

No. 67375-1

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

ROGER GARDNER,

Appellant,

and LYLE SINCLAIR,

Plaintiff,

v.

COLUMBIA STATE BANK, a Washington Bank corporation; SEL,
INC., a Washington corporation; and DOE DEFENDANTS 1-10,

Respondents.

**BRIEF OF RESPONDENTS COLUMBIA STATE BANK, F/K/A,
FIRST HERITAGE BANK AND SEL, INC.**

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 DEC 19 9 AM 12:42



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I. INTRODUCTION

Appellant Roger Gardner was the developer of a 153-acre parcel in Sultan, Washington, which he subdivided into ten 10-acre lots and three contiguous lots of varying acreage, commonly referred to as Lots 10, 11, and 12. Subsequently, Gardner borrowed money from First Heritage Bank, Respondent Columbia State Bank's predecessor in interest (the "Bank")¹ to develop an equestrian boarding and training facility on Lot 11 and to build a residence on Lot 10. Gardner defaulted on his loans with the Bank and filed bankruptcy to avoid foreclosure. With the bankruptcy court's permission, the Bank foreclosed on some but not all of Gardner's lots, and Gardner's bankruptcy case was subsequently dismissed. Having lost the protection of the bankruptcy court, Gardner filed this lawsuit to prevent foreclosure on Lot 10, which was the lot on which his residence was located and the only lot which the bankruptcy court had not previously permitted to be foreclosed. In conjunction with the lawsuit, Gardner also recorded a *lis pendens* on the property. CP at 978. Gardner twice failed to obtain an order enjoining the foreclosure sale. Following the Bank's completion of the foreclosure, the trial court granted summary

¹ First Heritage Bank was placed in receivership by the Federal Deposit Insurance Corporation on May 27, 2011, and then its assets were substantially purchased by Columbia State Bank. Columbia State Bank was subsequently substituted for First Heritage Bank as the proper party defendant. Clerk's Papers (CP) at 24-25; Verbatim Report of Proceedings (VRP) at 9. All references to the "Bank" in this brief refer to First Heritage Bank, however, because all of the operative events predated the acquisition by Columbia State Bank.

judgment in favor of the Bank on all of Gardner's claims. Gardner appeals from the denial of his motions for injunctive relief, the denial of his motion for summary judgment, and the trial court's entry of judgment in favor of the Bank and award of attorney fees.

II. STATEMENT OF THE CASE

A. Background

1. Gardner's Loans From the Bank Were For Business Purposes

In June 2004, through an entity then called YoungGardner, LLC, Roger Gardner purchased approximately 153 acres of undeveloped property in Sultan, Washington to subdivide as a real estate development. Clerk's Papers (CP) at 1031, 1084, 1097. Columbia State Bank (then unrelated to First Heritage Bank) financed the platting process. CP at 1031, 1084. The property was platted into 13 lots. CP at 1031, 1084. Gardner used Lots 10 and 11 as the site of an expansive new home and a horse boarding and training business, "Rising Sun Arabians, LLC."² CP at 1031, 1084.

In 2006, YoungGardner, LLC recorded Covenants on all 13 lots, restricting the use of the property to "single family residences" and expressly limiting any commercial activity thereon to "a cottage business."

² No improvements were constructed on Lot 12.

CP at 1019. Gardner and his partner, Lyle Sinclair,³ planned to operate a horse boarding and training business on Lot 11. CP at 366. They built a large barn on Lot 11 that could accommodate more than 50 horses. CP at 364-65. In 2008, the property was classified as Agricultural and Farm Land for tax purposes. CP at 366, 421.

On February 27, 2007, Gardner obtained a Construction Loan from the Bank, secured by a Construction Deed of Trust on Lot 10, in the principal amount of \$750,000. CP at 1029. On October 31, 2007, Gardner obtained a second loan from the Bank in the principal amount of \$212,160.26, secured by a deed of trust on different property that Gardner owned in Snohomish. CP at 1029, 1084-85. In November 2007, Gardner obtained an extension of credit from the Bank on the Construction Loan to address construction cost overruns and to pay down other debt, resulting in a Modified Deed of Trust. CP at 1029.

