71458-9 71458-9

71458-9-1

THE COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

THE HEIRS OR DEVISEES OF ALAN E. JAMES, DECEASED, BY AND THROUGH CAROLANNE STEINBACH, PERSONAL REPRESENTATIVE

Appellants,

v.

BANK OF AMERICA, N.A.

Appellee/Respondent

APPELLEE'S BRIEF

Renee M. Parker, ESQ., WSBA No. 36995
WRIGHT, FINLAY & ZAK, LLP
4665 MacArthur Court, Suite 200
Newport Beach, California 92660-1811
Tel: (949) 477-5050; Fax (949) 477-9200

TABLE OF CONTENTS

Page No.

I. **INTRODUCTION** 1

II. **ASSIGNMENT OF ERROR AND ISSUES** 1

A. **APPELLANTS' ASSIGNMENTS OF ERROR** 2

B. **APPELLANTS' ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** 2

III. **STATEMENT OF CASE** 3

IV. **ARGUMENTS** 4

1. **STANDARD OF REVIEW** 4

2. **BANK OF AMERICA, N.A.'S DEED OF TRUST ENCUMBERED** 6

A. RESPONDENT'S DEED OF TRUST WAS PERFECTED 6

B. RESPONDENT'S DEED OF TRUST WAS NOT VOID DUE TO FAILURE OF DORATHY JAMES TO EXECUTE THE DOCUMENT 7

C. DORATHY PREDECEASED ALAN JAMES, AND HER INTEREST WAS MERGED WITH ALAN JAMES' INTEREST PRIOR TO FORECLOSURE 9

D. ANY DEFECT IN RESPONDENT'S SECURITY INTEREST WAS CURED UNDER THE AFTER-ACQUIRED PROPERTY DOCTRINE 10

E. LATE RECORDATION OF A DEED OF TRUST DOES NOT AFFECT PERFECTION OF RESPONDENT'S SECURITY INTEREST 12

F. THE SUPERIOR COURT HELD A HEARING ON LIEN PRIORITY AND DETERMINED THAT RESPONDENT WAS ENTITLED TO THE FUNDS 12

3. **RESPONDENT WAS NOT REQUIRED TO SUBMIT A CLAIM IN EITHER PROBATE CASE** 14

4. RESPONDENT IS ENTITLED TO THE SURPLUS PROCEEDS UNDER RCW 61.24.080(3) 14

V. CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page No.**

Bakke v. Columbia Valley Lumber Co.,

49 Wash.2d 165, 170, 298 P.2d 849 (1956) 7

Beal Bank, SSB v. Sarich,

161 Wash.2d 544, 547, 167 P.3d 555 (2007) 5, 14, 15

Boeing Employees Credit Union v. Burns,

167 Wash.App. 265, 270, 272 P.3d 908 (2012) 5, 15

Campbell v. Sandy,

190 Wash. 528, [532], 69 P.2d 808 (1937) 8

Cashmere Valley Bank v. State, Dept. of Revenue,

181 Wash.2d 622, 334 P.3d 1100, 1104 (2014) 5

Cox v. Helenius,

103 Wash.2d 383, 387, 693 P.2d 683 (1985) 5

Dickson v. Kates,

132 Wash.App. 724, 737, 133 P.3d 498 (2006) 12

Dougherty v. Dougherty,

24 Wash.2d 811, 167 P.2d 467 (1946) 10

Erickson v. Wahlheim,

52 Wash.2d 15, 18, 319 P.2d 1102 (1950) 13

Ferris v. Blumhardt,

1956, 48 Wash.2d 395, 293 P.2d 935 13

Gilkes v. Beezer,

4 Wash.App. 761, 764, 484 P.2d 493, 496 (Wash.App. 1971) 14

HomeStreet, Inc. v. Dep't of Revenue,

166 Wn.2d 444, 451, 210 P.3d 297 (2009) 5

In re Ball,

179 Wash.App 559 at 564 ..... 10, 15

In re Estate of Kelly,

152 Wash.App. 1048 at *1 8

In re Giannusa,

169 Wash.App. 904, 282 P.3d 122 ..... 5, 15

In re the Trustee's Sale of the Real Property of Ball v. JPMorgan Chase Bank, N.A.,

