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No. 70208-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHARTER PRIVATE BANK, f/k/a CHARTER BANK, a Washington
state-chartered bank,

Respondent,

v.

JOSEPH J. SACOTTE, individually and the marital community of
JOSEPH J. SACOTTE and MIDORI SACOTTE; JOEL J. LAVIN and
JANE DOE LAVIN; and FIRST CHURCH, LLC, a Washington limited
liability company

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE MARIANE SPEARMAN

REPLY BRIEF OF APPELLANTS SACOTTE

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 4

 A. Appellants Have Standing To Appeal The Trial Court’s Order Approving The Settlement 4

 1. The Bank And The Receiver Did Not Raise Standing As A Defense In The Trial Court 4

 2. Appellants Have Standing Because They Are Plainly “Aggrieved” By The Trial Court’s Approval Of The Settlement 4

 B. The One-Sided Settlement Agreement Was Plainly Not “Fair And Equitable” 7

 1. Standard Of Review 7

 2. Appellants’ Claims Are Not “Weak” Because The Agreement States Mr. Patrick “Shall Be Paid By The Bank” And The Reasons For Mr. Patrick’s Abrupt Resignation Are In Substantial Dispute 9

 C. The Plain And Unambiguous Language Of The Release Makes Clear That The Bank “Forever” Released It’s Claim For The Diversion Of Funds 11

 D. Appellants’ Fourth Assignment Of Error 13

 E. The Bank Is Not Entitled To Attorney’s Fees 13

IV. CONCLUSION 13

STATEMENT OF AUTHORITIES

CASES

Breda v. B.P.O. Elks Lake City 1800 SO-620,
120 Wn. App. 351, 90 P.3d 1079 (2004) 4

Gloyd v. Rutherford,
62 Wn.2d 59, 380 P.2d 867 (1963) 1

Lea v. Young,
168 Wn. 496, 12 P.2d 601 (1932) 13

Nationwide Mutual Fire Insurance Co. v. Watson,
120 Wn.2d 178, 840 P.2d 851 (1992) 13

Parsons Supply, Inc. v. Smith,
22 Wn. App. 520, 591 P.2d 821 (1979) 13

State v. Turner,
99 Wn. App. 482, 994 P.2d 284 (2000)
rev, 143 Wn.2d 715, 23 P.3d 499 (2001) ... 8, 9

In re A & C Properties,
784 F.2d 1377 (9th Cir. 1986) 7

In re Woodson,
839 F.2d 610 (9th Cir. 1988) 3, 7, 8

STATUTES

RCW 7.60.190 6

COURT RULES

RAP 2.5(a) 4

RAP 3.1 4

I. INTRODUCTION

The settlement agreement between First Church and Charter Bank gave the Bank everything and First Church and its creditors literally nothing. An unbiased receiver would never have entered into such an agreement or represented that it was “fair and equitable.” Moreover, the Bank’s Response ignores and grossly distorts critical facts and significant cases. For these reasons, this Court should reverse the trial court’s order approving the settlement.

II. STATEMENT OF THE CASE

A receiver must be neutral and disinterested and act “for the common benefit of all parties in interest.” Gloyd v. Rutherford, 62 Wn.2d 59, 60-61, 380 P2d. 867 (1963). Although the Receiver - attorney Kevin Hanchett - represented to the court that he did not “have a dog in this fight” [RP 8], Appellants’ Opening Brief [at 14-16, 19] sets forth numerous facts showing the Receiver was clearly biased: the Bank and Pathfinder Funds (who purchased the Note from the Bank) were “Clients”¹ [CP 776, 855], important witnesses from the Bank were

¹ The Receiver’s use of the term “Clients” is especially significant because the Receiver is an attorney. For instance, the Receiver’s web site stated the Receiver is “*totally focused on our Client’s priorities. First we identify the Client’s goals, then we listen to their needs, finally we create innovative solutions*” [CP 773, 852] [italics in original].

