

No. 69858-3-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LAURIE SCHIFFMAN, Trustee of the C.B. Special Needs Trust,
Plaintiff/Appellant,

vs.

FINANCIAL FREEDOM ACQUISITION LLC, a California Limited
Liability Company and ONEWEST BANK, FSB, dba, Financial
Freedom;

Defendants/Counter-Claimant/Third Party
Plaintiff/Respondents/Cross-Appellants

vs.

SUSAN ABOLAFYA and JOHN DOE ABOLAFYA, and their
marital community; MERS AS NOMINEE FOR GOLF SAVINGS
BANK,

Third-Party Defendants

RESPONDENT / CROSS-APPELLANT FINANCIAL FREEDOM
ACQUISITION LLC'S ANSWERING BRIEF AND CROSS APPEAL
BRIEF

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STATE OF WASHINGTON

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INTRODUCTION

Laurie Schiffman, Trustee of the C.B. Special Needs Trust (“C.B. Trust”), originally brought this action to quiet title in certain real property, claiming that the subject deed of trust (“Deed of Trust”) granted to Financial Freedom Senior Funding Corporation (“Financial Freedom”) is not a valid lien. The Deed of Trust is on land (“Property”) that was owned by the Charles A. Bevins and Lanora I. Bevins Revocable Trust dated August 6, 1991 (“Bevins Trust”) and was executed by Lanora Bevins, Surviving Trustee of the Bevins Trust, the borrower. The C.B. Trust alleged that Financial Freedom disclaimed its interest in the Property by not providing copies of loan documents when they were requested by a new trustee of a new trust that acquired the Property by operation of law from Financial Freedom’s borrower. The C.B. Trust further asserted that because Financial Freedom’s Deed of Trust was not recorded, it was not a valid lien on the Property.

Financial Freedom moved for summary judgment, arguing that it has a valid security interest even if the Deed of Trust was not recorded. The C.B. Trust responded to Financial Freedom’s motion by arguing for the first time that Ms. Bevins was not the Trustee of the Bevins Trust when she executed the loan documents, because she suffered from dementia, but that her son, Dexter Welch, was the acting Trustee instead.

Financial Freedom has never conceded that Ms. Bevins was incompetent or that Welch was Trustee of the Bevins Trust when the loan documents were executed. Rather, Financial Freedom's position has always been that, even assuming Welch were the acting Trustee, it still prevails because Welch affirmatively consented to the loan in a notarized "Consent and Release" executed contemporaneously with the other loan documents. In other words, Financial Freedom is protected either way: if Ms. Bevins was the acting Trustee when she executed the documents, the loan is valid; if, instead, Welch was the acting Trustee, he ratified the loan by signing a consent to the loan — which he acknowledged Financial Freedom was relying upon — without objecting to Ms. Bevins's authority to sign the loan documents.

The Court below incorrectly found that Financial Freedom had conceded that Ms. Bevins was not the Trustee of the Bevins Trust when she signed the loan documents; Financial Freedom has never made that concession. The Superior Court, however, reached the correct result by ruling that Welch ratified the loan and granting of the Deed of Trust.

The Trial Court also correctly held that Financial Freedom's Deed of Trust on the Property was valid, despite the fact that it was not recorded.

ASSIGNMENT OF ERROR

The Court erred in finding that Dexter Welch was the acting Trustee of the Bevins Trust.

ISSUES RAISED ON APPEAL AND CROSS-APPEAL

1. Did Financial Freedom concede that Lanora Bevins was not the Acting Trustee when she signed documents encumbering property owned by the Bevins Trust?

2. Are self-serving, inherently contradictory, declarations by Laurie Schiffman and another interested witness sufficient to meet the requirement of clear, cogent, and convincing evidence necessary to establish that Lanora Bevins was incompetency?

3. If Dexter Welch was the Trustee of the Bevins Trust and knew that Lanora Bevins was obtaining a reverse mortgage loan secured by Bevins Trust property and representing that she was the Trustee authorized to sign the loan and security documents, did Welch effectively ratify Ms. Bevins's acts if he did not know the specific terms of the loan and encumbrance?

4. Should Laurie Schiffman be heard to challenge the validity of the Deed of Trust here when she previously represented to another Court that it was valid in order to obtain an advantage in that lawsuit and when

she repeatedly communicated with the lender and others before this lawsuit without questioning the loan's validity?

STATEMENT OF FACTS

A. The Bevins Trust and the C.B. Trust

During their lives, Charles and Lanora Bevins created two trusts. The "Bevins Trust" was created on August 6, 1991. Charles and Lanora Bevins placed much of their property into the Bevins Trust, for their own benefit during their lives and then for the benefit of their children upon the settlors' deaths. Charles and Lanora Bevins designated themselves as the Trustees of the Bevins Trust during their lives. They created the C.B. Trust nearly seven years later on May 11, 1998, for the care of their daughter, Charlene.¹

Ms. Bevins outlived her husband and served as the Surviving Trustee of the Bevins Trust. As of April 2008, the Bevins Trust agreement, as amended, provided that Ms. Bevins was the Surviving Trustee, but if she was unable to act as trustee and did not designate a successor, then Dexter Welch *and* Geraldine Ogden (Ms. Bevins's children from a

¹ CP 486, 493-94

previous marriage), or the survivor thereof, would serve as “Successor Co-Trustees.”²

B. The Financial Freedom Loan

On April 15, 2008, Lanora Bevins, acting as the Surviving Trustee of the Bevins Trust, executed a reverse mortgage loan with Financial Freedom Senior Funding Corporation.³ The loan was secured by a Deed of Trust on the property located at 4514 Seahurst Avenue, Everett, Washington (“Property”).⁴ Under the terms of the loan, Ms. Bevins would receive funds from the lender, which would be repaid in full, plus interest and fees, upon her death or when she stopped using the Property as her primary residence.⁵

As part of the loan approval process, Financial Freedom required the residual beneficiaries of the Bevins Trust to consent to the transaction. As a result, Welch and Ogden each executed a Residual Trust Beneficiary Consent and Release in which they represented, among other things:

3. 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

² CP 513

³ CP 404-18

⁴ CP 420-34

⁵ CP 409, 412-13

living or 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.

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

5. 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.

6. 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 loan proceeds of the reverse mortgage loan.

7. I acknowledge that...[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.⁶

Accordingly, Welch (and Ogden) knew that:

- Bevins was seeking a loan;
- Bevins was applying for the loan in her capacity as Trustee of

the Bevins Trust;

- Bevins was seeking a reverse mortgage loan; and
- Bevins was using the Property as security for the loan.