In April 9, 2008, after a series of extensions, Gardner's promissory note reflected the November 2007 extension of credit and refinanced the February 27, 2007 Construction Loan into a new promissory note in the principal amount of \$869,688.17. This loan was principally secured by

³ Gardner conveyed an interest in the Lot 10 property to Sinclair, as joint tenants with a right of survivorship. CP at 149-50; *see* CP at 157-58. On November 4, 2009, Sinclair filed a Chapter 7 petition in bankruptcy. CP at 146. Through Sinclair's bankruptcy proceedings, Gardner subsequently purchased Sinclair's interests in the real property and the instant causes of action. *See* CP at 88-89.

Lots 10 and 12. CP at 1029. Each Deed of Trust granted by Gardner in favor of the Bank cross-collateralized all of Gardner's other obligations, debts, and liabilities to the Bank.⁴ CP at 1029, 1072, 1085.

On August 25, 2008, Gardner obtained an additional loan from the Bank for \$102,435.96, secured by Lots 10, 11, and 12 and the Snohomish property.⁵ CP at 1029, 1071. This Deed of Trust, like the others, cross-collateralized Gardner's other obligations, debts, and liabilities with the Bank. CP at 1029, 1072.

B. Gardner Defaulted on Loans and Filed Bankruptcy Twice to Forestall the Trustee's Sales on the Property

In the third quarter of 2008, Gardner's horse boarding and training business suffered a significant loss of customers and earnings. CP at 370, 1085. The economic downturn ended his plans for an equestrian business on the property. CP at 1085. When his three Bank loans⁶ matured in April 2009, Gardner defaulted on them by nonpayment, CP at 1030, and

⁴ The Deeds of Trust provided the following standard language cross-collateralization provision:

CROSS-COLLATERALIZATION. In addition to the Note, this Deed of Trust secures all obligations, debts and liabilities, plus interest thereon of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor, or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, . . .

CP at 1072.

⁵ The Barn construction on Lot 11 was principally funded by a Small Business Association (SBA) guaranteed loan; it was also funded through First Heritage Bank. *See* CP at 1084.

⁶ The maturing loans do not include the SBA Loan on Lot 11, which had a longer term.

the Bank issued a Notice of Default in accordance with RCW 61.24.031. CP at 639.

Gardner filed a Chapter 11 bankruptcy petition, and the nonjudicial foreclosure proceedings were stayed until the bankruptcy court granted relief from the stay on March 18, 2010, as to all of the Gardner properties except Lot 10. CP at 229-30, 1030; *see* CP at 222. The Trustee's Sales on Lots 11 and 12 and the Snohomish property occurred on May 14, 2010. CP at 230, 1030. In Gardner's Bankruptcy Plan, he averred that the horse boarding and training business had effectively shut down in 2008. CP at 1085; *see* CP at 370. The bankruptcy court dismissed Gardner's Chapter 11 case in June 2010, finding that Gardner sought to use the proceedings "simply as a vehicle for delay and to hinder his creditors, without any prospect of a viable reorganization plan." CP at 1004. A new notice of sale was then issued for the sale of Lot 10. CP at 601.

In August 2010, Gardner filed a Chapter 13 bankruptcy petition, which stayed the foreclosure sale of Lot 10. In September 2010, the bankruptcy court dismissed the Chapter 13 case on Gardner's own motion. CP at 1011-12. The Trustee's Sale on Lot 10 was continued until November 5, 2010. On November 4, 2010, Sinclair, a joint tenant and co-borrower with Gardner, filed for bankruptcy, and the Trustee's Sale was again stayed until February 9, 2011, when relief from the automatic stay

was granted. CP at 146. On April 1, 2011, Lot 10 was sold at a Trustee's Sale. CP at 142, 1030.

