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

CD TRUST 10/22/92; CHRISTOPHER J. KOH and DAVID
A. KOH, co-Trustees; and WESTAR FUNDING, INC., a
Washington corporation,

Respondents,

v.

QUALITY LOAN SERVICE CORP., Trustee; and DLJ
MORTGAGE CAPITAL, Inc., through its servicing agent,
SELECT PORTFOLIO SERVICING, INC.,

Appellants.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

In 2006, appellant Select Portfolio Servicing, Inc. ("Select") foreclosed its deed of trust on Mr. Sanchez's property. At the foreclosure sale, a third party purchased Select's real estate collateral. The purchaser received and recorded a trustee's deed. By foreclosing its deed of trust, Select extinguished the lien that its deed of trust had created.

Shortly thereafter, a bankruptcy court set aside the foreclosure. Select was a party to the proceedings in which that occurred. Select now claims to be restored to its position as secured creditor. However, it did not record in the county real estate records the Bankruptcy Order that set aside its foreclosure and ostensibly restored its status as secured creditor, nor did it re-record its previously extinguished deed of trust.

In late 2008, respondent Westar lent the property's owner \$375,000. It is undisputed that Westar believed it had a first lien on the property. Westar relied on record title, which showed: (a) no Bankruptcy Order invalidating the foreclosure or the trustee's deed

to the third-party buyer; and (b) no outstanding deed of trust in favor of Select.

This case is a priority dispute between Select and Westar. Westar should prevail: (a) under the Recording Act, because it had no constructive or actual notice of Select's claim; and (b) under the doctrine of comparative innocence, because Select could have, but did not, protect itself by recording the Bankruptcy Order or re-recording its deed of trust.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, pursuant to RCW 65.08.070, Westar¹ was entitled to rely on the records of the Snohomish County Auditor in making a loan secured by a deed of trust. (Appellants' Assignments of Error 1 and 2.)

2. Whether the Washington Recording Act, RCW 65.08.070, gives priority to Westar's deed of trust. (Appellants' Assignments of Error 1 and 2.)

¹ Respondents here are: (1) CD Trust UTD 10/22/92, Christopher J. Koh and David A. Koh, co-Trustees, as owners and holders by assignment of the beneficial interest in a deed of trust dated October 28, 2008, between John J. Sanchez and Westar Funding, Inc.; and (2) Westar Funding, Inc., the servicing agent for CD Trust. They are collectively referred to as "Westar."

3. Whether Westar is protected by the comparative innocence doctrine because Select could easily have timely recorded its interest in the Snohomish County real property records, but failed to do so. (Appellants' Assignments of Error 1 and 2.)

III. STATEMENT OF THE CASE

A. The Undisputed Facts.

While Select's Statement of the Case is generally accurate, it leaves out crucial facts. None of the facts, however, are in dispute. The only disputes are as to the proper legal conclusions.

Select and Westar agree that Sanchez borrowed from Select's predecessor, Washington Mutual, in 1994. The loan was secured by a deed of trust on property at 8625 - 200th Street S.W., Edmonds, Snohomish County ("Property"). CP 123-30.

Sanchez defaulted, and Select began foreclosure proceedings. On December 29, 2005, Sanchez filed for Chapter 13 bankruptcy protection in the United States Bankruptcy Court for the Western District of Washington ("2005 Bankruptcy"). CP 116. The bankruptcy court granted Select conditional relief from the

stay. Select's trustee conducted a non-judicial foreclosure sale on August 25, 2006. CP 133.

On that date, the Trustee issued a "Trustee's Deed" to successful bidder John Gamlam. The Trustee's Deed was recorded on September 5, 2006. CP 132-33. The Trustee's Deed remained of record, with nothing in the Snohomish County real estate record to suggest it was invalid, until December 2009, over a year after Westar closed its loan. CP 117 (Sarver Decl., ¶ 8).

The foreclosure sale and Trustee's Deed eliminated Select's deed-of-trust lien. The public record reflected this. Thus, after the foreclosure sale, purchaser Gamlam then held record fee title unencumbered by any recorded deeds of trust. CP 115 (Sarver Decl., ¶ 3).

