

No. 665677

THE COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

MARGARET ANN BOSSIE, *Appellant (s)*,

v.

BANK OF AMERICA, *Respondent.*

BRIEF OF APPELLANT(S)

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2011 JUN 21 PM 1:50
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A. INTRODUCTION

This case centers on the application of RCW 61.24.080(3). RCW 61.24.080(3) is the statute that governs the disposition of surplus funds following a non-judicial foreclosure (i.e. the bid at the foreclosure was greater than the amount necessary to satisfy the foreclosing promissory note). Washington's surplus funds statute is an intellectually elegant statute, in that it treats the competing claims to the surplus funds in the same priority as they would have existed against the property. Therefore, the various claimants' claims to the surplus funds are prioritized in terms of the property rights that they possessed in the property prior to the foreclosure. Those property rights could be consensual liens, such as deeds of trust, statutory liens, such as materialman's liens, possessory interests, such as the owner's fee simple, or non-consensual liens, such as a judgment lien.

The surplus funds statute would have the trial court judge imagine that the various claimants were exercising their own rights and remedies as against the property, and prioritize the claims to the surplus funds in terms of which property right would be superior to the other.

At the same time, if a claimant fails to appear at a properly noted motion that meets all the statutory requirements of RCW 61.24.080(3), the remaining valid claimant's are evaluated by the trial court in the priority that their interest attached to the property. The claimants which appear

need only provide notice to all other parties whose interests were eliminated by the sale, and prove their own claim.

If other competing claimants fail to appear, even if those claims may have a superior claim to the other claimants who have actually appeared, there is no requirement in the law that all “potential” claims (non-appearing claimants) be evaluated against the claimants who actually appear before the court.

B. ASSIGNMENTS OF ERROR

Assignment of Error No. 1 “The court abused its discretion and erred by considering additional evidence when reviewing the commissioner’s ruling on revision.”

Assignment of Error No. 2 “The court erred by determining that BOA is entitled to a judgment after Ms. Bossie filed a proper claim to surplus funds which complied with RCW 61.24.080(3) and she has previously received a discharge in bankruptcy.”

Assignment of Error No. 3 “The court erred by determining that BOA is entitled to surplus funds, when BOA, as junior lien holder, was the successful bidder at the trustee sale.”

Assignment of Error No. 4 “The court erred by determining that mailed notification pursuant to RCW 61.24.080(3) requires an additional three days per CR 6(e) beyond the statutorily provided 20 day notice period.

C. STATEMENT OF THE CASE

Margaret Bossie was the owner of real property located at 20218 103rd Place NE, Bothell, WA 98011 (hereinafter “property”). CP 1-24. There were two loans secured by the Bothell property (1st lien in favor of Chase Bank, and 2nd position lien in favor of Bank of America). *Id.*

On May 4, 2010, Margaret Bossie filed for Chapter 7 Bankruptcy relief in the Western District of Washington. On August 25, 2010, Ms. Bossie obtained an order of discharge in a Chapter 7 bankruptcy in the Western District of Washington under case number 10-15122-KAO.

Ms. Bossie was unable to service the promissory note in favor of Chase Bank, and the Bothell property was sold at a non-judicial foreclosure on October 8, 2010. *Id.* The sale yielded excess proceeds which the foreclosing trustee deposited with the registry of the King County Superior Court on November 4, 2010 under cause number 10-2-38733-1-SEA. *Id.*

Margaret Bossie formally appeared in this case on November 29, 2010, by filing a notice of appearance and a concurrent motion for disbursement set for December 20, 2010. CP 27-35. Pursuant to RCW 61.24.080(3), Margaret Bossie sent notice of her motion to all parties listed by the trustee on the original declaration of mailing by first and certified mail. *Id.* Margaret Bossie's motion complied with all of the statutory requirements of RCW 61.24.080(3). *Id.*

On or about November 29, 2010, Ms. Bossie's counsel also performed a search of the existing case file for any parties who may have appeared or additional parties entitled to notice. No parties had appeared or filed responsive pleadings at that time. *Id.*