C. Procedure

1. Gardner's Complaint and Denial of Gardner's First Motion for Injunctive Relief

In October 2010 Gardner and Sinclair filed a Complaint against the Bank, SEL, Inc. (the foreclosing Trustee), and DOE defendants 1-10, seeking a restraining order, injunctive relief, declaratory relief, to quiet title to Lot 10 in favor of Gardner and free of the Bank's lien, and damages arising from a claim for intentional trespass to land and a claimed violation of the Consumer Protection Act (CPA), RCW 19.86 et. seq. CP at 1115. Gardner filed a separate motion to enjoin the Bank from conducting a Trustee's Sale of Lot 10. CP at 1105. Gardner's CPA claims alleged that in May 2010 the Bank deceptively conducted a Trustee's Sale of so-called "agricultural property," and then sought a "deficiency judgment." CP at 1108-09.

The Bank opposed the motion for injunctive relief on the basis that it had never sought a deficiency judgment, and that Gardner's property was not principally or currently used for the production of livestock. The Bank also demonstrated that the Covenants encumbering Gardner's

property barred commercial activity beyond a small “cottage business.”⁷ CP at 1097-98. The Bank presented evidence that Gardner had previously admitted in his Chapter 11 Bankruptcy Plan that the business had been closed for approximately two years due to the lack of revenue. CP at 1097-98. In Gardner’s Chapter 11 and Chapter 13 bankruptcy proceedings, Gardner listed no horses or other livestock as assets in his personal property schedules; in fact, he checked “None” on the schedules’ question about animal assets. CP at 1205, 1246. Instead, he referenced “farm equipment, animals, feed,” valued at the relatively nominal amount of \$5,000. CP at 1205, 1246-47. In the Sinclair Chapter 7 case, Sinclair claimed ownership of six horses, for a combined value of \$3,000.⁸ CP at 1205, 1247.

The trial court found, “I agree with counsel [for the Bank] that the statute doesn’t preclude nonjudicial foreclosures or deeds of trust on anything that is just zoned agricultural,” noting that the property “actually has to be principally used for agricultural purposes and the property in this

⁷ The Covenants provide that the Sultan property “shall be used for single family residential purposes only and no industrial and/or commercial uses or activities shall be permitted or conducted,” with the exception of “operating a home occupation (cottage business) which utilizes up to two employees[.]” CP at 1018.

⁸ By comparison Sinclair’s bankruptcy schedules list a \$45,000 Bayliner boat and a \$10,000 2006 Volkswagen Jetta. CP at 1205. In his Amended Statement of Financial Affairs filed with the Bankruptcy Court on January 11, 2011, Sinclair stated that “debtor partner Roger Gardner and/or debtor gave away approx. 10 non-saleable horses as gifts since Gardner/debtor real properties including horse boarding facilities were being foreclosed.” CP at 1205, 1247.

question is not presently being used in that fashion.” Verbatim Report of Proceedings (VRP) 10/27/2010 at 15. Based on the foregoing facts, the trial court denied Gardner’s motion by written order, finding that his request for injunctive relief rested “entirely on the conclusory statement in the Complaint,[sic] that the property was used for agricultural purposes,” and that Gardner failed to provide any evidence of current livestock production. CP at 980. In its written order, the trial court found that (1) incidental agricultural use does not take the property outside the parameters of nonjudicial foreclosure, (2) the property’s *principal* use must be for the *production* of livestock, (3) Gardner provided no evidence of producing livestock, (4) the principal use of the property as an agricultural operation would conflict with the Covenants, and (5) the property’s current use was for a single-family residence in a residential development and “not [for] an agricultural operation.” CP at 980-81; RCW 61.24.100(1) and (3).

2. Denial of Gardner’s Motion for Partial Summary Judgment

On December 13, 2010, the Bank moved for summary judgment or, alternatively, for dismissal of Gardner’s claims. CP at 964. In response, Gardner untimely filed a Motion for Partial Summary Judgment. CP at 646, 681, 684. The motion hearing was deferred due to the Sinclair bankruptcy proceedings. CP at 207. Several weeks later, Gardner re-filed

his Motion for Partial Summary Judgment, which the Bank opposed.⁹ CP at 340.

On March 22, 2011, Judge Joseph Wilson denied Gardner's Motion for Partial Summary Judgment. CP at 5. The trial court found that the evidence presented demonstrated that the subject property "is not currently nor principally used for the production of livestock, nor given the Covenants encumbering that property and executed by Mr. Gardner is that property susceptible to being principally used for the production of livestock." CP at 6. The trial court also found that because no claim for a deficiency was pending, "the continued assertion that the Bank was seeking a deficiency judgment shall be deemed an argument not made in good faith." CP at 6. The trial court ruled that any claim arising from the completed Trustee's Sale on May 14, 2010, was waived as a matter of law. CP at 7.

