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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

No: 39070-1--II

In re:

**RICHARD SORRELS
Appellant/Defendant**

v.

**WESTAR FUNDING,
Appellee/Plaintiff.**

REPLY BRIEF OF APPELLANT

Respectfully Submitted

**Frederick L. Hetter
WSB#: 21798
Attorney for Appellant
913 Powell St.
Steilacoom, WA 98388**

I. TABLE OF AUTHORITIES

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WASHINGTON CASE LAW

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I. REPLY STATEMENT

The case arose when Appellant/Defendant Richard Sorrells was foreclosing on a Deed of Trust on the subject property that was in default. Shortly before the sale, Plaintiff/Appellee came into title and started this lawsuit to restrain the sale. The lawsuit is against Richard Sorrells individually, who had no personal interaction with Plaintiff's prior to this lawsuit, and his only personal interaction with Appellee has been through the pleadings in this lawsuit.

The Appellee Weststar Funding, Inc. appears to suggest Appellant Sorrells is taking advantage of the Appellee Weststar Funding Inc. The fact is that the Appellee is a hard money lender, who provided \$42,000.00 to the RES Trust (CP 19) and seeks to clear title to a \$300,000.00 (CP 32) waterfront home. The lawsuit arose because Appellee failed to appreciate the recorded deed of trust in the recorded chain of title. (CP 32)

From the Brief provided by the Plaintiff/Appellee, the Plaintiff asserts wrongdoing or inconsistent acts done by or on behalf of the RES Trust. To hold the RES Trust responsible for

causing or encouraging Plaintiff to ignore the prior recorded Deed of Trust and thus suffer some harm, Plaintiff/Appellee could have added the RES Trust (the entity from whom Appellee acquired their interest in the property) as a party under CR 19. (RP 199-200).

If one follows Plaintiff's argument, the Sorrels' Deed of Trust becomes unenforceable because of what the RES Trust may have done. Even if the acts were done, they are not relevant to Sorrels' interest, but would be claims against the RES Trust. To have any chance of prevailing on this appeal, the Appellee must confuse the Court to hold Sorrels personally responsible for actions of the Trust by substituting Sorrels' actions for those of the RES Trust. Since all documents referenced by Appellee clearly identify actions of the RES Trust, they are not attributable to Richard Sorrels.

PRIOR DEEDS OF TRUST: Sorrels' senior prior recorded deed of trust survives Appellee Westar Funding Inc., foreclosure of its junior lien.

A nonjudicial foreclosure eliminates all subordinate liens and other interests in the property but has no effect on liens and other interests that are prior to the deed of trust.

Mann v. Household Finance Corp. III, 109 Wn.App 387, 393, 35 P. 3rd 1186 (2001) citing to IV Washington State Bar Ass'n Real Property Deskbook, at 48-33)3rd Ed. 1996)

MERGER: Whether there is a merger of equitable and legal title and an extinguishment of the underlying debt depends on the intent of the parties. Van Woerden v. Union Imp. Co., 156 Wash. 555, 560, 287 P. 870 (1930). The parties must also be the same for merger to apply. Here Plaintiff cannot and have not provided any information about intent, and furthermore the RES Trust and Richard Sorrels are not the same legal entity and cannot merge title between themselves. Therefore, the Court must disregard merger as a mechanism to avoid their failure to appreciate the prior recorded interest.

RCW 7.28.300: This statute provides that a recorded owner may bring an action to quiet title to property subject to the statute of limitations, but subject to all defenses. The statute only would apply when the owner is the person who was indebted originally. That is because a debt is not extinguished by the expiration of the statute of limitations, it is only subject to challenge by a party to the note. CHD, Inc. v. Boyles, 138 Wn.

App. 131; 157 P.3d 415 (2007). The law is not ambiguous, the Statute of limitations defense can only be invoked by the debtor himself. Guaranty Security Co. v. Coad, 114 Wash. 156, at 161, 197 P. 326 (1921). Appellees were never debtors in this case and cannot use the statute to clear title. Citing Walcker, the Court made it clear that the statute of limitations defense applies to foreclosure of trust deeds by a debtor. Id at 745-746. Moreover, a written agreement extended the note's due date until 2013 so the statute of limitations would only begin upon default which would have been 4 years from now. (CP 187).

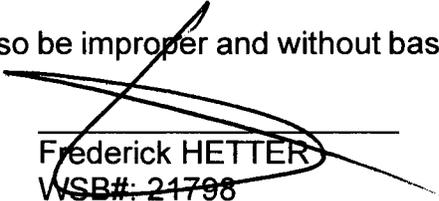
STATUTE OF LIMITATIONS: Statute of Limitations is an affirmative defense. Fisherman's Cooperative Ass'n v. State 198 Wash 413, 88 P.2nd 593 (1939). The same provisions apply because affirmative defenses are made by parties. CR 8(c). Only if the person asserting RCW 7.28.300 was a party to the Deed of Trust or Promissory Note, could they employ the defense.

JUDICIAL ESTOPPEL: Judicial Estoppel "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). First, any legal position was that of RES Trust, Richard Sorrels never took a position. Also Sorrels never benefitted because the Court never took action on anything. (Cp 86-87; 180).

Attorney Fees: The Summary Judgment is improper and thus the award of fees would also be improper and without basis.

Dated: 10/13/09


Frederick HETTER
WSB#: 21798

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: 10/13/09 at Pierce Co., WA.


~~Robert Jason Henry~~
Evelyn Pevey

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