Respondent, Bank of America (*hereinafter* "BOA") retained counsel to handle this matter and its counsel filed a motion to disburse the surplus proceeds on December 9, 2010. CP 42-62. On or about December 16, 2010, BOA's attorneys discovered the appearance by Margaret Bossie, as evidenced by their mailing of their motion to disburse Margaret Bossie's counsel on that date. CP 214-225. The mailing only consisted of BOA's own motion to disburse. *Id.* The mailing did not contain any response to Margaret Bossie's motion. *Id.* No further effort to contact Margaret Bossie's attorneys was made, and unfortunately, BOA's mailing was not received until after the scheduled December 20, 2010 motion. *Id.*

On December 20, 2010, Margaret Bossie appeared before King County Superior Court Commissioner Velategui. CP 72. BOA did not appear at Margaret Bossie's motion, despite the fact that it was aware of Ms. Bossie's motion. CP 72. Based upon the record before it, the proper notice given to all parties of record, and the arguments of Ms. Bossie's counsel, the court granted Ms. Bossie's request for relief and disbursed the surplus funds to her pursuant to RCW 61.24.080(3) and Civil Rule 55. CP 73-74. The funds were disbursed to Ms. Bossie on or about December 23, 2010.

On January 7, 2011, BOA heard its own motion to disburse before the King County Superior Court Commissioner, which was not granted. On January 14, 2011, BOA heard its motion for revision before the

Honorable Michael Heavey. CP 243-244. Judge Heavey granted BOA's motion for revision, finding that while Ms. Bossie provided twenty days notice, per RCW 61.24.080(3), an additional three (3) days notice needed to be provided for any notice provided by mail, therefore Ms. Bossie's motion was defective. *Id.* In addition, Judge Heavey ruled that Ms. Bossie should have discovered BOA's motion prior to hearing her own motion for disbursement, and as a result, the Commissioner's ruling should be revised. *Id.*

The present appeal was initiated on January 20, 2011. On March 3, 2011, BOA obtained a judgment against Ms. Bossie for the amount of funds previously disbursed on December 23, 2011.

D. ARGUMENT

Standard of Review:

This court is reviewing the propriety of an order disbursing surplus funds granted under RCW 61.24.080(3). Such matters are reviewed under an abuse of discretion standard. *See, Wilson v. Henkle*, 45 Wn. App. 162, 724 P.2d 1069 (1986). The trial court has broad discretion in determining the priorities of various lien claimants. *Wilson*, 45 App. 162 (1986). Accordingly, the proper standard of review is abuse of discretion.

Procedure for reviewing claims under RCW 61.24.080(3):

RCW 61.24.080(3) provides for the procedure for adjudicating claims related to surplus funds resulting from a non-judicial foreclosure.

In ascertaining the relative priorities of competing claimants, RCW 61.24.080(3) provides in relevant part that: “[i]nterests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property.” RCW 61.24.080(3). Generally, the determination of the relative priorities under RCW 61.24.080(3) is within the discretion of the Superior Court judge. *See, Wilson*, 45 Wn. App. 162 (1986).

1. MARGARET BOSSIE’S ORIGINAL MOTION MET ALL THE STATUTORY REQUIREMENTS OF RCW 61.24.080(3)

In this case, the motion filed by Margaret Bossie satisfied all the procedural requirements set forth in R.C.W. 61.24.080(3). CP 30-35, 73-74. There were no procedural defects in the manner in which Ms. Bossie brought her motion and the court was within its discretion to accord her relief. CP 73-74. R.C.W. 61.24.080(3) sets forth that a motion for disbursement of surplus funds shall provide “not less than twenty days prior to the hearing of the motion.” Ms. Bossie filed her motion on November 29, 2010, with a motion date set for December 20, 2010 (i.e. over twenty days from the date of filing). CP 28-29, 72.

Furthermore, RCW 61.24.080(3) provides the method of providing notice to other potential claimants, specifically that “[n]otice of the motion shall be personally served upon, or mailed in the manner specified

in RCW 61.24.040(1)(b).” RCW 61.24.040(1)(b) allows notice to be sent via first class and certified mail.

