

70208-4

70208-4

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.

**BRIEF OF RESPONDENT**

RYAN, SWANSON & CLEVELAND, PLLC  
Susan Rae Fox, WSBA No. 15278  
Gulliver A. Swenson, WSBA No. 35974  
1201 Third Avenue, Suite 3400  
Seattle, Washington 98101-3034  
(206) 464-4224

Attorneys for Respondent

~~FILED~~  
NOV 11 2008  
COURT OF APPEALS  
DIVISION I  
SEATTLE

ORIGINAL

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION / SUMMARY OF ARGUMENT .....	1
II. STATEMENT OF THE CASE.....	1
A. Overview .....	1
B. The Loan.....	2
C. The Project.....	3
D. The Bank Agrees to Forbear.....	4
III. ARGUMENT .....	10
A. Appellants Lack Standing to Challenge the Approval of a Settlement between First Church and the Bank. ....	10
B. The Order Approving the Settlement was Within the Discretion of the Trial Court. ....	14
C. Appellants' Fourth Assignment of Error is Waived for Failure to Offer any Supporting Argument or Citation. ....	21
D. Respondent Requests an Award of Attorneys' Fees Pursuant to RAP 18.1.....	22
IV. CONCLUSION .....	22

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>STATE CASES</b>	
In re A & C Properties, 784 F.2d 1377 (9th Cir. 1986).....	14, 16
Breda v. B.P.O. Elks Lake City 1800 SO-620, 120 Wn. App. 351, 90 P.3d 1079 (2004) .....	10
In re Central Ice Cream Co., 59 B.K. 476, (Bankr. N.D. Ill. 1985) .....	16
Cheng v. K&S Diversified Invs., Inc. (In re Cheng), 308 B.R. 448 (9th Cir. BAP 2004) .....	13
Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774 (9th Cir. 1999) .....	13
In re Heissinger Resources, Ltd., 67 B.R. 378 (C.D. Ill. 1986) .....	16
Holland v. City of Tacoma, 90 Wn. App. 533, 954 P.2d 290 (1998).....	22
Justine Realty Co. v. American Nat'l Can Co., 976 F.2d 385 (8th Cir. 1992).....	16
Lea v. Young, 168 Wash. 496, 12 P.2d 601 (1932) .....	20
In re MGS Marketing, 111 B.R. 264 (9th Cir. BAP 1990) .....	16
Milligan v. Thompson, 110 Wn. App. 628, 42 P.3d 418 (2002).....	22
Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 840 P.2d 851 (1992) .....	20
Parsons Supply, Inc. v. Smith, 22 Wn. App. 520, 591 P.2d 821 (1979) .....	20
In re Petters Company, Inc., 455 B.R. 166 (8th Cir. BAP 2011) .....	17

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).....	16
Robinson v. Fondiller (In re Fondiller), 707 F.2d 441 (9th Cir. 1983).....	12
State v. Turner, 99 Wn. App. 482, 994 P.2d 284, review granted, 141 Wn.2d 1011, 10 P.3d 1072 (2000) .....	14
In re Woodson, 839 F.2d 610 (9th Cir. 1988) .....	15, 16
Yates v. Forker, 303 B.R. 811 (B.A.P. 8th Cir. 2004) .....	13

### STATUTES

Bankruptcy Rule 9010(a) .....	15
RCW Ch. 7.60 .....	12
RCW 7.60.015 .....	11
RCW 7.60.060 (1)(b) and (c) .....	14
RCW 7.60.190 .....	12
RCW 7.60.190(2) .....	12

### COURT RULES

RAP 3.1 .....	10
RAP 10.3(a)(5)-(6) .....	1, 21
RAP 18.1 .....	22

## **I. INTRODUCTION / SUMMARY OF ARGUMENT**

The trial court acted well within its discretion in granting the Receiver's motion to approve a settlement which (i) eliminated claims and counterclaims between the borrower and the lender, (ii) facilitated the dismissal of claims against individual guarantors, and (iii) allowed the Receiver to complete the construction project for ultimate sale. The trial court was not required (as urged by appellants) to find the absence of material, disputed fact in order to approve the settlement. Settlements, by their very nature, are compromises undertaken to avoid lengthy and protracted factual disputes. The trial court's determination that the settlement was fair and reasonable cannot be set aside absent an abuse of discretion. Appellants, who are neither parties to the settlement nor stakeholders in the claims that were settled, lack standing to challenge the Order Approving Settlement and the first three assignments of error must be rejected. The fourth assignment of error is waived since appellants failed to put forth any argument or citation in support of the assignment. RAP 10.3(a)(5)-(6).

