Supreme Court No. 954623

Court of Appeals No. 75676-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CENTRUM FINANCIAL SERVICES, INC.,

Petitioner,

vs.

UNION BANK, N.A.,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF THE ANSWERING PARTY

Respondent M.U.F.G. Union Bank, N.A. ("Union Bank") (formerly known as Union Bank, N.A.) answers in opposition to Centrum Financial Services, Inc.'s ("Centrum") Petition for Review (the "Petition").

II. STATEMENT OF THE CASE

A. Overview

Centrum has abandoned every argument it previously made to the Superior Court and the Court of Appeals. Instead, its Petition raises a legal argument that Centrum has not previously asserted at any point in this litigation: because the Deed of Trust Act's ("DTA") notice provision, RCW 61.24.040, states that the holder of a conveyance has the right to receive notice of a trustee's sale under RCW 61.24.040(1)(b)(iii), this supposedly gives the conveyance holder a right to cure the default that triggered foreclosure, even though the conveyance holder is not included within the enumerated categories of persons that possess the right to cure a default under the DTA's cure provision, RCW 61.24.090. Centrum conflates the right to ***notice*** with the right to ***cure***. Nowhere in the notice statute, RCW 61.24.040, does the Legislature expand on the limited set of parties to whom the Legislature granted cure rights in RCW 61.24.090(1). Indeed, under the notice statute, notice of foreclosure is to be provided to a

huge universe of persons—everyone from renters (RCW 61.24.040(1)(b)(iii)) and other occupants (RCW 61.24.040(1)(b)(vi)) to any person who has merely requested notice (RCW 61.24.040(1)(d)).

The Legislature spoke wisely in setting out, in RCW 61.24.090(1), the five categories of persons entitled to cure. No rule of statutory interpretation gives the Court a path to erase RCW 61.24.090(1)'s clear language. No rule of statutory interpretation gives the Court a path to rewrite RCW 61.24.040 to transform it from a ***notice*** provision into a grant of the right to cure.

The Court of Appeals' decision clearly and compellingly articulates the applicable law. Centrum's Petition for discretionary review should be denied because its argument lacks merit ***and*** because the sole basis for its petition is a new argument never presented to the trial court or the Court of Appeals.[1]

Nowhere in RCW 61.24.040—or anywhere else in the DTA—does the Legislature state that the receipt of notice—required for a renter, the holder of a conveyance, or anyone who requests it—provides the right to

[1] This case is singularly inappropriate for Supreme Court review for the additional reason that the sole "cure" that would have been available, even for persons entitled under RCW 61.24.090(1), was complete payoff of the entire loan amount, because Centrum's acquisition of the real estate from Union Bank's borrower indisputably triggered the due-on-sale clause. Pet. App'x A at 3, 7; Respondent's Appendix at 2, 14.

reinstate or cure a defaulted loan. In short, the Legislature appropriately extended the right to notice to a very broad group of potentially interested people, while limiting the right to cure to the five categories of person enumerated in RCW 61.24.090(1). There is simply no inconsistency between RCW 61.24.090(1) and RCW 61.24.040(1). The core premise for Centrum's Petition is thus incorrect, and its Petition should be denied.

B. Restatement of the Relevant Material Undisputed Facts

As confirmed by the Court of Appeals in its December 18, 2017 decision (the "Decision") and by Centrum in its Petition, the material facts are not in dispute. The Petition's Statement of Facts, however, omits a number of key material facts cited in the Decision, including: (1) by January 10, 2011, Prium Development Company LLC ("Prium"), the borrower and grantor of the first-position deed of trust held by Union Bank, was in default under its promissory note with Union Bank because it had not been current on its loan payments since December 2009 and its real property taxes for 2009, 2010, 2011; (2) Centrum—which is a former junior lienholder that foreclosed on its deed of trust and took title to the property by Trustee's Deed on January 21, 2011—was never a party to the defaulted promissory note between Prium and Union Bank and assumed no liability under it; (3) Union Bank's first-position deed of trust contained a "Due On Sale" provision that states that if the property is sold

without Union Bank's written consent, then Union Bank has the right to "declare immediately due and payable all sums secured by this Deed of Trust"; (4) Prium did not provide notice to Union Bank of Centrum's non-judicial foreclosure on the property and did not seek Union Bank's written consent when Centrum foreclosed on its second-position deed of trust and took title to the property; (5) Union Bank had the right to demand payment for the full amount due on the promissory note; and (6) after Centrum acquired title to the property, it collected $600,000 in rent derived from the property that belonged to Union Bank, but refused to turn the rent over to Union Bank unless it agreed to let Centrum reinstate and assume Prium's defaulted loan. These are but a few of the key material facts missing in the Petition's Statement of Facts. But rather than repeat all of the material undisputed facts here, Union Bank adopts the factual recitation provided by the Court of Appeals in its Decision at pages 2 through 9.

C. Relevant Procedural History

On January 24, 2014, Union Bank filed a Motion for Partial Summary Judgment asking the Superior Court to reject, as a matter of law, Centrum's claim that it has the right to cure and reinstate Union Bank's defaulted first-position loan. CP 289–300. The only argument Centrum raised in response at that time was that it should be considered a "grantor"

under RCW 61.24.090 because it was supposedly a "successor" to Prium (the grantor) since Centrum took title to the property from Prium when it foreclosed on its second-position lien. On February 21, 2014, the Superior Court granted Union Bank's motion, holding that Centrum did not have the right to cure and reinstate the defaulted loan under RCW 61.24.090. CP 71–75.

Centrum appealed this order. In its briefing to the Court of Appeals, Centrum reasserted its original argument that it should be considered a "grantor" under RCW 61.24.090 because it is supposedly a "successor" to Prium and therefore fits within the five specific categories of individuals or entities that may cure and reinstate a defaulted loan. Centrum's briefing to the Court of Appeals also raised three new arguments that it had not raised with the Superior Court: (1) that Centrum had an "encumbrance of record" because it held title to the property; (2) that Centrum held an alleged equitable subordinate lien; and (3) that RCW 61.24.090's list of individuals and entities should be augmented to include those who have "public policy" reasons to cure a defaulted loan.

