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No. ~~6593~~ 1

THE SUPREME COURT OF THE STATE OF WASHINGTON

SPARK NETWORKS, PLC

Respondent/Judgment Creditor,

v.

WILL KNEDLIK,

Judgment Debtor

and

ANNA GIOVANNINI,

Appellant/Adverse Claimant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Douglass A. North)

BRIEF OF RESPONDENT

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I. SUMMARY INTRODUCTION

Judgment Debtor Will Knedlik, a disbarred former attorney, had a \$29 million judgment entered against him by Respondent/Judgment Creditor Spark Networks, PLC (“Spark”) in California in 2002. Spark initiated this proceeding in the King County Superior Court (the “Superior Court”) to partially satisfy the judgment by executing upon Knedlik’s Washington assets, including his waterfront house in Kirkland (the “Property”). Knedlik’s mother, Appellant/Adverse Claimant Anna Giovannini, intervened in this proceeding, claiming to be the owner of the Property and, separately, to hold several liens in the Property. In 2008, the Superior Court rejected Giovannini’s claimed ownership interest (reserving consideration of her claimed liens for a later date), and Spark purchased the Property at a sheriff’s sale, which the court confirmed. These actions were all affirmed by the Court of Appeals (with review denied by this Court) in a separate appeal.

In March 2009, following the expiration of Knedlik’s one-year homestead redemption period, Spark obtained a writ of assistance and had Knedlik removed from the Property by the King County Sheriff’s Office. In April 2009, following cross-motions for summary judgment, the Superior Court deemed all of Giovannini’s purported liens in the Property invalid. This appeal—distinct from the first appeal—only properly raises

the Superior Court's decision invalidating Giovannini's claimed liens.¹ Giovannini claims to hold four notes secured by deeds of trust in the Property and one judgment lien in the Property. The Superior Court properly held that enforcement of the deeds of trust is barred by the statute of limitations, and the judgment lien is unenforceable because it is expired. Further, even if the liens were legally valid, the Superior Court properly held that the doctrines of judicial estoppel and equitable subordination would bar Giovannini from enforcing her liens against Spark, given prior inconsistent statements she made to a bankruptcy court and her long history of colluding with Knedlik to shield his assets from legitimate creditors. Finally, the Superior Court also acted within its discretion in rejecting Giovannini's attempt to make a new argument in her motion for reconsideration claiming a tax lien. This Court should affirm the Superior Court and reject all of Giovannini's claimed liens in the Property.

II. COUNTERSTATEMENT OF ISSUES

The following issues are relevant to this Court's resolution of Appellants' appeal:

¹ Appellants purport to raise several other issues in this appeal, none of which are properly before this Court. Further, since this appeal only concerns Giovannini's claimed liens, Spark does not believe Knedlik has any standing to participate in this appeal and has filed a motion to dismiss Knedlik's notice of appeal.

1. **Issues resolved in prior appeal.** Should this Court consider issues that were previously resolved by the Superior Court and affirmed on appeal?
2. **Untimely appeal of order not identified in notice of appeal.** Should this Court consider an appeal of an order issued more than 30 days before the notice of appeal, not subject to a motion for reconsideration, and not identified in the notice of appeal?
3. **Validity of writ of assistance.** Did the Superior Court err in issuing a writ of assistance to the rightful owner of a property?
4. **Expired and unenforceable liens.** Did the Superior Court properly deem invalid (a) purported deeds of trust for which the statute of limitations had run on the underlying notes and (b) a judgment that had not been properly extended after its initial 10-year term?
5. **Judicial estoppel.** Did the Superior Court abuse its discretion in judicially estopping Giovannini from claiming assets and liens she had failed to list on a bankruptcy court property schedule?
6. **Equitable subordination.** Did the Superior Court abuse its discretion by equitably subordinating Giovannini's purported liens to Spark's when Giovannini engaged in a pattern of improper acts to shield Knedlik's assets from legitimate creditors?
7. **Issue raised for first time on reconsideration.** Did the Superior Court abuse its discretion in denying reconsideration and rejecting Giovannini's purported tax lien when that argument was raised for the first time in a motion for reconsideration without justification for the untimely argument?

III. COUNTERSTATEMENT OF THE CASE

A. The underlying California judgment against Knedlik, resolution of the ownership issue, sale of the Property, and the First Appeal

A \$29 million judgment with interest running at a rate of 10 percent per year was entered in favor of Spark and against Knedlik by the

Superior Court of California for Los Angeles County on January 31, 2002. *See* Sub. Nos. 1, 3, 4.² That judgment remains valid, and Knedlik has not appealed or challenged that judgment. On March 8, 2007, Spark filed the judgment in the King County Superior Court. *See id.* On December 21, 2007, after Knedlik's personal property had been exhausted, an execution for the enforcement of the judgment was levied against Knedlik's real property, including the property located at 2025 Rose Point Lane, Kirkland, Washington, 98033 (the "Property"), which was legally titled to Knedlik and also served as his primary residence. *See* Sub. No. 63.