179 Wash.App 559, 845-46, 319 P.3d 844 (2014) 5

In re Trustee's Sale of Real Property of Brown,

161 Wash.App. 412 (2011) 1

In re Trustee's Sale of the Real Property of Giannusa,

169 Wash.App. 904, 907, 282 P.3d 122 (2012) 5

In re Trustee's Sale of the Real Property of Upton,

102 Wash.App. 220, 223, 6 P.3d 1231 (2000) 5

In re Upton,

102 Wash.App. 220, 6 P.3d 1231 15

Jones v. Allstate Ins. Co.,

146 Wash.2d 291, 300, 45 P.3d 1068 (2002) 5

Locke v. Andrasko,

178 Wash. 145, 34 P.2d 444 (1934) 14

Olympic Coast Investments Inc. v. U.S. Bank Nat. Ass'n,

101 Wash.App 1003, *2 (2000) 6

Pennock v. Coe,

23 How. 117 [16 L.Ed. 436 11

Radach v. Prior,

1956, 48 Wash.2d 901, 297 P.2d 605) 13

Reed v. Miller,

1 Wash. 426, 25 P. 334 (1890) 14

Scammon v. Ward,

1 Wash. 179, 23 P. 439 (1890) 14

Simons v. Lee James Finance Co.,

56 Wash.2d 234, 237, 351 P.2d 507 (1960) 11

Stabbert v. Atlas Imperial Diesel Engine Co.,

39 Wash.2s 789, 238 P.2d 1212) 7

Taylor Distributing Co., Inc. v. Haines,

31 Wn.App 360, 365, 641 P.2d 1204 (1982) 7, 8, 15

Vansant v. Hartman,

88 Wash. 636, 642, 153 P. 1062 (1915) 11

Weber v. Laidler,

26 Wash. 144, 152, 66 P. 400 (1901 11

Wilson v. Henkle,

45 Wash.App. 162, 724 P.2d 1069 (1986) 5

Witzel v. Tena,

1956, 48 Wash.2d 628, 295 P.2d 1115 13

Zervas Group Architects, P.S. v. Bay View Tower LLC,

161 Wash.App 322, 325-26, 254 P.3d 895 (2011) 12

Statutes

RCW 6.13 2

RCW 6.13.060 and 6.13.010 13

RCW 7.28.230(3) 6

RCW 11.04.015 9

RCW 11.40.070 14

RCW 11.40.135 14

RCW 26.16.030 ..... 2, 7, 9

RCW 61.24.080 16

RCW 61.24.080(3) 2, 13, 14, 15, 16

RCW 62A.9A 13

RCW 62A.9A.204(a) 11

RCW 64.04.070 10

RCW 65.08.070 ..... 6, 7

UCC Article 9 13

Other Authorities

Washington Community Property Law-1972 Statutory Changes, 48 Wash.L.Rev. 527, 535 (1973) 9

Appellee and Respondent BANK OF AMERICA, N.A. (hereinafter "Respondent") herein submits this Appellee's Brief.

I. INTRODUCTION

The sole issue in this appeal is distribution of surplus funds to a mortgagee after its secured lien was extinguished by the non-judicial foreclosure sale of a senior lienholder.

It is undisputed that Alan E. James was the sole owner of the subject property just prior to the foreclosure sale; Alan and Dorathy James encumbered the subject property with a lien held by Wells Fargo Bank, N.A., and Alan James later encumbered the subject property with a junior lien held by Respondent. Respondent's lien was not a reverse mortgage.

At the time Alan James executed the lien with Respondent he was married to Dorathy James. However Dorathy James passed away a mere forty (40) days after Alan James executed the loan documents, and Alan James subsequently transferred ownership of the subject property to himself as his sole separate property through the probate of Dorathy's estate, thus creating a merger of interests. The record does not show Appellants ever disputed the fact that the Estate of Dorathy James never took action to invalidate the loan, is estopped from taking such action, and does not now have standing to do so.

Wells Fargo Bank foreclosed its lien in 2013 and deposited surplus proceeds with the Court. Respondent contends it was entitled to these surplus proceeds based on the fact its lien was perfected, secured, was not commercial, and was not void by statute or repudiation.

Appellants contend Respondent's lien was not perfected or secured, and therefore Respondent should not be entitled to the surplus proceeds. Appellants rely upon *In re Trustee's Sale of Real Property of Brown*, 161 Wash.App. 412 (2011) in support of their argument, however *Brown* does not address a similar fact pattern, and is distinguishable. Further,

Appellant's Opening Brief concedes that lien priority is based on the status of all parties just "prior to the foreclosure sale" (Appellant's Opening Brief, Page 4).

As a result, the Superior Court was correct in distributing the surplus proceeds to Respondent pursuant to RCW 61.24.080(3).

II. ASSIGNMENTS OF ERROR AND ISSUES

A. APPELLANTS' ASSIGNMENTS OF ERROR.

1. "The court erred in failing to determine whether the lien created by Bank of America's deed of trust is statutorily invalid."