⁶ CP 26-33. At the time they signed the Consents and Releases, Welch and Ogden were also the designated first and second successor trustees, respectively, of the C.B. Trust. CP 526.

And, with all this knowledge, Welch and Ogden consented to the loan, represented to Financial Freedom that Bevins was acting within the scope of her authority, and certified that the reverse mortgage loan was necessary for Bevins's care.

Just one week before signing the loan documents, Ms. Bevins executed a deed for the benefit of Laurie Schiffman and her husband, Steve Schiffman, in their personal capacities. Specifically, on April 8, 2008, Lanora Bevins, *in her capacity as Trustee*, executed an instrument granting an easement over Bevins Trust property to the Schiffmans, and the Schiffmans countersigned the instrument on the same day.⁷ All three signatures were notarized by S.A. McDonald, a notary public. The notary's acknowledgment reads:

I certify that I know or have satisfactory evidence that LANORA I BEVINS, STEVEN P. SCHIFFMAN, AND LAURIE SCHIFFMAN is/are the person(s) who appeared before me, and said person(s) acknowledged that he/she/they signed this instrument and acknowledged it to be his/her/their free and voluntary act for the uses and purposes mentioned in this instrument.[⁸]

Laurie Schiffman appears as plaintiff in this action in her capacity as Trustee of the C.B. Trust. Schiffman, as Trustee, contends that Ms. Bevins was incompetent to execute the loan documents on April 15, 2008, as a

⁷ CP 35-36

⁸ CP 36

result of dementia that had begun manifesting itself *as early as 2003*.⁹ Schiffman, as an individual, apparently had no such doubts about Ms. Bevins's competence just one week earlier, on April 7, 2008, when Schiffman procured an easement from Ms. Bevins over Bevins Trust property.

C. Loan Maturation and Communications between Financial Freedom and the C.B. Trust

Ms. Bevins died on June 30, 2008. Under the terms of the Bevins Trust, its remaining assets, including the Property, were to be transferred to Schiffman, as Trustee of the C.B. Trust.

In October 2008, Sarah Duncan, the attorney for Welch, who was then acting as Trustee of the Bevins Trust, notified Financial Freedom of Ms. Bevins's death.¹⁰ By letter dated November 25, 2008, Financial Freedom advised Ms. Bevins's estate of the reverse mortgage loan's maturity and stated the full amount that was due and owing, with interest and servicing fees continuing to accrue.¹¹ The loan was not repaid.

On February 17, 2009, Ms. Duncan sent a letter to Financial Freedom requesting the payoff amount for the reverse mortgage loan. Within a week, Nimo Ibrahim, a Maturities Administrator at Financial

⁹ See Appellant's Am. Opening Brief, at 2, 5

¹⁰ CP 36-37

¹¹ CP 439

Freedom, responded via e-mail to Ms. Duncan on February 24, 2009, and advised her that the payoff amount was \$116,504.¹²

On April 2, 2009, Financial Freedom issued a Notice of Intent to Foreclose.¹³ Financial Freedom provided another payoff estimate on May 27, 2009, in response to another request from Ms. Duncan. This payoff estimate was in the amount of \$118,319.87, and provided instructions to pay off the loan.¹⁴

Schiffman and Ms. Duncan began communicating with each other about how to satisfy the loan no later than April 14, 2009. Schiffman sent an e-mail on that date to Ms. Duncan, stating:

I want an accounting of all the funds he [Welch] received from the reverse mortgage loan, which he reported to me he was taking draws "to tide [C.B.] over until the house sold." He says he owes \$120,000. I'm reasonably certain that Lenore [sic] had used about \$60,000 in draws by the time of her death.¹⁵

In May 2009, Ms. Duncan also received correspondence from Financial Freedom outlining the foreclosure process and instructions as to how to obtain an extension of time.¹⁶

¹² CP 447

¹³ CP 449

¹⁴ CP 451-53

¹⁵ CP 455-58

¹⁶ CP 445-46

In August 2009, Schiffman started a lawsuit against Welch, seeking the transfer of all property of the Bevins Trust estate, including the Property, to the C.B. Trust. In a declaration executed on August 9, 2009, Schiffman, acting as Trustee of the C.B. Trust, acknowledged the existence of the reverse mortgage loan and that Ms. Bevins had received funds from that loan.¹⁷ Echoing her statement to Ms. Duncan, Schiffman testified, “there is an existing reverse mortgage loan on the house... I am reasonably certain that Lenora [sic] had used about \$60,000.00 in draws from the reverse mortgage loan at the time of her death.”¹⁸ Schiffman, a “licensed realtor,” argued that the house should immediately be put on the market for sale at a reasonable price, and that she was in the best position to do this.¹⁹ Schiffman further testified that Welch “refused to get the house ready for market in a timely fashion and allowed it to fall behind in payments and now the lender on the reverse mortgage loan is forcing it’s [sic] sale.”²⁰ Finally, she testified that Welch had “let [the Property] fall into a state where the lender has forced him to put it on the market for sale.”²¹

¹⁷ CP 463

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ CP 464

Schiffman was also repeatedly contacting Financial Freedom for information about the loan.²² On February 23, 2010, Schiffman called Financial Freedom to inquire as to the status of foreclosure on the Property.²³ She was informed that there was no sale date for the Property.²⁴ Although she did not receive any different information in the interim, Schiffman represented to the Court in a declaration signed March 16, 2010, that “The house is now in foreclosure with a bank that provided a reverse mortgage loan.”²⁵

Schiffman contacted Financial Freedom on March 25, 2010, and was again told that no sale date had been set.²⁶

On April 15, 2010, the Superior Court hearing Schiffman’s case against Welch rejected Schiffman’s motion to have the Property delivered to her possession, instead directing that the issue of whether the Property should be transferred to the C.B. Trust should be left for trial. The Court also held, “With respect to the alleged foreclosure on the Seahurst

²² CP 467-72. These are contemporaneous notes made by Financial Freedom employees to track activity in connection with a specific loan. They provide a telling background to Schiffman’s version of events, which fails to mention any of her numerous contacts with Financial Freedom from December 18, 2009 (nearly 18 months after Ms. Bivens’s death), until April 19, 2010, (CP 469-70). See Appellant’s Am. Opening Brief, 6-7.

²³ CP 469.