Giovannini, Knedlik's mother, challenged Spark's right to foreclose on and take possession of the Property on two separate—and contradictory—bases. In February 2008, Giovannini filed an affidavit in the Superior Court stating both that she owned the Property and that she had liens on the Property senior to Spark's judgment lien. *See* Sub. No. 58. Giovannini first filed a motion asking the Superior Court to set a hearing to establish the "probable validity" of her ownership claim to the Property pursuant to RCW 6.19.030(2). *See id.* On February 20, 2008, the Superior Court issued an order finding that Giovannini had "not met

² The documents in the record cited by "Sub. No." are designated in Spark's Supplemental Designation of Clerk's Papers, filed on November 30, 2009. "Sub. No." refers to the submission number of each document on the King County Superior Court's docket sheet for this matter.

the burden of proof to show that her claim of ownership in the” Property “is probably valid,” and further found that Knedlik’s alleged transfer of the Property to her was “void as a matter of law and has no legal effect whatsoever” and that “Knedlik . . . is the fee simple owner of the” Property. Sub. No. 69. The Superior Court denied reconsideration on March 6, 2008. Sub. No. 75.

On February 13, 2008, while the “probable validity” proceeding was ongoing, the Superior Court issued an order directing the Sheriff’s Sale of the Property to take place on February 15, 2008, pursuant to the writ. Sub. No. 63. On February 15, the Property was sold to Spark for \$4 million, deducted from the amount of Spark’s judgment against Knedlik. Sub. No. 71. The Superior Court confirmed the sale on April 8, 2008, *see* Sub. No. 85, and denied reconsideration of that order on May 2, 2008, *see* Sub. No. 90.

On June 2, 2008, Giovannini and Knedlik appealed the Superior Court’s orders deeming Knedlik (and not Giovannini) the owner of the Property and allowing the Property to be sold (the “First Appeal”). Giovannini and Knedlik sought direct review by this Court (Cause No. 81686-7). On November 5, 2008, this Court denied direct review and transferred the first appeal to Division I of the Court of Appeals (62555-1-I). The Court of Appeals affirmed the Superior Court’s orders on March

16, 2009 and denied reconsideration on April 28, 2009. May 27, 2009, Giovannini and Knedlik filed a petition for review to this Court, which this Court denied on November 4, 2009 (Cause No. 83255-2).

B. Spark's possession of the Property, resolution of the lien validity and priority issue, sale of the Property, and the Second Appeal

Although Spark had purchased the Property at a Sheriff's Sale on February 15, 2008, Knedlik continued to reside on the Property during his homestead redemption period. On March 5, 2009, after Knedlik's one-year homestead redemption period had expired, Spark brought a motion asking the Superior Court for a writ of assistance directing the King County Sheriff to put Spark in possession of the Property. *See* Sub. No. 133. The Superior Court granted Spark's motion and issued a writ of assistance on March 18, 2009. *See* CP 85-92. On April 3, 2009, Spark exercised its right of possession, and the King County Sheriff's Office removed Knedlik from the Property.

Meanwhile, in addition to claiming ownership of the Property (the claim the Superior Court rejected in February 2008, which was affirmed on appeal), Giovannini also claimed that she had liens on the Property senior to Spark's judgment lien. *See* Sub. No. 58. Although the Superior Court had held in February 2008 that Knedlik, not Giovannini, was the owner of the Property (until Spark purchased it at the Sheriff's Sale), the

Superior Court did not initially address Giovannini's assertion that she had liens on the Property senior to Spark's judgment lien. *See* Sub. No. 69.

In order to resolve this outstanding issue, Spark filed a Motion for Summary Judgment Eliminating Anna Giovannini's Claimed Security Interests Pursuant to RCW 6.32.270 on March 6, 2009 (the "Summary Judgment Motion"). *See* Sub. No. 136. Giovannini filed her own cross-motion for summary judgment on March 13, 2009. *See* CP 37-54. On March 30, Knedlik and Giovannini filed separate oppositions to Spark's Summary Judgment Motion, *see* CP 93-143,³ and Spark filed an opposition to Giovannini's cross-motion, *see* CP 149. The Superior Court held a hearing on both motions on April 10, 2009, granted Spark's motion, and denied Giovannini's (the "Summary Judgment Order"). *See* CP 162-73. Reconsideration was denied on May 12. *See* Sub. No. 164. Giovannini and Knedlik then jointly filed a notice of appeal to this Court on June 10, 2009, *see* CP 199-201 and a statement of grounds for direct review on June 26 (the "Second Appeal").⁴ On July 15, 2009, Spark filed a motion to dismiss Knedlik from this appeal, which this Court determined

³ Knedlik's opposition is two pages long, neither includes nor cites any evidence, and makes only a vague reference to summary judgment denying him "the benefit of terms of a contract . . ." CP 93-94.