In its Decision, the Court of Appeals correctly affirmed the Superior Court's order. In doing so, the Court of Appeals confirmed that "[u]nder the plain and unambiguous language of RCW 61.24.090(1), only the borrower, grantor, guarantor, any beneficiary under a subordinate deed

of trust, or any person having a subordinate lien or encumbrance has the right to cure a default under a deed of trust, discontinue a nonjudicial foreclosure sale, and reinstate the deed of trust and the obligation." Pet. App'x A at 12.

The Court of Appeals then determined that Centrum did not fall within the definition of any party entitled to cure a default on Union Bank's promissory note with Prium. Because Centrum was not a party to that note, it was not a borrower or guarantor. *Id*. at 12. Centrum conceded before the Court of Appeals that after foreclosing on its junior lien, it was not a beneficiary under a subordinate deed of trust. *Id*. Centrum waived the right to argue it had an encumbrance of record or an equitable lien by raising these arguments for the first time on appeal. *Id*. at 12 n.6.[2] Similarly, Centrum waived its argument about use of the term "successor" in a lease with the State, which it raised for the first time on reply. *Id*. (citing *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).[3]

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[2] In its Response to Appellant's Opening Brief, Union Bank nonetheless explained why these waived arguments are meritless. Resp. App'x at 18–22.

[3] Union Bank's counsel also addressed this waived argument during oral argument, explaining that the use of the term "successor" as a landlord in a lease is irrelevant to the issue Centrum raised on appeal, which is whether

The Court of Appeals next rejected Centrum's core argument that it was a successor to the Union Bank deed of trust's "grantor" under RCW 61.25.005(7), because Centrum did not assume Prium's obligations under the note. *Id*. at 13. Centrum was not obligated to pay Prium's debts under the promissory note, did not execute a deed of trust to secure that loan, and did not assume any liability for Prium's obligations to Union Bank. *Id*. at 14. Thus, it was not a successor to the grantor of the first-position deed of trust held by Union Bank. *Id*.

Finally, the Court of Appeals declined Centrum's invitation to rewrite the DTA by allowing, on public policy grounds, a person with a financial interest in real property the right to cure a default and discontinue a foreclosure sale because "[p]ublic policy arguments are best left to the legislature, not the courts." *Id.* at 14–15 (citing *Doe v. Wash. State Patrol*, 185 Wn.2d 363, 384, 374 P.3d 63 (2016)).

III. ARGUMENT

The Court of Appeals correctly held that RCW 61.24.090(1) does not allow Centrum to cure the default in Prium's deed of trust because Centrum was not a "borrower, grantor, any guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien

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it was a "successor" to Prium under Union Bank's promissory note and deed of trust. Centrum was never a party to the defaulted promissory note and deed of trust and assumed no liability under either document.

or encumbrance of record on the trust property or any part thereof." The Legislature did not include Centrum within the list of parties entitled to cure a default under RCW 61.24.090(1). Centrum no longer challenges this reality; instead, it now argues, for the first time in its Petition, that because it is entitled to receive notice of a trustee's sale under RCW 61.24.040(1)(b)(iii) as the holder of a conveyance recorded subsequent to Union Bank's deed of trust, the form of notice in RCW 61.24.040 allegedly states that it has the right to cure and reinstate a defaulted loan and that this form of notice should be "harmonized" with the cure provisions in RCW 61.24.090. The problem for Centrum's new argument, however, is that the Court of Appeals' decision is consistent with RCW 61.24.040 and RCW 61.24.090, which both exclude Centrum from the list of parties entitled to cure a default. There is nothing inconsistent to "harmonize" between the two provisions or the Decision below. Pet. at 6.

A. Centrum Abandons All of the Arguments It Raised Earlier Before the Superior Court and Court of Appeals.

As an initial matter, Centrum's Petition does not assert—and therefore abandons—all of the arguments it raised before the Superior Court and the Court of Appeals. This includes Centrum's original argument that it is a "grantor" within the scope of RCW 61.24.090(1), because it is allegedly Prium's "successor" under the deed of trust. *See*

Pet. App'x B at 13–17. Likewise, Centrum's Petition abandons its arguments that it has an encumbrance of record or equitable lien—arguments which the Court of Appeals deemed waived because Centrum only raised them for the first time on appeal. *Id*. at 18–20. The same holds true for Centrum's previous public policy argument that would have written a sixth category into the list set forth in RCW 61.24.090—a public policy argument that the Court of Appeals rightly rejected because RCW 61.24.090's language is plain and unambiguous and it is not the province of the courts to rewrite what the Legislature has enacted. Pet. App'x A at 14–15.

Because Centrum's Petition does not raise any of these arguments, they have been waived. *See Garth Parberry Equip. Repairs, Inc. v. James*, 101 Wn.2d 220, 225 n.2, 676 P.2d 470 (1984) (failing to raise issues in a petition for review results in waiver); *see also Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd*., 177 Wn.2d 136, 145, 298 P.3d 704 (2013) ("[A]n appellant is deemed to have waived any issues that are not raised as assignments of error and argued by brief.") (citing *State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011)). Even were this not the case, such waived argument should nonetheless be rejected for the reasons set forth in the Decision and Union Bank's Response to Appellant's Opening Brief. Resp. App'x at 11–22.