3. Denial of Gardner's Second Motion for Injunctive Relief

On March 24, 2011, Gardner again moved for injunctive relief, asserting the same arguments presented in his failed Motion for Partial Summary Judgment. CP at 243. These arguments included Gardner's contention that "the primary and principal use of the parcel at issue (Lot 10) is agricultural." CP at 257. The trial court denied the Motion,

⁹ The Bank's motion was not renewed on the central grounds raised in the December 13, 2010 motion. Later, the Bank filed a new summary judgment motion as described below.

finding that (1) contrary to Snohomish County Local Civil Rule 7(b)(1)(B), Gardner had failed to identify the facts on which his argument depended, and which had not been presented at the earlier injunctive motion hearing, (2) Judge Wilson had rejected Gardner's same arguments on summary judgment, and (3) Gardner waived or was estopped from asserting other claims based on the completed Trustee's Sales. CP at 164-65.

4. Grant of Summary Judgment for the Bank

On April 1, 2011, Lot 10 was sold at a Trustee's Sale, and Gardner moved for reconsideration of the trial court's denial of his Motion for Partial Summary Judgment. CP at 207. The Bank opposed the Motion, CP at 202, and the trial court denied it. CP at 9. On April 18, 2011, the Bank moved for summary judgment on all of Gardner's claims and an award of attorney fees. CP at 14. The Bank included the declaration of its attorney and its attorney's billing records for the case. CP at 32-63.

Just before the hearing date on the Bank's Motion for Summary Judgment, Gardner moved for leave to amend the Complaint, specifically to remove Sinclair as a party and to add an additional CPA claim. CP at 88. The trial court denied Gardner's motion to add the CPA claim finding that it was untimely because "[i]t comes too late in the process," and futile

because “[i]t doesn’t assert any meritorious sorts of claims.” VRP 5/25/2011 at 22.

The trial court granted the Bank’s Motion for Summary Judgment. VRP 5/25/2011 at 34. The trial court found no factual dispute that the loans at issue “were in fact commercial in nature.” VRP 5/25/2011 at 34-35.¹⁰ The trial court also found as a matter of law that there was no deficiency judgment, and that because the CPA claim was based on the completed Trustee’s Sales, it must be dismissed. VRP 5/25/2011 at 35, 38. On June 10, 2011, the trial court entered judgment for the Bank. CP at 20.

5. Award of Attorney Fees for the Bank

The trial court heard argument on the Bank’s motions for attorney fees and substitution of Columbia State Bank for First Heritage Bank. VRP 6/10/2011 at 49, 50. The trial court granted the motion to substitute. CP at 24. Gardner opposed the request for attorney fees, alleging that the time spent (90 hours) on the case and the billing rate (\$375/hour) for the Bank’s attorney, were both excessive. VRP 6/10/2011 at 51. The Bank countered that the time spent on the case was reasonable given that most of work was performed in response to Gardner’s actions, and that

¹⁰ The trial court added, “The declarations indicate that, the purpose of the loans indicate that, and any suggestion to the contrary is just without any support whatsoever.” VRP 5/25/2011 at 35.

\$375/hour was within the market rate for an attorney with the background and level of experience of its attorney. VRP 6/10/2011 at 51-52.

The trial court agreed with the Bank, finding that “the number of hours was driven by responding to the plaintiff’s[sic] actions.” VRP 6/10/2011 at 54. The trial court added, “It appeared to me that the defense counsel has in fact, as he had indicated, tried to be as lean as possible in terms of taking out various hours that were more involved in the bankruptcy, et cetera, and so the number of hours was reasonably expended.” VRP 6/10/2011 at 54. Noting that billable rates are higher in King County than in Snohomish County, the trial court also found, “When I compare [counsel for the Bank’s] expertise,[sic] knowledge, it seems to me that the rate is commensurate with people of his experience and knowledge and that the \$375 per hour is a reasonable rate that I see frequently.” VRP 6/10/2011 at 55. The trial court also noted that the Bank had the right to recover attorney fees and costs under provisions for fees and costs in the promissory notes and deeds of trust executed by Gardner in favor of the Bank. CP at 20. For these reasons, the trial court entered judgment and awarded attorney fees and costs to the Bank in the amount of \$47,537.23. CP at 20.

