

No. 39168-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

HUNTER CREST TWIN OAKS LLC.

Appellant,

v.

WASHINGTON MUTUAL BANK

Respondent.

REPLY BRIEF OF APPELLANT

David C. Smith  
Attorney for Appellant  
201 Saint Helens Avenue  
Tacoma, WA 98402  
253-272-4777  
WSBA #29824

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## B. ARGUMENT

### **Issue 1 –What are the evidentiary burdens on review?**

The court reviews summary judgment orders de novo, performing the same inquiry as the trial court. In conducting this inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). The appellate court must reverse summary judgment if the evidence could lead reasonable persons to reach more than one conclusion. On the other hand, it must affirm if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 325, 971 P.2d 500 (1999).

In this case we have cross-motions for summary judgment. The Bank inaccurately describes Hunter Crest's suit as one to "set aside" the Bank's valid deed of trust. Respondent's Brief (RB), 13. The actual relief requested by Hunter Crest is declaratory judgment that the Bank's deed of trust never conveyed any real property interest to Washington Mutual Bank. CP 255.

The Bank did not file any answer or counterclaim in response to Hunter Crest's amended complaint. However, the relief sought in the Bank's summary judgment motion was dismissal of Hunter Crest's complaint, or, in the alternative, that the deed of trust be reformed to reflect "the grantor's capacity on the instrument." CP 339.

The Bank, as the moving party, has the burden of showing that no genuine issue of material fact exists as to the validity of the deed of trust as matter of law. *Soproni*, 137

Wn.2d at 325. The Bank also has the burden of proving its alternative claim for reformation of the deed of trust, which is effectively a counterclaim for affirmative relief.

Questions of fact may be determined on summary judgment as a matter of law only where reasonable minds could reach but one conclusion. *Alexander v. County of Walla Walla*, 84 Wash.App. 687, 692, 929 P.2d 1182 (1997).

**Issue 2 – Did the Bank show an absence of genuine material fact as to whether the Deed of Trust conveyed an interest in the Hunter Crest Property?**

a. Unresolved Facts.

Keeping in mind that the Bank has the burden of showing the absence of any material fact, the court should keep in mind the Bank should have knowledge of the following facts, which

are not addressed in its summary judgment motion or on appeal:

- Why did the loan officer, Moses Staton, ask for title information from Group 9 if Daniel Hunter was WaMu's only source of title information?
- Why did WaMu charge Daniel Hunter \$55.00 for a Property Verification Report<sup>1</sup> if Daniel Hunter was WaMu's only source of title information?
- When did WaMu learn that Daniel Hunter did not own the Property?
- When were the loan funds disbursed?
- What is the balance due on the loan and how was it calculated?
- Were any funds disbursed prior to receipt of the Property Verification Report, Instant Title Report,

Puget Sound Title Report, or the First American  
Lender's Advantage Report?

- Were any loan funds disbursed before the Deed of Trust was recorded?
- Did anyone at WaMu look at the Puget Sound Title report?
- Who at WaMu hired First American Title Company to supplement and record the deed of trust?
- Did anyone at WaMu look at the deed of trust after it was supplemented and recorded by First American Title?

b. Requirements of a Deed.

“Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some

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<sup>1</sup> The Bank asserts that the “Property Verification Report” is the same as the “Instant Title®” report. RB 8-9. According to the Bank, Instant Title® is a title verification

person authorized by this act to take acknowledgments of deeds.” RCW 64.04.020.

The WaMu Deed of Trust was signed only by Daniel Hunter. The Deed of Trust was effective only to convey whatever interest Daniel Hunter held in the Property.

“Grantor” means a person, or its successors, who executes a deed of trust to encumber the person’s interest in property as security for the performance of all or part of the borrower’s obligations. RCW 61.24.005(1). Again, the only interest conveyed at the time the deed was recorded was Daniel’s, and Daniel did not have any title interest in the Property.

No deed can operate so as to convey an interest which grantor does not have in the land described in the deed, or so as to convey a greater estate or interest than the grantor has. 23

AmJur 2d Deeds, Sections 274, 194; see *Meltzer v. West*, 7 Wn.App. 90, 497 P.2d 1348 (1972).

The Bank cites two cases at length which it purports to support its argument that Hunter Crest Twin Oaks LLC was the true grantor on the Deed of Trust, not Daniel Hunter, even though Hunter Crest Twin Oaks LLC was not named as grantor and even though nothing in the deed states that Daniel Hunter was signing in any other capacity but personally.

In *Platts v. Platts*, 49 Wn.2d 203, 298 P.2d 1107 (1956), a trial court award of a lien against corporation property in a divorce action was affirmed on appeal. The issue in *Platts* was whether the trial court had authority to attach the corporate property owned and controlled by one of the divorcing spouses.

In *Platts*, title to the liened property was in the name of a corporation solely-owned by a divorcing spouse. The trial court awarded the lien against the corporation's property in

favor of the other spouse. No property grantors were found to be interchangeable.