On September 21, 2006, after the Trustee's Deed to Gamlam was recorded, the bankruptcy court entered an order setting aside the foreclosure sale, requiring return of the purchase price and arguably restoring Select's deed of trust lien ("Bankruptcy Order"). CP 154.

Critically, *no notice of the 2006 Bankruptcy Order was timely recorded in the real estate records of Snohomish County.* CP 114 (Sarver Decl., ¶ 4). Select's deed of trust was never re-recorded. There was no recorded notice that the bankruptcy court had undone the foreclosure sale or that Select's deed of trust was (ostensibly) reinstated until over a year after Westar made its loan. CP 117 (*id.*, ¶ 8, *Exh. J*).

On March 6, 2008, Sanchez's 2005 Bankruptcy was dismissed. CP 145.

On August 29, 2008, Gamlam deeded the Property to Sanchez. This deed was recorded on August 29, 2008 in the Snohomish County records, making Sanchez the record owner. CP 135.

Sanchez applied for a loan with Westar, to be secured by a first lien deed of trust on the Property. Westar obtained a preliminary title commitment showing the status of record title to the Property at that time. It showed that Sanchez held fee simple title and that there were no deeds of trust recorded against the Property. CP 91, 101-107. The title commitment did not make note

of Sanchez's bankruptcy (which had previously been dismissed) or Select's previously extinguished (of record) deed of trust.

Westar loaned Sanchez \$375,000 on October 28, 2008, secured by a deed of trust. The Westar deed of trust was recorded on October 28, 2008. CP 91, 94-99, 147-49. Westar's title commitment noted that its deed of trust lien would be in first lien position. Westar would not have made the loan if its deed of trust had been subject to a senior deed of trust. CP 91-92.

In December 2009, Select apparently realized that it had no record interest in the Property. On December 16, 2009, it recorded with the Snohomish County Auditor the 2006 Bankruptcy Order that voided the Trustee's sale. CP 153-55. This was more than three years after the 2006 Bankruptcy Order had been entered. By this time, Westar had long since loaned \$375,000 to Sanchez and recorded its deed of trust.

The parties do not dispute that the following documents were recorded with the Snohomish County recorder's office on the following dates:

DATE RECORDED	INSTRUMENT	EXHIBIT
05/13/1994	Statutory Warranty Deed to Sanchez	CP 120-21
05/13/1994	Deed of Trust from Sanchez to Washington Mutual (Select's predecessor)	CP 123-30
09/05/2006	Trustee's Deed from T.D. Escrow Services, as trustee of the Select Deed of Trust, to Gamlam	CP 132-33
08/29/2008	Quitclaim Deed from Gamlam to Sanchez	CP 135
10/28/2008	Deed of Trust from Sanchez to Westar	CP 147-49
12/16/2009	Order Voiding 2006 Trustee's Sale	CP 153-55

B. Facts Not Discussed by Select.

Missing from Select's recitation are the following undisputed facts:

1. Westar and its title company, Fidelity, relied on record title in determining that there were no outstanding liens on Sanchez's property and that Westar's deed of trust was in first lien position. CP 91, 115-17.

2. The September 21, 2006 Bankruptcy Order voiding the Trustee's Deed *was not recorded in the records of Snohomish County until December 16, 2009*, over a year after Westar loaned to the Borrower, Sanchez. CP 153-55.

3. Westar made a *commercial* loan to Sanchez. It was not a purchase money loan or a refinance of a personal residence. The loan funds were to be used in Sanchez's business. Westar loaned on the basis of the value of the collateral—here, a single-family residence owned (of record) free and clear of any liens. The collateral had more than adequate value to support the loan made. CP 91. Westar, an asset-based lender, relied on its inspection and valuation of the collateral, along with assurance that its deed of trust would be in first lien position upon making the loan. CP 90-92.

C. Procedural History.

Both the Westar and the Select notes are in default. Westar filed this action, seeking a declaration that its deed of trust has priority over Select's. Select counterclaimed. The parties filed cross-motions for summary judgment to determine which deed of

trust had priority. The trial court correctly ruled that Westar's deed of trust is prior. That decision should be affirmed.