## **II. STATEMENT OF THE CASE**

### **A. Overview**

Far from being a nearly-complete construction success, the First

Church project narrowly avoided disaster only because the respondent-lender was willing to be flexible and a receiver was appointed in the nick of time. As the maturity date for the construction loan approached (after the lender had already granted two extensions) the loan proceeds were fully disbursed; the project was unfinished; the borrower was out of money; and liens (over \$400,000.00) were piling up. Initiating the receivership ultimately resulted in the completion of construction; the successful marketing and sale of all units free and clear of liens; and the avoidance of costly foreclosure proceedings and protracted litigation.

**B. The Loan**

First Church LLC (“First Church”) approached Charter Bank (the “Bank”<sup>1</sup>) regarding a loan to retrofit a 1906 church to develop a 12-unit residential project called The Sanctuary (the “Project”). CP 95-98. First Church is a single-purpose, limited liability company and the Project was First Church’s sole asset. CP 287. Under a Construction Loan Agreement dated December 17, 2007, the Bank agreed to loan \$9,320,000.00 to First Church upon certain conditions, including an express provision that loan proceeds be applied only for approved costs associated with the redevelopment, construction and equipping of the Project. CP 294-304.

---

<sup>1</sup> Charter Bank subsequently became Charter Private Bank. Boston Private Bank & Trust Company is the successor by merger to Charter Private Bank.

The loan was secured by, among other things, a deed of trust against the property, and personal guaranty agreements from Joseph Sacotte (“Mr. Sacotte”) and Joel Lavin (“Mr. Lavin”). The loan was originally set to mature on January 1, 2009. CP 9.

**C. The Project**

The relationship between the Bank and First Church was sorely tested during the course of the Project. The Project itself was complicated and involved gutting the existing church structure and constructing an internal framework that would support four and five story townhomes. Moreover, the administration of the Project had a long history of problems associated with faulty documentation from First Church which proved insufficient to support the requested disbursement of loan proceeds. CP 145-174. Month after month, the Bank was unable to reconcile pay requests with existing invoices for work that was actually completed. *Id.*

By August 2009, the budget was 90% expended although the percentage of completion was far less. Despite repeated requests, First Church failed to provide a reasonable explanation for the numerous discrepancies and inconsistencies. The Bank continued to try and work with First Church by granting two extensions and ultimately extending the loan maturity date to February 1, 2010. CP 95-98.

Contrary to the appellants’ assertion, funding for the Project did

not stop as a result of any issue associated with the FDIC takeover of the participating lender, United Commercial Bank. The loan was disrupted solely as a result of First Church's failure to provide adequate documentation in support of draw requests and the accumulation of lien claims encumbering title, which occurred well before any FDIC action. CP 145-174.

In addition, the Bank had become aware that nearly One Million Dollars of loan money had been diverted from the Project into other Sacotte-owned entities including: 5<sup>th</sup> & Olympic, LLC; Intergalactic Technology, LLC; Sacotte First Church, LLC; Sacotte Construction, Inc.; and Shilshole Bay II, LLC under the guise of inter-company loans. CP 277-290. First Church's accountant confirmed that the "loans" were outstanding, that there was no documentation substantiating the loans, and no evidence of accruing interest or repayment. CP 363-374. In addition, \$288,190.00 of the loan proceeds had been distributed to pay non-First Church obligations. CP 287-289. In short, First Church misappropriated and diverted loan funds to Mr. Sacotte and Mr. Lavin, or into entities owned by Mr. Sacotte.

**D. The Bank Agrees to Forbear**

Against this backdrop, in early 2010, with the loan maturity date looming, First Church in default and the Project stalled, the Bank once

again took steps to try and salvage the Project. In the Loan Workout and Forbearance Agreement dated February 1, 2010 (the “Forbearance Agreement”) First Church acknowledged that it was in default and that the Bank was entitled to pursue its legal remedies. CP 408-419. For its part, the Bank, among other things, agreed to forbear its legal remedies and give First Church a further chance to complete the Project -- so long as a Private Receiver controlled the finances associated with the Project. Id. Given the problems of the past, the Bank was not inclined to trust First Church or its members with further control over the money. CP 145-174

The parties jointly designated Timothy Patrick (Real Estate Recovery Services, LLC) as the Private Receiver. CP 413. Any suggestion that First Church or the appellants opposed Mr. Patrick, or did not have the opportunity to vet him has long since been waived. Mr. Patrick was designated by name as the Private Receiver in the Forbearance Agreement signed by the appellants:

. . . The Bank has approved either Tim Patrick or Jack Rader to be the Private Receiver hereunder and Tim Patrick is hereby designated to be the Private Receiver, and he will be engaged by First Church within five (5) days following the date on which the last signature by all Parties are affixed to this Agreement.

