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NO. 39775-7-II

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

Paul J. Rutledge, Plaintiff

vs.

Susan E. Beck, Defendant; and Bryan Chushcoff, Appellant

Ryan Thomas and Julie Thomas, husband and wife, Respondents

vs.

Paul J. Rutledge, Plaintiff; and Susan E. Beck, Defendant

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

THE HONORABLE BRUCE HILYER AND DONALD THOMPSON, JUDGE PRO TEM

BRIEF OF APPELLANT

B. ASSIGNMENT OF ERROR AND ISSUES PERTAINING THERETO

Assignment of Error No. 1: To the extent it purports to vacate Appellant's deed of trust recorded under Pierce County auditor number 200502031098, the superior court

erred and had no jurisdiction to affect Appellant's interest in said deed of trust when it entered its Order Compelling Sale, Appointed Attorney and Granting Other Relief dated March 27, 2008. CP 104.

Assignment of Error No. 2: To the extent it purports to vacate Appellant's deed of trust recorded under Pierce County auditor number 200710180152, the superior court erred and had no jurisdiction to affect Appellant's interest in said deed of trust when it entered its Order on Show Cause Re: Contempt/Judgment dated June 24, 2008. CP 17.

Assignment of Error No. 3: The superior court erred when it entered the following orders: a) Order Denying Motion to Disburse by Intervenor Bryan Chushcoff (CP 55); b) Order Disbursing Funds and Granting Judgment for Attorney's Fees and Costs (CP 48-49); c) Order Authorizing Disbursal of Funds Held in Trust (CP 50-51); and, d) Order Granting Summary Judgment dated June 19, 2009 (CP 52-53) to the extent it authorizes payment of amounts owed by Beck or Rutledge from house sales proceeds/funds held in trust by attorney Peter Kram.

Assignment of Error No. 4: The superior court erred when it entered its Order on Reconsideration dated August 10, 2009. CP 118-119.

The foregoing assignments of error illuminate the following issues in this case:

- 1) Does superior court have authority to enter an order vacating or otherwise affecting the interest of a non-party to a deed of trust when such party has not been served with process? (Assignment of Error 1 and 2)

2) When determining the priority of parties and distributing proceeds from the sale (at the court's direction) of real property, is the court free to ignore the relative security interests of the parties in the real property? (Assignment of Error 3 and 4)

C. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of actions taken in the trial court to terminate two deeds of trust in real property of a non-party (Appellant) to the litigation.¹ Litigation between the primary parties – Rutledge and Beck – has a long history. Fortunately, it is not necessary to chronicle the entire course of the *Rutledge v. Beck* litigation but some account is needed. Much of the factual and procedural background is set forth in a prior Court of Appeals decision between those parties. A true copy of the decision is attached hereto as an Appendix. That history is prologue to the current dispute and it is summarized briefly in the following pages.

1. Rutledge v. Beck

Plaintiff Paul Rutledge and defendant Susan Beck had had an 8-year relationship, during which they co-habited in southern California. In 1999 they decided to move to Gig Harbor, Washington and they purchased a home. Two weeks before the move, Mr.

¹ The deeds of trust in question were originally owned by JB Properties, Inc. and later assigned to Bryan Chushcoff. JB Properties, Inc. is a Washington corporation. Bryan Chushcoff was and remains its sole stockholder, officer, director and its agent for service of process.

Rutledge told Ms. Beck that he was not going to move. He helped her move to Washington and stayed in the home for two days. Ms. Beck otherwise had exclusive possession of the home. Appx. p. 2.

On July 7, 2000 an action was filed in Pierce County Superior Court in cause number 00-2-09367-1. Mr. Rutledge, through his counsel, Peter Kram, sought to establish the relative interests of the parties in the home. Ms. Beck represented herself in the proceedings.

The parties agreed to settle on the day of the scheduled trial, May 24, 2001. The settlement was memorialized by the entry of an Agreed Judgment. The Agreed Judgment states, in pertinent part, as follows:

1. Paul Rutledge shall have judgment over and against Susan Beck for the sum of Fifty Thousand (\$50,000.00) Dollars.
2. Susan Beck shall pay Paul Rutledge the sum of Fifty Thousand (\$50,000.00) Dollars in full and final settlement of any and all interest of Paul Rutledge in the subject property located at 3502 125th Street NW, Gig Harbor, Pierce County, Washington more fully described as:

[legal description omitted]

6. When the Fifty Thousand (\$50,000.00) Dollars, together with interest, has been paid to Paul Rutledge, he will convey his entire interest in the subject property to Susan Beck conditioned on her obtaining either a new mortgage in her name only or a novation of the existing mortgage. The new mortgage or novation shall extinguish any liability of Paul Rutledge.

In sum, plaintiff gave up his interest in the home to defendant in return for a judgment for installment payments and interest on \$50,000 and extinguishment in due

course or sooner of the first “mortgage.”² Plaintiff’s counsel, Peter Kram, drafted the Agreed Judgment. No appeal was taken from the Agreed Judgment. *Id.*, p. 3.

2. More than Three Years Later - July 2004 - Litigation Resumes.

Ms. Beck was unable to make the payments outlined in the Agreed Judgment. So on July 27, 2004—more than three years after entry of the Agreed Judgment—plaintiff brought a “Motion for Sale of Property” in which he requested the court to order that the subject real property be sold commercially. Ms. Beck replied that the subject real property was her homestead; that she resided on the premises with her mother and three children; that she had done so for several years; and, that she intended to continue to reside there. She had no other residence. Ms. Beck also asserted that the Agreed Judgment established the rights of the parties in the property and she insisted that plaintiff’s remedy was to execute on the Agreed Judgment in the manner set forth in the execution statutes of the State of Washington.

Ultimately, the superior court³ agreed with plaintiff and on September 17, 2004, the court granted plaintiff “summary judgment on the issue of the sale of the property” and ordered the sale of defendants home.

² The first position security interest was a deed of trust; not a mortgage.

³ Beginning July 2004, Judge John McCarthy presided over the case at the superior court level. He recused October 2007. Thereafter, the case was presided over by Judge Donald Thompson (ret.) as a judge pro tem and since mid-2009 by Judge Bruce Hilyer, a King County Superior Court judge.

On October 22, 2004, Ms. Beck's motion to reconsider the superior court's decision was denied but the trial court did order that the order providing for a commercial sale of the property was granted on condition of Ms. Beck posting supersedeas of \$100,000. *Id.*, p. 4, fn. 4. Ms. Beck filed her Notice of Appeal November 8, 2004. On or about December 6, 2004, Ms. Beck filed a motion in the Court of Appeals seeking accelerated review of her appeal and a stay pending appeal. On January 13, 2005, a Court of Appeals Commissioner's Ruling denied Ms. Beck's motions but reduced the amount of supersedeas to \$50,000. *Id.*, fn. 5.⁴

Events proceeded rapidly and before the order for a reduced amount of supersedeas was issued, the superior court - by orders of October 29, 2004 and November 5, 2004 - ordered defendant to sign a listing agreement to sell the property for the sum of \$260,000. *Id.*, p. 4. On January 17, 2005, superior court approved a sale to Third Party Plaintiff Thomas. *Id.* p. 5.

At this point, the court was set to sell Ms. Beck's home before she could have an opportunity to appeal the decision of the court; without affording her the rights ordinarily available to anyone pursuant to the execution statutes of the State of Washington: homestead exemption and redemption rights being paramount. Moreover, it was thought that the established price was far less than the fair market

⁴The Court of Appeals decision correctly states that JB Properties posted \$50,000 as supersedeas for Beck in February 2005; however it erroneously states that Beck "posted \$80,000 as additional supersedeas" later. The \$80,000 was posted in order to pay off Rutledge. There was no pending appeal at the time of the \$80,000 loan and no order setting "additional" supersedeas.

value of the property. For Ms. Beck this was devastating. If Ms. Beck did not post supersedeas, she would lose her home and the rights to which judgment debtors are entitled before she had had the opportunity to prosecute any appeal.

3. The First (\$50,000) Loan to Ms. Beck.

Ms. Beck sought to borrow \$50,000 for supersedeas from her son-in-law, Bryan Chushcoff; she had no other source for the funds. The only thing she could offer for collateral was her interest in the subject real property. Chushcoff agreed to lend her the money and to accept a deed of trust against the subject realty.