²⁴ *Id.*

²⁵ CP 477

²⁶ CP 469

Property, unless there is some imminent risk and/or financial crisis existing today, that issue will be addressed at trial.”²⁷

The following day, on April 16, 2010, Schiffman contacted Financial Freedom to request another status report on the foreclosure, stating she had been authorized by the Court.²⁸ Schiffman called Financial Freedom again on April 19, 2010, stating that she “needed something in writing to show the court things are close so that they can get approval to sell the property.”²⁹ She was told that the foreclosure was on hold waiting for original documents, and then it would take an additional 30 days to move the process forward.³⁰ Schiffman called yet again on April 20, 2010.³¹ On April 22, 2010, Financial Freedom complied with Schiffman’s request for information showing that “things are close” with an e-mail stating that the loan was in foreclosure with an anticipated sale date of May 11, 2010.³²

Schiffman then took Financial Freedom’s e-mail to the Court and sought immediate transfer of the Property to the C.B. Trust.³³ Schiffman represented to the Court that she would sell the Property to “cure the de-

²⁷ CP 530

²⁸ CP 469

²⁹ CP 470

³⁰ *Id.*

³¹ *Id.*

³² CP 470, 532.

³³ CP 534-44

fault of the reverse mortgage loan.”³⁴ Indeed, in a declaration dated April 26, 2010, Schiffman requested “all documents and records pertaining to the reverse mortgage loan” and stated, “If I can sell the property, I can get it sold, *pay off the reverse mortgage loan* and place the balance of the sales proceeds into the Special Needs Trust.”³⁵

On April 29, 2010, the C.B. Trust entered into a Purchase and Sale Agreement to sell the Property to Susan Abolafya for \$420,000.³⁶ Schiffman inserted herself as the Listing Agent and Broker for the Property. On April 30, 2010, Ms. Abolafya executed an Addendum stating that if the Court did not uphold Schiffman’s authority to act as Trustee on May 6, 2010, the Purchase and Sale Agreement was to become null and void.³⁷

The May 6 hearing was stricken and was ultimately held on June 2, 2010. On June 3, 2010, the Court ruled that Schiffman was to be given immediate access to the Property to prepare it for sale.³⁸ The Court further found “there is a conflict of interest with Laurie Schiffman acting as

³⁴ CP 534

³⁵ CP 540, 542 (emphasis added)

³⁶ CP 546-50

³⁷ CP 552

³⁸ CP 556

listing agent for the Seahurst Property. She is either to waive her fee or commission, or arrange for someone else to list the property.”³⁹

Thereafter, on June 16, 2010, Schiffman e-mailed Financial Freedom, and inquired as to the status of default on the loan. She also stated that there was an offer on the Property.⁴⁰ Financial Freedom responded to Schiffman on June 17, 2010, informing her that the file was on hold and there was no scheduled or anticipated foreclosure sale date.⁴¹

On July 6, 2010, Schiffman executed an “Exclusive Sale and Listing Agreement” on behalf of the C.B. Trust with Skyline Properties, Inc. The Agreement provided that the Property’s asking price would be \$449,950, with a six-percent commission to the broker. In apparent violation of the June 3, 2010, Order, Schiffman was listed as a co-agent to sell the Property.⁴²

On August 2, 2010, the Trust entered into a new Purchase and Sale Agreement for the Property with Derek and Katherine White for \$435,000.⁴³ The Whites ultimately backed out of the contract.

Susan Abolafya was still interested in purchasing the Property. On August 12, 2010, Schiffman executed a third Purchase and Sale Agree-

³⁹ *Id.*

⁴⁰ CP 558

⁴¹ *Id.*

⁴² CP 561-65

⁴³ CP 567-71

ment for the Property on behalf of the Trust, whereby Susan Abolafya would purchase the Property for \$427,000 (“PSA”).⁴⁴ The PSA called for a closing date of September 9, 2010.

In the first week of September 2010, Abolafya and Schiffman executed an Addendum/Amendment to the PSA, extending the closing until after the resolution of “any and all issues related to ... Outstanding reverse mortgage loan and potential recording/lean [sic].”⁴⁵ Thus, both Ms. Abolafya and Schiffman were indisputably aware of the reverse mortgage loan on the Property before closing.

On September 9, 2010, Schiffman (through her counsel) responded to a request from Financial Freedom about the offer on the Property.⁴⁶ Despite the fact that both the Trustee and Abolafya had just executed the Addendum extending the closing date for the PSA, Schiffman’s counsel stated, “I now understand that there is no purchase and sale agreement yet in existence and therefore the information you seek is not available.”⁴⁷ Schiffman’s attorney went on to assert that:

Ms. Schiffman advises that neither your company nor any other company has any recorded lien, whether it be a mortgage, deed of trust or contract, which is a necessity in the State of Washington for any person or organization to try to assert any

⁴⁴ CP 573-77

⁴⁵ CP 584

⁴⁶ CP 581

⁴⁷ *Id.*

kind of lien or other security interest in real property. Ms. Schiffman has located a person who is willing to purchase the property. I do not have the proposed purchase price. Ms. Schiffman has checked the status of the title with a local title company and therefore she has confirmed that your company has no recorded interest in the property. She is therefore in a position to simply sell the property and convey title to the purchaser who will take the property in a first title position ...^[48]

The Trust then offered Financial Freedom \$90,000 to pay off the reverse mortgage loan. This was well below the loan's outstanding balance. And, the Trust gave Financial Freedom 24 hours to accept the offer.⁴⁹

Schiffman was correct that the Deed of Trust had never been recorded. Her attorney's legal conclusions, however, were wrong. Under Washington law, an unrecorded lien is valid and enforceable.⁵⁰ Further, while a purchaser *might* take title free and clear of an unrecorded interest, Schiffman could not sell the Property free and clear of the reverse mortgage loan without misrepresenting the status of title to the buyer. And, in fact, the buyer did know of the lien, as witnessed by the September 7 addendum to the PSA.

The representation by Schiffman's counsel that no purchase agreement existed was also wrong. Indeed, on September 11 and 12,

⁴⁸ *Id.*

⁴⁹ CP 581

⁵⁰ See *Ryan v. Plath*, 18 Wn.2d 839, 863-864, 140 P.2d 968 (1943). Indeed, Schiffman does not challenge this point of law on her appeal.

2010, Abolafya and Schiffman executed yet another Addendum to the PSA, wherein they agreed:

~~Seller agrees to complete any negotiations in connection with Seller's reverse mortgage loan on the property by noon on 9/17/2010, and~~ pay any remaining reverse mortgage loan balance off at closing the time required for or the results of negotiations shall not delay closing past 9/24/2010 and Seller warrants that Seller has sufficient funds to close this transaction regardless of Seller's ability to negotiate with the underlying lien holder.^{51]}

On October 7, 2010, the sale from the C.B. Trust to Abolafya closed. At the closing, Schiffman executed an "Agreement of Indemnification (Hold Back)" to protect the title company. The Indemnification states in pertinent part:

WHEREAS, The [title insurance] Company is unwilling to issue said policy(ies) without an exception(s) to the following item(s), among others, which affect or may affect the title hereto (hereinafter called "Items"):

Potential claim of lien upon the Land to secure indebtedness allegedly incurred due to a "Reverse mortgage loan" loan to, or on behalf of Charles A. Bevins Credit Trust, the Charles A. Bevins and Lanora I. Bevins Revocable Trust, and/or the Charlene Bevins Special Needs Trust from Financial Freedom or successors or assigns. The specific terms of the borrower, lender, and other terms are unknown to The Company and Indemnitors because the alleged lender has not produced a promissory note or mortgage, but has made claim that a lien exists.

