

No. 47755-6-II
(Pierce County Superior Court No. 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
the 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.

BRIEF OF RESPONDENT RANDY CAMPADORE

Bradley P. Thoreson, WSBA No. 18190
Jason R. Donovan, WSBA No. 40994
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: thorb@foster.com
Email: donoj@foster.com
Attorneys for Respondent
Randy Campadore

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I. INTRODUCTION

This case involves Union Bank's attempt to obtain a deficiency judgment against the Defendants after Union Bank circumvented Washington's Deed of Trust Act (and the protections afforded to Defendants thereunder) by having a general receiver sell the property secured by a deed of trust pursuant to Washington's Receivership Act. The lack of legal authority supporting Union Bank's unprecedented conduct speaks for itself; and the underlying rationale for Union Bank's conduct has never been denied: to navigate around the Deed of Trust Act's disputed deficiency judgment prohibition at the time. *See, e.g., First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC*, 178 Wn.App. 207, 218, 314 P.3d 420 (Div. 2 2013)).

Under Washington law, there are two methods of foreclosure for deeds of trusts: (1) judicial foreclosure under Washington's Deed of Trust Act; and (2) non-judicial foreclosure under Washington's Deed of Trust Act. The appointment of a general receiver pursuant to Washington's Receivership Act (Chapter 7.60 RCW) is *not* one of those two methods. Yet, that is the course Union Bank elected to pursue (even though the Deed of Trust required that Union Bank have a trustee sell the Property pursuant to Washington's Deed of Trust Act).

Whereas Washington's Deed of Trust Act permits deficiency judgments in limited circumstances, Washington's Receivership Act does not. Because Union Bank elected to have a general receiver sell the Property pursuant to Washington's Receivership Act (which does *not* give creditors the right to deficiency judgments) instead of having a trustee sell the Property pursuant to Washington's Deed of Trust Act (which does give creditors the right to deficiency judgments in limited circumstances), it follows that Union Bank has no right to pursue a deficiency judgment against Defendants.

Accordingly, the trial court properly granted summary judgment in Defendants' favor and the trial court's ruling should be affirmed.

II. ASSIGNMENTS OF ERROR

On April 24, 2015, the trial court granted summary judgment in favor of Defendants and dismissed Union Bank's claims for breach of contract, monies due on deficiency after receiver's sale, and attorneys' fees.¹

Defendants maintain that the trial court *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

¹ CP 448-50.

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).

In addition, Defendants maintain that the trial court *properly* denied Union Bank's motion for summary judgment for several independent reasons, including: (1) because factual issues precluded summary judgment in Union Bank's favor; (2) because the relief Union Bank sought was inherently factual in nature and not appropriate for summary judgment; and (3) because Union Bank sought summary judgment on claims never alleged in Union Bank's complaint.

III. STATEMENT OF THE CASE

As set forth in Defendants' summary judgment briefing, the pertinent facts are as follows:

A. The Voight Creek Property

In April 2006, Voight Creek Estates LLC ("Voight Creek") purchased land located at 19008 Pioneer Way East in Orting, Washington 98360 (the "Property").² The Property consisted of twenty individual lots that had a collective value of approximately \$1,775,000.³

² CP 92 (Declaration Of Andrew Bembry In Support Of Plaintiff MUFJ Bank, N.A.'s Motion For Summary Judgment And Final Judgment) at ¶¶4-5 and exhibits thereto.

³ CP 199-212 (Defendants' June 25, 2013 "Objection To Proposed Sale Of Real Property" and attachments).

B. The Note & Deed Of Trust

On April 13, 2006, Voight Creek executed a promissory note in favor of Frontier Bank (the “Note”).⁴

To secure payment on the Note, Voight Creek executed a deed of trust encumbering the Property in favor of Frontier Bank (the “Deed of Trust”).⁵ The Deed of Trust set forth Frontier Bank’s rights and remedies in the event of default.

As one remedy, the Deed of Trust allowed for the appointment of a receiver:⁶

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding or pending foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the indebtedness. Lender’s right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as receiver.

The above receivership remedy was the remedy that Union Bank (as successor in interest to the FDIC as Receiver of Frontier Bank) itself elected.⁷ Notably, this receivership remedy only authorized the

⁴ CP 90-146 (Declaration Of Andrew Bembry In Support Of Plaintiff MUFG Bank, N.A.’s Motion For Summary Judgment And Final Judgment) at ¶4 and Ex. A.

⁵ *Id.* at ¶5 and Ex. B.

⁶ *Id.*

⁷ *Id.* at ¶8.

appointment of a custodial receiver with power to “protect and preserve the Property;” it did *not* authorize the appointment of a general receiver with power to sell the Property; *nor* did it give to Union Bank a contractual right to pursue a deficiency judgment after a receiver’s sale of the Property.⁸

To the extent Union Bank wanted to sell the Property, the Deed of Trust also provided for foreclosure as another remedy:⁹

Foreclosure. With respect to all or any part of the Real Property, the Trustee shall have the right to exercise its power of sale and to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

To circumvent the Deed of Trust Act’s disputed deficiency judgment prohibition at the time, however, Union Bank elected *not* to pursue this foreclosure remedy.¹⁰

C. The Defendants’ Guaranties

The Defendants executed commercial guaranties (the “Guaranties”) to guarantee payment of Voight Creek’s obligations.¹¹ The

⁸ *Id.*

⁹ *Id.* at ¶5 and Ex. B.

