted equitable subrogation was entitled to "a decree foreclosing the lien." 4 Wn.2d 522, 539, 104 P.2d 344 (1940). This was in line with earlier cases which touched on the issue. *Burgert v. Carolina*, 31 Wash. 62, 64, 71 P. 74 (1903) (complaint stated a

cause of action where plaintiff sought "to have the amount paid by her as taxes declared a lien...and to have the lien foreclosed and the land sold to satisfy the same"); *City of Spokane v. Security Savings Soc.*, 46 Wash. 150, 89 P. 466 (1907) ("awarding the respondent a lien upon appellants' lot for the delinquent general taxes paid...if they be not so paid, an order of sale issue on behalf of the respondent for the enforcement of its lien"); *Stone v. Marshall*, 52 Wash. 375, 379, 100 P.858 (1909) ("Stone by the payment of the tax...acquired a lien on the respondents' interests for their just proportion of the taxes so paid, which he could have foreclosed").

Similarly, recently, in *Worden v. Smith*, the appellate court stated that the equitably subrogated party had "the remedy of foreclosure" and remanded "with instructions to enter an order imposing and foreclosing a lien." 176 Wn. App. 309, 332, 314 P.3d 1125 (2013).

Both *Olson* and *Worden* are factually and legally analogous to the present case as the following chart demonstrates:

Olson v. Chapman	***Worden v. Smith***	***Kent v. BAB***
Chapman owed money to the county	Granite Falls owed money to the county	Tran owed money to MortgageIt
The county had a tax lien on the property	The county had a lien for taxes and storm water assessments on the property	MortgageIt had a mortgage lien on the property
Olson paid the taxes on Chapman's interest in the property	Columbia Bank paid the taxes and assessments on the owner's interest in the property	The City of Kent paid off MortgageIt's mortgage on Tran's interest in the property
The *Olson* Court recognized an equitable lien for	The *Worden* Court recognized an equitable lien for	The trial court recognized an equitable lien for the

payment of the taxes	payment of the taxes and assessments	payment of the mortgage
The county had the right to foreclose its lien	The county had the right to foreclose its lien	MortgageIt had the right to foreclose its mortgage
The *Olson* Court allowed Olson to step into the shoes of the county	The *Worden* Court allowed Columbia Bank to step into the shoes of the county	Equitable subrogation allows the City of Kent to step into the shoes of MortgageIt
The *Olson* Court ordered a foreclosure of Olson's equitable lien	The *Worden* Court ordered a foreclosure of Columbia Bank's equitable lien	The trial court ordered a foreclosure of the City of Kent's equitable lien

Thus, Washington State's binding precedent is that a party that has been equitably subrogated has the right to foreclose its equitable lien.

Bel Air & Briney's attempts to distinguish *Olson* and *Worden* fail. First, it fails to explain why the fact that the cases involve property taxes makes the holdings inapplicable. Reply, p. 9-12. Their significance is that the party that was equitably subrogated had the right to foreclose its lien. The courts' reasons for applying the doctrine of equitable subrogation—whether it was a tax statute or the policy to encourage the payment of taxes—are beside the point.[1]

Second, *Olson* and *Worden* do not make a distinction between in rem and in personam judgments in allowing an equitably subrogated party to foreclose its lien. Reply, p. 12. In *Olson*, the action was in personam. *Olson*, 4 Wn.2d at 524. In *Worden*, the action was in rem. *Worden*, 176 Wn. App. at 313. In both cases the court expressly recognized the right to foreclose. *Olson*, 4 Wn.2d at 538; *Worden*, 176 Wn. App. at 332.

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[1] In fact, the property tax statute was not even the basis for the *Olson* Court's application of the doctrine of equitable subrogation. *Olson*, 4 Wn.2d at 536-37.

Finally, the *Olson* Court recognized the right of a party with an interest in the property to foreclose its equitable lien. Reply, pp. 12-13. In *Olson*, the Court held that "a **tenant in common** of real property has an interest therein sufficient to entitle him to enforce an equitable lien for taxes paid." *Olson*, 4 Wn.2d at 538 (emphasis added). *See also Stone*, 52 Wash. 375. The fact that the City of Kent has an equitable lien against its own real property does not mean that it cannot foreclose that lien.

B. Allowing the City of Kent to Foreclose is an Equitable Result because the Right to Foreclose is the Sine Qua Non of an Equitable Lien and Does Not Materially Prejudice Bel Air & Briney

Taking away the ability to foreclose its lien will cripple the City of Kent, subvert the purpose of the doctrine of equitable subrogation, and bestow upon Bel Air & Briney an unearned windfall at the expense of the City of Kent.