6. Gardner's Appeal

Gardner appeals the trial court's judgment and orders denying his motions for partial summary judgment, injunctive relief, leave to amend the Complaint, and reconsideration. CP at 1. The Bank and SEL Inc. are Respondents on appeal.¹¹

III. ARGUMENT

A. Gardner's Arguments Challenging the Completed Trustee's Sales Are Moot

Gardner's arguments challenging the completed Trustee's Sales and the trial court's orders denying injunctive relief are moot because the Trustee's Sales Gardner sought to enjoin below have since occurred.¹² A case is moot if a court can no longer provide effective relief. *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004). As a general rule, courts will not review a moot case. *Id.*

Because injunctive relief is no longer available for the completed Trustee's Sales, Gardner's arguments on this basis, *see e.g.*, Br. of App. at 21, 22, 35, 43, including his challenge to the trial court's denial of his motions for injunctive relief, Br. of App. at 25, 28, are moot.

Accordingly, to the extent that Gardner's appellate arguments rest on his

¹¹ Sinclair is not a party on appeal, and the DOE defendants 1-10 are not parties on appeal.

¹² The Trustee's Sale on Lots 11 and 12 occurred on May 14, 2010; the Trustee's Sale on Lot 10 occurred on April 1, 2011. CP at 1030.

underlying challenge to the denial of equitable relief with regard to the completed Trustee's Sales for which no relief is available, this Court should reject them. *Harvest House Rest., Inc. v. City of Lynden*, 102 Wn.2d 369, 373, 685 P.2d 600 (1984).¹³

B. Gardner's Argument Challenging the Denial of Summary Judgment is Unappealable

Gardner's argument challenging the trial court's order denying his Motion for Partial Summary Judgment is unappealable because orders denying summary judgment are interlocutory and not final. Br. of App. at 26. "[N]o matter what the basis may be for refusing summary judgment, the order of denial is interlocutory and not a final judgment for the claim still remains pending for trial." *Rodin v. O'Beirn*, 3 Wn. App. 327, 332, 474 P.2d 903 (1970). Denial of a motion for summary judgment "is generally not an appealable order under RAP 2.2(a) and discretionary review of such orders is not ordinarily granted." *DGHI Enters. v. Pac. Cities, Inc.*, 137 Wn.2d 933, 949, 977 P.2d 1231 (1999). Under RAP 2.3(b)(1), discretionary review may be granted where the superior court has committed an obvious error that would render further

¹³ Gardner seeks to have this Court hold that the April 1, 2011 Trustee's Deed is null and void. (Brief of App. at 49). Such relief is at odds with the purpose of the Deed of Trust Act in promoting the stability of land titles as described in a long line of cases including *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003); *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005); *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163, 189 P.3d 233 (2008) (citing *Plein v. Lackey*, 149 Wn.2d at 227-29); and *Peoples National Bank of Washington v. Ostrander*, 6 Wn. App. 28, 491 P.2d 1058 (1971).

proceedings useless. *Id.*; see *S & K Motors, Inc. v. Harco Nat'l Ins. Co.*, 151 Wn. App. 633, 638, 213 P.3d 630 (2009). Because the order denying summary judgment is not final, it is not appealable in this forum, and Gardner never sought relief from the order by discretionary review. Accordingly, this Court should reject Gardner's arguments based on the denial of his summary judgment motion and the denial of his related motion for reconsideration.¹⁴

