

CASE NO. 37960-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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(Pierce County Superior Court No. 07-2-13859-1)

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HOSS MORTGAGE INVESTORS, INC., a Washington Corporation

Plaintiff/Appellant,

vs.

THE SENATOR, LLC, a Washington Limited Liability Corporation,

Defendant/Respondent.

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APPELLANT'S APPELLATE BRIEF, RAP 10

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## I. ASSIGNMENTS OF ERROR

### **A. Assignments of Error**

- (1) Upon motion for summary judgment brought by Respondent The Senator LLC, the Trial Court, Honorable Brian Tollefson, erred in granting an order dismissing Appellant's claims where the dismissal was based on the Trial Court's finding that the parties intended for the three loans to be considered one loan package.
- (2) Upon motion for summary judgment brought by Respondent The Senator LLC, the Trial Court, Honorable Brian Tollefson, erred in granting an order dismissing Appellant's claims where the dismissal was based on the Trial Court's finding that the three loan agreements required that Appellant fund all three loans when the loan agreements contained specific language that stated Appellant did not and could not guarantee that any of the loans would be funded.
- (3) Upon motion for summary judgment brought by Respondent, The Senator LLC, the Trial Court, Honorable Brian Tollefson, erred in granting an order dismissing Appellant's claims on the basis that three loans were in fact one loan when the three loan agreements clearly stated that the each document represented the parties' entire agreement with respect to each particular loan.

- (4) Upon motion for summary judgment brought by Respondent, The Senator LLC, the Trial Court, Honorable Brian Tollefson, erred in granting an order dismissing Appellant's claims when issues of material fact existed as to whether Appellant had the funds necessary to finance two of the three loans.

**B. Issues Pertaining to Assignments of Error**

- (1) Issues Pertaining to Assignment of Error No. 1:

Upon Motion for Summary Judgment brought by Respondent seeking dismissal of Appellant's claims, was it error for the Trial Court to find that the contracts at issue, three loan agreement, were intended to be a loan package requiring Appellant to fund all three loans?

Appellant asserts: "YES."

- (2) Issues Pertaining to Assignment of Error No. 2:

Upon Motion for Summary Judgment brought by Respondent seeking dismissal of Appellant's claims, was it error for the Trial Court to find that the parties intended that Appellant was required to fund all three loans when the loan agreements specifically stated that Appellant did not and could not guarantee that any of the loans would be funded?

Appellant asserts: "YES."

(3) Issues Pertaining to Assignment of Error No. 3:

Upon Motion for Summary Judgment brought by Respondent seeking dismissal of Appellant's claims, was it error for the Trial Court to rely on statements made by Respondent months after the parties entered into the written agreements indicating that it viewed the loans as a loan package that required Appellant to fund all three loans?

Appellant asserts: "YES."

(4) Issues Pertaining to Assignment of Error No. 4:

Upon Motion for Summary Judgment brought by Responding seeking dismissal of Appellant's, was it error for the Trial Court to grant summary judgment when issues of material fact existed as to whether Appellant had the funds necessary to fund the two loans that are at issue in this matter?

Appellant asserts: "YES."

## II. STATEMENT OF THE CASE

### *A. Introduction to the Case and the Parties' Theories of the Case.*

This dispute arises out of the interpretation of loan agreements whereby Appellant, Hoss Mortgage Investors, Inc. ("HMI"), agreed to provide Respondent, The Senator LLC, with loans secured by separate

pieces of property. (CP 1-36) In mid-July 2007, The Senator applied for three loans for properties commonly known as “The Senator Apartments”, “The Savoy Apartments”, and “The Cascade Apartments.” Each agreement explicitly stated that HMI did not guarantee that any of the loans would be funded and that no oral promises or representations were made. (CP 11; CP 15-16; CP 20-21) Further, each agreement stated that within 30 days The Senator had the duty to clear title to the subject properties and had a duty to finalize the transactions. (CP 9-10; CP 14-15; CP 19-20) Failure to do so would result in The Senator’s liability for HMI’s marketing costs and attorney fees. (Id.) In the beginning of October 2007, HMI approached The Senator to close two of the three loans. (CP 82-83) The Senator refused and attempted to renegotiate the terms of the two loans. (Id.) On November 1, 2007, The Senator affirmatively stated that it would not finalize the transactions. (CP 446-52) Shortly thereafter, HMI initiated this litigation to recoup its costs for the two loans per the terms of the agreements.