In February 2005 Chushcoff provided the \$50,000 supersedeas (staying proceedings in superior court pending appeal) from his personal funds paying that sum to the Clerk of the court on behalf of JB Properties, Inc. for Ms. Beck. This was a loan to Ms. Beck and she signed a promissory note to evidence the loan and to secure the note she also signed a deed of trust affecting the realty all in favor of JB Properties, Inc. The deed of trust was recorded under Pierce County auditor #200502031098. The loan carried no interest rate and no payments; the principal of the loan became due and payable at the option of the holder of the note in the event that it was paid to the judgment creditor. After maturity or on default, interest would accrue at 12% per annum. JB Properties, Inc. (hereafter "JB Properties") is a Washington corporation. Bryan Chushcoff was and remains its sole stockholder, officer, director and its agent for service of process.

4. The Litigation Post-Supersedeas.

The appellate process proceeded and so did Ms. Beck's effort to obtain a loan to satisfy the Agreed Judgment. Ms. Beck was not successful in her effort to appeal the decision of the superior court. She was, however, successful in getting a commitment for a loan that would pay Mr. Rutledge and the first "mortgage" and satisfy the Agreed Judgment of May 2001. She began her effort to get pay-off information from Mr. Rutledge in September 2005. Mr. Rutledge, through Mr. Kram, refused to provide pay-off information to satisfy the judgment.

On June 29, 2007, the matter appeared to have reached an outcome favorable to Ms. Beck. At that time, Judge McCarthy ruled that Beck would be allowed to pay off plaintiff and keep her home. He stated:

What I am inclined to do is this, is allow the defendant to refinance and pay off the judgment, which we now know is owing, plus anticipated judgment. And so in order to set that specific amount, I need specifics from plaintiff as to what you claim is due and owing and I need to make a decision on the specific amount.

I think for the sake of her moving forward with the refinance efforts, I think you should assume that, Mr. Shillito, [defendant's counsel⁵] that it's going to be somewhere in the area of \$130,000. I am just selecting that number because I am not sure the plaintiff has provided me any better guesstimate as this point in time.

Essentially, I am going to allow her to do that within 30 days from now to get that set up.

...

⁵ Mr. Shillito began his representation of Ms. Beck after the first appeal of this matter concluded. Ms. Beck was a pro se litigant in all of the prior proceedings. Mr. Shillito withdrew from her representation June 6, 2008; she represented herself thereafter.

Your client is going to have to either refinance and pay off judgments or the sale will proceed.

...

Well, you know, and I am not going to enter an order today. I have got the Beck's proposed order, which I would modify substantially, but I am orally telling you what I am going to do today.

Id., p. 7. So as late as June 29, 2007 neither the court nor Ms. Beck knew the exact amount that Rutledge claimed was owed to him.

The court set July 27, 2007 for the next hearing in the case. At that time, Judge McCarthy established a total amount owing by Beck to Rutledge of something more than \$128,000. Ms. Beck had a loan approved that would fully pay Plaintiff in three days (a loan secured by real property cannot be funded until a 3-day right of rescission expires). Yet at that same hearing, Judge McCarthy allowed the Third Party Plaintiffs Thomas to file their lawsuit and intervene in this litigation. Clouding the title with this now pending Third Party Complaint complicated Ms. Beck's ability to obtain a loan with which to pay Plaintiff.

The Thomas Third Party Complaint alleged that Rutledge and Beck breached the contract of January 2005. So another hearing was set for late October 2007 to determine the merit of the Thomas claim. This hearing ultimately took place March 27, 2008.

On October 12, 2007, the \$50,000 that had been held as supersedeas was paid to Mr. Rutledge – through Mr. Kram – in partial satisfaction of the \$128,000 established as

being owed as of July 27, 2007.⁶ On October 19, 2007, on his own motion Judge McCarthy recused from participating further in the case.

5. The Second (\$80,000) Loan To Ms. Beck.

Next, on November 30, 2007, another \$80,000 was paid into the court registry by JB Properties on Beck's behalf to bring the total paid plaintiff to \$130,000. Added to the \$50,000 already paid, this was the amount Judge McCarthy estimated should fully pay the judgment. Through counsel, Ms. Beck immediately asked Mr. Kram, to enter a satisfaction of judgment. Mr. Kram ignored the request and he did not seek the money from the court. At this point, \$130,000 (\$50,000 plus \$80,000) had been paid toward the debt owed by Beck to Rutledge. As it would turn out, Rutledge was still due \$397.49. Because of this, all of the proceeds of the sale above \$397.49 (and net of liens and costs of sale) – nearly \$110,000 – were Ms. Beck's "share" of the proceeds. This "equity" was created by the borrowings from Appellant that reduced the Rutledge share to less than \$400. It was not enough to pay the more than \$134,000 owed to JB Properties as a result of these borrowings.

Ms. Beck aim in borrowing the \$80,000 was obvious. If Mr. Rutledge were paid there would be no reason to force Ms. Beck to sell her home; it would end the litigation

⁶ The order of July 27, 2007 included all sums accruing under the Agreed Judgment of May 24, 2001.

between them. Later, she could complete a new loan and pay off JB Properties. It would make it easier for a new judge to conclude as had Judge McCarthy: if Rutledge is paid, then Beck should keep her home.

As before, Ms. Beck had no other source for the funds. The only thing she could offer for collateral was her interest in the subject real property. Chushcoff agreed to lend her the money and to accept a deed of trust against the subject realty.

As before, Chushcoff provided the \$80,000 from his personal funds paying that sum to the Clerk of the court on behalf of JB Properties for Ms. Beck. This was another a loan to Ms. Beck and she again signed a promissory note to evidence the loan and to secure the note⁷ she also signed a deed of trust affecting the realty. The deed of trust was recorded October 18, 2007 under Pierce County Auditor number 200710180152.

6. The Court Vacates Appellant's First Deed of Trust.

On March 27, 2008 motions were heard before Judge *pro tem*, Donald Thompson. He ruled against Ms. Beck and ordered that the sale of the property to Third Party Plaintiff Thomas go forward. At that time, Mr. Kram offered an order to the court that the

Deed of Trust dated the 3rd day of February, 2005, recorded under auditors fee #200502031098 be and the same is hereby vacated and set aside and held for naught. This Deed of Trust shall not be an

⁷ The note included \$4,800 in funds Beck had borrowed to pay legal fees. CP 68, ¶3.

impediment to sale and any money due under the Deed of Trust shall not be an encumbrance on the property at the time of sale. Any monies due under the above Deed of Trust shall be payable solely from any monies awarded to Susan Beck in the ultimate distribution of these funds.

Emphasis added. CP 104. The order purported to terminate a property interest that JB Properties had in the real property: the first deed of trust between it and Ms. Beck.

Note that the identity of the beneficiary of the deed of trust, JB Properties, Inc., was not mentioned in the order. Importantly, neither JB Properties nor Bryan Chushcoff was provided notice; there is no proof of service in the court's file. CP9-10; 62, ¶12; CP 70; CP 81.

7. The Court Vacates Appellant's Second Deed of Trust.

As we have seen, the debt owed by Ms. Beck was secured by two deeds of trust. Mr. Kram had now vacated one of them. The remaining deed of trust would raise an issue in closing the sale to Thomas. In order vacate the second deed of trust, Mr. Kram made another motion before the court. Among other things, the motion sought "to vacate and set aside a deed of trust apparently filed by Susan Beck in October 2007."

An order to set a hearing on the motion on shortened notice was signed *ex parte* on Wednesday, June 11, 2008. It evidently was served on Ms. Beck by mail upon her withdrawing attorney, Mr. Shillito. The hearing was set for 9:30 a.m., Wednesday, June 18, 2008 before Commissioner *pro tem* Terry McCarthy. Mr. Shillito did not appear. Chushcoff learned of the motion from Ms. Beck over the intervening weekend. CP 9.

Chushcoff appeared specially at the June 18, 2007 hearing (CP 9) to point out to the Commissioner that Mr. Rutledge and Mr. Kram were attempting to terminate its property rights without legal notice; without due process of law; that the court had no jurisdiction of the matter.⁸

At the hearing, Mr. Kram contended that JB Properties was not a party to the action and that, therefore, the court should not allow it to be heard. To Commissioner McCarthy's question whether JB Properties had been given "legal notice" (*i.e.* served), Mr. Kram falsely said "yes." One has to ask why Mr. Kram would provide "legal notice" to someone whom he says does not have a right to be heard. No proof of service on Chushcoff or JB Properties of this motion is on file nor did Mr. Kram claim then or later that there was proof of service. Only because Chushcoff was present to contradict Mr. Kram's false statement, did Commissioner McCarthy properly decline to rule. He did so because JB Properties indeed had not been served. CP 9; Order filed June 18, 2008.