IV. ARGUMENT

A. **Westar Was A Bona Fide Mortgagee Without Knowledge Of Select's Interest. The Trial Court Correctly Held That Westar's Interest Is Prior.**

1. **The Recording Act Gives Priority to Westar's Deed of Trust.**

The Washington Recording Act provides that every real property conveyance not recorded in the proper county recording office "is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration ... whose conveyance is first duly recorded." RCW 65.08.070.

A good-faith purchaser for value who is without notice of another's interest in the real property purchased has a superior interest in the property. *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992). Under Washington law, "a bona fide purchaser of real property may rely upon the record title." *Ellingsen v. Franklin County*, 117 Wn.2d 24, 28, 810 P.2d 910, 912 (1991), quoting *Cunningham v. Norwegian Lutheran Church*, 28 Wn.2d 953, 184 P.2d 834 (1947). See *Koch v. Swanson*, 4 Wn. App. 456, 459,

481 P.2d 915 (1971) (a bona fide purchaser is not required to search beyond the records in the chain of title).

It is hornbook law that a recorded deed of trust has priority over a prior, unrecorded deed of trust. 59 C.J.S. MORTGAGES, § 292. For example, property owner A borrows from and executes a deed of trust in favor of lender B. Lender B fails to record the deed of trust. A then borrows from lender C and executes a deed of trust in C's favor. Lender C, who has no knowledge of B's deed of trust, records. B's deed of trust is valid as against A, but as between B and C, C's deed of trust has priority. See *Paganelli v. Swendsen*, 50 Wn.2d 304, 311 P.2d 676 (1957). That is the situation here.

Sanchez borrowed from Select's predecessor, who recorded a deed of trust. However, as a matter of law, that deed of trust was extinguished when Select completed its foreclosure. 18 William B. Stoebuck, WASHINGTON PRACTICE, REAL ESTATE: TRANSACTIONS, § 19.17 (1st ed. 1995). When Select's trustee recorded his deed to purchaser Gamlam, Select's deed of trust was extinguished of record. The trustee's deed was notice to the world that Select had extinguished its lien in return for cash. Westar was entitled to rely

on that recorded Trustee's Deed and to act upon the notice it imparted. *Cunningham v. Norwegian Lutheran Church*, 28 Wn.2d 953, 956, 184 P.2d 834 (1947) ("We have held without deviation that a bona fide purchaser of real property may rely upon the record title").

It is undisputed that Westar had no knowledge of Select's deed of trust. CP 91-92. In its underwriting, it relied on the record in determining that there were no liens or encumbrances on the Property. *Id.* When Westar loaned, it was like lender C above. Sanchez was the record owner of property that was not subject to any recorded deed of trust. Select may have a valid claim against Sanchez, but as between Westar and Select, Westar's interest is prior.

2. The Bankruptcy Order Could and Should Have Been Recorded.

Select's first argument is puzzling. It begins by correctly observing that a real property "conveyance" must be properly recorded to create constructive notice. The next step in its argument, however, is simply wrong. Select argues that only documents containing specific conveyancing language need to be

recorded to give notice of matters that affect title to real property. It argues that since the Bankruptcy Order did not include such language, either the Order need not be recorded, or could not be recorded.

The Bankruptcy Order is clearly a “conveyance” that can be recorded in order to give notice under RCW 65.08.060(3). That statute defines “conveyance” broadly. 18 William B. Stoebuck, WASHINGTON PRACTICE, REAL ESTATE: TRANSACTIONS, § 13.7 at 108 (1st ed. 1995) (the definition of “conveyance” in RCW 65.08.060 is broad and “open-ended”). The statute defines the term as not only “every written instrument by which an estate or interest in real property is created [or] mortgaged,” but as “every written instrument ... *by which the title to any real property may be affected* ... although the power may be one of revocation only” (emphasis added).

That is precisely what the Bankruptcy Order is. It affects title to real property (by setting aside a deed).² Thus, it falls

² The Order set aside the foreclosure sale and required Select to immediately repay Gamlam, the purchaser at the foreclosure sale. CP 154. The Bankruptcy Order was silent as to its effect on Select’s underlying deed of trust.

squarely within the definition of a document that needs to be recorded to give notice. Select claims an interest in the Property under its deed of trust. That deed of trust was void as against subsequent purchasers because it had been extinguished of record by the Trustee's Deed.