Both parties have claims in this matter.<sup>1</sup> HMI has two claims: breach of contract and breach of warranty. (CP 4-6) HMI supports its claim for breach of contract with the theory that The Senator breached the terms of the agreements when it refused to finalize the transactions on

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<sup>1</sup> This brief will not discuss The Senator’s claims as they are not the subject of this appeal. However, The Senator’s counterclaims can be found at CP 189-191.

November 1, 2007. Further, HMI claims breach of warranty because HMI because The Senator failed to give accurate information on its loan application. HMI's claims were dismissed on motion for partial summary judgment; their dismissal is the subject of this appeal.

The Senator refutes HMI's claims by asserting that the parties intended the loans to be construed as a loan package whereby HMI was obligated to fund all three loans. (CP 187-88) Further, The Senator argues that the language that obligated it to finalize the transaction and clear title within 30 days limited its liability for HMI's costs to within 30 days of signing the agreements. (Id.; CP 192-200) Therefore, if HMI failed to fund the loans within 30 days, The Senator asserts that it was not obligated to finalize the transactions and could not be liable for HMI's costs and fees. Because HMI failed to fund the loans within 30 days, The Senator argues, it cannot be liable for any of HMI's costs.

After extensive litigation, the Trial Court granted judgment in favor of The Senator on its second motion for partial summary judgment. (CP 504-505) In its motion, The Senator argued that HMI could not fund the loans for the Senator Apartments and the Savoy Apartments and, therefore, its claims must fail. (CP 506-16) The Trial Court, however, granted The Senator's motion upon the belief that at all times the parties had intended that the three loans be considered a loan package. (VR 36-

37) Because HMI failed to fund the loan for the Cascade Apartments, HMI could not maintain its claims for breach of contract and breach of warranty.

*B. Substantive History.*

HMI is in the business of hard money lending whereby it sells securities that are backed by the commercial loans, typically used to finance the purchase or refinance of commercial property. (CP 80) In order to market and sell the securities, Appellant must seek state approval of the security a process that, at the time the parties entered into this agreement, took more than 30 days. (CP 396)

In July 2007, Respondent approached Appellant to obtain three loans for three apartment complexes in Yakima, Washington. (CP 80) The loan agreements set forth specific responsibilities and duties of each party. Importantly, the loan agreements stated in "Section E" that:

"[i]n the event that borrower(s) should fail or refuse to complete the transaction or to clear title to the real property to enable [Appellant] to close the loan within 30 days from the date hereof, borrower(s) shall be liable for all the following: Any and all expenses actually incurred by [Appellant] or its agents pursuant to this loan application and the loan fee agreed to on page one, costs, fees and expenses of collections, including attorneys' fees actually incurred, should borrower(s) refuse to comply with the above provisions when requested to do so by [Appellant]."

(CP 9-10; CP 14-15; CP 19-20) Further, the loan agreements each stated that HMI did not guarantee that it could fund any of the loans and that no oral promises would alter the language of the written agreement. (CP 11; CP 16; CP 21) The agreements imposed a duty upon The Senator to provide certain information HMI needed to obtain state approval of the marketing material, specifically the Special Offering Circular (“SOC”). (*Id.*) Lastly, HMI recorded three deeds of trust, one on each property, in the amount of the loan per the agreements’ terms. (CP 36-40; CP 42-46; CP 48-55)

After the parties entered into the agreements, HMI began the process of obtaining state approval for the SOCs. (CP 395-97) Because much of the information needed to have the state approve the SOC is information maintained by the borrower, in this case The Senator, approval is dependent on the borrower’s cooperation. (CP 321-25; CP 397) Here, The Senator waited over a month to provide all the necessary information to HMI. CP 397. Once HMI received all the information, the State approved the SOCs in September 2007. (*Id.*)

After the State approved the SOCs, HMI began to solicit investors to fund the loans. However, the subject properties were in a dilapidated state and ultimately, HMI was unable to find investors who were interested in the loan for the Cascade Apartments. (CP 82-83)

Accordingly, HMI released the deed of trust securing that property. (Id.) HMI was able to find investors who were willing to fund the majority of the loans for the Senator Apartments and the Savoy Apartments. CP 398 To fund the balance of the two loans, HMI obtained a line of credit. (CP 398; CP 668-69; CP 780-81) Therefore, by early October 2007, HMI was able to fund two of the loans.