If the legislature had intended RCW 61.24.080(3) to add three days to the notice period in regards to Civil Rule 6(e), then legislature would have specified twenty-three days. In fact, the plain language of the statute specifies “twenty days” notice with no other reference to other civil rules, such as CR 6(e). As such BOA’s argument that Ms. Bossie should have provided an extra three days notice fails, as the statute simply does not require twenty-three days of notice, nor is there any reference to CR 6(e) contained in the statute.

Ms. Bossie did send notice to all parties entitled to notice as required by statute. CP 30-35. RCW 61.24.080(3) requires that notice of a motion to disburse shall be provided in the following manner:

Notice of the motion shall be personally served upon, or mailed in the manner specified in RCW 61.24.040(1)(b), **to all parties to whom the trustee mailed notice of the surplus, and any other party who has entered an appearance in the proceeding.**

RCW 61.24.080(3) (emphasis added).

The trustee’s declaration of mailing specified six different addresses for BOA. *Id.* Ms. Bossie sent notice to all these address. *Id.* As BOA’s counsel did not file a motion of appearance before Ms. Bossie filed her motion, Ms. Bossie had no reason to send notice to BOA’s

counsel, as Ms. Bossie could not have known that BOA's counsel would appear. CP 42-62.

Accordingly, Ms .Bossie's motion did comply with the statutory notice requirements of RCW 61.24.080(3). In fact, the burden was on BOA and its counsel to respond to Ms. Bossie's motion (which it failed to do) and to notify counsel for Ms. Bossie of its impending motion before the December 20, 2010, date. CP 72. At a minimum, it is obvious that BOA's attorneys were aware of the pending motion (as evidenced by its December 16, 2010 mailing), and yet they failed to appear at the December 20, 2010 hearing. CP 141-144.

Similarly, the trial court noted that since Ms. Bossie's pleadings were mailed that Washington Civil Rule 6(e) would require the addition of three days to the statutorily provided 20 day notice; i.e., a total of 23 days of notice. However, RCW 61.24.080(3) clearly requires 20 days notice "of the motion [to] be personally served upon, or mailed in the manner specified in RCW 61.24.040(1)(b)..." RCW 61.24.040(1)(b) requires that any mailing be sent as first class mail and as registered mail with return receipt requested. Nowhere does the statute require an additional three days to mail the motion or does in any other way invoke Civil Rule 6(e).

If the legislature had intended to provide for 'alternate service' and require additional time, the legislature would have included such a

provision, or at a minimum make reference to the Civil Rules of Procedure. Nothing in the legislative history, the statute, or case law would indicate that such an extension of the law is appropriate.

2. THE COMMISSIONER RULING WAS APPROPRIATE BASED ON THE RECORD BEFORE HIM AT THE TIME.

BOA moved for revision from the Commissioner's Ruling entered on December 20, 2010. RCW 2.24.050 provides in pertinent part:

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. **Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner[...]**

RCW 2.24.050. *Emphasis added.*

Revision is a remedy similar to the redress currently before this court. The procedure is meant to serve as an appeal based on an argued motion. It is a de novo review of the records before the court commissioner at the time the ruling was entered. This principle was addressed by the courts.

Generally, a superior court judge's review of a court commissioner's ruling, pursuant to a motion for revision, is limited to the evidence and issues presented to the commissioner. **The superior court has the authority to review the records of the case, and the findings of fact and conclusions of law entered by the court commissioner.** RCW 2.24.050. In an appropriate case, the superior court judge may determine that remand to the commissioner for further proceedings is necessary.

The superior court erred by considering additional evidence.

We reverse and remand to permit the superior court to conduct a review limited to the evidence before the commissioner. The superior court has the authority to issue a decision based on the evidence before the commissioner or, if appropriate, may remand this matter to the commissioner for further proceedings.

Balcom v. Fritchle, 101 Wn. App. 56, 59-60; 1 P.3d 1174, 1176 (2000).

