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NO. 69858-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

LAURIE SCHIFFMAN,
Trustee of the C.B. Special Needs Trust
APPELLANT

v.

FINANCIAL FREEDOM, ACQUISITION, LLC
A California Limited Liability Company; and OneWest Bank
F.S.B. A California Corporation
RESPONDENT/CROSS-APPELLANT

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
CAUSE NO. 10-2-09938-5

AMENDED OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Plaintiff, Laurie Schiffman, in her capacity as Trustee of the CB Special Needs Trust, brought this suit to obtain the Court's Declaratory Judgment establishing that the claims of Defendant Financial Freedom Acquisition LLC in the residential property located at 4514 Seahurst Avenue, Everett, Washington, are null and void because Defendants failed to record in Snohomish County the Deed of Trust and enjoining Defendants from continuing to assert any claim of interest in the subject property. Defendants admitted they did not record their Deed of Trust but denied the Plaintiff's allegations in the complaint that their claimed interest should be declared null and void. Defendants offered affirmative defenses and counterclaims against the Plaintiff and later brought in as Third Party Defendants Susan Abolafya, the purchaser of the residence, and MERS, Ms. Abolafya's lender. Defendants alleged that Plaintiff's predecessor in interest to the property, Lanora Bevins, now deceased, had validly executed a Promissory Note and Deed of Trust, among other instruments, relative to a reverse mortgage loan Defendants claim they provided to the decedent, though Defendants appear to have now conceded that Ms. Bevins was not the proper party with whom to contract because she was not Trustee at the time. Defendants also claimed in their counterclaim and third party claim that the third party defendants knew of Defendants' loan and Deed of Trust and continued with their plan to purchase

the property thereby disqualifying them from being considered bona fide purchasers of the property.

Lanora Bevins, whose signature appears on the defendant's Deed of Trust (which was provided to Plaintiff only after this litigation commenced and after Requests For Production were submitted to the defendants), never acted as the trustee of the trust that held the property in question and was therefore not the proper person to have applied for or executed the loan documents for the subject loan. Further, at the time the Deed of Trust was allegedly signed by Lanora Bevins, she was suffering from debilitating dementia and was incompetent to either serve as trustee of the Revocable Trust or to execute the loan documents. Instead, Dexter Welch—Lanora's son—was the trustee of the Revocable Trust. If any security interest in the subject property was to have been placed against the property, he was the only person who held the legal authority to execute the security instrument.

Defendant initially brought its motion for summary judgment on the basis that Lanora, as Trustee, had signed the Deed of Trust, but later appears to have conceded that she was not, in fact the Trustee, and therefore her execution of the reverse mortgage documents was a nullity. Defendant then instead argued that Mr. Welch ratified the Deed of Trust by signing a Consent and Release form specifically relating to his personal rights as an heir of the estate. Mr. Welch never signed any ratifying document in his capacity as

Trustee, and there is no evidence that he was ever aware of the terms of the numerous contracts and other instruments associated with the reverse mortgage and its Deed of Trust. It was error for the trial court to hold that a document Mr. Welch signed in his personal capacity implicitly ratified the Deed of Trust.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting defendant Financial Freedom Acquisition LLC's motion for summary judgment when there is no evidence that the Trustee ever signed or was aware of the terms of the agreement.

2. The trial court erred in finding that the Residual Trust Beneficiary Consent and Release Form signed by Dexter Welch in his personal capacity constituted a ratification of the Deed of Trust.

3. The trial court erred in denying Plaintiff Laurie Schiffman's cross-motion for summary judgment when Defendants have no viable security interest in the Seahurst property which would entitle them to recover any money from the Plaintiff or the sale of the property.

III. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Dexter Welch can implicitly ratify the Deed of Trust against the Trust through actions taken solely in his own personal capacity and when he had no knowledge of the terms of the contract constituting the reverse mortgage.

IV. STATEMENT OF THE CASE

A. History of the Trust.

On or about August 6th, 1991, Charles A. Bevins and Lanora I. Bevins individually and collectively entered into an agreement creating the Charles A. Bevins and Lanora I. Bevins Revocable Trust (hereafter sometimes referred to as "The Trust"). The Trust was funded, in part, by the conveyance of the real property, located at 4514 Seahurst Avenue, Everett, Washington, that is the subject of this action into The Trust. This real property is hereafter referred to as "the real property."