⁴ Spark does not believe this appeal warrants direct review.

would be considered together with this Court's consideration of Appellant's request for direct review.

IV. ARGUMENT

A. Standard of review.

This Court reviews the Superior Court's decisions granting Spark's summary judgment motion and denying Giovannini's summary judgment motion de novo. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 563, 178 P.3d 1054, *rev. denied* 165 Wn.2d 1004 (2008). In a summary judgment motion, "[t]he nonmoving party is entitled to have the evidence viewed in a light most favorable to her and against the moving party" however, "the party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value." *Id.* at 566. A party opposing summary judgment "must demonstrate the basis for her assertions." *Id.*

This Court reviews the Superior Court's decisions to invoke equitable remedies (including judicial estoppel and equitable subordination) for abuse of discretion. *See Skinner v. Holgate*, 141 Wn. App. 840, 847, 173 P.3d 300 (2007); *Sorensen v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). The Superior Court's denial of a motion for

reconsideration is also reviewed for abuse of discretion. *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637, *rev. denied* 133 Wn.2d 1012 (1997).

B. This Court should disregard all material in Appellants' brief pertaining to the allegations underlying the California judgment entered against Knedlik.

Much of Appellants' fact section⁵ focuses on allegations Appellants make regarding Knedlik's prior involvement with Spark and the entry of the California judgment against him. *See* Appellants' Br. at 9-15. Appellants do not cite to the record to support any of these factual allegations, nor could they, as the allegations are false. *See id.* These allegations are also irrelevant to this appeal, as neither Appellant has standing to challenge the California judgment in this Court, nor is the procedural validity of Spark's filing that judgment in the King County Superior Court at issue in this appeal. Since these allegations are false, irrelevant, and not supported by the record, Spark respectfully requests that this Court disregard them in considering this appeal.

C. The issues raised and resolved in the First Appeal cannot be raised again in this Second Appeal.

⁵ Since Knedlik and Giovannini filed a joint brief, Spark will refer to them collectively as "Appellants"; however, Spark maintains its position that Knedlik has no standing to participate in this appeal for the reasons stated in the motion to dismiss.

Appellants' brief purports to address (1) the Superior Court's decision rejecting Giovannini's ownership claim as a matter of law, (2) the Superior Court's decision confirming the Sheriff's Sale of the Property to Spark, and (3) the Superior Court's decision setting Knedlik's homestead exemption at \$40,000. *See, e.g.*, Appellants' Br. at 4-6. The Superior Court's resolution of these three issues (in Spark's favor) was already affirmed by the Court of Appeals, with review denied by this Court, in the First Appeal. *See Spark Networks PLC v. Knedlik* (No. 62555-1-I). Slip. Op. at 7-8.⁶ As such, Appellants' efforts to reargue these issues is improper, and this Court should disregard any arguments regarding the issues decided in the First Appeal. It is established law of the case that (1) Giovannini has no ownership interest in the Property, (2) the Sheriff's Sale of the Property to Spark was valid, and (3) \$40,000 was the proper homestead exemption. *See id.*

D. This Court should not reverse the Superior Court's order granting Spark a writ of assistance.

Appellants assign error to the Superior Court's March 18, 2009 order granting Spark a writ of assistance to take possession of the Property. *See* Appellants' Br. at 3 (Assignment No. 1). This issue is not

⁶ Consistent with GR 14.1(a), Spark is citing the Court of Appeals' unpublished decision as "law of the case," not as precedential authority beyond this case.

properly raised on appeal, and even if it were properly raised, the Superior Court's order granting the writ should be affirmed.

1. The Notice of Appeal does not raise the order issuing the writ of assistance.

This Court should disregard Appellants' effort to appeal the order issuing the writ of assistance because the June 10, 2009 notice of appeal does not identify this order. A notice of appeal must, among other things, "designate the decision or part of decision which the party wants reviewed" RAP 5.3(1)(3). "The party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made . . ." RAP 5.3(a). "The attached copy must be a copy of the *signed* order or judgment, to assure that the appeal is taken from the true and final version of the order or judgment." 2A Wash. Practice RAP 5.3, at 473 (emphasis in original). This Court may only "review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review." RAP 2.4(b).

