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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

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

Appellants,

v.

THE SENATOR LLC, a Washington Limited Liability Company,

Respondent.

RESPONDENT'S BRIEF

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ORIGINAL

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A. STATEMENT OF THE CASE

The Senator, LLC (hereinafter the Senator) owns three commercial properties in Yakima, Washington. All three properties were in 2007 subject to blanket security interests securing three outstanding loans. (CP 547-48) The first loan was from Fairway Commercial Mortgage in the amount of \$900,000.00 and had a balloon payment for the balance of the debt was due December 15, 2007. (CP 548, 553-56) The second debt was a June 2006 loan from Aspen Yak, LLC in the amount of \$1,620,000.00, which had a balloon payment for the balance of the debt due on December 14, 2007. (CP 548, 558-60) The third debt was a short term loan in the amount of \$183,600.00 from Remington Financial LLC, which was to come due on October 20, 2007. (CP 548, 562-64)

In July 2007 the Senator applied for three loans from Appellant Hoss Mortgage Investors, Inc. (hereinafter Hoss). (CP 81) Because all of the outstanding debts were secured by all three pieces of the Senator's real property, the Senator informed Hoss that it needed to obtain financing sufficient to pay off all three existing loans, and had to have the financing in place by September. (CP 548) Hoss was fully aware of the existing debts and the blanket deeds of trust. (CP 548, 517-18, 521, 523-24, 526).

Paragraph E of the individual loan applications stated that "[i]n the event that borrower should fail or refuse to complete the transaction or to clear title to the real property to enable HMI to

close the loan within 30 days from the date hereof, borrower shall be liable to HMI..." (CP 334, 338, 342) The Senator was willing to commit to paying the high fees set forth in the applications if Hoss was indeed able to fund the loans within the 30 days set forth in the applications.

Hoss did not fund the loans within 30 days of the submission of the loan applications, but in October 2007, three months later, its attorney sent letters to the Senator claiming that it would shortly be able to fund the proposed loans. (CP 549-50, 566) On October 30, 2007, however, Hoss for the first time, in a letter from its attorney, stated that it intended to fund only two of the three proposed loans. (CP 573) The next day, on October 31, 2007 Hoss claimed in a letter from its attorney to have actually funded the two loans, in the amount of \$2,050,000.00, by wiring funds to escrow. (CP 575)

Of course funding only two loans would not have been sufficient to pay off the existing blanket deeds of trust. Moreover, Hoss failed to provide any evidence to the Trial Court that it actually wired any money to escrow. Indeed, it has now apparently abandoned the claim that it actually funded the loans, asserting in its Appellate Brief only that it "was able to fund the loans." (Appellant's Brief at p.8)

However, based on its then claim to have funded two of the three loans, Hoss asserted in November 2007 that the Senator was obligated to pay the fees set forth in the loan applications, whether it

took the two loans or not. When the Senator refused to pay those fees, Hoss filed its lawsuit against the Senator. (CP 1-26)

On July 11, 2008, the Court entered an order granting the Senator's motion for summary judgment and dismissing Hoss's claims against the Senator. (CP 1117-1119) Hoss has appealed that dismissal, claiming that (1) there were issues of material fact as to whether it was able to fund the loans, and (2) there were issues of fact as to whether the loans were all part of one loan package.

B. ARGUMENT

1. Standard of Review.

Hoss correctly states that when reviewing a Trial Court's grant of summary judgment, the Appellate Court engages in the same inquiry as the Trial Court. However, even when reviewing a grant of summary judgment, an Appellate Court may affirm the Trial Court's judgment on any grounds established by the pleadings and supported by the record. Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d 751, 766, 58 P.3d 276 (2002).

Hoss also asserts in its Assignments of Error and designation of Issues Pertaining to Assignments of Error that the Trial Court made "findings" upon which it based its order of summary judgment. But the Trial Court did not enter any findings of fact, nor would it have been appropriate for the Trial Court to have done so. "The function of a summary judgment proceeding, or

a judgment on the pleadings, is to determine whether or not a genuine issue of fact exists, not to determine issues of fact.” Zempel v. Twitchell, 59 Wash.2d 419, 425, 367 P.2d 985 (1962). As a result, the Washington Supreme Court has “held on numerous occasions that findings of fact and conclusions of law are superfluous in both summary judgment and judgment on the pleadings proceedings.” Wash. Optometric Ass'n v. Pierce County, 73 Wash.2d 445, 448, 438 P.2d 861 (1968).