On or about the 11th day of May, 1998, Charles A. Bevins and Lanora I. Bevins amended and restated their Revocable Trust Agreement in which they established the CB Trust. CP 280. The primary purpose of the CB Trust was to provide for the grantors' daughter, CB, a disabled person who has special needs. On or about the 22nd day of August, 2006, after Charles A. Bevins passed away, Lanora I. Bevins amended the Charles A. Bevins and Lanora I. Bevins Revocable Trust Agreement for a third time which, principally, specially set forth the terms and conditions needed for the C.B. Trust to comply with federal requirements to insure that it would continue to qualify for Supplemental Security Income by the creation of a "Special Needs Trust" for her daughter. This Trust then was named the [C.B.] Special Needs Trust. CP 281.

As early as 2003, Laurie Schiffman—niece of Lanora, cousin to C.B., and a lifelong family friend to the Bevins—had noticed a marked diminishment in Lanora's physical and mental condition. CP 329. Lanora was already showing signs of confusion and dementia. *Id.* Additionally, Jerrie Ogden, Lanora's daughter, was acting as the Successor Trustee of The Trust at the time because Lanora could not care for herself or for The Trust. *Id.*; CP 282. In fact, throughout Lanora's life, she had relied on her family to take care of legal and financial matters. CP 281, 327. First her husband and then her children once her husband passed away. CP 281. In fact, when her husband died, Lanora was unable to act as Trustee. *Id.* Jerrie continued to act as the Trustee until sometime in 2005 when Dexter assumed the duties of the Trustee. CP 282, 329.

After assuming the duties as Trustee of the Trust, Dexter was writing and signing checks in order to take care of Lanora. *See* CP 330, 346-83. However, Dexter never set up a trust account in his own name as Trustee. *Id.* Instead, he used Lanora's old personal bank account that she and her husband Chuck had used for years at Cascade Bank, wrote checks for utilities, credit card charges and for the In-home Care Providers on that account that was clearly in Lanora's name personally, and signed the checks in his own name. *Id.*

Meanwhile, Lanora's condition continued to decline. By 2007, it was readily apparent that Lanora was suffering from dementia. CP 282, 330. Indeed, Jerrie would often receive calls from the hospice care providers telling her that Lanora had requested to talk to her; however, by the time Jerrie was on the phone with Lanora, Lanora would be unable to recognize her voice and did not know who Jerrie was. CP 284. By March 2008, Lanora could not even recognize Laurie and Laurie's parents and could not understand why they were visiting her. CP 330-31. She was convinced that Laurie's parents had come to "make a proposition to her" when they had merely come to see her before she would likely pass away. *Id.*

Lanora Bevins died on June 30, 2008, two and one-half months after Defendants allegedly had her sign for the reverse mortgage. Upon her death, all of the assets remaining in the Charles A. Bevins and Lanora I. Bevins Revocable Trust were to pass to the [C.B.] Special Needs Trust, including the residential property herein.

B. Financial Freedom Refused to Provide Documentation Supporting their Alleged Interest.

After Lanora's death, Laurie Schiffman, as trustee of the Special Needs Trust, then undertaking to sell the real property, discovered that there was no Deed of Trust or any other security instrument recorded against the property. CP 335. She tried to follow up on information that she had received

from Dexter Welch, the former Trustee of the Charles A. Bevins and Lanora I. Bevins Revocable Trust, that he may have obtained a reverse mortgage. In doing so, Ms. Schiffman contacted Financial Freedom in Austin, Texas and talked to their representative and agent, Matthew Stoner. *Id.* Mr. Stoner fraudulently told Ms. Schiffman that Financial Freedom had obtained a Decree of Foreclosure upon the real property. CP 336. Mr. Stoner also fraudulently told Ms. Schiffman that the Seahurst property was scheduled to be sold at a foreclosure sale on May 11, 2010, only twenty-one days later. *Id,* 389.