“References” [CP 774, 853], the Receiver said he was “appointed by the Bank” [CP 849], and the Receiver never bothered to talk with Appellants or their counsel during his purported “investigation” [CP 621, 638, 640]. These facts, which are not disputed by the Bank, explain why the Receiver entered into the one-sided settlement with the Bank.

In his motion seeking approval of the settlement, the Receiver represented that First Church would receive \$10,000 from the settlement [CP 524]. This is a nominal sum in light of the fact that First Church was releasing a \$1,000,000 - \$3,000,000 claim [CP 640-41, 668, 670].

Making matters worse, the Receiver admitted that, in fact, the \$10,000 would go to him, not First Church:

The bank initially wanted this claim to go away with no consideration. I asked the bank to pay for at least the cost of investigation, the cost of this motion. They agreed to pay \$10,000 [RP 7].

The Bank claims the \$10,000 was paid to the estate [Response, at 10]; however, not only is this contrary to the Receiver’s unequivocal statements to the trial court [RP 7], it is at odds with the Receiver’s final accounting, which does not reflect such a \$10,000 payment [CP 1383].

The Receiver’s motion below offered other rationales for the one-sided settlement but, as set forth in Appellants’ Opening Brief [at 26 - 32], they all have no merit: there was no “risk and costs of litigation”

[CP 534] because Appellants had retained counsel to pursue the claims; the settlement would not “facilitate the ability of the Note sale to proceed” [CP 523] because that sale closed well before the settlement was approved; and the settlement would not “ultimately benefit all creditors” [CP 520], as Appellants had warned [CP 626, 757]. In fact, the trial court never considered the interests of First Church’s creditors, which was error. In re Woodson, 839 F2d. 610, 620 (9th Cir. 1988) (trial court “must” consider “paramount interest” of creditors in determining if settlement should be approved).

The Bank’s Response does not assert that any of the above-rationales have merit. Rather, the Bank relies upon the two remaining rationales: (1) First Church’s claims were weak and (2) the Bank had not released its claim for the diversion of funds.² As set forth below, at Sections III-B and III-C, infra, these rationales are also completely devoid of merit.

² The Bank also offers two new rationales. The first - the settlement “facilitated the dismissal of claims against individual guarantors” [Response, at 1] - is not true because an Agreed Order dismissing these claims [CP 604] was entered before the settlement was approved. The other - unsupported by any facts - is the settlement “allowed the Receiver to complete the construction project for ultimate sale” [Response, at 1]; in fact, First Church’s claims against the Bank would not have affected the Receiver’s ability to complete and sell the townhomes.

III. ARGUMENT

A. Appellants Have Standing To Appeal The Trial Court's Order Approving The Settlement

1. The Bank And The Receiver Did Not Raise Standing As A Defense In The Trial Court

The Bank asserts Appellants lack standing to appeal the trial court's order. However, the Bank and the Receiver did not raise this argument below; if they had, Appellants would have submitted evidence in rebuttal, including the facts set forth in Section III-A-2, infra. Therefore, the argument should not be considered here. RAP 2.5(a).

2. Appellants Have Standing Because They Are Plainly "Aggrieved" By The Trial Court's Approval Of The Settlement

As the Bank indicates [Response, at 10], RAP 3.1 provides that an "aggrieved" party may appeal a trial court's order; "aggrieved" means "one whose proprietary, pecuniary, or personal rights are substantially affected." Breda v. B.P.O. Elks Lake City 1800 SO-620, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) [citation omitted]. As set forth below, Appellants are "aggrieved" by the trial court's order because (1) they lost the \$1,150,000 they pledged to the Bank, (2) as shareholders, they lost the opportunity to recover money from the receivership, and (3) as creditors,

they lost the opportunity to recover money from the receivership.