¹⁰ See, e.g., *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC*, 178 Wn.App. 207, 218, 314 P.3d 420 (Div. 2 2013) (holding that Washington’s Deed of Trust Act did not permit a lender to pursue a deficiency judgment against a guarantor whose guaranty was secured by a non-judicially foreclosed deed of trust).

¹¹ CP 90-146 (Declaration Of Andrew Bembry In Support Of Plaintiff MUFJ Bank, N.A.’s Motion For Summary Judgment And Final Judgment) at ¶6 and Ex. C1 – C5.

Defendants' payment obligations under the Guaranties were conditioned upon a "demand" for payment by the Lender:¹²

For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness. Guarantor will make payments to Lender or his order, *on demand*, in legal tender of the United States of America, in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform Borrower's obligations under the Note and Related Documents. Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.

But Union Bank *never* made a demand for payment prior to the filing of this lawsuit.

D. Union Bank Elected To Have A General Receiver Sell The Property Over Defendants' Objection.

As explained above, Union Bank elected to cause the appointment of a general receiver pursuant to Washington's Receivership Act (RCW

¹² *Id.* (emphasis added).

7.60.025) in March 2012.¹³ A general receiver was then appointed in April 2012.¹⁴

Instead of complying with the contractual requirements of the Deed of Trust by having a trustee sell the Property pursuant to Washington's Deed of Trust Act, Union Bank caused the court to appoint a general receiver to sell the Property in June 2013 over Defendants' objection.¹⁵ Even though the Defendants (as individual guarantors) were neither owners nor creditors with an interest in the Property, they objected to the sale of the Property because the sale price was significantly below market.¹⁶ More specifically, the Defendants explained how the remaining individual parcels, if sold separately, could have been sold for approximately \$1,775,000, collectively; yet Union Bank's general receiver nonetheless sold the Property in bulk for merely \$360,000.¹⁷

¹³ See Union Bank, N.A., v. Voight Creek Estates, LLC, Pierce County, No. 12-2-07227-8 (Union Bank's Complaint filed March 19, 2012, seeking the appointment of a general receiver).

¹⁴ See Union Bank, N.A., v. Voight Creek Estates, LLC, Pierce County, No. 12-2-07227-8 (Court's April 17, 2012 Order Appointing Receiver).

¹⁵ See Union Bank, N.A., v. Voight Creek Estates, LLC, Pierce County, No. 12-2-07227-8 (Court's July 12, 2013 "Order For Sale Of Real Property"); see also CP 147-275 (Declaration Of Douglas R. Cameron In Support Of Plaintiff MUFG Union Bank, N.A.'s Motion For Summary Judgment And Final Judgment) at Exhibit D (Defendants' June 25, 2013 "Objection To Proposed Sale Of Real Property").

¹⁶ *Id.*

¹⁷ *Id.*

E. Union Bank's General Receiver Knew (And Ignored) The Fact That The Property Could Have Been Developed And Sold For Approximately \$1,775,000.

Chuck Sundsmo, a Land Use Consultant and private developer, was interested in purchasing / developing the Property and made numerous attempts to contact Union Bank's general receiver (Mr. Stuart Heath), but had difficulty in contacting Mr. Heath by phone.¹⁸ In February 2012, therefore, Mr. Sundsmo went to Mr. Heath's home in Bellevue and personally hand-delivered a Purchase & Sale Agreement for the Property.¹⁹ During the visit, Mr. Sundsmo spoke to Mr. Heath about purchasing the Property.²⁰ In addition, Mr. Sundsmo advised that he was conducting a feasibility study and wanted to develop the Property with the septic easement that he obtained.²¹ The septic easement was necessary to develop all the lots on the Property, and developing all of the lots on the Property would have significantly increased the value of the Property as a whole.²² Mr. Heath advised that he would put the offer with the other offers and notify Mr. Sundsmo when the Judge decided the case.²³

¹⁸ CP 308-11 (Declaration Of Chuck Sundsmo) at ¶¶2-4.

¹⁹ *Id.* at ¶4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

But Mr. Sundsmo did not hear back from Mr. Heath concerning Mr. Sundsmo's offer to purchase the Property.²⁴ Accordingly, Mr. Sundsmo went to Mr. Heath's home for a second time.²⁵ This time, Mr. Heath's wife advised that Mr. Heath was out of the country (in South America).²⁶ Mr. Sundsmo accordingly asked Mr. Heath's wife to have Mr. Heath call him upon his return.²⁷

As he awaited a response from Mr. Heath, Mr. Sundsmo started receiving inquiries (e.g., from Washington Land Management LLC) into whether he would sell his septic easement to the Property.²⁸ Concerned that the Property was already sold, Mr. Sundsmo emailed Mr. Heath on June 17, 2013, and advised that he was receiving inquiries into whether he would sell his exclusive septic easement for the Property.²⁹ Mr. Sundsmo also advised Mr. Heath that he had completed his feasibility study, stood prepared to pay cash to purchase the Property, and that he had the exclusive easement to solve the septic problem.³⁰

Without the benefit of a response, Union Bank's general receiver sold the Property in August 2013 to someone else who had not obtained

²⁴ *Id.* at ¶5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at ¶6.