CP 408-419.

On April 21, 2010, First Church executed an engagement letter in which it “agreed to retain” Mr. Patrick and his company as the Private

Receiver. CP 685-687. The engagement letter confirmed that First Church had “agreed to provide a retainer of \$10,000.” CP 685. The engagement letter was signed on behalf of First Church by Mr. Sacotte. Moreover, Mr. Sacotte and Mr. Lavin personally guaranteed payment to Mr. Patrick. CP 687. Mr. Patrick served as the Private Receiver for several months, without objection, and his fees were included on the draw requests First Church submitted to the Bank.

Despite the clear statement in the engagement letter, First Church failed to pay the retainer to Mr. Patrick. First Church’s current excuse, that it was waiting for an invoice, or was confused about when to pay the retainer, is refuted by the facts. The first draw request after the Private Receiver’s appointment contained an express line item for the retainer. CP 145-174; 167-169. The draw request was signed by Mr. Sacotte and the Private Receiver. CP 169. The Bank honored the draw request and funds were placed into First Church’s bank account. CP 145-174. First Church simply failed to pay the funds to the Receiver. To this day, First Church has never accounted for the disposition of the funds.

The appellants have admitted in pleadings filed below that the Bank distributed the retainer funds into the First Church account and that “the funds should be distributed to the Private Receiver.” CP 203. The Trial Court determined that First Church had the responsibility to pay the

retainer.

The Court: You agree that your client was supposed to pay Mr. Patrick the \$10,000?

Mr. Finkelstein: Correct.

The Court: And he didn't?

Mr. Finkelstein: Well, the money was supposed to come from the pledged funds which were my client's funds.

The Court: It was his responsibility to pay the funds and he didn't.

RP 27.

The Forbearance Agreement also addressed the use of certain “pledged funds.” The pledged funds were additional collateral for the loan pledged by Joseph and Midori Sacotte. When First Church defaulted, the Bank was entitled to apply the pledged funds to reduce the outstanding loan balance. CP 130-131. However, in an effort to get the Project restarted, the Bank agreed to permit the pledged funds to be used to complete construction. *Id.* The Bank – not the Sacottes – made the concession to allow the pledged funds to be used for construction rather than repayment of the loan balance. RP 11.

Unfortunately, the appointment of the Private Receiver did little to prevent the on-going shenanigans by First Church. After only a few short months, on July 7, 2010, Mr. Patrick resigned as Private Receiver, noting that he was still owed for services rendered. CP 681. Despite the fact that First Church listed the retainer as a line-item on its May 14, 2010 draw

request, and the Bank fully funded the draw request, Mr. Patrick never received his retainer. CP 458-460.

On July 20, 2010, the Bank issued its Notice of Termination of Forbearance Agreement, citing the failure of First Church to perform as required. CP 683. The Forbearance Agreement expressly allowed the Bank to terminate its forbearance in the event of default by the borrower parties, or where the Private Receiver resigned by reason of the failure of the borrower parties to perform obligations owed to the Private Receiver. CP 408-419, ¶ 7.1.2 and 7.1.3.

On July 22, 2010, the Bank sued First Church and the individual guarantors for breach of the promissory note, breach of the personal guaranty agreements, and for the appointment of a receiver. CP 1-51. On September 14, 2010, the Court granted the Bank's motion and appointed Resource Transition Consultants, LLC ("RTC") as a General Receiver. CP 179-188. The Order held that the appointment of RTC was proper and met the requirements of RCW 7.60.005. CP 307. Moreover, the Order gave RTC broad powers including the power, authority and duty to assert rights, claims or interests in the name of First Church and exclusive possession and control over and power to liquidate all assets of First Church. *Id.* The appellants have not appealed from the Order Appointing the General Receiver or challenged its finding of RTC as a suitable

Receiver. In fact, First Church and the appellants stated that they “did not dispute the qualifications of the Bank’s proposed receiver.” CP 111.