B. Centrum's New Argument About Notice Requirements Misreads RCW 61.24.040(1)(f).

In lieu of the arguments it previously raised, and has now abandoned, Centrum in its Petition argues, ***for the first time***, that the Court of Appeals' interpretation of RCW 61.24.090 conflicts with the notice requirements of RCW 61.24.040(1)(f), and that the two provisions must be "harmonize[d]" to "give effect to the legislature's intent." Pet. at 6. Specifically, Centrum contends that "notice requirements to be sent in accordance with RCW 61.24.040(1)(f) specifically include a section advising ***the recipients*** that they have a right to reinstate. Centrum Financial is one such required recipient." *Id*. (emphasis added). Centrum blatantly misstates the plain language of RCW 61.24.040(1)(f), which does ***not*** provide the long list of notice "recipients" with the right to cure the defaulted loan. In fact, RCW 61.24.040(1)(f) requires the foreclosing lienholder (in the relevant instance, Union Bank) to serve interested parties with a notice of trustee's sale stating that only "the ***Borrower, Grantor, any Guarantor, or the holder of any recorded junior lien or encumbrance***" has the right to cure a default. *Id.* The list of parties in this provision is entirely consistent with that set forth in in RCW

61.24.090(1).[4] The list of parties entitled to receive notice is far broader, including not only holders of a conveyance recorded after the deed of trust (like Centrum), but also the property's renters, other occupants, plaintiffs in foreclosure proceedings, and absolutely "***any person who has recorded a request for notice***." RCW 61.24.040(1)(b–e) (emphasis added).

Centrum's Petition misquotes the DTA, which does not provide this long list of notified parties with the right to reinstate a default. Pet. at 6. To the contrary, "the holder of any conveyance" is entitled only to notice of an impending sale—not the right to cure. *Compare* Pet. at 7, *with* RCW 61.24.040(1)(b)(iii). If Centrum's argument were correct, then anyone in the world could obtain the right to cure simply by recording a request for notice. RCW 61.24.040(1)(d). The plain language of RCW 61.24.040(1)(f) confirms that ***only*** the parties listed in RCW 61.24.090(1) have the right to reinstate a delinquent loan. The Court of Appeals' decision is entirely consistent with these provisions, so there is no need for this Court to "harmonize" the Court's interpretation of the DTA. "If the statute is unambiguous after a review of the plain meaning, the court's

[4] As the Court of Appeals correctly determined, Centrum was not the holder of a recorded lien after foreclosing on Prium's junior lien. Pet. App'x at 12. Likewise, Centrum was not the borrower, grantor, or guarantor of Union Bank's senior deed of trust. *Id*.

inquiry is at an end." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

Even if Centrum had not misinterpreted these provisions, the Court should also reject the Petition because Centrum did not raise this argument below. Pet. App'x at B–C. Centrum may not raise new issues for the first time in this appeal. RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); *UNIFUND, CCR, LLC v. Elyse*, 195 Wn. App. 110, 118, 382 P.3d 1090 (2016) ("Although RAP 2.5(a) and RALJ 2.2(d) are phrased permissively that the court 'may refuse to review,' it is the rare exception when an appellate court will entertain a new legal theory that the opposing party and the trial court did not have an opportunity to fully explore."); *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 719, 375 P.3d 596 (2016) (recognizing the "general rule that appellate courts will not consider issues raised for the first time on appeal.").

C. Centrum's Policy Argument Is Unpersuasive and Reserved for the Legislature.

The Court should reject the new policy argument Centrum raises for the first time in Petition, just as the Court of Appeals rejected the now-abandoned policy argument Centrum raised below. Pet. App'x A at 8. There is no support for Centrum's hyperbolic and unsupported argument

that the decision below would have a "chilling effect" on the market for junior liens. As recognized by the Supreme Court of North Carolina, even when a junior lender is left unsecured, "the subordinate lienholder is not left without recourse, because it has an adequate means to compensate for this risk by charging a higher interest rate on the debt." *In re Vogler Realty, Inc.*, 365 N.C. 389, 398, 722 S.E.2d 459 (2012) ("[I]t is incumbent upon a subordinate lienholder to contemplate the risk associated with subordinating its right to payment to that of a higher priority lienholder."). The Court should also reject Centrum's ironic claim that it is pursuing the best interest of "every consumer in the state of Washington." Pet. at 9. As a hard-money lender whose loans "typically have been for six months of less," Centrum already charges interest rates far higher than other commercial lenders. Pet. App'x A at 5.

The Court of Appeals correctly rejected Centrum's attempt to benefit from Prium's rights as a borrower under the DTA, while simultaneously attempting to avoid the responsibilities and liabilities of a borrower under Prium's deed of trust. As explained by the Court of Appeals, Union Bank's senior deed of trust provided it the bargained-for right to demand immediate repayment in full upon any nonconsensual sale of the property. Pet. App'x A at 8; *see also* Resp. App'x at 4 (citing Sub. 153 at ¶¶ 8–9). Granting the Petition would allow junior lenders to escape

the "certainty and security" acquired by a senior lender, a result entirely inconsistent with Centrum's public policy arguments. Pet. at 8. Rather than provide stability to "lenders and consumers," Pet. at 8, granting the Petition would actually provide borrowers a roadmap for avoiding their obligations under a deed of trust. Borrowers like Prium could grant junior liens to affiliated entities, foreclose on the junior liens, and then avoid all contractual obligations under senior deeds of trust. Lenders relying on the certainty and predictability of their senior positions would lose every benefit to their bargain.

Finally, there is nothing in the Decision that encourages "lender misconduct and allows inflated interest and penalty charge calculations." Pet. at 5. The Court of Appeals recognized the plain, unambiguous, and reasonable interpretation of RCW 61.24.090(1), which applies consistently to all lienholders who foreclose on a lien, regardless of interest or penalty charges. The statute already provides ample insurance against Centrum's fears, because it awards only a "***reasonable*** trustee's fee, together with the trustee's ***reasonable*** attorney's fees." RCW 61.24.090 (emphasis added). Moreover, as Union Bank explained in its brief to the Court of Appeals, the record confirms that Centrum's years of interference with Union Bank's right of foreclosure was a direct cause of the expenses in this case—expenses that Union Bank cannot recoup against Centrum because

Centrum is not a party to Union Bank's deed of trust or promissory note. In addition, as Union Bank noted in its briefing to the Court of Appeals, Centrum illegally enriched itself at Union Bank's expense by collecting and keeping $600,000 in rent from the property that belonged to Union Bank. *See* Pet. App'x A at 6; Resp. App'x at 20. Centrum, not Union Bank, is the wrongdoer in this case, and public policy does not favor this Court rewriting the DTA to create a new exception that would benefit Centrum.