See also, State v. Ramer, 151 Wn.2d 106; 86 P.3d 132 (2004).

It is well established that the court's review on revision must be limited to the record before the commissioner. In the instant case, the only motion before the commissioner was Ms. Bossie's and based on the motion the commissioner properly granted a default judgment in favor of Ms. Bossie. CP 1-72. BOA could have filed a responsive pleading to Ms. Bossie's motion or take some steps to make known that it was asserting a competing claim. However, the bank did no such thing. Accordingly, the commissioner's ruling was appropriate, and for the Judge to consider additional evidence was an abuse of discretion. CP 243-244.

Additionally, the question arises whether revision was the appropriate remedy in this matter to assert by BOA. Ms. Bossie obtained a default judgment and remedy available to set aside a default is contained within Civil Rule 60. "CR 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding under specified circumstances. A trial court's denial of a motion to vacate under CR 60(b) will not be disturbed absent a showing of a manifest abuse of discretion." Haley v.

Highland, 142 Wn.2d 135, 156, 12 P.3d 119, 129-130 (2000). “The trial court abuses its discretion only when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons.” In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863, 865-866 (1989).

As such, it appears that BOA obtained review utilizing the incorrect procedure. Furthermore, when seeking review on revision the court was limited in its review to the material before the commissioner and it is an abuse of discretion for the court to consider additional material.

Even if BOA would have filed its motion pursuant to CR 60, the Bank’s failure to appear at the December 20, 2010 hearing, and to respond to Ms. Bossie’s motion to disburse is not due to excusable neglect. The facts of this case clearly show that BOA’s counsel failed to exercise due diligence and reasonable care in this matter. BOA failed to check the court file before filing its motion, nor did it prepare a responsive pleading to Ms. Bossie’s motion, despite knowing of the pending motion. A cursory check of the court file would have revealed Ms. Bossie’s motion and enabled BOA to provide proper notice to Ms. Bossie’s counsel and to respond and/or appear at the December 20, 2010, motion. It is clear from the record that no such diligence occurred, since BOA’s declaration of mailing, dated December 7, 2010, did not list counsel of Ms. Bossie as a

notice recipient. As such, BOA failed to identify the necessary notice parties at the time of the filing of its motion.

Furthermore, BOA's counsel did mail notice of its motion to Bossie's counsel on December 16, 2010 by first class mail. Unfortunately, the notice was not received until after the December 20, 2010, hearing. However, as of December 16, 2010, someone at the firm representing BOA had clearly learned about Ms. Bossie's motion and chose to take an action which was not reasonable calculated to reach Ms. Bossie's counsel in a timely fashion. Conversely, BOA's counsel was able to email Ms. Bossie's counsel after the motion on December 28, 2010, and received a quick response.

BOA's counsel has demonstrated a lack of due diligence, which should not be excused. In a recent case the Washington State Supreme Court held that it would be an abuse of discretion to vacate a judgment where a party "fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. " Little v. King, 160 Wn.2d 696, 706; 161 P.3d 345, 351 (2007). BOA's counsel (or the firm representing BOA) knew of the December 20, 2010, motion before the motion date but failed to act in manner that would call attention to its competing claim. BOA's counsel could have appeared at the motion date or emailed counsel (a means of communication which BOA's counsel had used several times

before to contact Ms. Bossie's counsel). Accordingly, BOA's motion for revision should fail on this ground alone, as BOA did not exercise reasonable care.

3. BOA'S MOTION IS MOOT AS MARGARET BOSSIE PREVIOUSLY DISCHARGED HER LIABILITY IN BANKRUPTCY AND THUS ENTRY OF A JUDGMENT IS NOT PROPER

Margaret Bossie filed for Chapter 7 Bankruptcy relief on May 4, 2010. BOA was properly scheduled in her Chapter 7 Bankruptcy schedules. On August 25, 2010, Judge Karen Overstreet granted Ms. Bossie a discharge which eliminated her liability with respect to BOA.