What good is a lien if it has no remedy? The right to collect a debt through a foreclosure of real estate is the essential attribute of a mortgage lien. "The great value of a lien is that it may serve as a source of payment of a debt or as a source of motivation for a debtor to pay a debt to avoid loss of the property subject to the lien." 27 Marjorie Dick Rombauer, *Wash. Prac., Creditor's Remedies-Debtors' Relief,* § 4.1 (2d ed.).

Equitable subrogation means nothing without the right to foreclose. If this remedy is removed, the City of Kent will be deprived of the benefit of equitable subrogation which has been clearly defined by the Washington Supreme Court. The Court allows an equitable subrogee to "step into the shoes of," *Columbia Community Bank v. Newman Park,*

LLC, 177 Wn.2d 566, 573, 304 P.3d 472 (2013), and be "substituted," *Bank of Am. N.A v. Prestance Corp.*, 160 Wn.2d 566, 564-65, 160 P.3d 17 (2007), for the paid-off mortgagee. *See also Columbia Community Bank v. Newman Park, LLC*, 166 Wn. App. 634, 643, 279 P.3d 869 (2012), *aff'd*, 177 Wn.2d 566, 304 P.3d 472 (2013) ("One who fully performs an obligation of another, secured by a mortgage becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains the priority in the hands of the subrogee.").

Removal of the City of Kent's ability to foreclose its equitable lien would strip it of any way to collect upon the judgment. The City of Kent needs to foreclose to perfect its title. It intended to purchase the property with an unencumbered title. What it got was something less: an interest created by Tran still exists and deprives it of full title. By paying off MortgageIt, the City of Kent succeeded to the interest of the senior lienholder and has the right to foreclose MortgageIt's senior interest in order to perfect its title. This situation is the exact reason why equitable subrogation may be granted to a party with an interest in the property.

Bel Air & Briney's argument that the City of Kent will somehow be paid if Bel Air & Briney forecloses is entirely erroneous. Reply, pp. 15-16. Without the remedy of foreclosure, there is no possible scenario in which the City of Kent will be paid. If the City of Kent cannot foreclose, Bel Air & Briney will foreclose, and has, in fact, initiated its foreclosure.

CP 364-374 (5/16/204 Letter and Notice of Default). There are three scenarios in which a party would purchase the property, and the result is the same in each case: the City of Kent will lose title to its property and never receive any money for it.

- First, if Bel Air & Briney makes a credit bid in the amount of its $374,471[2] lien, it will acquire the property subject to the City of Kent's unenforceable lien. The City of Kent will be paid nothing out of this sale and it will lose title to its property.
- Second, if a third party purchases the property at Bel Air & Briney's foreclosure sale, it will simply take the property subject to the City of Kent's unenforceable lien. All the money will go to Bel Air & Briney and the City of Kent will not be paid anything from the sale because no one will pay more that the property is worth, certainly not more than the amount of Bel Air & Briney's claimed lien.[3] The City of Kent will lose title to its property.
- Third, if either Bel Air & Briney or a third party purchaser later sells the property at a subsequent market sale, the buyer will also take the property subject to the City of Kent's unenforceable lien. However, there is no law that requires

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[2] In its Notice of Default, Bel Air & Briney states that the amount required to cure is $374,471.42. CP 364-374 (5/16/204 Letter and Notice of Default).

[3] The property was worth $110,000 in October, 2012. CP 71 (Stipulated Facts, ¶ 26). Bel Air & Briney hypothesizes that the property could now be worth $197,000. Reply, p. 15. A search on Zillow on September 19, 2014 shows an estimate of $163,063.

liens to be paid off in the context of a market sale. The only reason that they are paid off in practice is because, if they are not paid off, the lienholder can foreclose. If Bel Air & Briney got its way, the City of Kent would not be able to foreclose. There is no rational reason that anyone would pay off a lien that cannot be enforced, and the only way to enforce a lien is through foreclosure.

Accordingly, under any scenario, the City of Kent will never be paid anything if its lien is stripped of the foreclosure remedy.

Bel Air & Briney argues it would be materially prejudiced by the City of Kent foreclosing its lien because the MortgageIt loan is not in default. Reply, pp. 18-19. But this misses the point. The City of Kent succeeds to the *rights* of MortgageIt under its deed of trust because the City of Kent paid off MortgageIt. The MortgageIt Deed of Trust provides as follows: "If the default is not cured on or before the date specified in the notice, Lender at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and/or any other remedies permitted by Applicable Law." CP 329 (MortgageIt DOT, § 22). Assuming the MortgageIt Deed of Trust is revived, it is in default as follows:

1. Borrower has failed to promptly discharge all "impositions attributable to the Property which can attain priority over this Security Instrument," namely the Bel Air & Briney deed of

trust, if Bel Air & Briney were to prevail in this appeal. CP 321-22 (MortgageIt DOT, § 4).