The issue before this Court is thus not whether the Trial Court’s “findings” were appropriate, but is rather whether the Trial Court’s dismissal of Hoss’s claims on summary judgment was appropriate based on the record that was before it.

2. Hoss Failed To Produce Evidence That It Could Fund Any Of The Proposed Loans.

Hoss asserts that even though it claims to have been able to fund only two of the three proposed loans, it still is entitled to payment of over \$150,000.00 from the Senator, whether the Senator accepted the two loans or not. Accepting that premise for purposes of this argument, it is undisputed that Hoss’s proposed investor, Centurion Financial, was only willing to pay \$1,700,000.00 toward the loans. (CP 543) As the two loans Hoss claims it funded were in the amount of \$2,050,000.00 (CP 3, 8-11, 18-21), this

means that Hoss would itself have had to come up with \$350,000.00 in order to fund the balance of the loans. Yet Hoss failed to provide absolutely any evidence that it could have come up with the required \$350,000.00, much less that it had actually done so in October 2007.

Hoss asserts at page 21 of its Appellant Brief that by merely submitting declarations from Mr. Hoss and Mr. Nagle stating that Hoss could have funded two loans in the amount of \$2,050,000.00, Hoss created an issue of material fact sufficient to defeat summary judgment. But it is of course well settled that a party opposing summary judgment may not rest upon mere assertions, but must present evidence of fact on which that party relies. Leland v. Frogge, 71 Wn.2d 197, 427 P.2d 724 (1976).

That is all the more true in this case, as the parties had prior to the Trial Court's consideration of the Senator's motion for summary judgment already designated all exhibits for trial. (CP 515, 517) This is not a case where by granting summary judgment the Trial Court deprived a party of the opportunity of presenting its evidence at trial. Hoss simply had no evidence to produce at trial, and it thus failed to designate any exhibit evidencing any source for the \$350,000.00 in the joint statement of evidence submitted to the

Trial Court. (CP 517). Moreover, in response to the Senator's discovery requests and follow up inquiries, Hoss confirmed that it possessed absolutely no documentation of any credit line for the \$350,000.00, of any wire transfer of any monies to escrow, or of any other evidence that it either was able to fund, or had indeed funded, the loans. (CP 519, 536-37, 539)

Hoss produced absolutely no evidence that it ever wired any monies into escrow in response to the Senator's motion for summary judgment. And the only "evidence" it submitted that it had any source for the \$350,000.00 were the mere assertion of its president Todd Hoss that Hoss had a line of credit for the funds and thus could have funded the loans (CP 668-69), and the assertion of its loan officer John Nagle's assertion that Hoss had the funds available. (CP 781)

Obviously, however, if Hoss had possessed a line of credit as Mr. Hoss claimed, there would have been documentation associated with it. Had Hoss instead actually wired the funds to escrow, as its attorney had claimed in his October 31, 2007 letter, there would have been documentation of that. And had Hoss instead simply had the funds available, as Mr. Nagle alleged, there would have been bank records and/or agreements with other

investors for those funds. Having affirmatively stated that no such documentation existed, the mere assertions of Hoss's employees in their declarations were insufficient under Washington law to create an issue of material fact. Leland v. Frogge, supra.

Because Hoss created no issue of material fact regarding its ability to fund even the two loans it claims it was able to fund, the Trial Court thus properly dismissed its claims.

3. The Proposed Loans Were One Loan Package.

As noted above, all three of the Senator's properties were encumbered by blanket deeds of trust securing its existing debt. As a result, the only way to obtain releases of all the deeds of trust encumbering any of the properties was to pay off all of the underlying debt secured by all of the property.

Hoss nonetheless claims that there was an issue of material fact as to whether the three proposed loans at issue were part of one loan package. Hoss further claims that because the Senator was obligated to provide clear title to Hoss in exchange for the proposed loans, the Senator was actually required to pay off its existing debt to clear title, even if Hoss failed to provide sufficient funds to pay the underlying debt. By that logic, Hoss on October 30, 2007 could have announced that it was only going to fund one

of the proposed loans, in the amount of only \$850,000.00, and the Senator would have been required the next day to close on that loan and pay the approximate \$1.7 million shortfall necessary to have the remaining deeds of trust removed from title.