²⁹ *Id.*

³⁰ *Id.*

the necessary septic easement that would have significantly increased the value of the Property.³¹ Notably, Union Bank's general receiver never gave Mr. Sundsmo the opportunity to increase his offer for the Property, which would have likely resulted in the higher and better sale price for the Property.³²

By filing this lawsuit, Union Bank seeks to profit from the misconduct of Union Bank's own general receiver by seeking a deficiency judgment against the Defendants (even though Washington law does not permit deficiency judgments after property is sold by a general receiver pursuant to Washington's Receivership Act).

F. Procedural History.

On August 12, 2014, Union Bank filed suit against the Defendants and alleged claims for: breach of contract; monies due on deficiency after receiver's sale; and attorneys' fees and costs.³³

Defendants answered Union Bank's complaint and asserted various affirmative defenses.³⁴ Defendants have not asserted any counterclaims against Union Bank.³⁵

³¹ *Id.*

³² *Id.* at ¶7.

³³ *CP* 1-6.

³⁴ *CP* 56-70.

³⁵ *Id.*

The parties filed cross motions for summary judgment.³⁶ On April 24, 2015, the Court granted Defendants' motion for summary judgment and denied Union Bank's motion for summary judgment.³⁷

IV. ARGUMENT

A. **Trial Court Properly Granted Defendants Summary Judgment Because Union Bank Has No Right To Pursue A Deficiency Judgment.**

As explained below, the trial court properly granted summary judgment in favor of Defendants because Union Bank has no right to a deficiency judgment after Union Bank elected to have a general receiver sell the Property pursuant to Washington's Receivership Act (instead of properly having a trustee sell the Property pursuant to Washington's Deed of Trust Act).

1. **Washington Law Authorizes Two Methods For Foreclosing Upon Deeds Of Trusts: Neither Method Involves A General Receiver Appointed Pursuant To Washington's Receivership Act.**

The Washington Supreme Court has repeatedly recognized that there are two methods of foreclosure for deeds of trust: (1) judicial

³⁶ CP 71-81; CP 276-285.

³⁷ CP 448-49. After the summary judgment ruling, Union Bank filed a 24-page motion for reconsideration (together with a 100-plus page declaration) based on new arguments and new evidence. CP 458-481 (Union Bank's Motion For Reconsideration) and CP 484-597 (Declaration of Joseph E. Shickich and exhibits). Defendant Campadore timely objected to Union Bank's over-length brief and submission of evidence that Union Bank had knowledge of long before the summary judgment hearing. CP 588-91. In addition, Defendant Campadore filed an opposition to Union Bank's Motion For Reconsideration. CP 599-612. On May 29, 2015, the trial court denied Union Bank's Motion For Reconsideration. P 631-32.

foreclosure under Washington's Deed of Trust Act, Chapter 61.12 RCW; and (2) non-judicial foreclosure under Washington's Deed of Trust Act, Chapter 61.24 RCW.³⁸ The appointment of a general receiver pursuant to Washington's Receivership Act (Chapter 7.60 RCW) is not one of the two methods of foreclosure for deeds of trust under Washington law. In fact, 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.³⁹

Accordingly, creditors cannot circumvent the protections afforded to borrowers and guarantors under Washington's Deed of Trust Act simply by having a general receiver sell collateral secured by a deed of trust pursuant to Washington's Receivership Act. To that end, Union Bank had no right to strip Defendants of the protections afforded to Defendants under Washington's Deed of Trust Act by having a general receiver sell the Property secured by the Deed of Trust pursuant to Washington's Receivership Act.

Notably, Union Bank could have foreclosed upon the Property pursuant to Washington's Deed of Trust Act. In fact, Union Bank was

³⁸ See *Washington Federal v. Harvey*, 340 P.3d 846, 847 (2015).

³⁹ 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).

required to have a trustee sell the Property pursuant to Washington's Deed of Trust Act. To circumvent the Deed of Trust Act's disputed deficiency judgment prohibition at the time, however, Union Bank intentionally elected not to have a trustee sell the Property pursuant to Washington's Deed of Trust Act.⁴⁰ Instead, Union Bank elected to breach the Deed of Trust by having a general receiver sell the Property pursuant to Washington's Receivership Act.⁴¹

Because Union Bank elected to have a general receiver sell the Property pursuant to Washington's Receivership Act (which, as further explained below, does not give creditors a legal right to a deficiency judgment), Union Bank has no legal right to pursue a deficiency judgment against Defendants. To conclude otherwise would not only defy Washington Supreme Court precedent, but it would also render Washington's Deed of Trust Act superfluous by allowing deficiency judgments (against borrowers and guarantors alike) without requiring the

⁴⁰ See *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC*, 178 Wn.App. 207, 218, 314 P.3d 420 (Div. 2 2013) (holding that Washington's Deed of Trust Act did not permit a lender to pursue a deficiency judgment against a guarantor whose guaranty was secured by a non-judicially foreclosed deed of trust).