IV. CONCLUSION

For these reasons set forth herein, Union Bank respectfully requests that the Court deny Centrum's Petition to review the Court of Appeals' Decision.

Respectfully submitted this 16th day of February, 2018.

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CERTIFICATE OF SERVICE

I declare that on February 16, 2018, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated:

Rick J. Wathen, WSBA No. 25539 Cole | Wathen | Leid | Hall, P.C. 303 Battery Street Seattle, WA 98121 Tel: 206.622.0494 Fax: 206.587.2476 Email: rwathen@cwlhlaw.com Attorney for Appellant	☐ Via Hand Delivery ☐ Via U.S. Mail ☐ Via Facsimile ☑ Via Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of February, 2018 at Seattle, Washington.

s/ Stellman Keehnel
Stellman Keehnel, WSBA No. 9309

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APPENDIX

No. 75676-1-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CENTRUM FINANCIAL SERVICES, INC.,

Appellant,

vs.

UNION BANK, N.A.,

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RESPONDENT'S RESPONSE TO APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

M.U.F.G. Union Bank, N.A.'s ("Union Bank")[1] predecessor-in-interest Frontier Bank and Centrum Financial Services, Inc. ("Centrum") both separately loaned money to Prium Development Company, LLC ("Prium"). Both loans were secured by the same real property ("Property"). Union Bank's loan was secured by a first-position deed of trust on the Property. Centrum's loan was secured by a second-position deed of trust on the Property. Prium defaulted on Centrum's loan first. Centrum responded by foreclosing on the Property securing both loans. When Centrum took title to the Property following foreclosure, it triggered Union Bank's contractual right to immediately receive repayment of the full amount of its loan. Centrum refused to pay the full amount of Union Bank's loan and made every effort to prevent Union Bank from recovering what it was owed from the Property, despite the fact that Union Bank had the first-position deed of trust and despite the fact that the change of title owner indisputably caused Union Bank's loan to be immediately due in full.

When Union Bank began to foreclose on the Property to recover what it was owed, Centrum filed the instant lawsuit. Centrum's lawsuit is based on Centrum's erroneous contention that it had the right to reinstate

[1] Defendant M.U.F.G. Union Bank, N.A. was formerly known as Union Bank, N.A.

and assume Prium's loan from Union Bank under RCW 61.24.090. Centrum is wrong. RCW 61.24.090 enumerates the categories of people/entitles that have the right to reinstate a loan. Centrum does not fit into any of these categories. Centrum's creative arguments for why it fits into one of the categories are contradicted by clear authority.

Equally important is the practical consideration that Centrum ignores: Even if Centrum had possessed the legal right to cure Prium's default in not making timely periodic payments on Union Bank's loan, the sole mode of curing the overarching default on not paying the loan in full upon transfer of title would be to pay the loan in full! Thus, ultimately, even if Centrum had the right to cure, the cure would necessarily have been full payment of the total loan amount–resulting in no loan remaining from Union Bank.

Centrum also criticizes Union Bank because the attorneys' fees Union Bank incurred defending itself in this litigation increased the total amount owed to Union Bank under the note securing Prium's loan, so that when Union Bank was finally able to foreclose on the Property to collect what it was owed, there was a deficiency and Centrum received no proceeds from the sale of the Property. Centrum could have avoided this additional cost by allowing Union Bank to foreclose on the Property or by

paying Union Bank what it was owed, instead of dragging Union Bank through years of litigation.

The trial court properly held that Centrum was not entitled to reinstate the Prium loan and properly granted summary judgment in Union Bank's favor. That ruling should be affirmed.

II. STATEMENT OF THE CASE

A. Union Bank's First–Position Deed of Trust

On October 6, 2004, Prium signed a promissory note made payable to Frontier Bank in the original principal amount of $1,875,000.00 (the "Note"). CP 302 at ¶ 2, CP 305. The Note is secured by a first-position deed of trust ("Deed of Trust") and an assignment of rents ("Assignment of Rents"), both against the Property. CP 302 at ¶¶ 3, 4, and CP 309–19. Union Bank is the successor-in-interest to the FDIC as receiver of Frontier Bank. CP 302 at ¶ 5. As such, Union Bank was assigned the Note and Assignment of Rents and was the beneficiary under the Deed of Trust. *Id*.

B. Centrum Obtained a Second Lien Deed of Trust, then Foreclosed on the Property

Centrum made a loan to Prium secured by a second lien deed of trust (the "Centrum Deed of Trust"), which was recorded on December 8, 2006. CP 923 at ¶ 4.4. As is the case whenever a lender agrees to have its loan secured by a second lien deed of trust, Centrum was aware that upon

default, Union Bank's loan would be paid first, and Centrum would receive only whatever equity remained in the Property.

After Prium defaulted on its loan with Centrum, Centrum foreclosed on the Property. CP 923 at ¶ 4.5. Because the Centrum Deed of Trust was subordinate to Union Bank's, Centrum took title to the Property ***subject to*** Union Bank's Deed of Trust and Assignment of Rents. *Id*.

C. Centrum Refused to Pay the Amount Due on the Note, then Filed This Lawsuit to Stop Union Bank's Foreclosure

Prium subsequently failed to make payments on Union Bank's loan. Prium defaulted on its monthly payment to Union Bank on January 10, 2011. Sub. 153 at ¶ 8.[2] And Prium also failed to pay the Note in full when the Property was transferred without the prior written consent of the beneficiary under the Deed of Trust. Sub. 153 at ¶ 8. After Centrum took title to the Property, it refused to pay the Note in full. Sub. 153 at ¶ 9.