Ms. Schiffman informed Mr. Stoner that she had just assumed the position of Trustee of the CB Special Needs Trust and requested that the foreclosure sale be withdrawn and she be allowed sufficient time to obtain possession of the real property, prepare it for sale, and sell it so she could pay off the note and reverse mortgage, thereby providing additional capital to the CB Special Needs Trust. CP 332, 336. Because Ms. Schiffman did not have copies of any documents pertaining to the claimed reverse mortgage affecting the real property, she also requested that Mr. Stoner provide to her photocopies of the Promissory Note, Deed of Trust or other similar security for the Promissory Note and an accounting as to what allegedly was owed from the Trust to defendant. CP 335. Ms. Schiffman first requested that Mr.

Stoner provide these documents to her on April 29, 2010. Mr. Stoner stated that he would send Ms. Schiffman those documents, but he never did. CP 336.

After Ms. Schiffman's initial request, both Ms. Schiffman and her attorney, Mr. Van Siclen, attempted repeatedly over a six-month period to obtain from Financial Freedom true and correct copies of its purported Promissory Note and Deed of Trust on the real property, without success, as Mr. Stoner failed, refused, and/or neglected to provide such information. *Id.* On May 21, 2010, Mr. Van Siclen asked Mr. Stoner for the original loan documents and "most importantly, the amounts and dates of all disbursements to Dexter Welch who I assume was the individual who applied for the loan and managed it." CP 94. Mr. Stoner never responded with either the loan documents or to refute the assumption that Dexter was the one who had entered into the loan. CP 73. During this time, Mr. Van Siclen confirmed that Defendant still had not recorded its claimed interest in Snohomish County. *Id.* It was important to obtain the necessary information pertaining to a claimed security interest in the property because Ms. Schiffman had by then obtained a Purchase and Sale Agreement to sell the property to Ms. Abolafya, one of the Third Party Defendants. Nothing further happened through the summer months and the Purchase and Sale Agreement lapsed.

In an effort to keep the sale of the property on course to Ms. Abolafya, and at the request of Ms. Schiffman, on September 7, 2010, Mr. Van Siclen

again contacted Mr. Stoner and notified him that Mr. Van Siclen knew that there was still no recorded lien on the property. CP 73-74. He informed Mr. Stoner that Plaintiff may have a purchaser for the property. He again requested the information. CP 97. There was no response from Mr. Stoner.

On September 9, 2010, Mr. Van Siclen again contacted Mr. Stoner and pointed out the fact that Financial Freedom had, for over six months, failed to prove the security interest it claimed to have. CP 99-100. Mr. Stoner then referred the matter to Anna Egdorf, who he falsely claimed was his "counsel." CP 74. In an Email note to Mr. Stoner that was copied to Mr. Van Siclen, Ms. Egdorf then asked Mr. Stoner if he had the Deed of Trust. CP 75-76. There is no evidence that he confirmed that he had the Deed of Trust to Ms. Egdorf, however, and he certainly did not confirm to Mr. Van Siclen. CP 102. A week later on September 17, 2010, after he had still not received any evidence of the security interest, despite leaving two additional voicemails for Ms. Egdorf, Mr. Van Siclen wrote both Mr. Stoner and Ms. Egdorf and made clear that he assumed from their silence over the past months that they had no interest in the property. CP 104. Mr. Stoner was never heard from again, failing even to provide a reply email to Mr. Van Siclen to reassert that Defendants continued to claim an interest in the property.

On September 20, 2010, Ms. Egdorf finally replied to Mr. Van Siclen's email, but did not in any way refute Mr. Van Siclen's stated

assumption that Financial Freedom had no security interest in the property. CP 106. She merely stated that there was no sale date for the property. *Id.* Additionally, although the two spoke on the telephone, Ms. Egdorf still did not offer to provide any proof of the loan. *Id.* Mr. Van Siclen responded to Ms. Bergdorf's email the same day and pointed out what Mr. Stoner had stated to Ms. Schiffman with regard to his false claim of a foreclosure sale, and counsel again stated that he assumed Mr. Stoner did not have a provable Deed of Trust. *Id.* No reply was ever received, and neither Ms. Egdorf nor Mr. Stoner ever again communicated with either Ms. Schiffman or Mr. Van Siclen regarding their principal's claim of an interest in the property. The closing agent handling the purchase/sale of the property refused to close the transaction without obtaining more information on the purported reverse mortgage held by Financial Freedom. *Id.*