On October 4, 2010, First Church submitted its Schedule of Assets and Liabilities, attested to under oath by Mr. Sacotte, and identified a claim against the Bank as an asset of the LLC. CP 190-195. The appellants are not listed as creditors of First Church. Id.

Throughout the course of the litigation, the Bank pursued a strategy designed to minimize litigation and facilitate the completion of the Project. To that end, the Bank sought to resolve the claims against the individual guarantors and the extra-contractual claims between the Bank and First Church. On August 19, 2011, the Bank submitted a Stipulation which, among other things, dismissed the deficiency claims against Mr. Sacotte and Mr. Lavin, which were valued at over Two Million. CP 602-603. On August 31, 2011, the Bank submitted, and the Court signed, an Agreed Order, formally dismissing the guaranty claims against the individuals and also dismissing the defendants’ third counterclaim for declaratory relief. CP 604-605.

The only issues remaining were the Bank’s claim for misappropriation of loan proceeds and First Church’s counterclaims against the Bank. A settlement was reached whereby the claims were offset and dismissed, and the Bank paid an additional \$10,000.00. The

Receiver moved for approval of the proposed settlement. CP 520-586. The Court granted the motion and approved the settlement. CP 748-749; RP 1-29. The Bank and the Receiver, on behalf of First Church, executed a Settlement Agreement, pursuant to which the Bank paid the receivership estate (not the Receiver personally as contended by the appellants) the \$10,000.00, and the remaining counterclaims were dismissed. CP 781-782.

Having eliminated the litigation obstacles, the Receiver successfully completed construction of the Project and all of the units were sold, following notice to all interested parties and approval of the Court. *See generally*, CP 927-1368.

### **III. ARGUMENT**

#### **A. Appellants Lack Standing to Challenge the Approval of a Settlement between First Church and the Bank.**

The question of standing asks whether a party is the proper one to request adjudication of a particular issue. Pursuant to RAP 3.1, “[o]nly an aggrieved party may seek review by the appellate court.” RAP 3.1. An aggrieved party is 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).

The appellants do not have standing to oppose a settlement entered into between First Church and the Bank. According to the Schedule of

Assets and Liabilities, the claim against the Bank was identified as an asset of First Church. CP 195. The Order Appointing Receiver gave RTC “exclusive” power, authority and duty over the assets of First Church, including the right to liquidate assets and prosecute or defend all claims for and against First Church. In fact, as a General Receiver (as opposed to a Custodial Receiver) the statute expressly granted the power to liquidate assets. RCW 7.60.015.

The Sacottes were not borrowers on the loan from the Bank. They were named in the lawsuit because they individually guaranteed the loan. However, the claims based on the guaranty agreements were dismissed by the Bank before First Church and the Bank settled the remaining claims. CP 602-603. Moreover, according to their Answer, Mr. and Mrs. Sacotte denied that they were individual members of First Church, LLC. CP 196. Therefore, the Sacottes had no proprietary, pecuniary or personal rights affected. The claim being settled did not belong to them and they did not control it; they were not borrowers; they had no individual basis for a claim against the Bank; and they were not members of First Church. The loan documents were signed by “Sacotte First Church LLC” as manager of First Church LLC. Sacotte First Church LLC is one of Mr. Sacotte’s many inter-related shell entities, but it was not a party below and is not an appellant in this case.

Appellants also lacked standing under the Receivership Act, RCW Ch. 7.60. In general, properly notified creditors and parties in interest are bound by the acts of the Receiver with regard to management and disposition of estate property. RCW 7.60.190. Pursuant to RCW 7.60.190(2), only a creditor or other party in interest has a right to be heard with respect to all matters affecting the estate.

Although the statute does not define who is a “party in interest” well-developed case law from the bankruptcy courts is instructive. Bankruptcy courts regularly address when a shareholder or member of the debtor may object to a trustee’s proposed compromise of a claim that belongs to the debtor’s estate. In this case, the appellants are neither shareholders nor members of First Church, and therefore fail to meet the preliminary threshold to claim “party in interest” status.

