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MAY 18 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 295851

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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THE BANK OF NEW YORK, AS TRUSTEE, PURSUANT TO THE  
TERMS OF THE CERTAIN POOLING AND SERVICING  
AGREEMENT DATED AS OF NOVEMBER 1, 1996 RELATED TO  
METROPOLITAN ASSET FUNDING, INC., MORTGAGE PASS-  
THROUGH CERTIFICATES SERIES 1996-A

Appellant,

v.

BRIAN R. HOOPER AND LISA M. HOOPER, HUSBAND AND WIFE,  
MARCO T. BARBANTI, ROYAL POTTAGE ENTERPRISES,  
STERLING SAVING BANK, JUNCO FROST LAVINIA, IN.,  
UNIFUND CCR PARTNERS, AND BANKERS TRUST COMPANY OF  
CALIFORNIA,

Respondents.

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APPELLANT'S REPLY BRIEF

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REPLY BRIEF OF APPELLANT

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A. Assignments of Error

1. The trial court's Order Reconveying Deed of Trust entered October 29, 2010 erred in so far as it declared that Royal Pottage Enterprises is the fee owner of the property.

2. The trial court's Judgment For Defendants Royal Pottage Enterprises and Junco Frost Lavinia, Inc. and Judgment for Defendant Marco T. Barbanti entered on October 29, 2010 erred in ordering attorney fees to these three defendants.

3. The trial court's Order Denying Motion for Reconsideration entered November 30, 2010, repeated the errors set forth in Assignments 1 and 2.

B. Argument

1. The Trial Court's Order Should Have Been Limited to Reconveyance of the Deed of Trust

The order was issued by the trial court pursuant to RCW 7.28.300 to purge the stale Deed of Trust from the Property's title. CP 144. The trial court's order went beyond the scope of the issue that was before it included a conclusion that Royal Pottage was the "fee owner" of the Property. CP 142-44. The trial court improperly entered the order with the "fee owner" designation without having had evidence and arguments

put before it by the parties as to the actual status of the ownership of the Property.

2. Using the Term “Fee Owner” to Describe Royal Pottage’s Interest in the Property was Legal Error

Respondents contend that because Bank of New York listed Respondent Barbanti’s interest in the Property as “fee title” in the Complaint, it was proper for the trial court to designate Royal Pottage as the “fee owner” in the order. *See Brief of Respondent*, pp. 7, 18. However, a designation in a Complaint is not a basis for a factual finding by the court. Barbanti’s interest was listed in the Complaint as “fee title” merely as notice of potential claims on the land. It was not a final decision on interests in the Property.

Respondents’ Brief leads the court through the history of case law which carved out the rights of a real estate contract vendee in the property that is the subject of the contract. *See Brief of Respondents*, pp. 10-14. Bank of New York does not argue with the fact that vendees have substantial interest in the property as asserted by Respondents. However, this does not change the simple fact that under a real estate contract, the seller retains title to the Property. *See Tomlinson v. Clarke*, 118 Wn.2d 498, 504, 825 P.2d 706 (1992). And although a vendee may be the “beneficial owner” of property under a real estate contract, the simple fact

of the matter is that a vendee's interest "does not amount to a fee title." *Bays v. Haven*, 55 Wn. App. 324, 327-28, 777 P.2d 562 (1989). Barbanti did not hold fee title to the Property under the real estate contract and, thus, Royal Pottage was unable to gain fee title pursuant to the Quit Claim Deed executed by Barbanti. As such, Royal Pottage cannot be the fee owner.

Although the original Deed of Trust was stale and has now been reconveyed pursuant to court order, the real estate contract under which Royal Pottage is the current vendee is still valid and is still the only manner in which Royal Pottage has claim to the Property. Under the terms of the real estate contract, Bank of New York retains legal title to the Property.

3. RCW 4.84.330 Allows for Bilateral Interpretation of a Unilateral Attorney Fees Provision Only Where One Party to the Contract is Entitled to Fees

Respondents suggest that the portion of RCW 4.84.330 which reads "...the prevailing party, whether he is the party specified in the contract of lease or not..." should be interpreted as meaning that a third party to an action based on a contract should be entitled to attorney's fees under the subject contract. *See Brief of Respondents*, p. 21. Respondents further suggest that Bank of New York's argument that the statute only

applies to award attorney's fees to a prevailing party who was also a party to the underlying contract is adding a new element to RCW 4.84.330 that does not already exist. *See Brief of Respondents*, p. 25. Such an interpretation, however, is contrary to the clear language of the statute. In *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 494, 200 P.3d 683 (2009), the Washington Supreme Court unambiguously stated that "RCW 4.84.330 is designed to make a unilateral attorney fees provision bilateral when a **contracting party** receives a final judgment." (emphasis added).

