No. 47755-6-II
(14-2-11438-4)

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

MUFG UNION BANK, N.A., successor-in-interest to the Federal Deposit Insurance Corporation, as the Receiver of Frontier Bank,

Appellant,

v.

RANDY CAMPADORE, a single person; RAYMOND E. PELZEL, and he marital community composed of RAYMOND E. PELZEL and MERRILEE PELZEL; WILLIAM RILEY and ALTHEA RILEY, husband and wife, and the marital community composed thereof,

Respondents.

SUR-REPLY OF RESPONDENT CAMPADORE

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I. INTRODUCTION

Appellant's reply brief asserts new arguments based entirely on three appellate decisions that were all decided *after* the filing of Respondent's Appellate Brief. Even though one of those cases (*Umpqua Bank v. Shasta*) is still on appeal to the Washington Supreme Court, the following explains why none of the appellate court rulings support Union Bank's argument that the trial court's summary judgment ruling in this case should be reversed.[1]

A. *Umpqua Bank v. Shasta* Is Distinguishable.

Union Bank argues that *Umpqua Bank v. Shasta* requires reversal of the trial court's summary judgment ruling in this case because the Court of Appeals ruled that the plain language of the Receivership Act does not preclude a secured creditor from pursuing a deficiency following a

[1] In addition to the specific reasons explained herein, none of the cases address Respondent's argument that Washington's Deed of Trust Act supersedes Washington's Receivership Act. As explained in Respondent's Opposition to Union Bank's Motion for Reconsideration, Washington Supreme Court precedent confirms that Washington's Deed of Trust Act (the specific statute) supersedes Washington's Receivership Act (the general statute) as it relates to the sale of collateral secured by a deed of trust; accordingly, Union Bank cannot strip Defendants of the protection afforded to guarantors under Washington's Deed of Trust Act simply by electing to have a receiver sell the Property pursuant to Washington's Receivership Act. *See, e.g., Waste Management of Seattle, Inc. v. Utilities And Transportation Commission*, 123 Wn.2d 621, 869 P.2d 1034 (1994) **("A specific statute supersedes a general statute when both apply.")**; *see also General Telephone Co. v. Washington Utilities & Transportation Commission*, 104 Wn.2d 460, 464, 760 P.2d 625 (1985).

receivership sale.[2] But Union Bank's reliance on *Umpqua Bank v. Shasta* is misplaced for several reasons.

First, Union Bank's reliance on *Umpqua Bank v. Shasta* is misplaced because there are many distinguishing facts between *Umpqua Bank v. Shasta* and the present case. In *Umpqua Bank v. Shasta*, for example, the guarantors were named as parties to the receivership action (to provide due process) and had the opportunity to appear, defend, and go through the appraisal and fair value hearing; but the guarantors elected not to and simply allowed defaults to be entered against them.[3] In stark contrast, the guarantors in this case were never named in the receivership action, and did not have the opportunity to appear, defend, or go through the appraisal and fair value hearing. The guarantors objected to the sale of the Property, noting that the individual parcels, if sold separately, could have been sold for approximately $1,775,000, collectively; instead, Union Bank's general receivers sold the Property in bulk for merely $360,000.[4] But the Court failed to take the guarantors' objections into consideration when issuing the order approving the sale of the Property and the Court

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[2] *See Union Bank's Reply at pp. 2-6.*

[3] *See id.* at 3. The guarantors in *Umpqua Bank v. Shasta* could have argued that the Deed of Trust Act superseded the Receivership Act, but they elected to do **nothing** and allowed a default judgment to be entered against them. Thus, the issue was never addressed.

[4] *See* Respondent's Appellate Brief at pp. 7-10.

failed to conduct a hearing to decide the fair value of the Property – protections otherwise afforded under the Deed of Trust Act. And as a third example, in *Umpqua Bank v. Shasta*, the receiver was appointed within an ongoing judicial foreclosure.[5] In this case, there was no claim for judicial foreclosure and the receiver was not appointed within an ongoing judicial foreclosure.