Because Laurie Schiffman had informed the closing agent of her conversations with Mr. Stoner, and of the fact that Financial Freedom was continuing to claim an unrecorded security interest in the property, and because sheneeded to verify the existence and legitimacy of the Defendants' lien(s) against the real property, or even the amount claimed as owing against the real property, Ms. Schiffman had no alternative other than to petition the Court for instructions on how she should proceed as the Trustee of the C.B. Special Needs Trust and to enter into an indemnification agreement with the

title insurance company. CP 77. 113-15. The indemnity agreement required her, on behalf of the special needs trust, to hold harmless the title insurance company and to place into the title company's trust account $200,000 from the sale proceeds of the sale of the real property to Third Party Defendant. These were the terms the title company stated they needed to have to close the sale to Ms. Abolafya. CP 337. This would not have been required if the defendants would have provided proof to the plaintiff and to the escrow company of its claimed promissory note and Deed of Trust on the subject property because the security interest would have been satisfied from the proceeds of sale.

C. **The Trustee Never Ratified the Reverse Mortgage.**

Defendants never provided any documentation supporting the existence of a valid loan until April 4, 2012, well after suit had been initiated. Even then the discovery responses were grossly incomplete. For the next two months, Mr. Van Siclen sought supplemental answers from Defendant, and finally on June 20, 2012 filed a motion to compel. It was not until three days before the summary judgment hearing, on December 12, 2012, that Financial Freedom finally provided the document it claims demonstrates that Dexter Welch ratified the Deed of Trust. CP 26-32. The document crucial to this case is entitled Residual Trust Beneficiary Consent and Release Form, which was

signed by Dexter Welch in his personal capacity as an heir of Lanora Bevins and not as the Trustee. That document states, in relevant part:

1. I am one of the remainder / residual beneficiaries under the above-named Trust (the "Trust"). The Trust is the record owner of all or a portion of the Real Property identified above. The Trust is, in whole or part, irrevocable.

2. I understand that the above-named Borrower is the life beneficiary under the Trust. This means that the Borrower is entitled to the use of, and the income from, the Trust assets, including the Real Property, during his/her life. The Trust may limit the power of the Trustee to invade the principal of the Trust for the benefit of the life beneficiary.

4. I understand that the Borrower intends to obtain and receive a reverse mortgage loan from Financial Freedom Senior Funding Corporation. A reverse mortgage loan uses the equity of the Real Property to provide liquid funds to the Borrower for living and other expenses. I understand that this could deplete or eliminate the equity in the Real Property that might otherwise pass to me under the trust.

5. I agree that the reverse mortgage loan is necessary and appropriate for the enjoyment, care, support, maintenance, heath and living expenses of the Borrower, as the life beneficiary of the Trust.

6. I acknowledge the Trustee's authority to (a) authorize the reverse mortgage loan from [Financial Freedom] and (b) encumber the Real Property held by the Trust to secure the reverse mortgage loan.

7. I hereby consent to the reverse mortgage loan from [Financial Freedom] and I hereby release any remainder or residual interest I may have in the proceeds of the reverse mortgage loan.

8. On behalf of myself, my minor children, if any, and my heirs, beneficiaries, representative, executors, trustees, successors and assigns, I release and forever discharge the Trustee, the Trust, and [Financial Freedom] from any claim I or they may have or any liability that may arise from the reverse mortgage loan made by [Financial Freedom] to Borrower or the encumbrance of the Trust property to secure that reverse mortgage loan. This is a release of claims I have or may have arising form or relating to the reverse mortgage loan, including those which I may not be aware of or mentioned in this release. I acknowledge that this release is intended to include in its effect any and all claims which I do not know exist, or which I do not suspect to exist at the time of this release. I realize that I may discover facts in addition to or different from those that I now believe to be true with respect to the subject matter of this release, but it is nevertheless my intention to fully release any and all claims within the scope hereof, whether, past, present or future, without regard to the subsequent discovery of additional or different facts.

9. I acknowledge that I have received full and fair consideration for this Consent and Release, the [Financial Freedom] is relying on this Consent and Release, and that [Financial Freedom] would not make the reverse mortgage loan to Borrower in the absence of this Consent and Release.