As, Ms. Bossie previously discharged her personal liability in bankruptcy, BOA has no further recourse against her on the original obligation. Consequently, in order to render a judgment against Ms. Bossie (and in favor of BOA), the court would have to have concluded that Ms. Bossie committed some sort of actionable wrong against BOA by filing and hearing her motion to disburse.

Such a ruling would set a dangerous precedent. Ms. Bossie committed nothing wrong by asserting her claim to the surplus funds. Her motion was properly filed, and notice was provided to all parties requiring notice. The mere potential existence of superior claimants does not invalidate junior claims, it only changes the relative priorities. Superior claimants to surplus funds that received notice and fail to appear waive

their claim, and there is nothing in the entire body of the law of real property to suggest otherwise. Consequently, to claim that Ms. Bossie committed some wrong against BOA (which would give rise to a judgment) by pursuing her own claim is simply not fair, nor is it legally supportable. If the judgment is based upon the prior obligation, then that obligation was discharged in her Ch. 7 Bankruptcy filing. If the judgment is based upon Ms. Bossie having received disbursement, then the Court would have to articulate how Ms. Bossie harmed BOA, either in contract or tort, in order to justify the judgment. For the court to reach a contrary result would have a serious chilling effect on potential claimants, who would always fear to raise a valid, yet potentially losing competing claim, if they believed that a superior claimant, who received notice, could merely appear at some future date and receive a judgment against the junior claimant for validly pursuing their rights. This would constitute an abuse of discretion on the part of the trial court. The court's record is clear that Ms. Bossie's motion was properly filed, and based upon the appearances at the hearing, and lack of responsive pleading, the court commissioner was perfectly within his discretion to award relief to Ms. Bossie. It is manifestly unfair to then state that Ms. Bossie should be held liable with a civil judgment, when BOA failed to appear at her motion, when she did nothing wrong in asserting her claim.

4. BOA SHOULD BE PRECLUDED FROM PURSUING THE SURPLUS FUNDS AS THE RESULT WOULD BE TANTAMOUNT TO A DEFICIENCY JUDGMENT

a. A recovery from Surplus Funds does Constitute a form of Deficiency.

Washington's anti-deficiency statute is contained under RCW 61.24.100 within the structure of Washington's Deed of Trust Act (RCW 61.24), which also contains the statute governing the disposition of surplus proceeds under RCW 61.24.080(3). Clearly, surplus resulting from a non-judicial trustee sale and a deficiency judgment from a trustee sale are interrelated and to distinguish one from the other defeats the purpose of the anti-deficiency statute. In either case, the former homeowner is subject to a monetary detriment. Whether loss of pecuniary interest is by virtue of a judgment or by loss of surplus funds exalts form over substance. Moreover, in recently published opinion the Washington Court of Appeals analogized a recovery from surplus funds with a deficiency. In In the Matter of the Trustee's Sale of the Real Property of Willard H. Brown et al., 161 Wn. App. 412, 250 P.3d 134 (2011), the court reasoned that RCW 61.24.100 would limit a junior lien-holder's recovery from surplus funds pursuant to Washington's anti-deficiency statute.

The Browns treat the two sentences of *paragraph (6)* as two separate matters, one sentence deals with the limited opportunity for a deficiency judgment after foreclosing a commercial loan deed of trust **and the second with priority for proceeds after a foreclosure**. This effectively creates the

following hierarchy for the proceeds from a foreclosure sale: (1) deed of trust securing a noncommercial loan (typically that used to purchase the residence); (2) homestead exemption; (3) deed of trust securing a commercial loan.

Id. (emphasis added).

Although, the Brown case dealt with the matter of a commercial loan, the court clearly applied Washington's anti-deficiency statute contained under RCW 61.24.100 to apply with respect to surplus funds. To suggest a segregation of surplus funds and deficiency judgment would be an artificial distinction, which is simply not supportable under Washington law, nor is it equitable given the purpose of the law.

b. **A non-foreclosing junior lien-holder and successful bidder at the trustee sale should not be able to avail itself of the surplus funds remedy.**

In the seminal case of Washington Mutual Savings Bank v. United States, 115 Wn.2d 52; 793 P.2d 969 (1990), the Washington Supreme Court held that the non-foreclosing lien-holder was barred from seeking a deficiency judgment against the former homeowner.