Appellants personally pledged \$1,150,000 (the “Pledged Funds”) to the Bank as security for the loan [CP 640]. In the Workout Agreement, the parties agreed the Pledged Funds would be used to pay the cost of completing the Project and selling the townhomes [CP 640, 648]. However, instead of using the Pledged Funds to pay First Church and the entities who worked to complete the Project, as it committed to do under the Workout Agreement, the Bank wrongfully terminated the Agreement, seized the nearly \$1,000,000 in remaining Pledged Funds, and kept this money for itself [CP 642]. Because the wrongful seizure of Pledged Funds is part of First Church’s claims against the Bank [Opening Brief, at 14 n. 4], Appellants’ proprietary and pecuniary rights were substantially affected by the trial court’s approval of the settlement.

The Bank claims Appellants are not shareholders of First Church. Response, at 11. This is grossly misleading, as the Bank acknowledges [Response, at 11] that Appellants own Sacotte First Church, LLC, which is an owner of First Church. Further, the Bank asserted in the trial court that Appellant Joseph Sacotte was “the manager of First Church, LLC” [CP 864]. Because Appellants are effectively shareholders of First Church and the settlement deprived First Church and its shareholders of a

valuable claim against the Bank, the proprietary and pecuniary rights of Appellants - as shareholders - were substantially affected.

Appellants are also creditors of First Church. 5th & Olympic, LLC was the general contractor on the Project [CP 869] and is the largest creditor of First Church, as it is owed more than \$1,000,000 for work it performed on the Project [CP 191]. Sacotte 5th & Olympic, LLC is an owner of 5th & Olympic and Appellants own Sacotte 5th & Olympic, LLC. This, too, is known by the Bank; for instance, the Bank asserted below that Appellant Joseph Sacotte is the “manager” of 5th & Olympic [CP 864]. As such, Appellants are effectively creditors of First Church; as creditors, Appellants are plainly “aggrieved” because the settlement deprived creditors of an opportunity to recover money in the receivership.

The Bank also argues that Appellants lack standing under RCW 7.60.190 because “only a creditor or other party in interest has a right to be heard with respect to all matters affecting the estate.” Response, at 12. In light of the facts set forth above - Appellants’ loss of the \$1,150,000 in Pledged Funds and that Appellants are both shareholders and creditors of First Church - Appellants have standing under RCW 7.60.190.

Finally, the Bank asserts Appellants lack standing because they cannot establish there was “likely to be a surplus after bankruptcy.”

Response, at 12-13. This argument fails for at least two reasons. First, any such requirement applies only to a debtor appealing a bankruptcy court order - it does not apply to a creditor, which Appellants are. Also, there is no “surplus” here because it was the settlement that deprived First Church of its seven figure claim; but for the settlement, First Church would have prevailed on its claim against the Bank and there would have been a surplus of funds.

B. The One-Sided Settlement Agreement Was Plainly Not “Fair And Equitable”

1. Standard Of Review

The court may approve a compromise only if it is “fair and equitable.” In re Woodson, 839 F.2d. at 620 [quotation omitted]. The Bank appears to agree. Response, at 15. Further:

An approval of a compromise, absent a sufficient factual foundation which establishes that it is fair and equitable, inherently constitutes an abuse of discretion.

In re A& C Properties, 784 F.2d 1377, 1383 (9th Cir. 1986) [emphasis added].

In their Opening Brief [at 23-25], Appellants set forth the facts and holding of In re Woodson, a leading Ninth Circuit case that the Receiver cited below [CP 525, 526]. In In re Woodson, the Ninth Circuit reversed a settlement approved by the trial court because it “was not a

compromise but a complete rejection” of a creditor’s claim:

Even if the bankruptcy court believed that Fireman’s Fund’s objection was unmeritorious or untimely, it should have recognized that Fireman’s Fund had *some* probability of ultimate success on its claim, and therefore that Woodson’s personal creditors had *some* entitlement to the \$1 million. . . . No responsible trustee would have proposed as “fair and equitable” a compromise that gave \$900,000 to the debtor and not a cent to his creditors.