Mr. Kram was persistent and he brought an emergency motion before Judge *pro tem* Thompson on Tuesday, June 24, 2008 at 9:30 a.m. The purported reason for the "emergency" for hearing this matter on short notice, claimed Mr. Kram, was that the Thomas' would lose their loan commitment on June 20. ("Mr. and Mrs. Thomas face an expiration of their loan commitment and this matter must be dealt with by June 20,

⁸ While a party need not appear specially in order to challenge the jurisdiction of a court it is not uncommon to put it that way so as to make clear that one is not submitting to jurisdiction. See, *e.g.*, *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 866 (1996). (Quinault Indian Nation entered special appearance to contest the court's jurisdiction.)

2008.”) CP 76. Of course, the “emergency” no longer existed on June 24 when Judge Thompson heard this matter. But neither Ms. Beck nor Chushcoff could be present on this short notice to point this out.

The filed proof of service indicates that it was mailed to JB Properties on Thursday, June 19, 2008 to Chushcoff at superior court, his place of employment. Obviously this was after June 18. Chushcoff received the motion on the afternoon of Friday, June 20. This provided him with one workday – Monday – to respond to the motion.

Chushcoff filed a written response to this motion with the court. CP 7-14. In that response he pointed out that he previously “appeared specially” on short notice to protest that JB Properties had not received notice of the proceedings, that there is “no proof of service on file” that “nothing had changed” and, that, accordingly, the motion should be denied. He also pointed out that the order of March 27, 2008 should be vacated as having similarly been entered without notice and opined that the financial interests of all of the parties should be ascertained before a sale was completed. Chushcoff’s employment precluded him from appearing in court on such short notice. At the hearing, Judge Thompson determined to terminate the deed of trust so the sale could proceed.

Chushcoff did not learn the result of the hearing until the next day – June 25 – when he checked the court’s records. On June 26, 2008, Chushcoff filed a Motion for Emergency Stay and to Permit a Special Appearance of JB Properties, Inc. in the Court of Appeals. (Ms. Beck had previously filed an appeal of the decision of March 27, 2008 to

sell her home and this motion was filed in that proceeding.) He asserted that this was an emergent matter because completion of the sale would eliminate JB Properties' interest in the realty. In a nutshell, the argument was: "fundamental to any order of a court affecting the property or personal rights of any legal entity is jurisdiction."

First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process.

Painter v. Olney, 37 Wn. App. 424, 427 (1984)." The Court of Appeals declined to grant Chushcoff's motion (CP 100, fn. 3; Appx. p. 3, fn. 3). Hence, these issues were not considered by it. The sale of Ms. Beck's home was completed July 3, 2008. Appx. p. 10. On August 10, 2008, JB Properties assigned its interest in the promissory notes and deeds of trust to Bryan Chushcoff. CP 95.

8. The Sales Proceeds/Appellant Intervenes.

On September 12 2008, Judge Thompson ordered, among other things, that Appellant would be allowed to intervene; and that the balance due to plaintiff Rutledge (after deduction of the \$50,000 supersedeas but not the \$80,000 from the second loan that Mr. Kram was holding for Rutledge) was \$80,397.49. This meant that Rutledge's share of the sales proceeds was \$397.49. Judge Thompson also ordered that \$10,000 "should be retained in Mr. Kram's trust acct. to pay any statutory costs and to cover possible rental value of property post-sale to Thomas." All other sums being held in Mr. Kram's trust account on this cause number was to be paid "to Bryan Chushcoff on or

before September 22, 2008.” CP 19. As a result of this order, on September 25, 2008, Appellant received \$99,401.38. As of August 18, 2008, Beck owed Appellant \$134,762.45. After deducting this payment, the balance owed was \$35,360.97 (plus accrued interest after August 18, 2008). CP 68 ¶2d; CP 71, ¶14.

9. Proceedings Before Judge Hilyer.

On June 19, 2009, Judge Hilyer heard Appellant’s motion to disburse the \$10,000.⁹ He also heard Third Party Plaintiff Thomases motion for partial summary judgment on its breach of contract claims against Rutledge and Beck. He denied Appellant’s motion to disburse; he granted the Thomas motion for partial summary judgment and awarded damages for attorney fees and costs of \$15,861.33. He ordered this judgment be “partially paid and satisfied out of the sales proceeds currently held by Mr. Kram, counsel for Mr. Rutledge, in his trust account.” CP 53; CP 48. With that, Appellant’s \$9,480 was paid to Thomas. By Order dated August 10, 2009 (filed August 13, 2009) Judge Hilyer denied Appellant’s motion for reconsideration. This appeal was thereafter timely filed. A trial on the issue of damage to Thomas as a result of delay in occupancy occurred September 2009 and is not a subject of this appeal.

⁹ Previously, the parties – except Third Party Plaintiff Thomas – agreed that \$520 be paid to attorney Steve Callson who had facilitated the closing of the sale on the court’s order to signing closing documents for defendant Beck. Judge Hilyer ordered Callson paid. This left a residual to be disbursed of \$9,480.

D. ARGUMENT OF COUNSEL

PART I—Appellant’s Vested Property Deeds Of Trust Should Be Restored.

Assignment of Error 1 and 2.

Without Proper Service Of Process, Superior Court Had No Jurisdiction To Vacate Appellant’s Deeds Of Trust.

A deed of trust is a vested property right within the meaning of the federal and state constitution. The right of a mortgagee to have the mortgaged premises subjected to the payment of the mortgage debt is regarded as a vested property right within the meaning of constitutional provisions. 54A Am.Jur.2d *Mortgages* §138. Under both the United States and Washington constitutions, a person may not be deprived of property without “due process of law.” 18 WA Practice *Real Estate* §20.14. Article I, §3 of the Washington State Constitution provides “[n]o person shall be deprived of life, liberty, or property, without due process of law.” “The mortgagee’s vested rights may not be impaired by action of Congress. *Louisville Joint Stock Land Bank v. Radford*, [295 U.S. 555, 588-591, 55 S.Ct. 854, 863-864 (1935)]. To do so is to take property without compensation.” *In re Chicago, R.I. & P. Ry. Co.*, 90 F.2d 312 (7th Cir. 1937); *Armstrong v. United States*, 364 U.S. 40, 44, 80 S.Ct. 1563, 1566 (1960).

In this case, Ms. Beck made a series of loans from Appellant. On Beck’s behalf, the Clerk of Court received a total of \$130,000 from Appellant¹⁰ and this sum was later

¹⁰ A total of \$134,800 was lent to Ms. Beck. She also received \$4,800 from Appellant for payment of her attorney fees.

transferred to Mr. Kram's trust account. No party disputed that this occurred. Clearly this was a genuine transaction; the loan of the funds was not fictitious. Ms. Beck owed Appellant \$35,360.97 as of September 25, 2008. (Plus interest from August 18 to September 25, 2008.) Far more than the \$10,000 being held by Mr. Kram from the house sale proceeds remained owing to Appellant from Ms. Beck. CP 68 ¶¶ 2(c), 3; CP 69 ¶5; CP 70-71, ¶¶ 13 and 14.

It was undisputed that in order to secure payment to Appellant, Ms. Beck signed notes and gave deeds of trust against the subject real property to secure those loans. The first deed of trust was dated and recorded February 3, 2005 under recording number 200502031098; the second deed of trust was dated and recorded October 18, 2007 under recording number 200710180152. CP 69 ¶¶ 4 and 8; CP 78; CP 86-90.

The superior court, in two orders, vacated first one¹¹ and then the second¹² of the deeds of trust. It is undisputed that the first deed of trust was vacated wholly without any notice or service of process upon the then owner of the deed of trust, JB Properties. Neither Rutledge nor Thomas has denied this assertion in any way. There is NO PROOF OF SERVICE in the court file. CP 62. It is also undisputed that Mr. Kram, representing plaintiff Rutledge, attempted to do the same as to the second deed of trust; that Appellant learned of this from defendant Beck and appeared specially to contest the

¹¹ Order Compelling Sale, Appointed Attorney and Granting Other Relief dated March 27, 2008. CP 104.

¹² Order on Show Cause Re: Contempt/Judgment dated June 24, 2008. CP 17.

entry of the order. *Pro tem* Commissioner Terrence McCarthy denied plaintiff's request. But plaintiff persisted and upon one day's notice by mail, obtained an order terminating the second deed of trust despite Appellant's written opposition to the court's jurisdiction.

These orders are void and should be vacated. This is because fundamental to any order of a court affecting the property or personal rights of any legal entity is jurisdiction.

First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process.

Painter v. Olney, 37 Wn. App. 424, 427 (1984); *State v. Breazeale*, 144 Wn.2d 829, 841, 31 P.3d 1155 (2001); *Pascua v. Heil*, 126 Wash.App. 520, 526, 108 P.3d 1253 (2005).