When HMI approached The Senator to finalize the transactions, The Senator demanded that the terms of the loans be changed. (CP 395-440) For the next three weeks, the parties sent numerous communications discussing the transaction. (Id.) The Senator affirmatively stated that it would not finalize the transaction on November 1, 2007. (CP 441-45; CP 446-52)

### *C. Overview of Procedural History*

After HMI filed suit to recoup its fees and costs per the terms of the agreement, the parties entered into extensive litigation that culminated with The Senator's renewed motion for partial summary judgment. HMI asserted that when The Senator refused to finalize the transactions for the Senator Apartments and Savoy Apartments, The Senator breached the parties' agreements. (CP 4) The Senator argued that the loans were part of a package and because HMI could not fund the loan for the Cascade Apartments, HMI could not maintain its claims. (CP 187-191)

The parties' litigation generated a voluminous record that established material issues that are not in dispute and those that are. Importantly, the parties agree that HMI was under no obligation to fund the loans and that the 30 day clause in the agreement did not impose a duty on HMI to close the loans within 30 days. (CP 155; CP 480) Further, the parties did not dispute that on November 1, 2008, The Senator affirmatively stated that it would not finalize the transactions. (CP 441-45; CP 446-52)

The issues that were in dispute were whether the 30 day clause in Section E limited The Senator's obligation to finalize the transaction to 30 days, whether Section E limited HMI's ability to recover its costs to 30 days, and whether the loans were individual loans or part of a package deal. (CP 193-200; CP 237-248; CP 479-488; CP 489) These issues were established in The Senator's first unsuccessful attempt at a motion for partial summary judgment. (CP 489; CP 507-08)

With these issues in dispute, The Senator filed its second motion for summary judgment. In support of its motion, The Senator argued that a new declaration of Shannon Sperry, the attorney for the investor who had personal knowledge regarding the financing of the loans and The Senator's refusal to finalize the transactions, showed that HMI did not

have the funds to close the two remaining loans. (CP 506-12)

Specifically, Ms. Sperry's declaration stated:

Centurion Financial Group, LLC was prepared to invest \$1,700,000.00 to fund portions of two loans that [HMI] was in the process of making to The Senator. All of the documents necessary to consummate the Centurion's investment in the loans had been finalized, though the documents had not been signed and no money had been disbursed. Centurion's investment was conditioned upon it receiving an interest in two deeds of trust [The Senator] had already granted to [HMI], and upon those deeds of trust being in first position, not subject to any prior liens.

(CP 543-44) The Senator also relied upon a declaration of The Senator's counsel in which he stated that The Senator had requested documentation related to the line of credit HMI secured but had not received any. (CP 517-40; RP 11-13) Lastly, The Senator's agent, Aaron Stewart, provided a declaration that outlined the correspondence between HMI and The Senator. (CP 545-51) In particular, Mr. Stewart stressed communications in which HMI stated it had either wired the funds or was in the process of wiring the funds to finalize the transaction. (CP 566-76) The Senator theorized that because HMI could not place its investor into first position, HMI could not finalize the transaction. With this information, The Senator argued that HMI could not finalize the transactions and, accordingly, HMI's claims should be dismissed as a matter of law.

Importantly, in its renewed Motion The Senator did not re-raise the issue regarding whether the loans were suppose to be considered interrelated in a “loan package”. Rather, The Senator simply reiterated its position but acknowledged that the parties disputed this matter and that it was not an issue of fact upon which it could prevail on summary judgment. (CP 513-14) Therefore, The Senator sought judgment in its renewed motion not because it believed it had evidence that eliminated the issues of fact surrounding whether the loans were part of a package but rather because The Senator believed it had irrefutable evidence that HMI could not fund the two loans it stated it would fund.

In response HMI stressed that the language of the agreements obligated The Senator to clear title to the properties so that HMI could finalize the transactions and that The Senator failed to do so. (CP 577) Further, HMI noted that testamentary and documentary evidence was before the court that, at the very least, raised significant issues of fact with regard to HMI’s ability to fund the loans. (CP 579; VR 15-16) HMI, like The Senator, cited to Ms. Sperry’s two declarations in which she stated that the documents to finalize the transaction were completed and that funds were available. CP (441-45; CP 543-44) Further, HMI cited to numerous declarations in which representatives of HMI stated that it had

the funds available to finalize the two loans. (CP 579; CP 668; CP 673; CP 786)