It was permissible to record that Order so that subsequent purchasers would have notice that the Trustee's Deed on record was void. Nothing prevented Select from doing so. In fact, Select successfully recorded the Order in 2009.³ CP 153-55. It could also have re-recorded the original deed of trust to provide notice of its interest, but it failed to do so.

Select's reliance on *Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish*, 111 Wn.2d 219, 758 P.2d 494 (1988), is misplaced. The court in that case held that under RCW 4.56.200, a *money judgment* is not a conveyance that must be recorded in the county recorder's office for it to become a lien on property. *Sablefish* holds that despite this, a money judgment "*may*" be recorded. *Sablefish*, 111

³ The format requirements in RCW 65.04.045 were met by attaching a cover sheet, as allowed in RCW 65.04.047, to a court-certified copy of the Bankruptcy Order.

Wn.2d at 227. That case supports Westar's argument that the Bankruptcy Order could have been recorded.

Select wrongly relies on *Sablefish* in arguing that a court order need not be recorded to provide notice to subsequent purchasers. RCW 4.56.200's exception to the Recording Act, followed in *Sablefish*, is limited to money judgments, which Select does not have. Court orders that affect interests in real property must be recorded in the county auditor's records if they are to serve as constructive notice to later purchasers. *See* discussion in the next section.

B. Knowledge Of The Bankruptcy Action Did Not Impart Constructive Or Inquiry Notice Of The Bankruptcy Order.

1. The Issue.

It is undisputed that the Select deed of trust had been extinguished of record in the county recording office at the time Westar loaned and recorded its deed of trust. It is also undisputed that Westar and its title company knew that the Sanchez bankruptcy action had been dismissed. CP 116, 145, 110. The sole question is whether knowledge of the bankruptcy and its dismissal

imparted notice of the 2006 Bankruptcy Order voiding sale, which appeared only in the bankruptcy court file.

2. A Document Does Not Impart Constructive Notice to Bona Fide Purchasers Merely Because It Is "Public."

Select cites the dissent in *Ellingsen v. Franklin County*, 117 Wn.2d 24, 810 P.2d 910(1991), for the proposition that a public record gives constructive notice. *Ellingsen* supports Westar, not Select. The majority opinion makes it clear that not every publicly filed document provides constructive notice of matters affecting real property. In *Ellingsen*, an easement was recorded and filed in the county engineer's office. It was not recorded with the county recording officer. The court held that this was not sufficient to provide constructive notice. A statute may permit recording in a particular office. However, if the statute does not state that such recording constitutes constructive notice, the recording does not impart constructive notice to subsequent bona fide purchasers.

[T]he statute does not provide that it is intended to give constructive notice. In the absence of such declaration there is no constructive notice.... "The matter of constructive notice from the record is entirely a creation of statute, and no record will operate to give constructive notice unless such

effect has been given to it by some statutory provision.”

Id., 117 Wn.2d at 27 (citations deleted).

In *Ellingsen*, the statute allowing recording and filing of easements with the county engineer did not express any intent that such filings constitute constructive notice. Thus, the recording did not constitute constructive notice. *See also In re Crystal Cascades Civil, LLC*, 415 B.R. 403, 411 (9th Cir. 2009) (an ordinarily prudent person would not be expected to find federal tax liens that were not recorded in county record designated by state law).

In particular, court orders that affect ownership in property, although filed in public court records, do not impart constructive notice unless recorded in the county real estate records. *Murphy v. City of Seattle*, 32 Wn. App. 386, 392-93, 647 P.2d 540 (1982) (“Although the stipulation [affecting property] was of ‘public record’ insofar as it was filed with the clerk of the court as part of a lawsuit, such a filing cannot trigger the protection of the recording act. Accordingly, Murphy did not have constructive notice of the restriction ...”).

3. The Bankruptcy Code Does Not Make Bankruptcy Court Orders, Filed Only with the Bankruptcy Court Clerk, Exceptions to the Recording Act.