"When a court lacks personal jurisdiction over a party, any judgment entered against that party is void." *Breazeale*, 144 Wn.2d at 841, 31 P.3d 1155. A motion under CR 60(b)(5) to vacate a judgment on the grounds that it is void may be made at any time.

Roberts v. Johnson, 137 Wn.2d 84, 92, 969 P.2d 446 (1999). It is a matter of fundamental constitutional principle. The individual interest sought to be protected by the Fourteenth Amendment of the U.S. Constitution, "is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.'

Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and

can choose for himself whether to appear or default, acquiesce or contest.” *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950).

JB Properties/Appellant received no notice of the motion to vacate its first deed of trust. While it learned of plaintiff’s motion to vacate its second deed of trust by mail from the defendant to Appellant’s place of business one business day before the hearing, “mere receipt of process and actual notice alone do not establish valid service of process.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 177 (1987). No party has attempted to claim that this was adequate or sufficient service of process; nor was an order authorizing service of process by mail entered. Appellant’s deeds of trust property interest should be restored against the realty because the court had no jurisdiction or power to enter an order terminating them.

PART II—Appellant Is Entitled To The Proceeds Of The Sale Of The Realty.

Assignment of Error 3 and 4.

In this case, while declaring the deeds of trust invalid, the court has never expressly identified anything invalid about the JB Property deeds of trust. Both deed of trusts were in writing, in correct form, for valid and genuine consideration and properly recorded. They were entered into with a person with capacity to so contract. The notes the deed of trusts secure remain unpaid. Except for the claim that Ms. Beck could not encumber the property without consent, this was undisputed by either Thomas or Rutledge. When the matter came on for hearing before Judge Hilyer, he did not identify

any failing with Appellant's claim to priority in the sales proceeds. In denying Appellant's motion to disburse to him the remaining sales proceeds that ultimately went to Third Party Plaintiff Thomas, the court ruled that Appellant "failed to establish his right to priority over the other parties." The court did not indicate why this was so; it did not set forth either a legal or factual basis for this conclusion. Not having provided any grounds or reasons for the lower court's decision, an appellate court need not give it deference. Moreover, this was a matter of law rather than of discretion. As we will see, as a matter of law the ruling was erroneous.

1. If The March 27, 2008 Order Is Not Void As Argued In Part I, Then That Order Directs That Appellant Is Entitled To The Proceeds Of The Sale Of The Collateral.

If the Orders purporting to vacate the deeds of trust are void as argued in Part I above, it is clear that Appellant should have received all of Beck's interest in the sales proceeds.

It is likely that Judge Thompson only acquiesced in the removal of Appellant's secured interest in the subject realty in this highly irregular procedure because the Plaintiff assured him that Appellant's interest would be protected. CP 70; CP 75.

Indeed, the March 13, 2008 court order vacating Appellant's first deed of trust says that deed of trust should be paid from the sales proceeds! The language of that order terminating the 2005 deed of trust states the

Deed of Trust dated the 3rd day of February, 2005, recorded under auditors fee #200502031098 be and the same is hereby vacated and set aside and held for naught. This Deed of Trust shall not be an impediment to sale and any money due under the Deed of Trust shall not be an encumbrance on the property at the time of sale. Any monies due under the above Deed of Trust shall be payable solely from any monies awarded to Susan Beck in the ultimate distribution of these funds.

Emphasis added. CP 104. Despite this language and the undisputed fact that the money in Mr. Kram's trust account represented money otherwise due to Beck from the sale of the realty, (CP 57; CP 68, ¶12a) the money was ordered paid to Third Party Plaintiff, Thomas. CP 48-49; CP 50-51; CP 52-53. By virtue of the prior order in the case, the sales proceeds should have been paid Appellant. While Judge Thompson later ordered that \$10,000 should be retained in Mr. Kram's trust account "to pay any statutory costs and to cover possible rental value of property post-sale to Thomas" he did not rule on Appellant's interest in the real property. Appellant's claim being secured by the real property was not subject to the claims of the parties among themselves. Of course, in fact the funds were ordered to pay Thomas' attorney fees arising out of the underlying litigation and not for lost use damages.

2. As The Owner Of An Unsatisfied Security Interest, Appellant Is Entitled To The Proceeds Of The Sale Of The Collateral.

The termination of these deeds of trust was tantamount to foreclosure. In a typical case of a foreclosure proceeding by a senior lienholder, Appellant would have had a number of rights afforded under the deed of trust statute. Among those rights is

that Appellant's security interest attaches to the surplus of the proceeds from the foreclosure sale. RCW 61.24.080(3) provides in pertinent part: "Interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property." (Emphasis added.) After payment of sums due to Rutledge, all of the sale proceeds up to the balance owed is Appellant's property. The proceeds should have been paid to Appellant.

3. The Lis Pendens Filed By Third Party Plaintiff Thomas Does Not Confer On Thomas Any Substantive Rights And In Any Event Came Too Late.

A lis pendens, is a purely to give notice to protect third parties that there is a suit involving the real property. Here, Thomas got the realty. A lis pendens does not give Thomas any interest in the proceeds of the sale. A lis pendens does not confer any right, title or interest in real property; it confers no substantive rights.

"Lis pendens" is a common-law and statutory doctrine which has the effect of providing constructive notice to the world of an alleged claim of a lien or an interest in property. Lis pendens is fundamentally procedural because it provides a different, more adequate method of notice, without conferring any additional substantive right.

(Emphasis added.) 51 Am.Jur.2d *Lis Pendens* § 1. It helps to assure the court of jurisdiction of the property and prevent endless litigation of real property titles. But that is all that it does.

Third Party Plaintiff Thomas filed a lis pendens in mid-2007. Appellant's deed of trust against the property dated and recorded February 3, 2005 predates the Thomas lis pendens. Appellant's first deed of trust secured advances or loans even if made at a later date and subsequent promissory notes stated that they were secured by BOTH deed of trusts. CP 94. The 2005 deed of trust states on its face that it is

for the purpose of securing performance of each agreement of grantor herein contained, and payment of the sum of Fifty Thousand Dollars (\$50,000.00) in accordance with the terms of a Note of even date, payable to Beneficiary or order, and made by Grantor, and all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of their successors or assigns, together with interest thereon at such rate as shall be agreed upon.

(Emphasis added.) CP 87.

The effect of this "future advances" clause is to relate back to the original deed of trust the security for the loans; this is expressly authorized by Washington statute. RCW 60.04.226 "provides that a recorded mortgage or deed of trust is prior to all subsequently recorded liens, mortgages, deeds of trust, and other encumbrances "to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory." (Emphasis added.)

18 WA Practice *Real Estate* §17.16.¹³

¹³ RCW 65.08.070 has the effect of giving priority among competing liens to the one first recorded. As we have seen, the Thomas lis pendens does not confer a substantive right and is not therefore "a competing lien" even if it had been recorded earlier which, of course, it was not.

4. Defendant Beck Was Competent To Encumber The Realty

I address this issue because in this litigation plaintiff's lawyer, Peter Kram, repeatedly claimed that Ms. Beck needed the consent of the court or of his client, Rutledge, to validly encumber the realty with a deed of trust. Thomas asserted that this was the reason Judge Thompson vacated the deeds of trust although Judge Thompson's reason for doing so is nowhere in the record. In any event the argument is erroneous.

In Washington State the right to mortgage one's property is within the constitutional guarantee of freedom of contract. *Dennis v. Moses*, 18 Wash. 537, 576-577 (1898); 54A Am.Jur.2d *Mortgages* §5. And,

An encumbrance purportedly placed on the whole property is valid as to the cotenant who executed it, and will be held good as to the part allotted to that cotenant in any subsequent partition. If there is a judicial sale of the premises to a stranger, the mortgage follows the mortgagor's interest in the proceeds, and does not affect the title of the purchaser.

Any cotenant may encumber his or her separate interest without consent, and without affecting the interests, of other tenants.

(Emphasis added.) 20 Am.Jur.2d *Cotenancy and Joint Ownership*, §102, *U.S. v. Omdahl*, 104 F.3d 1143, 1146, (9th Cir., 1997); *Dieden v. Schmidt*, 128 Cal Rptr.2d 365, 369 (2002).

Neither Rutledge nor Thomas ever cited contrary legal authority.