Union Bank asked Centrum to pay the amount owed to it under the Note (i.e., the full remaining loan balance), and provided a calculation of interest charges, but Centrum steadfastly refused to pay. CP 302–03 at ¶ 8. Accordingly, Union Bank, which had a first-position lien on the

[2] Union Bank has designated additional documents to be added to the clerk's papers but has not yet received CP numbers for those documents. These documents are referred to by Sub number.

Property, exercised its right to have the Property sold to satisfy the debt owed. On August 14, 2012, Hacker & Willig—the Property's trustee appointed by Union Bank—issued a notice of foreclosure and a notice of trustee's sale, setting the date of the trustee's sale for November 16, 2012. CP 1115 at ¶ 24. On November 2, 2012, two weeks before the sale was to occur, Centrum filed this lawsuit seeking to enjoin the trustee's sale and seeking an order to force Union Bank to allow Centrum to reinstate Prium's loan. CP 1106–20. Union Bank voluntarily discontinued the trustee's sale so that the issues presented by this litigation did not have to be litigated on the condensed schedule associated with a preliminary injunction motion.

D. Centrum Aggressively Litigated Its Claims, Refusing to Allow Union Bank to Collect What It Was Owed Until Union Bank Obtained a Court Order Authorizing It to Foreclose Without Centrum's Interference

When Centrum acquired title to the Property, it began collecting rents derived from the Property. CP 302 at ¶ 7. Although Centrum acknowledged that this rent belonged to Union Bank under the Assignment of Rents, Centrum refused to turn the rents over to Union Bank unless Union Bank would agree to allow Centrum to assume the loan. *Id.* Union Bank did not want a lending relationship with Centrum, so it declined Centrum's requests to reinstate. *Id.*

When it became clear that Centrum was not willing to be reasonable, Union Bank filed a Motion to Appoint Custodial Receiver. CP 874–82. The Superior Court granted Union Bank's motion on June 27, 2013, appointing a custodial receiver for the Property to collect rent and turn it over to Union Bank. CP 809–24. The receiver found that Centrum had allowed the Property to fall into disrepair and the Property's sole tenant—the Washington Department of Social and Health Services ("DSHS")—was unwilling to renew its lease unless certain improvements to the Property were made. CP 679–80 at ¶ 6. The receiver successfully negotiated a new lease with DSHS and made the necessary improvements to the Property. CP 679–80 at ¶¶ 5–6. The Superior Court approved this lease, over Centrum's objections, on October 18, 2013. CP 626–71.

When the custodial receiver demanded Centrum turn over the rent it had been improperly collecting for almost a year and a half, Centrum refused. Centrum confessed that it had deposited the rent into its general account and spent all of it on Centrum's general operations. Sub. 115 at Ex. D at 20:17–23:7. To date, Centrum has refused to turn over the almost $600,000 in rent that it wrongfully collected from the Property.

With the receiver properly managing and maintaining the Property, and with the DSHS lease secured, the Property was finally in a position to be sold. Union Bank asked the Superior Court to authorize the receiver to

sell the Property, which would have ensured that the Property was sold for the maximum price possible. CP 427–36. But Centrum, again the obstructionist, steadfastly refused to allow the receiver to be given this power and demanded that its claim of reinstatement be adjudicated first. CP 339–47.

Accordingly, Union Bank filed a Motion for Partial Summary Judgment, asking the Superior Court to reject, as a matter of law, Centrum's claim that it has the right to reinstate Union Bank's loan to Prium. CP 289–300. On February 21, 2014, the Superior Court agreed with Union Bank that Centrum does not have the right to reinstate the Prium loan and dismissed Centrum's fifth cause of action—"Determination of Reasonable and Necessary Expenses to Reinstate the Loan, Pursuant to RCW 61.24.090(2)"—which was premised on Centrum's incorrect assertion that it was entitled to reinstate the Prium loan. CP 71–75. The Superior Court also dismissed Centrum's first two causes of action (to enjoin trustee's sale and for declaration that nonjudicial foreclosure is invalid). *Id*. That is the order Centrum challenges in this appeal.

Centrum's other two causes of action (for negligent misrepresentation and violation of the Consumer Protection Act) were neither discussed in the motion nor adjudicated by the Superior Court.

Finally, the Motion for Partial Summary Judgment asked that if the Court found that Centrum did not have the right to reinstate the loan, the Court give the receiver the authority to sell the Property. CP 289. Ever the obstructionist, Centrum opposed this request, this time insisting that there was not good cause to authorize the receiver to sell the Property because Union Bank could collect what it was owed through foreclosure. The Superior Court sternly warned Centrum that because Centrum did not have the right to reinstate the Prium loan, it should not interfere with the foreclosure, but the Superior Court felt compelled to deny Union Bank's request to authorize the receiver to sell the Property.[3]

E. Union Bank Foreclosed, with the Court's Express Authorization, but Centrum Continued Obstructing Union Bank's Ability to Collect What It Was Owed by Filing a Lis Pendens

Because Centrum had blocked the more efficient route of a sale by the receiver, Union Bank moved forward with nonjudicial foreclosure, holding a trustee's sale on August 22, 2014. No bidder was willing to bid

[3] Centrum filed a notice of appeal from the partial summary judgment order, despite the fact that the order is plainly interlocutory because two claims remained unadjudicated. This Court recognized that the partial summary judgment order is interlocutory and, on April 2, 2014, sent a letter to the parties setting a motion to determine appealability, asking the parties to be prepared to argue both finality and whether discretionary review should be accepted, stating: "[I]t does not appear the order is appealable as a matter of right." Sub. 121 at Ex C. At the hearing, Centrum, argued that the partial summary judgment order should be considered a final order because Centrum no longer intended to pursue its two remaining claims. Sub. 121 at ¶ 4. This Court did not find Centrum's assurances to be sufficient and advised Centrum that the two remaining causes of action precluded finality and appealability. *Id*. The Court continued the hearing to allow Centrum to dismiss its remaining claims and obtain a final judgment. Sub. 121 at Ex. D. Centrum opted not to dismiss its remaining claims.

the full amount due to Union Bank. Thus, Union Bank, the highest bidder, bidding fair market value, took title to the Property, leaving a deficiency of approximately $140,000.00.