Moreover, under bankruptcy law, even a party in interest lacks standing to object to a motion to settle an estate claim unless they establish a financial stake in the court’s decision. A party asserting standing must demonstrate that the bankruptcy court’s order either diminishes his property, increases his burdens, or detrimentally affects his rights. *Robinson v. Fondiller (In re Fondiller)*, 707 F.2d 441, 442-43 (9th Cir. 1983). It is well-established that a party in interest ordinarily lacks standing to challenge orders affecting the assets of the estate unless there

is likely to be a surplus after bankruptcy. *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.)*, 177 F.3d 774, 778 (9th Cir. 1999). In the case of stockholders in a corporation, the burden is on the party in interest to establish a real possibility that the litigation would have resulted in a surplus. *Yates v. Forker*, 303 B.R. 811, 815 (B.A.P. 8th Cir. 2004). Where there is no likely return for equity holders, they are not "injured in fact" and, accordingly, lack standing to object to a proposed compromise. See e.g., *Duckor Spradling*, 177 F.3d at 777-79; *Fondiller*, 707 F.2d at 442; *Cheng v. K&S Diversified Invs., Inc. (In re Cheng)*, 308 B.R. 448, 454 (9th Cir. BAP 2004).

Although the Sacottes objected to the compromise of First Church's purported claim against the Bank, they did not have standing to do so. As discussed above, the Sacottes previously denied that they were even members of First Church, and therefore fail to meet the preliminary threshold as a party in interest. Even if they were members of First Church, the Sacottes were required to establish a real possibility that the suggested settlement prevented them from individually realizing a surplus recovery. They made no such showing, and therefore did not have standing to object to the compromise, and do not have standing to maintain this appeal.

Despite the fact that the receivership was successful in completing and selling the Project, it did not result in any surplus that would have been distributed to the LLC members. As the Receiver's final accounting revealed, the unit sale proceeds were insufficient to retire the entire primary debt (the Bank loan) or pay the outstanding materialmen's liens – all of which would have priority for payment over a distribution to LLC members. CP 377-382.

**B. The Order Approving the Settlement was Within the Discretion of the Trial Court.**

1. Standard of Review

An order approving compromise will be upheld absent abuse of discretion. *In re A & C Properties*, 784 F.2d 1377 (9th Cir. 1986). "Our appellate standard for abuse of discretion claims is generally whether the trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons; at times a no reasonable person/judge formulation has also been used." *State v. Turner*, 99 Wn. App. 482, 488, 994 P.2d 284, *review granted*, 141 Wn.2d 1011, 10 P.3d 1072 (2000).

The Order Appointing General Receiver granted RTC exclusive power, authority and duty over the assets of First Church. CP 72-82; 195. The claim against the Bank was identified as belonging to First Church and was therefore under the direction and control of RTC as Receiver. RCW 7.60.060 (1)(b) and (c) provides:

If the appointment applies to all or substantially all of the property of an operating business or any revenue-producing property of any person, to do all things which the owner of the business or property might do in the ordinary course of the operation of the business as a going concern or use of the property including, but not limited to, the purchase and sale of goods or services in the ordinary course of such business, and the incurring and payment of expenses of the business or property in the ordinary course;

(c) The power to assert any rights, claims, or choses in action of the person over whose property the receiver is appointed relating thereto, if and to the extent that the claims are themselves property within the scope of the appointment or relate to any property, to maintain in the receiver's name or in the name of such a person any action to enforce any right, claim, or chose in action, and to intervene in actions in which the person over whose property the receiver is appointed is a party for the purpose of exercising the powers under this subsection (1)(c)

....

Although there are no reported decisions interpreting this portion of the statute, Bankruptcy Rule 9010(a), upon which the statute was based, provides guidance. Bankruptcy Rule 9010(a) permits the Court, upon motion and after notice and opportunity to be heard, to approve a compromise or settlement. The Court has great latitude in determining whether to approve a compromise or settlement and may approve the settlement if it is “fair and equitable.” *In re Woodson*, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988). In making its determination, the Court may consider the

probability of success in litigation, the difficulties encountered in collection, the complexity and expense of the litigation, inconvenience and delay, and the paramount interest of the creditors, with proper deference to their reasonable views. *In re MGS Marketing*, 111 B.R. 264 (9<sup>th</sup> Cir. BAP 1990); *In re Woodson, supra*; *In re A&C Properties, supra*.

Settlements are a normal part of a receivership. *See e.g., Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968), quoting *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939). Courts favor and encourage settlements and “[in] the absence of mistake or fraud, a settlement agreement will not be lightly set aside.” *Justine Realty Co. v. American Nat’l Can Co.*, 976 F.2d 385, 391 (8th Cir. 1992).