Similarly, in this case, the Bankruptcy Code does not provide that orders and pleadings in the bankruptcy court file constitute constructive notice for purposes of state recording schemes. In fact, it does just the opposite. 11 U.S.C. § 549 allows the trustee to avoid a transfer of property of the estate to an otherwise bona fide purchaser if "*a copy or notice of the petition was filed, where a transfer of an interest in such real property may be recorded to perfect such transfer....*" 11 U.S.C. § 549(c). In other words, under the Bankruptcy Code, a purchaser is not expected to be aware of any restrictions a bankruptcy matter might place on the transfer of property unless the bankruptcy petition was recorded in the county auditor's records, where filing must be done to perfect (as against third parties) the claimed interest. Filing in the bankruptcy court file is not enough to impart constructive notice to bona fide purchasers. *See also Beach v. Faust*, 2 Cal.2d 290, 40 P.2d 822, 823 (1935) (the mere pendency of bankruptcy proceedings does not impart constructive notice to a bona fide purchaser).

Select cites *In re Professional Investment Properties of America*, 955 F.2d 623 (9th Cir. 1992), to argue that a bankruptcy pleading can be constructive notice of an interest in real property. That decision, involving a bankruptcy trustee's strong-arm powers under 11 U.S.C. § 544, is limited to its peculiar facts. There, the holders of a note and unrecorded deed of trust in real property filed an involuntary bankruptcy petition against their borrower, listing the note and deed of trust on the petition. The court held that the bankruptcy trustee's knowledge of the contents of the *petition* was inquiry notice of the unrecorded deed of trust, sufficient to defeat his strong-arm powers: "There is no practical reason why a trustee should not be put on inquiry notice by the very petition that created his position." *Id.*, 955 F.2d at 628.

Professional Investment has been limited to its unique facts. *In re Deuel*, 594 F.3d 1073, 1078 (9th Cir. 2010) ("By its terms, *Professional Investment* is limited to *involuntary* [bankruptcy] *petitions* that give notice of an interest") (emphasis added). No involuntary bankruptcy petition was filed against Sanchez.

4. Sanchez's Bankruptcy Did Not Impart Inquiry Notice.

Nor can it be argued that Sanchez's bankruptcy filing itself constituted inquiry notice of the 2006 Bankruptcy Order. By the time Westar loaned to Sanchez, the bankruptcy had been dismissed, and there was no automatic stay in place. Although the title officer discovered the prior bankruptcy through a name search, when he saw that the bankruptcy had been dismissed, he properly inquired no further. CP 116-17.

The title officer searched court records only to determine whether a judgment had been entered that would be a lien on property under RCW 4.56.200(1). *Id.* The Bankruptcy Order setting aside the foreclosure sale could only be discovered by a careful review of the bankruptcy court records in a matter *that had been dismissed*. Since there was no money judgment entered in that bankruptcy action against the debtor, there was no reason to inquire further into the bankruptcy court file. *Id.*

Title companies typically search beyond the documents recorded in the county recording office in order to assure there are no outstanding judgments that might attach to the proposed

collateral. *Id.* That is because, as Select points out by citing *Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish*, 111 Wn.2d at 223, money judgments do not need to be recorded with the county auditor in order to be a judgment lien on real property under RCW 4.56.200. There is no exception, however, to the recording rule for court orders (or non-money judgments) that affect title to property. *Murphy v. City of Seattle*, 32 Wn. App. at 392-93.

Title companies do not search entire court files looking for any order that might affect title, since a document evidencing that effect should be (and ordinarily is) recorded in the county real estate records. In particular, it is not standard practice for a title company to review all documents in a bankruptcy file. As one commentator observes:

Since the standard title search that title insurance companies perform prior to issuing a policy includes only records in the county courthouse, the title insurance company normally will uncover only past bankruptcies in the chain of title, and then only if the land was ordered transferred in the bankruptcy proceeding *and the transferee recorded the bankruptcy court's order with the county recorder.*

Palomar, TITLE INSURANCE IN FORECLOSURES, BANKRUPTCIES AND WORKOUTS, § 14.14 (emphasis added). A dismissed bankruptcy in which no money judgment has been entered does not constitute inquiry or constructive notice of every order and pleading filed in that action.

5. Requiring Purchasers/Lenders to Scour Every Court Document Would be Unduly Burdensome.

If Select's argument were accepted, it would wreak havoc on the record notice system. A party purchasing or extending a loan secured by real property should not be forced to search and analyze every court paper in actions involving a grantor to determine whether its contents might affect title. That would impose a burden that the Recording Act was intended to eliminate.