C. Gardner's Argument Challenging Summary Judgment Dismissal of His Consumer Protection Act Claim Is Unsupported

1. Gardner's CPA Claim Is Dependent Upon The Bank Having Sought A Deficiency Judgment, Which Has Never Occurred

Gardner argues that the trial court erred in dismissing his CPA claim because disputed issues of fact remained as to whether the Bank violated RCW 61.24.100(1) and 3(b). Br. of App. at 32. But Gardner cannot show that an issue of material fact remained in dispute about whether the Bank violated RCW 61.24.100(1) and 3(b) because this statute is inapplicable. RCW 61.24.100 governs deficiency judgments, but

¹⁴ In his assignments of error, Gardner challenges the trial court's denial of his motion for reconsideration. But this argument fails because Gardner did not thereafter address it in the argument section of his Brief of Appellant. Reviewing courts will not consider assertions that are given only passing treatment and are unsupported by reasoned argument. *Bonneville v. Pierce County*, 148 Wn. App. 500, 518, 202 P.3d 309 (2008); see *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). Gardner's argument on this point also fails under RAP 10.3(6), which requires adequate briefing of arguments to merit appellate review.

no such judgment was sought in this case. In fact, the trial court ruled that Gardner's continued "deficiency judgment" contention would be deemed an argument made in bad faith. *See* CP at 6. Notably, Gardner provides no evidence to counter this ruling. Thus, the record supports the trial court's conclusion that no issue of material fact remained in dispute.¹⁵

Accordingly, the trial court properly granted summary judgment for the Bank.

2. Gardner's Bank Loans Were Commercial in Nature

Furthermore, Gardner's CPA arguments fail because the record shows that Gardner's Bank loans were commercial in nature, as the trial court found as a matter of fact. Although Gardner appears to argue that the loans were not commercial because they were akin to personal consumer or mortgage loans, Br. of App. at 43, there is nothing in the record to support this position. Instead, the record shows that Gardner executed the loans for the commercial purpose of developing his real

¹⁵ Appellate courts review a summary judgment order de novo. *Bonneville v. Pierce County*, 148 Wn. App. at 509 (citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008)). In conducting this review, courts consider all the facts and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id.* (citing *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005)). A court may grant summary judgment only if the record demonstrates the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* (citing CR 56(c)).

property and constructing an expansive residence and a large barn for a horse boarding and training business.¹⁶ CP at 685, 1084.

The record also shows that (1) Gardner expected his investment in equestrian training to “increase the market value of the livestock thereby increasing the businesses[sic] opportunities for success,” CP at 685; (2) Gardner used the loans to build a barn that was capable of accommodating more than 50 horses and to set aside Lot 12 as pastureland, CP at 365-66 (No. 17), 1084; and (3) Gardner’s loan documents reflect that he received a Construction Loan and subsequent loans from the Bank to pay construction expenses and to cover “construction cost overruns.” CP at 364, 1028-29, 1050. These facts support the trial court’s finding that there was no factual dispute about the commercial nature of the loans.¹⁷ *See* VRP 5/25/2011 at 34-35. Because Gardner cannot show that his Bank loans were anything other than commercial in nature for the purposes of RCW 61.24.100, his argument fails.

¹⁶ Indeed, the trespass claim was entirely predicated on the fact that the barn, which was principally located on Lot 11, was constructed so that it also encroached on Lot 10. The barn was the locus of the business activity, when that activity had occurred. *See* CP at 370 (No. 37).

¹⁷ The encroachment of the barn onto Lot 10 is consistent with the fact that Gardner’s Bank loans were “commercial in nature,” as the trial court found below. VRP 5/25/2011 at 34-35.

3. Property Was Not Principally Used For Production of Livestock

Gardner's argument about livestock production also fails because it misreads and misapplies RCW 61.24.030(2). The statute provides that a Trustee's Sale of real property requires a statement "that the real property conveyed is not used principally for agricultural purposes."

RCW 61.24.030(2). Real property "is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods."

Id.

Gardner tried to restrain the Trustee's Sale below by claiming that because the property was legally eligible for agricultural use, the Trustee's Sale was impermissible. Br. of App. at 32, 35. But merely showing that property is used for *some* agricultural activity does not demonstrate that it is "used *principally* for agricultural purposes," as set forth in the statute.

Satisfying the statute requires a three-part showing. The property (1) must produce livestock; (2) the production of livestock must be the property's principal use, and (3) the property's principal use for the production of livestock must be current at the time of the Trustee's Sale. RCW 61.24.030(2). As the record shows, Gardner fails to satisfy each of these three parts.