On November 24, 2014, Centrum, ever the obstructionist, filed a Notice of Lis Pendens to block Union Bank from selling the Property. CP 31–35.

On May 4, 2016, Union Bank filed a Motion for Summary Judgment on Plaintiff's Remaining Claims and to Cancel Notice of Lis Pendens. Sub. 152. Centrum agreed that its remaining claims should be dismissed but vigorously fought for the lis pendens to remain. Sub. 158. The Superior Court determined that because it had already found that Centrum did not have the right to reinstate the Prium loan, and because Centrum had no other argument for why title should be clouded, if Centrum wanted the lis pendens to remain, it would have to post a bond. Centrum elected not to post a bond, and on June 6, 2016, the Superior Court entered an order dismissing Centrum's remaining claims and cancelling the lis pendens. Sub. 160.

F. Union Bank Voluntarily Dismissed Its Counterclaims After Learning Centrum Likely Would Not Have the Funds to Pay

Union Bank had expected that once the Superior Court determined Centrum had no right to reinstate the Prium loan, Centrum would turn

over the almost $600,000 in rent that it improperly collected from the Property. Centrum did not. Thus, on May 13, 2014, Union Bank filed a Motion to Amend Counterclaims, seeking to add counterclaims for conversion and injunctive relief in order to recover the rent Centrum had improperly taken. Sub. 114. The Superior Court granted that motion on May 27, 2014. Sub. 132.

After investigating Centrum's financial position, Union Bank determined that it did not make economic sense to spend attorneys' fees to litigate its counterclaims, because it would likely be unable to collect from Centrum the $600,000 of rent that it had misappropriated and spent. Union Bank waited for more than a year after adding its counterclaims, hoping Centrum's financial situation would improve as the economy improved. After the lis pendens was cancelled and Centrum's claims had all been dismissed, on July 25, 2016, Union Bank voluntarily dismissed its counterclaims. CP 1–3.

After all claims had been dismissed, Centrum filed its notice of appeal, challenging only the February 21, 2014 order holding that Centrum did not have the right to reinstate Union Bank's loan to Prium. That order should be affirmed.

III. ARGUMENT

When the Legislature enacted RCW 61.24.090, it granted the right to reinstate a loan to five categories of individuals or entities: "the borrower, grantor, any guarantor, any beneficiary under a subordinate deed of trust, or any person having a subordinate lien or encumbrance of record on the trust property or any part thereof." Centrum does not fit into any of these categories. No other statute, contract, or common law principle gave Centrum the right to reinstate Prium's loan.

Centrum's appeal is rooted in its contention that as the owner of the property securing Union Bank's loan to Prium, Centrum should have the right to reinstate that loan. But the Legislature chose not to include the owner of the property securing the loan among the categories of individuals and entities that have the right to reinstate a loan. Centrum therefore tries to characterize itself as the grantor's successor, because a grantor's successor has the right to reinstate under the RCW 61.24.090 categories. As the Superior Court correctly held, Centrum is not the grantor's successor. Centrum's additional arguments on appeal were not raised in the Superior Court and thus should not be considered. But even if this Court chooses to consider them, it will find that each of Centrum's new arguments lacks merit. Centrum simply did not have the right to reinstate Union Bank's loan to Prium.

A. Centrum Is Not the Grantor's Successor

In an attempt to shoehorn itself into one of the five RCW 61.24.090 categories, Centrum argues that it should be considered a "grantor" because the statutory definition of "grantor" includes the grantor's successor. RCW 61.24.005(7). Centrum is simply not the grantor's successor. The Deed of Trust defines the "Grantor" as Prium. CP 310. Centrum argues that it is Prium's successor because it later took title to the property securing Union Bank's loan to Prium. But merely being the owner of property that was once owned by Prium does not make Centrum Prium's legal successor. If it did, then every subsequent purchaser of a property would be considered a legal successor of the grantor, ***encumbering each subsequent purchaser with the legal obligations of the grantor***, which is the legal burden of a successor.

A "subsequent owner" is simply not the same as a "successor." The few on-point precedents cogently identify the differences. A legal successor must be personally liable for the grantor's obligations in order to be entitled to the benefits of being a grantor, such as having the ability to reinstate a loan. *See Barnhart v. Fidelity Nat. Title Ins. Co.*, No. 13-CV-0090-TOR, 2013 WL 5739023, *2 (E.D. Wash. Oct. 22, 2013) ("only a successor in *liability* can qualify as a 'grantor' under the DTA [Washington's Deed of Trust Act]") (emphasis in original); *Ramirez-*

Melgoza v. Countrywide Home Loan Servicing LP, No. CV-10-0049-LRS, 2010 WL 4641948, *6 (E.D. Wash. Nov. 8, 2010).

In *Ramirez-Melgoza*, the District Court squarely rejected Centrum's argument that being a subsequent property owner is sufficient to qualify as the legal successor of the grantor. In *Ramirez-Melgoza*, a lender foreclosed on property securing a deed of trust after the buyer defaulted. 2010 WL 4641948 at *1. The family that purchased the property after it had been granted as a security to the lender, but before the foreclosure, argued that they had the right to reinstate the loan under the Deed of Trust Act because they were purported "successors" to the borrowers/grantor. *Id*. at *3. The District Court disagreed, holding that "the definition of 'successor' under RCW 61.24.005(6)[4] is limited to the successor in liability on the loan because a deed of trust is executed to serve as security for the performance of the borrower's obligations under the loan." *Id*. at *6. The court properly reasoned that "[i]t would be illogical to extend the definition of 'successor' to a party which had no liability on the underlying obligation." *Id*.