E. CONCLUSION

1. Court Orders Vacating Appellant's Deeds of Trust.

As a matter of fundamental constitutional principle, when a court lacks personal jurisdiction over a party, any judgment entered against that party is void. And a motion to vacate a judgment on the grounds that it is void may be made at any time. There has been no claim that JB Properties/Chushcoff received service of the order vacating the first deed of trust; there has been no claim that the notice received by Appellant of the motion to vacate the second deed of trust was adequate or sufficient service of process. Appellant's deeds of trust property interest should be restored against the realty because the court had no jurisdiction or power to enter an order terminating them.

2. Priority In The Proceeds Of The Sale.

As we have seen, there are several reasons Appellant should have been awarded the sales proceeds. First Appellant's deeds of trust are vested interests in realty that cannot be disregarded. Because they were vacated without legal authority, giving the property to Thomas amounts to an unconstitutional taking. Property cannot be taken without due process of law and should, therefore, follow in the proceeds of the sale of the real estate.

Next, RCW 61.24.080(3) provides in pertinent part: "Interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property." (Emphasis added.)

Third, in his moving papers, Mr. Kram assured the court that the “sale proceeds are to be placed in trust pending disposition after the sale is concluded. Thus any alleged holder of a deed of trust would be protected.” The language of the very order purporting to vacate Appellant’s first deed of trust provides that any money due under the deed of trust shall be paid from the “monies awarded to Susan Beck.” If superior court was not going to vacate that court order as void and restore Appellant’s deed of trust interest, then that order should have been followed and the sale proceeds awarded Appellant. It was not.

Finally, RCW 60.04.226 “provides that a recorded mortgage or deed of trust is prior to all subsequently recorded liens, mortgages, deeds of trust, and other encumbrances “to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.”

The Thomas interest was unsecured. Thomas obtained a judgment when this court granted their motion June 19, 2009 but such judgment lien as created by statute is clearly subsequent to Appellant’s deeds of trust of 2005 and 2008. If the Thomas judgment had been entered prior to the sale of the realty, the Thomas judgment having attached to the property later in time to Appellant’s deeds of trust would have been a junior encumbrance and, hence, the Thomas claim would have been subordinate to Appellant’s claim.

3. Relief To Be Granted.

The following orders of the superior court herein should be vacated:

- To the extent it purports to vacate Appellant's deed of trust recorded under Pierce County auditor number 200502031098, the Order Compelling Sale, Appointed Attorney and Granting Other Relief dated March 27, 2008.
- To the extent it purports to vacate Appellant's deed of trust recorded under Pierce County auditor number 200710180152, the Order on Show Cause Re: Contempt/Judgment dated June 24, 2008.
- The Order Denying Motion to Disburse by Intervenor Bryan Chushcoff (CP 55).
- To the extent it disburses the sales proceeds to Third Party Thomas and not to Appellant: a) the Order Disbursing Funds and Granting Judgment for Attorney's Fees and Costs; b) the Order Authorizing Disbursal of Funds Held in Trust; and, c) the Order Granting Summary Judgment dated June 19, 2009.
- The Order on Reconsideration dated August 10, 2009.

The superior court should have granted Appellants Motion to Disburse by Intervenor (Appellant) and it should have granted Appellant's Motion for Reconsideration. Judgment should be entered in favor of Appellant and against Third Party Plaintiffs for the proceeds awarded by superior court to Third Party Plaintiffs plus

prejudgment interest (it is a liquidated amount) at 12% per annum. An order should be entered restoring the Appellant's deeds of trust against the subject real property.

This matter should be remanded to the superior court for proceedings consistent with this court's decision/opinion.

Dated: November 23, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan Chushcoff", written over a horizontal line.

BRYAN CHUSHCOFF, *Pro se*, WSBA #7817
Appellant
6905 Narrows Lane
Tacoma, WA 98407
253.759.9279

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAUL J. RUTLEDGE,
Respondent,

v.

SUSAN E. BECK,
Appellant,

No. 37587-7-II

UNPUBLISHED OPINION

RYAN THOMAS and JULIE THOMAS,
Husband and wife,
Third Party Intervenors,

v.

PAUL J. RUTLEDGE; SUSAN E. BECK,
Third Party Respondents.

Van Deren, C.J.—This case presents the issue of whether a trial court’s order to partition real property by sale, followed by its order requiring a reluctant tenant in common to sign and cooperate with the ordered sale using a real estate purchase and sale agreement (REPSA), binds the parties or whether the subsequently executed REPSA becomes the only enforceable means of partitioning the property and transferring ownership.

Susan Beck appeals the trial court’s orders (1) granting summary judgment to Ryan and

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Julie Thomas and Paul Rutledge for specific performance of a purchase and sale agreement executed according to the trial court's earlier ruling and (2) applying a 12 percent interest rate to certain amounts Beck owed to Rutledge.¹ We affirm the trial court's order requiring the sale to the Thomases and its order that 12 per cent per annum is the appropriate interest on amounts not covered by Beck and Rutledge's earlier agreement. We reverse and remand issues of attorney fees to the trial court for further proceedings.

FACTS

Susan Beck and Paul Rutledge, an unmarried couple living in California, purchased a home in Gig Harbor, Washington, in June 1999 as tenants in common.² They separated two weeks before their scheduled move to Washington and Rutledge decided to stay in California. Beck, her children, and her mother moved to Washington and began residing in the Gig Harbor home. When Beck failed to pay the mortgage, Rutledge began making the monthly mortgage payments. Up until the trial court's order at issue in this appeal, Beck and her family "had

¹ Beck also appeals the trial court's approval of the original real estate listing agreement and its requirement that she sell the house. We earlier affirmed the trial court's rulings on these matters. *Rutledge v. Beck*, No. 32504-7-II (Wash. Ct. App. Sept. 9, 2005). Beck also lists the trial court's order allowing the Thomases to intervene in her notice of appeal. But Beck does not argue this issue in her opening brief, her reply brief, or her supplemental brief. "[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made." *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

² We earlier determined that Rutledge and Beck were tenants in common. *Rutledge v. Beck*, No. 32504-7-II (Wash. Ct. App. Sept. 9, 2005). Tenants in common have a right under the partition statute "to partition their property, either in kind or by sale." *Friend v. Friend*, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998) (emphasis omitted). RCW 7.52.010 states:

When several persons hold and are in possession of real property as tenants in common . . . an action may be maintained by one or more of such persons, for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property . . . if it appear[s] that a partition cannot be made without great prejudice to the owners.

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exclusive possession of the home and ha[ve] physically maintained the subject property ever since.” Br. of Appellant at 4.

Rutledge filed suit against Beck on July 7, 2000, “to establish the relative interests of the parties” in the Gig Harbor property. Br. of Appellant at 4. In May 2001, Beck and Rutledge entered into an agreed judgment.³ The agreement stated that “Paul Rutledge shall have judgment over and against Susan Beck for the sum of Fifty Thousand (\$50,000.00) Dollars.” It further stated that “[t]his amount shall be paid at the rate of One Thousand (\$1,000.00) Dollars per month. . . . The \$1,000.00 per month shall be in addition to the full house payment hereafter described.” Clerk’s Papers (CP) at 2. Once Beck paid Rutledge the full amount, the agreed judgment stipulated that “[Rutledge] will convey his entire interest in the subject property to Susan Beck conditioned on her obtaining either a new mortgage in her name only or a novation of the existing mortgage.” CP at 3.

Following the agreed judgment in 2001, Beck and Rutledge refinanced the mortgage together in April 2003. They subordinated the 2001 agreed judgment to the new deed of trust to accommodate the refinance. The new deed of trust listed Rutledge and Beck as grantors “IN UNDIVIDED INT[E]RESTS AS THEIR RESPECTIVE SEPARATE ESTATES.” CP at 269. The record does not reveal what agreement they had for payment of the new mortgage.

Beck did not comply with the 2001 agreed judgment and Rutledge brought an action in 2004 to force sale of the property. The trial court denied Rutledge’s motion for summary judgment but granted him “leave to renew this motion to resolve issues concerning the homestead

³ Pierce County Superior Court Judge Bryan Chushcoff presided over the agreed judgment. Judge Chushcoff is now Beck’s son-in-law. He also represented J.B. Properties, Inc. at the trial court and in part of this appeal. Here, J.B. Properties moved to intervene and also moved for an emergency stay. We denied both motions.

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exemption.” CP at 13. Rutledge filed a second motion for summary judgment that same day and, on September 17, 2004, the trial court entered an order authorizing sale of the property. The trial court ordered that the parties “list the property for sale with a licensed realtor at a fair market price . . . on or before October 1, 2004.”⁴ CP at 8.