Appellants' June 10, 2009 notice of appeal sought review of "a final order as signed by Honorable Douglass A. North on May 11, 2009 and as filed of record on May 12, 2008 [*sic*], which such order denied a

timely filed motion for reconsideration, and as to each and every order previous thereto as applicable herein.” CP 199. The notice attached a copy of the order denying reconsideration. *See* CP 200-201. Although Giovannini’s appeal of the order denying reconsideration brings the April 10, 2009 summary judgment order into this appeal pursuant to RAP 2.4(c), there is no basis for including in this appeal the separate order granting the writ of assistance, dated March 18.

The order granting the writ does not “prejudicially affect[] the decision designated in the notice.” RAP 2.4(b). The order granting the writ allowed Spark to take possession of the Property by having Knedlik removed from the Property following the expiration of his one year homestead redemption period. *See* CP 85-92. In contrast, the April 10 summary judgment order and the order denying reconsideration thereof exclusively address the validity and priority of Giovannini’s purported liens in the Property. *See* CP 612-73. If Spark had not brought its motion for a writ of assistance when it did, or if the Superior Court had not granted the motion, it would have made no difference in the completely distinct summary judgment motions concerning Giovannini’s liens and judgment, which ultimately led to the April 10 order and the order denying reconsideration. As such, RAP 2.4(b) cannot bring the order granting the writ into this appeal, and this Court should not review that order.

2. Knedlik's effort to appeals the writ of assistance is untimely.

Even if the order granting the motion for writ of assistance had been identified in and attached to the June 10, 2009 notice of appeal, review of the order granting the writ would not be timely. RAP 5.2(a) requires that a notice of appeal be filed within "30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed," although RAP 5.2(e) makes a notice of appeal filed within 30 days of denial of a timely motion for reconsideration timely for both the order denying reconsideration and the order for which reconsideration was sought. The April 20, 2009 motion for reconsideration—the motion that makes the June 10, 2009 notice of appeal timely as to the April 10, 2009 summary judgment order—asked the Superior Court to reconsider only the summary judgment order. *See* Sub. No. 161 at 1-2.⁷ Indeed, the motion does not even reference the order granting the writ of assistance. As such, had the notice of appeal specifically referenced the order granting

⁷ Giovannini filed a motion to reconsider on April 20, 2009, *see* Sub. No. 161 and then filed an amended motion to reconsider on April 24, 2009, *see* CP 174-98. The amended motion was filed more than 10 days after the order for which reconsideration was sought and therefore was not timely. *See* CR 59(b).

the writ of assistance (which it did not), the writ still would not have properly been brought into this appeal.⁸

3. Even if Knedlik could properly appeal the writ of assistance, the writ was properly issued, and the Superior Court's decision to issue the writ should be affirmed.

Regardless of whether Knedlik could or did bring the order granting the writ of assistance into this appeal, both the order and the writ were properly issued. Therefore, if it considers this issue on appeal, this Court should affirm the Superior Court's order granting the writ. The Superior Court confirmed the sheriff's sale of the Property to Spark, held that Knedlik was the owner of the Property before the sale, and set the

⁸ The CR 70 order granting the writ of assistance is appealable because it is a "final order after judgment that affects a substantial right." RAP 2.2(a)(13). Because the underlying Superior Court matter is a supplemental proceeding to enforce an out-of-state judgment, the "judgment" occurred at the beginning of the proceeding. *See* 4 Wash. Practice CR 70, at 649 (5th ed.) ("The purpose of CR 70 is to provide a means of enforcing a judgment that requires a party to perform some specific act to implement the judgment . . ."). Consequently, the order granting the writ fits within RAP 2.2(a)(13) as follows: (1) It is a "final order" because it left nothing to be decided regarding Spark's right to take possession of the Property from Knedlik (or, for that matter, regarding any other dispute between Spark and Knedlik), (2) it is "after judgment" because, as noted, the "judgment" here took place at the beginning of the proceeding when Spark filed the California judgment in the Superior Court, and (3) it "affects a substantial right" because Spark's right to take possession of the Property from Knedlik and Knedlik's ability to continue to reside there following the expiration of his redemption period are by any measure "substantial rights."

homestead exemption at \$40,000 in 2008. *See* Sub. No. 85. The Court of Appeals has since affirmed all three decisions, and this Court denied review. Thus, there is no dispute (nor can there be any dispute) that Spark was entitled to take possession of the Property in March 2009, and the Superior Court took the only permissible course of action in granting Spark's motion for an order issuing a writ of assistance authorizing the sheriff to assist Spark in taking possession of the Property.

E. The Superior Court properly granted Spark's motion for summary judgment deeming Spark's lien senior to any of Giovannini's alleged liens.