⁴¹ As set forth in Defendants' opening brief, the Deed of Trust provided various remedies in the event of default, including: (1) having a receiver appointed to "protect and preserve" the Property; and (2) having a trustee appointed to foreclose upon the Property. Union Bank elected to have a general receiver appointed and had the general receiver sell the Property. But the Deed of Trust did not authorize Union Bank to have a general receiver appointed to sell the Property. Had Union Bank wanted to sell the Property, Union Bank had a contractual duty to have a trustee appointed to "exercise its power of sale and to foreclose by notice and sale." See CP 276-289 (Defendants' Cross-Motion for Summary Judgment) at pp. 3:1 – 4:7.

statutorily-mandated procedures and protections afforded under Washington's Deed of Trust Act. Similarly, a contrary conclusion would undermine the very purpose of Washington's Deed of Trust Act (i.e., to avoid court action and streamline an efficient and inexpensive non-judicial process to realize on property security interests) by allowing lenders to disregard numerous obligations imposed upon trustees and protections afforded to guarantors in the sale of collateral secured by a deed of trust, including:

- Whereas Washington's Deed of Trust Act describes and defines "fair value" of property encumbered by a deed of trust, Washington's Receivership Act does not.⁴²
- Whereas Washington's Deed of Trust Act requires strict adherence to statutory notice requirements, Washington's Receivership Act does not.⁴³
- Whereas Washington's Deed of Trust Act imposes a duty of good faith owed to guarantors, Washington's Receivership Act does not.⁴⁴
- Whereas Washington's Deed of Trust Act provides recourse to contest any alleged default, Washington's Receivership Act does not.⁴⁵
- Whereas Washington's Deed of Trust Act provides for the right to stop the sale by paying amounts due and owing, Washington's Receivership Act does not.⁴⁶

⁴² RCW 61.24.005(6).

⁴³ RCW 61.24.040; see also *Rucker v. Novastart Mortgage, Inc.*, 177 Wn.App. 1 (2013).

⁴⁴ RCW 61.24.005(3); RCW 61.24.005(8); RCW 61.24.010(4).

⁴⁵ RCW 61.24.030(8)(j); RCW 61.24.130.

⁴⁶ RCW 61.24.040(1)(e).

- Whereas Washington’s Deed of Trust Act requires that notice be provided to guarantors, Washington’s Receivership Act does not.⁴⁷
- Whereas Washington’s Deed of Trust Act provides for the right to a fair value hearing and Foreclosure of Mortgages and upset price hearing, Washington’s Receivership Act does not.⁴⁸
- Whereas Washington’s Deed of Trust Act provides for the right to restrain the sale, Washington’s Receivership Act does not.⁴⁹
- Whereas Washington’s Deed of Trust Act provides for the right to pursue a deficiency judgment against a guarantor, Washington’s Receivership Act does not.⁵⁰

Because Union Bank has no legal right to pursue a deficiency judgment against Defendants after having a general receiver sell the Property pursuant to Washington’s Receivership Act, the trial court properly granted summary judgment in favor of Defendants.

2. The Right To A Deficiency Judgment Is Statutory In Nature And Washington’s Receivership Act (Unlike Washington’s Deed Of Trust Act) Does Not Permit Deficiency Judgments.

For more than 100 years, the Washington Supreme Court has repeatedly recognized that the right to a deficiency judgment is statutory in nature. *See, e.g., Bradley Engineering & Machinery Co. v. Muzzy*, 54 Wn. 227, 103 P. 37 (1909) (“for the general rule is that a court of equity

⁴⁷ RCW 61.24.042.

⁴⁸ RCW 61.24.042; RCW 61.24.100(5).

⁴⁹ RCW 61.24.130.

⁵⁰ RCW 61.24.042; RCW 61.24.100(3)(c).

has no power to enter a deficiency judgment in an action to foreclose a mortgage unless authorized so to do by statute or rule of court.”) (emphasis added); *see also Washington Mutual Savings Bank v. United States*, 115 Wn.2d 52, 57-58, 793 P.2d 969 (1990) (“There is simply no statutory authority for allowing such a [deficiency] judgment following a nonjudicial, or deed of trust, foreclosure.”) (emphasis added); *Washington Federal v. Harvey*, 340 P.3d 846, 848 (2015) (“RCW 61.24.100(3)(c) allows for a deficiency judgment against a guarantor of a commercial loan” upon satisfaction of certain requirements).⁵¹ Union Bank’s decision to keep ignoring such Washington Supreme Court precedent speaks for itself.⁵²

Illustrating the fact that deficiency judgments are statutory in nature, Washington’s Deed of Trust Act (Chapter 61.24 RCW) explicitly states that deficiency judgments are “permitted” in limited circumstances:

⁵¹ *The legal right to a deficiency against a guarantor under Washington’s Deed of Trust Act is **necessarily statutory in nature** because, as Union Bank concedes, “[a] trustee’s sale under such a deed of trust extinguishes the liability of the guarantor under the guarantee to the same extent a borrower’s liabilities are terminated by a trustee’s sale.” See Union Bank’s opening brief at p. 18 (quoting a WSBA article). For secured creditors to pursue deficiencies against guarantors after a trustee’s sale under a deed of trust, therefore, a **statutory** remedy is necessarily required (i.e., the Deed of Trust Act) because the guarantor’s contractual liability was extinguished by the trustee’s sale. Union Bank provides **no** legal authority to the contrary (because such authority does not exist).*

⁵² *Defendants repeatedly cited such precedent in Defendants’ summary judgment briefing. See, e.g., CP 281 (Defendants’ summary judgment motion) at lines 10-14; see also CP 599-612 (Defendants’ Opposition To Union Bank’s Motion For Reconsideration) at pp. 1-2.*

Except *to the extent permitted in this section* for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.⁵³

Union Bank's opening brief curiously omits the full text of the above provision permitting deficiency judgments, citing only the language of the exception instead.⁵⁴

Washington's Receivership Act (Chapter 7.60 RCW), on the other hand, contains *no* language permitting deficiency judgments (in limited circumstances or otherwise) following foreclosures for deeds of trusts (as Union Bank even concedes).⁵⁵ Reason being: Washington's Receivership Act was never intended to be – and is not – an authorized method of foreclosure for deeds of trust; as explained above, that is the province of Washington's Deed of Trust Act.⁵⁶

⁵³ See RCW 61.24.100(1). Union Bank's opening brief curiously omits the pertinent language of RCW 61.24.100(1) which permits deficiency judgments, citing only the language of the exception instead. See, e.g., Union Bank's opening brief at p. 15.