Second, Union Bank's argument is misplaced (even if the Washington Supreme Court confirms *Umpqua Bank v. Shasta*) because the issue in *Umpqua Bank v. Shasta* was simply "whether the plain language of the receivership statute precludes a secured creditor from obtaining a post-sale deficiency judgment against… a guarantor on the loan after a court-approved receiver's sale of the secured property." *Umpqua Bank v. Shasta,* 2016 WL 3457726 at *3 (June 21, 2016). The issue in this case is whether Union Bank had a legal right to pursue a deficiency judgment after Union Bank breached the terms of the Deed of Trust by having a general receiver sell the Property (pursuant to Washington's Receivership Act) even though the Deed of Trust explicitly required that Union Bank have a trustee sell the Property (pursuant to

[5] *See Umpqua Bank v. Shasta,* 2016 WL 3457726 at *3.

Washington's Deed of Trust Act).[6] That issue was never raised (much less addressed) in *Umpqua Bank v. Shasta*.

Finally, Union Bank's reliance on *Umpqua Bank v. Shasta* is misplaced because, as noted above, *Umpqua Bank v. Shasta* is currently on appeal to the Washington Supreme Court and the Washington Supreme Court has yet to decide whether secured creditors (such as Union Bank) have the right to deficiency judgments after circumventing Washington's Deed of Trust Act (and the protections afforded thereunder) by electing to have a general receiver sell collateral pursuant to Washington's Receivership Act.[7] As set forth in Respondent's Appellate Brief, Respondent maintains that secured creditors (such as Union Bank) have no such right.

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[6] *See* Respondent's Appellate Brief at pp. 2-3 ("Defendants maintain that the trial properly granted summary judgment in Defendants' favor because Union Bank had no legal right to a deficiency judgment against Defendants after Union Bank elected to have a general receiver sell the Property (pursuant to Washington's Receivership Act) even though the Deed of Trust required that Union Bank have a trustee sell the Property (pursuant to Washington's Deed of Trust Act).").

[7] By electing to sell the Property through a general receiver under the Receivership Act, for example, Union Bank circumvented several essential protections afforded under the Deed of Trust Act, including: any opportunity the Respondents would have otherwise had to redeem the Property, to petition the court to sell the Property in parcels rather than in bulk (RCW 61.12.150), or to seek establishment of an upset price (following a judicial foreclosure pursuant to RCW 61.12.060). The receiver's sale resulted in a sale of the Property "free and clear of all liens and all rights of redemption," which is akin to a sale following a non-judicial foreclosure.

For all these reasons, *Umpqua Bank v. Shasta* does not require reversal of the trial court's summary judgment ruling in this case.

B. *Union Bank v. Blanchard* Has No Application To This Case.

Next, Union Bank argues that *Union Bank v. Blanchard* requires reversal of the trial court's summary judgment ruling in this case because the Respondents had actual and constructive notice of the Receivership.[8]

Again, however, the issue in this case is not whether the Respondents had actual or constructive notice of the Receivership Action; in fact, that was not even the issue in *Union Bank v. Blanchard.*[9] The issue in this case is whether Union Bank had a legal right to pursue a deficiency judgment after Union Bank breached the terms of the Deed of Trust by having a general receiver sell the Property (pursuant to Washington's Receivership Act) even though the Deed of Trust explicitly required that Union Bank have a trustee sell the Property (pursuant to Washington's Deed of Trust Act).[10] That issue was never raised (much

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[8] *See* Union Bank's Reply Brief at pp. 7-8.

[9] Rather, the issue in *Union Bank v. Blanchard* was whether "each of the guarantors' claims and defenses is foreclosed by enforcement of the guaranties, together with application of the state statute of frauds and the federal D'Oench doctrine…." 194 Wn.App. 340 (2016).

[10] *See* Respondent's Opening Brief at pp. 2-3 ("Defendants maintain that the trial properly granted summary judgment in Defendants' favor because Union Bank had no legal right to a deficiency judgment against Defendants after Union Bank elected to have a general receiver sell the Property (pursuant to Washington's Receivership Act) even though the

less addressed) in *Union Bank v. Blanchard*. Accordingly, *Union Bank v. Blanchard* does not require reversal of the trial court's summary judgment ruling in this case.