Rutledge subsequently employed Sterling Real Estate Brokers. They determined that the fair market value was \$255,000 and Rutledge signed a listing agreement and seller’s disclosure documents. The trial court ordered Beck to sign the listing agreement on October 29, 2004, but granted her time to submit an alternate listing agent and valuation of the property. When Beck did not do so, the trial court set \$260,000 as the asking price on November 5, 2004, and required Beck to sign the listing agreement with Sterling Real Estate.

On November 8, 2004, Beck appealed the trial court’s orders (1) authorizing sale of the property, (2) denying Beck’s motion for reconsideration, (3) compelling Beck’s signature on the listing agreement, and (4) setting the listing price and the brokerage firm.⁵ While the trial court’s original orders were on appeal, on November 17, 2004, the trial court signed an order requiring Beck to “provide full and complete access to the property” and stating that “[Beck] was not to interfere with the efforts by the listing agent to sell the property.” CP at 476. Sterling Real Estate obtained a buyer for the property and, in January 2005, Ryan and Julie Thomas entered

⁴ Beck moved for reconsideration or a stay of the order to sell the property. The trial court denied the motion for reconsideration on October 22, 2004, because “[Rutledge] is in a situation where he is having to incur monthly charges to maintain a mortgage on the property without the benefit of the property, in order to prevent it from going into foreclosure.” The superior court granted Beck’s motion to stay the order to sell the property “upon a super[s]ed[ea]s bond of \$100,000 being paid in the proper form.” CP at 82.

⁵ In February 2005, J.B. Properties posted \$50,000 as supersedeas on Beck’s behalf. Beck filed a deed of trust on the home, without Rutledge’s approval, in order to obtain these funds. Beck posted \$80,000 as additional supersedeas sometime before March 27, 2008.

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into a REPSA with Rutledge. On January 21, 2005, the trial court ordered Beck to sign the REPSA. The REPSA listed several closing dates for the sale, i.e., January 31, February 14, and February 26, 2005.⁶

Rutledge and the Thomases continued to change the closing date of the REPSA on several more occasions throughout the ensuing litigation. It appears that they first signed an addendum to the REPSA sometime before November 8, 2005, changing the closing date to October 31, 2005. Thereafter, the record shows that they signed addenda on (1) November 8, 2005, extending the closing date to November 30, 2005; (2) September 18, 2006, extending the closing date to November 1, 2006; (3) December 22, 2006; extending the closing date to March 1, 2007; and (4) September 4, 2007, extending the closing date to October 30, 2007. Beck did not sign any of the addenda. She maintained throughout the litigation, and still maintains on appeal, that she never agreed to the sale to the Thomases.

We affirmed the trial court's order compelling sale of the property on September 9, 2005. *Rutledge v. Beck*, No. 32504-7-II (Wash. Ct. App. Sept. 9, 2005). Beck appealed to the Supreme Court and in May 2006 it denied review, stating, "[T]he trial court will soon regain jurisdiction, and at that point will be able to afford Ms. Beck any relief to which it might find her entitled." CP at 160.

On July 27, 2006, Beck filed a bankruptcy petition,⁷ seeking Chapter 13 relief from the

⁶ The closing date listed on the REPSA itself seems to have been altered twice. It appears that the original closing date was January 31, 2005, but this was crossed out and replaced with February 26, 2005. February 26 was also crossed out and replaced with February 14, 2005. Beck states that the original closing date was subject to a ten-day grace period, placing the final closing date at February 24, 2005. It is unclear which version of the REPSA Beck signed on January 21, 2005.

⁷ Beck's bankruptcy petition is not included in the record on appeal.

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trial court's orders. Beck submitted a bankruptcy plan that included a proposal to refinance the Gig Harbor property to pay Rutledge's claim. Rutledge objected to confirmation of Beck's proposed plan.⁸ The Thomases submitted a claim in the bankruptcy proceeding, asserting a right to specific performance of their REPSA "or \$100,000 + if breached." CP at 558. The bankruptcy court denied Beck's plan to refinance on March 7, 2007. On May 10, 2007, the bankruptcy court entered a stipulation and order for relief from stay, "which returned the pending matters to the jurisdiction of the Superior Court." CP at 539. It then filed an order on July 10, 2007, authorizing Beck "to refinance her personal residence to pay the secured claim of Paul Rutledge" and ordered that, "[s]hould the Debtor be unable to refinance successfully with the Wagner Lending Group Inc., Debtor is authorized to refinance with any other lender without further order of this Court as long as the terms are substantially consistent with the Good Faith Estimate previously submitted by the Wagner Lending Group, Inc."⁹ CP at 325, 326.

Beck filed a motion in the trial court on May 24, 2007, asking it to compel Rutledge to specify the amount she owed so she could pay Rutledge and retain the property. She stated that John Wagner, of the Wagner Lending Group, was willing to refinance for her and asked the trial court to grant her at least ten days to do so.

Rutledge asked the trial court to require completion of the sale to the Thomases and

⁸ Rutledge apparently objected to the plan to refinance because "Ms. Beck did not attempt to deal with the contingent liabilities noted against her by the Thomases and the realtor and Mr. Rutledge, as tenant-in-common or co-debtor." CP at 538-39.

⁹ The bankruptcy court added, "This Court makes no decision as to the validity of third party claims as it relates to the Rutledge/Beck/Thomas transactions. At this time, this Court declines jurisdiction as to the validity of third party claims as to the Rutledge/Beck/Thomas transactions." CP at 326.

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appoint an attorney-in-fact to sign the sales documents for Beck. He also asked that J.B. Properties' deed of trust be set aside. Finally, he argued that "failing to close the sale further exposes [Rutledge] to lawsuits by [the Thomases and] the Realtors." Report of Proceedings at (RP) (June 6, 2007) at 7. He argued that the trial court could not change the relief at this point because "[Rutledge] has relied on it. The buyers have relied on it. The Realtors have relied on it, and the problem is of [Beck's] own making." He further stated, "The Realtors have earned their commission because they brought a qualified buyer to the table who signed up, signed the agreement [Beck] signed." RP (June 6, 2007) at 27-28.

Beck argued that the REPSA with the Thomases had "long since expired." RP (June 6, 2007) at 39. Without ruling on the issue of whether the REPSA had expired according to its own terms or making a finding that Beck repudiated the agreement or failed to follow the trial court's orders, the trial court granted Beck 30 days "to refinance and pay off the judgment, . . . plus [the] anticipated judgment." RP (June 29, 2007) at 21. The court stated, "I think for the sake of her moving forward with refinance efforts, I think you should assume that [the payoff amount is] going to be somewhere in the area of \$130,000." RP (June 29, 2007) at 21. It continued, "[Beck] is going to have to either refinance and pay off judgments or the sale will proceed." RP (June 29, 2007) at 22. The trial court set July 27, 2007, as Beck's refinance deadline.

On July 27, the Thomases successfully moved to intervene. Other than establishing a 12 per cent interest rate on all mortgage payments Rutledge made after their 2001 agreed judgment, the trial court deferred ruling on all other motions to give the Thomases time to respond. The transcript indicated that Beck's refinance would not have been final until either July 30 or July 31.

On July 31, the Thomases filed a third party complaint for specific performance and/or damages. Beck asserted three affirmative

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defenses to their claims: (1) the Thomases knew when they signed the REPSA that the Gig Harbor property was subject to litigation and that they would not obtain the property if “[the Thomases] could not obtain the court’s approval and that of Susan Beck”; (2) the REPSA “expired and terminated by its terms on February 24, 2005 when the [Thomases] obtained neither the signature of the court nor of Susan Beck on an extension of the time for concluding the agreement”; and (3) “[t]he claim of [the Thomases] is subject to equitable considerations extant in the claims between Beck and [] Rutledge.” CP at 348-49.

On September 18, 2007, the Thomases moved for partial summary judgment, asking for specific performance of the REPSA contract or, in the alternative, damages.¹⁰ The Thomases argued that “[t]he REPSA contained all of the material terms of the transaction” and that “Ms. Beck signed every page.” They alleged that “Beck continues to resist the sale and has refused to go forward with the closing as agreed.” They contended that Beck “repudiated the REPSA well before the sale was scheduled to initially close” and that “Rutledge and the Thomases have continued to execute addenda extending the closing date while attempting to obtain resolution from the court.” CP at 355-56. To support their claims that Beck repudiated the REPSA and that she refused to close the sale on February 24, they pointed to Beck’s appeals and bankruptcy filing and, further, to her refusal to allow an appraiser access to the property at some point.¹¹

¹⁰ In March, 2008, Rutledge told the trial court that if it did not order specific performance, “then we have a breach of damages. We have a contract price of \$260,000, and the value of the property is probably . . . \$380,00[0] . . . so the difference is \$120,000 right there, it’s easily calculated.” RP (March 27, 2008) at 32-33. The Thomases argued that Beck prevented appraisers from entering the property, making an accurate appraisal impossible. Finally, the Thomases stated that “whatever th[e] appreciation is would be what [we] are entitled to as damages as a result of this breach.” RP (March 27, 2007) at 34.