⁵⁴ See, e.g., Union Bank's opening brief at p. 15 ("Under the DTA, 'a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.' RCW 61.24.100(1).")

⁵⁵ Union Bank argues that Washington's Receivership Act "expressly preserves a deficiency for a secured creditor." But that argument is completely misplaced: RCW 7.60.230(1)(a) (which merely relates to lien priority) only applies to "the proceeds from the disposition of their collateral." RCW 7.60.230(1)(a) does **not** apply to proceeds other than proceeds from the disposition of collateral (which is the fundamental nature of a deficiency judgment) and it does **not** somehow create a right to a "deficiency judgment" (unlike Washington's Deed of Trust Act).

⁵⁶ 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

Had the Legislature intended to permit deficiency judgments after a receiver's sale, the Legislature certainly knew how to draft – and would have drafted – Washington's Receivership Act to permit for deficiency judgments; but it didn't. And as recently explained in *Washington State Department of Revenue v. FDIC*, No. 71524-1-I (Div. 1 Sept. 14, 2015), the distinction between the language in Washington's Deed of Trust Act and the language in Washington's Receivership Act is critical:

It is an elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent. *Guillen v. Contreras*, 169 Wn.2d 769, 776, 238 P.3d 1168 (2010) (quoting *State v. Jackson*, 137 Wn.2d 712, 724, 976 P.2d 1229 (1999)). A difference in legislative intent is presumed where the legislature uses certain language in one instance but different language in another. *Woodbury v. City of Seattle*, 172 Wn.App. 747, 753, 292 P.3d 124 (2013).

Where the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced... We assume the legislature means exactly what it says and we interpret the working of statutes according to those terms. Where the legislature uses different terms, we deem the legislature to have intended different meanings. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009).

Because Washington's Receivership Act does *not* give creditors a right to a deficiency judgment following the sale of property secured by 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).

deed of trust (unlike Washington's Deed of Trust Act), Union Bank has no right to a deficiency judgment after Union Bank elected to have a general receiver sell the Property pursuant to Washington's Receivership Act.⁵⁷

That trial court's summary judgment should therefore be affirmed.

B. The Receivership Proceeding Did Not Create An Independent Right To Pursue A Deficiency Judgment.

Union Bank argues that the trial court should have denied Defendants' motion for summary judgment because: (1) Defendants had

⁵⁷ *Union Bank's reliance on case law to support Union Bank's argument (i.e., that Union Bank has a right to pursue a deficiency judgment pursuant to Washington's Receivership Act) is entirely misplaced. In Gardner v. First Heritage Bank, 175 Wn.App. 650 (Div. 1 2013), the issue was whether the Deed of Trust Act permitted a series of non-judicial foreclosures; the bank never even sought a deficiency judgment (much less a deficiency judgment pursuant to Washington's Receivership Act). In Washington Federal v. Harvey, 340 P.3d 846 (2015), the issue was whether the bank could pursue deficiency judgments following a trustee's sale pursuant to Washington's Deed of Trust Act; it was not whether the bank could pursue deficiency judgments following a receiver's sale pursuant to Washington's Receivership Act (as is the issue in this case). In Beal Bank v. Sarich, 161 Wn.2d 544 (2007), the issue was whether a non-judicial foreclosure of a senior lienholder's deed of trust under Washington's Deed of Trust Act impacted the rights of a junior lienholder; it did not involve the pursuit of a deficiency judgment (much less a deficiency judgment pursuant to Washington's Receivership Act). In Boeing Employees' Credit Union v. Burns, 167 Wn.App. 265 (Div. 1 2012), the issue was whether a junior lienholder was entitled to the surplus proceeds from a non-judicial foreclosure of a senior lienholder's deed of trust under Washington's Deed of Trust Act; it did not involve the pursuit of a deficiency judgment (much less a deficiency judgment pursuant to Washington's Receivership Act).*

Union Bank's reliance upon the Real Estate Contract Forfeiture Law is similarly misplaced because the Real Estate Contract Forfeiture Law has absolutely no bearing on whether Union Bank has a right to pursue a deficiency judgment after a receiver's sale of the Property pursuant to Washington's Receivership Act. Moreover, RCW 61.30.020 simply provides that forfeiture does not bar other remedies. When real estate mortgages are judicially foreclosed upon, RCW 61.12.070 explicitly permits for deficiency judgments: "When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor." Such language further confirms that the right to a deficiency judgment is necessarily statutory in nature under Washington law.

standing to participate in the receivership proceeding; and (2) Defendants were “bound” by the orders of the receivership order.⁵⁸ Those arguments, however, are red-herrings.⁵⁹

Defendants moved for summary judgment because Union Bank had no legal right to pursue a deficiency judgment against Defendants under Washington law after Union Bank elected to have a general receiver sell the Property pursuant to Washington’s Receivership Act. Whether or not Defendants had standing to participate in the receivership proceeding has no bearing on whether Union Bank had a legal right to a deficiency judgment in the first instance. Similarly, the receivership orders have no bearing on whether Union Bank had a legal right to a deficiency judgment following a general receiver’s sale of the Property in the first instance.