If a court order is intended to affect title, it must be recorded in the county recorder's office for it to do so. For example, Professor Stoebuck comments that although an interest acquired by adverse possession is inherently off-record, if that interest has been declared by court judgment, a certified copy of the judgment should be recorded. 18 William B. Stoebuck, WASHINGTON

PRACTICE, REAL ESTATE: TRANSACTIONS, § 13.12, at 129 (1st ed. 1995).

That is what the Bankruptcy Code requires. 11 U.S.C. § 549(c). That is what Washington law requires. RCW 65.08.070. Otherwise, there is no notice to a bona fide purchaser of the property interest. The party whose interest is affected by a court order has an affirmative obligation to record that interest if it seeks to protect its interest as against an otherwise bona fide purchaser.

In *Ritchie v. Griffiths*, 1 Wash. 429, 434, 25 P. 341, 342 (1890), the court found that an instrument recorded with the county recorder did not provide constructive notice because it was improperly indexed. In holding that the recording party was responsible for assuring the proper indexing of the instrument, the court emphasized the importance of an accurate recording system, and the policy reasons for limiting a search only to those records that are properly indexed and recorded with the county:

If there was no such [recording statute], and [a purchaser] had abundance of time, and untold patience, he might devote himself to the task of examining the vast accumulations of records, page by page; but with the law in effect, and the universal custom recognized, of examining the

record through the index, if the instrument is not indexed, the law, instead of aiding and protecting the citizen, becomes a delusion and a snare, and a ready vehicle for collusion and fraud. It would be a policy worthy of the consideration of the ancient tyrant, who wrote his laws in small characters, and posted them so high that his subjects could not read them, while, at the same time, he held them accountable for their strict observance. In this connection, we cannot refrain from quoting the language of the court, in *Barney v. McCarty*, that “a deed might as well be buried in the earth as in a mass of records, without a clue to its whereabouts.”

Ritchie, 1 Wash. at 444-45.

Ritchie remains the law of Washington. See *Ellingsen*, 117 Wn.2d at 29 (holding that if all documents designated a “public record” served as constructive notice, “the consequences would be disastrous to the stability and certainty heretofore provided by recording with the county auditor”); *Koch v. Swanson*, 4 Wn. App. 456, 459, 481 P.2d 915 (1971) (to require subsequent lender to search outside the chain of title for prior lender’s off-record instrument “would impose an almost impossible burden upon a party seeking to become a bona fide purchaser This would destroy the strength of our recording system and any justifiable reliance

thereon"). Westar was entitled to rely on the real estate record, but the record provided no notice of Select's interest in the Property.

C. There Is No Evidence That Westar Had Off-Record Inquiry Notice Of Select's Deed Of Trust.

1. Select Had the Burden of Raising Material Facts Regarding Notice Sufficient to Defeat Summary Judgment.

Select had the burden of proving Westar had inquiry notice of its interest in the Property. *Paganelli v. Swendsen*, 50 Wn.2d 304, 308, 311 P.2d 676 (1957); *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436, 439, 302 P.2d 198 (1958). Select must show that Westar had or should have had knowledge of some fact or circumstance which would raise a duty to inquire. *Paganelli, supra*, at 308. Moreover, it must show that, had Westar inquired, the inquiry would have lead to the discovery of the Bankruptcy Order voiding the trustee's sale. *Glaser v. Holdorf*, 56 Wn.2d 204, 352 P.2d 212 (1960). Select has failed to identify any fact that, if Westar had inquired further, would have notified it of the voidance of the foreclosure sale.

2. Sanchez's Loan Application Did Not Put Westar on Notice of the Bankruptcy Order.

Select argues that "red flags" in Sanchez's loan application were sufficient to put Westar on notice of the Bankruptcy Order. Select bases its argument solely on innuendo and recitation of facts that it deems "suspicious" rather than evidence of Westar's knowledge of a fact or circumstance that would raise a duty to inquire. This is not sufficient to raise a material issue of fact. *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 36, 991 P.2d 728 (2000) (non-moving party's burden on summary judgment is not met by responding with conclusory allegations, speculative statements, or argumentative assertions). Further inquiry into the "numerous inconsistencies" and "red flags" on Sanchez's loan application that Select cites would not have led Westar to discover the Bankruptcy Order.