...

⁵¹ CP 579. The strike-out appears in the original, with the parties' initials in the adjacent margin.

AND THE INDEMNITOR FURTHER AGREES that for the purposes of carrying out the provisions of this Agreement, the Indemnitor hereby pays The Company the sum of Two Hundred Thousand (\$200,000) and The Company, in its sole discretion, may use any portion or portions of all or said funds for such purposes.^[52]

Both buyer and seller had actual knowledge of the Deed of Trust, but failed to pay Financial Freedom upon the sale of the Property. And, despite funds being placed in a hold-back with the title insurance company, Schiffman did not request a payoff amount from Financial Freedom. The loan remains unpaid.

D. Cross-Motions for Summary Judgment

Schiffman commenced the present lawsuit, seeking a declaration that Financial Freedom has no security interest in the Property, as well as damages for violation of the Consumer Protection Act (“CPA”), negligent misrepresentation, and negligence. Schiffman alleged only one ground for invalidating the security interest: *Schiffman* had never had any copies of the loan or security documents, and Financial Freedom refused to provide proof of its security interest or the amount secured by the Deed of Trust.⁵³

Financial Freedom filed a Motion for Summary Judgment stating that it had a valid, first position lien on the Property because both the C.B.

⁵² CP 589, 590

⁵³ CP 697-708

Trust and Abolafya had knowledge of the reverse mortgage loan and the Deed of Trust. Financial Freedom also moved for summary judgment dismissing Schiffman's claims under the CPA, negligent misrepresentation, and negligence.

Schiffman filed a cross-motion for summary judgment, arguing that Financial Freedom had no viable security interest in the Property. In responding to Financial Freedom's motion, Schiffman argued for the first time ever that Welch, not Ms. Bevins, was Trustee of the Bevins Trust at the time the loan documents were executed. Financial Freedom responded that even assuming — but without conceding — that Welch was the Trustee, the loan and Deed of Trust are valid as a result of Welch's consent and ratification.

The Court ruled that Welch, as Trustee of the Bevins Trust, consented to, and ratified the, loan, so it was enforceable against the trust. As such, the Court found that Financial Freedom has a valid, first-position lien on the Property.⁵⁴

ARGUMENT

Schiffman's notice of appeal refers to the Superior Court's order granting summary judgment to Financial Freedom and denying

⁵⁴ CP 4-6

Schiffman's cross-motion for summary judgment. The actual issues presented by her appeal, however, are considerably narrower than those before the Superior Court. Schiffman's brief challenges only the Superior Court's ruling that Welch ratified the reverse mortgage loan and Deed of Trust. She does not assign error to, or argue against, the Superior Court's conclusions that: (1) the Deed of Trust is valid as between Financial Freedom and the Bevins Trust despite not having been recorded; and (2) Abolafya and her lender are not bona fide purchasers who acquired interests in the Property free of Financial Freedom's security interest.

Out of an abundance of caution, Financial Freedom's cross-appeal challenges the Superior Court's order if it is determined to be a ruling, as opposed to a summary of Schiffman's argument, that Ms. Bevins was not the Trustee when she signed the loan documents because Ms. Bevins was incompetent.

I. STANDARD OF REVIEW

The Court of Appeals makes a *de novo* review of an order granting summary judgment, with the reviewing court performing the same inquiry as the trial court.⁵⁵

⁵⁵ See *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)

II. SUPERIOR COURT INCORRECTLY FOUND THAT DEXTER WELCH WAS THE ACTING TRUSTEE OF THE BEVINS TRUST

In its order, the Superior Court stated, “Indeed, [Ms. Bevins] was not the trustee at the time she signed the note.”⁵⁶ Accordingly, this is the subject of Financial Freedom’s cross-appeal.

Schiffman submitted no documents demonstrating that Ms. Bevins had resigned, or been replaced, as Trustee. Instead, she submitted declarations by Ogden and herself, asserting that Ms. Bevins was incompetent when she executed the loan documents.⁵⁷ From that premise, Schiffman argued that Welch was the Acting Trustee at the time. Despite testimony that Ms. Bevins was under constant care of physicians and other health-care providers, Schiffman presented no medical testimony concerning Ms. Bevins’s competence.

In the Court below, Financial Freedom expressly stated that it was not conceding that Ms. Bevins was not competent and could not act as the Trustee: “Financial Freedom disputes that Lanora Bevins was not competent when she obtained the loan, and nothing in its Response/Reply

⁵⁶ CP 14. The immediate context of this sentence indicates that it is just part of the Court’s summary of Schiffman’s argument. But, in the larger context, particularly that the Court discussed only on the issue of ratification and not Ms. Bevins’s competence, it appears that this sentence might actually be a ruling that she was not the Trustee at the time, especially if the Court mistakenly assumed Financial Freedom had conceded the point.

⁵⁷ CP 279-85, 326-37

should be deemed an admission otherwise.”⁵⁸ Instead, Financial Freedom argued that it ultimately did not matter whether Ms. Bevins was competent and acting as the Trustee, because if Welch were the Trustee, he ratified the loan and Deed of Trust.

If Ms. Bevins was competent, then she was the Acting Trustee at the time she signed the loan documents. Washington law presumes that a party to a contract is competent.⁵⁹ In considering a person’s capacity to enter into a contract, courts consider whether the party executing the contract “possessed sufficient mind or reason to enable him to comprehend the nature, terms and effects of the contract in issue.”⁶⁰ In *Page*, the Court set forth how courts should consider the question of incompetence:

But mere mental weakness falling short of incapacity to appreciate the business in hand will not invalidate a contract ... Where a person possesses sufficient mental capacity to understand the nature of the transaction ... his contract will not be invalidated because he was ... aged or both aged and mentally weak or insane.

...

The test of mental capacity to contract is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged... it must be shown that this unsoundness or insanity was of such a

⁵⁸ CP 49 (n.8). Financial Freedom also asked that the motion be continued in order to conduct discovery into Ms. Bevins’s competence if the Court found there was an issue of fact on that point. See CP 62-63.