10. This Consent and Release is binding upon me, my minor children, if any, as well as anyone claiming by or through me, including my heirs, representatives, executors, trustees, successors, and assigns.

11. This Consent and Release may be executed in any number of counterparts, each of which shall be considered an original with respect to the signing party.

Id. Nowhere in this language is there any indication that by signing this document, Mr. Welch would bind the Trust itself to the reverse mortgage contractual documents. The document makes no mention of the fact that Mr. Welch was Trustee at the time this was executed, and in fact references the Trustee as a separate entity. Instead, it is specifically addressed to his personal rights as an heir to Lanora Bevins. Also conspicuously absent from this document is any indication whatsoever regarding the terms of the loan, including any amount, duration, or associated duties, penalties, fees or costs.

Both parties moved for summary judgment in this case. Defendant was the initial moving party and based its motion on its assumption that Lanora Bevins had executed the numerous reverse mortgage documents, including the note and Deed of Trust, as Trustee of The Trust. Plaintiff answered the Defendant's motion by filing her own Cross-motion for Summary Judgment, pointing out that Lanora Bevins was not the Trustee of The Trust when she allegedly executed it and even if she had been, she was incompetent to have been able to execute the reverse mortgage loan documents. In its Response to Plaintiff's cross motion, Defendant, for the first time, appeared to acknowledge that Lanora Bevins was not the Trustee and thereby the proper person to have executed the loan documents, and presented, for the first time, the document it now relies upon as being the instrument that legally binds The Trust to the loan and its security instrument, entitled "Residual Trust

Beneficiary Consent and Release Form." Defendant argued that Dexter Welch's signing of this instrument constituted a "ratification" on behalf of the Trust thereby binding the Trust to the reverse mortgage.

At oral argument, counsel for both parties agreed that the case turned on whether Mr. Welch ratified the reverse mortgage and associated contracts through his signing, in her own personal capacity, the Residuary Beneficiary Consent and Release document (The Consent). On January 3, 2013, the court properly found that Lanora Bevins lacked authority to sign the note because she was not Trustee at the time it was executed. The trial court erroneously ruled, however, that the language contained in (3.) of the Consent and Release demonstrated that Mr. Welch had "actual and full knowledge of the loan when he signed the release," and affirmatively ratified the loan by signing the document. The trial court thus granted Financial Freedom's motion while simultaneously denying Ms. Schiffman's motion. Plaintiff timely appealed on January 28, 2013. Defendant then cross-appealed on February 11, 2013.

V. ARGUMENT

The heart of this appeal is a dispute over what facts and actions are necessary to agree to or ratify a reverse mortgage contract executed on real property under the control of a valid trust. Defendant Financial Freedom initially improperly obtained a signed contract from an incapacitated individual whose assets were held in a trust for her benefit. No agreement

was ever obtained from the valid trustee which bound the [C.B.] Special Needs Trust to the reverse mortgage and its claimed security. Instead, the Defendant now argues that the Consent and Release form signed by Dexter Welch constitutes his "ratification" of all the terms of the reverse mortgage, including the alleged security.

The standard of review for this case is based on a summary judgment dismissal, in which case appellate courts view the case from "the position of the trial court." *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). A trial court's decision to grant summary judgment is reviewed de novo. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). The reviewing court must consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Here, the trial court erred when it granted Financial Freedom's Motion for Summary Judgment and denied Ms. Schiffman's Cross-Motion for Summary Judgment.

A. Mr. Welch Never Ratified the Deed of Trust

For a ratification to occur on an otherwise voidable contract, after discovering facts that warrant rescission, the party must remain silent or continue to accept the contract's benefits. *Snohomish Cnty v. Hawkins*, 121 Wn.App. 505, 511, 89 P.3d 713 (2004) (citing to *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn.App. 423, 433, 754 P.2d 120, *review denied*, 111