2. "The court erred by determining that Mrs. James' homestead rights were extinguished when she died and the Estate of Mr. James does not have legal standing to assert her rights or defenses."

3. "The court erred in basing its ruling on whether Mrs. James (sic) homestead rights applied (or rather were extinguished) in the instant case instead of determining that a homestead cannot be encumbered by a deed of trust unless executed or acknowledged by both, Mr. and Mrs. James, pursuant to RCW 26.16.030."

B. APPELLANTS' ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. "The sole issue in this case is whether Bank of America holds a valid enforceable deed of trust or an unsecured claim without any associated enforceable lien."

2. "Mrs. James' homestead rights are immaterial in the instant case, as the legal issue in this case centers on whether Bank of America's deed of trust is valid."

3. Whether "RCW 26.16.030 should be the applicable statute in determining whether Bank of America's deed of trust instead of the homestead statute contained in RCW 6.13."

III. STATEMENT OF THE CASE

On or about March 16, 1999 Alan and Dorathy James financed the real property commonly known as 2139 SW 317TH PL, FEDERAL WAY, WA 98023, and having the following abbreviated legal description:

> LOT 8, KRUSE ADDITION, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 65 OF PLATS, PAGE 33, RECORDS OF KING COUNTY

(hereinafter the "Property"), by executing a Note in favor of Washington Mutual Bank in the principal amount of $60,550.00 and secured by a Deed of Trust; Wells Fargo Bank, N.A. (hereinafter "Wells Fargo") was the assignee of the Deed of Trust (Clerk's Papers ("CP"), 3-6).

Alan James executed a second Note and Deed of Trust in favor of Respondents, also secured by the Property, on or about November 29, 2006 for the principal amount of $115,000.00 (CP, 45-46, 51-97). The Deed of Trust was recorded in the Office of the King County Auditor on September 6, 2007 as Instr. No. 20070906002552 (CP, 45-46, 51-97, 202-250). Dorathy James did not execute these documents (Appellants' Opening Brief ("AOB"), 6).

Dorathy James' date of death was January 8, 2007. Thereafter, on October 10, 2007 Alan James transferred ownership of the Property to himself as his sole, separate property, through probate (AOB, 7).

Alan James' date of death was July 9, 2011 (AOB, 7). Appellants are the heirs and devisees of Alan James ("Appellants") and bring this appeal on behalf of the Estate of Alan E. James by and through its personal representative Carolanne Steinbach (AOB, 6).

The issue in this case stems from the June 28, 2013 foreclosure sale by the Trustee for Wells Fargo (CP, 21-22) which resulted in $97,369.43 of proceeds in excess of the amount owed to Wells Fargo (hereinafter "Surplus Proceeds") that Wells Fargo deposited with the Superior Court of Washington, King County, Case No. 13-2-29548-2 KNT (CP, 1-2).

Both Appellants and Respondent made competing claims for the Surplus Proceeds. Appellants submitted a claim based on a homestead theory, and a demand that the Superior Court (hereinafter the "Court") determine the lien priorities of Respondent and Appellants. Respondents submitted a cross-claim for the entirety of the Surplus Proceeds, accompanied by a Declaration from Respondent that the amount due on the loan was $121,121.62 (CP, 51-52, 82, 135-136, 166).

After a hearing, Hon. Mariane Spearman entered an Order Disbursing Funds to Respondent Bank of America, N.A. on or about December 5, 2013 (CP, 263-265, 284-286), and stated the Court's reasons why Respondent was entitled to the Surplus Proceeds.

Appellants subsequently filed a Motion for Reconsideration on or about December 13, 2013, arguing 1) that Respondent's Deed of Trust was unperfected; 2) Appellants could claim a homestead exemption in the Surplus Proceeds ahead of Respondent's lien; and 3) that there was a bar to recovery by Respondents because Respondents failed to make a probate claim for the funds (CP, 266-288). The Opening Brief contains the same legal arguments the Appellants made in both of their motions for disbursement.

The Appellants' motion was denied by the Court in its Order Denying Motion for Reconsideration entered on December 19, 2013 (CP, 289-290). Appellants filed their Notice of Appeal, which appears to seek discretionary review pursuant to RAP 2.2, of the Order Denying Motion for Reconsideration on January 17, 2014.

IV. ARGUMENTS

1. STANDARD OF REVIEW.

This appeal involves a question of law; more specifically it involves the construction of Washington Statutes regarding community property, homestead statutes, and perfection of a lien.