2. "[T]here is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this security Instrument." CP 324 (MortgageIt DOT, § 9(b)).
3. "Borrower has abandoned the property." CP 324 (MortgageIt DOT, § 9(c)).
4. "If all or any part of the Property or any Interest in the Property is sold or transferred." CP 327 (MortgageIt DOT, § 18).

The defaults in MortgageIt's Deed of Trust and, by extension, City of Kent's equitable lien, cannot be cured.

Bel Air & Briney's attempt to recast itself as being prejudiced by the remedy that naturally flows from the doctrine of equitable subrogation is unpersuasive. Without the remedy of foreclosure Bel Air & Briney would end up with a windfall after all.

C. The City of Kent is Permitted to Foreclose its Lien in the Manner Set Forth by Law

The trial court properly held that, like any judgment lien, the City of Kent's lien can be foreclosed in the manner set forth by law.[4] Reply, pp. 7-8. Although the issue of the mechanics of how to foreclose an equitable lien arising under the doctrine of equitable subrogation has apparently not risen to the appellate level in Washington, other appellate courts have addressed this issue. *See, e.g., G.E. Capital Mortgage*

[4] The applicable statute is RCW ch. 6.21 (Sales Under Execution).

Services, Inc. v. Levenson, 338 Md. 227, 657 A.2d 1170 (1995). In *G.E. Capital*, the Maryland court held that the foreclosure of the equitable lien extinguished all junior liens "as if the refinanced first mortgage had been foreclosed." *Id.* at 232. Although the court reversed on other grounds, it did not take issue with the intervening court's characterization of the foreclosure of an equitable lien: "A subrogated lender must foreclose under the authority of the prior lender's lien instrument, because that instrument contains the security and the rights it obtains through subrogation. In this respect, equitable subrogation operates as though the prior lien is revived and assigned to the refinancing lender." *Levenson v. G.E. Capital Mortgage Services, Inc.*, 101 Md. App. 122, 137 n.4, 643 A.2d 505, 512 (1994), *rev'd on other grounds*, *G.E. Capital Mortgage Services, Inc. v. Levenson*, 338 Md. 227, 657 A.2d 1170 (1995).[5]

Here, the City of Kent succeeds to the rights of MortgageIt under its Deed of Trust. Under the Deed of Trust, MortgageIt would have the right to foreclose judicially under RCW ch. 61.12 and ch. 6.21or non-judicially under RCW ch. 61.24. Except as provided in RCW ch. 61.24, a deed of trust is subject to all laws relating to mortgages and may be foreclosed as a mortgage. RCW 61.24.020. "A decree of foreclosure of mortgage or other lien may be enforced by execution as an ordinary

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[5] See George M. Platt, *The Dracula Mortgage: Creature of the Omitted Junior Lienholder*, 67 Or. L. Rev. 287, 322 (1988) ("This remedy [foreclosure] is possible because the bank, as purchaser at its own sale, not only acquired the position and rights of the original mortgagor but also that of the foreclosing mortgagee...Therefore, the bank can foreclose, just as it could in its capacity as the senior mortgage holder, against the yet unforeclosed junior mortgage...").

judgment or decree for the payment of money." RCW 61.12.090. The judgment specifies a sheriff's sale, which means that the sale will follow the procedures of RCW ch. 6.21. This makes sense because that is also the procedure a judgment creditor would follow.[6]

IV. CONCLUSION

The trial court correctly ordered that the City of Kent could foreclose its equitable lien. Bel Air & Briney fails to distinguish the cases on point and identifies no new theories that indicate that the trial court erred. If the City of Kent's right to foreclose its lien is taken away, Bel Air & Briney would reap an unearned windfall. Equitable subrogation and the accompanying foreclosure does not prejudice Bel Air & Briney. Rather, it preserves the status quo ante and prevents a windfall to Bel Air & Briney at the City of Kent's expense.

Respectfully submitted this 19th day of September, 2014.

SOCIUS LAW GROUP, PLLC

By 

Thomas F. Peterson, WSBA #16587
Eleanor H. Walstad, WSBA #44241
Attorneys for Respondent

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[6] Bel Air & Briney contends that RCW ch. 6.21 could not apply because "the Judgment [the City of Kent] presented made no mention of a monetary judgment." Reply, p. 8. But, that's not true. The trial court awarded the City of Kent a judgment in the amount of $196,894.17, which it has the right to recover from a foreclosure of the property.

CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2014, I caused a true and correct copy of this Supplemental Brief of Respondent to be served on the following in the manner indicated below:

Counsel for Appellants:

Michael D. Hunsinger
The Hunsinger Law Firm
100 S. King Street, Suite 400
Seattle, WA 98104
mike@hunsingerlawyers.com

☐	U.S. Mail
☒	Electronic Mail
☒	Legal Messenger
☐	Hand Delivery

Linda McKenzie,
Legal Assistant