But, as is the case in any refinance, the purpose of the new loans the Senator applied for was to retire the Senator's existing debt. While any borrower is of course obligated to provide a new lender with clear title, the payment of the existing debt needed to obtain such clear title cannot be accomplished until the new lender provides the funds from the new loan. The pay off of the existing debt is thus handled through escrow, with the existing creditor providing a release of its deed of trust in exchange for payment from the loan proceeds. Similarly, the Senator's obligation to provide clear title to its properties was predicated on obtaining sufficient loan proceeds from Hoss to pay off the existing debt encumbering its properties.

Seeking to overcome this, Hoss claims that the three proposed were nonetheless entirely separate because it was not aware of that all of the loans needed to fund in order to satisfy the underlying debt to clear title to each property. To support this argument, Hoss asserts that prior to August 14, 2007 the Senator

never revealed to Hoss what it intended to do with the loan proceeds. (Appellant's Brief at p. 16, CP 668-69, 781)

However, the evidence in the record clearly establishes that Hoss always was aware of the existing debts and the blanket deeds of trust securing them. In July 2007, the same month the loan applications were submitted to it, Mr. Nagle prepared and asked the defendant to sign a HUD statement that identified the existing Fairway and Aspen Yak debts in the aggregate amount of over \$2.5 million. (CP 854-55, 857-59) The HUD statement shows that all three loans were intended to fund as part of one transaction, with almost \$700,000.00 net proceeds going to the defendant over and above the amounts needed to pay off the existing debts.

In addition, Hoss prepared offering circulars to market the three proposed loans that included the preliminary title reports which specified that each of the properties were encumbered by the Fairway and Aspen Yak deeds of trust. (CP 521, 523-24, 526) Hoss's own documents thus clearly prove it always knew that all three loans had to fund in order to pay off the existing debts and that the parties always intended them to be part of one transaction.

Moreover, Hoss's own letters demonstrate that it neither expected nor requested that the Senator cover any shortfall, let

alone the \$500,000.00 shortfall that would have resulted if only two of the loans had funded. Hoss clearly knew how much was owed on the underlying debts as they are reflected in the HUD Statement. Hoss also clearly knew that its investor had to be in a superior secured position to any underlying creditors. (CP 543-44) Despite knowing that, never once did Hoss in any of the voluminous correspondence that was introduced into evidence state that the Senator needed to provide any cash of its own at closing. Nor did Hoss ever request that the underlying creditors subordinate to the new lender.

Instead, as discussed above, Hoss on October 31, 2007 falsely stated that the loans had already funded. (CP 575) Only many months later, after the Senator had been able to document the fact that Hoss did not, and indeed could not, fund the loans, did Hoss assert in response to the Senator's motion for summary judgment that the Senator was actually responsible for paying off all of its existing debts, regardless of the amount of any loan Hoss was willing to provide. Had that truly been the case, that fact would have been expressed by Hoss and its attorney somewhere in the numerous letters exchanged between the parties through the end of October, 2007.

Consequently, the evidence in the record conclusively establishes that Hoss always knew that all three loans had to fund in order to pay off the debt secured by all three properties, and that the parties always intended the loans to be a package.

4. Even If Hoss Had Been Able To Fund All Three Loans On October 31, 2007, Senator Was Free To Reject The Loans Because They Were Not Funded Within 30 Days Of The Date The Applications Were Submitted.

In the Senator's first motion for summary judgment the Senator asked the Trial Court to dismiss Hoss' claims because Hoss had not funded any of the proposed loans within 30 days of the date the loan applications were submitted. (CP 192-200) While the Trial Court denied the Senator's first motion, this Court can affirm the Trial Court's subsequent order on the Senator's renewed motion for summary judgment dismissing Hoss's claims on any grounds established by the pleadings and supported by the record. Truck Ins. Exch. v. VanPort Homes, Inc., supra.

Hoss's claims against the Senator were based not on a contract signed by both parties, but instead rested solely on loan applications submitted by the Senator to Hoss. Hoss's position was that once an applicant submits a loan application to Hoss, the applicant is contractually obligated to pay all of the various loan

fees set forth in the application if at any time thereafter Hoss decides to fund the loan, whether it still wants the loan or not.