The standard of review is *de novo* when reviewing statutory interpretation. *HomeStreet, Inc. v. Dep't of Revenue,* 166 Wn.2d 444, 451, 210 P.3d 297 (2009), *Beal Bank, SSB v. Sarich*, 161 Wash.2d 544, 547, 167 P.3d 555 (2007). De novo review is also used when the issues presented are purely legal. *In re the Trustee's Sale of the Real Property of Ball v. JPMorgan Chase Bank, N.A.*, 179 Wash.App 559, 845-46, 319 P.3d 844 (2014), *In re Trustee's Sale of the Real Property of Upton*, 102 Wash.App. 220, 223, 6 P.3d 1231 (2000), *In re Trustee's Sale of the Real Property of Giannusa*, 169 Wash.App. 904, 907, 282 P.3d 122 (2012) ("Since this issue is purely legal and involves statutory construction, our review is de novo.").

Under a *de novo* review, the Appellate Court "performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). "When possible, the court derives legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Cashmere Valley Bank v. State, Dept. of Revenue*, 181 Wash.2d 622, 334 P.3d 1100, 1104 (2014). "Our task is to discern the legislature's intent." *Giannusa*, 169 Wash.App 904 at 907. "Courts are required, when possible, 'to give effect to every word, clause and sentence of a statute.'" *Giannusa*, 169 Wash.App 904 at 910 (citing *Cox v. Helenius*, 103 Wash.2d 383, 387, 693 P.2d 683 (1985). "If the statute is unambiguous, the inquiry ends. A statute is unambiguous when it is not susceptible to two or more reasonable interpretations. *Boeing Employees Credit Union v. Burns*, 167 Wash.App. 265, 270, 272 P.3d 908 (2012).

Appellants argue that the standard of review should be abuse of discretion under *Wilson v. Henkle*, 45 Wash.App. 162, 724 P.2d 1069 (1986). This is not the proper standard when the issues presented are a question of statutory interpretation, and as a result no abuse of discretion

occurred here. In *Boeing Employees Credit Union v. Burns*, 167 Wash.App. 265, 271, 272 P.3d 908 (2012), which contained a fact pattern more in alignment in this case, *Wilson* was distinguishable in that *Wilson* involved two "contradictory judgments and orders" entered in an unlawful detainer case and where the funds at issue were deposited with the Court. Like the respondent in *Boeing*, Respondent does not seek to vacate a judgment.

2. BANK OF AMERICA, N.A.'S DEED OF TRUST ENCUMBERED THE PROPERTY.

Respondent contends its Deed of Trust was properly perfected, legally encumbered the Property, and was enforceable for purposes of Respondent's claim for Surplus Proceeds. In accordance with the arguments below, Respondent's Deed of Trust was valid and enforceable, Alan James, as the sole owner of the Property, was liable for the debt, and Respondent is entitled to the full distribution of the Surplus Proceeds.

A. RESPONDENT'S DEED OF TRUST WAS PERFECTED.

Alan James executed a Note and Deed of Trust, secured by the Property, in favor of Respondent on or about November 29, 2006 for the principal amount of $115,000.00 (CP 45-46, 51-97). Respondent recorded its Deed of Trust in the Office of the King County Auditor on September 6, 2007 as Instr. No. 20070906002552 (CP, 65-80, 149-164)

"The recording of an assignment, mortgage, or pledge of unpaid rents and profits of real property, intended as security, in accordance with RCW 65.08.070, shall immediately perfect the security interest in the assignee, mortgagee, or pledgee and shall not require any further action by the holder of the security interest to be perfected as to any subsequent purchaser, mortgagee, or assignee..." RCW 7.28.230(3), *see also Olympic Coast Investments Inc. v. U.S. Bank Nat. Ass'n*, 101 Wash.App 1003, *2 (2000) ("A security interest in a promissory note and the deed of trust securing it is created and perfected by endorsement and physical delivery of the note to the

secured party, and the recordation of an 'assignment for security purposes' of the deed of trust in the real property records."). "An instrument is deemed recorded the minute it is filed for record." RCW 65.08.070.

As a result Respondent's security interest was deemed perfected against all other mortgages, or against any claims made by subsequent purchasers, as of September 6, 2007.

B. RESPONDENT'S DEED OF TRUST WAS NOT VOID DUE TO FAILURE OF DORATHY JAMES TO EXECUTE THE DOCUMENT.

Appellants contend that the Deed of Trust was void under RCW 26.16.030, which states that community property cannot be encumbered without both partners acknowledging the instrument (AOB, 9). However Respondent's Deed of Trust is not automatically void and unsecured as Appellants contend, and the facts of this case show the Deed of Trust is not void.