¹¹ Rutledge’s counsel, rather than the Thomases’, argued that Beck had delayed the process by appealing and filing for bankruptcy. However, the Thomases’ counsel expressly adopted

Rutledge also asked the trial court to compel the sale with the Thomases.¹² Rutledge argued that “[t]he [trial court’s] orders of January 2005 remain in [e]ffect, have never changed,” and that he was “now exposed to [the Thomases’] claims for specific performance plus the claims of the realtors who have a perfected claim for their commission and attorney’s fees.” RP (March 27, 2008) at 9-10. He also alleged intransigence by Beck. Rutledge asked that the court appoint an attorney to sign the sale documents for Beck, strike the deed of trust to J.B. Properties, and award him attorney fees.¹³

Beck argued that she had satisfied the agreed judgment underlying Rutledge’s money claims to force the sale of the property by paying \$130,000 for his benefit. She argued that the trial court’s ruling, giving her 30 days to refinance and pay Rutledge in June 2007, showed “a change of equities” and that, because Rutledge’s claim was moot, the only issue before the court was the “alleged contract claims of Thomas.” RP (March 27, 2008) at 20, 23.

Following much more argument, including Beck’s argument that there was no enforceable contract, the trial court stated what it viewed as its only alternatives, “[T]he Court is faced with two alternatives: Either allow Ms. Beck to retain the property and the \$130,000 would be paid over, plus any additional amount that may be determined due . . . or enforcement of the contract.” RP (March 27, 2008) at 49. It then turned to a consideration of the equities:

And what are the equities? My overall view is that this matter is one that is far too long in being brought to a conclusion and that Ms. Beck has had numerous

Rutledge’s comments on the subject.

¹² Beck also submitted a cross motion for summary judgment against the Thomases.

¹³ Judge John McCarthy recused himself from the case in October 2007 and retired Pierce County Superior Court Judge Donald Thompson served as judge pro tempore at the March 27, 2008 hearing.

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opportunities to get the matter finalized and resolved . . . [a]nd then we have the threat that if I don't allow specific performance that there is going to be a sizeable action for damages. . . . [T]aking all those into consideration, those arguments, it's my conclusion that the specific performance should be granted and the matter brought to a conclusion.

RP (March 27, 2008) at 49-50. Although it discussed the equities of the matter, its order compelling the sale required that it be "pursuant to this Court's order of January 21, 2005."¹⁴ CP at 495. It also granted specific performance of the REPSA with the sale to the Thomases. Beck appeals the trial court's orders.¹⁵

ANALYSIS

Beck appeals the trial court's decision (1) to compel the sale of the property to the Thomases and (2) that the amounts she owed Rutledge should bear interest at 12 percent per annum.¹⁶ Rutledge and the Thomases cross appeal the trial court's denial of their claims for

¹⁴ The January 21 order required Beck to sign the sale agreement with the Thomases and cooperate to accomplish the sale.

¹⁵ Beck asked us to stay the sale of the Gig Harbor property and to accelerate review, which we granted, subject to a supersedeas bond or cash in the amount of \$120,000. Beck did not post the supersedeas bond or cash. Beck again moved for an emergency stay on June 27, 2008, after the trial court vacated the two deeds of trust to J.B. Properties without allowing it to intervene. We denied Beck's motion for stay on June 27, 2008, because the conditions for a stay had not been satisfied.

The sale to the Thomases closed on July 3, 2008. We denied Rutledge's motion to dismiss Beck's appeal for mootness on July 11, 2008. On September 12, 2008, the trial court granted the Thomases a writ of restitution and a writ of ejectment, granting possession of the real property to the Thomases and ejecting Beck and her family from the home. The order required that no eviction would be scheduled before September 28, 2008. The trial court denied the Thomases' and Rutledge's motions for reasonable attorney fees. The trial court also allowed Bryan Chushcoff to intervene and ordered that, "of the funds now being held in trust . . . the balance due to [Rutledge] for all sums . . . is \$80,397.49 . . . ; all other sums being held . . . shall be paid to Bryan Chushcoff." Suppl. Br. of Resp'ts Thomas, Ex. A at 2.

¹⁶ Because we have already considered Beck's first appeal regarding the original listing agreement, as well as the trial court's order requiring Beck to sign the original sales agreement with the Thomases, we do not reconsider these issues. In addition, we held that the partition by commercial sale was proper. *Rutledge v. Beck*, No. 32504-7-II (Wash. Ct. App. Sept. 9, 2005).

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attorney fees.

I. March 2008 Order of Sale

Beck argues that the trial court erred in ordering sale of the property to the Thomases and then granting partial summary judgment to the Thomases, because the Thomases knew that the REPSA was in litigation between Rutledge and Beck and because the REPSA expired by its terms.¹⁷

A. Standard of Review

When reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts that sufficiently rebutt the moving party's contentions and disclosing the existence of a material issue of fact. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. The court should grant summary judgment "only if, from all the evidence, reasonable persons could reach but one conclusion." *Wilson*, 98 Wn.2d at 437. We review issues of law de

Beck also argues that the REPSA is unenforceable because it lacked mutuality of assent when created. Because we decide the issue based on the trial court's order to partition the property, we do not address this issue. Thus, we consider only those issues not considered during the first appeal.

¹⁷ Rather than considering the trial court's denial of Beck's cross motion for summary judgment, we focus on the trial court's order granting summary judgment to Rutledge and the Thomases.

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novo. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991). We may affirm a trial court's order on any legal ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

B. Order To Sell

Beck asserts that the REPSA expired according to its terms when Rutledge and the Thomases failed to obtain Beck's signature or a court order allowing them to extend the closing date for three-and-a-half years. Rutledge and the Thomases rely on the trial court's January 21, 2005, order requiring Beck to sign the REPSA, as well as its earlier orders requiring her to cooperate in the sale and partition of the property. They assert that Beck repudiated the REPSA before the closing date, making closing according to the REPSA impossible in February 2005, and, therefore, subject to closing at any time.

Enforceable contracts for sale of real property are required to be in writing, specifying all material terms. See RCW 64.04.010, .020. Material terms include the property description, the price, and the terms of sale. *Kruse v. Hemp*, 121 Wn.2d 715, 722-23, 853 P.2d 1373 (1993) (citing *Hubbell v. Ward*, 40 Wn.2d 779, 785-87, 246 P.2d 468 (1952)). The date of closing is a desirable term, but not essential unless the agreement contains a "time is of the essence" clause. 3 Washington Real Property Deskbook: Conveyances (continued) § 40.4(2)(a) at 40-10 (3d ed. 1996) ("Failure to specify the time period in which the contract will be effective does not render the agreement void because of indefiniteness. Under these circumstances, the court will provide that the contract lasts for a reasonable period of time.") (citing *Robertson v. Wilson*, 121 Wash. 358, 360-61, 209 P. 841 (1922)).

It has long been the rule in Washington that, if an original contract requires a party's signature in order to be valid, all modifications of the contract must also include that party's signature. *Consol. Elec. Distribs., Inc. v. Gier*,

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24 Wn. App. 671, 676-77, 602 P.2d 1206 (1979) (citing *Woolen v. Sloan*, 94 Wash. 551, 553, 162 P. 985 (1917)). “[A] contract modifying or abrogating a prior contract, required by statute to be in writing, must itself be in writing to be obligatory.” *Consolid. Elec.*, 24 Wn. App. at 676-77 (quoting *McInnis v. Watson*, 116 Wash. 680, 682, 200 P. 578 (1921)); *see also Anderson v. Anderson*, 128 Wash. 504, 223 P. 323 (1924). If property is owned as a tenancy in common, any agreement to sell the property must be signed by all cotenants. 1B Kelly Kunsch, *Washington Practice: Methods of practice* § 79.5, at 741 (4th ed. 1997).

Beck argues that the REPSA expired by its terms because she did not sign the extensions and the court did not agree to the extensions, thereby eliminating her obligation to cooperate in closing the sale to the Thomases.¹⁸ The closing date on the REPSA signed by Beck and approved by the trial court, assuming Beck signed the version of the REPSA as it appears in the record, was February 14, 2005.¹⁹ On its face, the REPSA expired long before the summary judgment motion and, therefore, unless Beck repudiated her obligations under it, the Thomases and Rutledge were not entitled to a judgment enforcing the REPSA.