*Platts* does not grant an exception to the requirements of RCW 64.04.020, nor does it make corporations and their officers interchangeable as grantors of real property. Far from supporting the Bank's position that corporations and their officers are interchangeable when making real property conveyances, *Platts* is an example of a trial court imposing an equitable lien to allow a worthy creditor access to debtor property.

Likewise, *Clearwater v. Skyline Const. Co., Inc.* 67, Wn.App. 305, 835 P.2d 257 (1992), does not grant an exception to RCW 64.04.020. The courts in *Clearwater* did not treat the corporate property owner and the corporation's owner as interchangeable, even when the owner engaged in fraudulent conduct.

*Platts* and *Clearwater* are consistent with the cases cited in the Appellant's brief. None of the cases supports the Bank's position that the Washington Mutual Deed of Trust was an effective conveyance by Hunter Crest Twin Oaks LLC. The Deed of Trust must be reformed by the court to conform with the statutory requirements or it is invalid a lien on the Property. As already explained in the Appellant's Brief, the Bank has not presented facts sufficient to compel the Court's intervention in the transaction between Washington Mutual Bank and Daniel Hunter.

c. Laches, Waiver, and Acquiescence.

Laches, waiver, and acquiescence assume knowledge and a failure to act on a given state of affairs in a timely fashion.

See *Buell v. Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358

(1972). Laches, waiver, and acquiescence do not apply in this case.

If HCTO were asking the court to invalidate an otherwise valid WaMu Deed of Trust, then laches, waiver and acquiescence might be an issue. However, HCTO is asking for declaratory judgment that the Deed of Trust was never valid. CP 255. No failure of HCTO to act would cause the invalid Deed of Trust to become valid.

**Issue 3 – Did the appellant raise evidence and issues not called to the attention of the trial court?**

a. Documents and Evidence Called to the Attention of the Trial Court.

AR 9.12 provides:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the

documents and other evidence called to the attention of the trial court before the order on summary judgment was entered...

The Appellant's motion for summary judgment rests on one issue: whether the Deed of Trust was a valid conveyance.

The Appellant relies only on the Deed itself and the chain of title to show that the Deed did not conform to RCW 64.04.020 and was therefore not a valid conveyance.

The Bank, on the other hand, requests that the court look at a variety of other evidence to support the Bank's position that the Deed of Trust was valid, or that the court should intervene to make the Deed valid. Among the evidence submitted by the Bank were loan processing documents and deposition testimony. The Court of Appeals can consider the evidence called to the attention of the trial court by the Bank.

Among the evidence called to the attention of the trial court by the Bank and in response to the Bank were:

- Ownership of the Property by HCTO was readily available online at the Pierce County Assessor's website. CP 378-80.
- Page 2 of Washington Mutual Bank's loan Comment Summary contains separate lines for "APPRAISAL" and "TITLE INSURANCE" requests from the loan officer to the bank's loan processing department containing the message "YES PLEASE ORDER." CP 75.
- Page 4 of the WaMu Equity Plus Loan Agreement and Disclosure contains a \$55.00 charge to Daniel Hunter for a "Property Verification Report." CP 63.
- Page 4 of the bank's transaction log contains "Request type is Instant Title. Names and vesting verified." CP 85.

- “Attachment A” of the WaMu Deed of Trust has the words “HUNTER CREST TWIN OAKS LLC” written below the tax parcel number and legal description. CP 33.

b. Jurisdictional Issue.

The Bank asserts that the issue of jurisdiction to retroactively renovate the Deed of Trust is new and should not be considered on appeal. RB 30.

The facts related to the jurisdictional problem were before the trial court. The trial court knew that other creditors—Douglas Hales and Raban Contractor Services, LLC—recorded deeds of trust on the Hunter Crest Property. CP 300-09.

The Bank asserts that HCTO failed to join Hales and Raban. RB 30-31. However, the relief sought by HCTO was declaratory judgment that WaMu’s Deed of Trust was invalid.

CP 255. This relief was consistent with the public recorded documents showing HCTO as owner and showing that HCTO never executed the WaMu Deed of Trust. When HCTO filed its quiet title action, the bank Deed of Trust was invalid and not prior in right to the Hales and Raban Deeds of Trust.

If the Bank were only defending the validity of the WaMu Deed of Trust as a real property conveyance, then Hales and Raban would not be prejudiced by the outcome, because a decision in the Bank's favor would only confirm what already existed.

However, the Bank also has a countersuit for alternative affirmative relief: that the court reform the Deed of Trust to create a valid conveyance. CP 339. If granted, this relief would allow the Bank's previously invalid conveyance to jump in front of Hales's and Raban's valid deeds of trust. The Bank did not join Hales or Raban. Hales and Raban never appeared

or were represented in this case and the Bank never joined them. Therefore, this court has no jurisdiction to change Hales' and Raban's positions relative to the WaMu Deed of Trust.