From the evidence before the Trial Court, the Trial Court determined that the parties intended that the transactions be considered a part of a “loan package” and that because HMI did not fund the third loan, “The Cascade Apartments” loan, HMI’s claims for breach of contract must fail. (RP 36-37) In support of its ruling, the Trial Court relied on a letter from The Senator to HMI that outlined the way in which The Senator was going to use the funds. (VR 37; *see* CP 824) The letter, as noted in a declaration of Todd Hoss, was required by the State in order to approve the SOC. (CP 784-85; RP 43-44) Further, The Senator generated the letter because HMI requested the information and the letter was created in August 2007, nearly a month after the parties entered into the agreements. The letter, the Trial Court believed, showed that the parties from the inception of the agreements intended the loans to be interdependent and HMI’s failure to fund the Cascade Apartments loan prevented HMI from maintaining its claims, despite the clear language of the loan applications and the declarations submitted by HMI. (VR 36-37)

### III. ARGUMENT

#### **A. Standard of Review**

HMI pursues this appeal from a ruling granting summary judgment.

When reviewing a summary judgment, an appellate court engages in the same inquiry as the trial court. Richard C. Gossett, et. al., v. Farmers Ins. Co. of Washington, 82 Wn. App. 375, 381, 917 P.2d 1124 (1996) (*reversed on other grounds*, 133 Wn.2d 954, 948 P.2d 1264 (1997)). “Summary judgment is proper if the pleadings, depositions, and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Id.; CR 56 “The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” Id. Review is de novo, requiring the court to step into the shoes of the trial court by engaging in the same inquiry as the trial court. Id.

In contract disputes, summary judgment is appropriate only if a contract is unambiguous as the execution of an unambiguous contract is an issue of law. Voorde Poorte v. Evans, 66 Wn. App. 358, 361, 832 P.2d 105 (1992) Ambiguity creates factual issues that place a contract outside the arena of summary resolution as such contracts require a trier of fact to weigh evidence and the credibility of the parties. In re Estates of Wahl, 99

Wn.2d 828, 831, 664 P.2d 1250 (1983) A contract is ambiguous if its terms are uncertain or they are subject to more than one meaning. Dice v. City of Montesano, 131 Wn. App. 67, 128 P.3d 1253 (2006).

Here HMI is asking this Court to step into the shoes of the Trial Court and determine whether issues of fact exist regarding two matters: (1) if the parties intended the loan agreements to be part of a “loan package” and (2) if HMI was able to fund the loans for the Senator Apartments and the Savoy Apartments.

#### **B. Discussion of Authority**

*(1) The Court Erred when it Determined that the Loans were to be Considered a Loan Package Because Each Loan Agreement Clearly Stated that HMI was not Obligated to Fund Any of the Loans nor were Oral Promises Made in Relation to the Loans.*

The court below erred when it found that the parties intended to consider the three loans a single package because in doing so it relied on the claimed unilateral understanding of one party to contradict the clear, explicit language of the contracts and the evidence offered by HMI.

Washington courts have adopted the manifestation theory of contracts, which requires the court to rely on the objective manifestation of the agreement rather than on an unexpressed, unilateral understanding of one party. In doing so, courts may look beyond the document’s

language to lend meaning to specific words but not to contradict or vary the contract's language. Here, the court erred when it ruled on summary judgment that the parties intended the loans to be one package based upon a letter The Senator sent HMI a month after the parties entered into the three agreements. Error lies in the fact that The Senator's letter expressed its unilateral understanding that directly contradicted the explicit language of the agreements and the evidence offered by HMI.

The law of contracts is the same be it a contract between two corporate giants or two individuals contracting for the sale of a used car. Washington Courts use the manifestation theory of contract interpretation. Hearst Communications, Inc. v. Seattle Times Company, 154 Wn. 2d 493, 115 P.3d 262 (2005). Under this theory, courts attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. Id. Thus, courts interpret what was written and not what one party thought was written. Id. Surrounding circumstances and other extrinsic evidence are to be used to determine the meaning of specific words and terms and not to show an intention independent of the instrument or to vary, contradict, or modify the written word. Id. Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions. Lynott v. National Union

Fire Ins. Co., 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Therefore, courts may consider the circumstances surrounding the contract to lend meaning to the contract's specific terms but not to contradict the written terms.

Here, the Trial Court claimed it could determine that HMI "knew that this was a packaged loan deal and that all three loans had to be funded" (*see* RP 37) despite the fact that the last page of each loan agreement stated that HMI was under no obligation to fund any of the loans and despite the fact that the agreements stated no oral promises were made.