By improperly instituting receivership proceedings to have a general receiver sell the Property, Union Bank did not somehow create an independent right to pursue a deficiency judgment; and because receivership proceedings have no bearing on the right to pursue deficiency

⁵⁸ See Union Bank’s opening brief at pp. 31-40.

⁵⁹ Moreover, those arguments are substantively misplaced. For example, while it is true that RCW 7.60.190(2) provides that “[a]ny person having a claim against or interest in any estate property or in the receivership proceedings may appear in the receivership,” the fact remains that only “the owner of the property or a creditor with an interest in the property” can file an objection to the receiver’s sale so as to prevent property from being sold free and clear of liens under Washington’s Receivership Act. See RCW 7.60.2690(2)(b)(ii). Defendants were neither owners of the Property or creditors. Thus, the Defendants had no right to file an objection to the receiver’s sale, which raises significant due process concerns.

judgments in the first instance, the receivership proceedings do not serve as a valid basis to challenge the trial court's summary judgment ruling in favor of Defendants.

C. Defendants Never Intentionally Abandoned Any Substantive Defenses Or Statutory Protections Afforded To Guarantors Under Washington's Deed Of Trust Act.

Union Bank also argues that this Court made an error in law by granting summary judgment in favor of Defendants because "each guarantor has expressly and in writing waived all defenses and rights of setoff and counterclaim, and those must be enforced by this Court."⁶⁰ Once again, however, Union Bank's argument ignores binding precedent and improperly attempts to shift upon Defendants Union Bank's own affirmative burden of establishing a right to a deficiency judgment in the first instance.

Under Washington law, a waiver of rights requires an intentional abandonment shown by unequivocal acts or conduct.⁶¹ As applied to this case, there is no evidence suggesting that Defendants ever intentionally abandoned any affirmative defense or statutory protections afforded to guarantors under Washington's Deed of Trust Act. They never did.

⁶⁰ CP 458-81 (Union Bank's Motion For Reconsideration) at p. 15:6-8.

⁶¹ See First-Citizens Bank & Trust Co. v. Reikow, 177 Wn.App. 787, 795, 313 P.3d 1208 (Div. 2 2013).

Moreover, Union Bank’s waiver argument has been flatly rejected by Washington courts. In *First-Citizens Bank & Trust Co. v. Reikow*, for example, the lender argued that the guarantor waived any right they may have had to request a judicial determination of fair value based on the broad, boilerplate language set forth in the guaranty’s fine print (nearly identical language in the guaranties at issue in this case).⁶² The Court of Appeals properly rejected the lender’s waiver argument:

We note that, under Washington law, “a guaranty agreement should receive a fair and reasonable interpretation reflecting the purpose of the agreement and the right of the guarantor not to have his obligation enlarged.” *Old Nat’l Bank of Wash. v. Seattle Smashers Corp.*, 36 Wash.App. 688, 691, 676 P.2d 1034 (1984) (emphasis added). Our Supreme Court has shown great reluctance to allow waiver of the statutory requirements governing nonjudicial foreclosure. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wash.2d 94, 106–07, 297 P.3d 677 (2013) (stating that “[w]e will not allow waiver of [chapter 61.24 RCW’s] protections lightly” and citing cases) (quoting *Bain v. Metro. Mortg. Grp.*, 175 Wash.2d 83, 108, 285 P.3d 34 (2012)). A valid waiver, furthermore, requires “intentional abandonment or relinquishment of a known right, and intent to waive must be shown by unequivocal acts or conduct which are inconsistent with any intention other than to waive.” *Harmony at Madrona Park Owners Ass’n v. Madison Harmony Dev., Inc.*, 143 Wash.App. 345, 361, 177 P.3d 755 (2008), appeal after remand, 160 Wash.App. 728, 253 P.3d 101 (2011). Thus, were we to find the issue relevant to this dispute, the broad, boilerplate waiver in the guaranties’ fine print could hardly defeat the explicit and specific provisions of RCW 61.24.100(5),

⁶² *Id.*

which plainly aim to protect guarantors from having their obligations enlarged.⁶³

What Union Bank neglects to acknowledge is that Union Bank bears the affirmative burden of establishing that Union Bank has a legal right to a deficiency in the first instance; not Defendants.⁶⁴ And as the trial court properly confirmed, Union Bank cannot satisfy its own burden because Union Bank has no right to a deficiency judgment following a receiver's sale of the Property. It follows that Union Bank failed to state an affirmative claim upon which relief can be granted, rendering Defendants' substantive defenses immaterial. *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) ("In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").⁶⁵ Accordingly, the trial court did not make an error in law based on the existence of limited waivers in Defendants' guaranties.⁶⁶

⁶³ *Id.*

⁶⁴ *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (if "plaintiff fails to make a showing sufficient to establish the existing of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion" for summary judgment.).