We do not deem it necessary to determine how a deficiency judgment should be measured in this case since we hold here that none may be obtained by a nonforeclosing junior lienor following a nonjudicial foreclosure sale. There is simply no statutory authority for allowing such a judgment following a nonjudicial, or deed of trust, foreclosure. Indeed, the title to RCW 61.24.100, part of the deeds of trust act, states flatly that "[d]eficiency decree precluded in foreclosure under this chapter". We decline to create an exception to this statutory bar by judicial fiat.

Id. at 58

Based on the court's ruling in Washington Mutual BOA should be barred by Washington's anti-deficiency statute from recovering any of the surplus funds. Clearly any post-sale recovery of money resulting from the sale would constitute a deficiency. Naturally, a normal creditor in BOA's position may proceed to sue a debtor like Ms. Bossie on the underlying promissory note and recover in that manner; however, any claim arising from the deed of trust is not allowed, and in her specific case, they would be barred by the operation of her Ch. 7 discharge. "We do not herein address the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note because it is not before us." Id. at 59.

The Washington Mutual decision was later clarified by the court. In Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 67 P.3d 555 (2007), the court distinguished its holding so that it does not apply to a sold-out junior lien-holders; i.e., a junior lien-holder that does not purchase the property at the foreclosure sale.

Here, Beal Bank is not a purchaser of the property at a nonjudicial foreclosure sale but seeks to enforce its rights under the separate promissory notes. Because Washington Mutual, as the senior lienholder, elected to pursue its rights to a nonjudicial foreclosure, Washington Mutual's action does not preclude a junior lienholder (here, Beal Bank) from seeking its legal recourse. Put another way, while Beal Bank's rights in the collateral are extinguished by Washington Mutual's trustee's sale, the underlying promise by the Sariches and Mr. Cashman to pay Beal Bank on the two notes continues via the promissory

notes, although the promissory notes are now unsecured as a result of that trustee's sale.

Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 67 P.3d 555 (2007) (emphasis added). Clearly both courts felt that a junior lien-holder that is the successful bidder at the trustee sale has different rights from sold-out junior lien-holders (i.e. a 2nd mortgage that does not purchase at the auction). Other jurisdictions, such as California, Nevada and Alaska have created similar distinctions by statute or by judicial fiat.

This reasoning is sound from a public policy standpoint, since the junior lien-holder bidder could outbid most other bidders knowing that any excess proceeds will be recovered subsequent to the sale by utilizing the surplus funds statute. As such, the junior lien-holder has an unfair advantage, since the junior lien-holder could recover the proceeds up to the amount of the outstanding debt and basically purchase the property for the price of the first mortgage and then sell the property at a profit and still seek a deficiency by suing under the promissory note.

Precisely this issue was addressed by the California Court of Appeals in Walter E. Heller Western Inc. v. Bloxham, 176 Cal. App. 3d 266 (1985). In that case the California court was asked to determine whether the fair value limitations contained in California's anti-deficiency statute would apply to a junior lien-holder that purchased the property at a non-judicial foreclosure sale of the senior lien-holder. The court found

that the fair value provisions would apply to limit the non-foreclosing junior lien-holders recovery.

In Bank of Hemet v. United States (9th Cir. 1981) 643 F.2d 661, the Ninth Circuit reviewed California's antideficiency legislation and concluded a junior lienor who purchases at the senior's sale is limited by the fair value provisions of section 580a when he seeks a deficiency judgment. (*Id.*, at p. 668.)...