In re Woodson, 839 F.2d at 620 [emphasis added] [italics in original].

Here, as in In re Woodson, the trial court approved a “compromise” that gave everything to the Bank and literally nothing to First Church and its creditors. Even if the trial court believed, on the limited record before it, that First Church’s claims had no merit, it should have recognized that, as in In re Woodson, First Church “had *some* probability of ultimate success on its claims” and the settlement value of the claims was more than zero. Id.

The Bank ignores the facts and holding of In re Woodson; instead, it cites State v. Turner, 99 Wn. App. 482, 994 P.2d 284 (2000) for a standard of review that is favorable to the Bank. Response, at 14. However, Turner is a criminal case that did not involve a trial court’s approval of a settlement and the standard of review espoused by the Bank

comes from the dissenting opinion.³ Turner does not help the Bank.⁴

2. Appellants' Claims Are Not "Weak" Because The Agreement States Mr. Patrick "Shall Be Paid By The Bank" And The Reasons For Mr. Patrick's Abrupt Resignation Are In Substantial Dispute

In his motion seeking approval of the settlement, the Receiver stated that First Church's claims against the Bank were based on the selection of Mr. Patrick as Private Receiver and whether First Church's purported breach of the Workout Agreement was material [CP 526]. As set forth in Appellants' Opening Brief [at 26], this is not correct: First Church's claims are based on the Bank's wrongful termination of the Workout Agreement. For some reason, the Bank repeats the Receiver's mistaken assertions. Response, at 17-18.

The Bank alleges "[t]here is no factual support for appellants' claim that the obligation to pay the Private Receiver lay with the Bank." Response, at 18. This ignores the critical language of Paragraph 8.4 in the Workout Agreement, cited in Appellants' Opening Brief [at 10]: Mr. Patrick "shall be paid by the Bank" [CP 652] [emphasis added].

³ The Bank's quote from Turner [Response, at 14] fails to indicate it is from the dissenting opinion, cites to the wrong page in the opinion (correct page is page 494), and fails to indicate that Turner was reversed at 143 Wn.2d 715, 23 P.3d 499 (2001).

⁴ The other cases cited by the Bank [Response, at 16-17] involve general legal principles that are not significant here.

To support its argument, the Bank refers to an engagement letter between First Church and Mr. Patrick, where First Church “agreed to provide a retainer of \$10,000” [CP 685]. Response, at 6. Appellants agree the funds to pay the retainer were to come from their money - the \$1,150,000 in Pledged Funds; however, because the Pledged Funds were held and controlled by the Bank, it was the Bank who was supposed to pay Mr. Patrick. This is why Paragraph 8.4 states Mr. Patrick “shall be paid by the Bank” [CP 652].

The Bank also claims that Mr. Patrick resigned due to non-payment of his retainer. Response, at 7. However, as set forth in Appellants’ Opening Brief [at 12-13], Mr. Patrick’s letter does not say why he resigned [CP 681], the Bank and the Receiver never submitted a declaration from Mr. Patrick explaining why he resigned, and Mr. Patrick never billed First Church for his months of service [CP 756, 765].

Further, the Bank ignores two critical problems that led to Mr. Patrick’s resignation. As set forth in Appellants’ Opening Brief [at 9-10], when Mr. Patrick became the Private Receiver: (1) East West Bank - the new participating lender in the loan to First Church - opposed the Workout Agreement because the Agreement jeopardized guarantees the FDIC had made to East West Bank [CP 755, 778]; and (2) Mr. Patrick

had a clear conflict of interest because he performed a substantial amount of work for East West Bank [CP 641]. Mr. Patrick recognized the conflict and told First Church he would seek a conflict waiver from East West Bank [CP 641, 677]. Not only did Mr. Patrick fail to obtain such a waiver [CP 641], he retained private counsel and told the attorney he did not want to continue as Private Receiver because the situation was a mess [CP 756, 765]. At a minimum, these facts, which are not disputed by the Bank, demonstrate that the reasons for Mr. Patrick's abrupt and unexplained resignation are not known and are in substantial dispute.