Select simply "presumes" Fidelity reported the foreclosure to Westar, and that foreclosure was inconsistent with Sanchez's loan application stating he had not been foreclosed upon. Appellants' Brief at 6, 21. There is nothing in the record supporting this presumption. In any event, knowledge of a title insurer cannot

be imputed to its insured. *Soper v. Knafllich*, 26 Wn. App. 678, 682, 613 P.2d 1209 (1980) (title agent's knowledge will not be imputed to party to transaction absent evidence of control over title agent). There is no evidence, therefore, that Westar was aware that Sanchez had been foreclosed upon. There is no evidence suggesting that Westar had any duty to inquire further about Sanchez's statement on the loan application denying that foreclosure had occurred.

Even if Westar had been aware of the foreclosure, further inquiry would have revealed that the foreclosing lender had sold to Gamlam at a trustee's sale, and that Gamlam had later deeded the Property to Sanchez. *See* CP 115-16. This was consistent with the understanding that Sanchez held the property in fee subject to no other encumbrances.

Select argues that Sanchez disclosed that he had filed for bankruptcy in the last seven years. Further inquiry, however, revealed that the bankruptcy had been dismissed. CP 116-17, 145 (Sarver Decl., ¶6). There was no reason to suspect that an Order

filed in this dismissed bankruptcy action would affect title to the Property, and no reason to inquire further.

Sanchez noted, on his loan application to Westar, that the “purpose of loan” was “refinance,” that there was a “\$0.00” balance for mortgage debt, and the Property was both an “investment” and “primary real property.” These statements were consistent with Westar’s understanding that: (1) Sanchez resided at the Property; (2) he desired a loan for a business purpose rather than to purchase the Property or to finance construction (“refinance” was closer to that purpose than either “purchase” or “construction,” which were the alternate options provided on the form for “purpose of loan”) CP 109; (3) the Property was not encumbered; and (4) Sanchez desired to use the Property as collateral for his business loan. CP 91-92 (Hogan Decl., ¶3). Nothing in the application was sufficient to “excite apprehension” sufficient to put Westar on notice of Select’s continuing interest in the Property. *Daly v. Rizzutto*, 59 Wash. 62, 65, 109 P.2d 276 (1910) (grantee entitled to rely on grantor’s representation that he was a “single man”).

Sanchez affirmatively represented to Westar that there were no mortgages or loans existing against the Property. CP 91, 110. Westar had no reason to inquire further. It is undisputed that Westar had no actual notice of Select's deed of trust. CP 92-93 (Hogan Decl., ¶ 4). The title commitment revealed no encumbrances. CP 101-107.

Select cites but one case holding that a purchaser had inquiry notice outside the record: *Miebach v. Colusardo*, 102 Wn.2d 170, 685 P.2d 1074 (1984). The court held that a purchaser or encumbrancer could not rely solely on the property records *while ignoring the rights of parties in possession*. The fact that there was a party in visible possession was inquiry notice of that party's interest. Had the purchaser inquired of the party in possession, he would have discovered her competing claim to the property.

Miebach does not help Select. Here, Sanchez was in possession. His possession was entirely consistent with the state of the record that showed him in fee title to the Property. Further inquiry into his possession would have revealed nothing about the existence of the Select deed of trust.

3. Westar's Lending Practices Do Not Raise a Material Issue of Fact Regarding Notice or Good Faith.

Select argues that Westar did not act as a "reasonably prudent lender," and that it therefore cannot be a bona fide purchaser under RCW 65.08.070.

First, Select cites no authority for this ostensible requirement in the Recording Act. Nothing in the Recording Act suggests that a lender must meet any particular lending standards before it can avail itself of the protections of the Act. The only cases cited, *Levien v. Fiala*, 79 Wn. App. 294, 902 P.2d 170, and *Miebach v. Colusardo*, 102 Wn.2d 170, 685 P.2d 1074 (1984), simply recite the general standard for inquiry notice, and have nothing to do with a lender's lending practices.