⁵⁹ See *Vo v. Pham*, 81 Wn.App. 781, 784, 916 P.2d 462 (1996).

⁶⁰ *Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942)

character that he had no reasonable perception or understanding of the nature and terms of the contract.^{61]}

To overcome the strong presumption that the party executing the contract was competent to bind herself, the party challenging competency must present clear, cogent and convincing evidence.⁶²

The evidence submitted by Schiffman does not meet this high burden of proof to demonstrate incompetence. Ms. Bevins's capacity to enter into the reverse mortgage loan was actually not pleaded in the Complaint in this action — it was first raised in the response to Financial Freedom's counterclaim. Similarly, in the years of her prior litigation against Welch, Schiffman repeatedly acknowledged the existence of Financial Freedom's reverse mortgage loan without ever challenging Ms. Bevins's capacity to enter into the loan agreement — in fact, Schiffman represented to the Court there that Financial Freedom's loan would be paid by selling the Property.

Facing summary judgment in this lawsuit, Schiffman presented only her testimony and that of Ogden to attack Ms. Bevins's competency. Schiffman, however, provided no testimony from any psychologists, psychiatrists, physicians, or other experts qualified to opine on competency,

⁶¹ *Id.*, at 108-09

⁶² *See id.*, at 109

nor did she present any testimony from any other health-care providers who had attended Ms. Bevins in the years before her death.

Moreover, the declarations create their own issue of fact on competence. Ogden testified that, after her parents became incompetent and unable to care for themselves, they executed amendments to the Bevins Trust agreement, including the amendment that created the C.B. Trust, of which Schiffman is the Trustee.⁶³ Obviously, the amendments would be invalid if Mr. and Ms. Bevins were incompetent at the time they executed those. And, while Ogden states that she had been acting as guardian for both her parents “for several years preceding” May 11, 1998, because of their inability to look after themselves, Schiffman testifies that “[i]n the mid to late 90’s,” she was discussing estate-planning with Mr. Bevins, who went to his lawyer at her suggestion to have the May 11, 1998, amendment to the Bevins Trust prepared.⁶⁴ Schiffman also “convinced [Mr. Bevins] to purchase a small condominium ... on Mercer Island” in 1998, which, again, would be after he became incompetent, according to Ogden.⁶⁵

Two other events bolster the likelihood that this testimony is questionable, if not outright fabricated. First, Schiffman herself engaged in a

⁶³ CP 280-81 (¶¶ 4-8), 282-83 (¶¶ 9-14)

⁶⁴ CP 281(¶ 6), CP 328 (¶ 5). This is especially ironic, because it is the May 11, 1998, Amendment that created the C.B. Trust. If the Bevinses were then incompetent, the C.B. Trust never validly came into existence.

⁶⁵ CP 327 (¶ 4)

real-property transaction with Ms. Bevins in April 2008. Just one week before Ms. Bevins signed the Financial Freedom loan documents, Schiffman and her husband acquired an easement over Bevins Trust property through an instrument executed by Ms. Bevins, as Trustee, as part of “an I.R.S. Section 1031 Tax Deferred Exchange.”⁶⁶ Schiffman — who describes herself as a “licensed realtor” and a real estate broker or agent⁶⁷ and purportedly gave estate-planning advice to Mr. Bevins⁶⁸ — understands that a conveyance is invalid if the grantor is incompetent; presumably, then, when she countersigned the grant of easement in March 2008,⁶⁹ she believed Ms. Bevins was utterly competent to execute that instrument.

The second event was the final amendment to the Bevins Trust. On June 20, 2010 — three months after Ms. Bevins signed the Financial Freedom loan documents — she executed the “Fourth Amendment to the Charles A. Bevins and Lanora I. Bevins Revocable Trust Agreement.”⁷⁰ The Fourth Amendment made a new distribution of personal property; ensured that Ogden would receive no distribution other than tangible personal property; made a distribution of the trust’s remainder; and changed the

⁶⁶ CP 35-36

⁶⁷ CP 330, 463, 478, 542

⁶⁸ CP 327-28

⁶⁹ CP 35. Interestingly, both the grant of easement and the Deed of Trust were notarized by the same person. *Compare* CP 36 *with* CP 432.

⁷⁰ CP 480-84

provision for a successor trustee to “Lanora I. Bevins.” The document is signed twice by Ms. Bevins in her capacities as “Surviving Grantor” *and* “Trustee.” The Fourth Amendment is notarized by Sarah E. Duncan, the attorney. Thus, after Ms. Bevins signed the loan documents and just ten days before her death, Ms. Duncan — who did not submit a declaration supporting Schiffman’s claim that Ms. Bevins was incompetent — met with Ms. Bevins, notarized her signature on an amendment to the Bevins Trust in her capacity as “Trustee,” and presumably was of the opinion that Ms. Bevins was competent to sign the document.

In light of these two events, Schiffman’s allegations that Ms. Bevins was “out of it,” “had absolutely no understanding of who we were or why we were there,” and “was completely incompetent” in March 2008 should be deemed incredible as a matter of law.⁷¹

Ogden’s testimony was similarly contradictory to her representations to Financial Freedom at the time of the loan, upon which it relied in making the loan. On March 22, 2008, she executed the Consent and Release form in which she acknowledged Ms. Bevins’s authority to enter into the reverse

⁷¹ CP 330-31. Of course, if Schiffman’s testimony about Ms. Bevins’s mental state and lack of business acumen is true, the obvious implication is that Schiffman and her husband took advantage of a mental incompetent whom they knew was not the acting trustee and had no authority to sign the grant of easement in March 2008.

mortgage loan.⁷² The form further recited that Ogden “agree[d] that the reverse mortgage loan [was] necessary and appropriate for [Lanora Bevins’] enjoyment, care, support, maintenance, health and living expenses.”⁷³ In other words, Ogden represented to Financial Freedom that her mother had the authority to enter into the reverse mortgage loan, and that the reverse mortgage loan was required for her on-going care. Ogden’s new allegation that her mother was “fully mentally incompetent” is contradicted by her representations when the loan was made.

It is not enough to show that Ms. Bevins experienced mental infirmity. Instead, Schiffman must show that not only was Ms. Bevins mentally unwell, but also that she could not understand the implications of the reverse mortgage loan contract. Ultimately, the “evidence” of incompetency alleged by Schiffman is only in the form of two self-interested declarations that contradict the declarants’ own contemporaneous actions at the time of Ms. Bevins’s alleged incompetency. These declarations failed to establish “clear, cogent and convincing” evidence required to overcome the strong presumption of competence.