Wn.2d 1019 (1988)). A ratifying party must have acted voluntarily and with full knowledge of the facts. *Id.* (emphasis added). Ratification may be express or implied. *Barnes v. Treece,* 15 Wn.App. 437, 443, 549 P.2d 1152 (1976). The relevant inquiry in determining whether implied ratification has occurred is whether the facts demonstrate an intent by the party to affirm or approve the contract. *Id.* at 443-44. The mere passage of time does not establish ratification. *Atlas Bldg. Supply Co. v. First Indep. Bank*, 15 Wn.App. 367, 370, 550 P.2d 26 (1976). Ratification is normally a question for the jury, and it may be decided as a matter of law only if the evidence is undisputed. *Ward,* 51 Wn.App. at 433. Here, there is no evidence in the record that the Trustee was ever presented with the full contractual terms which he allegedly ratified, or that he remained silent or continued to accept the contract's benefits, or that there are any facts or evidence demonstrating the Trustee's intent to affirm or approve the reverse mortgage and security instrument. The only thing presented into the record of this case by the Defendant are the reverse mortgage documents which they had Lanora Bevins sign together with the Residuary Beneficiary's Consent and Release form, which they presented in reply to Plaintiff's cross motion after they became aware that Lanora Bevins was never the Trustee of the Trust.

At the trial court level, Financial Freedom previously argued that *Swiss Baco Logging v. Halliewicz*, 18 Wn.App. 21, 567 P.2d 1141 (1987),

Snohomish Cnty v. Hawkins, 121 Wn.App. 505, 511, 89 P.3d 713 (2004), and *Ebel v. Fairwood Park 2 Homeowners' Assoc'n*, 136 Wn.App. 787, 150 P.3d 1163 (2007), stood for the proposition that Dexter ratified the Deed of Trust by signing the acknowledgement of his rights as a beneficiary. Financial Freedom argued that Dexter "did more than "remain silent" and that he had actual knowledge of the loan, that he "affirmatively consented to the loan, including a Deed of Trust. In so doing, he ratified the loan. The Trust's argument that the loan was invalid because Dexter Welch was the Trustee, therefore fails." This is an incorrect application of the law.

No directly on-point Washington authority, relating to an implied ratification by a trustee achieved through a limited document he signed regarding his personal rights, was located by counsel. Other jurisdictions, however, have also grappled with similar ratification issues, and have found full knowledge and disclosure of the facts to be necessary. *In re McIntyre's Estate*, 159 Misc. 351, 355, 289 N.Y.S. 10, aff'd as modified on other grounds, 249 A.D. 833, 292 N.Y.S. 746 (2d Dep't 1937), order aff'd, 275 N.Y. 603, 11 N.E.2d 776 (1937), involved a case where The court held that the respondent "was bound to disclose to the petitioner the provisions of the will, the nature of the investment, the possibility of its propriety being questioned, the right to reject or ratify it as well as the effect of a release or discharge given at the time" before seeking ratification. *Id.* at 355. The respondent's

failure to make a full and frank disclosure of the material facts and circumstances surrounding or relating to this investment "is an obstacle to holding that the so-called instrument of release operated as a ratification," noting that "the instrument by its terms is merely a receipt and release of liability for a particular payment. The recital preceding the acknowledgment of payment that a full statement of its account had been submitted to and approved by the petitioner does not justify the conclusion that the respondent made known to petitioner all the facts relating to the investment." *Id.*

In *Prodromos v. Poulos*, 202 Ill.App.3d 1024, 560 N.E.2d 942 (1990), suit was brought to compel a trustee bank to perform on a real estate contract, alleging among other claims that the trustee ratified the contract when it signed associated documents. The court held that "ratification must be of the nature that would justify authorization in the first place and show that the ratifying party fully understood what was being ratified." Id. at 1030. Furthermore, "[t]he signing of the undelivered deed, without showing that appellee fully understood what [it] was doing, cannot be held to be a ratification of the contract." Id. (citing *Bruns v. Huseman*, 266 Ill. 212, 215-16, 107 N.E. 462 (1914)).