Giovannini has claimed five liens in the Property—four notes she alleges are secured by deeds of trust, and one judgment lien. *See* Sub. No. 137B, Exs. K, L. The four deeds of trust are unenforceable and invalid because the statutes of limitations on their underlying notes have run, and the judgment lien is invalid because Giovannini failed to pay the statutory extension fee. Further, the Superior Court properly judicially estopped Giovannini from enforcing any of these liens and held that these liens are also equitably subordinated them to Spark's judgment lien.

1. Giovannini's asserted deeds of trust are unenforceable and invalid because the statutes of limitations on their underlying notes have long since run.

Giovannini has submitted four promissory notes, allegedly secured by deeds of trust in the Property, that state they were executed between

1990 and 1994. *See* Sub. No. 137B, Ex. L. The note dated December 7, 1990 states that it was due 42 months from the note's date, and the notes dated November 20, 1991, June 6, 1994, and December 14, 1994 were payable upon demand, *see id.*⁹

Under Washington law, “[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement” must be commenced within six years to be enforceable. RCW 4.16.040(1). This statute of limitations rule applies to enforcement of deeds of trust and mortgages, as well as to the underlying note obligations secured by deeds of trust and mortgages. *See* RCW 7.28.300; *Walcker v. Benson & McLaughlin, P.S.*, 79 Wn. App. 739, 742-46, 904 P.2d 1176 (1995), *rev. denied* 129 Wn.2d 1008 (1996); *Bingham v. Lechner*, 111 Wn. App. 118, 127-28, 45 P.3d 562 (2002), *rev. denied* 149 Wn.2d 1018 (2003). The statute of limitations on a note with a fixed maturity date begins running on the date the note matures. *See Federal Financial Co. v. Gerard*, 90 Wn. App. 169, 172, 949 P.2d 412, *rev. denied* 136 Wn.2d 1025 (1998); *A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 615, 440 P.2d 465 (1968). The statute of limitations on a demand note runs from the date of the note's execution. *Chatos v. Levas*, 14 Wn.2d 317, 321, 128 P.2d 284 (1942).

⁹ When a note does not state a maturity date, it is a “note payable on demand.” *Chatos v. Levas*, 14 Wn.2d 317, 321 (1942).

Here, the six-year statute of limitations would have begun on each of Giovannini's purported notes no later than December 14, 1994, and the limitations period for all of them would have expired by December 14, 2000. As such, even if these notes and deeds of trust had been valid at one point, Giovannini had long since lost her ability to enforce any deeds of trust when she claimed liens in the Property. All of her claimed liens are therefore invalid.¹⁰

Giovannini also cannot avoid the effect of the limitation period by claiming that Knedlik "reaffirmed" his obligation to pay her as part of the September 12, 1995 document. *See* CP 133-39. Under Washington law "[n]o acknowledgment or promise shall be sufficient evidence of a new or continuing contract" to toll or avoid the statute of limitations "unless it is contained in some writing signed by the party to be charged thereby." RCW 4.16.280. Although the document dated September 12, 1995 purports to bear Knedlik's signature, nowhere in the agreement does

¹⁰ Appellants claim that, under *Catlin v. Murray*, 37 Wash. 164 (1905), the statute of limitations never runs between a mortgagee and a mortgager. *See* Appellants' Br. at 27. Whatever validity this common law rule had in the past, it has been superseded by RCW 7.28.300, which plainly subjects deeds of trust and the notes they secure to the six-year statute of limitations that ordinarily applies to written instruments. *See* 27 Wash. Practice § 3.35.

Knedlik promise to pay his debts to Giovannini. *See* CP 133-39.¹¹ Moreover, even if this document constitutes a “promise to pay,” the statute of limitations still would have run, as, even according to Giovannini, the agreement only extended the payment deadline until September 12, 1996.¹²

2. Giovannini’s asserted judgment lien is expired and invalid because she did not pay the filing fee to extend it in 2004.

Giovannini also claims to have a lien in the Property based on a judgment against Knedlik originally obtained by Skagit Valley Publishing Company. This judgment was entered on July 25, 1994 and, according to the Property’s title report, later assigned to Giovannini. *See* Sub. No. 137B, Ex. K. Absent an extension, judgments expire ten years after entry. *See* RCW 6.17.020. Extending a judgment requires (1) an application to the court for an extension “within ninety days before the expiration of the

¹¹ If anything, the agreement is evidence that Knedlik never intended to pay off the notes, as Giovannini stated in her summary judgment opposition (the equivalent of a declaration, because she signed it under penalty of perjury) that she knew “it [was] unlikely that [Knedlik] could repay his debts to her.” CP 98, 118.