At most, Schiffman only created an issue of fact as to whether Ms. Bevins was competent when she signed the loan papers and, by extension,

⁷² CP 30-33

⁷³ *Id.*

whether she was the acting Trustee of the Bevins Trust as of April 15, 2008. Assuming the Superior Court actually ruled on this issue, the Court should not have found that, as a matter of law, Ms. Bevins was incompetent and thus not acting as Trustee at the time.

III. EVEN IF DEXTER WELCH WAS THE ACTING TRUSTEE, HE RATIFIED THE LOAN AGREEMENT

Even assuming, *arguendo*, that Dexter Welch was Trustee of the Bevins Trust and only he had authority to obtain the loan, he ratified the loan and thereby validated it.

Ratification can occur when a party intentionally assumes an obligation without inquiry or accepts the benefits of the acts.⁷⁴ “A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, [the party] remains silent or continues to accept the contract’s benefits.”⁷⁵ “The party must act voluntarily and with full knowledge of the facts.”⁷⁶ To determine if implied ratification occurred, the court looks at whether the facts demonstrate an intent to affirm or approve the contract.⁷⁷ Ratification may be a question of law if the evidence is undis-

⁷⁴ See *Stroud v. Beck*, 49 Wn.App. 279, 286, 742 P.2d 735 (1987)

⁷⁵ *Snohomish County v. Hawkins*, 121 Wn.App. 505, 510-11, 89 P.3d 713 (2004), *rev. denied*, 153 Wn.2d 1009, 111 P.3d 1190 (2005)

⁷⁶ *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn.App. 787, 793, 150 P.3d 787 (2007)

⁷⁷ See *id.*

puted.⁷⁸ “Regardless of the other party’s knowledge or good faith and regardless of the fairness of the terms ... the power to affirm or disaffirm may be exercised on [the incompetent person’s] behalf by his guardian or after his death by his personal representative.”⁷⁹

Here, Welch did more than “remain silent.” Welch, in fact, *actually* knew about the loan and consented to Ms. Bevins’s execution of the documents. In a notarized document, Welch represented that: (1) he understood the implication of the reverse mortgage loan; (2) he agreed the loan was necessary for Ms. Bevins’s care; (3) Ms. Bevins had the authority to enter into the reverse mortgage loan; and (4) he consented to the loan, including the Deed of Trust.⁸⁰

Schiffman herself provides evidence that Welch ratified the loan. She states that she contacted Financial Freedom “to follow up on information that she had received from Dexter Welch, the former Trustee of the [Bevins Trust], that he may have obtained a reverse mortgage loan.”⁸¹ In an April 14, 2009, e-mail to Ms. Duncan, Schiffman stated,

I want an accounting of all the funds he [Dexter] received from the reverse mortgage loan, which he reported to me he was taking draws ‘to tide Charlene over until the house sold’. He says he owes \$120,000.00.

⁷⁸ See *Ward v. Richards & Rossano, Inc.*, 51 Wn.App. 423, 433, 754 P.2d 120 (1988)

⁷⁹ RESTATEMENT (2ND) CONTRACTS, §15, cmt. d

⁸⁰ CP 26-29

⁸¹ Appellant’s Am. Opening Brief, 6-7 (punctuation in original).

I'm reasonably certain that Lenore had used about \$60,000.00 in draws by the time of her death. I believe this information came from Dexter.^{82]}

These uncontroverted facts are more than sufficient to establish ratification. Attempting to avoid this conclusion, Schiffman cites a number of cases to argue that Welch lacked sufficient knowledge of the loan's specific terms for his acts to constitute ratification.⁸³ This argument fails for four reasons. First, it was not raised in the trial court. Second, there is no record support for it. Third, it misses the point. And, fourth, the cases cited by Schiffman are not apposite.

It is axiomatic that a matter not presented to the trial court will not be considered when presented to an appellate court.⁸⁴ Schiffman argued in the Superior Court that Ms. Bevins was incompetent, Welch was the Acting Trustee, and the Residual Trust Beneficiary Consent and Release did not contain "ratification language" and was signed by Welch only as a residuary beneficiary.⁸⁵ Schiffman never argued that Welch "had no awareness of [the reverse mortgage loan's terms] at the time he signed the Consent

⁸² CP 456

⁸³ See Appellant's Am. Opening Brief, 18-20. Schiffman also cites an unpublished opinion of Division I. See Appellant's Am. Opening Brief, 20-21. Because this violates GR 14.1, Financial Freedom does not address that case.

⁸⁴ See *Orkney v. Valley Cement Co.*, 43 Wn.2d 338, 344, 261 P.2d 114 (1953)

⁸⁵ CP 253-75, CP 19-22

and Release.”⁸⁶ In fact, Schiffman could not have made this argument below because it would have required Welch’s testimony about his knowledge, and Schiffman presented no evidence whatsoever as to Welch’s knowledge.

Of course, because Schiffman presented no evidence of Welch’s knowledge, there is nothing in the record on appeal to determine what Welch knew. Accordingly, the argument must be rejected as unsupported by substantial evidence.

Furthermore, Schiffman’s argument does not correctly frame the question before this Court. The Residual Trust Beneficiary Consent and Release signed by Welch explicitly stated that Ms. Bevins was taking out a loan using Bevins Trust property as collateral. Assuming for the sake of argument that Welch was then the Acting Trustee, he certainly knew that he was not signing any documents encumbering the Bevins Trust property. Thus, the proper inquiry is, “Did Welch ratify Ms. Bevins’s actions in representing that she was Trustee of the Bevins Trust and had authority to encumber the Trust’s property?” Welch had all the necessary information to know what Ms. Bevins was doing when he signed the Consent and Release — the specific terms of the reverse mortgage loan and Deed of Trust were irrelevant to his agreeing that Ms. Bevins could encumber Bevins Trust property. By signing the Consent and Release and not advising Financial

⁸⁶ Appellant’s Am. Opening Brief, 22.

Freedom or anyone else that Ms. Bevins lacked such authority, Welch clearly ratified her actions.⁸⁷

Finally, the cases cited by Schiffman are not persuasive. The controversy here asks whether a third party who contracted with a beneficiary can defend against the trustee's claim by asserting the trustee ratified the beneficiary's actions. Two cases on which Schiffman relies involve claims by a beneficiary against the trustee, who defended by arguing that the beneficiary ratified the trustee's actions. The third case cited by Schiffman presents a transaction more similar to the one here, but the case is factually distinguishable.