Neither Rutledge nor the Thomases dispute that the REPSA clearly conditioned the validity of the sales agreement on Beck’s signature and the court’s approval or that the REPSA addenda granting extensions of the closing date were not signed by Beck or expressly approved by the court. But they argue that the sale failed to occur only because Beck refused to comply

¹⁸ There is an addendum to the REPSA which states, “This offer is subject to court approval and the signature of Susan Beck.” CP at 386. The trial court approved the offer and Beck signed the REPSA.

¹⁹ We noted earlier the many changes to the original closing date on the REPSA itself. At the latest, the closing date was February 26, 2005, according to the REPSA executed by Beck, Rutledge, and the Thomases.

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with the trial court's orders. Thus, they argue that they were excused from performance of the sale agreement in February 2005 and entitled to enforce the sale through specific performance of the REPSA as a matter of law due to Beck's repudiation.

The evidence was clear that Beck repudiated (and continues to do so) her signature and agreement to sell the property to the Thomases and, thus, that she has continually failed to abide by the trial court's orders to effectuate partition of the property and has repudiated her obligation to follow through with the court-ordered sale. *See Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994) (repudiation occurs when there is a clear statement or action by one contracting party that expresses an intention not to perform); *Turner v. Gunderson*, 60 Wn. App. 696, 703, 807 P.2d 370 (1991) (repudiation by one contracting party excuses the

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injured party's performance and entitles them to restitution or damages).²⁰

The March 28, 2008, order compelling the sale states, "The sale is to be completed and immediately and forthwith pursuant to this Court's order of January 21, 2005." CP at 495. The January 21 order required Beck to sign the sales agreement with the Thomases and required Beck to complete sellers' disclosures and "cooperate in the sale [and] *closing* of the property." The January 21 order also notes that "cooperation with listing agents was required by prior order." CP at 57 (emphasis added).

Furthermore, specific performance is appropriate in this case due to several factors: (1) the sale of real property and its attendant unique factors; (2) the protracted litigation involving this particular piece of property; (3) the difficulty of valuing this property without access by an appraiser during the litigation; and (4) the proper timing of any damages determination. *See Crafts v. Pitts*, 161 Wn.2d 16, 23-24, 162 P.3d 382 (2007); 3 Restatement of the Law Second: Contracts 2d § 360 at 171 (1981).

Considering all facts in the record and all reasonable inferences from them in the light most favorable to Beck, under these facts and inferences, there is a clear absence of any genuine issue of material fact and both Rutledge and the Thomases were entitled to judgment as a matter of law

²⁰ Even if Beck did not repudiate the REPSA, we hold that the trial court's orders requiring sale of the property to effectuate a partition of Beck and Rutledge's interests in the property, entitled Rutledge to complete the sale according to the court's orders, regardless of the REPSA closing date. The trial court's orders, beginning in 2004, with the exception of the June 2007 order allowing Beck 30 days to pay Rutledge and refinance (which the record fails to demonstrate she did), consistently required Beck to cooperate in a sale of the property to the Thomases. We previously held that the trial court properly ordered the sale of the Gig Harbor property and that Rutledge was entitled to partition as a tenant in common. *Rutledge v. Beck*, No. 32504-7-II (Wash. Ct. App. Sept. 9, 2005). Here, we hold that Rutledge was entitled to complete the sale pursuant to the trial court's 2005 order and that the March 27, 2008, order requires compliance with the trial court's 2005 order of sale.

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enforcing the REPSA sale to the Thomases as ordered by the trial court in January 2005.

II. Debt Calculation

Beck contends that the interest rate on all monies owed to Rutledge should have been five percent. The trial court calculated the amount due to Rutledge using two different interest rates: four percent for the original \$50,000 and twelve percent for the “entire amount of the payments made by Rutledge on the underlying mortgage on the property.” Br. of Appellant at 37 (internal quotation marks omitted). Rutledge does not respond to Beck’s argument on this issue.

We review a trial court's decision setting the interest rate on a judgment for abuse of discretion. “[A] trial court abuses this discretion if it provides for an interest rate below the statutory rate without setting forth adequate reasons for doing so.” *In re Marriage of Knight*, 75 Wn. App. 721, 731, 800 P.2d 71 (1994).

To calculate interest on a judgment, RCW 4.56.110(1) states, “Judgments founded on written contracts, *providing for the payment of interest until paid* at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.” (Emphasis added.) RCW 4.56.110(4) provides, “Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof.” RCW 19.52.020(1)(a) imposes a statutory interest rate of no more than 12 percent per annum.

Here, the original agreement between Beck and Rutledge stated that “[t]he Fifty Thousand (\$50,000.00) dollar judgment shall bear interest at the rate of five (5%) per cent per annum on the unpaid balance.” CP at 2. It did not contemplate future payments by Rutledge on the underlying mortgage because it required Beck to pay the mortgage payments. Therefore, any payments owed beyond the \$50,000 fall outside the scope

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of RCW 4.56.110(1) and within the scope of RCW 19.52.020. For those amounts not limited by agreement to 5 percent interest, the trial court was entitled to rely on the legislature's provision for 12 percent per annum as the statutory interest rate. Thus, the trial court did not abuse its discretion and we do not substitute our judgment to change the interest rate it imposed.

III. ATTORNEY FEES

Both the Thomases and Rutledge ask us to reverse the trial court's order denying attorney fees for litigation related to the contract claim. The Thomases state that "despite the fact that an award of attorneys' fees and costs pursuant to a contractual attorneys' fees provision is mandatory, the trial court recently denied an award of fees to the Thomases." Suppl. Br. of Resp'ts Thomas at 2. Rutledge states that "[t]he attorney's fees incurred in defending against this third party claim are clearly recoverable by Rutledge under the contract for sale of the property. . . . The contract provides that if litigation is necessary[] the parties may recover their attorney's fees." Suppl. Response Br. of Resp't Rutledge at 4.

Generally, before a party is entitled to costs and fees on appeal, it must comply with RAP 18.1. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). RAP 18.1 requires (1) that there be a statutory, common law, or recognized ground of equity making such costs and fees available and (2) that the party making the request specifically state its request in its brief. RAP 18.1(a), (b). Awarding attorney fees under a statute or contract is a matter of discretion with the trial court that will not be disturbed absent a clear showing of an abuse of that discretion. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *see also Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, 153 Wn.2d 657, 666, 105 P.3d 985 (2005).

Here, the Thomases sued on the

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REPSA that provided that “[i]f Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys’ fees and expenses.” CP at 370. Although the trial court based its refusal to award fees to the Thomases on the nature of the partition action, the Thomases’ suit was a contract action on a REPSA that contained an attorney fees provision. We uphold the trial court’s order requiring sale based on the court’s order of sale but also recognize that Beck’s repudiation of the REPSA excused strict performance by Rutledge and the Thomases and that they were forced to engage in extensive litigation to obtain specific performance of the real property sales agreement. We agree with the Thomases that the trial court abused its discretion in refusing to consider the award of fees under the REPSA and remand to the trial court for its consideration and award of fees.

The REPSA clearly states that the prevailing party, either buyer or seller, is entitled to attorney fees. Rutledge was a seller, and technically the breaching party, in the Thomases’ action for specific performance. The parties have not thoroughly briefed the issue of Rutledge’s right to attorney fees against Beck on appeal and, since we remand for the trial court to consider the award of fees to the Thomases, we also remand the issue of whether Rutledge is entitled to recover fees against Beck based on contract.

We affirm the trial court’s order requiring sale of the property to the Thomases and the interest rate on the debt owed from Beck to Rutledge. We reverse the trial court’s order denying fees to the Thomases and remand that determination to the trial court and also remand for further

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proceedings on whether Rutledge is entitled to fees based on the REPSA.²¹

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Bridgewater, J.

²¹ If this case is subject to further proceedings in Pierce County Superior Court, it should be assigned to a visiting judge from another county, given Judge Bryan Chushcoff's involvement.

*** Brief of Appellant**

*** Declaration of Service**

on heirs/estate of Rutledge, Maureen J. Haugen; counsel for Thomas, William Spurr;

and Susan Beck, pro se, via U.S. Mail, postage prepaid, addressed as follows:

Paul Rutledge Estate c/o Maureen J. Haugen 435 Ridgeland Drive Sharp Chapel, TN 37866	William Spurr Attorney at Law 1001 – 4 th Avenue, Ste. 3600 Seattle, WA 98154-1130	Susan E. Beck 7420 Rosedale St. NW Gig Harbor, WA 98335
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Tacoma, Washington, on November 23, 2009.



BRYAN CHUSHCOFF