¹² Giovannini’s implication that the statute of limitations did not begin to run on the notes because the payment date was “subject to the sole discretion of [Giovannini],” CP 99, is baseless. As stated, a note that does not state a maturity date is a “note payable on demand,” and the statute of limitations begins to run on the date the note is executed. *Chatos v. Levas*, 14 Wn.2d 317, 321 (1942).

original ten-year period” and (2) payment of “a filing fee equal to the filing fee for filing the first or initial paper in a civil action in the court.” *Id.* Giovannini has submitted no evidence capable of showing that she validly extended the judgment beyond its initial expiration date in July 2004. Giovannini submitted an order signed in the Superior Court’s *ex parte* department extending the judgment, but a certified copy of the Superior Court’s docket in that matter does not show that the statutory fee for extending the judgment was ever paid. *See* Sub. No. 137B, Ex. M.¹³ Absent any evidence that she paid the fee to extend the judgment, Giovannini failed to comply with RCW 6.17.020, and the judgment expired.

3. The Superior Court properly judicially estopped Giovannini from asserting her purported liens.

Even if Giovannini’s purported liens were not time barred or expired, the Superior Court acted within its discretion by judicially estopping her from asserting any such liens. Courts may use the equitable doctrine of judicial estoppel to “preclude[] a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Skinner*, 141 Wn. App. at 847 (quoting

¹³ When fees are paid, they appear on the docket. *See e.g.*, Sub. No. 137B, Ex. M (showing filing fees received for the complaint, jury demand, jury fee, appellate filing fee, and clerk’s papers).

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007)).

The purposes of judicial estoppel are: “(1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time.” *Id.* (internal citations omitted). Trial courts “generally consider[] three factors when deciding to apply the doctrine of judicial estoppel: (1) whether the party’s later position is clearly inconsistent with its earlier position; (2) whether the party successfully persuaded a court to accept the party’s earlier position but then creates the perception that the court was misled when it adopts a later, inconsistent position; and (3) whether the party would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Id.* (internal citations omitted).

Here, the Superior Court judicially estopped Giovannini from claiming the four deed of trust liens and the judgment lien in the Property after she failed to list the liens, the Skagit Valley judgment, or the balances outstanding on the notes in her March 2007 bankruptcy petition. *See* CP (71-73). In her bankruptcy petition’s personal property schedule, Giovannini listed no accounts receivable and no “contingent and unliquidated claims,” and she identified her “other liquidated debts owing debtor” as “Loans to son, Will Knedlik (Debt assigned more than five

years ago) – \$0.00.” Sub. No. 137B, Ex. I, Schedule B, Items 16 & 18. On her real property schedule, Giovannini identified only her personal residence, located at 6109 106th Avenue NE in Kirkland, which is not the property at issue in this proceeding. Sub. No. 137B, Ex. I, Schedule A. Giovannini certified under penalty of perjury that these schedules were “true and correct” and filed them with the United States Bankruptcy Court for the Western District of Washington. *See* Sub. No. 137B, Ex. I.

Washington courts have previously held that judicial estoppel may be invoked where a bankruptcy debtor makes a statement concerning her property on bankruptcy disclosures and then makes a contrary statement in a subsequent court proceeding. *See Skinner*, 141 Wn. App. at 848 (“Courts will generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during the bankruptcy proceedings but then pursue the claim after the bankruptcy discharge.”) (citing *Bartley-Williams*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)); *Arkison*, 160 Wn.2d 535. In *Skinner*, the Court of Appeals noted that “[b]oth the bankruptcy code and court rules impose on the debtor an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.” *Id.* (citing *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 229-30, 108 P.3d 147 (2005)). This

includes “an express, affirmative duty to list all potential causes of action, even if he lacks knowledge about the likelihood of success.” *Id.*

Giovannini has taken two contrary positions in two different proceedings. In her personal bankruptcy, she claimed that she was not owed any money by Knedlik, that she owned no judgments against him, and that she had no interest in the Property. If she had identified (and actually owned) these purported assets, presumably they would have been subject to possible use by a bankruptcy court or trustee to satisfy her outstanding debts. Because they were not identified on her bankruptcy schedule, they were not available for satisfaction of her debts. Now, in this proceeding, she is claiming that she is owed millions of dollars by Knedlik through notes and the Skagit Valley judgment, and that these debts are secured by the Property. The claims are part of a larger, ongoing effort to shield Knedlik’s assets (and former assets) from his legitimate creditors, including Spark.¹⁴

This is a classic case for judicial estoppel, as Giovannini has attempted to take two diametrically opposite positions before two different courts. Allowing her to disclaim these purported debts and liens in bankruptcy court (to her advantage) and then claim these same purported

¹⁴ Other courts have previously found that Giovannini has abused the judicial process to shield Knedlik’s assets from his creditors. *See* Sub. No. 137B, Ex. D at 2, Ex. J at 23, Ex. N; Ex. O.

debts and liens before this Court (to her advantage, and to Spark's disadvantage) would be manifestly unjust to both Spark and the court system.