First, Respondent's Deed of Trust was merely *voidable* as opposed to *void*. "Where an instrument conveying an interest in community real estate is not signed by the wife, she may avoid it." *Bakke v. Columbia Valley Lumber Co.*, 49 Wash.2d 165, 170, 298 P.2d 849 (1956) (citing *Stabbert v. Atlas Imperial Diesel Engine Co.*, 39 Wash.2s 789, 238 P.2d 1212). The power of avoidance is possessed by the party whose signature did not appear on the document. *Stabbert* at 792. The "statute is designed to protect the nonsigning spouse against improvident transfers or encumbrances involving major assets belonging to the community." *Taylor Distributing Co., Inc. v. Haines*, 31 Wn.App 360, 365, 641 P.2d 1204 (1982).

Second, in order to render Respondent's Note and Deed of Trust void, either Dorathy James or, after her death, the Estate of Dorathy James was required to take affirmative steps to void the contract: "Unless rescinded, however, a voidable contract imposes on the parties the same obligations as if it were not voidable… It does not follow that a [party] may, tortoise-like, claim the protection of the statute …" *Stabbert* at 791-793.

Nothing in the court's records show that Dorathy James or her probate estate contested Respondent's lien against the Property.[1] Instead Appellants seek to belatedly invoke the waived right of Dorathy James to void Respondent's Note and Deed of Trust. Dorathy James estate is not a party to this action, and Appellants do not have standing to assert her defenses to obtain the Surplus Proceeds. Appellants are also estopped from reopening the probate of Dorathy James in order to attempt to void the lien (*see In re Estate of Kelly*, 152 Wash.App. 1048 at *1: "Finality in probate proceedings is important. So the grounds for reopening an estate once it has been closed are rigorous and limited. The court must conclude that there was extrinsic fraud or that the declaration of completion of probate is void on its face.").

Third, Appellants' reliance on *Campbell v. Sandy*, 190 Wash. 528, [532], 69 P.2d 808 (1937) to support their argument that Respondent's Deed of Trust is void is disingenuous. The circumstances of *Campbell* are dissimilar to those of issue here because in *Campbell*, unlike here, (a) the signing spouse had been awarded sole possession of the property, and (b) in *Campbell* there was a competing claim by a later encumbrancer who presumably obtained the signatures of both spouses. Here the estate of the signing spouse is challenging the lien.

Campbell was distinguished by *Taylor Distributing*, which pointed out *Campbell* relied on a statute that was revised in 1972 <u>and was no longer applicable</u>. *See Taylor Distributing*, 31 Wash.App. 360 at 363-364 ("This section changed the wording of the former statute, only to the extent of equalizing the rights and duties of the spouses; the nonjoining spouse, either male or female, now has the power to disaffirm the transaction where that spouse has not joined in its

---

[1] In fact, the documents filed in Dorathy James' intestate Probate case, Superior Court of Washington, King County, Case No. 07-4-01929-1 KNT, the Estate of Dorathy James actually ratified Respondent's lien by listing it in Section B of the Inventory document filed, under penalty of perjury, by Alan James on July 9, 2007.

execution. H. Cross, Equality for Spouses in Washington Community Property Law-1972 Statutory Changes, 48 Wash.L.Rev. 527, 535 (1973). The legislature is presumed to have been aware of prior judicial interpretations on this point [where only one spouse in a community encumbers real property] and has not seen fit to change those interpretations."). This statutory revision occurred prior to Alan James' execution of Respondent's Note and Deed of Trust.

Further, RCW 26.16.030 does not provide protection to the spouse that created the encumbrance on the community property asset: "neither the purpose of the statute nor justice would be served by allowing Mrs. Haines to assert the statute as a sword to defeat satisfaction of a debt owed by her." *Taylor Distributing* at 365. That is precisely the situation presented here.

Alan James encumbered the Property and was clearly liable for the debt to Respondent. Appellants cannot use miscited case law, RCW 26.16.030, and a vague conclusion to declare Respondent's contract void when the Court's record does not show that either Dorathy or Alan James took any act to void the contract, or that either manifested any intent to do so.

C. DORATHY PREDECEASED ALAN JAMES, AND HER INTEREST WAS MERGED WITH ALAN JAMES' INTEREST PRIOR TO FORECLOSURE.

Dorathy James died intestate in January, 2007, at which time Alan James commenced probate proceedings, and as part of the probate process, recorded a Personal Representative's Deed which transferred the Property into his sole ownership (AOB, 7).[2]

RCW 11.04.015 states that where a person dies intestate the surviving spouse receives the decedent's entire share of the community estate. Because the Court's record leaves no other conclusion, the Appellants all appear to be the offspring of Alan and Dorathy James, and

---

[2] This Deed was recorded in King County on October 10, 2007 as Instr. No. 20071010000411.

therefore would not have been entitled to any share of Dorathy James' estate upon her death. Only Alan James was entitled to, and subsequently took, Dorathy's community property share.