First, Gardner fails to show that the property produced livestock. The statute defines “agricultural use” as the “production” of livestock. RCW 61.24.030(2). But Gardner submitted no evidence that animals were currently and actually produced, *i.e.*, bred, on the property. The record shows instead that the property’s current equestrian activity, when it occurred, was limited to horse boarding, and the limited breeding activity which had occurred at the property had substantially ended by the time of Gardner’s first bankruptcy.¹⁸ Even if Gardner intended for breeding to occur as part of his equestrian business, the evidence he submitted below showed no current breeding activity on the property when the injunctive relief was sought.

Second, Gardner failed to show that the property was *principally* used for the production of livestock. Gardner listed no horses or other livestock as assets in his bankruptcy schedules; in fact, he checked “None” on the schedules’ questions about animals owned. CP at 1205, 1246. As the trial court found, Gardner represented to the bankruptcy court that the horse boarding business had been defunct since 2008, and that the property was not currently used for that business. VRP 10/27/2010 at 15.

¹⁸ In support of this argument below, Gardner submitted “Competition Records” and miscellaneous documents from an online Arabian Horse Association, CP at 459-513; show records, CP at 451-57; an owner report for Sinclair, CP at 521-24; and several breeding agreements with Rising Sun Arabians. CP at 526. Although Gardner submitted these documents to “show the record of the offspring of our animals,” CP at 367, none of these documents show that a single horse was bred on Lot 10, the property at issue.

Moreover, because of the restrictive Covenants that encumbered the property, Gardner could not have made livestock production the principal use of the property. *See* CP at 272. Thus, regardless of what Gardner might have intended for the property, the record demonstrates that it was not and could not be used principally for livestock production.

Third, Gardner failed to show that the property was used principally for the production of livestock at the time of the Trustee's Sale. The statute specifically contemplates that principal use for the production of livestock is determined at the time of the "Trustee's Sale" on the property; it is not based on a party's historical usage. RCW 61.24.030(2). But at the time of the Trustee's Sale, Gardner's property was used for his single-family residence. CP at 980-81, 1085. The evidence Gardner submitted to support his argument pertains to the property's possible previous or potential use, not its current use at the time of the Trustee's Sale; and Gardner's Bankruptcy Plan averred that the horse boarding and training business had effectively shut down in 2008, two years before the first scheduled Trustee's Sale. CP at 1085; *see* CP at 370. These facts demonstrate that the property was not used for livestock production at the time of the Trustee's Sale.

4. The Trial Court Properly Denied Gardner's Motion for Leave to Amend the Complaint to Modify the CPA Claim

Gardner also asserts that the trial court erred in denying his Motion for Leave to Amend the Complaint to modify his CPA claim. Br. of App. at 42, 45. But the record shows that the trial court properly denied Gardner's Motion because it found that it was untimely filed and futile. VRP 5/25/2011 at 38. Denial of a motion for leave to amend is not an abuse of discretion if the proposed amendment is futile. *Orwick v. Fox*, 65 Wn. App. 71, 89, 828 P.2d 12 (1992). "A motion to amend the pleadings is addressed to the sound discretion of the trial court and will not be overturned except for abuse of that discretion." *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001) (quoting *Culpepper v. Snohomish County Dep't of Planning & Cmty. Dev.*, 59 Wn. App. 166, 169, 796 P.2d 1285 (1990)). Denial of a Motion for Leave to Amend as untimely is proper where the Motion is filed in response to a pending summary judgment motion. See *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 49 P.3d 912 (2002) (trial court did not abuse its discretion by denying the plaintiff's motion to amend the complaint when the plaintiff filed the motion to amend 10 days before the summary judgment hearing); *Del Guzzi Constr. Co. v. Global N.W., Ltd.*, 105 Wn.2d 878, 888-89, 719 P.2d 120 (1986) (trial court did not abuse its

discretion by denying the plaintiff's motion to amend the complaint when the plaintiff filed the motion approximately one week before the summary judgment hearing). Although CR 15(a) is intended to provide freely for leave to amend, it does not contemplate permitting amendments where the result of granting leave for such an amendment would burden the parties and the courts with disposing of it in a subsequent motion to dismiss, or would result simply in rendering litigation more costly, and would consume more judicial resources. *See Robel v. Roundup Corp.*, 103 Wn. App. 75, 89-90, 10 P.3d 1104 (2000), *reversed in part on other grounds*, 149 Wn.2d 35, 59 P.3d 611 (2002); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997), *cited in M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wn. App. 819, 837, 970 P.2d 803 (1999).