Furthermore, RCW 4.84.330 deals with situations in which a court is awarding attorney's fees. Given that the trial court **could not** have utilized RCW 4.84.330 to award attorney's fees to Bank of New York and against Barbanti and Junco Frost as they were not signors on the Deed of Trust, the bilateral effect of RCW 4.84.330 is not triggered. This point was emphasized in *Mutual Security*, where the court found no basis to enact the bilateral protections of RCW 4.84.330 by reasoning that "because Guzman never signed the note, the unilateral fee provisions would not have entitled Mutual Security to fees from Guzman even if it had prevailed." *Mutual Security Financing v. Unite*, 68 Wn. App. 636, 643, 847 P.2d 4 (1993).

Respondents' proposed interpretation of RCW 4.84.330 in fact eviscerates that intended bilateral effect of the statute by allowing the

court to award attorney's fees to a party against whom Bank of New York could not obtain such an award.

Under Washington law, the sole question for a court determining if fees are required to be awarded to a prevailing party pursuant to RCW 4.84.330 is whether there is a unilateral fee provision that would have entitled one party to collect fees against the other party. In this case, the answer is "no" and thus RCW 4.84.330 is inapplicable.

4. Public Policy Considerations Do Not Extend the Scope of the Statute Beyond the Language of the Statute and Case Law

Although Respondent's Brief states that for public policy reasons, RCW 4.84.330 is "specifically drafted in a way which does not limit its application to parties on the contract," no actual cases or legislative history is cited to support their overly-broad interpretation. *See Brief of Respondents*, pp. 23-24. Bank of New York agrees that the purpose of RCW 4.84.330 is remedial in nature. However, the remedial nature is limited to making unilateral attorney fees provision bilateral. *See Herzog Aluminum Inc v. General American Window Corp.*, 39 Wn. App. 188, 196-97, 692 P.2d 867 (1984).

Respondents additionally state that they were "directly affected" by the litigation and that their rights were at risk of elimination in the

proceedings. *See Brief of Respondents*, p. 24. This certainly was true in this case, but this is true in basically every case brought in Washington courts. The standard for court award of attorney's fees in Washington is that, "absent a contractual provision, statutory provision or well recognized principle of equity to the contrary, a court has no authority to award attorney fees to the prevailing party." *Herzog*, 39 Wn. App. at 191. People's rights are affected by litigation every day, but that does not entitle them to circumvent the attorney's fee standard and collect where there is no basis.

5. Purported "Indirect" Collection of Attorney's Fees Are Not Within the Scope of the Statute

Respondents devote much of their Brief to the proposition that Bank of New York's position on the proper application of RCW 4.84.330 would allow it to collect any attorney's fees "indirectly" against Respondents. *See Brief of Respondents*, p. 26. However, as discussed *supra*, this is not the standard in Washington. A court may only award attorney fees where allowed by statute, contract or based on a well recognized principal of equity. *Herzog*, 39 Wn. App. at 191. The *Herzog* court identified the "well recognized principle of equity" to allow attorney fees where there is "(1) a wrongful act or omission by A towards B; (2) such act or omission exposes or involves B in litigation with C; and (3) C

was not connected with the original wrongful act or omission of A towards B.” *Herzog*, 39 Wn. App. at 191, n. 1. No such principle or relationship between the parties is involved in the instant case.

There is no applicable statute authorizing fees and Respondents were not in a contractual relationship with Bank of New York. Furthermore, “indirect” collection of attorney fees does not qualify as a “well recognized principle of equity”.