C. *Union Bank v. Blanchard* and *Frontier Bank v. Bingo* Have No Application.

Finally, Union Bank argues that *Union Bank v. Blanchard* and *Frontier Bank v. Bingo* require reversal of the trial court's summary judgment ruling in this case because the courts in *Union Bank v. Blanchard* and *Frontier Bank v. Bingo* enforced similar waiver provisions.[11] Again, however, Union Bank's argument is misleading.

The issue in *Union Bank v. Blanchard* was whether the guarantors waived the right to assert that their guaranties were void or voidable.[12] The issue in this case is not whether Defendants waived the right to assert that their guaranties were void or voidable; the issue is whether Union Bank has a legal right to pursue a deficiency judgment after Union Bank breached the terms of the Deed of Trust by having a general receiver sell the Property (pursuant to Washington's Receivership Act) even though the Deed of Trust explicitly required that Union Bank have a trustee sell the

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Deed of Trust required that Union Bank have a trustee sell the Property (pursuant to Washington's Deed of Trust Act).").

[11] *See* Union Bank's Reply Brief at p. 9.

[12] *See* Union Bank v. Blanchard, 194 Wn.App. 340 (Div. 1 2016).

Property (pursuant to Washington's Deed of Trust Act).[13] That issue was never raised (much less addressed) in *Union Bank v. Blanchard.* Accordingly, *Union Bank v. Blanchard* does not require reversal of the trial court's summary judgment ruling in this case.

Similarly, the issue in *Frontier Bank v. Bingo* was whether the statute of frauds applied, whether the *D'Oench* doctrine applied, and whether the common law duty of good faith applied.[14] Despite Union Bank's contrary argument, the Court in *Frontier Bank v. Bingo* never ruled on the scope of waiver provisions; in fact, the Court specifically stated that it was not ruling on the scope of waiver provisions.[15] Accordingly, *Frontier Bank v. Bingo* does not require reversal of the trial court's summary judgment ruling in this case either.

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[13] *See* Respondent's Opening Brief at pp. 2-3 ("Defendants maintain that the trial properly granted summary judgment in Defendants' favor because Union Bank had no legal right to a deficiency judgment against Defendants after Union Bank elected to have a general receiver sell the Property (pursuant to Washington's Receivership Act) even though the Deed of Trust required that Union Bank have a trustee sell the Property (pursuant to Washington's Deed of Trust Act).").

[14] Frontier Bank v. Bingo Investments, LLC, 191 Wn.App. 43, 71, 361 P.3d 230 (2015).

[15] Id. Moreover, Union Bank's suggestion that the waivers apply to any and all defenses would effectively permit secured creditors such as Union Bank to engage in fraud or other conduct in breach of their contractual obligations without repercussion. Such an interpretation cannot be condoned under Washington law.

II. CONCLUSION

For the reasons set forth herein, (e.g., because Union Bank had *no* legal right to pursue a deficiency judgment against Defendants under Washington law after Union Bank breached the terms of the Deed of Trust by having a general receiver sell the Property pursuant to Washington's Receivership Act, even though the Deed of Trust explicitly required that Union Bank have a trustee sell the Property pursuant to Washington's Deed of Trust Act), Respondent Campadore respectfully requests that this Court *AFFIRM* the trial court's April 24, 2015 summary judgment Order.

RESPECTFULLY SUBMITTED this 16th day of September, 2016.

s/Bradley P. Thoreson
s/Jason R. Donovan

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DECLARATION OF SERVICE

I, Jason R. Donovan, declare under penalty of perjury under the laws of the State of Washington that I am now and at all times mentioned herein, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On September 16, 2016, I caused to be served in the manner noted copies of the foregoing upon designated counsel:

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DATED in Seattle, Washington on September 16, 2016.

s/Jason R. Donovan
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