When Alan James recorded the Personal Representative's Deed the community estate's interest in the Property was merged with his own. Merger occurs when two separate interests vest in one person, and that person intends for the interests to unite. *In re Ball*, 179 Wash.App 559 at 564 ("The doctrine of merger springs from the fact that when the entire equitable and legal estates are united in the same person there can be no occasion to keep them distinct…"). *See also Dougherty v. Dougherty*, 24 Wash.2d 811, 167 P.2d 467 (1946).

Clearly when Alan James acted to transfer all interest in the Property into his name alone there were two distinct estates, he had the right to merge them, and that he intended for the estates to unite and be merged, thereby extinguishing the community property interest.

At the time Wells Fargo conducted the foreclosure sale, title was vested in "Alan E. James as his separate property." (CR, 7). Appellants did not dispute this stated vesting of title during the proceeding, and in fact Appellants' Opening Brief affirms that the status of the parties just "prior to foreclosure" is what controls distribution of the Surplus Proceeds (AOB, 4).

D. ANY DEFECT IN RESPONDENT'S SECURITY INTEREST WAS CURED UNDER THE AFTER-ACQUIRED PROPERTY DOCTRINE.

Even if this Court were to agree with Appellant's contention that Respondent's Deed of Trust was void (or voidable) as a result of the absence of his spouse's signature, under the after-acquired title doctrine [RCW 64.04.070], once James Alan took sole ownership of the Property, via the Personal Representative's Deed (AOB, 7), his interest would have then become subject to Respondent's Deed of Trust. As a result Respondent's lien remained fully enforceable against both the Property and Surplus Proceeds. RCW 64.04.070 states:

> Whenever any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and

> any person or persons who may hereafter sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, **such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered, and to his or her and their heirs and assigns forever**. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands and to his or her or their heirs and assigns, and shall thereafter run with such land.

[emphasis added]. That is essentially what occurred here, with James Alan acquiring *sole* ownership of the Property after executing the DOT in favor of Respondent. Indeed, any contrary result would be inequitable and allow James Alan and his heirs to be unjustly enriched at the expense of Respondent.

Case law not only supports Respondent's position, it has remained undisturbed since at least 1901: "the general doctrine of estoppel must apply to this as to any other case where lands are mortgaged by one not having title, but who afterwards acquires title. When a person contracts an obligation to another, and grants a mortgage on property of which he is not then the owner, the mortgage is valid if the debtor ever afterwards acquires the ownership of the property by any right." *Weber v. Laidler*, 26 Wash. 144, 152, 66 P. 400 (1901). "It is well settled, since the decision of the Supreme Court of the United State in *Pennock v. Coe*, 23 How. 117 [16 L.Ed. 436], that one may execute a mortgage, valid at least in equity, upon property not in existence or not owned by him, the lien of which will immediately attach to the property when it shall come into existence, or become the property of the mortgagor; and this whether the title of the mortgagor is legal or equitable." *Simons v. Lee James Finance Co.*, 56 Wash.2d 234, 237, 351 P.2d 507 (1960). *See also*, *Vansant v. Hartman*, 88 Wash. 636, 642, 153 P. 1062 (1915) ("If Meacham had mortgaged the real estate to Vansant, we have no doubt that an after-acquired title to the real estate would be subject to the mortgage…"). *See also* RCW 62A.9A.204(a) ("a security agreement may create or provide for a security interest in after-acquired collateral.").

As a result Respondent's lien remains fully enforceable against James Alan and his heirs as to both the Property and Surplus Proceeds.

E. LATE RECORDATION OF A DEED OF TRUST DOES NOT AFFECT PERFECTION OF RESPONDENT'S SECURITY INTEREST.

Respondent's lien rights were not adversely affected in this case despite the fact Respondent did not record its Deed of Trust until several months had passed after the loan documents were executed (AOB, 7).

Washington is a "race-notice" state. *Zervas Group Architects, P.S. v. Bay View Tower LLC*, 161 Wash.App 322, 325-26, 254 P.3d 895 (2011) (citing *Dickson v. Kates,* 132 Wash.App. 724, 737, 133 P.3d 498 (2006)). In a race-notice state, where there are two or more competing claims for lien priority, the first to record is deemed to have the senior lien.[3] There is no statutory requirement that requires a mortgagee to record its Deed of Trust within a stated time from when the document is executed. The failure to timely record is solely at risk of subordination to a subsequent mortgage or claim of ownership by a subsequent bona fide purchaser for value. *Zervas*, 161 Wash.App 322 at 325-26.