The court's focus on a letter from The Senator to HMI in which The Senator outlined how the funds were to be used was a reliance on The Senator's statements that did nothing more than infer The Senator's subjective understanding of the agreements. Importantly, HMI required the information from The Senator not to show their mutual intent, or to understand The Senator's subjective intent for that matter, but to obtain state approval of the SOC. Further, prior to the request for the information contained in the August 14, 2007 letter, The Senator never indicated how it would use the funds or that, at least in The Senator's view, the funds were interrelated.

The court noted that the loan applications were signed on the same date and that the majority of the loans' terms were the same. From this, the court found that "it's clear that they were all tied together." (RP 37) However, the court ignored the explicit language that forbade oral modifications and language that stated Appellant did not guarantee that it could fund any of the loans. Further, the Court ignored the fact that each application refers to the property that secured the loan and outlined guarantees regarding the property that Respondent had to make and that each loan application set forth the loan amount that was based upon the value of the respective property. Therefore, the loan applications contained no language that allowed them to be considered a "package" but rather contained explicit language that showed they were separate agreements, for distinct loan amounts, and secured by separate parcels of property. By ignoring this clear and explicit language, the Trial Court deviated from the expressed terms and instead relied on subjective a proposed construction urged by one party.

The actions of the parties surrounding this transaction do not show, particularly for purposes of summary judgment, that the parties intended the three loans to be a loan package.

Washington courts use extrinsic evidence to give meaning to specific terms and not to alter or contradict the written language. Other

than The Senator's statements made months after the parties entered into three separate loan agreements, the circumstances surrounding the transactions indicated three separate loans that were distinct and not a loan package. Thus, the Trial Court erred when it found that The Senator's unilateral statement, made months after the parties entered into the agreements, showed that the parties intended the loans to be considered a "loan package".

*(2) Respondent's Motion Fails to Establish that Appellant Could not Fund the Two Loans Because Appellant has Presented Evidence that Raises Issues of Material Fact.*

Even if the Trial Court had adopted The Senator's argument presented at summary judgment, a grant of summary judgment dismissing HMI's claims would still be in error. The Senator based its motion on the theory that HMI could not fund the loans because it did not have the funds to finance the Senator Apartments and the Savoy Apartments loans. In order for a party to prevail on summary judgment, the moving party must present evidence that no issues of material fact exist. After the moving party meets its burden of proof, the burden shifts to the nonmoving party to present admissible evidence to establish issues of fact exist. In response to The Senator's motion, HMI presented declarations, supported by statements made in prior depositions, that HMI had access to funds to

finance the loans for the Senator Apartments and the Savoy Apartments. Further, HMI noted that the agreements' language clearly placed the burden on The Senator to clear title to its properties. Because HMI presented admissible evidence to refute The Senator's claims, issue of fact existed that should have been resolved by the trier of fact. Accordingly, the order dismissing HMI's claims was in error.

In general, a party moving for summary judgments bears the burden to bring forward evidence that show that there are no issues of fact exist and that it is entitled to judgment as a matter of law. Doherty v. Seattle, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996). Once the moving party meets its burden, the burden shifts to the nonmoving party to present admissible evidence to establish issues of material fact. Id. Even though all evidence is viewed in a light most favorable to the nonmoving party, that party must present admissible evidence that refutes the allegations and my not rely on conclusory or speculative statements. Molsness v. City of Walla Walla, 84 Wn. App. 393, 397, 928 P.2d 1108 (1996) Where there is conflicting recitations of material evidence, the nonmoving party's recitation must prevail and where there is a dispute, the ultimate determination of fact is the exclusive province of the trier of fact. Tabak v. State, 73 Wn. App. 691, 698, 870 P.2d 1014 (1994). A central tenet of case law construing CR 56 is that not only are all facts viewed in a

light most favorable to the nonmoving party but all inferences therefrom as well. Hash Ex Rel Hash v. Children's Orthopedic Hospital and Medical Center, 49 Wn. App 211, 741 P.2d 1039 (1987). Importantly, a motion for summary judgment can be refuted with circumstantial evidence. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 150, 94 P.3d 930 (2004).