In *In re Estate of McIntyre*,⁸⁸ the beneficiary requested his share from a testamentary trust, which the trustee paid after extracting the beneficiary's signature on a receipt stating that the sum received was in full payment of his distributive share. The beneficiary later sued the trustee on the ground that the trustee had made an investment that violated the trustor's

⁸⁷ If Welch signed the Consent and Release without reviewing the loan documents, then we can assume that he did not consider their terms to be material to his decision. *Cf.*, *Thiel v. Miller*, 122 Wash. 52, 55, 58-59, 209 P. 1081 (1922) (Parties not entitled to rescission due to claimed "mistake" when they agreed to assume a loan, but did not know when the principal was due, whether installments were due, nor the interest rate, as their assumption of the loan without that information was a manifest conclusion that such information would not influence their action).

⁸⁸ 159 Misc. 351, 289 N.Y.S. 10 (Queens Co. Surr. Ct.), *modified*, 249 App. Div. 833, 292 N.Y.S. 746 (2d Dep't), *aff'd without opinion*, 275 N.Y. 603, 11 N.E.2d 776 (1937)

instructions. The trustee argued the receipt constituted a ratification of the investment. The trial court stated,

“To establish a *ratification by a cestui que trust*, the fact must not only be clearly proved, but it must be shown that the ratification was made with a full knowledge of all the material particulars and circumstances, and also in case like the present, that the cestui que trust was fully apprised of the effect of the acts ratified, and of his or her legal rights in the matter. ... The cestui que trust must therefor not only have been acquainted with the facts, but apprised of the law, how these facts would be dealt with by a court of equity. All that is implied in *the act of ratification, when set up in equity by a trustee against his cestui que trust*, must be proved, and will not be assumed.”^[89]

Similarly, *In re Mendleson's Will*⁹⁰ involved a trustee's accounting and the beneficiaries' objections. The trustee there asserted ratification by the beneficiaries as a defense against their claims.⁹¹

Estate of McIntyre and *Mendleson's Will* each are concerned with protecting the beneficiary to whom the trustee owes a fiduciary duty. In those cases, the trustee sought to avoid paying damages to the beneficiary by arguing the beneficiary had ratified the trustee's actions. The New York courts understandably imposed on the trustee a heavy burden of

⁸⁹ *In re Estate of McIntyre*, 159 Misc. at 354-55, *supra*, quoting *Adair v. Brimmer*, 74 N.Y. 539, 554 (1878) (emphasis added). The New York Appellate Division did not reach the question of ratification, because it concluded that the trustee's investment was authorized and “modified” the lower court's order by striking the provision awarding Willis McIntyre his distributive share in cash. See *In re Estate of McIntyre*, 249 App. Div. 833, *supra*. As a practical matter, this effectively reversed the lower court's order, albeit on a ground other than ratification.

⁹⁰ 46 Misc.2d 960, 261 N.Y.S.2d 525 (Albany Co. Surr. Ct. 1965)

⁹¹ See *id.*, at 976-78, 261 N.Y.S.2d at 543-44

proving that the transaction's terms were fully disclosed to, and understood by, the beneficiary before ratification would be found. To hold otherwise would weaken the trustee's absolute duty of loyalty to the beneficiary.

This case, however, is much different. Here, it is not the beneficiary asserting the trustee acted wrongly. Rather, it is a third party — Schiffman — who is challenging actions by the beneficiary — Ms. Bevins — and arguing that the trustee — Welch — did not ratify them. Fiduciary duties run from Welch to Ms. Bevins, and those are not implicated when the question is whether Welch ratified Ms. Bevins's actions in executing the loan documents. Thus, protecting against breach of the fiduciary relationship is not an issue, and there is no need to impose some heightened standard of proof for establishing ratification.

The last case cited by Schiffman does involve a third party asserting ratification against a trustee. In *Prodromos v. Poulos*,⁹² Poulos, the beneficiary of a trust, whose trustee was First National Bank of Skokie, signed a contract as agent of the trustee to convey trust property to Prodromos. Under the terms of the trust, Poulos had power to direct the trustee to dispose of property, but he was not authorized to act in the

⁹² 202 Ill.App.3d 1024, 560 N.E.2d 942 (1990), *rev. denied*, 135 Ill.3d 553, 567 N.E.2d 341 (1991)

trustee's name. After contracting with Prodromos, Poulos caused the trustee to issue a trustee's deed conveying the property to a different trust, along with two other, related documents. Prodromos sued to obtain title to the property, arguing that the trustee bank ratified the contract signed by Poulos by issuing the three documents. The Illinois Court of Appeals rejected Prodromos's argument, noting that "the document ratifying an action must show that the principal fully understood that ratification included the contract at issue."⁹³

In this case, the writings referred to transfer of the specific property at issue but did not mention the Prodromos-Poulos sales contract. There are no allegations in the complaint that the Trustee Bank signed the documents with full understanding that these papers were connected with the Prodromos-Poulos contract.^[94]

The situation here is markedly different. Welch signed a document that did far more than "reference" the Financial Freedom loan to Ms. Bevins. The Consent and Release set forth: (i) the loan number; (ii) Ms. Bevins was the borrower; (iii) the specific property that would serve as collateral; (iv) the collateral was owned by Bevins Trust; (v) the loan was in the nature of a reverse mortgage loan that uses the equity of the encumbered property; and (vi) the loan proceeds would be used for Ms. Bevins's enjoyment, support, maintenance, and health and living

⁹³ 202 Ill.App.3d at 1029, 560 N.E.2d at 946, *supra*

⁹⁴ *Id.* at 1030, 560 N.E.2d at 947

expenses. Welch also acknowledged that the Trustee had authority to authorize the loan and to encumber the property.⁹⁵ Were this case in Illinois, it is all but certain that Welch would be deemed to have ratified the Financial Freedom loan.

Nor does this impose unfair burdens upon Welch, as Schiffman argues.⁹⁶ Schiffman's concern that a trustee with a common interest in the trust's property will have to continually monitor his or her actions ignores the trustee's duty of loyalty to the beneficiaries:

[T]he duty of a trustee, not to profit at the possible expense of his beneficiary, is the most fundamental of the duties which he accepts when he becomes a trustee. It is a part of his obligation to give his beneficiary his undivided loyalty, free from any conflicting personal interest^[97]

In short, it is Schiffman's proposed paradigm that would throw the law of trusts on its head: a trustee with a common interest in trust property could act without liability to the trust by simply stating that she signed a document in her personal capacity and was not obligated to use the information

⁹⁵ CP 28

⁹⁶ See Appellant's Am. Opening Brief, at 23-24

⁹⁷ *Dabney v. Chase Nat'l Bk.*, 196 F.2d 668, 670 (2d Cir. 1952). *Dabney* addressed two transactions by the trustee there, holding that only the first violated the trustee's duties to the beneficiaries. Schiffman's quotation (see Appellant's Am. Opening Brief, p. 23) is from the Second Circuit's discussion of the second transaction, and is preceded by the Court's observation, "[T]here must come a point at which [the trustee] is not bound to take against himself a future chain of events, *each link of which carries a substantial coefficient of improbability.*" *Id.*, at 675 (emphasis added). Upon signing the Consent and Release, Welch undisputedly had knowledge of the Financial Freedom loan and its security with trust assets, and there was essentially no "coefficient of improbability" that the transaction would be consummated.

obtained from that document to protect the trust's interests. This would eviscerate the trustee's fundamental duty not to profit at the expense of her beneficiary.