Here there is no issue of subordinate lien or ownership interests by another party with respect to lien priority rights. Alan James cannot claim any right as a "subsequent purchaser," particularly since he acquired with express knowledge of the lien, and in any event his Personal Representative's Deed was recorded after Respondent's Deed of Trust.

F. THE SUPERIOR COURT HELD A HEARING ON LIEN PRIORITY AND DETERMINED THAT RESPONDENT WAS ENTITLED TO THE FUNDS.

Appellants own Opening Brief specifically states that determination of lien priority is "within the discretion of the Superior Court Judge" (AOB, 8-9). This means Appellants concede

that the ruling by the Court should remain undisturbed, notwithstanding a homestead argument that Appellants specifically exclude from appellate review, absent an abuse of that discretion. None has been established here.

"This court has said many times that, if a judgment of the trial court can be sustained on any theory, such judgment will not be reversed on appeal." *Erickson v. Wahlheim*, 52 Wash.2d 15, 18, 319 P.2d 1102 (1950) (citing *Witzel v. Tena*, 1956, 48 Wash.2d 628, 295 P.2d 1115; *Ferris v. Blumhardt*, 1956, 48 Wash.2d 395, 293 P.2d 935; *Radach v. Prior*, 1956, 48 Wash.2d 901, 297 P.2d 605). This standard has been met.

The Court record shows Appellants filed two separate Note for Motion Docket for a "Motion for Determination of Claimant's Priority (RCW 61.24.080(3)" (CP, 30-31, 107-108). The matter was set for trial (CP, 187-190), and the Court reviewed the competing motions and heard oral argument on the facts at issue (CP, 284). The Court determined Respondent was entitled to receipt of the Surplus Proceeds (CP, 263-265, 284-286), and ruled that Appellant's homestead claims, which in reality were Appellants arguments pertaining to the failure of Dorathy James to execute the Note and Deed of Trust under RCW 6.13.060 and 6.13.010, were extinguished at the time of her death. The Court further found that the Estate of Alan James did not have standing to assert the rights and defenses of Dorathy James.

Based on Appellant's concession and the Court's ruling, Respondent was and is entitled to the Surplus Proceeds.

///

///

---

[3] Exceptions to this rule exist under UCC Article 9 (as incorporated by RCW 62A.9A) that are not applicable here.

3. RESPONDENT WAS NOT REQUIRED TO SUBMIT A CLAIM IN EITHER PROBATE CASE.

Appellants allege a failure of Respondent to submit a claim to either the Estate of Dorathy James or the Estate of Alan James as the basis for holding that Respondent now lacks an ability to enforce its lien and claim the Surplus Proceeds (AOB, 7); they are incorrect.

RCW 11.40.135, which governs distribution of probate estates, states: "If a creditor's claim is secured by any property of the decedent, this chapter does not affect the right of a creditor to realize on the creditor's security, whether or not the creditor presented the claim in the manner provided in RCW 11.40.070." That security interest extends not just to the property itself, but to any proceeds from its sale.

Further, "in an action for mortgage foreclosure, the claim is not subject to the nonclaim statute where no personal deficiency judgment against the estate is claimed." *Gilkes v. Beezer*, 4 Wash.App. 761, 764, 484 P.2d 493, 496 (Wash.App. 1971) (quoting *Locke v. Andrasko*, 178 Wash. 145, 34 P.2d 444 (1934); *Reed v. Miller*, 1 Wash. 426, 25 P. 334 (1890); and *Scammon v. Ward*, 1 Wash. 179, 23 P. 439 (1890)).

Respondent does not seek a deficiency judgment because it never foreclosed its lien, and was not required to present a probate claim. Accordingly, Respondent's failure to file a probate claim does not bar recovery from the Surplus Proceeds.

4. RESPONDENT IS ENTITLED TO THE SURPLUS PROCEEDS UNDER RCW 61.24.080(3).

RCW 61.24 governs Washington's use of deeds of trust. *Beal Bank,* 161 Wash.2d at 548. Surplus proceeds from a sale are disbursed pursuant to RCW 61.24.080(3): "[i]nterests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property, as determined by the court.

A party seeking disbursement of the surplus funds shall file a motion requesting disbursement in the superior court for the county in which the surplus funds are deposited."

"Courts are required, when possible, 'to give effect to every word, clause and sentence of a statute.'" *Giannusa*, 169 Wash.App 904 at 910. "If the statute is unambiguous, the inquiry ends. A statute is unambiguous when it is not susceptible to two or more reasonable interpretations. *Boeing*, 167 Wash.App. 265 at 270.