Leave to amend shall not be granted if it would cause prejudice to the nonmoving party. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). In determining whether prejudice would result, courts consider potential delay, unfair surprise, or the introduction of remote issues. *Id.* at 505-06.

As the trial court found, Gardner submitted this motion too "late in the process." VRP 5/25/2011 at 38. Granting leave to amend the Complaint at that time would have prejudiced the Bank by delaying the trial court's hearing on the Bank's Motion for Summary Judgment.

Because Gardner filed the Motion for Leave to Amend the Complaint just before the hearing, the trial court found it was untimely filed, VRP 5/25/2011 at 38; and Gardner failed to explain the delay or to articulate a counterargument.

The trial court also found that amending the CPA claim would have been futile because Gardner failed to state a meritorious claim arising from the then-completed foreclosure sales. VRP 5/25/2011 at 38. The record supports this finding. Although Gardner's CPA argument alleged that the Bank had engaged in deceptive acts by conducting the Trustee's Sales, it did not identify these "acts" or explain this theory further. Br. of App. at 42-44. Accordingly, Gardner cannot show that the trial court abused its discretion. Because Gardner's argument challenging the dismissal of his CPA claims is unsupported by the record, this Court should reject it and affirm the trial court's summary judgment dismissal of Gardner's claims.¹⁹

D. Award of Attorney Fees For the Bank Was Reasonable

Contrary to Gardner's final argument, the trial court did not abuse its discretion in awarding attorney fees to the Bank because the amount of

¹⁹ Gardner's proposed Amended Complaint did not seek equitable relief, but Gardner also took no action subsequent to the Trustee's Sale to release the *lis pendens* on the property. CP at 978. Thus, the continuing presence of the recorded *lis pendens* precluded Gardner from availing himself of the claim savings provisions in RCW 61.24.127(1). RCW 61.24.127(2)(d).

fees was reasonable, as the trial court found below. Br. of App. at 48. Courts review attorney-fee awards for an abuse of discretion, focusing on whether the amount charged and the hours expended are reasonable. *See Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). A trial judge has broad discretion in determining the reasonableness of an award. *Id.* To reverse an attorney fee award, the trial court must manifestly abuse its discretion by exercising it on untenable grounds or for untenable reasons. *Id.*

Here, the trial court agreed with the Bank's argument that the hours expended on the case were "driven by responding to the plaintiff's[sic] actions," VRP 6/10/2011 at 54, and that the billing rate for the Bank's attorney "is commensurate with people of his experience and knowledge," for whom "\$375 per hour is [] reasonable." VRP 6/10/2011 at 55. The trial court also found that the Bank had the right to recover attorney fees and costs under the promissory notes and deeds of trust that Gardner executed with the Bank. CP at 20. Because Gardner fails to show that the trial court abused its discretion in awarding attorney fees for the Bank, this Court should affirm the award.

IV. CONCLUSION

In sum, because Gardner's arguments are moot, unappealable, and unsupported by the record, this Court should reject them and affirm the

trial court's judgment, orders denying Gardner's motions, and award of attorney fees. If the Bank prevails on appeal, it is entitled to additional attorney fees and costs under RAP 18.1.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 9th day of December, 2011, I caused a true and correct copy of the foregoing document, "BRIEF OF RESPONDENTS COLUMBIA STATE BANK, F/K/A, FIRST HERITAGE BANK AND SEL, INC.," to be served on the following counsel of record, as described:

VIA HAND DELIVERY TO:
Counsel for Appellant Roger Gardner:

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Dated this 9th day of December, 2011, at Seattle, Washington.


Bonnie Nelson

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