Here, fatal to The Senator's theory is the fact that it ignores the clear language of the contracts. As noted above, "Section E" of every contract clearly states that The Senator had the duty to clear title to each property so that HMI may finalize the transaction. The Senator's theory requires an interpretation of the contract, presumably using extrinsic evidence, that directly conflicts with the clear written terms. Without unnecessarily reiterating the case law discussed in subsection 1, extrinsic evidence may not be used to replace or contradict the text of a document but rather may only be used to give specific terms meaning. The Senator's theory, that HMI bore the duty to clear title to the properties owned by The Senator, simply ignores this foundational principle of contract interpretation and therefore, it cannot support summary judgment. Accordingly, The Senator's theory does not show that it is entitled to judgment as a matter of law but rather raises more issues of material fact. In response to The Senator's claim that HMI did not have the funds necessary to finance the loans, HMI pointed to numerous portions of the

record in which representatives of HMI and Ms. Sperry indicated that funds were available to finance the transaction. Importantly, reading the declarations of Ms. Sperry in a light most favorable to HMI shows that HMI has, at the very least, raised factual issues regarding whether investor funds were available to finance the transactions.

Additionally, it is undisputed that the loans were not finalized at the end of October 2007 because The Senator made affirmative statements that it would not consummate the transaction. Arguably, The Senator's theory, that HMI could not fund the transactions, was preempted by The Senator's clear statement to the escrow agent that it was not permitted to release funds from escrow or to close. Because The Senator affirmatively stated it would not finalize the transaction, HMI was not given the opportunity to fund and The Senator cannot, especially for purposes of summary judgment, argue that HMI could not meet its contractual obligations.

The Senator's reply to HMI's evidence that established material issues of fact was unpersuasive because it did not refute the evidence HMI presented. Importantly, The Senator focused on the fact that HMI did not produce documents support HMI's assertion that it had a line of credit but wholly ignored that the declarations of Todd Hoss, Shannon Sperry, and the deposition testimony of John Nagle were based upon personal

knowledge. (*See* CP 872-73). Therefore, the Trial Court was presented with conflicting testimony that did nothing more than establish that issues of fact exist that must be resolved by the trier of fact.

The submissions in this matter do not establish that HMI did not have the funds available to finance the loans for the Senator Apartments and the Savoy Apartments. The parties have submitted contradicting evidence which merely establishes that issues of material fact exist which must be determined by a trier of fact. Accordingly, summary judgment was not appropriate.

#### IV. CONCLUSION

Based on the Trial Court's record and the authority discussed above, the Trial Court erred in granting The Senator's Motion for Summary Judgment dismissing HMI's claims. The parties' dispute whether the contracts were separate transactions or part of a loan package that required all three to fund and whether HMI was able to fund the two loans in late October 2007 when The Senator affirmatively stated it would not finalize the transaction. These issues are material and can only be resolved by a trier of fact. When this Court analyzes these issues as the trial court should have the facts and inferences derived therefrom in a light most favorable to HMI, summary judgment dismissing HMI's claims is

inappropriate and accordingly, the Trial Court erred when it entered its order dismissing HMI's claims.

Respectfully submitted this 10<sup>th</sup> day of December , 2008.

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**APPENDIX A**  
**(Amended Notice of Appeal)**



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A.M. JUL 29 2008 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE PIERCE COUNTY**

**HOSS MORTGAGE INVESTORS INC., A  
Washington Corporation,**

**NO.: 07-2-13859-1**

**Plaintiff,**

**AMENDED NOTICE FOR  
DISCRETIONARY REVIEW AND  
NOTICE OF APPEAL (RAP 5.1)**

**v.**

**THE SENATOR LLC, A Washington  
Limited Liability Company,**

*Clerk's Action Required*

**Defendant.**

Plaintiff Hoss Mortgage Investors, Inc. respectfully submits this Amended Notice for Discretionary Review and Notice of Appeal pursuant to RAP 5.1 and RAP 5.2. Hoss Mortgage Investors, Inc. seeks appellate review of the trial court's Order Granting Defendant's Renewed Motion for Partial Summary Judgment, a copy of which is attached to this Notice at "Attachment A." Originally, Plaintiff filed a Notice of Discretionary Review of the Court's oral ruling. However, the Order was entered as a final decision and therefore, appellate review of this matter is not discretionary.

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1 Hoss Mortgage Investors, Inc. seeks review of the trial court's findings that there are no  
 2 genuine issues of material fact as to certain claims at issue in this case and the resulting  
 3 dismissal of Plaintiff's claims.