Giovannini makes two arguments in her brief explaining why she believes judicial estoppel should not apply. Neither is valid, and both should be rejected:

First, Giovannini argues that *Arkison*, limits the application of judicial estoppel. *See* Appellants' Br. at 36. As *Skinner* noted, however, *Arkison* restricted the use of judicial estoppel against bankruptcy trustees, not bankruptcy debtors. *See Skinner*, 141 Wn. App. at 848. Indeed, this Court in *Arkison* explicitly stated that "Courts may generally apply judicial estoppel to *debtors* who fail to list a potential legal claim among their assets during bankruptcy proceedings and then later 'pursue the claims after the bankruptcy discharge.'" *Arkison*, 160 Wn.2d at 539 (quoting *Bartley-Williams*, 134 Wn. App. at 98) (emphasis in original). Drawing a distinction between debtors and bankruptcy trustees is, of course, logical, because trustees and debtors have different motivations and roles in the bankruptcy process. *See id.* *Arkison's* holding regarding trustees supports application of judicial estoppel against Giovannini, who made her contrary statements as a debtor.

Second, Giovannini claims that her bankruptcy schedule was not inaccurate because, at the time she prepared the schedule, the liens, debts, and judgment were allegedly held by a trust. In support of this assertion, Giovannini cites CP 14-20, the “agreement” she and Knedlik allegedly signed in 1995. In this document, Giovannini purportedly stated that she would (at some point in the future) create a trust for the benefit of her grandson, Caleb Knedlik. *See* CP 19. There is no evidence that any such trust was actually created or that any property was transferred into such a trust. And even if a trust had been created and had held the notes, deeds of trust, and Skagit Valley judgment at the time Giovannini filed her bankruptcy schedule, judicial estoppel would still be appropriate. Giovannini refers to the trust as a “revocable trust.” Appellants’ Br. at 37. Under Washington law, a trustor retains a property interest in a *revocable* trust during the trustor’s lifetime. *See Estate of Overmire v. American Nat. Red Cross*, 58 Wn. App. 531, 534-35, 794 P.2d 518 (1990). If, as with a revocable trust in Washington, a trust interest is considered a property interest under state law, it must be disclosed on a personal bankruptcy schedule as personal property. *See In re Schmitt*, 215 B.R. 417, 421-23 (9th Cir. B.A.P. 1997) (“Under Section 541, estate property includes all legally recognizable interests, although they may be contingent and not subject to possession until some future time.”) (internal

quotation omitted). As such, even if Giovannini had transferred all of her liens into a revocable trust, as she claims, they remained disclosable property interests, and she was properly subject to judicial estoppel for failing to identify them on her bankruptcy schedule.

4. The Superior Court properly subordinated equitably any of Giovannini's purported liens to Spark's.

The Superior Court also acted within its discretion by equitably subordinating any of Giovannini's claimed liens in the Property to Spark's. Washington trial courts have "broad discretionary power to fashion equitable remedies." *Sorensen v. Pyeatt*, 158 Wn.2d 523, 531 (2006) (citing *In re Foreclosure of Liens*, 123 Wn.2d 197, 204 (1994)). Equitable subordination, a form of equitable relief, is a well-established doctrine in bankruptcy and admiralty law. *See, e.g. Wardley Intern. Bank, Inc. v. Nasipit Bay Vessel*, 841 F.2d 259, 263 (9th Cir. 1988). Regardless of the technical legal priorities, equitable subordination can change the priorities of liens based on principles of equity. *See id.* at 263 n.2 ("Subordination does not necessarily question the legality of the transaction; rather, it merely ensures an equitable ordering of payment from the *res* before the court.") (quoting *Custom Fuel Servs., Inc. v. Lombas Indus., Inc.*, 805 F.2d 561, 568 (5th Cir. 1986))

Equitable subordination is appropriate where “(1) the claimant has engaged in inequitable conduct, (2) the misconduct results in injury to the competing claimants or an unfair advantage to the claimant, and (3) subordination is not inconsistent” with applicable laws. *Key Bank of Puget Sound v. Alaskan Harvester*, 738 F. Supp. 398, 401 (W.D. Wash. 1989) (citing *Wardley*, 841 F.2d at 263). When the claimant is an insider and the objector presents sufficient evidence of her misconduct, the burden shifts to the insider to prove her good faith regarding a particular claim. *See, e.g., In re Pacific Express*, 69 B.R. 112, 116 (9th Cir. B.A.P. 1986). Although Washington courts have not expressly adopted the doctrine outside of bankruptcy, the Alaska Supreme Court has applied it in situations of “[f]raud, unfairness, or breach of the rules of ‘fair play.’” *Nerox Power Systems, Inc. v. M-B Contracting Co., Inc.*, 54 P.3d 791, 795 (Alaska 2002) (quoting *White v. State ex rel. Block*, 597 P.2d 172, 176 (Alaska 1979)).