Case law has not questioned the interpretation of RCW 61.24.080(3), and never stated that any portion of that statute is ambiguous. *See e.g. Beal*, 161 Wash.2d 544, 167 P.3d 555; *In re Ball*, 179 Wash.App 559, 319 P.3d 844; *In re Upton*, 102 Wash.App. 220, 6 P.3d 1231; *In re Giannusa*, 169 Wash.App. 904, 282 P.3d 122; and *Boeing*, 167 Wash.App. 265, 272 P.3d 908.

Instead, case law has consistently held that the holder of a junior lien extinguished by the foreclosure of a senior lien is entitled to excess proceeds based on its Note and lien position:

> A second deed of trust beneficiary has a superior interest in the surplus over the borrower…In *Upton,* Division One of this court held that a second deed of trust beneficiary had priority to the surplus funds over a homeowner interest, rejecting the homeowner's argument that their homestead interest was superior. … Under RCW 61.24.080(3), the second deed of trust beneficiary maintained its priority interest in the surplus from the trustee's sale... Public policy supported this conclusion: A contrary holding would discourage lenders from granting second deeds of trust and from entering subordination agreements.

In re Giannusa, 169 Wash.App 904 at 908 (citing *Upton,* 102 Wash.App. at 224–25, 6 P.3d 1231) (internal citations omitted).

RCW 61.24.080(3) does not contemplate an exception for community property interests, and does not raise the prospect of community property claims. As the *Taylor Distributing* Court noted, "[t]he legislature is presumed to have been aware of prior judicial interpretations on this point [where only one spouse in a community encumbers real property] and has not seen fit to change those interpretations." *Taylor Distributing*, 31 Wash.App. 360 at 363-364.

Here the Court investigated the facts and circumstances in this case, held a hearing on the matter, and determined that Respondent was entitled to the Surplus Proceeds. By Appellants' own concession on Pages 8-9 of the Opening Brief, this ruling should remained undisturbed.

V. CONCLUSION

Predicated on the foregoing, it is clear that the Superior Court properly granted Respondent's "Cross-Motion for Disbursement of Excess Proceeds From Trustee's Sale Pursuant to RCW 61.24.080," and also properly denied Appellants' "Motion for Disbursement of Surplus Funds Pursuant to RCW 61.24.080(3)" as well as their "Motion for Reconsideration." Appellants seek an inequity based on a tenuous stretch between sparsely cited case law and several "conclusions" drawn from their misleading cites. As a result the rulings of the Superior Court should be affirmed in entirety.

Respectfully submitted,
WRIGHT, FINLAY & ZAK, LLP

Dated: January 29, 2015

By: _____
Renee M. Parker, Esq.
Attorneys for Respondent,
BANK OF AMERICA, N.A.

PROOF OF SERVICE

I, Steven E. Bennett, declare as follows:

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 4665 MacArthur Court, Suite 200, Newport Beach, California 92660. I am readily familiar with the practices of Wright, Finlay & Zak, LLP, for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited with the United States Postal Service the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

On January 30, 2015, I served the within **APPELLEE'S BRIEF** on all interested parties in this action as follows:

[ ] by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope(s) addressed as follows:

N. Brian Hallaq
Jan Gossing
BTA Lawgroup, PLLC
Attorney for Appellant(s)
31811 Pacific Hwy. S., Suite B-101
Federal Way, WA 98003
Tel: (253) 444-5660

[X] (BY MAIL SERVICE) I placed such envelope(s) for collection to be mailed on this date following ordinary business practices.

[ ] (BY CERTIFIED MAIL SERVICE) I placed such envelope(s) for collection to be mailed on this date following ordinary business practices, via Certified Mail, Return Receipt Requested.

[ ] (BY PERSONAL SERVICE) I caused personal delivery by ATTORNEY SERVICE of said document(s) to the offices of the addressee(s) as set forth on the attached service list.

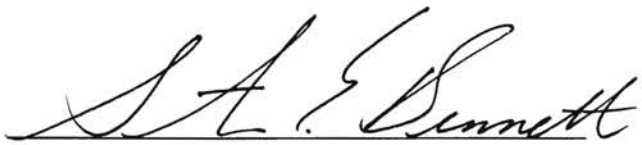
[ ] (BY FACSIMILE) The facsimile machine I used, with telephone no. (949) 477-9200, complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original Proof of Service.

[ ] (BY GOLDEN STATE OVERNIGHT- NEXT DAY DELIVERY) I placed true and correct copies thereof enclosed in a package designated by Golden State Overnight with the delivery fees provided for.

[ ] (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(b)(2)(E). "A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P.5(b)(2)(E). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."

[X] (Federal) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 30, 2015, at Newport Beach, California.



Steven E. Bennett