⁶⁵ Quoting *Celotex Corp. v. Catrett*, 447 U.S. 317, 322, 106 S. Ct. 2548 (1986).

⁶⁶ *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) ("In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."), quoting *Celotex Corp. v. Catrett*, 447 U.S. 317, 322, 106 S. Ct. 2548 (1986).

Nor did the trial court make an error in law based on the case law cited by Union Bank. Reason being: none of the cases cited (e.g., *Century 21 Products Inc. v. Glacial Sales*, *In re Coney*, *Puyallup Valley Bank v. Mosby*, or otherwise) involved a lender foreclosing its right to pursue a deficiency after selling secured collateral through a general receiver pursuant to Washington's Receivership Act (unlike this case).⁶⁷ Because the case law cited by Union Bank is inapposite, the trial court did not make an error in law pursuant to any of the cases cited by Union Bank either.

D. Defendants' Guaranties Did Not Create An Independent Right To A Deficiency Judgment.

Union Bank also argues that the trial court made an error in law simply because "each guaranty is absolute and unconditional so it must be enforced by this Court."⁶⁸ Once again, however, the nature of Defendants' contractual guaranties (e.g., conditional, unconditional, or otherwise) has no bearing on whether Union Bank has a statutory right to pursue a deficiency judgment in the first instance (after electing to have a receiver

⁶⁷ See *Century 21 Products, Inc. v. Glacier Sales*, 129 Wn.2d 406, 918 P.2d 168 (1996); *Grayson v. Platis*, 95 Wn.App. 824, 978 P.2d 1105 (Div. 1 1999); *Fruehauf Trailer Co. of Canada v. Chandler*, 67 Wn.2d 704, 409 P.2d 651 (1966); *Columbia Bank, N.A. v. New Cascadia Corp.*, 37 Wn.App. 737, 682 P.2d 966 (Div. 3 1984); *Old National Bank of Washington v. Seattle Smashers Corp.*, 36 Wn.App. 688, 676 P.2d 1034 (Div. 1 1984); *Pacific County v. Sherwood Pacific, Inc.*, 17 Wn.App. 790, 657 P.2d 642 (Div. 2 1977); *In re Coney*, 2011 WL 1656371 (Bkrcty. W.D. Wash. 2011); *Puyallup Valley Bank v. Mosby*, 44 Wn.App. 285, 723 P.2d 2 (Div. 2 1986).

⁶⁸ CP 458-81 (*Union Bank's Motion For Reconsideration*) at p. 13:4-5.

sell the Property pursuant to Washington's Receivership Act instead of having a trustee sell the Property pursuant to Washington's Deed of Trust Act). Because Union Bank has no statutory right to pursue a deficiency in the first instance, the nature of Defendant's contractual guaranties is immaterial and the trial court did not make an error in law based on the nature of the Defendants' contractual guaranties.

Nor did the trial court make an error in law based on the case law cited by Union Bank. Reason being: *none* of the cases cited involved a lender foreclosing its right to pursue a deficiency following a receiver's sale of the collateral. In *Cronney*, for example, the lender did not even sell collateral secured by a Deed of Trust, so it was *not* foreclosed to make a claim in the bankruptcy proceeding against a guarantor.⁶⁹ That important distinction undermines Union Bank's argument that the trial court made an error in law pursuant to the case law cited by Union Bank. Because the case law cited by Union Bank is inapposite, the trial court did not make an error in law pursuant to *Cronney* or any of the other cases cited by Union Bank.⁷⁰

⁶⁹ *In re Cronney* is a **bankruptcy** case from the Western District of Washington; it is not a receivership case involving Washington's Receivership Act.

⁷⁰ Similarly, none of the other cases Union Bank cited (i.e., *Century 21 Products, Inc. v. Glacier Sales*, *Amick v. L.M. Baugh*, *National Bank of Washington v. Equity Investors*, *L.B. Franco v. Peoples National Bank of Washington*) involved a borrower foreclosing its right to pursue a deficiency against a guarantor by selling secured collateral through a general receiver. Thus, **all** of the cases cited by Union Bank are inapposite.

E. Trial Court Properly Denied Union Bank's Motion For Summary Judgment For Additional Reasons.

As set forth above, the trial court properly granted summary judgment in favor of Defendants because Union Bank has no right to pursue a deficiency judgment after having 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). In addition, the trial court properly denied Union Bank's motion for summary judgment for several other reasons:

1. Factual Issues Precluded Summary Judgment.

For example, Union Bank argued that the alleged deficiency amount owed totals \$3,306,032.73. But that total was based, in part, on a credit for the sale price of the Property received by Union Bank's receiver. The evidence on record, however, confirms that there is a genuine issue of material fact over the value of the Property at the time it was sold by Union Bank's general receiver, which has a substantial effect on the amount of deficiency allegedly owed (if any). Specifically, the propriety of the receiver's sale price of the Property (in light of evidence on record showing that the Property had an estimated value of \$1,775,000 at the time it was sold by Union Bank's general receiver) has yet to be determined by

a trier of fact.⁷¹ Union Bank accordingly asked the trial court to blindly endorse Union Bank's claim that the Property only had a value of \$360,000 at the time it was sold by Union Bank's general receiver and to ignore evidence demonstrating that the amount of a deficiency would have been substantially different from the amount requested in Union's Bank's motion had the lots been sold individually or for their fair value at the time of the sale.⁷²

Because: (a) Union Bank's alleged deficiency amount is based, in part, on the value of the Property at the time it was sold by Union Bank's general receiver; and (b) there is a factual dispute over the value of the Property at the time it was sold by Union Bank's general receiver, Union Bank's motion for summary judgment was properly denied because of the existence of factual disputes.