The Court below correctly found that Welch ratified the loan documents and deed of trust.

IV. SCHIFFMAN'S ATTACK ON THE FINANCIAL FREEDOM LOAN IS INCONSISTENT WITH HER PRIOR REPRESENTATIONS AND CONDUCT

Before Schiffman commenced this lawsuit to declare that the Financial Freedom loan is invalid, she repeatedly and consistently acted and represented that the Financial Freedom loan was valid and the Deed of Trust was an existing lien on the Property. Her present attack, therefore, should not be entertained.

First, Schiffman is judicially estopped from now challenging the reverse mortgage loan's validity. Judicial estoppel applies when:

(1) a party asserts a position that is clearly inconsistent with an earlier position; (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.^[98]

In her lawsuit against Welch, Schiffman used the existence of the reverse mortgage loan to wrest control of the Property away from Welch.

⁹⁸ *Arkinson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007) (citations omitted)

Schiffman made numerous representations to the Court affirming the existence of the reverse mortgage loan, the threatened depletion of the C.B. Trust's assets that would occur if the Deed of Trust were foreclosed against the Property, and her intention to sell the Property to pay off the loan. Schiffman never took the position in her first lawsuit that the Financial Freedom loan and Deed of Trust were invalid. To the contrary, she used the existence of that loan and its pending foreclosure to persuade the Court to order immediate transfer of the Property to her possession.

If this Court now rules that the reverse mortgage loan and Deed of Trust are invalid, it will mean that Schiffman obtained a benefit in her first action by arguing that the loan was valid and would obtain a benefit in the present action by arguing that the loan is invalid. If the reverse mortgage loan were determined to be invalid, then the first court was misled by Schiffman's contradictory statements there. And, obviously, Financial Freedom will suffer an unfair detriment if its security interest were deemed to be invalid, particularly under the present circumstances, where the underlying loan obligation is non-recourse.

Schiffman also acknowledged the existence, and validity, of the Financial Freedom loan and Deed of Trust on repeated occasions outside of her lawsuit against Welch. Schiffman repeatedly contacted Financial Freedom seeking information about the loan, including pay-off figures,

without questioning its validity. She wrote Welch's lawyer, Ms. Duncan, and asked for an accounting of all funds taken from the reverse mortgage loan; Schiffman stated that Charlene may have received about \$10,000 in proceeds from that loan.⁹⁹ Schiffman informed Financial Freedom that she was the Trustee of the C.B. Trust and asked for an update on the loan without any mention that the C.B. Trust considered the loan and Deed of Trust to be invalid.¹⁰⁰ To the contrary, on August 13, 2010, Schiffman called Financial Freedom and asked for the fax number to send in a pay-off request for a sale scheduled to close on September 10, 2010.¹⁰¹ C.B. Trust promised to repay the reverse mortgage loan in an addendum to the Purchase Agreement with Abolafya.¹⁰² When C.B. Trust offered a discounted amount to repay the loan, it challenged the Deed of Trust *solely* because it was not recorded, but it never questioned the validity of the instrument itself (or the underlying loan).¹⁰³ Finally, when Schiffman acknowledged that Ms. Bevins had accessed at least \$60,000 from the reverse mortgage loan secured by the Property, she did not question its

⁹⁹ CP 456

¹⁰⁰ CP 558

¹⁰¹ CP 471

¹⁰² CP 579

¹⁰³ CP 581

validity but wanted to know only “if the bank will be extending the loan [because] I do not want to have to do radical reductions to effect a sale.”¹⁰⁴

Schiffman now claims the loan was invalid because Ms. Bevins “was showing marked signs of confusion and dementia” as early as 2003 and 2004 and was completely incompetent by March 2008.¹⁰⁵ It is more than passing curious that she forgot to mention this in all her representations to the Court in her lawsuit against Welch, her communications with Financial Freedom, and her communications with Abolafya and the title company. Having repeatedly invoked, and taken other actions predicated on, the loan’s validity, Schiffman’s present, inconsistent position should not be countenanced.

REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1, Financial Freedom requests an award of attorney fees. The Deed of Trust contains an attorneys’ fees provision that allows Financial Freedom to recover its attorneys’ fees and costs “in any action or proceeding to construe or enforce any term of this Security

¹⁰⁴ CP 456, 457

¹⁰⁵ CP 329, 330

Instrument.”¹⁰⁶ The Deed of Trust further provides that any fees awarded are also secured by the Property.¹⁰⁷

CONCLUSION

The Superior Court correctly ruled that, if Dexter Welch was the Trustee of the Bivens Trust at the time the Financial Freedom loan documents were signed by Ms. Bivens, he ratified her actions in encumbering the Property owned by the Bivens Trust. In fact, it was unnecessary for the Superior Court to reach this issue, however, because Schiffman failed to present evidence sufficient to overcome the presumption that Ms. Bivens was competent when she signed the loan documents and, therefore, was herself the Trustee of the Bivens Trust at the time.

Under either theory, the Deed of Trust is a valid encumbrance. Unchallenged on appeal are the Superior Court’s rulings that the failure to record the Deed of Trust does not affect its validity as between the original parties; and Abolafya and her lender are not bona fide purchasers, so their interests are subject to the Deed of Trust.

¹⁰⁶ CP 429

¹⁰⁷ CP 424-25

For the foregoing reasons, Financial Freedom respectfully requests that this Court affirm the Superior Court's order and award Financial Freedom its attorney fees on appeal pursuant to RAP 18.1.

Alternatively, should the Court of Appeals determine that neither Welch's ratification nor the identity of the Acting Trustee are established as a matter of law, then Financial Freedom respectfully requests that this Court's decision clarify that Financial Freedom has not conceded that Ms. Bivens was not the Acting Trustee when she signed the loan documents.

Dated this 13th day of June, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kay Spading, certify that on the 13th day of June, 2013, I caused the foregoing document, Financial Freedom Acquisition LLC's Answering & Cross Appeal Brief, to be delivered to the following parties in the manner indicated below:

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Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 13th day of June, 2013, at Seattle, Washington.

Kay Spading
Kay Spading