Even if Giovannini could establish that her liens were valid *and* that the Superior Court abused its discretion in applying judicial estoppel against her, the Superior Court still acted within its discretion by equitably subordinating her purported liens to Spark’s. Giovannini’s extended pattern of “fraud, unfairness, [and] breach of the rules of fair play” more than justify equitable subordination. The Bankruptcy Court previously

deemed all three deeds Giovannini claims Knedlik transferred to her to be fraudulent conveyances. *See* Sub. No. 137B, Exs. N & O. In addition, Giovannini has filed *four* improper “involuntary” bankruptcy petitions against Knedlik to prevent Knedlik’s legitimate creditors, including Spark and Skagit Valley Publishing Company, from recovering against his property. *See* Sub. No. 137B, Ex. D, p. 3-7. Moreover, Giovannini has filed a complaint against one of Knedlik’s other creditors, which was dismissed for violating CR 11. *See* Sub. No. 137B, Ex. Q.

Given Giovannini’s repeated efforts to shield Knedlik’s assets from his legitimate creditors, allowing Giovannini to assert a lien in the Property senior to Spark’s lien would unfairly prevent Spark—a legitimate judgment creditor—from recovering on its \$29 million judgment against Knedlik and would encourage further abuse of the courts by Giovannini and Knedlik. The Superior Court properly equitably subordinated Giovannini’s purported liens to Spark’s judgment lien to avoid rewarding past inequitable conduct by Giovannini and Knedlik, to discourage future inequitable conduct, and to ensure that Spark was not penalized by Giovannini’s bad acts.

F. Giovannini’s tax lien assertion is untimely and improper.

Giovannini repeatedly implies that her alleged payment of certain taxes on the Property affects the legal status of her claimed liens. *See*

Appellants' Br. at 19, 20, 21, 24, 27, 34. This argument should be rejected for two separate reasons:

First, Giovannini raised this issue for the first time on reconsideration. *See* CP 189-96. She neither cites or explains any basis for doing so. "Only newly discovered evidence which was not available may be considered on a motion for reconsideration." *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637 (1997) (citing CR 59(a)(4)). Giovannini did not raise this issue in her motion for summary judgment or in her opposition to Spark's motion for summary judgment, and the Superior Court did not abuse its discretion by refusing to consider the additional evidence she submitted and new issue she raised for the first time on reconsideration.

Second, even if Giovannini could have raised the tax lien issue on reconsideration, she would still be judicially estopped from asserting her tax lien because she failed to disclose it on her bankruptcy personal property schedule. *See* Sub. No. 137B, Ex. I.

G. The Superior Court did not err by limiting the time for Giovannini to present oral argument on the cross-motions for summary judgment.

Appellants' assignment of error regarding "summary preclusion of reasonably adequate oral argument," *see* Appellants' Br. at 3, should be dismissed out of hand. Giovannini had the opportunity to present oral

argument and has made no effort to show why the Superior Court's decision to limit argument was in any way improper. Indeed, even though Giovannini had the opportunity to present argument, it is well established that oral argument on civil motions in Washington is not a due process right. *See Hanson v. Shim*, 87 Wn. App. 538, 551, 943 P.2d 322 (1997), *rev. denied* 134 Wn.2d 1017 (1998); *Parker v. United Airlines, Inc.*, 32 Wn. App. 722, 728, 649 P.2d 181 *rev. denied*, 98 Wn.2d 1011 (1982) (same); *see also* 15A Wash. Practice § 63.2 ("If oral argument is authorized, it will typically be limited to 5 or 10 minutes per side by local rule or practice, unless the court permits additional time upon request.").

V. CONCLUSION

The Superior Court properly rejected Giovannini's purported liens in the Property, and none of the other issues raised by Appellants are properly before this Court. Spark respectfully request that the Superior Court's orders be affirmed.

RESPECTFULLY SUBMITTED this 30th day of November,
2009.


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No. 83208-1

Spark Networks, PLC v. Will Knedlik and Anna Giovannini

Attached please find the Brief of Respondent, with certificate of service attached.

<<Brief of Respondent.PDF>>

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