However, Paragraph E of the application provides that the Senator is only liable to Hoss for fees and expenses in the event that the Senator “should fail or refuse to complete the transaction or to clear title to the real property to enable [plaintiff] to close the loan within 30 days from the date hereof.” (CP 334, 338, 342) The date hereof is an obvious reference to the date of the application.

It is undisputed that the loan applications were submitted in July, 2007. (CP 81) It is also undisputed that Hoss was not ready to close any of the proposed loans until at least October 30, 2007, three months after the date the loan applications were submitted. (CP 82) Under the clear terms of the application, the Senator could not be liable for any fees to Hoss, because Hoss was not ready to close any of the loans within 30 days of the date of the application.

Hoss, however, asserts that Paragraph E of the loan applications contains no limitation on the Senator’s obligation to close. Under Hoss’s interpretation of Paragraph E, once an applicant submits an application to Hoss, the applicant is obligated to close on a proposed loan no matter how long it takes Hoss to

decide to approve the application or to be ready to close the loan. Presumably Hoss would be entitled to payment of all listed fees if it decided literally years after receiving an application to fund loan. Such an interpretation is ridiculous and would obviously lead to absurd results.

“Initially, it should be noted that contract language subject to interpretation is construed most strongly against the party who drafted it, or whose attorney prepared it.” Guy Stickney, Inc. v. Underwood, 67 Wash.2d 824, 827, 410 P.2d 7 (1966). In the present case, Hoss drafted the loan application, and so any ambiguity in the language of the application must be construed against it. Whether a written contract is ambiguous is a legal question. Syrov v. Alpine Res., Inc., 68 Wn.App. 35, 39, 841 P.2d 1279 (1992). The court, however, will not read ambiguity into a contract where it can be reasonably avoided by reading the contract as a whole. Universal/Land Const. Co. v. City of Spokane, 49 Wn.App. 634, 637, 745 P.2d 53 (1987).

There is nothing ambiguous about paragraph E of the loan applications. Either the loan application provides for a time frame in which the loan applicant is obligated to pay fees even if it does not want or is unable to proceed with the loan, or it does not.

Paragraph E specifically provides that the potential obligation of an applicant for loan fees is limited by the thirty day period expressly stated in Paragraph E of the application. Only by ignoring that provision - which would result in there being absolutely no limitation as to an applicant's liability, which would instead depend solely on the whim of Hoss in deciding when and if to fund a loan – could the Senator be obligated to accept a loan proffered by Hoss more than 30 days after the date the applications were submitted.

There is no dispute that Hoss was not ready to fund any of the three loans within 30 days of the application date. The Senator thus as a matter of law could not have breached Paragraph E of the application, and thus cannot be contractually liable to Hoss under the application for any fees and costs. This Court should therefore affirm the Trial Court's dismissal of Hoss's claims.

CONCLUSION

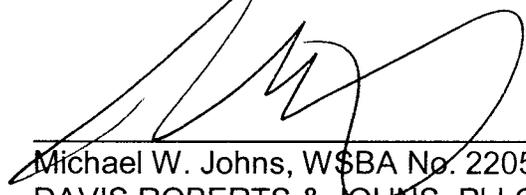
The evidence in the record conclusively establishes that Hoss was always aware that all three proposed loans needed to fund in order to clear title to any of the Senator's properties, and thus that the parties intended the loans to be one loan package. Even if there was any question of fact regarding that issue, to fund only two of the loans Hoss would still have had to come up with

\$350,000.00, yet it failed to provide any evidence that it could have done so. Moreover, there is no dispute that Hoss was unable to fund any loan within 30 days of the date of the loan applications, so the Senator was free to reject any loans Hoss could have funded without being obligated to pay any fees to Hoss.

For all of these reasons, this Court should therefore affirm the Trial Court's dismissal of Hoss's claims on summary judgment.

Dated: February 26, 2009.

Respectfully submitted,

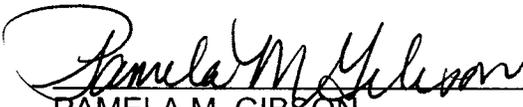


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same into a receptacle for that purpose to Appellants' counsel to
be delivered no later than March 2, 2009, at the following address:

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DATED this 26th day of February, 2009 at Gig Harbor,
Washington.


PAMELA M. GIBSON