4 Plaintiff Hoss Mortgage Investors, Inc. is also seeking discretionary review of the trial  
 5 court's order granting Defendant's Motion to Compel Release of the Deeds of Trust a copy of  
 6 which is attached to this Notice as "Attachment B."

7  
 8 Pursuant to RAP 5.3(c), the attorneys for each of the parties in this matter are as follows:  
 9

10 Attorneys for Plaintiff Hoss Mortgage Investors, Inc.:

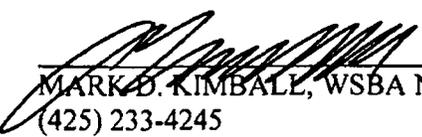
11 Mark D. Kimball, WSBA No. 13146  
 12 James P. Ware, WSBA No. 36799  
 13 Mark Douglas Kimball, P.S.  
 10900 NE 4<sup>th</sup> St., Suite 2300  
 Bellevue, WA 98004

14 Attorneys for Defendant The Senator LLC:

15 Michael W. Johns, WSBA No. 22054  
 16 Davis Roberts & Johns, PLLC  
 7525 Pioneer Way, Suite 202  
 Gig Harbor, WA 98335

17  
 18 Dated this 22nd day of July, 2008.

19  
 20 MDK Law Associates,  
 Law Offices of Mark Douglas Kimball, P.S.

21  
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 24 \_\_\_\_\_  
 MARK D. KIMBALL, WSBA No. 13146  
 (425) 233-4245  
 Attorneys for Plaintiff

25  
 LAW OFFICE  
 MARK DOUGLAS KIMBALL, P.S.  
 SKYLINE TOWER  
 SUITE 2300, 10900 NORTHEAST FOURTH  
 BELLEVUE, WASHINGTON 98004  
 (425)-455-9610  
 FAX: (425) 455-1170

ATTACHMENT A

Honorable Brian Tollefson  
Hearing Date: July 3, 2008  
Time: 9:00 a.m.

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

**HOSS MORTGAGE INVESTORS,  
INC., a Washington corporation,**

**Plaintiff,**

**vs.**

**THE SENATOR LLC, a Washington  
Limited Liability Corporation,**

**Defendant.**

**No. 07-2-13859-1**

**ORDER GRANTING  
DEFENDANT'S RENEWED  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

This matter having come before the Court upon the Defendant's  
Renewed Motion for Partial Summary Judgment Dismissing the  
Plaintiff's Claims, and the Court having considered the files and records  
of this case, including the following pleadings of the parties:

1.	DEFENDANT'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT
2.	DECLARATION OF AARON STEWART
3.	DECLARATION OF SHANNON SPERRY
4.	DECLARATION OF MICHAEL W. JOHNS

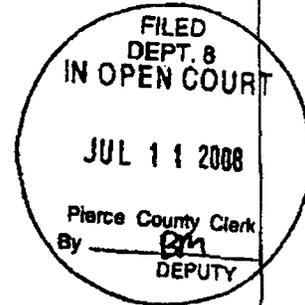


**ORDER GRANTING DEFENDANT'S  
RENEWED MOTION FOR PARTIAL  
SUMMARY JUDGMENT - Page 1**

**DAVIS ROBERTS & JOHNS, PLLC**  
7325 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8648

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5.	PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
6.	DECLARATION OF TODD HOSS
7.	DECLARATION OF JOHN NAGLE
8.	DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT
9.	REPLY DECLARATION OF AARON STEWART



as well as the arguments of counsel, it is hereby,

ORDERED, ADJUDGED AND DECREED that the Defendant's motion is granted and that the Plaintiff's claims asserted herein against the Defendant be and hereby are dismissed with prejudice. It is further

ORDERED, ADJUDGED AND DECREED that, the Court having determined that the existence of the Plaintiff's claims and the Plaintiff's deeds of trust on the Defendant's property based upon those claims is causing an immediate hardship upon the Defendant by encumbering the Defendants' property and that there is no just reason for delay in entry of such order this Order be entered as a final judgment pursuant to Rule 54(b).

DONE IN OPEN COURT this 11<sup>th</sup> day of July, 2008.

JUDGE BRIAN TOLLEFSON

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Presented by:

DAVIS ROBERTS & JOHNS, PLLC

By:



MICHAEL W. JOHNS, WSBA No. 22054  
MARK R. ROBERTS, WSBA No. 18811  
Attorneys for Defendant  
THE SENATOR LLC

Copy received; Notice of Presentation Waived:

LAW OFFICE OF MARK DOUGLAS KIMBALL, P.S.

