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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DIVISION II

OF THE STATE OF WASHINGTON

No: 39070-1--II

In re:

**RICHARD SORRELS
Appellant/Defendant**

v.

**WESTAR FUNDING,
Appellee/Plaintiff.**

BRIEF OF APPELLANT

Respectfully Submitted

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Steilacoom, WA 98388**

I. TABLE OF AUTHORITIES

Table of Cases

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Walker v. Sieg, 23 Wn. 2nd 552, 161 P. 2nd 542 (1945).6

STATUTES

RCW 4.16.2807

RCW 7.28.3006

RCW 65.08.0705

TREATISES

18 Washington Practice, Stoebuck and Weaver Sec. 18.294

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I. CITATION TO SUPERIOR COURT DECISION

The appeal is based on an Order Granting Summary Judgment on March 6, 2009.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No.1 Did the Court err in extinguishing Sorrels' interest in the property and quieting title to Plaintiff and granting additional relief?

Issues pertaining to Assignments of Error

No. 1 Can a Trial Court on Summary Judgment eliminate all rights to a prior recorded interest in property under a disputed allegations of Merger and Statute of Limitations?

III. STATEMENT OF THE CASE

Plaintiff Xianju bought the subject property at auction in Pierce County on April 13, 2007. (Cp 5.) Upon Learning that a prior recorded deed of trust placed him in second position the Plaintiff filed a lawsuit in Pierce County on May 4, 2007, seeking to quiet title to the property. (CP 3).

The Plaintiff alleged the cloud of title should be removed based on violation of the Statute of Limitations (Cp 6) and Merger of Interest (Cp 7). Plaintiff took no action for well over a year until the Motion for Summary Judgment dated January 16, 2009. (Cp 153).

In 1992, David Brown purchased the subject property using borrowed funds from Sorrels secured by a Deed of Trust and Promissory Note recorded under Pierce County Auditors Number 9208040744. (Cp 13, 28-31). Once Sorrels learned that Plaintiff started to foreclose a junior interest in the property, Sorrels also initiated a foreclosure action in February 2007. (Cp 23-30). Plaintiff stayed Sorrels' foreclosure. (Cp 161). Both parties sought summary judgment. (CP 153-178)

Brown provided a number of liens on the property through time, some of which were later acquired by the RES Trust. (CP 36-38). In 1995, Brown assigned his rights via Deed to RES Trust. (Cp 39). In 2002, the RES Trust provided Westar Financial a Deed of Trust and Promissory Note for \$61,500.00. (Cp 16-18; 31, 155). Westar Financial assigned its

interest to Xianju Cui. (Cp 5). In 2007, Xianju obtained a Trustee Deed. (Cp 5) At the time of the purchase, the home would have reflected a value over \$300,000.00 and is waterfront property. (Cp 32).

At all times the distinction between Richard Sorrels and the RES Trust is clearly identified in the documents affecting the RES Trust, where he acted for RES Trust, as a trustee and only in that capacity. (Cp 31-54; 74-77)

IV. ARGUMENT

There are two issues, all without merit and never should have been brought in good faith.

1. First, did the interest of Sorrels and RES Trust Merge?

The rule is that unless the person who acquires both the senior mortgage and the mortgaged estate wants to provide priority to a junior lien holder, merger does not apply. 18 Washington Practice Sec. 18.29, Page 361. Merger occurs when the fee interest and a deed of trust vest in possession of one person. Altabet v. Monroe Methodist Church, 54 Wn. App.

695, 777 P. 2nd 544 (1989). A merger cannot exist where a deed in lieu of foreclosure is provided which affects the rights of third parties. (Id. at 699). Whether there is a merger or equitable and legal title and an extinguishment of the underlying debt depends on the intent of the parties. Id. at 698, citing to Van Woerden v. Union Imp. Co., 156 Wash. 555, 560, 287 P. 870 (1930)

Clear in the law of merger, is that 2 factors must be met. One the rights must vest in the same person, and second, there must be an extinguishment of the debt. Here, although Richard Sorrels is one of the trustees for the RES trust, the RES Trust and Sorrels are not the same person. RES Trust is an independent legal entity. Second, the RES Trust never paid Sorrels or satisfied the prior Deed of Trust. Therefore, since they are not the same entity and there was no satisfaction of the debt, there can not possibly be a merger.