Second, Westar, which was not in privity with Select, owes no duty to Select to meet any particular lending standards, and Select has no standing to challenge Westar's lending practices. In fact, lenders do not have a legal duty to exercise any particular standard of care, even to a borrower. *Tokarz v. Frontier Federal S & L Assn.*, 33 Wn. App. 456, 459, 656 P.2d 1089 (1982) (no fiduciary duty

on bank to disclose negative facts to borrower regarding construction loan); *Nat'l City Bank v. Syatt Realty Group, Inc.*, Slip opinion, 2011 WL 8144, 7 (E.D. Mich. Jan. 3, 2011) (borrower's allegations that lender ignored "several red flags" in loan application dismissed because there is no legal duty of care between borrower and lender).

Third, even if such a duty to a borrower existed, there is no evidence that Westar did not deal fairly with Sanchez, its borrower. There is no evidence, for example, that Westar charged usurious interest rates, misrepresented the nature of the loan documents, unfairly pushed Sanchez into a loan he could not afford, or sought in any way to defraud him. Nor is there evidence that Westar colluded with Sanchez to defraud Select or anyone else.

Fourth, Select offered no evidence in the trial court of the nature of proper lending standards, or of their violation. In contrast, Westar's president testified by declaration that it was reasonable for an asset-based lender making a business loan to rely primarily on the equity in the collateral. CP 90-91. Select offered no expert—or any—testimony to rebut this. Select had the burden

of offering evidence sufficient to raise a material issue of fact on the proper standard of care of a lender. *McKee v. American Home Products Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). Mere “suspicion” is not adequate to meet this burden.

Fifth, Westar did act prudently for a lender making an asset-based business loan. It reviewed a title commitment, inspected the property, and verified that the collateral had a 60.7 percent loan-to-assessed-value ratio. CP 91-92.

Select asserts that the “very suspicious” difference in the consideration recited in the quitclaim deed from Gamlam to Sanchez should have put Westar on inquiry notice of Select’s interest. The deed from Gamlam put Sanchez back into record title. But no one questions the validity of Sanchez’s title, which is not at issue in this case. Moreover, there is no evidence that inquiry into the circumstances surrounding the deed to Sanchez would have revealed the Select claim to Westar. There is no duty to inquire if the inquiry would not reveal the interest claimed. *Glaser*, 56 Wn.2d at 210.

The worst that can be said about Westar's lending decision is that it made a loan which Sanchez ultimately cannot, or chooses not to, repay. Select made the same mistake. Both parties made what turned out to be a bad loan. The question is not which party more scrupulously followed appropriate lending standards for the type of loan it was making. As discussed below, the question is which party was in a better position to prevent the loss.

D. The Recording Act Protects The Party That Relies On The Record, And As Between Two Innocent Parties, The Party That Could Prevent A Loss By Recording Must Suffer The Loss.

The question is, as between the two innocent parties, which should bear the loss. Under settled law, the loss should be borne by the party that failed adequately to notify the world of its interest.

[That party] has the right and opportunity to see that the work is done as he directs it to be done, in legal manner. No one else has this opportunity, and if, from any cause, he fails to give the notice required by law, the consequences must fall on him. It may be a hardship; but, where one of two innocent persons must suffer, the rule is that the misfortune must rest on the person in whose business, and under whose control, it happened, and who had it in his power to avert it. Any other rule would be abhorrent to our natural ideas of

right, and would render perilous every business enterprise.

Ritchie v. Griffiths, 1 Wash. 429, 434, 25 P. 341, 342 (1890). *Accord*, *Paganelli v. Swendsen*, 50 Wn.2d 304, 310-11, 311 P.2d 676 (1957) (“When applying the rule of comparative innocence, it is impossible for us to escape the conclusion that the plaintiffs [who failed to record their deed] were negligent and should bear the loss”).

In this case, Select had the power to prevent Sanchez from borrowing against the property from an innocent lender. All it needed to do was timely place, in the Snohomish County records, a copy of the Bankruptcy Order. Ultimately, Select did just that, but it was too late. CP 117, 153-55. By that time, Westar had already closed its loan in reliance on a Snohomish County record showing that Sanchez’s title was unencumbered by any prior deeds of trust.

V. CONCLUSION

Westar requests that this Court affirm the superior court’s summary judgment declaring the seniority of Westar’s deed of trust and denying Select’s priority motion.

DATED: July 8, 2011.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on July 8, 2011, a true copy of the foregoing document was served upon counsel of record as follows:

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