By:



MARK D. KIMBALL, WSBA No. 13145  
JAMES P. WARE, WSBA No. 36799  
Attorneys for Plaintiff  
HOSS MORTGAGE INVESTORS, INC.

ATTACHMENT B

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

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**HOSS MORTGAGE INVESTORS,  
INC., a Washington corporation,**

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**Plaintiff,**

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15

**vs.**

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**THE SENATOR LLC, a Washington  
Limited Liability Corporation,**

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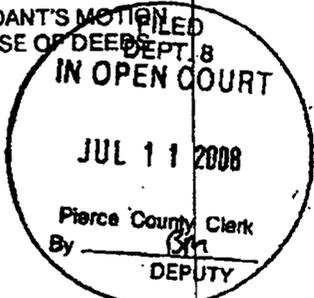
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**Defendant.**

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**No. 07-2-13859-1**

**ORDER ON DEFENDANT'S MOTION  
TO COMPEL RELEASE OF DEEDS  
OF TRUST**



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THIS MATTER comes before the above-entitled Court on the motion of Defendant to compel release of Plaintiff's deeds of trust. The Plaintiff being represented by the Law Office of Mark Douglas Kimball, P.S. and the Defendant being represented by Davis Roberts & Johns PLLC and the Court

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**ORDER ON DEFENDANT'S MOTION TO  
COMPEL RELEASE OF DEEDS OF TRUST  
Page -- 1**

**DAVIS ROBERTS & JOHNS, PLLC  
7525 PIONEER WAY, SUITE 202  
GIG HARBOR, WASHINGTON 98335  
TELEPHONE (253) 858-8606  
FAX (253) 858-8846**

1  
2 having considered the arguments of counsel and the pleadings on file herein  
3 and deeming itself otherwise advised in the premises, it is hereby

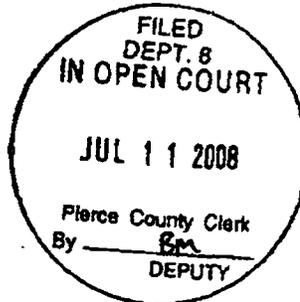
4 ORDERED ADJUDGED AND DECREED that the Defendant's motion  
5 to compel release of the deeds of trust is granted. It is further

6 ORDERED ADJUDGED AND DECREED that Plaintiff shall forthwith  
7 and without delay remove, reconvey and/or vacate all three deeds of trust  
8 affecting Defendant's property. It is further

9 ~~ORDERED ADJUDGED AND DECREED~~

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15 ENTERED IN OPEN COURT this 11<sup>th</sup> day of July, 2008.

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18 JUDGE BRIAN TOLLEFSON



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Presented by:

DAVIS ROBERTS & JOHNS, PLLC

By:   
MARK R. ROBERTS WSBA No. 18811  
Attorneys for Defendant  
THE SENATOR LLC

Copy received; Notice of Presentation Waived:

LAW OFFICE OF MARK DOUGLAS KIMBALL, P.S.

By:   
MARK D. KIMBALL WSBA No. 13145  
JAMES P. WARE WSBA No. 36799  
Attorneys for Plaintiff  
HOSS MORTGAGE INVESTORS, INC.

COURT OF APPEALS  
DIVISION II  
08 DEC 12 PM 1:57  
STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY CLERK

WASHINGTON STATE COURT OF APPEALS DIVISION II

**HOSS MORTGAGE INVESTORS, INC.,  
a Washington corporation,**

**Plaintiff,**

**vs.**

**THE SENATOR LLC, a Washington  
Limited Liability Company,**

**Defendant.**

**Court of Appeals No.: 37960-1-II**

**PROOF OF SERVICE ON PARTIES OF  
APPELLATE BRIEF**

THE UNDERSIGNED certifies that on December 10, 2008, arrangement of service upon all parties of record of the foregoing Amended Statement Regarding Arrangements was made via ABC Legal Messengers, with provision for delivery no later than December 12, 2008.

Dated this 10<sup>th</sup> day of December 2008

MDK Law Associates:  
Law Offices of Mark Douglas Kimball, P.S.

  
JAMES P. WARE WSBA 36799  
Attorneys for Plaintiff/Appellant  
(425) 455-9610

MDK LAW ASSOCIATES:  
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