Additionally, the court in *In re Mendelson's Will,* 46 Misc.2d 960, 977, 261 N.Y.S.2d 525 (1965), reasoned that "Confirmation and ratification imply to legal minds, knowledge of a defect in the act to be confirmed, and of

the right to reject or ratify it. The cestui que trust must therefore not only have been acquainted with the facts, but appraised of the law, how these facts would be dealt with by a court of equity." In that case, trust beneficiaries brought suit against a trustee on the basis of the trustee's improper disposal of shares of stock of a close corporation. The trustee argued that the beneficiaries ratified the act because they saw a short summary of the accounting and should have raised objections at that time. *Id.* at 977. The court disagreed, and found that this was insufficient to support a finding of ratification because the full facts had not been shown. *Id.*

Although an unpublished case, this Court itself addressed comparable circumstances in *Maple Beach Estates Property Owners Ass'n v. Trotzer*, 162 Wn.App 1022, Not Reported in P.3d (2011 WL 2320563), ruling that full knowledge of the facts is necessary for a ratification. There, a homeowner did not ratify her membership in a homeowners association despite her occasional attendance and participation in association activities over a course of years. *Id.* Trotzer initially purchased her house in 1981, and engaged with the association until 2005, when she disavowed membership. Similar to Defendants here, the homeowners association relied on *Ebel v. Fairfield Park II Homeowners Association* for the proposition that Trotzer's participation over 15 years ratified her membership. In finding *Ebel* distinguishable, the court noted that "[t]he 1972 covenants put property owners on notice they had

to comply with certain requirements or face legal action." *Id. (citing to Ebel,* 136 Wn.App. at 793). These restrictions "were not significantly changed" by the 1998 amendments at issue in that case. *Id.* Therefore, the plaintiff homeowners "had notice of the 1972 and 1998 CCRs and had full knowledge of all the relevant facts" when they chose to participate in the organization for several years. *Id.* The Court then found that "Nothing in the record before us suggests Trotzer had such notice. The Association never recorded its bylaws and there is no evidence they were provided to Trotzer or that she was ever informed the Association could levy assessments for expenses beyond road maintenance." *Id.* This logic is equally applicable to the case currently before the Court.

In the present case, a reading of the document relied upon by Financial Freedom demonstrates that the above-cited cases where ratification has been found are distinguishable. In *Hawkins,* the party disputing a quitclaim deed had taken affirmative steps regarding the deed, including personally making related payments and told witnesses that she had quitclaimed the property. *Hawkins,* 105 Wn.App. at 511. In *Swiss Baco,* the court found that the plaintiff ratified the sale of the timber contracts by claiming an interest in their proceeds, but that this did not constitute ratification of the defendant's alleged acts of misappropriation of a portion of those proceeds. *Swiss Baco,* 18 Wn.App. at 32. In each of those cases, evidence was presented that the parties

were aware or became aware of the material facts of the agreements they were found to have ratified.

Conversely, nowhere in the instrument here nor in any other part of the record, is there language or conduct of ratification, and nowhere in that instrument does it indicate that Dexter Welch is acting on behalf of the Trust. Instead, that instrument simply indicates that the "Borrower" is 'Lanora I. Bevins," that Welch is one of the remainder/residuary beneficiaries of the Trust, that Welch understands that Lanora, as "Borrower" is the life beneficiary under the Trust, that the "Borrower" intends to obtain and receive a reverse mortgage from Financial Freedom Senior Funding Corporation, that Dexter Welch "agrees that the reverse mortgage loan is necessary and appropriate for the enjoyment, care, support, maintenance, health and living expenses of the Borrower," that he acknowledges "the Trustee's authority" to obtain the reverse mortgage and encumber the real property and finally that Dexter consents to the reverse mortgage loan and releases any interest he may have to the proceeds of the reverse mortgage loan. This is insufficient to bind the Trust to the contract. The reverse mortgage documents contain, among other terms, extensive terms regarding interest, default interest, penalties, and bilateral agreements within the loan itself. Mr. Welch had no awareness of these terms at the time he signed the Consent and Release.

Moreover, there is no ratification language contained in this instrument. Dexter signed, and was asked to sign only as a residuary beneficiary, not as Trustee. The argument advanced by the Defense that Dexter Welch's execution of this instrument is a ratification on behalf of the Trust to the reverse mortgage and its ancillary documents and instruments is simply incorrect and not supported by anything in this record or in any legal authority cited to the trial court by the Defendants. There is no evidence in this record supporting the Defendant's claim that he had full knowledge of the facts of the reverse mortgage contract at the time of signing, and there is no evidence that he was ever presented with those facts later. It in fact took years of refusals and a lawsuit to obtain such documents from Financial Freedom. Because neither Plaintiff, Mr. Welch, nor the Trust were aware of the facts of the agreement until this point, no ratification could have occurred.