A party that merely purchases property securing a loan is not a successor to the grantor. While the fact of the property being security for

[4] The definitions in RCW 61.24.005 were amended after *Ramirez-Melgoze* was decided. The definition of "grantor" has not changed, but it now appears at subsection (7), whereas it was at subsection (6) when *Ramirez-Melgoze* was decided.

a loan does not get erased through a sale, a buyer does not assume all the terms of a loan secured by the property unless both the buyer and the lender agree to assumption of the loan by the buyer. For example, very often a loan includes personal liability for the obligation (as opposed to a non-recourse loan). Buying a property does not automatically subject the buyer to such loan terms. Similarly, sale of a property does not require a lender to extend the same loan terms to a new buyer, regardless of whether the property is security for the loan.

Here, for its own business reasons, the lender (Union Bank) refused to enter into a lending relationship with Centrum. And the buyer (Centrum) did not undertake the defaulted loan's obligations, which included immediate payment of the full loan balance that was in excess of $2,000,000.00. Centrum is not the successor to the grantor.

The authority Centrum relies upon does not support its contention that it should be considered the grantor. Centrum relies primarily on *Homeowners' Ass'n v. Hal Real Estate Invs*., 108 Wn. App. 330, 30 P.3d 504 (2001), which is inapposite because it analyzes what the phrase "succeeds to" means under the Washington Condominium Act, RCW 64.34.900—an entirely different statute from the Deed of Trust Act at issue in this litigation. The issue in *Homeowners' Ass'n* was whether defendants could be considered "declarants," and thus required to provide

purchasers with a public offering statement. The Condominium Act has the peculiarity of a prescribed mode for "transfer" of a special declarant right (108 Wn. App. at 343), involving recording, while also imposing legal duties on any person who "succeeds to any special declarant right under the declaration." *Id*. at 339. The Court was called upon to grapple with whether "one who '*succeeds to*' special declarant rights may do so only by a *transfer* evidenced by a duly executed and recorded instrument." *Id*. at 343. There, the "successor" question was quite easy, given that the two parties executed a formal agreement by which "substantially all of the beneficial interests of the special declarant rights passed to the [defendant] entities…." *Id*. at 342.

The analysis of "succeeds to" in *Homeowners' Ass'n* has no bearing on who is a grantor's successor under the Deed of Trust Act. Certainly, nothing in *Homeowners' Ass'n* supports Centrum's hope that merely being the subsequent property owner qualifies Centrum as the grantor's successor. The context of use of a word obviously matters, and it makes no sense for the "successor" of a grantor of a deed of trust to mean less than one who succeeds to the legal duties of the grantor—as opposed to merely being a later owner of the property.

The Court of Appeals, invoking Black's Law Dictionary in *Homeowners' Ass'n* strongly supports not divorcing obligations from

benefits in ascertaining who qualifies as a successor. The Black's definition of successor in the corporate context is explicit: "vested with the rights and duties of an earlier corporation." Similarly for individuals: "Someone who succeeds to the…rights, responsibilities…."

The additional cases Centrum relies on are similarly inapposite. None of these cases interprets the definition of "successor" under the Deed of Trust Act. Although some of these cases hold that property ownership is a requirement for being a grantor's successor, none of them holds that ownership alone is sufficient. *See Stewart v. Beghtel*, 38 Wn.2d 870, 874–75, 234 P.2d 484 (1951) (holding individual who did not have a property interest was not grantor's successor under a deed of trust conveying property with several restrictions to benefit grantor and grantor's successors); *Fidelity Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 52, 767 P.2d 1382 (1989) (holding a defendant was not a successor in interest to the judgment debtor's right of redemption because the "assignment of interest" was not recorded and thus was insufficient to convey the judgment debtor's property interest); *Messett v. Cowell*, 194 Wash. 646, 649, 79 P.2d 337 (1938) (holding that property restrictions are binding on subsequent owners of the property); *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 224, 232 P.3d 1147 (2010) (holding that a coventee's heirs cannot enforce a restrictive covenant because the heirs no

longer have an ownership interest in the benefitted property and therefore have no justiciable interest in enforcing the covenants).

Centrum is not the grantor's successor for purposes of RCW 61.24.090(1) and .005(7); it has not assumed the grantor's liabilities and thus does not have the grantor's right to reinstate a defaulted loan. Had the Legislature intended to give the right to reinstate a loan to any owner of the property securing the loan, it would have done so expressly. It did not. Centrum's argument that it should have had the right as grantor to reinstate the Prium loan must be rejected.

B. Centrum's Additional Arguments Were Not Raised Below and Thus Should Not Be Considered

The only argument Centrum raised in the Superior Court to support its claim that it had the right to reinstate Prium's loan was its argument that it should be considered the grantor's successor because it became a later owner of the property securing Prium's loan. As is evident from Centrum's Response in Opposition to Union Bank's Partial Summary Judgment Motion to Authorize the Receiver to Sell Centrum's Property, CP 135–49, Centrum did not argue that it had an encumbrance of record or an equitable lien. Nor did Centrum argue that the Court should add a sixth category to RCW 61.24.090's list of individuals and entities who have the right to reinstate a loan for "public policy" reasons.

Because Centrum did not raise these arguments below, this Court should not consider them. *See* RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); *UNIFUND, CCR, LLC v. Elyse*, 195 Wn. App. 110, 118, 382 P.3d 1090 (2016) ("Although RAP 2.5(a) and RALJ 2.2(d) are phrased permissively that the court 'may refuse to review,' it is the rare exception when an appellate court will entertain a new legal theory that the opposing party and the trial court did not have an opportunity to fully explore."; declining to consider a legal theory plaintiff raised for the first time on appeal).