The court in Bank of Hemet correctly perceived a real distinction **between a sold-out junior and one who purchases at the senior's sale, a distinction that was not before our Supreme Court in Roseleaf.** (See Benjamin, *California Fair Value Limitations Applied to Non-Foreclosing Junior Lienholder* (1982) 12 Golden Gate L.Rev. 317.) The junior in Roseleaf did not purchase at the senior's sale. To apply the fair value limitations to that junior would result in the amount of his deficiency being limited by the amount of someone else's bid, a factor over which he has no control. **However, once a junior chooses to purchase, it is equitable to apply the fair value limitations to him. Any loss to him as creditor by his own underbidding is gained by him as purchaser for a bargain price.** (Cal. Mortgage and Deed of Trust Practice (Cont.Ed.Bar Supp. 1985) § 4.31, p. 35.) "To so limit the deficiency judgment right is consistent with the general purpose of section 580a, *viz.*, **to protect against a lienor buying in the property at a deflated price, obtaining a deficiency judgment, and achieving a recovery in excess of the debt by reselling the property at a profit [para.] The unmistakable policy of California is to prevent excess recoveries by secured creditors.**" (Bank of Hemet v. United States, *supra*, 643 F.2d at p. 669.)

Walter E. Heller Western Inc. v. Bloxham, 176 Cal. App. 3d at 272-273 (1985) (*emphasis added*). Coincidentally, the Bank of Hemet case is factually very reminiscent of the Washington Supreme Court's holding in Washington Mutual. Both cases turn on the question of the

appropriate redemption price the IRS is entitled to utilize after a foreclosure. Both cases limit the junior lien-holders' right to receive a deficiency, since in both cases the junior lien-holder was the successful bidder at the trustee sale. Unlike, California, Washington does not have a statutory provision which only limits a deficiency judgment by the fair market value of the property. Washington's statutory scheme provides for an outright prohibition of a deficiency. Accordingly, a purchasing junior lien-holder should be prohibited from obtaining any surplus funds following a non-judicial foreclosure sale.

In Carrillo v. Valley Bank of Nevada, 734 P.2d 72 (1987) the Nevada Supreme Court came to the same conclusion.

Valley Bank insists that the trustee's sale extinguished its security interest in the property and left the Bank in the position of a sold-out junior lienor. **Endorsement of such a view would truly exalt form over substance in disregard of reality. The Bank, in fact, preserved its security by acquiring the property at the sale. It could have elected not to participate in the sale, thereby losing its security interest.** Thereafter, it could have pursued its remedy against Carrillo on the promissory note. In so doing, the Bank would have enjoyed the status it now claims. **The Bank could not restructure the equation to produce a return greater than its full entitlement by treating the property and Carrillo's promissory note as unrelated factors.** It is the policy of Nevada law, under First Interstate Bank and Crowell, not to countenance such an approach. Valley Bank nevertheless contends that McMillan v. United Mortgage Co., 84 Nev. 99, 101, 437 P.2d 878, 879 (1968), is dispositive in exempting sold-out junior lienors from Nevada's deficiency statutes. First, as previously observed, we do not consider Valley Bank to be a

sold-out junior lienor in spite of the legal effect of the trustee's sale in extinguishing the Bank's second trust deed.

Carrillo, 734 P.2d at 724 (1987), (*emphasis added*).

This holding, as the California cases cited above, clearly limit a purchasing junior lienholder's recovery. At a minimum, California and Nevada distinguish between sold-out junior lien holders and purchasing junior lien-holders. Washington's case law does the same when combining the holdings in Washington Mutual and Beal Bank.

E. CONCLUSION

It was an abuse of discretion for the court to revise the commissioner's ruling as that mechanism is not procedurally proper, and because the court considered additional evidence in contravention of the applicable statute and prevailing case law. BOA's failure to appear at the December 20, 2010 or to file a responsive pleading constituted a waiver of its claim. Finally, Ms. Bossie did nothing wrong in asserting her claim to the surplus funds, and therefore the resulting judgment could not be based upon her obligation to BOA (as it was discharged in bankruptcy) and it was an abuse of discretion on the part of the court to conclude that her motion to disburse surplus funds should give rise to such strict civil liability.

Dated this 14th day of June, 2011

Respectfully Submitted by:
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