The trial court's ruling is also problematic for policy reasons. Were the trial court's interpretation of the law to be upheld, it would unduly burden the positions of trustees by continually requiring them to, in circumstances where they may have some interest in trust property, affirmatively assert whether a particular act was done as trustee or as an individual. Judge Learned Hand observed that 'the law ought not make trusteeship so hazardous that responsible individuals … will shy away from it [and] the courts should not impose impractical obligations on a trustee." *Dabney v. Chase Nat. Bank*, 196

F.2d 668, 675 (2nd Cir. 1952). Trustees could become liable for breach of their duties each time they personally signed documents relating in any way to trust property unless that trustee made explicit which capacity in which the document was sign. The alternative, requiring a lender such as Financial Freedom to make the releases they draft explicit as to whether it is to the individual or to the trust, is not burdensome, and will permit easy and accurate determination of such an issue.

The trial court erred in finding that the Deed of Trust had been ratified by Mr. Welch's personal conduct. He never ratified the lien, because without knowledge of the extensive terms of the loan, he could not do so under the law. Financial Freedom does not have a valid security interest against the property, and the trial court should have granted summary judgment for the Plaintiff.

VI. REQUEST FOR FEES

Plaintiff respectfully requests an award of attorneys' fees and costs on appeal under RAP 18.1, RCW 4.84.330, and *Fairway Estates Ass'n of Apartment Owners v. Unknown Heirs, Devisees of Young*, 172 Wn.App. 168, 289 P.3d 675 (2012). Generally in Washington, "attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity." *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). The principle of mutuality of remedy is a

"well recognized principle of equity." *Kaintz v. PLG, Inc.*, 147 Wn.App. 782, 789, 197 P.3d 710 (2008) (quoting *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003)). Where a party has successfully argued that a statute is invalid, and therefore rendered the statute's fee provision invalid, that party is nevertheless entitled to an award of attorney fees if such fees would have been awarded to the opposing party had the statute been deemed valid. Id. Courts have found this same equitable principle to underly the legislature's enactment of RCW 4.84.330, requiring that a unilateral attorney fee provision contained in a contract be applied on a reciprocal basis. *Yuan v. Chow*, 96 Wn.App. 909, 918, 982 P.2d 647 (1999). Thus attorney's fee provisions contained in a contract regarding a lien on real property are available to a party which prevails in having the lien found invalid. *Fairway Estates*, 172 Wn.App. at 182 (citing *Kaintz,* 147 Wn.App. at 789).

Although Plaintiff maintains that there is no valid Deed of Trust, Defendant is relying on the Security Instrument attached to the Deed to seek an award of attorney's fees, and has in fact filed a motion seeking such with the trial court. The Security Instrument contains an Attorney's Fees provision in Article 16, stating that "the losing party must pay the prevailing party, on demand, the latter's reasonable attorneys' fees and expert witnesses' fees and all other reasonable costs it incurred in connection with the arbitration or legal

proceeding." Plaintiff is therefore entitled to her reasonable attorneys' fees and cost incurred to litigate the invalidity of the Deed of Trust and associated contracts.

VII. CONCLUSION

For all the foregoing reasons, this Court should reverse the trial court's denial of plaintiff's cross motion for summary judgment on the first claim and declare that Defendant has no viable security interest in the Seahurst property which would entitle it to recover any money from the plaintiff or the sale of the property. This Court should further reverse the trial court and grant summary judgment in favor of the Plaintiff.

DATED this the 15th day of April, 2013

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Certificate of Transmittal/Proof of Service

The undersigned, under penalty of perjury under the laws of the State of Washington, deposes and states as follows:

That declarant is a citizen of the United States of America and of the State of Washington, living and residing in Pierce County in said State, of legal age, not a party to the above-entitled action, and competent to be a witness herein.

That on the 2nd day of May, 2013, declarant effected service of this Amended Opening Brief of Appellant to the following individual by using the methods stated below:

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DATED this 2nd day of May, 2013 in Auburn, Washington.

Jennifer L. Hamblen - Paralegal