A court should approve the proposed compromise if it eliminates the risks and delays of litigation and achieves certainty even if the amount obtained in settlement is less than a possible ultimate recovery. *In re Central Ice Cream Co.*, 59 B.K. 476, 487-488 (Bankr. N.D. Ill. 1985). The court does not have to decide the numerous questions of fact and law raised by objecting parties. *In re Heissinger Resources, Ltd.*, 67 B.R. 378, 383 (C.D. Ill. 1986). The court’s responsibility is to canvass the issues and see whether the settlement “falls below the lowest point in the range of reasonableness.” *Id.*, citing *In re W.T. Grant Co.*, 699 F.2d 599, 608

(2nd Cir. 1983). In determining whether the proposed settlement is fair and equitable, the Court may consider the opinion of the Receiver. *In re Petters Company, Inc.*, 455 B.R. 166, 176-77 (8th Cir. BAP 2011). The Court's determination that the settlement is fair and reasonable will not be disturbed in the absence of an abuse of discretion.

2. The Trial Court Correctly Determined that the Proposed Settlement was Fair and Reasonable.

The trial court properly found that the proposed settlement was reasonable, where First Church agreed to dismiss two meritless counterclaims in exchange for the Bank's dismissal of its claim to recover improperly diverted funds and payment of \$10,000. In the exercise of its authority, RTC investigated the alleged breach of contract claims identified as First Church's asset and determined that they were of questionable legal merit. The counterclaims relate to the Forbearance Agreement, namely (1) whether the selection of Tim Patrick as the Private Receiver was a breach of the agreement by the Bank, and (2) whether the breach of the Forbearance Agreement by First Church was material. RTC determined that both counterclaims were legally and factually weak and thus well-disposed to a resolution by settlement.

There was no factual support for the claim that the Bank breached the Forbearance Agreement in the selection of the Private Receiver. The

Forbearance Agreement, signed by First Church, specifically named Mr. Patrick as the Private Receiver. First Church thereafter entered into an engagement letter with Mr. Patrick and worked with him – without objection – for a period of months. CP 685-687. Finally, although such payments were never delivered to Mr. Patrick, First Church included his expenses as part of a draw request, which was thereafter funded by the Bank. CP 145-174; 167-169.

First Church's second counterclaim, regarding whether the breach of the Forbearance Agreement by First Church was material, was also weak and subject to compromise. The mishandling of loan funds by First Church had been a material issue and point of contention between First Church and the Bank prior to the execution of the Forbearance Agreement. In fact, the Bank would have been unwilling to forbear pursuing its legal remedies without the appointment of a Private Receiver to handle the funds. CP 408-419. Therefore, the obligation to timely pay the Private Receiver so that he remained involved in the transaction was a material term.

There is no factual support for appellants' claim that the obligation to pay the Private Receiver lay with the Bank. First Church had the obligation under the Forbearance Agreement to pay the Private Receiver; the request to fund the retainer was made by First Church as a line item in

the May 14, 2010 draw request that First Church made to the Bank. The Bank funded the draw request by delivering the money to First Church but First Church simply failed to pay it to the Private Receiver. The plain language of the Forbearance Agreement states that where a private receiver resigns by reason of failure of borrower (First Church) to perform its obligation under the agreement, the Bank is entitled to pursue its default remedies.

Having determined that First Church's counterclaims were weak and unsupported, the Receiver then considered the strength of the Bank's claim relating to the diverted loan proceeds. Based on the materials available, it was clear that nearly a million dollars of loan proceeds specifically designated for the First Church Project had been diverted improperly to unrelated entities and individuals. CP 277-290. Although the appellants attempted to assert that the loans had either been "repaid" (in complete absence of any documentation) there was never an explanation provided as to why the loan documents were violated in the first place by transferring proceeds of the loan to non-First Church related entities. CP 363-374.

In addition to receiving the cash payment as part of the settlement, the Bank agreed to release First Church from the claim associated with the wrongfully diverted loan proceeds. The Receiver determined, based on

the documentation, that First Church would face probable exposure on the diversion of funds claim. If such a claim was allowed, the Estate would be further depleted to the disadvantage of the creditors, therefore making settlement of such claims preferable.

3. The Trial Court Properly Rejected Appellants' Assertion that the Bank had Released its Claim.

Appellants' claim that the Bank released its claim to recover the diverted funds is without merit. The Bank's agreement to enter into a release of its claims was part of the consideration for First Church entering into the Forbearance Agreement. The appellants cannot claim the benefit of the Forbearance Agreement where they breached the terms and failed to perform.