6. The Type of Case Does Not Change the Application of RCW 4.84.330

Respondents further contend that because this case involved a judicial foreclosure of a deed of trust, the analysis of the facts under RCW 4.84.330 should be different. *See Brief of Respondents*, p. 31-33. The Respondents only citation in support of this contention is the California case of *Saucedo v. Mercury Savings and Loan Assoc.*, 111 Cal.App.3d 309 (1980). *Saucedo* deals with the application of California Civil Code § 1717, which is, in large part, the same as the mutuality of attorney fees provisions of RCW 4.84.330. In that case, the California Court of Appeals held that:

While we adhere to our conclusion that Civil Code section 1717 was not intended to extend the right to recover attorney fees to persons who themselves could not have been required to pay attorney fees in the event their adversary prevailed in the action, we are persuaded that in every case in which a non-assuming

grantee has sufficient interest in the property to warrant his resisting foreclosure, he would as a real and practical matter be required to pay reasonable attorney fees incurred by trustee and/or beneficiary should they prevail in the action to prevent foreclosure.

*Saucedo*, at 315. The court further held this “practical ‘liability’ of the non-assuming grantee is sufficient to call into play the remedial reciprocity established by Civil Code section 1717.” *Id.*

*Saucedo*, however, is not controlling in Washington and should not be followed by this court. This case is not an appropriate vehicle for the court to depart from the Washington rule of direct mutuality of attorney fee liability.

Even if this court finds the *Saucedo* court’s rationale persuasive, the attorney fees awarded in the instant case were still in error. The facts of *Saucedo* are distinguishable from the present matter. In *Saucedo*, Mercury loaned money to the original borrowers of the loan. *Id.* at 311. In return Mercury received a promissory note and deed of trust executed by the borrowers. *Id.* The note contained a due on sale clause and an attorney fees provision. The Saucedos purchased the property from the original borrowers making a sizeable down payment and agreeing to take over the underlying obligation. The Saucedos attempted to negotiate an assumption agreement with Mercury. *Id.* When these negotiations collapsed, Mercury exercised the due on sale clause and began non-

judicial foreclosure proceedings. The Saucedos brought a declaratory action to prohibit enforcement of the due on sale clause. Mercury argued in its summary judgment motion that it was entitled to attorney fees against the Saucedos. The court held that the due on sale clause could not be enforced, Mercury could not foreclose and awarded attorney fees to the Saucedos. The court reasoned that if Mercury had prevailed an award of attorneys fees would have become part of the debt the Saucedos would have to pay to prevent foreclosure. *Id.* at 315.

In the instant case, Barbanti purchased the property from the original borrowers under a real estate contract which specifically provided that he was not assuming the obligations of the deed of trust but that the sellers were to continue to pay on the underlying note and deed of trust. Barbanti did not attempt to assume the loan. Barbanti quit claimed the property to Royal Pottage and therefore Barbanti no longer had an interest in the property. Royal Pottage was the grantee of a quit claim from Barbanti. Unlike the Saucedos, there is nothing in the record that Royal Pottage put any money into the property when it received the quit claim deed from Barbanti or that Royal Pottage ever made any payment of any obligation associated with the property. Finally, Junco Frost is a merely a junior judgment creditor.

Even if the court finds the *Saucedo* case persuasive on the award of fees to a non-contracting party with “sufficient interest” in the property to warrant resisting foreclosure, the attorney’s fees award by the trial court in favor of respondents is still error. Barbanti was not a contracting party under the note and deed of trust and he quitclaimed his interest in the property to Royal Pottage. After the quit claim, Barbanti had no interest in the property, let alone a “sufficient interest in the property to warrant his resisting foreclosure” as required by *Saucedo*. Similarly, as a mere junior creditor, Junco Frost, also clearly lacks a sufficient interest in the property under *Saucedo* which would entitle it to attorney fees.

Finally, this court should find that Royal Pottage, the quit claim grantee from Barbanti, also does not have a “sufficient interest” under *Sauced*. Royal Pottage did not purchase the property and nothing in the record indicates it has any equity interest in the property sufficient to warrant resisting foreclosure that would entitle it to attorney fees under *Saucedo*.

### C. Conclusion

After finding the foreclosure action barred by the statute of limitations, the trial court correctly quieted title against the barred deed of trust. However, the trial court erred in declaring that Royal Pottage holds

the property in fee ownership. Additionally, the court erred in awarding attorney fees to Barbanti, Royal Pottage and Junco Frost under RCW 4.84.330.

Dated this 17<sup>th</sup> day of May, 2011.



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CERTIFICATE OF SERVICE

I, Allison Heuschele, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a paralegal to Phillip E. Brenneman and Joe Solseng, attorneys for Appellant, Bank of New York, and am competent to be a witness herein.

On May 17, 2011, I caused to be served via Federal Express Overnight Delivery a true and correct copy of APPELLANT'S REPLY BRIEF to the following:

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