The purpose of the recording system established under RCW 65.08.070 is to make the prior recorded interest superior to other conveyances. Bank of America v. Wells Fargo Bank.,

126 Wn. App. 710, 714, 109 P.3rd 863 (2005).

2. Can a holder of a second mortgage assert Statute of Limitations under RCW 7.28.300?

RCW 7.28.300 provides that a recorded owner may bring an action to quiet title to property subject to the statute of limitations, subject to all defenses.

A debt is not extinguished by the expiration of the statute of limitations, it is only subject to challenge. CHD, Inc. v. Boyles, 138 Wn. App. 131; 157 P.3d 415 (2007). It is very clear that there are many reasons why the Plaintiff may not use the Statute of Limitations defense to clear title.

The statute of limitations can only be invoked by the debtor himself. Guaranty Security Co. v. Coad, 114 Wash. 156, at 161, 197 P. 326 (1921). Statute of Limitations is an affirmative defense. Fisherman's Cooperative Ass'n v. State 198 Wash 413, 88 P.2nd 593 (1939).

The permissive use of the property constituted compensation, and the law provides that partial payment tolls the statute of limitations, so does ratification. Walker v. Sieg, 23 Wn.

2nd 552, 161 P. 2nd 542 (1945). (Where providing fruit constituted partial payment). Here, the trust has affirmed the debt by partial payments through the use of the property, authorized its use by the Defendant, ratified the debt in writing and through actions. (See Cp 31-34).

The first deed of trust filed, remains valid and has been revived pursuant to RCW 4.16.280 in many of the documents contained in the Court file mentioned above.

Once intent to reaffirm a debt occurs, the burden is on the party asserting the statute of limitations to show a contrary intent. Cannacina v. Posten, 12 Wn. 2nd 182, 124 P.2nd 787 (1942). This the Plaintiff cannot do. The case cited as authority for the 6 year statute of limitations, Walcker v. Benson and McLaughlin, 79 Wn. App 739, 904 P. 2nd 1176 (1995), would be applicable if the person provided with the defense were the one to have asserted the defense. Here, no one possessing that right asserted the defense.

The facts are simple, the Plaintiff is prohibited by law from asserting the statute of limitations defense, Plaintiff in unable to

factually support the defense, and once the presumption the debts remains valid is brought the Plaintiff is unable to provide any evidence to the contrary.

Plaintiff later argued Judicial Estoppel which “applies only if a party’s prior inconsistent position benefitted the party or was adopted by the court.” Johnson v. Si Cor, Inc. 107 Wn. App 902; 28 P.3d 832 (2001). There is no evidence to suggest that Sorrels or R.E.S. Trust benefitted whatsoever and it is equally clear that the court did nothing because the case voluntarily dismissed. (Cp 86-87; 180).

Attorney Fees: Plaintiff argued he was entitled to attorney fees pursuant to the 1992 Deed of Trust. (Cp 169; 193). Arguably this provision of the Deed of Trust is a valid and enforceable contract and Appellant seeks attorney fees pursuant to that same provision or as otherwise provided herein.

V. CONCLUSION

There are risks when someone obtains title to property via trustee deed. That risk of course is that they buy subject to prior recorded interests, especially if they are paying \$61,500.00

for salt water frontage valued in excess of \$300,000.00.

The Court of Appeals should direct the Trial Court to enter Summary Judgment in favor of Sorrels and award costs and attorney fees.

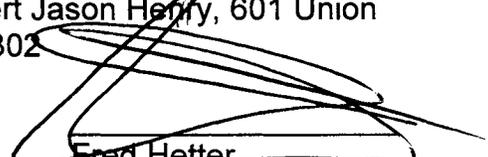
Dated: 7/21/09



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DECLARATION OF SERVICE: I declare under penalty of perjury under the laws of Washington State that I forwarded a copy of this Brief, this date to Robert Jason Henry, 601 Union St. Ste. 2600, Seattle WA 98101-2302

Dated: 7/21/09 at Pierce Co., WA.



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