2. Relief Sought By Defendant Is Inherently Factual In Nature And Not Appropriate For Summary Judgment.

Union Bank's summary judgment motion also requested that the trial court "in its discretion and as a matter of law, determine that the fair

⁷¹ CP 147-275 (Declaration Of Douglas R. Cameron) at Ex. D (Defendants' Objection To Proposed Sale Of Real Property identifying the value of the Property to be approximately \$1,775,000); see also CP 308-11 (Declaration Of Chuck Sundsmo) at ¶7 (noting that the Property would have sold for a higher price had Union Bank's general receiver allowed bidders to modify / increase the amount of their offers).

⁷² The factors to be considered in determining a fair value are: (1) the usefulness of the property under normal conditions; (2) the potential or future value of the property; (3) the type of property involved; (4) the potential future economy; and (5) any other factor that a bidder might consider in determining a fair bid for the mortgaged property. See Lee v. Barnes, 61 Wn.2d 581, 586-87, 379 P.2d 362 (1963).

value of the Property at the sale was \$360,000.”⁷³ Union Bank’s requested relief, however, required that the trial court make inherently factual findings concerning the Property, including without limitation: the usefulness of the Property; the potential or future value of the Property; the Property’s type; the potential future economy of the Property; and any other factor that a bidder might have considered in determining a fair bid for the Property.⁷⁴ Such factual determinations render summary judgment inappropriate. *See, e.g., Gray’s Harbor Energy, LLC v. Gray’s Harbor County*, 175 Wn.App. 578, 581, 307 P.3d 754 (2013) (acknowledging the trial court determined how “a factual dispute regarding the value of a building... precluded summary judgment.”); *see also Worthington v. Worthington*, 73 Wn.2d 759, 762, 440 P.2d 478 (1968) (property valuation is a determination to be made by the trier of fact); *see also Sammons v. Commissioner of Internal Revenue*, 838 F.2d 330, 333 (9th Cir. 1988) (“determination of the value of property is a finding of fact”). Union Bank’s motion for summary judgment was properly denied because of the existence of factual disputes.

⁷³ CP 71-81 (*Union Bank’s Summary Judgment Motion*) at p. 9:11-13.

⁷⁴ *The factors to be considered in determining a fair value are: (1) the usefulness of the property under normal conditions; (2) the potential or future value of the property; (3) the type of property involved; (4) the potential future economy; and (5) any other factor that bidder might consider in determining a fair bid for the mortgaged property. See Lee v. Barnes*, 61 Wn.2d 581, 586-87, 379 P.2d 362 (1963).

3. Union Bank Sought Summary Judgment On Claims Never Alleged In Union Bank’s Complaint.

Union Bank also sought summary judgment on an “unjust enrichment” claim.⁷⁵ But Union Bank’s Complaint did not even allege a claim for “unjust enrichment.”⁷⁶ Furthermore, Union Bank’s “unjust enrichment” claim was fatally flawed because there is no evidence showing that any benefit was conferred upon the Defendants individually. The benefit alleged was, at most, conferred upon Voight Creek; not the Defendants (i.e., individual guarantors). Union Bank’s motion for summary judgment was properly denied for this reason as well.

V. 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 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), Defendant Campadore respectfully requests that this Court AFFIRM the trial court’s April 24, 2015 summary judgment Order.

⁷⁵ CP 79-80.

⁷⁶ CP 1-6.

RESPECTFULLY SUBMITTED this 19th day of October, 2015.

s/ Jason R. Donovan

Bradley P. Thoreson, WSBA No. 18190

Jason R. Donovan, WSBA No. 40994

Foster Pepper PLLC

1111 Third Avenue, Suite 3400

Seattle, Washington 98101-3299

Telephone: (206) 447-4400

Facsimile: (206) 447-9700

Email: thorb@foster.com

Email: donoj@foster.com

Attorneys for Respondent

Randy Campadore

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 eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On October 19, 2015, I caused to be served in the manner noted copies of the foregoing upon designated counsel:

Joseph E. Shickich, Jr.
RIDDELL WILLIAMS, P.S.
1001 Fourth Avenue Plaza, Suite 4500
Seattle, WA 98154-1192
E-mail: jshickich@riddellwilliams.com
Attorneys for Appellant

- Via U.S. Mail
- Via Messenger
- Via Email
- Via ECF

Raymond E. and Merrilee Pelzel
17911 213th Avenue E.
Orting, WA 98360
Email: ray@pelzeldevelopment.com
Pro Se Respondents

- Via U.S. Mail
- Via Messenger
- Via Email
- Via ECF

William and Althea Riley
1002 39th Ave. SW, Suite 302
Puyallup, WA 98373
Email: Briley@govista.net
Pro Se Respondents

- Via U.S. Mail
- Via Messenger
- Via Email
- Via ECF

DATED in Seattle, Washington on October 19, 2015.

s/ Jason R. Donovan

Jason R. Donovan

FOSTER PEPPER LAW OFFICE

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jshickich@riddellwilliams.com