A release provision in a contract that is terminated for failure of performance is ineffective. A release is a contract. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992). A breaching party cannot enforce the terms of a contract. *Parsons Supply, Inc. v. Smith*, 22 Wn. App. 520, 523, 591 P.2d 821 (1979); *See also Lea v. Young*, 168 Wash. 496, 12 P.2d 601 (1932). This general rule would seem to be especially true in the context of a release, where the releasing party should not be bound to its release if the promises exchanged for that release were not provided. First Church cannot enforce the release

because it breached the Forbearance Agreement by, among other things, failing to pay the Private Receiver.

Full performance of the terms of the Forbearance Agreement was a material element of consideration for the Bank. The recitals state:

WHEREAS the Bank is only willing to forbear from the commencement of litigation and the pursuit of and enforcement of its other rights and remedies against each or all of the Borrower/Guarantor/Pledgor Parties, upon the full performance by each of the Borrower/Guarantor/Pledgor Parties of the terms and conditions stated in this Agreement.

The Bank only agreed to a release in exchange for the Borrower/Guarantor/Pledgor Parties' promises, representations, warranties and covenants, with the expectation of full performance. First Church and the appellants breached the Forbearance Agreement by failing to meet the obligations with respect to the Private Receiver, as a result of which he resigned. The resignation of the Private Receiver was an expressly stated basis upon which the Bank was entitled to terminate the agreement.

Having breached the Forbearance Agreement, neither First Church, nor the appellants are entitled to claim the benefits of the Bank's release of claims.

**C. Appellants' Fourth Assignment of Error is Waived for Failure to Offer any Supporting Argument or Citation.**

Appellants are required to support assignments of error with appropriate argument and citations to the record. RAP 10.3(a)(5)-(6).

Failure to do so waives the assignment of error. *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002); *see also Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (noting that “[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration”). Although the appellants have assigned error to the trial court’s March 15, 2013, Order to Abandon Property, Discharge the Receiver and Terminate the Case, they have failed to support this assignment with any argument in their opening brief. As a result, this Court need not consider the final assignment of error.

**D. Respondent Requests an Award of Attorneys’ Fees Pursuant to RAP 18.1.**

Pursuant to RAP 18.1, the respondent requests an award of attorneys’ fees as provided in the Construction Loan Agreement.

**IV. CONCLUSION**

The respondent asks that this appeal be dismissed for lack of standing, or in the alternative, that the trial court be affirmed in all respects.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of December, 2013.

RYAN, SWANSON & CLEVELAND, PLLC

By   
Susan Rae Fox, WSBA #13278  
Attorneys for Respondent

**DECLARATION OF SERVICE**

I declare that on the 20<sup>th</sup> day of December, 2013, I caused to be served the foregoing document on counsel for Appellants, as noted, at the following addresses:

***VIA HAND DELIVERY***

FINKELSTEIN LAW OFFICE, PLLC  
Fred S. Finkelstein  
701 Fifth Avenue  
Suite 4745  
Seattle, Washington 98104



---

Michael S. Callahan, Legal Assistant

Dated: December 20, 2013

Place: Seattle, Washington

Handwritten initials and a date stamp: 10/20/13 2:58

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION ONE

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

Appellants.

NO. 70208-4

King County Superior Court  
Cause No. 10-2-26503-1 SEA

**DECLARATION OF SERVICE**

I hereby declare as follows:

1. I am a citizen of the United States and a resident of the State of Washington.

I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Ryan, Swanson & Cleveland, PLLC, 1201 Third Avenue, Suite 3400, Seattle, Washington, 98101-3034.

2. On the 20<sup>th</sup> day of December, 2013, I caused to be served upon counsel of record at the address and in the manner described below the following documents:

BRIEF OF RESPONDENT; and

DECLARATION OF SERVICE.