C. Even If the Court Considers Centrum's New Arguments, They Should Be Rejected as Meritless

1. Centrum Does Not Have an Encumbrance of Record

Centrum argues that because it took title to the Property, it had an encumbrance of record, which would entitle it to reinstate the loan. But having title to a property is not an encumbrance on that property; an encumbrance is a cloud ***on title***. *See Robinson v. Khan*, 89 Wn. App. 418, 422, 948 P.2d 1347 (1998) (noting that an encumbrance is a cloud on title). What Centrum had was title itself, not an encumbrance on that title. Encumbrances include "liens, easements, and servitudes," "outstanding mortgages, leaseholds, restrictive covenants, and existing violations of a

restrictive covenants[.]" *Ensberg v. Nelson*, 178 Wn. App. 879, 887, 320 P.3d 97 (2013) (citing 18 WASH. PRAC., REAL ESTATE § 14.3 (2d ed.)).

To support its argument, at page 18 of its brief, Centrum selectively quotes from the 1990 edition of Black's Law Dictionary. The more recent edition of Black's Law Dictionary makes it clear that having title to a property is not an encumbrance, defining encumbrance as follows: "A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; **any property right that is not an ownership interest**." ENCUMBRANCE, Black's Law Dictionary (10th ed. 2014) (emphasis added). Centrum's ownership of the property is not an encumbrance of record. Centrum's attempt to fit into this category of RCW 61.24.090 should be rejected.

2. Centrum Did Not Have an Equitable Lien

Centrum's "equitable lien" claim is difficult to decipher, perhaps due in part to the argument never having been raised below.

One of the five categories of individuals or entities authorized to reinstate a loan under RCW 61.24.090 is "any person having a subordinate lien." At one time, Centrum had a subordinate lien. But when Centrum foreclosed, it took title to the Property and extinguished its own lien. There was no longer a subordinate lien on the Property. If Centrum, through its "equitable lien" claim, is trying to fit itself into the

subordinate-lien category, the simple answer is that Centrum had already exchanged its lien for title.

If, on the other hand, Centrum is contending that it, as title holder, expected some residual amount after Union Bank foreclosed (once Union Bank knocked down the row of obstacles to orderly foreclose that Centrum alone interposed), the simple answer is that there was a $140,000.00 deficiency at the foreclosure sale.

And if Centrum is lamenting that the costs and fees ate into the net proceeds, the simple answer is that Centrum has no one but itself to blame for the protracted process that resulted from its obstructionist behavior.

In any event, the equities weigh against Centrum—which illegally grabbed $600,000.00 of rents belonging to Union Bank. Sub. 115 at Ex. D at 20:17–23:7. Bear in mind that Centrum then spent that money on unrelated matters before claiming it had no funds to repay what it had converted. *Id.*

Had Centrum wanted to keep the Property, all it had to do at the outset was pay the full amount owed to Union Bank under the Note. Had it done so, Centrum would have owned the Property free from Union Bank's first-position lien. Union Bank asked Centrum to pay that loan. Centrum steadfastly refused. Thus, Union Bank had the right to foreclose on the Property. Instead of allowing Union Bank to lawfully exercise its

remedies, Centrum filed the instant lawsuit to block the foreclosure. Centrum has dragged Union Bank through years of litigation. The attorneys' fees Union Bank incurred increased the total amount owed to it under the Note. None of this additional expense would have been necessary if Centrum had paid the amount owed to Union Bank when it took title to the Property or if Centrum had allowed Union Bank to collect what it was owed from the Property through foreclosure.

Centrum's equitable argument should be rejected.

3. Public Policy Strongly Favors Adhering to the Statute as Written

The Legislature gave the right to reinstate a loan to only five categories of individuals or entities. Centrum asks this Court to re-write RCW 61.24.090 to allow any "party with an interest in the subject property" to reinstate the loan. The Court cannot alter the statute as Centrum requests. *See Port of Grays Harbor v. Bankr. Estate of Roderick Timber*, 73 Wn. App. 334, 340, 869 P.2d 417 (1994) (holding that where the Legislature has established a specific requirement, the court cannot alter that requirement through common law).

Even if the Court could amend the statute, it should not do so. Centrum argues that RCW 61.24.090 should be amended to allow more people to reinstate a loan in order to curb "improper lending practices."

The supposedly "improper lending practices" about which Centrum complains consists of Union Bank's "delay" in foreclosing. But Union Bank ***tried*** to foreclose in November 2012. CP 1106–37. Centrum filed this lawsuit to stop that foreclosure. Centrum forced Union Bank to incur hundreds of thousands of dollars in legal fees defending itself in this litigation and finally obtaining a court order allowing it to foreclose without Centrum's interference. Centrum could have avoided all of this additional expense by either allowing Union Bank to foreclose or by paying Union Bank what it was owed under the Note. Centrum's public policy argument should be rejected.

IV. CONCLUSION

Centrum did not have the right to reinstate Union Bank's loan to Prium. Centrum does not fit into any of the categories authorized by RCW 61.24.090 to reinstate the loan. And Centrum's request to amend that statute to allow any "party with an interest in the subject property" to reinstate the loan should be rejected.

This Court should affirm the Superior Court's summary judgment ruling that Centrum did not have the right to reinstate the Prium loan.

Respectfully submitted this 22nd day of December, 2016

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CERTIFICATE OF SERVICE

I declare that on December 22, 2016, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated:

Rick J. Wathen, WSBA No. 25539 Cole | Wathen | Leid | Hall, P.C. 303 Battery Street Seattle, WA 98121 Tel: 206.622.0494 Fax: 206.587.2476 Email: rwathen@cwlhlaw.com Attorney for Appellant	☐ Via Hand Delivery ☐ Via U.S. Mail ☐ Via Facsimile ☑ Via Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of December, 2016 at Seattle, Washington.

s/ Stellman Keehnel
Stellman Keehnel, WSBA No. 9309

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