The court only has jurisdiction to declare the WaMu Deed of Trust valid *ab initio* (which would violate the statutory requisites of a deed under RCW 64.04.020), or grant an equitable lien valid as of the date of the trial court's summary judgment order (if WaMu merits the intervention of the court on its behalf). The court does not have jurisdiction to retroactively reform the WaMu Deed of Trust at the expense of non-parties Hales and Raban.

**ISSUE 4 – Did the Bank assert facts not called to the attention of the trial court?**

a. No Evidence About Bank's Knowledge After Closing.

The Bank asserts for the first time, on appeal, that "First American never... informed the bank that Hunter Crest held

title to the Property. CP 432” RB 8. This assertion is much broader than the record upon which it is based. Michael Coon’s Declaration states:

Daniel Hunter represented that title to the property that was used as security in this transaction was vested in him personally and that no one had any other interest in the property. WaMu had no knowledge to the contrary. *WaMu has no title report in its file related to this loan.*

CP 432 (emphasis added).

It should be noted that Puget Sound Title has records showing that Washington Mutual requested a title report (or more accurately, a commitment for title insurance). CP 369-75.

It should also be noted that nothing in Washington Mutual’s records indicates any dealings with First American Title, even though the Deed of Trust clearly indicates that First American Title Company was involved in recording the Deed of Trust.

CP 17, 24, 33.

Most importantly, the evidence before the court is limited to the Bank's knowledge about title to the Property at the time of closing the loan and before—not after closing:

WaMu did not know that title to the property which is the subject of this lawsuit was vested in Hunter Crest Twin Oaks LLC at any time before the loan closed.

CP 198.

In his deposition Mr. Garcia was equally clear about the limited time frame of the Bank's evidence about its knowledge about title to the Property:

Q To the extent that you have information, did you see in the file or are you aware of when the bank learned that Hunter Crest Twin Oaks LLC was the title owner of the Custer Road property?

A Nothing up to the point we completed loan process...

Q And the extent of your knowledge is up through closing and funding of the loan?

A Correct...

CP 171-172.

b. Instant Title Included Title Research After Closing.

The Bank's asserts on appeal that WaMu "receives no information from a third party under the Instant Title process, and did not in this instance." RB 8. This contradicts the testimony of the bank's representative, Mr. Garcia:

So, on the front end, Instant Title, we receive no information from a third party on the front end of the transaction, *so all of the title research is done after the loan completes.*

CP 167 (emphasis added).

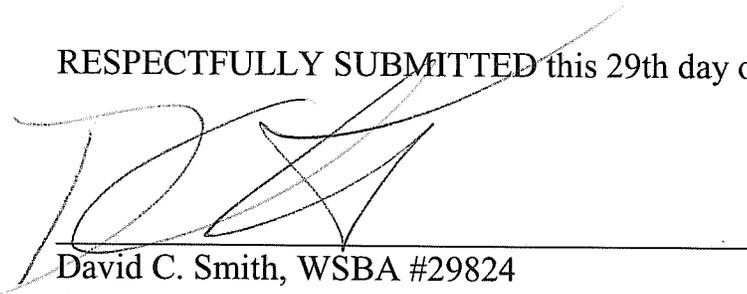
Clearly, the Bank was careful not to disclose how and when it learned about Hunter Crest's ownership of the Property.

C. CONCLUSION

The evidence of Washington Mutual's knowledge, before and after closing, of Hunter Crest's ownership is substantial. The Bank asks the court to believe that WaMu did not know the Property's owner, and was not even curious enough to look at

its own title products related to the Property, and the Bank asks the court to intervene in its transaction with Daniel Hunter to give Washington Mutual more than it bargained for, and to do more for WaMu than WaMu was willing to do itself. The court should not intervene, and the Bank should be left with what it bargained for: a personal line of credit loan that was not properly secured.

RESPECTFULLY SUBMITTED this 29th day of May, 2012.



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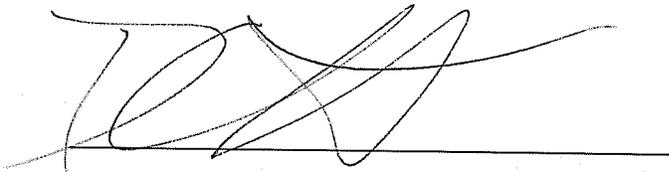
David C. Smith, WSBA #29824  
Attorney for Appellants

## CERTIFICATE OF SERVICE

On penalty of perjury under the laws of the State of Washington, I certify that I served copies of the foregoing document, with appendices attached, by electronic mail and by legal messenger to the following:

Kennard M. Goodman  
Ann T. Marshall  
720 Olive Way, Ste 1201  
Seattle WA 98101-1878  
[kgoodman@bwmlegal.com](mailto:kgoodman@bwmlegal.com)  
[amarshall@bwmlegal.com](mailto:amarshall@bwmlegal.com)

DATED this 29th day of May, 2012.

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