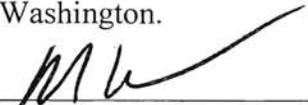
1	Seth Millstein	<input checked="" type="checkbox"/>	U.S. Mail
	Pillar Law	<input type="checkbox"/>	Hand Delivery
2	1800 9 <sup>th</sup> Ave., Suite 1630	<input checked="" type="checkbox"/>	Email
	Seattle, WA 98101	<input type="checkbox"/>	Facsimile
3	Counsel for Intervenor Defendant	<input type="checkbox"/>	Federal Express
4	<u>seth@pillar-law.com</u>		
5	Mr. Fred S. Finkelstein Esq.	<input type="checkbox"/>	U.S. Mail
	Finkelstein Law Office, PLLC	<input checked="" type="checkbox"/>	Hand Delivery
6	Columbia Center	<input checked="" type="checkbox"/>	Email
	701 Fifth Avenue, Suite 4745	<input type="checkbox"/>	Facsimile
7	Seattle, WA 98104	<input type="checkbox"/>	Federal Express
8	Counsel for Appellants		
	<u>fred@finkelsteinlaw.com</u>		
9	Kevin P. Hanchett	<input checked="" type="checkbox"/>	U.S. Mail
10	Resource Transition Consultants, LLC	<input type="checkbox"/>	Hand Delivery
	144 Railroad Avenue	<input checked="" type="checkbox"/>	Email
11	Suite 310	<input type="checkbox"/>	Facsimile
12	Edmonds, WA 98020	<input type="checkbox"/>	Federal Express
	<u>hanchett@RTCreceivers.com</u>		
13	Samuel M. Meyler	<input type="checkbox"/>	U.S. Mail
14	Meyler Law Office, PLLC	<input type="checkbox"/>	Hand Delivery
	PO Box 777	<input checked="" type="checkbox"/>	Email
15	Redmond, WA 98073	<input type="checkbox"/>	Facsimile
16	Counsel for Jim Dandy Sewer	<input type="checkbox"/>	Federal Express
	<u>Samuel@meylerlegal.com</u>		
17	Rob J. Crichton	<input type="checkbox"/>	U.S. Mail
18	Keller Rohrback	<input type="checkbox"/>	Hand Delivery
	1201 Third Avenue	<input checked="" type="checkbox"/>	Email
19	Suite 3200	<input type="checkbox"/>	Facsimile
20	Seattle, WA 98101	<input type="checkbox"/>	Federal Express
	Counsel for H&H Coatings, Inc.		
21	<u>rcrichton@kellerrohrback.com</u>		
22	Alan Mitchell	<input type="checkbox"/>	U.S. Mail
	Mitchell Law Office	<input type="checkbox"/>	Hand Delivery
23	PO Box 14247	<input checked="" type="checkbox"/>	Email
24	Portland, OR 97293	<input type="checkbox"/>	Facsimile
	Counsel for SuperFloors, Inc.	<input type="checkbox"/>	Federal Express
25	<u>alan@mitchell-lawoffice.com</u>		

26

1	Andrew J. Gabel	<input type="checkbox"/>	U.S. Mail
	Lane Powell	<input type="checkbox"/>	Hand Delivery
2	1420 Fifth Avenue	<input checked="" type="checkbox"/>	Email
	Suite 4100	<input type="checkbox"/>	Facsimile
3	Counsel for Sargent Construction	<input type="checkbox"/>	Federal Express
4	<u><a href="mailto:gabela@lanepowell.com">gabela@lanepowell.com</a></u>		
5	Talis Abolins	<input type="checkbox"/>	U.S. Mail
	Campbell Dille Barnett	<input type="checkbox"/>	Hand Delivery
6	317 S Meridian	<input checked="" type="checkbox"/>	Email
	Puyallup, WA 98371	<input type="checkbox"/>	Facsimile
7	Counsel for Sound Heating & AC	<input type="checkbox"/>	Federal Express
8	<u><a href="mailto:talisa@cdb-law.com">talisa@cdb-law.com</a></u>		
9	David E. Linville	<input type="checkbox"/>	U.S. Mail
	Linville Law Firm	<input type="checkbox"/>	Hand Delivery
10	800 Fifth Avenue	<input checked="" type="checkbox"/>	Email
	Sutie 3850	<input type="checkbox"/>	Facsimile
11	Seattle, WA 98104	<input type="checkbox"/>	Federal Express
12	Counsel for Langcom, Inc.		
13	<u><a href="mailto:dlinville@linvillelawfirm.com">dlinville@linvillelawfirm.com</a></u>		
14	J. Todd Tracy	<input type="checkbox"/>	U.S. Mail
	Crocker Law Group, PLLC	<input type="checkbox"/>	Hand Delivery
15	720 Olive Way, Suite 1000	<input checked="" type="checkbox"/>	Email
	Seattle, WA 98101	<input type="checkbox"/>	Facsimile
16	<u><a href="mailto:ttracy@crockerlaw.com">ttracy@crockerlaw.com</a></u>	<input type="checkbox"/>	Federal Express

17  
18 I declare under penalty of perjury under the laws of the State of Washington that the  
19 foregoing is true and correct.

20 DATED this 20<sup>th</sup> day of December, 2013, at Seattle, Washington.

21   
22 \_\_\_\_\_  
23 Michael S. Callahan