C. **The Plain And Unambiguous Language Of The Release Makes Clear That The Bank "Forever" Released It's Claim For The Diversion Of Funds**

The Release, Paragraph 9.1(ii) in the Workout Agreement [CP 653], expressly provides that the Bank "irrevocably and unconditionally forever" released "any and all claims" it might have against First Church for the alleged diversion of funds:

The Bank hereby **irrevocably** and **unconditionally forever releases**, remises, acquits each of the Borrower/Guarantor/Pledger Parties, jointly and severally, and their respective agents, representatives, employees, members, officers, relatives, successors and assigns, **from any and all claims and/or causes of action that the Bank has or may have**, whether known or unknown, which directly or indirectly, could be or could have been asserted against them or any of them by reason of any default under the Loan Documents, implied contract

claims and tort claims arising out of or in connection with the Loan occurring prior to the date of the Bank's signature on this Agreement (**including, but not limited to**, failure(s) to make payment(s) on the Note as and when required, **questionable allocations of funds, misrepresentations to the Bank, and other failures to perform their duties or obligations under the Loan Documents**) . . . [bold and underline added].

The Bank cannot re-assert claims it “irrevocably and unconditionally forever” released [CP 653] simply by alleging that First Church breached the Workout Agreement.

In addition to the plain and unambiguous language of the Release, it is undisputed that the parties' intent was that the Bank was “forever” releasing its claim for the alleged diversion of funds. According to attorney Vincent DePillis, who represented First Church in the negotiation and drafting of the Agreement:

The parties did not intend for the Release to be of no effect if the Workout Agreement was breached; rather, their intent was that if First Church breached the Agreement, the Bank would no longer have to forbear from collecting the amounts owed under the Note [CP 780].

The Bank ignores the clear language of the Release and the declaration of attorney DePillis.⁵ Instead, it cites three cases [Response,

⁵ The Bank also ignores (1) it was error for the trial court to disregard the August 31, 2011 Balance Sheet [RP 23] and (2) the Bank's claim for diversion of funds is “double dipping” because the Bank is attempting to collect the same money twice. Opening Brief, at 30.

at 20], all of which are inapposite: Nationwide Mutual Fire Insurance Co. v. Watson, 120 Wn.2d 178, 840 P.2d 851 (1992) (issue was whether release included UIM claims); Parsons Supply, Inc. v. Smith, 22 Wn. App. 520, 591 P.2d 821 (1979) (involved covenant not to compete, not a release); Lea v. Young, 168 Wn. 496, 12 P.2d 601 (1932) (involved rescission of real estate contract, not a release).

D. Appellants' Fourth Assignment Of Error

Appellants' fourth assignment of error pertains to the trial court's March 15, 2013 Order [CP 912]. Appellants appeal this order to the extent it incorporates the court's prior orders approving the settlement.

E. The Bank Is Not Entitled To Attorney's Fees

If the Bank prevails on this appeal, it is not entitled to attorney's fees.

IV. CONCLUSION

The one-sided settlement was not "fair and equitable" because it gave the Bank everything and First Church and its creditors literally nothing. Further, the Receiver was clearly biased in favor of the Bank. The trial court's order approving the settlement should be reversed so that First Church can pursue its seven figure claim against the Bank.

January 21, 2014

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BANK, a Washington state-chartered bank,)
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LLC, a Washington limited liability company,)
Appellants.)

NO. 70208-4
DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the date below I caused copies of the following documents: (1) Reply Brief of Appellants Sacotte and (2) this Declaration of Service to be served upon the following persons in the manner provided below:

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DECLARATION OF SERVICE

Page 2 of 3

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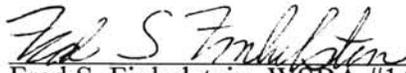
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